

**Town of Kittery
 Planning Board Meeting
 March 24, 2016**

Town Code Amendments – 16.8.11 - Cluster Residential and Cluster Mixed-Use Development. 16.8.11.1 Purpose; 16.8.11.3 Dimension Standards Modifications; 16.8.11.5 Application Procedure; 16.8.11.6 Standards; 16.8.20.1 Green Strip; 16.9.1.7 Buffer areas; and 16.2.2 Definitions

Action: review amendment and schedule a public hearing. The proposed amendments provide clarity with regard to open space and other requirement standards in cluster residential and cluster mixed-use development.

PROJECT TRACKING

REQ'D	ACTION	COMMENTS	STATUS
NO	Workshop	2/1/2016	HELD
YES	Initial Planning Board Meeting	12/10/2015	HELD
NO	Secondary Planning Board Meeting	Held 1/14&28/2016, 2/11/16, 2/25/2016 Scheduled for 3/24/2016	HELD
YES	Public Hearing (special notice requirements)	1/28/2016	HELD
YES	Review/Approval/ Recommendation to Town Council		TBD

Background

This group of amendments was developed over the course of several months, was reviewed at the workshop on May 28, 2015 and revised December 10, 2015. The amendments were revised again for review at the January 14 and 28 2016 Planning Board meetings. The current amendment reflects comments made from the Town Council joint workshop on 2/1, public testimony on the 1/28 public hearing and the Board’s input. (highlighted in yellow)

Review

Attached for the Board’s consideration are amendments to Article XI of Title 16.8. Staff revised the 2/11 draft amendment to reflect comments from previous Planning Board meetings and the February 1st Joint Workshop with Town Council.

Highlights in this amendment include:

1. The definition of Cluster Residential Development allowing for more consistency with the state statute, Title 30-A 4301(1-A) and 30-A 4353 (4-C) Variance from Dimensional Standards. Note, the definition of Cluster Mixed-Use Development may need a similar review, however, it may be more appropriate to do that review in the context of the Business Park base zone, where such development is permitted.
2. The intent of Title 16.8.20.1 Green Strip is combined with Title 16.9.1.7 Buffer areas, the provision staff recommends as the more appropriate location in the ordinance.
3. A re-work of the open space standard relating to size, shape and location for the reserved open space under 16.8.11.6.7.
4. The amount of developable land (net residential acreage) required to be located in open space is increased from 30% to 50%. The proposed amendment has been revised to address board members’ comments regarding encouraging growth in the sewered portions of town and issues related to small sized parcels.

Staff spoke to the legal department at MMA with regard to the appropriateness of varying the percent of required “upland” open space by zone or access to sewer. Since the provision does not explicitly prohibit the overall requirement of open space in some parts of town and not in others, MMA found that such a provision that varies the amount and type of open space should be O.K as long as the overall requirement is consistent with the Comprehensive Plan.

Staff prepared a comparison, distributed at the previous meeting, of applying the 30% vs. the 50% requirements suggesting the total decrease in area is not as significant when comparing potential difference in lot sizes.

5. Buffer requirements for cluster development along public streets that are designated in the Comprehensive Plan as ‘scenic roadways’ has been increased to 100 feet.
6. Staff reviewed Board concerns regarding the references to the Comprehensive Plan in the ordinance with MMA. See attached email for details, however, they did not see a legal problem with referencing the Comprehensive Plan, but suggested an inclusion of the information that is being referenced or cite a specific date or version of the referenced Comprehensive Plan.

Changes from the 2/25/2016 draft amendment are highlighted in yellow.

