



Town of Windham

Town Offices
8 School Road
Windham, Maine

Meeting Minutes - Draft

Planning Board

Monday, September 26, 2016

7:00 PM

Council Chambers

1 Call To Order

2 Roll Call and Declaration of Quorum

The meeting was called to order by Chair, David Douglass. Other members present were: Margaret Pinchbeck, Keith Elder, Jim Hanscom, Rachael Mack, and Bill Walker.

Planner, Amanda Lessard, was also present.

3 [PB 16-085](#) Approval of Minutes: September 12, 2016

Attachments: [Planning Board Minutes 9-12-16 - draft](#)

Jim Hanscom made a motion to approve the minutes as written.

Seconded by Keith Elder.

Vote: All in favor.

Continuing Business

4 [PB 16-084](#) 16-18 Otterbrook Estates Subdivision. Third Amendment. RP Gagnon Company, LLC to request an amendment for a lot line adjustment to swap 5,658 square feet of land between Lot 26 and Lot 27 and for an easement on Lot 26 to benefit Lot 23 so that no building may be placed within the easement. The properties in question are located at 5 and 15 Rocklinn Drive and identified on Tax Map: 11B, Lots: 23, 27 Zone: Farm Residential (FR).

Attachments: [16-18 Otterbrook 3rd Amend PBMemo09-22-16](#)

[16-18 Otterbrook-Attorney Letter-09-22-16](#)

[16-18 Otterbrook-Attorney Letter-09-19-16](#)

[16-18 Otterbrook-3rdAmended Sub-08-11-16](#)

Amanda Lessard discussed information that had been received but was not in the Planning Board packets. At the previous meeting there had been comment about legal issues. The applicant had been asked to provide some evidence:

- A letter had been submitted by the applicant's attorney. The town's attorney said the information didn't provide a basis for the Board to approve the amendment. The applicant's attorney had then submitted additional information. Upon review of the letter,*

the town's attorney had not changed his opinion. He felt that the Planning Board still lacked authority to approve the application as presented.

- The concern was that when lot lines were adjusted on a nonconforming lot it essentially created a new lot and the ordinance required compliance. The lots were nonconforming because they were larger in size than was allowed in an existing cluster subdivision.
- An abutter had submitted a letter. The applicant would be submitting a small revision to the plans based on discussion with that abutter.

Matthew Ek, of Sebago Technics, was present representing the applicant. He reviewed:

- The subdivision had been approved in 1989. There had been two amendments since. The first was to divide lot 15 in two. The second was an amendment to lot 13 for setbacks.
- Lots 26 and lot 27 had been purchased by the previous owners separately. They constructed a garage on the property line between the two lots. No variance had been granted for that.
- The applicant had now purchased the lots as separate lots.
- They had first submitted a change to the plan so the garage would meet setbacks and to convey some land to the abutter. The town's attorney had said they couldn't do that because it would be changing the lot sizes and they were required to maintain the lot sizes and do a lot swap of the same size parcels.
- They had resubmitted plans showing those changes.
- They had obtained DEP approvals.
- There was a public hearing.
- Since the last meeting they had met with Mr. Noel. The applicant had agreed to grant a 25 foot natural vegetated buffer so a visual no-cut buffer would be maintained.
- Other abutters had been concerned with the front setback. A 40 foot buffer would be maintained on the front of the property instead of the 25 foot buffer that was required by the town.
- They were proposing the amendment so they didn't have to demolish the garage.

Attorney, Alan Wolf, was present representing the applicant.

