

**MINUTES OF MEETING  
PHIPPSBURG PLANNING BOARD  
September 30, 2021**

*As is customary, a video recording was made at this meeting so that members of the public could also observe without attending in person. All government regulations regarding COVID concerns in public meetings are followed.*

**MEMBERS PRESENT:** Mark Hawkes, Alternates Robert Smith and Ashley Thayer, and Marie Varian, Chair. Also present was the Town's attorney, Jessica Maher, Esq.

[20:34] The meeting to continue the discussion from September 14<sup>th</sup> on the 14-lot Kennebec Shores subdivision was called to order by Ms. Varian at 5:16 pm at the Town Hall. Ms. Varian appointed Ms. Thayer to fill in for Mr. Newell, who was absent, and Mr. Smith, who was appointed to fill in a vacancy in the Board. Ms. Varian identified the only article of business for this meeting as:

**[21:10] Maine Woodland Properties, Parker Head Road, Tax Map 9, Lot 3, Represented by James A. Boyle and Joseph Marden – Lift from the table the discussion of the Final Plan phase of proposed 14-lot Kennebec Shores Subdivision.**

**Application #2021-06**

Mr. Hawkes moved to lift from the table the discussion of the Final Plan phase of the 14-lot Kennebec Shore subdivision. Ms. Thayer seconded the motion, which was passed unanimously.

Ms. Varian raised the outstanding issue of the vote made in error at the June 15<sup>th</sup> meeting and then vacated at the September 14<sup>th</sup> meeting. She noted that no decision had been made about what to do about the applicant's request that the Board allow them to waive the requirement in Section 8.A.4 that "No lot in a subdivision may be sold, leased, or otherwise conveyed before an approved road is completed to the lot" and find a way that permits the Board to allow this waiver while also protecting the interests recognized in this section of the Subdivision Ordinance.

Ms. Varian introduced Jessica Maher, Esq., the Town's attorney.

Ms. Maher asked if there was a list of outstanding issues. She suggested that it might be preferable to start with any issues that may be easier to take care of.

Ms. Varian informed Ms. Maher of the following items in addition to the resolution of the applicant's request regarding the requirement in Section 8.A.4:

1. Amount of the escrow account
2. Couple of notes in the covenants to be discussed
3. Adherence to the Comprehensive Plan: a couple of items to be mentioned for the record
4. Reviewing the covenants and make sure they have everything they need regarding stormwater management and permit by rule

Ms. Varian informed Ms. Maher that the purpose of this meeting was to continue work on the Board's review of the Final plan.

Mr. Boyle asked about the status of responses from the Town departments to Ms. Varian's notice to them about the proposed subdivision. Ms. Varian responded that she has heard from the Road Commissioner, the Fire Department, and the Police Department. The only department that she has not heard from is the Transfer Station.

Mr. Marden distributed the following documents to the members of the Board:

1. Draft "Conditions of Approval," based on (1) Mr. Marden's draft summary of conditions identified in prior meetings and (2) Ms. Varian's responses to that initial draft.
2. Revised covenants, with the only change being the removal of the language regarding horses on the lots.
3. DEP Stormwater Management System Plan permit just received.

Ms. Varian asked Mr. Marden if he had been able to connect with the Post Office. He responded that he has. He was told that, as long as the design is similar to the Capt. John Parker Road, they are fine with it. He then directed the Board's attention to the revised plan showing the location of the mailboxes. As recommended by Mr. Smith, they relocated the turnout on the left (if entering the subdivision) closer to Parker Head Road, which is similar to the location of the mailboxes on the Capt. John Parker Road subdivision. The apron coming out is 20' long, enough for one vehicle.

Ms. Varian noted that the Road Commissioner stated that Parker Head Road is narrow, and mailboxes could be a hazard to drivers and cause cars to stop, increasing the likelihood of an accident. He highly recommends they be placed on the road into the subdivision vs. the Parker Head Road and to give careful consideration of the placement of bushes and shrubs to maintain safe sight lines.