Recommendation

After considering staff edits and additions to the amendment and additional thoughts from board members the Board may direct staff with additional changes and

...move to schedule a public hearing for the proposed Title 16 amendments to the April 28, 2016 Planning Board meeting

1 **Article XI. Cluster Residential and Cluster Mixed-Use Development.** (Ordained 9/24/12; effective
2 10/25/12)

3
4 **16.8.11.1 Purpose.**

5 To implement adopted Comprehensive Plan policies regarding the Town's natural, scenic, marine,
6 cultural and historic resources, land use patterns and recreation and open space, this Article is intended
7 to encourage and allow new concepts and innovative approaches to housing/commercial development
8 and environmental design so development will be a permanent and long-term asset to the Town, while in
9 harmony with the natural features of the land, water and surrounding development. Objectives include:

- 10
11 A. efficient use of the land and water, with small networks of utilities and streets;
12 B. preservation of contiguous, unfragmented open space and creation of recreation areas;
13 C. maintenance of rural character, by means of preserving farmland, forests and rural
14 viewsheds ~~scapes~~, and limiting development in close proximity to existing public streets,
15 especially along scenic roads, as designated in the Comprehensive Plan;
16 D. preservation of areas with the highest ecological value;
17 E. location of buildings and structures on those portions of the site most appropriate for
18 development;
19 F. creation of a network of contiguous open spaces or 'greenways' by linking the common open
20 spaces within the site and to open space on adjoining lands wherever possible;
21 G. reduction of impacts on water resources by minimizing land disturbance and the creation of
22 impervious surfaces and stormwater runoff;
23 H. preservation of historic, archaeological, and cultural features; and
24 I. minimization of residential development impact on the municipality, neighboring properties, and
25 the natural environment.
26
27

28
29
30 **16.8.11.3 Dimensional Standards Modifications.**

31 Notwithstanding other provisions of this Code relating to dimensional standards, the Planning Board, in
32 reviewing and approving proposed residential or mixed-use development under this Article, may modify
33 said the dimensional standards listed in Cluster residential development in 16.2.2. Definitions, to permit
34 flexibility in approaches to site design in accordance with the Code standards. The Board may allow
35 subdivision or site development with modified dimensional standards where the Board determines the
36 benefit of a cluster development is consistent with the Code. Such modifications may not be construed as
37 granting variances to relieve hardship.
38

39
40 **16.8.11.5 Application Procedure.**

41 All development reviewed under this Article is subject to the application procedures in Chapter 16.10,
42 Development Plan Application and Review, and the following:

- 43
44 A. In addition to the requirements of Chapter 16.10, the following are required at submittal of the
45 Sketch Plan:

- 46
47 1. Calculations and maps to illustrate:

- 48 a. proposed dimensional modifications and the dimensional standards required in the zone
49 in which the development will be located;
50 b. All land area identified in Title 16.7.8 Net Residential Acreage; and (Ordained 9-28-15)
51 c. Net Residential Density; and
52 d. open space as defined in Section 16.8.11.6.D.2 of this Article.

53
54 2. A map showing constraints to development, such as, but not limited to, wetlands, resource
55 protection zones, shoreland zones, deer wintering areas, side slopes in excess of ~~thirty three~~
56 ~~percent (33%)~~ twenty percent (20%), easements, rights-of-way, existing roads, driveway
57 entrances and intersections, existing structures, and existing utilities.

58
59 3. A written statement describing the ways the proposed development furthers the purpose and
60 objectives of this Article, including natural features which will be preserved or enhanced. Natural
61 features include, but are not limited to, moderate-to-high value wildlife and waterfowl habitats,
62 important agricultural soils, moderate-to-high yield aquifers and important natural or historic sites
63 worthy of preservation.

64
65 4. The location of each of the proposed building envelopes. Only developments having a total
66 subdivision or site plan with building envelopes will be considered.

67
68 5. A sketch plan showing a conventional nonclustered subdivision layout that complies with all
69 applicable standards, excluding those included in this Article. The Planning Board may use this
70 plan in addition to the proposed cluster site design to determine if the overall design is consistent
71 with the purpose of this Article, applicable provisions of this Title and the growth designations of
72 the Comprehensive Plan. This determination may result in a change to the total number of
73 lots/dwelling units allowed.