- He read the attorney's email to Amanda Lessard which stated the opinion that the Planning Board lacked the authority to approve the application because the redrawn lot lines would cause the lots to lose their grandfathered nonconforming status.
- They had discussed this with the town's attorney and had asked for an explanation of where it said that was true. He could not provide case law or statutory authority.
- The case that the opponent's attorney had cited at the last meeting, Day vs. Town of Phippsburg, had nothing to do with a land swap, it regarded a merger and grandfathered rights, had nothing to do with changing a lot line or permission or statutory authority to do it. There was nothing there that supported the Town's attorney.
- The Board had already approved an amendment for lot 15. They had taken a nonconforming lot and split it in two. According to what the town's attorney said they shouldn't have done that either.
- There was nothing that said they couldn't do it. They could do it; they had done it.
- Section 204 C did apply. It said that lots in subdivisions approved after February 7, 1972 were exempt from the provisions.
- The applicant had done everything right. He had done his due diligence. They had spoken with the town's Code Enforcement Officer. The town's attorney had told them to do a land swap, so they did. They'd gone to DEP. Now the rules had changed. In order to be fair they asked that it be heard and approved.

Amanda stated:

- Upon first review the applicant had proposed to transfer the portion of the land that

the garage was on to the lot, increasing the size of it. At that time, the guidance was that the lot couldn't be made bigger; a land swap wouldn't make anything more nonconforming.

- The current opinion had been arrived at based on information gained as the application moved through the process.
- If the building envelope and septic system were to be at the front of the lot the subdivision plan would still require an amendment because the original approval required a peat system and location at the rear of the lot. That wouldn't require a lot line adjustment but it still required Planning Board approval.

Matthew Ek explained that the 25 foot natural buffer would remain with the lot, but it would be encumbered by a deed restricted buffer which would be noted on the subdivision plan and the deed.

The Board discussed:

- The Board couldn't go against the town attorney's opinion.
- What could be done to lot 26? Would the garage have to be torn down or moved and the lines left exactly as approved in 1989?
- What about the 25 foot buffer to the Noel's property?
- If lot 26 was sold without changing the lot lines would there still be an easement on the back half?
- It was difficult not to follow the town attorney's opinion.
- This looked familiar to other instances. It also looked like it would handcuff other subdivision property owners who may want to change things.
- This all occurred because a building permit was issued which allowed a building to be built on a lot line. It had to be rectified. It was a simple land swap. The Board should be given the authority to do a simple land swap.
- Was the applicant interested in having the application tabled to give the town attorney time to send correspondence to the Planner which would allow the Board to back the application?

The applicant, Mr. Gagnon explained it had been a long road for him.

- He had done a considerable amount of due diligence. Had he known it would be like this he would never have bought it. At every juncture he would take the advice of whatever town authority he was working with, the Director of Code Enforcement, or the town attorney, who had a total reversal of opinion.
- Since the beginning he had just tried to right a wrong. They had tried to rectify the issue at every level.
- He wanted a decision, approve him or deny him. They had tried to work with the town's attorney who had offered nothing at all. In fairness to him, he had done everything right. It was a simple land swap.

There were some alternatives that the Board had:

- The Board could table the application and Mr. Gagnon could try to get an attorney's letter sent to Amanda Lessard that was defensible for the town by the attorney, saying he was on board with it.
- The best possible option was to give the town's attorney and Mr. Gagnon's attorney an opportunity to work it out.

The Board recessed for five minutes.

Attorney, Alan Wolf, asked that the application be tabled to the next available date. In the meantime they would work with the town's attorney and hopefully have things worked out by the next meeting.

Jim Hanscom made a motion to table the application.

Seconded by Bill Walker.

Vote: All in favor.

New Business

- 5 [PB 16-083](#) 16-32 Green Acres Subdivision. First Amendment. MGM Construction, Inc. to request an amendment to the road section, to install curbing instead of the previously approved ditch. The property in question is located at 170 Windham Center Road and identified on Tax Map: 12, Lot: 21 Zone: Farm Residential (FR) and Resource Protection (RP).

Attachments: [16-32 Green Acres Amendment 09-20-16](#)
 [16-32 Peer Review Green Acres Amendment 09-20-16](#)
 [16-32 Green Acres Amendment](#)
 [16-32 Green Acres - Revised P&P](#)
 [Green Acres Plans 05-2016](#)

Jeff Amos, of Terradyn Consultants, was present representing the applicant. They proposed a minor amendment to the subdivision.

