

**MINUTES OF MEETING
PHIPPSBURG PLANNING BOARD
April 12, 2022**

MEMBERS PRESENT: Mark Hawkes, Clifford Newell, Ashley Thayer, John Totman, Jr., and Marie Varian, Chair.

1. [0:1:30] The meeting was called to order by Ms. Varian at 5:01 pm at the Town Hall. Ms. Varian reported that there was a quorum, and full board.

2. [0:1:46] **Consider the minutes of February 8, 2022, regular meeting; the March 8, 2022, regular meeting; the March 29, 2022, public hearing; and the March 29, 2022, special meeting.**

Mr. Hawkes made a motion to approve all minutes as written. Ms. Thayer seconded the motion, which was passed unanimously.

3. [0:2:54] **Foxy CEOs, LLC, 126 Parker Head Road, Tax Map 08, Lot 18, Represented by Christopher Fox – Continuation from January, February, and March meetings. Review covenants and wording relating to further subdividing of the lots. Application #2022-02**

Ms. Varian stated that the Board might not be able to finish their consideration of this issue at this meeting.

She summarized the question under consideration, which is where the last discussion at the March 8th meeting ended: If the covenants were changed, and, whatever would happen to these lots in the future, would the Board have to abide by the rules in place today, or would they go to the future? She reported that her legal advisers told her that, if the applicants ever appeared at the Board for permission to subdivide the lots, the Board would have to abide by the rules in place at that time. In the meantime they would stay the way they are under the old subdivision permit.

She then said that they should continue the conversation on the covenants, as she believed they had not ever gone through them all.

She then reported that the only information available to the Board in connection with the original covenants are the meeting minutes in which the subdivision was considered and approved. It is her opinion that the final approved covenants include those requested by the applicants for the subdivision permit as well as the Board, but the available records do not allow the present Board to know which were in the original application and agreed to by the Board and which were added to or requested/required by the Board.

However, Ms. Varian has been informed by her legal advisers that the present Board does have the authority to assume that Planning Board had made this decision when they wrote on the map that the covenants were approved.

She then asked Mr. Fox and the Board if this assumption was agreeable to them. They all agreed that it was.

Ms. Varian directed attention to the list of covenants. Below are comments made in connection with each covenant:

- 1) *No mining, quarrying or removal of soil, subsoil, gravel or stone shall be conducted upon said lot, excepting that which may be necessary in connection with excavation for or incidental to the construction of the building on said land.*

Ms. Varian asked whether it should be kept. It's about mining. If there would not be any desire to allow mining on the land, it should be kept.

- 2) *There shall be no subdivision of the above-described parcel of land.*

Mr. Fox stated that it was his understanding that there is a difference between "division" and "subdivision." Ms. Varian responded that that was true. Mr. Fox stated that they are looking to have an option to *divide* a lot sometime in the future if it is desired at that time, but he has no problem with the prohibition against *subdividing* a lot.

- 3) *Not more than one single family private residential building, a garage and a pump-generator or tool shed building shall be constructed or placed upon said lot.*

Ms. Varian said that it seems logical to keep, but they should think about it.

- 4) *No animals shall be kept on said premises except domestic pets and horses for recreational use.*

Ms. Varian stated that they had decided to prohibit horses, so that means that the statement in covenant #4 would end at "domestic pets." Then, "Horses are prohibited" would be added.

- 5) 6) and 7) Delete.

- 8) *No building or structure shall be erected or placed within fifty (50) feet of any property line.*

Change the setback from 50' to 20'.

- 9) 10) and 11) Delete.

- 12) *No building or structure shall be erected, constructed or placed within fifty (50) feet of the nearest roadway.*

Ms. Varian suggested that the language would stay as is except that "of the nearest roadway" would be changed to "from the center of the traveled way," to be consistent with the wording in the Town ordinance.

- 13) 14) and 15) Delete.

16) No commercial, agricultural, except for domestic garden use, business or industrial activities shall be conducted upon said lot. A professional office for a physician, dentist, attorney or architect may be constructed and/or used upon said lot provided it is contained within the main residential building.