The consensus of the Board was that the position of the mailboxes was satisfactory.

[34:07] Ms. Varian then brought up questions or concerns about the *Protective Covenants and Restrictions*:

1. Lots 1-13 would not be divided in any way unless approved by the Board as an amendment to the subdivision plan. She asked whether this was addressed on any of the documents. Mr. Marden stated that he would make that a separate note on the plan.
2. Ms. Varian noted that the covenants describe the protection for the foundations and cellar holes, but they do not say anything about the tree or the glacial boulder. Mr. Hawkes said that those are shown on the map. Ms. Varian said that it is unfortunate that the rock is on two lots, but someone might just assume they can do what they want with it, unless they know right up front that it is protected, and that they can't do anything with it. Mr. Boyle said that the restrictions will be included in the covenants, which will be attached to the deeds.

3. Ms. Varian then referenced a portion of Article III, ¶ a, *Residential Use*: “This restriction shall not prevent . . . either the attachment to or inclusion within the principal residential building an apartment or a separate guest house (with municipal approval).” She stated that an apartment would be another living space. She asked Mr. Boyle if the covenants that were submitted are standard covenants used by the applicant in his other subdivision developments and were not necessarily consistent with the zoning ordinances of the specific municipality in which the subdivision was located. Mr. Boyle said that was correct.

Ms. Varian said that they would probably run into a problem with that section of the paragraph, even though it states “with municipal approval.” Right now, to her knowledge, the Town ordinances do not have anything that would allow an apartment or a separate guest house. She acknowledged that it was possible that what was going on in the Legislature could change that.

Assuming the apartment and guest house have (1) toilet, (2) cooking, and (3) sleeping, they would not be allowed unless the lot was large enough to allow for two dwelling units. As the ordinance now stands, if an apartment or a guest house with the three characteristics that make them inhabitable, then it would mean that each lot could have two residences and the subdivision could have 28 dwelling units even though there are only 14 lots.

She added that, if the guest house was actually a bunkhouse with a bathroom, then it would be no different from a shed or another accessory building and would be allowed because it wouldn’t actually be a dwelling unit if it didn’t have all three elements.

Mr. Marden responded that the way the covenant was worded—the addition of “with municipal approval”—meant that, if the Town’s regulations changed, the covenant would still apply. However, Ms. Varian stated that a purchaser of a lot could be misled and believe that if they wished to add a structure with the three elements of a dwelling unit, it would not be a problem. There is no warning that it might be prohibited by Town ordinance.

Mr. Boyle said that he would go back to Mr. Emmons, the applicant, and change the wording in the covenants so that it was consistent with what the Town’s ordinances allow.

Ms. Maher stated her opinion that it was preferable for the covenants to state “with *Planning Board* approval,” rather than *municipal* approval, since the reference to the latter term is unclear.

4. Mr. Smith noted that the covenants in ¶ III.d state “The driveway onto each Parcel shall be constructed in the location as shown on the Plan.” However, the Plan does not actually show the location of driveways.

Mr. Boyle responded that it was most appropriate to delete that sentence, if it was satisfactory to the Board. The consensus of the Board was that it was satisfactory.

5. Ms. Varian referred to Article III, ¶ b: “This restriction shall not be construed to prevent rental of any home on said Parcel for private residential purposes, nor to prevent the conduct of professions, craft work, artistic endeavors and similar home occupations, but only when conducted from within a private residence, solely by individuals regularly living therein.” She stated that, according to the Town’s Land Use Ordinance, the Town has no objection to a home occupation, but it is necessary to come to the Planning Board to get a determination about whether the activity does meet the definition of a Home Business, or is actually a full business, depending upon traffic coming to the property, number of employees, etc.

Mr. Boyle suggested that they could remove this paragraph, since it is more restrictive than the Town’s Land Use Ordinance with regard to commercial uses, and the Town has a process for legally determining whether a proposed business is actually a home occupation according to the Ordinance. Another suggestion was that a statement be added that lot owners wishing to conduct a business on their lot should follow Town regulations for New Businesses and Home Businesses.

