

MINUTES OF MEETING
PHIPPSBURG PLANNING BOARD
February 13, 2024

MEMBERS PRESENT: Mark Hawkes, Ashley Thayer, John Totman, Jr., Lori Follett (alt), and Marie Varian, Chair

1. **[5:35]** The meeting was called to order by Ms. Varian at 5:33 pm at Town Hall. She announced that there was a quorum and that a regular member was absent on medical leave. Ms. Varian appointed Alternate Lori Follett to serve for Clifford Newell.
2. **[6:04] Consider Minutes:** January 9 Regular Meeting; January 26 Public Hearing; and January 30 Special Meeting.

Ms. Varian explained that there are no minutes to approve as the Planning Board Administrative Assistant is on leave and will catch up on them when she returns.

3. **[6:24] DRIFTWOOD CONDOMINIUMS, 23 Williamsburg Drive, Amherst NH 03031, represented by Joseph Murphy, President, Driftwood Condominium Owner's Association, Tax Map 14, Lot 41 - Repair damage to seawall resulting from January 10 and 13 storms, using approximately 1000 cubic yards of stone. Application #2024-03**

Ms. Varian introduced the application and gave Mr. Murphy the floor.

Mr. Murphy stated they had lost a significant portion of their seawall, and they have been working with Curtis Doughty. Ms. Varian explained that the application will be considered under the Town of Phippsburg Shoreland Zoning Ordinance, Section 14.2, 12, and 31, as well as Section 17.

Ms. Varian stated that the application was complete, and the Board agreed. Mr. Hawkes said he had not received a packet and spent some time reviewing the application. He asked Mr. Murphy if he had a vertical wall. Mr. Murphy asked him to clarify "vertical" and they discussed the pitch of face of the wall. Mr. Murphy referenced a photograph in his packet and explained that the side of the wall facing away from the ocean was pretty vertical, while the opposite side has pitch. Mr. Hawkes asked about the north end of the wall and Mr. Murphy said they would be replacing the wall as it was previously.

Mr. Hawkes said that Mr. Murphy previously stated that he was having an issue with people climbing on the rock wall. Mr. Hawkes stated this was a safety issue and asked whose property the wall is on; Mr. Murphy stated that they owned the entire wall. Mr. Hawkes asked if it is still their wall if it settles and moves towards the ocean, and Mr. Murphy said they own to the low tide mark. He explained that as you move south, towards the State Park, there is a line there where the wall becomes someone else's. Mr. Murphy stated that the winter is when they have

the most trouble with people on the wall, and that they had placed some fencing, but lost it in the storm. He stated they are open to ideas to stop people from going on the rocks.

Ms. Varian stated that the application packet has proof that Mr. Murphy is the President of the Driftwood Condominium Owner's Association. She explained that he is applying to replace a set of stairs and sections of the seawall. Mr. Murphy said Mr. Doughty had placed stones that may remove the need to build the wooden stairs. Ms. Varian said he would not need to build them if they were not necessary.

Ms. Varian referenced the Findings (Shoreland Zoning, Section 17.D.3) and the Board considered the questions with Mr. Murphy. All findings were found positive.

Ms. Thayer made a motion to accept the application as written. Ms. Follett seconded the motion, which the Board passed unanimously.

Mr. Murphy asked about submitting photos and Ms. Varian explained that he would need to submit hard copy photos of the project no later than 20 days from completion.

Applicant paid a fee of \$100 by check #2073.

4. [23:15] PHILLIP WYMAN, 245 West Point Road, represented by Scott Wyman - Repair damage to wharf, buildings, and surrounding area at 36 Carrying Place Road, Tax Map 27, Lot 86, resulting from January 10 and 13 storms. Application #2024-04

Ms. Varian introduced the application and explained that it would be considered under the Town of Phippsburg Shoreland Zoning Ordinance, Section 14.2, Section 15.12, 17, 31, as well as Section 17.

Mr. Hawkes asked if Mr. Wyman was raising the building, or just the wharf. Mr. Wyman stated that it would be easier for him to cut 3 feet off the bottom of the building and put in a new floor, rather than lifting the building up. This would allow the building to match the outside pier. He explained the concrete floor had already been destroyed.

Ms. Varian referenced the Findings (Shoreland Zoning, Section 17.D.3) and the Board considered the questions with Mr. Wyman. All findings were found positive.

Mr. Wyman adjusted his application to change the requested height change from 2.5 feet to 4 feet. Ms. Varian noted that a law (LD 2030) is working its way through state procedure that will allow wharf height to be 4 feet above the base flood level, with no other dimensional changes and that the local permit allows for the applicant to use up to the maximum level decreed of the LD 2030. She stated Mr. Wyman will need to notify the Board of his final height decision.

