

From: Haskins, Kevin J. <KHaskins@preti.com>
Sent: Wednesday, September 28, 2016 11:09 AM
To: Amanda L. Lessard
Subject: FW: 2012 Windham Approval Docs
Attachments: WindhamPlanningBoard92616.pdf

FYI

Kevin J. Haskins
Attorney
PretiFlaherty

From: AEW123@aol.com [<mailto:AEW123@aol.com>]
Sent: Wednesday, September 28, 2016 9:02 AM
To: Haskins, Kevin J.
Cc: kgagnon1@maine.rr.com
Subject: Fwd: 2012 Windham Approval Docs

Kevin,

I tried reaching you yesterday to discuss the Kevin Gagnon matter and to go over what we have discovered since our last telephone discussion.

I don't know if you have reviewed the tape from Monday's meeting, but it was clear that the Board wanted to approve Kevin's amendment to right a wrong that the Town made several years ago when the garage was allowed to be built. It was also clear that the Board was confused with your decision, that they did not have authority to vote on this amendment, because they had voted on this type of land swap on many occasions. One Board Member brought up an old subdivision on the lake that they had recently acted upon. I have also spoken with the surveyor who worked on the 2012 division of lot 15 in Otterbrook and he said that the vote was a "in and done deal," and that Ken Cole, who was an experienced municipal attorney was involved in the matter. He also said that from his experience, the Town makes these land swap amendments many times a year.

I am forwarding this email so that you can see the findings of fact from the 2012 amendment to the Otterbrook Subdivision. Two current Board Members were on the Board at that time and acknowledged that they signed the approved plat. In that situation, the Board took an approved non-conforming grandfathered lot and subdivided it thus creating two nonconforming lots. Natalie Burns, former employee/counsel for the City of Portland and attorney at Jensen Baird, advised the Town that "because the creation of these lots does not make the non-conformity of the lots worse, and fit the character of the neighborhood, they should be allowed." In our current situation, we are taking a nonconforming situation and with a land swap we are correcting the garage mistake that the Town made many years ago - making the non-conformity better for everyone. I would hope that with this new information that was not available to you when you made your initial decision that you will now agree that the Board has precedent and authority to vote on and to amend Mr. Gagnon's plan.

In a follow-up email, I will attach the two plan amendments for Otterbrook, which will include the subdivision of Lot 15.

Amanda asked Kevin Gagnon to have me copy her on correspondence to you. Where you represent the Town in this matter, I will only be copying my client.

Please give me a call at your earliest convenience so that we can discuss this case. Thank you for your anticipated prompt response.

Alan Wolf

From: kgagnon1@maine.rr.com
To: aew123@aol.com
CC: mek@sebagotechnics.com
Sent: 9/27/2016 3:53:45 P.M. Eastern Daylight Time
Subj: 2012 Windham Approval Docs

Hi Alan,

I had a good meeting with Amanda and she said more than once that if the town attorney will soften his position the board is prepared to act accordingly.

Attached, please find the documents that Amanda gave me to include, Letter from Ken Cole 3/22/12, Ben Smith findings of facts 3/22/12 and recent emails involving Heather McNally and Natalie Burns with Jensen Baird.

Kevin

This E-Mail may contain information that is privileged, confidential and / or exempt from discovery or disclosure under applicable law. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege. If you are not the intended recipient of this communication, and have received it in error, please do not distribute it and notify me immediately by E-mail at khaskins@preti.com or via telephone at 207.791.3000 and delete the original message. Unless expressly stated in this e-mail, nothing in this message or any attachment should be construed as a digital or electronic signature or as a legal opinion.

Town of Windham

Planning Department
8 School Road
Windham, ME 04062

voice 207.892.1902

fax 207.892.1916

March 22, 2012

Norman Harris
Harris Land Solutions
P.O. Box 986
Windham ME 04062

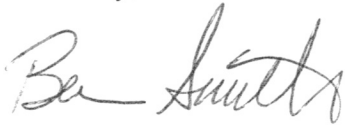
Dear Mr. Harris:

I am writing to confirm the Planning Board's approval of the 12-02 Otterbrook Estates, 1st Amended Subdivision application to create an additional lot in an existing residential subdivision located on Rocklinn Drive, identified on Tax Map 11B; Lot 15, Zone: Farm District (F).

For your records, the Planning Board voted 5 to 1 (Jim Hanscom opposed) to approve the subdivision plan application with conditions, at the meeting on March 12, 2012. The motion was made by John Carlberg and seconded by Keith Elder.