- *They wanted to change the road section from curbing and sidewalk on one side with ditch on one side to curbing and sidewalk on one side and curbing and catch basins on one side. This was simply for aesthetic reasons.*
- *It wouldn't change the stormwater flows.*
- *The road cross section on the plan and profile sheet and associated grading was the only part of the plan that would change.*
- *The third party engineer had reviewed it and had no issues.*

Jim Hanscom made a motion that the subdivision application for 16-32 Green Acres Subdivision Amendment on Tax Map: 12, Lot: 21 was to be approved with conditions with the following findings of fact and conclusions.

FINDINGS OF FACT

A. POLLUTION

- *A portion of this subdivision is within the mapped 100 year floodplain. This should be shown on the plan. The floodplain is located in the Resource Protection District where no development is proposed.*
- *Any development within a special flood hazard area must obtain a Flood Hazard Development Permit.*
- *The new residential lots will not result in undue air or water pollution.*
- *The Amendment to the plan to replace a ditch with curbing would not have an impact on pollution standards.*

B. WATER

- *All lots will be served by public water for domestic use.*
- *A written statement from the Portland Water District indicating that there is adequate water supply to service the subdivision must be submitted with the Preliminary Plan.*

- At the Development Team meeting on March 1, 2016, Public Works Director Doug Fortier stated that Windham Center Road was paved in 2013 and there is a moratorium on road opening permits for 5 years.
- The closest fire hydrant is located on Windham Center Road, approximately 500 feet from the proposed subdivision road. The existing hydrant location is shown on the plan.
- At the Development Team meeting on March 1, 2016, Deputy Fire Chief John Wescott recommended a new hydrant located at Lot #10.
- Hydrants and water main locations and details are shown as part of the Preliminary Plan on Sheets 4 and 6.
- A detail for the cross section of the excavation and trench repair of Windham Center Road in accordance with Chapter 120 Streets & Sidewalks Section 210-14.B should be added to the Final Plan.
- Pavement restoration on Windham Center Road is noted on the Utility Plan Sheet 4 of 7 dated May 13, 2016.
- In an email dated May 18, 2016, Larry Bastian, P.E., of Gorrill-Palmer Consulting Engineers, stated that the extent of the milling and pavement overlay appear to meet the ordinance requirement but requested that the depth of the milling and overlay be noted.
- On May 19, 2016 the applicant submitted a section of the utility plan showing a revision to the milling note.
- The Amendment to the plan to replace a ditch with curbing would not have an impact on water supplies.

C. SOIL EROSION

- An Erosion and Sedimentation Control Plan prepared by Terradyn Consultants dated March 18, 2016 on Sheet 5 has been submitted as part of the preliminary plan submission.
- In an email dated March 29, 2016, Larry Bastian, P.E., of Gorrill-Palmer Consulting Engineers, stated that the application appears to satisfy the ordinance requirements for erosion control but also recommended that the plan include a typical erosion control plan for lot development within the subdivision.
- The applicant must submit a stormwater management plan that meets the water quality and quantity standards as well as the flooding standard of Section 3 DEP Chapter 500 Stormwater Management.
- This project exceeds 1 acre of total disturbed area and requires a Maine Department of Environmental Protection (DEP) Chapter 500 Stormwater Permit by Rule. The permit must be submitted as part of the Final Plan.
- A stormwater management plan that treats stormwater from the lots as well as the street has been included with the March 21, 2016, Preliminary Plan submission.
- At the Development Team meeting on March 1, 2016, Public Works Director Doug Fortier noted that this project is in the NPDES (National Pollutant Discharge Elimination System) MS4 area as designated by the Environmental Protection Agency for the Town of Windham. This may mean there are additional permitting requirements, and ongoing requirements for reporting of stormwater infrastructure maintenance if the area of development is greater than one (1) acre. See recommended Condition of Approval #2.
- In an email dated March 29, 2016, Larry Bastian, P.E., of Gorrill-Palmer Consulting Engineers, asked for clarification or more information in comments #27-33. Comments requested revisions to the level lip spreader and buffer calculations to conform to MDEP requirements.
- In the May 2, 2016 submission the applicant responded to peer review comments and submitted revised stormwater calculations. Buffers not associated with level lip spreaders have been removed from the plan. In addition to treatment of stormwater through the use of buffers, roof drain filter strips and rain gardens are proposed on several lots, and the amount of disturbance on each lot is proposed to be limited to