74
75 [NOTE: THE FOLLOWING SECTION 16.8.11.5.B IS NOT BEING AMENDED]

76
77

78 **16.8.11.6 Standards.**

79

80 **E. Open Space Requirements:**

81

82 1. Open space must contain equal at least 50% of the total area of the property, ~~and no less~~
83 ~~than 30% of the total net residential acreage, as defined~~ and must include no less than 50% of the
84 property's total net residential acreage. Where there is access to town sewer or it is demonstrated
85 to the Planning Board that, due to the limited size of the parcel, requiring a minimum of 50% of the
86 property's total net residential acreage to be contained in open space results in an unreasonable
87 development constraint, the minimum total net residential acreage requirement may be reduced to
88 30%.

89

90 2. Total calculated open space must be designated as follows (See Open Space definitions
91 Section 16.2): a. Open Space, Reserved; b. Open Space, Common; and/or c. Open Space, Public

92

93 3. The use of any open space may be further limited or controlled by the Planning Board at the
94 time of final approval, where necessary, to protect adjacent properties or uses.

95

96 4. Open space must be deeded in perpetuity for the recreational amenity and environmental
97 enhancement of the development and be recorded as such. Such deed provisions may include
98 deed/plan restrictions, private covenants, or arrangements to preserve the integrity of open spaces
99 and their use as approved by the Planning Board.

100
101 5. Open space must also be for preserving large trees, tree groves, woods, ponds, streams,
102 glens, rock outcrops, native plant life, and wildlife cover as identified in applicant's written
103 statement. In the Business Park (BP) zone, open space may be both man-made and natural. Man-
104 made open space must be for the development of recreational areas, pedestrian ways and
105 aesthetics that serve to interconnect and unify the built and natural environments.

106
107 ~~6. Open space should be in a contiguous form of unfragmented land to protect natural~~
108 ~~resources, including plant and wildlife habitats.~~
109 ~~[INCORPORATED IN NEW SUBSECTION 7(d) BELOW]~~
110

111 ~~7.6.~~ A portion of the open space should be in close proximity to other open spaces used for
112 recreation (e.g. a common green, multi-purpose athletic field, gardens, and playgrounds).

113
114 7. Reserved open space must preserve areas with the highest ecological value. The final
115 composition, configuration and location of the reserved open space is determined by the Planning
116 Board after considering the applicant's objectives, the parcel's configuration and its relation to
117 natural resources on adjoining and neighboring properties. The Planning Board shall also consider
118 whether:

- 119
120 a) the majority of the land is wetland, floodplain, and areas of slopes 20% or greater;
121 b) the land is identified on specialized mapping such as that prepared by *Beginning with Habitat*;
122 c) existing open space is located on adjacent or nearby properties;
123 d) the size and shape is contiguous and unfragmented to the extent necessary to achieve the
124 conservation objective;
125 e) the land has critical habitat or conservation area as identified by Maine Department of Inland
126 Fisheries and Wildlife, Maine Department of Environmental Protection, Army Corps of Engineers,
127 or the U.S. Fish and Wildlife Service; and
128 f) the land is identified as a conservation priority by the Kittery Open Space Committee, Kittery
129 Land Trust or other land trust.
130

131
132
133 I. The developer must take into consideration the following points, and illustrate the treatment of
134 buildings, structures, spaces, paths, roads, service and parking areas, recreational facilities, and any
135 other features determined by the Planning Board to be a part of the proposed development.

136
137 1. Orientation. Buildings, viewpoints corridors and other improvements are to be designed so
138 scenic vistas viewsheds and natural features are integrated into the development. Buildings should
139 be sited to consider natural light and ventilation.

140
141 2. Utility Installation. All utilities are to be installed underground, wherever possible. The
142 Planning Board must require the developer to adopt a prudent avoidance approach when
143 permitting above ground electrical service installations. Transformer boxes, pumping stations and

144 meters must be located so as not to be unsightly or hazardous to the public.
145

146 3. Recreation. Facilities must be provided consistent with the development proposal. Active
147 recreation requiring permanent equipment and/or modification of the site may not be located within
148 the wetland setback areas or contiguous reserved open space areas.

