

**MINUTES OF MEETING
PHIPPSBURG PLANNING BOARD
September 14, 2021**

It should be noted that state government restrictions about public gatherings in response to the Coronavirus outbreak were removed on May 24, 2021, so, per the vote of the Phippsburg Select Board on May 19, 2021, were no longer in force at the time of this meeting. The meeting was, as is customary, recorded so that members of the public could also observe without attending in person.

MEMBERS PRESENT: Mark Hawkes, Clifford Newell, Alternates Robert Smith and Ashley Thayer, and Marie Varian, Chair. *(Mr. Smith joined the meeting during the discussion of Item #4.)*

1. [2:50] The meeting was called to order by Ms. Varian at 5:02 pm at the Town Hall. Ms. Varian reported that there was a quorum, and there was a member who was not present at the moment, but was on his way in. Ms. Varian appointed Ms. Thayer to step in for an absent member.

2. [4:03] **Consider the following minutes:**

- **Regular Meeting on August 10, 2021**
- **Site Walk: August 1, 2021 – Glen S. Theall (non-conforming structure)**

Mr. Newell moved to approve the minutes of the regular meeting as printed. Ms. Thayer seconded the motion, which was passed unanimously.

Mr. Newell moved to approve the minutes of the August 1 site walk. Mr. Hawkes seconded the motion, which was passed unanimously.

3. [5:33] **Glen S. Theall, 960 Popham Road, Tax Map 14, Lot 18 – Construct retaining wall on north side of proposed septic system in the Village District of the Shoreland Zone.**

Ms. Varian reported that the applicant was not going to appear at this meeting. She also stated that, as far as she knows, he would not be at the next meeting, either, but is planning to go to the Board of Appeals.

4. [6:00] **Albert & Christine Desmond, 27 Seguin Street, Tax Map 14, Lot 63 – Replace 7' x 16' shed with new 8' x 16' shed in same non-conforming location (too close to property line) under Land Use Ordinance rules. Application #2021-28**

Mr. Desmond told the Board that the existing shed is 2.75' from the property line, and the proposed shed would be in the same location in relation to the property line. The location of the proposed shed will not increase non-conformity. There was discussion about whether it was feasible to move the position of the new shed farther from the property line in order to decrease non-conformity.

Ms. Varian stated that this application was being considered under the following sections of the Town of Phippsburg Land Use Ordinance:

- Section 11.C.2, “Non-conforming Structures.” The Planning Board has the authority to permit expansion without increasing non-conformity. Non-conformity is caused by the shed being too close to the property line.
- Section 12.C, “Procedure for Administering Permits.”
- Section 12.D, “Applications.” Section 12.D.3 requires positive findings on the proposed use. Ms. Varian reviewed the standards listed in Section 12.D.3:
 - a. Will maintain safe and healthful conditions;
 - b. Will not result in water pollution, erosion, or sedimentation to surface waters;
 - c. Will adequately provide for the disposal of all wastewater;
 - d. Will not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat;
 - e. Will protect archaeological and historic resources as designated in the Town’s Comprehensive Plan;
 - f. Will avoid problems associated with flood plain development and use;
 - g. Is in conformance with the provisions of Section 9, Land Use Standards.

Mr. Newell moved to approve the expansion on the condition that the proposed building is positioned 1’ farther from the property line (toward Seguin Street) than the existing building. Ms. Thayer seconded the motion, which was passed unanimously.

Applicant paid the fee of \$100 with check #8041.

[30:10] *Ms. Varian appointed Alternate Robert Smith to serve.*

5. [30:48] Maine Woodland Properties, Parker Head Road, Tax Map 9, Lot 3, Represented by James A. Boyle and Joseph Marden – Continue review of Final Plan phase of proposed 14-lot Kennebec Shores Subdivision. Application #2021-06

Mr. Marden distributed to the members of the Board copies of the Final drawings.

Ms. Varian commenced the discussion by referencing the vote taken on June 15, 2021, which permitted the applicant to substitute a performance guarantee in accordance with provisions in Section 11.C of the Subdivision Ordinance for the prohibition in Section 8.A.4 against selling any lot prior to the completion of the road to that lot. She reminded the Board that, at the last meeting, a decision was made to obtain legal advice in order to determine whether the Board actually had the authority to permit such a substitute action on the part of the applicant.

She reported that, according to the legal advice obtained, the Board did make a mistake in taking that vote. The Board now needs to discuss vacating that vote.