Mr. Hawkes made a motion to accept the application as presented with note to the pending state ruling that is working its way through legislature. Ms. Thayer seconded the motion, which the Board passed unanimously.

Applicant paid a fee of \$100 in cash.

5. [41:23] GIRI SEBASCO SOLAR, LLC, Falmouth ME represented by Peter Whitney, Tax Map 28, Lot 71 - Continue New Business application action on building an approximate 5.4-acre commercial solar (array) system on property of GIRI Sebasco Property, Inc., bordering on Sebasco Road and West Point Road. Application #2023-20

Ms. Varian introduced the ongoing application and noted that the owner's name on the original application had been updated. She gave Mr. Whitney the floor and he stated that the name had been updated to GIRI Sebasco Property, Inc, but the rest of the application has stayed the same.

An audience member asked if a final draft of the Restrictions had been prepared, or if it was with the lawyer. He also asked if the Restrictions would become public information. Ms. Varian explained that it would be available to the public once it is reviewed by the Town's attorney. The audience member said he had been in touch with an abutting landowner, and asked if there was a right to an appeal a Planning Board decision. Ms. Varian said appeals are possible. Ms. Varian reviewed where public notices are posted.

Mr. Whitney said that the document outlining his land conservation and donation proposal is being reviewed by his lawyer, and that he would provide it to them at the next Planning Board meeting.

6. [48:21] MARK and NOREEN ALEXANDER, 60 Morrison Pasture Road, Tax Map 31, Lot 78 - Replace wharf and access ways demolished in January 10 and 13 storms; raise wharf height to not exceed the up to 4' allowed maximum. Application #2024-05

Ms. Varian introduced the application explained that the wharf is 155 feet long and 10 feet wide, pilings are 3 feet across and 8 feet apart. She stated that this would be considered under the same conditions as previous wharf applications. Ms. Varian asked Ms. Alexander if any filling would be necessary. Ms. Alexander explained that there was seawall damage and that she would need to build a ramp.

Mr. Hawkes made a motion to approve the application as presented with the condition of the height increase pending on legislature decision. Ms. Thayer seconded the motion, which the Board passed unanimously.

Ms. Alexander asked how long the permit would be good for. Ms. Varian explained that it is good for a year, with an opportunity for two additional one-year extensions with Planning Board approval.

Applicant paid a fee of \$100 in cash.

7. [1:06:11] ELIZABETH and ALEXANDER McKAY, 32 Fred Brigham Road, Tax Map 38, Lot 32, represented by owner(s) and Kathy Gallant, Gallant Real Estate - Subdivision application to divide Lot 32 by selling a 1.77-acre lot. Application #2023-16

Ms. Varian introduced the ongoing application and gave Ms. Gallant the floor. Ms. Gallant presented copies of the land survey and explained that pins have been set. She asked about the requirement of guaranteeing water, and what she needed to provide for that. Ms. Varian said nothing was needed, but it's a guarantee that someone could get their money back if water was not available.

Ms. Gallant asked if another site visit would be necessary, and Ms. Varian said it would not. Ms. Varian explained that the original application was complete enough to be accepted as a Preliminary Plan. She stated that the next step is a public hearing separate from a Planning Board meeting, and then the presentation of a Final Plan. The Board determined that there would not be a need for an escrow account.

Ms. Varian stated that the Board would notify all abutters of the proposed subdivision. Town departments would also be notified and be allowed to give comments on their ability to service the proposed subdivision.

The Board scheduled a Public Hearing for February 27, 2024, at 5:30pm. Ms. Varian stated that the Town would put out notices for the hearing, and that there would be a future fee of \$100 for that advertising.

Applicant paid a fee of \$300 in cash.

8. [1:23:13] The Board will hear any other walk-in applications resulting from the January 10 and 13 storm damage. Application # TBD

Ms. Varian asked the audience if there were any walk-in applicants, and no one stepped forward.

NOTE: Mr. Hawkes then stepped down from the Board due to a conflict of interest, as he is the agent for the next two applicants. The Chair appointed Mr. Clark to replace Mr. Hawkes on the Board.

9. [1:24:52] GREGORY GENSHEIMER, 63 Newbury Point, Tax Map 27, Lot 20, represented by Mark Hawkes of Mark Hawkes Forestry & Construction - Repair right-of-way damage resulting from January 10 and 13 storms. Application #2024-07

Ms. Varian introduced the application and stated it would be considered under the Shoreland Zoning Ordinance, Section 14.1.12. Emergency operations. Ms. Varian gave Mr. Hawkes the floor as the Project Description portion of the application only said, "repair right of way from storm damage."