Ms. Varian inquired of the applicant whether he would want to change the language to be more consistent with the definition of a home businesses in the Town ordinance, rather than being so specific about which businesses would be allowed.

Ms. Varian stated these were her thoughts. She stated that, if the applicant put the covenants under the authority of the Planning Board, they wouldn't lose anything, other than having a few rules to go by.

Mr. Fox responded that he just thought it was simpler to get rid of the whole list of covenants, but, if the Planning Board wants to keep some of them, he would have no problem.

Ms. Varian then asked for comments from the Board. Mr. Hawkes responded that he thought there were 4-5 that they had discussed and should be kept, but not all of them. Mr. Newell stated that he thinks they should have some, otherwise someone would come in and think they could do whatever they want.

Ms. Varian said someone has to write them up again. The Board can do it, the applicants can do it, or their attorney can do it. Mr. Fox said whatever is the simplest. Ms. Varian said they were all simple; it's just a question of who pays for it. Mr. Fox said that they were proposing to have the Town requirements replace the covenants, so they were not thinking that they could do whatever they want.

Ms. Varian stated that it seems they would have to come back another time. Mr. Fox said that he would have someone draft them and see if they're suitable, but he would like to have Ms. Varian's notes.

Ms. Varian then proposed the following addition to covenant #2: "A division would be considered under the rules at the time of the request."

Mr. Fox stated that his understanding was that a subdivision is three or more lots. What he is trying to preserve for his children and grandchildren is the option to *divide* a 6-acre lot into two lots. Mr. Hawkes pointed out that, while that distinction was true, the fact is that the subdivision was approved for four lots, and if one of the lots is divided, then the subdivision becomes a five-lot subdivision, which it wasn't approved for.

The consensus was that, if the request was permitted under the rules at the time as stated in the proposed language, then the potential problem raised by Mr. Hawkes would be dealt with at that time.

In summarizing which covenants should be kept and which deleted, Ms. Varian went over her list again. In connection with covenant #7 (*No house trailers, mobile homes, or tents shall be erected or placed on said lot*)—which she had suggested could be deleted, she said that was a matter of preference. If they wanted to keep it, they should.

In connection with covenant #12, Ms. Varian amended her proposed revision by changing “traveled way” to “Parker Head Road.”

Ms. Varian requested a motion to write up the suggestions above and address it at the next meeting. Mr. Hawkes moved to rewrite the conditions and restrictions for the Cooley Estate Kennebec River Minor Subdivision, removing the restrictions and revising the remaining restrictions as agreed to at this meeting. Ms. Thayer seconded the motion, which was passed unanimously.

Mr. Fox said that he would write up the proposed language and send it to each member prior to the next meeting so that they would be able to review in advance and be prepared with their comments at the meeting.

4. [0:29:23] Foxy CEOs, LLC, 126 Parker Head Road, Tax Map 08, Lot 18, Represented by Christopher Fox – Continuation from January, February, and March meetings. Restate and amend the June 1, 1990, Certificate of Easement/Driveway Location as regards the Cooley Estate Kennebec River Minor Subdivision Lots #2 (Tax Map 08, Lot 16) and #3 (Tax Map 08, Lot 18). Application #2022-03

Ms. Varian noted that this application had been approved at the last regular meeting, in March. However, a question came up about the actual agreement that was presented at the time. She got legal advice to make sure that this several-page opinion did not take away any authority from the Planning Board’s ability to work on this again if questions ever came up for anything to do with it. Legal word came back as follows:

- The agreement does allow changes, and all of the relevant parties are included.
- It does not change the existing rights of lot owners by itself.
- All parties are retaining rights to the easement that they now have; it’s just the location that is changing.
- No driveway or vehicular access may be established in Lot 3 directly onto Parker Head Road without approval of the Planning Board and language in the deed to the Lot 3 owner will remain in force until after any implementation of this agreement.

Ms. Varian then said, “So, we’re good to go. You don’t need anything else.”

Mr. Fox asked what date should be put on the agreement. Ms. Varian responded that, since the agreement was approved at the last meeting, on March 8, 2022, she would think that should be the date.