Enclosed, please find the findings of fact and conclusions and conditions of approval.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ben Smith".

Ben Smith, AICP
Assistant Town Planner

Enclosure: Findings of Fact and Conclusions

Cc: Planning File

12-01 Otterbrook Subdivision, 1st Amended Subdivision
Findings of Fact & Conclusions

FINDINGS OF FACT

A. POLLUTION

- New residential units on Lots 15 and 15-1 will not result in undue air or water pollution.

B. WATER

- Lot 15 will be served by public water from the existing 8-inch water main in Rocklinn Drive. Lot 15-1 will be served by public water from the existing 2-inch water service in the deeded right of way over the land shown over the property labeled "N/F Dale S. Morrell."
- An existing fire hydrant is shown at the corner of Lots 14 and 15 on Rocklinn Drive.

C. SOIL EROSION

- The proposed amendment will have no impact on the approved surface drainage plan.
- The proposed amendment will not result in undue soil erosion.

D. TRAFFIC

- The addition of an additional single family home with access on Rocklinn Drive will not have an undue impact on traffic congestion or safety.
- The addition of an additional single family home with access over a private drive utilizing an existing curb cut on River Road will not have an undue impact on traffic congestion or safety.

E. SEWERAGE

- Lots will be served by private subsurface wastewater disposal (septic) systems.
- Passing test pits (TP 40 and TP 43) are shown on the originally approved plan, and on the February 2012 plan included as part 1st Amendment submission.
- Passing test pit logs for TP-1 and TP-2 completed by Norman Harris of Harris Land Services, dated November 26, 2011, as well as for TP-15A completed by James Mancini, dated January 27, 2012, are included in the 1st Amendment submission. These test pit locations are shown on the February 2012 plan.

F. SOLID WASTE

- The single family homes proposed for these lots would participate in the Town's pay-per throw garbage bag program. Development of these lots will not produce an undue burden on the Town's ability to collect and dispose of solid waste

G. AESTHETICS

- The site is currently wooded, and Otter Brook crosses the property.
- There are no documented rare botanical features for significant wildlife habitat documented on the site.

H. CONFORMITY WITH LOCAL PLANS AND ORDINANCES

- Comprehensive Plan:
 - The plan does meet the goals of the 2003 Comprehensive Plan.
- Land Use Ordinances:
 - The proposed lots meet the frontage and setback requirements of the F zoning district.
 - Otterbrook Estates was approved as a cluster subdivision. At the time of approval (1989), the cluster subdivision standards allowed smaller lot sizes in exchange for the provision of common open space, as they do today, but there was no maximum lot size in place. The current cluster subdivision standards state that lots connected to public water must be between 30,000 and 50,000 square feet, with only one lot in the subdivision over 60,000 square feet. As approved in 1989, every lot in the subdivision was over 60,000. After conferring with Town Attorney Natalie Burns, the proposed lots do not meet the maximum lot size dimensional standard in today's ordinance. However, because the creation of these lots does not make the non-conformity of the lots worse, and fit the character of the existing neighborhood, they should be allowed.
- Subdivision Ordinance
 - The proposal meets the other provisions of the subdivision ordinance.
- Others:
 - The tax map and lot numbers shown on the plan have been approved by the Assessing Department.

I. FINANCIAL AND TECHNICAL CAPACITY

- The applicant is not proposing any public improvements that would require evidence of financial or technical capacity as part of the 1st Amendment proposal.

J. RIVER, STREAM OR BROOK IMPACTS

- There will be no stream crossing over Otter Brook.
- The portion of Otter Brook that crosses existing Lot 15 is not within a Shoreland zoning district. However, the applicant is preserving the 100-foot buffer from the stream, and the 250-foot building setbacks from the stream, as originally approved.

CONCLUSIONS (N/A)

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 not** 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/do not have** a lot depth to shore frontage ratio greater than 5 to 1. (N/A)~~
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 dependant upon, and limited to, the proposals and plans contained in the application dated February 27, 2012, 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.

**JENSEN-BAIRD
GARDNER-HENRY**

Attorneys at Law

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November 14, 2011

Norman Harris
P.O. Box 986
Windham, ME 04062

Re: Rocklinn Drive, Windham

Dear Bud:

In accordance with the Standards adopted by the Maine State Bar Association and resting on a warranty deed dated July 16, 1954 and recorded in the Cumberland County Registry of Deeds in Book 2185, Page 206 and an additional deed dated April 25, 1952 and recorded in said Registry of Deeds in Book 2089, Page 180, I hereby certify that I have examined or caused to be examined records in the Registry of Deeds and Probate Court within and for said County and State of Maine, and all instruments of record therein as correctly reflected by indices affecting the title to the premises described in a quitclaim deed to Kyle D. Rich and Jill C. Rich from Mayberry Estate Enterprises, LLC dated September 20, 2010 and recorded in said Registry of Deeds in Book 28101, Page 297.

