

Town of Windham

Planning Department
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Windham, ME 04062

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MEMO

DATE: January 27, 2017

TO: Windham Town Council
THROUGH: Tony Plante, Town Manager
FROM: Amanda Lessard, Planner *AL*
Cc: Ben Smith, Director of Planning
Jon Earle, P.E., Town Engineer

RE: Planning Board Recommendation - Ordinance Amendment – Post Approval
Activities: Site Plan (Section 800) and Subdivision Review (Section 900)

At the Planning Board's meeting on January 9, 2017, a public hearing was held on the proposed ordinance changes to the site plan and subdivision post approval standards of Sections 800 and 900 of the Land Use Ordinance.

One (1) member of the public spoke at the public hearing and commented that an applicant should be able to request reasonable extensions on the completion of construction from the Board without requiring a lot of additional work.

During Planning Board discussion it was noted that the ordinance language of Section 814.D.1 was awkward and should be corrected (Planning Board suggested change is highlighted):

“At least fifteen (15) days prior to commencing construction of required improvements, the developer shall notify ~~in writing the Planner~~ the Planner in writing of the time when ~~he proposes to commence~~ commencement of construction of such improvements so that the Planner can cause observations to be made of all specifications and requirements of the approved plans ~~shall be met.~~”

The Board also discussed the public comment that some projects may require more than two years to complete construction and noted that phasing a subdivision's approval would be a way to address that concern. The Board commented that the Council could in the future consider that there should be a way for staff to approve a phased performance guarantee without having to return to the Board for approval.

Following discussion of the proposed changes, the Board made the following motion:

To recommend to the Town Council approval of the proposed amendments with the suggested minor revision to Section 814.D.1.

Motion: Jim Hanscom
2nd: Margaret Pinchbeck

Vote: 6-0

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MEMO

DATE: December 8, 2016

TO: Windham Planning Board
FROM: Ben Smith, Planning Director
Cc: Amanda Lessard, Planner
Jon Earle, PE, Town Engineer

RE: Post Approval ordinance revisions –
Site Plan (Section 800) and Subdivision Review (Section 900)

Attached is draft ordinance language that makes changes to performance guarantees for approved site plans and subdivisions. The changes deal with management of performance guarantees, clarifications on how guarantees can be used and calculated and how long applicants have to complete approved construction activities.

Overview

Planning staff have identified the need for several changes to the post approval sections for both site plan and subdivision ordinances. There are several examples of projects in Windham that have extended over many construction seasons. This poses issues when many homes are built and moved into while the road and sidewalks or the stormwater and drainage infrastructure are not complete. There are also several examples of approved site plans that were completed to the point where almost all of the site work was completed, but it was actually cheaper to renew the performance guarantee every year rather than complete the remaining work. Staff is also suggesting several other changes that are relatively minor or technical in nature that are meant to make establishment and management of performance guarantees more consistent between the two ordinances and to clarify the specific items that are required to be covered whenever a guarantee is established.

Proposed Changes

1. Establish a time limit to complete the project or approved project phase.
A two year limit from the establishment of the performance guarantee is proposed. The project or project phase must be complete within that timeframe, or the Town may use the performance guarantee to complete the remaining work as approved or to reclaim and stabilize the site. As noted above, there are several examples of both subdivisions and site plans that have had letters of credit extended multiple times and this change would

make it clear to applicants that projects cannot have indefinite construction periods. Projects that go on over many seasons have negative implications on residents' quality of life, lead to stormwater quantity and quality issues, potential traffic and public safety issues and more.

2. Create a schedule of values to be maintained by the Town Engineer as the basis for establishing the amount of the guarantee.

Staff proposed to create a sheet that lists all of the proposed construction items to be covered by guarantees and establish costs per quantities that will be the basis for guarantees. This sheet will be updated regularly by working with local suppliers and builders so that the guarantee amounts make sense for local conditions while still protecting the interests of the town.

3. Limit the dollar amount and frequency of guarantee reduction requests.

This change will reduce the burden on staff time associated with the site visits and administration required by frequent reduction requests. Reductions are proposed to be processed no more than once per month per project, and only if more than \$10,000 worth of work has been done.

4. Limit the expiration dates on guarantees so that they don't fall out of season.

Calling a letter of credit at a time of year when neither the developer nor the town can physically or logistically do the remaining work presents some fairness issues. Staff proposes that letters of credit should not expire between October 31, or April 15, the following year.

5. Clarify the project components that the performance guarantee covers and what the maintenance guarantee covers in the case of new public roads.