She reported that the Maine Municipal Association advised the Board that there was nothing in the Ordinance that allowed the Board to make that substitution. She also stated that the opinion of the Town's attorney was "pretty much the same"—that they didn't have the authority to take that vote and that they must now vote to vacate it.

Mr. Boyle asked if he could respond. Ms. Varian said that he could, but she did not believe that the Board has any choice at this point. All they would be doing now is undoing the vote that they took. Anything else to be done would have to be done after that action. She stated that she admits they made a mistake. She further stated that, while it was done in good faith, it was wrong. She said the Board will undo what they did, and then the issue can be put back on the table.

Mr. Newell moved to vacate the June 15th vote to allow a performance guarantee to substitute for compliance with Section 8.A.4 of the Subdivision Ordinance prohibiting the sale of any lot prior to the completion of the road to that lot, due to the fact that the Planning Board has no authority to disregard Section 8.A.4, or provide an alternative to it. Ms. Thayer seconded the motion, which was passed unanimously.

Mr. Boyle stated that it sounded to him as if the vote not only vacated the June 15th vote but also determined that there was nothing the Board could do about this issue. Mr. Newell clarified that the vote did state that the Board had no authority to provide an alternative to Section 8.A.4, but that didn't preclude, under special circumstances, the Board waiving Section 8.A.4, if requested by the applicant and approved by the Board.

Ms. Varian then read Section 10.B.2 of the Subdivision Ordinance:

No person, firm, corporation or other legal entity may convey, offer or agree to convey any land in a subdivision which has not been approved by the Board and recorded in the Sagadahoc Registry of Deeds.

Ms. Varian noted that this regulation would enter into any consideration of the issue in the future, even if another way was found to sell the lots early. She also noted that "offer" or "agree" to convey is prohibited in this section, but not in the language of Section 8.A.4.

Mr. Boyle noted that the language in Section 10.B.2 referred to actions taken in a subdivision that has not been approved, but that their request for selling a lot would occur after the subdivision has been approved and recorded in the Registry of Deeds.

Ms. Varian agreed that was true; however, it does emphasize the time line—that a conveyance cannot even be offered until the Board has completed its review and issued its approval of the Final Plan.

Mr. Boyle stated that this was understood. They were only interested in being able to convey lots prior to the completion of the road, not prior to Board approval and recording in the Registry of Deeds.

Mr. Smith asked whether Section 10.B.2 prohibits the land offered or sold to the abutters. Ms. Varian stated that it does not. First of all, abutters who have occupied abutting land for five years are exempt from restrictions on conveyance of land, and, second, if land is sold to an abutter, it is removed from the subdivision. The language in this section pertains only to the land *in* the subdivision.

Mr. Smith then asked whether the regulations required that the Board receive the Final Plan a week before the consideration of them was conducted. Mr. Boyle stated that the plans distributed at this meeting have only 2-3 minor changes from the last plans submitted. Ms. Varian stated that Mr. Smith's understanding that the Board was supposed to have a week to review the plans prior to discussing them in the meeting is correct. However, she said that there are many more other issues to deal with.

Ms. Varian asked Mr. Marden to tell the Board what the changes are in the Final Plan. He reported the following.

1. Based on conversations with the Town's CEO, the road names have changed. The new names are:
 - Entry road is Chimney Rock Road;
 - The main roads that service the lots are Kennebec Shores North Road (north of the intersection with Chimney Rock Road) and Kennebec Shores South Road (south of the intersection with Chimney Rock Road);
 - Misty Cove Road is unchanged.
2. On sheet C7, there is a paved apron proposed on Chimney Rock Road at the entrance to Parker Head Road, which we discussed at the last meeting.
3. There is a turnoff on Chimney Rock Road with a cluster box unit for the group mail box. He's called the post office 16 times between last week and this week, and still hasn't been able to talk to anyone, except "Matt," who sometimes answers the phone, so the location has not yet been finalized.

Mr. Hawkes suggested that the position of the cluster box unit should be right off Parker Head Road, rather than 300' from the entrance, as proposed by Mr. Marden. Mr. Marden said that in his experience, it is less desirable to have this activity right at the entrance, where people are coming and going into the subdivision, but he would let the post office know of this suggestion.

Ms. Varian returned to the question of what can be done about the prohibition in Section 8.A.4. She stated that they now know that the Board has no authority. She said they can apply for a waiver. She directed everyone's attention to Section 12, "Waivers." She noted that, in the second line of ¶ A, there is a reference to "special circumstances." The applicant has to prove that there is a special circumstance "to permit a more practical development, provided the public health, safety, and welfare are protected." Also, it is required that "the waivers do not have the effect of nullifying the intent and purpose of The Comprehensive Plan, the Shoreland Zoning Ordinance and Land Use Ordinance, Section 1 of this [Subdivision] Ordinance, or Maine State Law."