149
150 4. Buffering. Planting, landscaping, form and siting of building and other improvements, or
151 fencing and screening must be used to integrate the proposed development with the landscape
152 and the character of any surrounding development. A buffer not less than 100 feet in depth must
153 be provided along the street frontage adjacent to scenic roadways, as identified in the
154 Comprehensive Plan and 50 feet in depth for all other public streets. Where the portion of the
155 development does not abut a street, the side and rear yard setbacks must include a buffer no less
156 than 20 feet in depth. All or a portion of the existing vegetation may be used in lieu of new
157 plantings for the buffer area as determined by the Planning Board.

158
159 5. Development Setbacks.

160 Setbacks from wetlands and water bodies, must demonstrate compliance to Table 16.9 of Chapter
161 16.9.4.3. These setbacks must be permanently maintained as no cut, no disturb buffer areas. If
162 the setback areas are ~~not of substantial vegetation to~~ do not provide a sufficient buffer, the
163 Planning Board may require additional plantings. The most restrictive setback applies in
164 determining the buffer area.
165

166 **Article XX Subdivision Noise Pollution Buffer** **[RESERVED]**

167 **16.8.20.1—Green Strip.**
168

169 ~~Subdivision design must minimize the possibility of noise pollution either from within or without the~~
170 ~~development (from highway or industrial sources) by providing and maintaining a green strip at least~~
171 ~~twenty (20) feet wide between the abutting properties that are so endangered.~~

172 {MODIFIED AND MOVED TO 16.9.1.7.B}
173

174
175 **16.9.1.7 Buffer and Buffer areas.**

176 A. Any nonresidential yard setback space abutting an existing or potential residential area shallmust
177 be maintained as a buffer area, as defined in 16.2.2, strip by the developer and subsequent owners.
178 Such buffer area shall be is for the purpose of eliminating any adverse effects upon the environmental
179 or aesthetic qualities of abutting properties, or any type of nuisance affecting impacts to the health,
180 safety, welfare and property values of the residents of Kittery. The Planning Board or Board of
181 Appeals may require an increase to the size of the buffer area and/or establish a buffer, as defined in
182 16.2.2, if yard area is insufficient to mitigate the potential adverse effects as determined by the Board.

183
184 B. Subdivision development must minimize the possibility of noise pollution either from within or from
185 outside the development (from highway or industrial sources) by providing and maintaining a buffer or
186 buffer areas as described in subsection A. above.

187
188 C. Subdivision development must provide and maintain a buffer or buffer area of no less than fifty
189 (50) feet deep along the frontage of existing streets.
190

191 D. The Planning Board may reduce or waive the buffer requirement in areas where the Board
192 determines that a buffer would have an adverse effect on existing scenic viewsheds or public safety.
193

194
195 **16.2.2 Definitions**
196

197 **Cluster residential development means** a form of development land use improvements and/or
198 ~~change~~ in which the dimensional requirements standards are reduced below what is that normally
199 required in the by the land use zoning regulations district in which the land use improvements and/or
200 ~~change is located~~, in exchange for the creation of permanent open space for recreation areas, the
201 preservation of environmentally sensitive areas, agriculture and silviculture, and for the reduction in
202 the size of road and utility systems. ~~return for the provision to set aside a portion of the tract as of~~
203 ~~permanent open space and other environmental enhancements.~~ Such open space is owned and
204 maintained jointly in common by individual lot/unit owners, the Town, or a land conservation
205 organization. For the purpose of this definition "dimensional standards" means and is limited to
206 ordinance provisions relating to lot area, building coverage, street frontage and yard setback
207 requirements.
208

209 Viewpoint means a place from which the surrounding landscape or scenery can be viewed or
210 observed.
211

212 Viewshed means those parts of a landscape that can be seen from a particular point.
213
214

Chris DiMatteo

From: Legal Services Department <Legal_Services_Department@memun.org>
Sent: Wednesday, March 16, 2016 11:03 AM
To: Chris DiMatteo
Subject: RE: Kittery - FW: referencing the comprehensive plan in ordinances

Chris,

I apologize for the delay in responding to your inquiry. I don't think there is necessarily a legal problem in generally referring to the principles and values contained in the town's comprehensive plan. After all, a zoning ordinance is meant to be consistent with, and pursuant to, a comprehensive plan. Thus, I am not troubled by the reference in the purpose section of the ordinance you attached.