Proposed changes specify the items covered by site plan guarantees, subdivision guarantees, and maintenance guarantees for newly accepted public streets.

The attached ordinance language contains strike-through text for deletions and underlined text for new wording. The text color is not relevant to the proposed changes but is simply a reflection of multiple staff contributions to the overall proposal.

814 Post Approval Activities

- A. Limitation of Approval. Construction of the improvements covered by any site plan approval shall ~~be substantially commenced~~ within two (2) years of the date upon which the approval was granted. If construction has not ~~been substantially commenced~~, as determined by the Code Enforcement Officer, within the specified period, the approval shall be null and void. The time period does not run during any appeal of the project approval.
1. The applicant may request an extension of the approval deadline prior to the expiration of the period. Such request shall be in writing and shall be made to the Planning Board or Development Staff Review Committee.
 2. The Planning Board or Development Staff Review Committee may grant up to two (2), one-year extensions to the periods if the approved plan conforms to the ordinances in effect at the time the extension is granted and any and all federal and state approvals and permits are current.
- B. Incorporation of Approved Plan. One copy of the approved and signed site plan shall be included with the application for the building permit for the project and all construction activities shall conform to the approved plan, including any conditions of approval and minor changes approved by the Planner, Code Enforcement Officer or Town Engineer~~Town's Consulting Engineer~~ to address field conditions.
- C. Improvement Guarantees
1. Application
 - (a) Improvement Guarantee. The Town shall require the posting of an improvement guarantee for an amount adequate to cover ~~110%~~ the total construction costs of all required off-site improvements, and the following on-site improvements, ~~taking into account the time span of the construction schedule and the inflation rate for construction costs.~~ The fee amount will be based upon a Schedule of Values maintained by the Town and based on construction costs of similar projects:
 - (1) Site preparation, including but not limited to clearing, grading, excavation, ~~and~~ blasting, parking area gravel material.
 - (2) All stormwater management infrastructure, and erosion control and drainage improvements
 - (3) Any public or private streets and associated sidewalks, and any sidewalks providing access to the site from public or private streets

- (4) Site lighting, landscaping, ~~and other~~ public amenities, and utilities.
- (b) Construction of improvements covered by any site plan approval shall be completed within two (2) years of the date upon which the performance guarantee is accepted by the Town Manager. If construction has not been completed within the specified period, the Town shall, at the Town Manager's discretion, use the performance guarantee to either reclaim and stabilize the site or to complete the improvements as shown on the approved plan.
- (c) ~~Construction~~ Upon substantial completion of all required improvements, the developer shall notify the Town Manager, Public Works Department, Code Enforcement Department and Planning Department of the completion or substantial completion of improvements, and shall send a copy of such notice to the appropriate municipal officials. The respective municipal officials shall cause an inspection of all improvements and shall file a report indicating either approval, partial approval, or rejection of such improvements with a statement of reasons for any rejection.
- (1) If the improvements are approved, the guarantee shall be released by the Town Manager. Where partial approval is granted, the developer shall be released from liability only for that portion of the improvements approved.
- (2) Performance guarantees may be reduced periodically, but in no event more than one (1) time per month. In no case shall the performance guarantee be reduced by less than ten thousand dollars (\$10,000.00) at one time; or in any line item where improvements remain to be completed. No performance guarantee shall be reduced to less than ten (10) percent of the performance guarantee. The remainder of the guarantee will be release upon completion of the improvements.
2. Form of Guarantee. Performance guarantees may be provided by a variety of means including, but not limited to, the following which shall be approved as to form and enforceability by the Town Manager. A performance guarantee shall not expire between October 31 and April 15 of the following year.
1. Security Bond. The applicant may obtain a security bond from a surety bonding company authorized to do business in the state.
 2. Letter of Credit. The applicant may provide an irrevocable letter of credit from a bank or other reputable lending institution. The letter of credit shall be provided in accordance with the Town of Windham's most current template.
 3. Escrow Account. The applicant may deposit cash or other instruments readily convertible into cash at face value, either with the municipality, or in escrow with a

bank. Any such account shall require Town approval for withdrawal and shall stipulate that the Town can withdraw the money upon forty-eight (48) hour advance notice to the applicant to complete the guaranteed improvements.