5. [0:33:31] Riverside Camping, David and Tracy Percy, 6 Sea Street, Tax Map 14, Lot 22 – Change in Permit 2019-28 to relocate building and construct different fence style to conform to DEP requirements. Application #2022-12

Mr. Hawkes, who is the contractor for the applicants for this project, recused himself from consideration of this application and stepped down.

Ms. Varian reported that they had the application packet and legal advisory that there is nothing in the Town ordinance that requires the Board to go back into public hearing. This was all handled originally. Therefore, it is this application that is being considered in this regular meeting.

Ms. Varian stated that the application is a description of DEP-required changes in the building location and the fence style. She then asked Mr. Percy to describe the plan.

Mr. Percy explained that DEP has moved the location of the building from the V zone to the AE zone, and they would like open fencing in the erosion hazard area. That would put 35' approximately of open fencing on the south boundary. He noted that there are 115' on the northern boundary, but there is an existing fence there. He mentioned that the original DEP measurement was 50' on the south border, but it's actually 35'.

Ms. Varian asked Mr. Percy to describe the fencing. He directed the Board to the photograph included in his application. He noted that the slats are 4" apart.

Ms. Varian asked whether all of the abutters have been notified. He said they were, and had not heard anything from any of them. Ms. Varian stated for the record that there was nothing in the Town ordinance that would make applicants undertake all the requirements to obtain a permit in the first place. In this case, the applicant is applying for revisions in the 2019 permit.

Ms. Varian asked the Board if there were any questions about the fencing. There were none.

Ms. Varian then said that, in a regular Planning Board meeting, the public does not have the right to speak. In a public hearing, the public does have a right to speak. She noted that, in the past, the Board has been lenient about letting a member of the public speak in a regular meeting. If it gets rowdy, then the discussion is shut down. She said that she wants it to be known that if there is something that really does need to be said, there would be an opportunity to be heard. She then reported that a written comment has come in from John Curran, whose property abuts the Percy property to the south. In this letter, Mr. Curran expressed his belief that "Open fencing should not be considered as an acoustic or visual protection to support a substitute buffer and reduce a setback by 115 feet to 35 feet."

Ms. Varian asked Mr. Totman to read the letter aloud at the meeting, which he did. The letter in its entirety is filed with the Town's records for this project.

Ms. Varian asked Mr. Percy if he had any comments or opinions about the required fencing. She stated that the reason for her question is that the Town's Shoreland Zoning Ordinance does not say anything about the fence. The Town's Land Use Ordinance does mention that a campground would have "fencing or vegetation having a minimum height of 6 feet" (Section 9.C.1.a). When the fencing was being debated during the four public hearings held for this application, it was stated—during the third session she believes—that the DEP doesn't always allow closed fencing in certain areas. Therefore, they realized at the time that this could be an issue.

Now that the Percys have applied to the DEP and gotten word back from the DEP as to what they would allow in that area, this requirement is what has come back to the applicants and the

Board. The Board did not know what would be allowed by the DEP in front of the Curran cottage and approved closed fencing.

Mr. Percy said that the sound engineer in his original study recommended carrying that closed fence as far to the east as possible. That's going to be 35' short. He noted that the ordinance says "fence or vegetation." He questioned whether the vegetation would be required to be 6' right away, or would it be allowed to grow to that height. He said that the option is whether there is a fence there or not, whether it's open or closed. In the DEP application, the Maine Geological Survey (MGS) asked why it would even have to be put in the erosion hazard area. He pointed out that the site of the campground has been a commercial use the entire time that Mr. Curran has occupied his cottage, so, while the business is new, the commercial use is not. Mr. Percy does not believe that an open fence requirement is unreasonable, with vegetation. He reported that they have opted to go with 12' height, and he believes that they have proven that they are willing to go out of their way to accommodate all of their neighbors. The ordinance requires either fencing or vegetation, and they are doing both.

Ms. Varian agreed that the site has been commercial for way over 100 years, which is a well-known, historical fact.

Mr. Percy stated that they have a guest list of occupants of the campground that comprises a total of 20 people. There is no evidence that these 20 people would create more nuisance in the neighborhood than the previous use—a store with a 100-car parking lot.