15,000 square feet.

- In an email dated May 11, 2016, Larry Bastian, P.E., of Gorrill-Palmer Consulting Engineers, had comments related to level spreader #1 and buffers on Lot 7 and requested additional information on rain gardens proposed.
- In a letter dated May 13, 2016 Jeff Amos, P.E. responded to the peer review comments and stated that the level spreader was sized correctly and revised the lot treatment table. The revised table was submitted on May 19, 2016.
- In an email dated May 18, 2016, Larry Bastian, P.E., of Gorrill-Palmer Consulting Engineers, recommended that a table listing the dimensions of the underdrained bioretention cells (rain gardens) be included in the plans or the Board require designs be submitted with the building permit application for each lot. See recommended Condition of Approval #4.
- The Amendment to the plan to replace a ditch with curbing would not have an impact on the assumptions made in the approved stormwater plan calculations. Underdrain will be installed on both sides of the street as shown on Plan & Profile Sheet 3 of 7 with a revision date of September 12, 2016.
- In an email dated September 20, 2016, Will Haskell, P.E., of Gorrill-Palmer Consulting Engineers, noted that catch basins have already been installed and will need to be cored to accept the new underdrain pipe.

D. TRAFFIC

- The subdivision lots will have frontage on a dead-end private street. Streets constructed within a cluster subdivision must meet a public standard, the Minor Local Street standard.
- The proposed street is 700 feet to the center of the cul-de-sac.
- Section 911.M.3.d requires streetlights at intersections with existing public streets. A streetlight is shown on Sheet 4 of the preliminary plan to be installed on the existing pole located on Windham Center Road approximately 50' from the proposed right-of-way intersection. On the Final Plan, a streetlight is shown on a new decorative pole at the intersection of Hazel Drive and Windham Center Road.
- The driveway to the existing house will be relocated to the new subdivision road.
- At the Development Team on March 1, 2016, Public Works Director Doug Fortier requested that the site distance for the proposed road at Windham Center Road be shown on the plan.
- Sidewalks are required in the subdivision. This subdivision is less than 1,000 linear feet from an existing convenience store or public building (Windham Hill United Church of Christ and the Town Public Works Garage).
- A road plan and profile, prepared by Terradyn Consultants LLC, dated March 18, 2016, shown on Sheet 3 of 6, was submitted as part of the Preliminary Plan.
- In an email dated March 29, 2016, Larry Bastian P.E., of Gorrill-Palmer Consulting Engineers, recommends that the proposed sidewalk have a tipdown and accessible ramp connecting to Windham Center Road and a single driveway be provided to the existing house lot.
- A 50' wide future right-of-way is shown through the common open space to Lot 44A. The applicant should provide a plan for relocating level lip spreader # 2 in the event that the roadway is extended at this location in the future.
- See recommended Condition of Approval #3 to address relocation of stormwater management facilities should the future right-of-way be developed.
- The Amendment to the plan to replace a ditch with curbing is shown on as shown on Plan & Profile Sheet 3 of 7 with a revision date of September 12, 2016.