If there is a legal issue, I think it would relate to the incorporation of material from another source by reference into the zoning ordinance provisions imposing specific performance standards and requirements. For example, if an ordinance incorporates another document, law or regulations as they exist and "as amended in the future," that amounts to an improper delegation of legislative authority because the underlying material that is referenced (and as a result the zoning ordinance criteria) could change without any approval by the local legislative body. See *Op. Me. Att'y Gen.* (March 15, 1978). I have not had time to perform extensive research on whether there is an issue when an ordinance incorporates a document created by the same legislative body. I'm not sure if that is even your intention in this case, but it is a fact that the comprehensive plan and the roadways it mentions may change over time. To avoid any problems, I would suggest that in the open space buffer criteria example you sent, that you either list the specific scenic roadways or that you indicate the specific version of the comprehensive plan that you are incorporating. For example: "scenic roadways as identified in the Kittery Comprehensive Plan adopted March 16, 2016." Even if you do not do so, a court may interpret your reference to the comprehensive plan as a reference to the version in effect when the zoning ordinance language was adopted, so it makes sense to state the specific version as a way of reminding yourself of the need to update that language when the plan changes. See generally, *State v. Webber*, 133 A. 738 (Me. 1926).

If you were seeking to incorporate the plan as amended into the future, let me know and I can do some additional research, although I think you would also need to consult the town's private attorney.

I know you did not ask me about the substance of the buffer provision itself, but I did want to mention generally that buffers and similar requirements need to be supported by a legitimate land use concern. A 100 foot or 50 foot wide planted buffer would need to be reasonable and have a rational relationship to applicable land use impacts and goals the town is seeking to attain. I don't know what the common practice is concerning buffer depth, so I offer no opinion. I only wanted to note that the town would need to be able to explain why a 100-foot buffer is necessary instead of a 25-foot or 10-foot buffer, etc. . if you have already considered this issue, disregard my comments.

I hope this is helpful. Please let me know if you need anything further.

Susanne F. Pilgrim, Esq., Director
Legal Services Department

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From: Chris DiMatteo [<mailto:CDiMatteo@kitteryme.org>]
Sent: Wednesday, March 09, 2016 8:07 AM
To: Christine Bragg <cbragg@memun.org>
Subject: referencing the comprehensive plan in ordinances

Good morning Christine!
I have another question....

Some Board and Council members raised the question regarding the appropriateness and legality of directly referencing the Comprehensive Plan in the town's land use code. Below are the two instances that are being proposed.

My thoughts are that since the state statute expects that at least subdivision in 30-A §4404 Review Criteria (that the town uses this for site plan and subdivision) requires conformity with the comprehensive plan that referencing it directly is not an issue and actually would help clarify considering conformity with the comp plan.

Very much interested in your insight on this.

Thanks
Chris

Current proposals:

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- D. preservation of areas with the highest ecological value;
- E. location of buildings and structures on those portions of the site most appropriate for development;
- F. creation of a network of contiguous open spaces or 'greenways' by linking the common open spaces within the site and to open space on adjoining lands wherever possible;
- G. reduction of impacts on water resources by minimizing land disturbance and the creation of impervious surfaces and stormwater runoff;
- H. preservation of historic, archaeological, and cultural features; and
- I. minimization of residential development impact on the municipality, neighboring properties, and the natural environment.

16.8.11.6 Standards.

E. Open Space Requirements:

4. Buffering. Planting, landscaping, form and siting of building and other improvements, or fencing and screening must be used to integrate the proposed development with the landscape and the character of any surrounding development. A buffer not less than 100 feet in depth must be provided along the street frontage adjacent to scenic roadways, as identified in the Comprehensive Plan and 50 feet in depth for all other public streets. Where the portion of the development does not abut a street, the side and rear yard setbacks must include a buffer no less than 20 feet in depth. All or a portion of the existing vegetation may be used in lieu of new plantings for the buffer area as determined by the Planning Board.

Christopher Di Matteo

Town Planner

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