Mr. Hawkes discussed photographs he provided to the Board, referencing the location of a right of way that was present since the property was purchased in 1985. He explained that the roadway is damaged, and he would like to restore it. Mr. Clark asked if that is the only access, and Mr. Hawkes said there is other access, but this is the original access and a legal right of way, and the applicant would like to put it back.

Ms. Varian asked if anything would be changed, and Mr. Hawkes said no, that it would be in the same footprint, but extensive damages make the footprint hard to make out. He explained he would need to use the right of way to bring material in to do repairs. Ms. Varian asked about the quantity of material, and Mr. Hawkes said it would likely be around 350 cubic yards. He explained that since the road travels along the cove, he was also planning to use large boulders to protect the roadway from future damage.

Mr. Totman asked if there were plans to do anything in front of the house. Mr. Hawkes said yes, there would be rock retrieval and wall replacement in front of the house. Mr. Clark asked what kind of path it was, and Mr. Hawkes stated it is a maintained road. Ms. Varian asked if the 350 cubic yards of material would cover all maintenance, including the work in front of the house; Mr. Hawkes said it would. Ms. Thayer asked if the power still comes in the way shown in the old photograph, Mr. Hawkes said no, that the power was changed during development of subdivision lots.

Ms. Varian addressed the members of the audience and asked if there were any questions. An audience member, Mark Overington, addressed the Board, and stated that the roadway in question has been brought before the Planning Board many times to determine if it was a legitimate roadway. He explained that the case was brought to the Maine Superior Judicial Court in 2005 and 2007 and was deemed not a roadway/driveway/access point to the Gensheimer's property. Mr. Overington stated that the Gensheimers have two legitimate access points to their property right now, one that they have built, and one that came with the property. He said the Gensheimers have been trying for years to turn this previous roadway, which was an access point to Newbury Point, into an access road for their property. Mr. Overington referenced the 1985 photograph and said that the roadway was originally there but that it was eliminated as part of a requirement of the approval from the Town of the subdivision in 1985. He explained that the roadway goes through resource protection and shoreland zones. He stated that wetlands pour into a stream that runs right through/underneath at least a quarter of a mile of the roadway, and that culvert drains were put in years ago to keep water from going up over the road and into the ocean. Mr. Overington reiterated that the Supreme Court and the Town have previously stated that this is not a right of way and that resource

protection areas need to be protected. He referenced the Subdivision Plan and noted that the road does not exist on the plan, stating again that it was officially eliminated. He said that the Gensheimers have not been driving on the roadway and that it is gated to keep others from driving on it. He stated that it was once a footpath and that the Gensheimers had cleared it back, which had started the previous controversy and decision. Mr. Overington referenced the area of the purposed wall and road reconstruction and stated it is not a road, it is a maintained grass footpath and has been that way since 1985. He also explained that this is the reason why the telephone poles are not there, as they were moved to along the main road when the subdivision was made.

Ms. Overington explained that the Supreme Court decision denied any vehicle access or change in the roadway in any way, and that the Town won after a 10-year legal battle over this issue. Mr. Overington presented copies of the court cases to the Board. Ms. Varian referenced the photographs in the application packet, and Ms. Overington stated she was aware of the history of the roadway, and that it had been eliminated when the subdivision was created. She explained that in the early 2000s, the Gensheimers tried to expand the footpath into something more, which took 10 years and two visits to the Supreme Court to resolve.

Mr. Hawkes referenced the 1985 photograph stated it clearly shows a path and that he understands why the powerlines would have had to move to bring power to other lots when the subdivision was created. He stated that he was not there to determine if it is going to be established as a right of way or roadway, but to say that it is the Gensheimer's land, and that the road is legal access to his land. Mr. Hawkes explained that it was an existing path so that the applicants could access the cove. He stated he has not seen very much water moving through the stream area labeled on the map, and that there is an old concrete culvert to divert the water. He explained that Mr. Gensheimer would like to restore the path, not necessarily for the use of vehicular traffic, but for walking. He stated that the path has been mowed and maintained and that Mr. Gensheimer would like to go back to using it that way.

Mr. Overington asked to speak and stated that the Gensheimers purchased the property after the subdivision was created, so the conjecture that they are returning the path to something that they previously owned is not the case. He explained that it was the original and a historic road and said that he has a portion of that road on his property as well, and that it is no longer used. He restated that the Gensheimers are not trying to restore something that was there when they purchased the property. He stated that he believed that they are trying to reestablish a way to open the road back up to vehicular traffic. Mr. Overington reiterated that the State Supreme Court and Planning Board have previously said several times that this is not permissible due to the road being eliminated when it became part of a subdivision, and because it is in a wetland and resource protection zone.