6. Mr. Smith referenced ¶ j, which states that “No business or commercial vehicle, or vehicle of similar nature (including tractor trailers) shall be brought upon, or be maintained, or be permitted to remain on the property except a business vehicle normally used by a Parcel [Lot] owner in his or her occupation may remain on the property provided said vehicle is parked in an enclosed garage.” Mr. Smith’s opinion was that it was an odd requirement.

Mr. Boyle suggested that they could replace “parked in an enclosed garage” with “not visible from a road.”

7. Ms. Varian asked about the limit of 120 days per calendar year that travel trailers, camping trailers, tents or other form of mobile or temporary residences are allowed to be used and kept on the premises (¶ g). She stated that she wanted to be sure that it does not conflict with the Town’s regulations.
8. Mr. Smith referenced ¶ n, which states, “There shall be no ground disturbance to the cellar holes/foundations on Lots 2 and 12 as depicted on the subdivision plan, or within 25 feet of the cellar hole/foundation.” Mr. Smith asked whether the language should be more specific than “no ground disturbance.” Decision was made that additional language should be included to make sure it is clear cellar holes and foundations may not be removed.

**[1:36:08]** Ms. Varian then brought up issues in connection with *The Comprehensive Plan*. She read the “5 Key Goals,” as listed on page 1 and commented:

1. *Maintain the rural character of Phippsburg.*

Ms. Varian noted the effort that has been made so that the lots will not be seen from the Parker Head Road, and that Mr. Emmons has said that it is his intention that people driving past the subdivision on Parker Head Road will not be able to see the complex. She asked Mr. Boyle if this commitment will be a condition when Lot 14 is sold. Mr. Boyle said that he did not know; he has not discussed it with Mr. Emmons.

Mr. Marden stated that it would be somewhat self-limiting; for one thing, the units have to be accessed from the interior roads; they cannot be accessed from Parker Head Road.

Mr. Boyle said that he was not certain that was correct; he hasn't been told that this is the case. There may be some DOT or engineering reason for that requirement, but, with 2,000-3,000 feet of road frontage on Parker Head Road, it would be similar to the density of any other road in Phippsburg. Anyone building a driveway from Parker Head Road would need to get a driveway entrance permit onto the road. The soils wouldn't allow driveways every 150'. There could be a few lots with driveways on the public road, but not 10-12 of them.

Mr. Boyle stated that all they are addressing now are the 14 lots they have. In his opinion, the time to put prohibitions on a future development is at the time there is an application for a proposed development. Ms. Varian agreed, acknowledging that subdivision of Lot 14 would not be allowed for 5 years. Her question was, rather, what is Mr. Emmons' overall plan? Would Lot 14 honor the rules and regulations of what is being developed on the other 13 lots? After all, it is possible that, in the future, a single-family house could be constructed on Lot 14. Her question was: is there any protection currently anticipated for the owners of the 13 lots when Lot 14 is transferred to a new owner? Mr. Boyle stated that, because of the size of Lot 14, it is rural by default, and it has the same covenants that the rest of the lots have. There have been no discussions beyond that. He doesn't think there would be any reason to do more than that now because it is a 60+-acre lot.

2. *Assure there will be open spaces for hunting, working forests, farming and the enjoyment of the residents of Phippsburg.*

Ms. Varian stated that they haven't control over this aspect because the roads and property are privately held.

3. *Assure a vital fishing industry with adequate access to the water.*

Access to the water will not be done from the subdivision, unless a lot owner happens to be a fisherman. Ms. Varian stated that the only thing the Planning Board can do in this area—and they've done it—is talk about the horses and drainage closing the Town's productive clam flats. So, there has been due diligence on that. This area of the river sees more sports fishing boats, rather than the larger commercial boats.

4. *Assure a sustained supply of quality drinking water.*

All of the engineering reports say it should be fine.