I further certify that on November 7, 2011, the said Kyle D. Rich and Jill C. Rich were the record owners of said premises in fee simple with good and marketable record title thereto, free and clear of all encumbrances, with the following exceptions:

1. Declaration of Protective Covenants and Common Easements for Otterbrook Estates dated April 6, 1995 and recorded in said Registry of Deeds in Book 11876, Page 190, as amended on numerous occasions. We understand that you have received and reviewed this Declaration and amendments and you are aware of the provisions in Article II, which exempt Lot 15 from the typical single residential use allowing potential multiple uses. I point out, however, that the restriction at Article II,

~ Over 50 Years of Service ~

November 14, 2011
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paragraph 19 in regard to access to Lot 15, may need to be addressed specifically prior to construction. Although I understand from you that to build on the Rocklinn Road end of the lot you do not need to cross the brook and therefore, you do not need DEP approval, the restriction itself is so broad that it appears to say that Lot 15 cannot be entered from Rocklinn Drive at all, but only from the 50-foot right-of-way from Hope Road depicted on the Plan. You may therefore need a letter from DEP making it clear that you can comply without crossing the brook.

2. As referenced above as to DEP, there are also numerous DEP orders of record affecting the overall subdivision and various amendments to it over time. Other than the access issue, those should not impact your proposed construction directly.

3. There are easements to New England Telephone and Telegraph and earlier to Cumberland County Power and Light Company going back across the larger parcel from which the site was derived coming back into 1914 in Book 938, Page 471 and 1941 in Book 1658, Page 231, as well as more recent utility easements of record. You should confirm on site that your lot is unaffected by these.

4. Please note that in the deed to your Grantors, the Richs, Mayberry Estate Enterprises, LLC included various exceptions and reservations for the benefit of Easter I. Rolfe, her heirs and assigns, in regard to utility and drainage easements across the larger site, as well as a perpetual right to pass or repass on foot over the lot for those purposes. You should definitely confirm that these rights will not affect your proposed residential home location.

5. Finally, we note that the conveyance is benefitted by the 50-foot right-of-way referred to above to Pope Road and that particular right-of-way is subject to various terms and conditions that were described in a confirmatory easement deed from Dale S. Morrell to the Estate of Easter I. Rolfe on December 7, 2009 and recorded in said Registry of Deeds in Book 27571, Page 249. Please note further that this underlying easement is contained in a deed from Phyllis P. Stuart, as referenced in the Morrell deed.

Jensen Baird
Gardner Henry

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6. The annual real property taxes are \$1,042.50 and are paid through December 31, 2011.

**THIS OPINION IS ALSO SUBJECT TO THOSE STANDARD
CONDITIONS AND EXCEPTIONS SET FORTH IN
EXHIBIT A HERETO**

Very truly yours,



Kenneth M. Cole III

KMC/lts

Amanda L. Lessard

From: Heather McNally
Sent: Friday, September 09, 2016 1:09 PM
To: Haskins, Kevin J.
Cc: Amanda L. Lessard
Subject: FW: grandfathered lot

Follow Up Flag: Follow up
Flag Status: Flagged

Good afternoon,
Here is the previous interpretation from Natalie Burns as a reference from Amanda's email.

Heather McNally
Director of Code Enforcement and Zoning Administration
Town of Windham
8 School Rd.
Windham, ME 04062
hmcnally@windhammaine.us
(207) 894-5900 ext. 6111

From: Heather McNally
Sent: Thursday, June 02, 2016 2:25 PM
To: 'Irmartinez@yahoo.com'
Subject: FW: grandfathered lot

From: Natalie L. Burns [<mailto:nburns@JBGH.com>]
Sent: Tuesday, August 14, 2012 3:38 PM
To: Heather McNally
Subject: Re: grandfathered lot

Heather,

A nonconforming lot can't be changed without losing its lot of record status. Without that status, it's no longer a legal lot. Nonconforming status gives the right to keep a lot that doesn't meet current standards but doesn't include the right to make changes to the lot unless the change will make the lot conforming under current requirements.

Thanks,

Natalie

Sent from my iPhone

Natalie L. Burns, Esq.
Jensen Baird Gardner & Henry
P.O. Box 4510
Portland, ME 04112

(207) 775-7271