Ms. Varian then stated that, if the applicant were to request a waiver, they would have to convince the Board that there is a special circumstance. The fact that the applicant is trying to get going and get it done wouldn't be the same as something that is truly a special circumstance.

Mr. Boyle responded that the performance bond, which would not be released until the entire project was completed satisfactorily exceeded the requirements of such a bond in the ordinance, and that should be considered the special circumstance.

Ms. Varian responded that the special circumstance needs to pertain to a special circumstance in the development itself in order to meet the intent of the waiver language and to justify the issuance of a waiver. It is not appropriate for the Board to issue a waiver so that the project can be marketed and sold more quickly.

Mr. Boyle asked if the Board could give him an example of a special circumstance for which the Board issued a waiver. Mr. Hawkes said that no one has ever asked to be able to sell a lot before there was a road to it, so they've never been in the circumstance before. Board members had no memory of the Board being asked to issue a waiver due to special circumstances in the development of a subdivision. Ms. Varian suggested to Mr. Boyle that he bring to the attention of the Board any examples he can find of a special circumstance that could also apply to this subdivision and that resulted in a waiver.

Mr. Marden submitted two copies of the applications for the Permit by Rules that the Board had requested at the last meeting. He reported that he is still waiting for the receipt of the permit for the Stormwater Management Plan.

He also submitted copies of the final report on water supply and evaluation of David Brooks, the project's hydrogeologist. His conclusion was that the parcel has adequate capacity for the proposed development.

Mr. Boyle asked for confirmation that the Board had received the \$300 fee for the Final Plan application. Ms. Varian confirmed that they had and she gave Mr. Boyle the treasurer's receipt.

Ms. Varian mentioned the Town's Comprehensive Plan, and stated that she thought the most important of the five key goals in connection with this project is to maintain the rural character of the town. She stated that she believed Mr. Emmons had told the Board that persons driving by the entrance to the subdivision on Parker Head Road would not be able to see Lots 1 through 13 because of the tree growth on Lot 14.

Ms. Varian then referred to Section 6, "Final Plan Application," in the Subdivision Ordinance. She noted that Section 6.A, "Submissions," included the statement that "These packets shall contain all of the approved Preliminary Plan documentation. . . ." She stated that they could proceed to look at the list of additional submissions, as follows:

1. **Maps & Drawings** – confirmed that all required maps and drawings have been received. Ms. Varian raised a question about where the language describing the conditions of the permit would be reproduced on the maps.

Ms. Varian asked Mr. Boyle whether he expected that the conveyance to the abutter to the north would be complete prior to the final approval. Mr. Boyle responded that he didn't know; it was possible. She cautioned him that the ordinance stipulated exactly what must be done after the final approval of the subdivision plan about land transfers to abutters. These requirements are different from what can be done prior to final approval.

d.vii – confirmed that type of water supply is wells for all lots.

d.xii – doesn't apply

2. **Written Documentation –**

- a. Mr. Hawkes noted that the homeowners' association by-laws permit three horses on any lot in the subdivision. He stated that he did not think that was a good idea because of the wetlands on the parcel and water problems caused by horse manure. Mr. Boyle said that he didn't believe that the applicant was particularly committed to horses being permitted, except for the fact that people do sometimes want that, depending upon the size and configuration of the lot. He noted that horses are not prohibited by the Town's zoning ordinance, so they did not want to add restrictions that the Town does not already have.

There was discussion about whether there were other regulations that would affect whether horses could or should be permitted in that location. Ms. Varian stated that she agreed with Mr. Hawkes.

Mr. Boyle noted that prohibiting horses in this subdivision put the marketing of the lots at a disadvantage to other land parcels available for sale in the Town which do not have this prohibition. Mr. Smith agreed with that point.

Mr. Boyle made the point that, normally, restricting what people can do on their land is done through zoning, rather than the developer creating the restrictions. If the Town doesn't want a particular activity on a parcel or wants to protect the land or the area from a particular potential harm, it would normally be done by the Town.

Ms. Varian stated that she would do some research on this issue to determine whether there are any guidelines to follow. She said that if they were not able to complete this review tonight, she—and presumably the rest of the Board—would be willing to meet again as a continuation of this discussion prior to the regular October meeting to move the process along.