5. *Assure affordable housing to retain the local working population, the elderly, and the young growing up in Phippsburg.*

Ms. Varian stated that, while the proposed development, overall, is consistent with *The Comprehensive Plan*, it doesn't even come close on this goal. Mr. Smith stated that this is really a Town issue. Ms. Varian noted that every sale of every lot cannot meet all the goals.

Board consensus was that the subdivision plan is satisfactory in connection with the goals of *The Comprehensive Plan*.

[1:47:40] Ms. Varian said that, at this point in the discussion, they were back to talking about the escrow account and the issue of whether and, if so, how, lots can be transferred prior to the completion of the road.

Mr. Marden suggested an additional condition for the plan that would state that, prior to construction, the escrow account balance will be approved between the applicant and the Select Board.

Ms. Varian responded that, chances are, there might be more discussion on that. The Planning Board has not yet discussed the escrow account with the Select Board. The Select Board has a copy of the suggested form, but they haven't given the Planning Board their opinion on it.

Mr. Smith asked if the Planning Board could get an opinion on the language from the Town's attorney, Ms. Maher, before proceeding.

Mr. Marden explained his reasoning for the proposed additional condition: if, in October, the Planning Board is ready to approve the Final plan, but there still has not been agreement on the escrow account, with his proposed language, the subdivision can be approved, and the permit recorded, but construction would not begin until agreement on the escrow account has been reached. Ms. Maher said she thought that suggestion makes sense, although she did not anticipate there would be a huge delay in reaching agreement on the escrow account.

Mr. Boyle asked for confirmation about his understanding of the process. He noted that the applicant has responded to the comments made at the last meeting: need to correct the arithmetical error, increase the contingency amount, and increase the total inspection fees, and the Select Board members have that new document. Ms. Varian stated that the Town has also consulted with someone in that field in order to learn whether they agree with the cost estimate and believe it is logical.

Ms. Maher clarified that the applicant had selected option #1 of the four options provided in Section 11.A of the Subdivision Ordinance: "A certified check payable to the Town . . . for the establishment of an escrow account." The only outstanding question is the amount of the check.

Mr. Boyle stated that the applicant also offered, if they were permitted to sell lots prior to completion of the road, that they would maintain the initial balance in the escrow account until the entire project was completed and satisfactory to the Town. If they were not able to sell the lots under these conditions, then funds would be released in phases as portions of the project were completed, as is also permitted.

Mr. Hawkes stated that, under the scenario of phased releases of escrow funds, the phases and the amounts to be released as phases were completed also needs to be agreed-upon in advance. Mr. Boyle agreed.

Mr. Boyle asked when the Select Board expects to meet to take up this issue and whether he and Mr. Marden should plan to attend the meeting. Ms. Varian responded that the Select Board meets weekly, but they would be talking with Ms. Maher, the Town's attorney. Ms. Varian has given the Select Board all the information that she has, but she does not know whether they would discuss it in a public session or handle it among themselves. Ms. Maher stated that they are aware of where the Planning Board is in the approval process, so they can be expected to deal with it soon.

Ms. Varian stated that she cannot anticipate what the Select Board's questions or concerns or required revisions will be. She did tell Mr. Boyle to be prepared for the Town to request a larger guarantee than the \$448,000 currently calculated.

Mr. Smith asked Mr. Boyle if this type of guarantee is typical in the municipalities in which he has developed subdivisions. Mr. Boyle said that it was not. He could only remember one time that they provided a performance guarantee—in 1986 in Cornish, they provided a letter of credit from a bank. Mr. Boyle stated that they usually have the language that Phippsburg's Ordinance has, but they just don't use it. In 2019, they built a 5+-mile subdivision road in a subdivision and had no performance guarantee required.

Mr. Boyle explained that, at the time the applicant offered to establish an escrow account with cash, he had assumed that this would be in exchange for the ability to sell the lots prior to completion of the road. By the time the possibility of that option became questionable, they were already on the escrow account path.