Ms. Overington said that the path is used as a footpath and that she was concerned when it was described as a right of way, which implies vehicle usage. She attended the meeting to receive an understanding of the scope of the project and to make sure the Board knew of the history and

restrictions of the path. Ms. Overington stated that the footpath should be allowed to be fixed, but that nothing should be expanded.

Mr. Hawkes said that he misused the word phrase “right of way” on the application and that he would change it to describe the project as returning the path back to its original state from before the storm. Ms. Varian told him that whatever is written in the description should not lead to any more usage than the court allowed.

The Board decided that they needed more time to review the application. Mr. Overington suggested the Board refer to Lee Rainey, the Town’s Code Enforcement Officer, as he was very familiar with the situation. There was some discussion about the past and current state of the path. Mr. Hawkes said the material to repair the path would come from the surrounding woods. He stated that they have applied for a DEP permit.

Ms. Overington asked the Board not to accept the 1985 photograph that was presented as anything valid. She explained that in the 1990s, she saw what was a 3-foot-wide path change into something else over a period of weeks, and that this was when the Town and State got involved.

Ms. Varian asked how far up the path goes, and Mr. Hawkes said it goes all the way to the house. Ms. Varian asked if it follows the shoreline and then goes up through the woods, and Mr. Hawkes said it does. Ms. Varian asked how far into the woods the damage went, and Mr. Hawkes said the path is fine just behind the now exposed culvert, about 20-30 feet up.

Mr. Hawkes stated that Mr. Gensheimer has purchased multiple lots in the subdivision. He also explained that he had cut the trees and built the driveway that the Gensheimers use on a regular basis. Mr. Hawkes said he is asking to put the roadway back into its pre-storm condition.

Ms. Varian clarified that she is not interested in denying Mr. Gensheimer the use of his land, but stated if there are restrictions on the land, nothing above storm damage could be touched. Mr. Hawkes explained that he would need to gain access to repair the storm damage. Ms. Varian asked why the area could not be accessed from another route, and Mr. Hawkes said that would be going through Mr. Gensheimer’s dooryard and could cause damage to his septic system, which is beside the driveway.

Ms. Varian said she would not be opposed to replacing what was lost during the storm but cautioned about any expansion in footage. She said she would like to review the files. Ms. Overington said she would be happy to provide photographs from the early 1990s.

Mr. Hawkes suggested a sitewalk and explained that he would not need to cut any trees but may have to cut some branches to get his vehicles into the area to do the repair. Ms. Varian asked if the path was strong enough to hold equipment, and both Mr. Hawkes and Mr. Totman, (who explained that he has also done work for Mr. Gensheimer), said it would be. Mr. Hawkes

said if the ground is soft, he plans to add material to it so he can get his equipment down the path. Ms. Varian asked how long the stretch of road would be, and Mr. Hawkes said, from Newbury Point Road, it was 250-300 feet. Mr. Totman asked the distance from the gate to the cove, and Mr. Hawkes said it is around 75 feet.

The Board decided a site walk was a good idea. Mr. Hawkes asked if he should withdraw or just make changes to his application. Ms. Varian said they could not schedule a sitewalk if he withdrew his application, so that Mr. Hawkes should revise the application. She noted that the repairs to the front of the house were not listed on his application. Mr. Hawkes stated he would revise the application to add more details.

Ms. Overington asked if she could or should attend the sitewalk, and the Board said the sitewalk was advertised, and open to the public. She said the Board was welcome to park in her driveway, 55 Newbury Point, for the sitewalk.

The sitewalk was set for March 3, 2024, at 9:00 am.

Mr. Hawkes asked if he needed to pay a fee, and Ms. Varian said the fee should be paid, along with advertising costs, at the next meeting.

10. [2:26:17] DAVID and TRACY PERCY, RIVERSIDE CAMPGROUND, 6 Sea Street, Tax Map 14, Lot 22, represented by Mark Hawkes of Mark Hawkes Forestry & Construction - Repair seawall; dune restoration to prevent further loss of land on Lots 1, 2, and 3 of the campground, resulting from January 10 and 13 storms. Application #2024-06

Mr. Clark asked if RV parking spots were lost, and Mr. Hawkes said no, but that you could now no longer walk along the waterside end of some of the campers.