Ms. Varian then returned to the question of the buffer zone. All that is pertinent tonight is the fact that, because this is a campground, it does require a "minimum rear and side yard distance of at least 150 feet from the nearest residential lot line" (Section 15.G.3.b). A "residential lot line" is defined as "any part of a property line within 200 feet of a dwelling." However:

The Planning Board may approve substitute buffer zones providing the purposes of this Ordinance are maintained. Substitute buffer zones may be approved when the topography of the land, the nature of the vegetation, or building(s) provides screening that is equal in protection to the required width of buffer zones. Substitute buffer zones may also be approved when the character of a neighborhood is predominantly commercial.

Ms. Varian stated that it was proven at the public hearings that the character of the neighborhood is predominantly commercial. There is a business next door, and there are many rental properties. She said that in the Town's ordinances, renting a cottage is a commercial activity. Ms. Varian was not sure of the exact number, but she believes that the tax map of that particular area that the applicant showed at the public hearing indicated that the houses on approximately 44 lots were rented. So it was decreed that the neighborhood is predominantly commercial. Ms. Thayer added that the number reported is only the number of houses that are known to be rented. There could be others that are private transactions and not known to the Town.

Ms. Varian then turned to the question of what to do about a fence. After discussion, consensus of the Board was that the plans submitted with the application are as required by the Department of Environmental Protection (DEP):

- A 35' long, open (slatted) fence will start west of the "cannon" and extend westerly to approximately the middle of the cottage on the south side of the site. The rest of the fence will be solid construction.
- There is no change in the width of the buffer zone. It remains as originally approved. According to the sound engineer for the project, R. Scott Bodwell, P.E., Bodwell EnviroAcoustics, LLC, of Brunswick, "sound reduction . . . would be approximately 2.7 dBA. A 3dBA change in sound levels is generally considered as just perceptible."

Mr. Newell moved to approve the application as written, as it complies with the DEP's requirements regarding fencing. Mr. Totman seconded the motion, which was passed unanimously.

The next issue was the relocation of the building. After discussion, the Board consensus was that relocation of the building meets all setbacks. All requirements of both phases are allowed under ordinances.

Mr. Newell moved to approve the relocation of the building to the northwest section of the parcel, which complies with the DEP's requirements regarding the location of the building. Ms. Thayer seconded the motion, which was passed unanimously.

Applicant paid the fee of \$100 by check #11121.

Mr. Hawkes rejoined the meeting.

6. [1:40:24] Alex Sulkowski, 28 Lookout Point, Tax Map 32, Lot 12 – Continued from March meeting – Landscaping by replacing impervious material (crushed stone) with 16 cubic yards of pervious material (loam) extending outward from house toward water in the Resource Protection District of the Shoreland Zone. Application 2022-10

Ms. Varian stated that she has received a copy of the applicant's DEP approval. She noted a comment in that correspondence that there might be an issue with the Town's Shoreland Zoning Ordinance. Therefore the applicant is meeting with the Town to discuss it, via this meeting with the Planning Board.

Ms. Varian reported that it is a problem in that:

- It's very close to the water
- The state has a 75' setback
- The Town has a 125' setback

Therefore, there is a difference in the requirements of the Town and the State.

Mr. Sulkowski introduced Michelle Grover, ASLA, Landscape Designer of Great Works Landscape. Ms. Grover is the designer of the project, and she completed the application to the DEP.

Ms. Varian asked if it was known yet the actual quantity of pervious material that would be brought in. Ms. Grover stated that about 6” of crushed stone currently on the site would be removed and replaced with 6” of loam in order to establish a lawn area.

The Board decided that a site walk would be required in order to make its decision about this application. A site walk was scheduled for 9:00 am on Sunday, May 1st.

7. [1:58:09] Edward H. Abraham and Ellen Davis Waitzkin, 46 Fort Baldwin Road, Tax Map 14, Lot 6 – Represented by Karen Jorgensen. Adjustment to private driveway as it crosses the property in the Residential District of the Shoreland Zone.

Application #2022-13

Mr. Hawkes, who is working on the project involved in this application, recused himself from consideration of this application and stepped down.