E. SEWERAGE

- *Lots will be served by private subsurface wastewater disposal (septic) systems.*
- *Soil test pit logs dated March 18, 2016, prepared by Mark Cenci Geologic, Inc were provided in the March 21, 2016, submission. All lots have at least one passing test pit.*
- *Test pit locations are shown on the Preliminary Plan Sheet 1.*
- *The Amendment to the plan to replace a ditch with curbing would not have an impact on wastewater disposal.*

F. SOLID WASTE

- *Private residences in this subdivision will participate in the Town trash bag program.*
- *Development of these lots should not produce an undue burden on the Town's ability to collect and dispose of solid waste.*

G. AESTHETICS

- *There is currently a residence and several accessory structures on the site. The remainder of the site is predominately wooded.*
- *This existing parcel has frontage on the Pleasant River. The frontage on the river is proposed to be included in the common open space.*
- *There are no documented rare botanical features or significant wildlife habitat documented on the site.*
- *The applicant proposes maintaining existing trees along the proposed road to meet the requirement for street trees as part of the subdivision (§911.E). Note #12 on the plan states, "One tree (minimum 2" diameter) will be preserved within the road rights of way to be constructed every 50 feet of the road. Where it is not possible to find or preserve a suitable tree, one will be planted." Approximate street tree locations are shown on Sheet 3.*
- *In an email dated March 29, 2016, Larry Bastian, P.E., of Gorrill-Palmer Consulting Engineers, asked that the clearing limits be shown on the plan.*
- *In an email dated May 11, 2016, Larry Bastian, P.E., of Gorrill-Palmer Consulting Engineers, recommended that easements be included on the plans to protect any designated street trees that are located outside the right-of-way, whether new planted trees or existing preserved trees.*
- *A tree maintenance easement around the entirety of the right-of-way is shown on plans dated May 13, 2016.*

H. CONFORMITY WITH LOCAL PLANS AND ORDINANCES

- *Comprehensive Plan:*
- *The plan does meet the goals of the 2003 Comprehensive Plan.*
- *Land Use Ordinances:*
- *All lots fall within the minimum and maximum lot sizes of 20,000-35,000 square feet (one lot 45,000 sf max) for cluster lots in the FR zoning district.*
- *Net residential density calculations are shown on the plan. .*
- *No more than 30% of the lots have direct vehicular access onto an existing public road.*
- *At least 50% of the land suitable for development shall be included in the common open space. This calculation is shown on the plan.*
- *Subdivision Ordinance*
- *A landscaping plan must be submitted with the Preliminary Plan. Street trees are shown on the plan.*
- *Standard notes and the standard condition of approval must be shown on the plans.*

- Homeowner association documents have been supplied in the Preliminary Plan submission dated March 21, 2016. The association will be responsible for maintaining the subdivision stormwater infrastructure until such time as these are accepted by the Town. The Green Acres Homeowners Association documents must specify the rights and responsibilities of each lot owner with respect to the maintenance, repair, and plowing of the subdivision streets should it not be accepted by the Town Council.
- The Tax Map and Lot numbers provided by the Tax Assessor are shown on the Final Plan.
- Digital transfer of the subdivision plan data for inclusion with the Town's GIS was provided with Final Plan submission.
- Others:
- Chapter 221 Street Naming and Addressing: The street name approved by the Addressing Officer, Hazel Drive, is shown on Final Plan.
- Chapter 199 Shoreland Zoning: A portion of the property is zoned Resource Protection. No development is proposed in the Resource Protection District.
- Chapter 144 Post-Construction Stormwater Ordinance: The site is in the NPDES MS4 area. See Condition of Approval #2.

I. FINANCIAL AND TECHNICAL CAPACITY

- Evidence of financial capacity must be provided as part of the Preliminary Plan submission.
- The Preliminary Plan application dated March 21, 2016 includes a cost estimate for the project.
- The applicant has provided information on the licensed professionals working on this project as evidence of technical capacity.

J. RIVER, STREAM OR BROOK IMPACTS

- The 250 foot Resource Protection District boundary around Pleasant River is shown on the plan.
- This project will not adversely impact any river, stream, or brook.