D. Post Approval Construction Observations (*See Sec. 810 Fees*)

1. At least fifteen (15) days prior to commencing construction of required improvements, the developer shall notify ~~in writing the Planner~~the Planner in writing of the time when he proposes to commence construction of such improvements so that the Planner can cause observations to be made of all specifications and requirements of the approved plans shall be met.
2. At least five (5) days prior to commencing construction of required improvements, the developer shall pay the construction observation fees as required in Subsection 810.C. No building permits shall be issued on the project and no work, including site preparation, shall commence until the fee has been paid. A preconstruction meeting shall be held with Town staff prior to commencing construction.
3. If the observer finds that any of the required improvements have not been constructed in conformance with the plans and specifications approved by the Planning Board or ~~Development Staff~~ Review Committee, he shall so report to the Town Manager, Public Works Director~~Road Commissioner~~, Code Enforcement Officer and Planner. The Planner shall notify the developer of the reviewer's findings and seek confirmation of the developer's intent and timeline to remediate the deficiencies.
 - (a) If the developer is not capable, or refuses, to correct the identified deficiencies, the Town Planner or Town Manager shall notify the bonding company or bank and take all necessary steps to preserve the municipality's rights under the bond, letter of credit or escrow account.
 - (b) No site plan amendments or new site plans submitted by said developer shall be approved by the Planning Board or ~~Development Staff~~ Review Committee as long as the developer is in default on a previously approved plan.
4. Prior to the Town issuing any Certificates of Occupancy, the observer shall find that all required boundary markers have been installed by a Maine Licensed Professional Land Surveyor according to the plans approved by the Planning Board or Development Review Committee.

- E. Submission of As-Built Plans. Any project involving the construction of more than twenty thousand (20,000) square feet of gross floor area or fifty thousand (50,000) square feet of impervious surface shall provide the Planning Department with a set of construction plans showing the building(s) and site improvements as actually

constructed on the site. These "as-built" plans shall be submitted in both paper and electronic copies (including any revisions to the GIS information required in Section 811 Submission Requirements) prior to the issuance of a Certificate of Occupancy for the project or occupancy of the building.

- F. Minor Changes to Approved Plans. Minor changes in approved plans necessary to address field conditions may be approved by the Planner provided that any such change does not affect compliance with the standards or alter the essential nature of the proposal. Any such change shall be approved in writing by the Planner. Copies of the approval letter shall be placed in the project file.
- G. Amendments to Approved Plans. Approvals of site plans are dependent upon and limited to the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant, and conditions, if any, imposed by the Planning Board or [Development-Staff](#) Review Committee. Any variation from the plans, proposals, supporting documents, and representations, except minor changes that do not affect approval standards, is subject to review and approval by the Planning Board or [Development-Staff](#) Review Committee, as appropriate.
- H. Change in Ownership. Where there is a change in ownership of a project after approval has been granted, but prior to the release of the performance guarantee, the Town Manager may request new financial capability information, as well as other factors that the Town Manager deems necessary because of changing conditions.

911 Performance and Design Standards

M. Traffic Conditions and Streets6. *Process for Town Acceptance of Streets*

A street constructed on private lands by the owner, developer, or association thereof and not dedicated for public travel prior to October 22, 2009, may be laid out and offered for acceptance as a public street by the Town Council. For the Town Council to accept a public street the procedures and conditions of this section must be met. In the event that all procedures and conditions are met, the Town Council reserves the right to reject any street offered for public acceptance.

- (a) The street proposed for acceptance shall be constructed, or improved, to the standards for the construction of a public street.
- (b) The owner(s) shall give the Town a deed to the property within the boundaries of the right-of-way at the time of its acceptance by the Town, a separate deed to areas reserved for the future development of streets, and separate easements for the provision of street stub hammerheads. (*See Subsec. 911.M.3 General Internal Subdivision Street Standards*)
- (c) A plan of said street or way shall be recorded in the Cumberland County Registry of Deeds at the time of its acceptance.
- (d) A petition for the acceptance of said street shall be submitted to the Town Council upon a form to be prescribed by the Town Attorney. Said petition shall be accompanied by a plan, profile and cross section of said street as follows:
 - (1) A plan drawn when practical to a scale of 50 feet to 1 inch, and to be on one or more sheets of paper not exceeding 24 inches by 36 inches in size. Said plan shall show the North point, the location and ownership of all adjoining lots of land, underground utilities, passageways, street lights and electric lines, boundary monuments, water ways, topography and natural drainage courses with contours at 2 foot intervals (or lesser intervals approved by the Planning Board), all angles, bearing and radii necessary for the plotting of said street and lots and their reproduction on the ground.
 - (2) A profile of said street or way drawn to a horizontal scale of 50 feet to 1 inch, and a vertical scale of 5 feet to 1 inch, or other suitable engineering scale as required by the Town's consulting engineer.
 - (3) Said profile shall show the profile of the centerline of said street and the proposed grades thereof. Specific cross sections shall be submitted as required

by the Town's ~~consulting~~ engineer. Any buildings abutting on said street shall be shown on said profile.