Mr. Boyle stated that, as it stands now, their preference would be to begin road construction and be able to sell lots prior to completion of the road and to keep the balance of the escrow account untouched until the project is complete. Given the time of year, that would make a material difference to the marketing of the lots. If the Board determines that they cannot sell lots prior to completion of the road, then the marketing and sale of the lots would be delayed, past the fall and into the winter, and, therefore, they would ask for release of funds from the escrow account in agreed-upon phases and amounts as they go. Their plan is to complete the entire road, rather than completing portions for individual lots.

Mr. Boyle said that people are willing to buy lots without the road being complete. It's exciting to be part of a new development, something that's coming and you're the first ones in.

Ms. Maher stated that, according to her reading of the Ordinance, once the subdivision is approved, the developer can do anything except for actually conveying the lot until the road is complete.

Ms. Varian called attention to Section 10.B.2: “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.” In her opinion, that means that, once you have Board approval and have recorded the plan, the idea of talking to potential buyers is opened up. Ms. Maher agreed.

Ms. Varian then called attention to Section 8.A.4: “No lot in a subdivision may be sold, leased, or otherwise conveyed before an approved road is completed to that lot.”

The discussion following the reading of these two sections established that there is no contradiction. Section 10 refers to restrictions in marketing and sales prior to approval and recording of the plan, while Section 8 refers only to restrictions on actually conveying the land prior to completion of construction of the road to the lot sold.

Ms. Maher summarized: while marketing of any kind would be prohibited until the plan is approved and recorded, any activity associated with the sale of the lots, including executing purchase and sale agreements, but excluding actual conveyance, would be permitted between the time the plan is approved and recorded and the time the road to a specific lot is completed. Ms. Maher stated that, according to her reading of these sections, a purchase and sale agreement could define closing as within 30 days of the completion of the road. And, in keeping with the Ordinance, “completion of the road,” would be completion to that particular lot.

Mr. Marden asked Ms. Varian the name of the person from whom they obtained their estimate of the cost. She responded that it was Pine Tree Engineering, and they recommended \$518,860. There is still discussion that it should be higher than that. The Planning Board is awaiting advice from the Select Board.

Ms. Varian drew attention to Section 11.F, “Phasing of Development,” which delineates how that can be done as part of the Board’s approval of the plan.

Mr. Boyle confirmed that the next meeting is October 12<sup>th</sup>, and he asked whether, assuming that all the outstanding questions were resolved satisfactorily, he could anticipate getting the Planning Board signatures at that meeting and therefore being able to record the approved plan on October 13<sup>th</sup>. Mr. Boyle wants to be able to tell Mr. Emmons when to expect that the contractor can begin working.

Ms. Varian gave Mr. Boyle copies of the letters she sent to the Town Departments regarding the subdivision and the responses received to date, excluding only a letter from the Transfer Station.

Mr. Marden submitted four copies of the Final plans as they are currently, without the additional conditions discussed at this meeting. He said that when he obtained the recorded plan, he would provide four copies of that and swap them out with the plans submitted this evening.



Mr. Boyle and Mr. Marden left the meeting.

[2:40:20] Ms. Varian informed Ms. Maher that, at the Town Meeting in May, there were increases in fees charged for Town services. She stated that all the fees charged and paid in connection with the subdivision application were in the amount in effect prior to the changes. She asked Ms. Maher for her opinion about fees charged to an applicant in a case in progress after the fees change. Should the old fee be charged since that's what was required when the application was made, or should the new fee apply since that's what is currently required?

Ms. Maher said she would think about it and get back to her, but, off the top of her head, she believed that the appropriate course of action would be to follow the fee schedule that was in effect when the application was filed.

[2:45:53] **Adjourn.** Mr. Hawkes moved to adjourn. Mr. Smith seconded the motion, which was passed unanimously. Meeting was adjourned at 7:43.

Respectfully submitted,



Channa A. Eberhart  
Secretary