Mr. Hawkes presented photographs to the Board showing a wall in front of what was Percy's Store. He referenced a photograph from 1922 showing a dune in front of the current RV park. He referenced another photograph and said that half of a dune, back to the snow fence, was lost in early 2023, leaving only a narrow part of the dune grass. He explained that they put stakes in and planted dune grass, which is also now gone. Mr. Hawkes described the extent of the damage, including that the applicants lost their flagpole, and somewhere between 12-16 feet of the land that was lost was behind dune grass and in front of the RV sites. Mr. Hawkes referenced another photograph showing a wall he built on January 12th and 15th. He explained that that work was covered under an emergency act. He is now assisting in applying for a DEP permit to place larger rocks to break the velocity of wave action.

Mr. Hawkes referenced an overlay photograph which shows how the rocks and dune grass have changed and that stated that the wall they built was behind the D1, on a back, rather than frontal dune. He showed photographs on his phone of how the sand had moved during tides in the storm.

Ms. Varian said they had gone a little out of order, and introduced the application and said it would be reviewed under the Shoreland Zoning Ordinance, Section 14, items 2 and 31, along with Section 17. She gave Mr. Hawkes the floor.

Mr. Hawkes again reviewed the photographs he had presented to the Board, this time showing the recording camera. He said that when he built the rock wall, he did not restore any land but placed rocks to protect further loss to the campground. Mr. Hawkes stated that moving forward at the location, he would like to finish restoring the wall and bring sand in as part of a dune restoration project. He explained that that project would require 200-400 yards of sand, along with the planting of dune grass. The Percys are applying for a DEP permit that would include the placement of larger rocks in the project area to prevent erosion.

Ms. Varian asked if the campground sites (#1, 2 and 3), were lost. Mr. Hawkes said no, but that you won't be able to walk on the water side along #1 and #2. He stated that the underground water and sewer pipes were not compromised.

Mr. Totman asked how many more yards of rock they are proposing to add, and Mr. Hawkes said 50-75 yards of rock, and that the amount of sand needed was hard to determine. He is proposing the use of large angular rocks that would displace wave action. He also said he would be using a tapered wall to slow the velocity of waves.

Mr. Hawkes said that neither the Town's ordinances, nor DEP regulations, state that someone can prevent the loss of more land, and that in order to protect income, he thinks it should.

Ms. Varian referenced page 15 and page 60 of the Shoreland Zoning Ordinance and stated that a retaining wall is considered a structure, and that it is necessary for erosion control and is a functionally water dependent use. She referenced Section 15.U.1.c. and 15.U.6. There was some discussion about the historic presence of retaining walls in and adjacent to the project area. Mr. Hawkes said that historically, there were rocks and a wall at the location, but they had been buried.

Mr. Clark questioned if the rock wall would be considered a retaining wall, or if the project would be considered dune restoration. Mr. Totman stated that in the past, there was a retaining wall, but the wall being discussed is a new emergency retaining wall. Ms. Varian asked what other applications they were applying for, and Mr. Hawkes said that the Percys had hired an engineering firm to write a DEP permit application. Mr. Hawkes stated he has a license certifying him to work in the Resource Protection Zone.

Ms. Follett made a motion to accept the application as written, Ms. Thayer seconded the motion, which the Board passed unanimously.

Ms. Varian read the Planning Board Action, saying the application was considered under the Town of Phippsburg Shoreland Zoning Ordinance, Section 14.1.12 and 31, Section 17, Section 14.2, Section 15.B.1.a, (which cites a retaining wall as an operational necessity). A retaining wall is a Functionally Water-Dependent Use per definition. Section 15.U.1.a-c, describes a rip-rap wall as this would be, rather than a structured retaining wall. Section 15.U.6 requires a certified person to manage the construction work. Mark Hawkes has his certification and will manage the project. The wall and dune area will be in an area previously containing a wall as evidenced by photos. The applicant will secure any and all permits from any and all persons or agencies to complete the project.

Ms. Varian referenced the Findings (Shoreland Zoning, Section 17.D.3) and the Board considered the questions with Mr. Hawkes. All findings were found positive.

Mr. Hawkes asked if he needed anything from the Code Enforcement Officer, and the Board suggested he speak to him since he is building a structure.

Mr. Hawkes paid a fee of \$100 by check #8250.

11. **[3:44:53] Other Business** - Set date(s) for Ordinance amendment workshop(s).

The Board decided they would meet on February 22nd to work on ordinance amendments.

12. **[3:46:12] Announcements.** None.

13. **[3:46:20] Adjourn.**

Mr. Totman made a motion to adjourn. Ms. Thayer seconded the motion, which passed unanimously. The meeting was adjourned at 9:14 pm.

Respectfully submitted,



Rachael Newbert
Administrative Assistant to the Planning Board and Board of Appeals