- (4) A typical cross section of said street drawn to a horizontal scale of 5 feet to 1 inch and a vertical scale of 5 feet to 1 inch.
- (5) The location and size of the proposed water and/or sewer mains in accordance with these regulations.
- (6) The location and size of all culverts, storm drains, catch basins and manholes.

(e) Streets Offered for Acceptance

- (1) Streets to be offered to the Town for acceptance must have a written report of investigation prepared by the Town's ~~consulting~~ engineer after completion of construction based on review and observation of construction by the Town's ~~consulting~~ engineer.
- (2) The owner shall warranty all public improvements for a period of one year from the date of acceptance and post a maintenance guarantee per the subdivision regulations. This maintenance guarantee shall ensure the workmanship and the durability of all materials used in the construction of the roadways, curbing, esplanades, sidewalks, sanitary sewerage systems, storm drainage stems, street lighting, tree planting, and other public improvements located within the right-of-way which may become defective within the one (1) year period, all as determined by the Public Works Director or Town Engineer in accordance with Section 911.M.6. The amount of the maintenance guarantee shall be 10% of the total construction costs of all required improvements.
- (3) At the conclusion of the one-year warranty period, the owner shall request the Town's consulting engineer to prepare a second written report of investigation prior to the release of the improvements guarantee.

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A. Performance Guarantees

1. **Types of Guarantees.** The applicant shall provide one of the following performance guarantees for an amount adequate to cover 110% of the total construction costs of all required improvements, taking into account the time-span of the construction schedule and the inflation rate for construction costs. A performance guarantee shall not expire between October 31 and April 15 of the following year.
 - (a) Either a certified check payable to the municipality or a savings account or certificate of deposit naming the municipality as owner, for the establishment of an escrow account;

- (b) A performance bond payable to the municipality issued by a surety company, approved by the municipal officers, or ~~town~~ Town managerManager; or
 - (c) An irrevocable letter of credit, from a financial institution establishing funding for the construction of the subdivision, from which the Municipality may draw if construction is inadequate, approved by the Town Manager.
- 2. ***Contents of Guarantee.*** The performance guarantee shall contain the following:
 - (a) Construction schedule,
 - (b) Cost estimates for each major phase of construction taking into account inflation, provisions for inspections of each phase of construction, provisions for the release of part or all of the performance guarantee to the developer, and a date after which the applicant will be in default and the municipality shall have access to the funds to finish construction. The amount will be based upon a Schedule of Values maintained by the Town and based on construction costs of similar projects. The cost estimate shall be submitted in a format containing a schedule of values for each construction item. The acceptable format is available from the Town Engineer and on the Town's website.
- 3. ***Escrow Account.*** A cash contribution to the establishment of an escrow account shall be made by either a certified check made out to the municipality, the direct deposit into a savings account, or the purchase of a certificate of deposit.
 - (a) For any account opened by the applicant, the Town of Windham shall be named as owner or co-owner, and the consent of the Town shall be required for a withdrawal.
- 4. ***Performance Bond.*** A performance bond shall detail the conditions of the bond, the method for release of the bond or portions of the bond to the applicant, and the procedures for collection by the municipality. The bond documents shall specifically reference the subdivision for which approval is sought.
- 5. ***Letter of Credit.*** An irrevocable letter of credit from a bank or other lending institution with offices in the region, shall indicate that funds have been set aside for the construction of the subdivision for the duration of the project and may not be used for any other project or loan.
 - (a) The letter of credit shall use the template established by the Town of Windham, unless waived by the Planning Board in consultation with the Town Attorney.
- 6. ***Phasing of Development.*** The Board may approve plans to develop a Major Subdivision in separate and distinct phases. This may be accomplished by limiting final approval to those lots abutting that section of the proposed subdivision street which is covered by a performance guarantee.