Mr. Hawkes referenced Section 1.H, "Aesthetic, cultural and natural values," as being pertinent in this discussion. This section states the following: "The proposed subdivision will not have an undue adverse effect on the natural beauty of the area, historic sites and significant wildlife habitat identified by the Department of Inland Fisheries and Wildlife (IF&W)."

- b. Ms. Varian noted the requirement in this section of the Ordinance: “The subdivider shall guarantee in writing to the buyer for one year from date of purchase available quantity/quality of potable water for each lot to the extent of refunding the price paid for the lot.” She stated that this guarantee must be stated on the final map that gets recorded.

The Board then moved on to Section 6.B, “Procedure.”

Ms. Varian noted Section 6.B.6: “Within thirty (30) days of the receipt of the Final Plan application, the Board shall determine whether the application is complete and notify the Applicant in writing of its determination. If the application is not complete, the Board shall notify the Applicant of the specific additional material needed to complete the application.”

Mr. Hawkes noted Section 6.B.10: “Before the Board grants approval of the Final Plan, the subdivider shall meet the performance guarantee requirements contained in Section 11.” Ms. Varian reported that she had given the language provided by the applicant on this issue to the Town’s attorney for her review and comments.

Mr. Marden called attention to Section 6.C.5: “The approval by the Board of a subdivision Plan shall not be deemed to constitute or be evidence of any acceptance by the Town of any road easement, recreational area or other open space shown on such Plan. Approval of the Plan shall not constitute an acceptance by the Town of such areas. The Board shall require the Plan to contain appropriate notes to this effect.”

Mr. Marden asked if this requirement would apply in the case of this subdivision. Ms. Varian responded that this section means that whatever improvements are built in the subdivision are not the Town’s responsibility to maintain. Mr. Boyle suggested that the note on the Plan would be the entire Section 6.C.5, excluding only the final sentence of that section.

Mr. Boyle raised questions about the status of the performance guarantee language and cost estimate that he had submitted to the Board. He wanted to know how he would know whether there were any issues or revisions required. Ms. Varian said that she is waiting to hear from the Town’s attorney, who is currently reviewing the performance guarantee. Ms. Varian is hoping that the result of the review of the cost estimate can also be nailed down soon. The Town has decided to use one engineer, who has not yet been hired. Ms. Varian reported that she has received recommendations that the inspection fee estimate will probably need to be increased, as well as the size of the contingency estimate, and correct the mistake in the arithmetic. She said that they may say that the Town may want more inspections than are anticipated in the inspection fee estimate.

Ms. Varian stated that she has yet to receive responses to her request for comments from several of the Town departments: Road Commissioner, Transfer Station, and Police.

Mr. Boyle asked if he could get any preliminary information about comments or concerns that are expressed as Ms. Varian receives information, or would it have to wait till the next meeting.

Mr. Boyle then asked about the prior conversation about potential damage to Parker Head Road due to the increased travel by heavy equipment due to construction at the subdivision site. He said that he had three points on this issue:

1. This developer has done a total of 136 lot subdivisions in Maine in the last two years and there has been no road damage. They don't do that, and they can prove it.
2. It is a public road, and, as members of the public, they have the right to use it.
3. They can't find anything in the ordinances that gives the Board authority to require them to create an escrow account to provide funds in the event that the Town finds that they're responsible for road damage and require them to pay for any required repair.

Mr. Smith made a motion to table this discussion and continue it on September 30th at 5:00 pm. Mr. Newell seconded the motion, which was passed unanimously.

Mr. Marden brought up the requirement that a Mylar plan be presented for the Board's signatures. He noted that Mylars are not used any more, but asked if the Board would like them to provide a Mylar plan in any case. Ms. Varian responded that she would like them to provide a Mylar for the Board's signatures, as required in the Ordinance. Mr. Marden agreed, stating that the plan that will be recorded will be on paper.

6. **[2:49:38] Other Business.** Ms. Varian told the Board that she had a conversation with Jeff Kallinich at the DEP because one of the items on trees wasn't updated at this year's Town Meeting. He wants it to be done as soon as possible, but he is willing to wait until the next Town Meeting. She reminded the Board that there are still a lot of amendments to be addressed.

7. **[2:50:43] Announcements.** None.

8. **[2:50:48] Adjourn.** Mr. Newell moved to adjourn. Mr. Smith seconded the motion, which was passed unanimously. Meeting was adjourned at 7:50 pm.

Respectfully submitted,

Channa A. Eberhart

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Secretary