Ms. Jorgensen explained that the driveway that serves the property also serves two properties that are beyond it. Therefore, they have engaged with the two other property owners to help design the new path. The existing path, she stated, has probably been there since the house was built in 1830. It was designed for shortened carriage traffic, has been upgraded over the years, and, in one case, upgraded for vehicular traffic.

However, the entrance to the Abraham’s house is only 14’ from the traffic pattern. This has always been an issue for them, but more so lately: fuel trucks are bigger, and there is more traffic with the families using the driveway. Since the applicants need to put in a new septic system this year, and the ground will be disrupted, this seemed the time to make this change. The new path design seems to be agreeable to those affected by it.

Ms. Varian reported that a 50’ wide section is in the Resource Protection District. The roadway will not encroach on the Resource Protection District. The application is considered under Section 15.I.a (*Roads and Driveways*) and Section 17.D. (*Procedure for Administering Permits*) of the Town’s Shoreland Zoning Ordinance.

Section 15.I.a says that “Roads and driveways shall be set back at least one hundred (100) feet, horizontal distance, from the normal high-water line.” Ms. Varian noted that the proposed design is set back, at the closest point, 120’.

Section 17.D.3 states that the Planning Board will decide the items listed below after receiving information from the applicants’ representatives. Mr. Hawkes responded in each case.

- a. *Will maintain safe and healthful conditions* – Yes
- b. *Will not result in water pollution, erosion, or sedimentation to surface waters* – Will not
- c. *Will adequately provide for the disposal of all wastewater* – There won’t be any wastewater.
- d. *Will not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat* – Will not

- e. *Will conserve shore cover and visual, as well as actual, points of access to inland and coastal waters* – No trees have to be cut, so everything will stay the same as it is now
- f. *Will protect archaeological and historic resources as designated in the comprehensive plan* – Yes, it will. Ms. Jorgensen added that they have notified the State Archaeologist that the ground is going to be disturbed in case he would like to view things as it is going on. The area has been disturbed before, when the Army built Fort Baldwin. It will be handled very carefully.
- g. *Will not adversely affect existing commercial fishing or maritime activities* – It will not
- h. *Will avoid problems associated with flood plain development and use* – It is not in the flood plain at all
- i. *Is in conformance with the provisions of Section 15, Land Use Standards* – Yes it is

Ms. Varian asked if there were any questions or comments. Mr. Butler, a property owner who uses the driveway, clarified that the deeds define this as an easement or a right of way, rather than a private driveway, as it has been referred to in this application and discussion.

Mr. Newell moved to approve the application as written. Ms. Thayer seconded the motion, which was passed unanimously.

Fee of \$100 was paid by check #468.

8. [2:20:46] The Historic 1774 Inn, LLC, 44 Parker Head Road, Stuart and Sara Devan, Tax Map 8, Lot 26 – Discussion – Convert barn to event space at their 42 Parker Head Road property, Tax Map 8, Lot 28; create parking area and raised beds at their 21 Church Lane property Tax Map 8, Lot 27.

Mr. Hawkes returned to the meeting.

Applicants were not present, so this discussion did not occur.

9. [2:26:08] Other Business. Shannon Russo was in attendance at this meeting. She had asked to be put on the agenda for this meeting, but her information did not come in early enough for her to be told that her application is not complete. Her application is for a new business, Wellhaus Goods, a local, seasonal shop with elevated home goods and gifts.

Ms. Russo asked the Board whether it could recommend which of the new business applications were appropriate: New Business or Home Business. The Board gave her comments and suggestions about the differences between the two. Mr. Hawkes informed her of the relevant sections of the Town's Land Use Ordinance. Ms. Varian told Ms. Russo that she will be put on the agenda for the May meeting.

10. [2:36:03] Announcements. Ms. Varian announced that Adele Suggs has taken the rewrites for the Shoreland Zoning Ordinance, and she probably will start preparing it tomorrow.

The plan is to go along for about a third of it, send it back to the Planning Board to look it over, and then move forward.

11. [2:37:32] **Adjourn.** Ms. Varian moved to adjourn. Mr. Hawkes seconded the motion, which was passed unanimously. Meeting was adjourned at 7:36 pm.

Respectfully submitted,

Channa A. Eberhart

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Secretary