- (a) When development is phased, road construction shall commence from an existing public way, when available.
 - (b) The Board shall grant final approval of lots in subsequent phases only upon satisfactory completion of all requirements pertaining to previous phases. Evidence of satisfactory completion shall be a report from the Code Enforcement Officer or consulting engineer retained by the Town of Windham.
7. **Release of Guarantee.** Prior to the release of any part of the performance guarantee, the Town Manager shall determine to his/her satisfaction, in part upon the report of the Town's ~~consulting E~~ngineer or other qualified individual retained by the municipality and any other agencies and departments who may be involved, that the proposed improvements meet or exceed the design and construction requirements for that portion or phase of the subdivision for which the release is requested. ~~The Town of Windham shall retain 10% of the performance guarantee for a period of one (1) year from the date of final paving for any streets to be offered to the Town Council for acceptance.~~
- (a) Performance guarantees may be reduced periodically, but in no event more than one (1) time per month. In no case shall the performance guarantee be reduced by less than ten thousand dollars (\$10,000.00) at one time; or in any line item where improvements remain to be completed. No performance guarantee shall be reduced to less than ten (10) percent of the performance guarantee. The remainder of the guarantee will be release upon completion of the improvements.
 - (b) The Town of Windham shall retain 10% of the performance guarantee for a period of one (1) year from the date of final paving for any streets to be offered to the Town Council for acceptance. This guarantee shall ensure the workmanship and the durability of all materials used in the construction of the roadways, curbing, esplanades, sidewalks, sanitary sewerage systems, storm drainage stems, street lighting, tree planting, and other public improvements located within the right-of-way which may become defective within the one (1) year period, all as determined by the Public Works Director or Town Engineer in accordance with Section 911.M.6.
8. **Default.** If upon investigation, the Town's ~~consulting E~~ngineer or other qualified individual retained by the Town finds that any of the required improvements have not been constructed in general conformance with the plans and specifications filed as part of the application, he or she shall so report in writing to the Code Enforcement Officer, the Town Manager, the Board, the Planner, and the applicant or builder. The Town Manager, or his designee, shall take any steps necessary to preserve the municipality's rights.
9. **Improvements Guaranteed.** Performance guarantees shall be tendered for all improvements required to meet the standards of these regulations and for the construction of the streets, storm water management facilities, public or private

sewage collection or disposal facilities, public water systems, and erosion and sedimentation control measures.

B. Investigation of Required Improvements

1. ***Notice of Construction.*** At least fifteen (15) days prior to commencing construction of required improvements, the subdivider shall notify in writing the Town Planner of the time when he proposes to commence construction of such improvements so that the Town Manager and Town Planner can cause investigation to be made to observe construction or required improvements to confirm general conformance to the approved plans and specifications, and to confirm satisfactory completion of improvements and utilities required by the Board. Investigation shall be made of all required public improvements including, but not limited to, public streets or private roads, drainage structures and ditches, erosion control measures, utilities, landscaping and recreation facilities and of all survey monuments as required by Subsection 911.A.3. of this chapter to insure they have been placed.
2. ***Construction Observation Fee.*** At least five (5) days prior to commencing construction of required improvements, the subdivider shall pay a construction observation fee in according with the requirements of Section 909 Fees. No building permits shall be issued on the project and no work begun until the inspection fee has been paid. [A preconstruction meeting shall be held with Town staff prior to commencing construction.](#)
3. ***Improvements Not Constructed To Plan.*** If the Town's representative shall find, upon investigation of the improvements performed before the expiration date of the performance bond, that any of the required improvements have not been constructed in general conformance with plans and specifications filed by the subdivider, he shall so report to the Town Manager, ~~Road Commissioner~~[Public Works Director](#), Building Inspector, and Town Planner. The Town Planner shall then notify the subdivider and, if necessary, the bonding company or bank, and take all necessary steps to preserve the municipality's rights under the bond or letter of credit.
4. ***Modifications to Required Improvements.*** If at any time before or during the construction of the required improvements it is demonstrated to the satisfaction of the ~~Town's representative~~[Town Engineer](#) that unforeseen conditions such as encountering hidden outcrops of bedrock, natural springs, etc... make it necessary or preferable to modify the location or design of any required improvement, the ~~Town Engineer~~[Town's representative](#) may, upon approval of the Town Planner, authorize modifications. The modifications must be within the spirit and intent of the Board's approval and do not extend to the waiver or substantial alteration of the function of any improvements required by the Board. The ~~Town's representative~~[Town Engineer](#) shall issue and transmit a written authorization under this section to the Town Planner.

5. **Completion of Construction of Required Improvements.** Construction of improvements covered by any subdivision plan approval shall be completed within two (2) years of the date upon which the performance guarantee is accepted by the Town Manager. If construction has not been completed within the specified period, the Town shall, at the Town Manager's discretion, use the performance guarantee to either reclaim and stabilize the site or to complete the improvements as shown on the approved plan.

- C. Maintenance of All Improvements. The applicant shall be required to maintain all improvements and provide for snow removal on streets and sidewalks until either of the following has occurred:
1. The legislative body accepts said improvements, or
 2. The applicant has transferred responsibility for ongoing maintenance of the improvements to a Home Owners Association.