CONCLUSIONS

1. The proposed subdivision will not result in undue water or air pollution.
2. The proposed subdivision has sufficient water available for the reasonably foreseeable needs of the site plan.
3. The proposed subdivision will not cause an unreasonable burden on an existing water supply.
4. The proposed subdivision will not cause unreasonable soil erosion or a reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results.
5. The proposed subdivision will not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of the highways or public roads existing or proposed.
6. The proposed subdivision will provide for adequate sewage waste disposal.
7. The proposed subdivision will not cause an unreasonable burden on the municipality's ability to dispose of solid waste.
8. The proposed subdivision will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, significant wildlife habitat identified by the Department of Inland Fisheries and Wildlife or the municipality, or rare and irreplaceable natural areas or any public rights for physical or visual access to the shoreline.

9. *The proposed subdivision conforms with a duly adopted site plan regulation or ordinance, comprehensive plan, development plan, or land use plan.*
10. *The developer has adequate financial and technical capacity to meet the standards of this section.*
11. *The proposed subdivision is not situated entirely or partially within the watershed of any pond or lake or within 250 feet of any wetland, great pond or river as defined in Title 38, Chapter 3, subchapter I, article 2-B M.R.S.A.*
12. *The proposed subdivision will not alone or in conjunction with existing activities, adversely affect the quality or quantity of ground water.*
13. *The proposed subdivision is situated entirely or partially within a floodplain.*
14. *All freshwater wetlands within the proposed subdivision have been identified on the plan.*
15. *Any river, stream, or brook within or abutting the subdivision has been identified on any maps submitted as part of the application.*
16. *The proposed subdivision will provide for adequate storm water management.*
17. *If any lots in the proposed subdivision have shore frontage on a river, stream, brook, or great pond as these features are defined in Title 38, section 480-B, none of the lots created within the subdivision have a lot depth to shore frontage ratio greater than 5 to 1.*
18. *The long-term cumulative effects of the proposed subdivision will not unreasonably increase a great pond's phosphorus concentration during the construction phase and life of the proposed subdivision.*
19. *For any proposed subdivision that crosses municipal boundaries, the proposed subdivision will/will not cause unreasonable traffic congestion or unsafe conditions with respect to the use of existing public ways in an adjoining municipality in which part of the subdivision is located. (N/A)*
20. *Timber on the parcel being subdivided has not been harvested in violation of rules adopted pursuant to Title 12, section 8869, subsection 14.*

CONDITIONS OF APPROVAL

1. *Approval is dependent upon, and limited to, the proposals and plans contained in the application dated February 22, 2016, as amended September 14, 2016 and supporting documents and oral representations submitted and affirmed by the applicant, and conditions, if any, imposed by the Planning Board, and any variation from such plans, proposals and supporting documents and representations are subject to review and approval by the Planning Board or the Town Planner in accordance with Section 913 of the Subdivision Ordinance.*
2. *Approval is subject to the requirements of the Post-Construction Stormwater Ordinance, Chapter 144. Any person owning, operating, leasing or having control over stormwater management facilities required by the post-construction stormwater management plan must annually engage the services of a qualified third-party inspector who must certify compliance with the post-construction stormwater management plan on or by May 1st of each year.*
3. *A level spreader and wooded buffer shall be located within the 50' future right of way as depicted on this plan. At such time as the developer proposes to construct a road within this right of way, the developer shall apply to the Planning Board for approval to construct a replacement stormwater management system or device(s). The level spreader and wooded buffer may not be removed or rendered inoperable, and no road may be constructed within this right of way, until the Planning Board has reviewed the proposed replacement stormwater management system or device(s) and concluded that the proposal will adequately provide for stormwater management.*
4. *Rain gardens designed by a licensed Professional Engineer shall be submitted with the building permit application for Lots 1, 5, 6, 7, and 10.*

Seconded by Margaret Pinchbeck.

Vote: All in favor.

Other Business

6 Adjournment

Keith Elder made a motion to adjourn.

Seconded by Jim Hanscom

Vote: All in favor.