

**TOWN OF KITTERY  
PLANNING BOARD MEETING  
Council Chambers**

**APPROVED**  
Thursday, April 9, 2009

Meeting called to order at 6:12 p.m.

Members Present: Russell White, Ernest Evancic, Michael Luekens, Douglas Muir, Megan Kline, Joseph Carleton  
Members absent: D. Scott Mangiafico  
Staff: Sandra Mowery, Town Planner

**Minutes:**

**March 26, 2009 PB Meeting -**

**Mr. Carleton moved** to accept the minutes as presented

**Mr. Luekens** seconded

**Motion carries 5-1** with Ms. Kline abstaining

**March 23, 2009, Site Walk –**

**Mr. Muir moved** to accept the minutes as amended

**Mr. White** seconded

**Motion carries 4-2**, with Mr. Carleton and Ms. Kline abstaining

**ITEM 1 - Amendment to Title 16 Land Use and Development Code Zoning Ordinance –Public Hearing Continued/Discussion with Action** - Save the Village, a citizen's group, has circulated a petition for the repeal of the 2006 amendment to Section 16.12.070 – Village Residential (**VR**) zoning district. The representative for Save the Village is Kathryn Davis, a citizen.

**Kathryn Davis** briefly summarized the ordinance revision request.

**Susan Emery**, 44 Woodlawn Ave., read a letter from Richard Balano in support of the ordinance revision.



Ms. Emery also requested that the Board recommend the ordinance be accepted as requested in the petition to avoid a referendum.

**George Lombardi**, 105 Manson Ave., spoke in favor of accepting the ordinance revision as presented.

**Earldean Wells** stated that the Kittery Conservation Commission was in favor of the revision.

There being no further testimony, the Public Hearing closed at 6:22 pm.

**Mr. Luekens** noted that, outside of the Industrial Zone, this would be the only zone that does not permit an educational facility.

**Mr. Carleton moved** that the Planning Board forward the proposed ordinance revision language to the Kittery Town Council with a recommendation for approval.

**Mr. Evancic** seconded

**Motion carries 5-1**, with Mr. Luekens voting against

**ITEM 2 - Amendment to an Approved Subdivision – Public Hearing /Preliminary Review** – Beth and John Roylos, Owners, propose to construct a 3-lot subdivision at 32 Haley Road, located on Map 47 Lot 18-4, in the Rural Residential (**RR**) Zoning District, parcel area is ±9.6 acres. The Owner’s agent is Jim Nadeau and Associates.

**Jim Nadeau**, summarized the proposed subdivision and reviewed the staff notes and outstanding issues.

**Earldean Wells** requested that evergreens, shrubs, understory and groundcover be included; that a bond be put in place to assure that funds would be available to replace plants that do not survive, and that a notation be made on the plan that there would be no development in the wetland of the cul-de-sac area.

There being no further testimony, **the Public Hearing closed at 7:35 pm.**

**Mr. White** suggested that remaining technical issues raised by the peer review engineers be further reviewed and resolved with the Town Planner. Board members discussed the proposed road design and waiver request in depth. Members would like the Fire Chief to review the plans and provide his input before a waiver is considered. **Mr. Nadeau** indicated that the applicant would work with the Fire Chief to meet public safety needs. The enforcement of the Consent Agreement was discussed and the language needed to insure that vegetation is retained. **Mr. White** directed that the applicant resolve the road issues with the Fire Chief and DPW Director. **Mr. Luekens** and **Mr. White** concurred that if the Chief and DPW Director accept the design, then they would be in support of a waiver.

**Mr. Carleton moved** to continue review of this item at a date to be scheduled by the Planner.

**Ms. Kline** seconded

**Motion carries unanimously**

**ITEM 3 - Sluiceway Condominiums a Minor Subdivision – Public Hearing/Preliminary Review** – Tudor and James Austin, Owners, propose a four (4) unit condominium development on a 6.25 acre parcel located at 37 Pepperill Road, situated on Map 18 Lot 22 in the Kittery Point Village (**KPV**) Zoning District,. The Owner’s agent is Thomas Harmon with Civil Consultants.

**Mr. Carleton** excused himself from review of this item.

**Tom Harmon** summarized the project and addressed concerns including buffering, hydrant location and water lines, the existing dock and dock access.

**Mr. White** asked about use of the pier, and any restrictions that may be imposed. He suggested this should be included in the homeowner’s documents.

**The Public Hearing opened at 7:40 pm.**

**Patrick Bedard**, attorney, representing abutters to the project: William & Susan Treadwell, 9 Sparhawk Lane, Kathy Conner and David Gibson, 31 Pepperell Road, John and Ann Boardman, 8 Sparhawk Lane, Mary & Jonathan Carter, 10 Sparhawk Lane, Robert and Carlene Baine, 15 Sparhawk Lane, Sarah and Snowden Smith, 51 Pepperell Lane.

**Mr. Bedard** argued that his understanding of condominium law is that a declarant is not allowed to deed out separate lots to develop, but that the declarant has to develop the actual units. The declarant may reserve development rights and transfer development rights, but cannot convey lots. As proposed, this is no different than a subdivision development, because the developer is conveying lots, not buildings. Under condominium law, the applicant is required to convey the vertical and horizontal dimensions of the unit

(33MRSA1602109), and this applicant should be required to show what kind of structure will be built. Regarding Sparhawk Lane, a 40 foot setback should be required as the proposal impacts a number of individuals, and there should be a 20 foot buffer of trees, as well. Additional concerns of the abutters are: the impact of cutting in the shoreland zone, stormwater, erosion control, etc. and that the plans do not appear to cover these issues in enough detail. Additionally, the applicant is asking for a waiver of the soils report, to which the abutters object. Abutters asked that a landscape plan be prepared to show the preservation of trees and other related ordinance requirements; that a 20 foot green strip be required in accordance with 16.32.1050, as they (the abutters) are in close proximity to the proposed development; and that it be clarified whether or not the 20% non-vegetated surface coverage within the shoreland zone (16.32.490.N2f) has been met; the removal of wetlands, rights of way, easements and poorly drained soil areas in calculating lot size (16.32.500C3, Soil Suitability), may reduce the available area for lot development; how do the soils tests, proposed for separate lots, apply to a condominium development as proposed; the applicant should provide a stormwater drainage plan in accordance to 16.32.390; there is no lighting plan and it is unsure if lighting will create a nuisance (16.32.1240); if there is going to be additional development, the applicant be required to include that in the plans and declarations; and finally the applicant be determined financially capable of completing this proposed development.

**Paula Ledgett**, Spruce Creek Association, read a letter from the Association requesting careful review and consideration of the application's impact on the watershed.



April 9, 2009

Mr. Russell White  
Chair, Planning Board  
Town of Kittery  
Post Office Box 808  
Kittery, Maine 03904

Re: Sluiceway Condominiums, 37 Pepperrell Road, Kittery Point, Maine

Dear Mr. White,

As you know, the Spruce Creek Association is a watershed organization with over 220 members – residents, abutters, and business owners – and we have taken on the responsibility of the stewardship of Spruce Creek and its watershed—which includes protecting its environmental health and character.

The Spruce Creek watershed encompasses over half of the land in town (9.6 square miles) and approximately 11% of that area is no longer in its natural state and instead has impervious cover. Effectively 1 out of every 10 acres in the watershed is no longer able to serve as a natural water collection, purification and storage system that is vital to the creek.

Studies have shown that there is a direct relationship between the amount of land that is impervious and the health of the water. Water quality decreases once a watershed exceeds 8% land that cannot filter. In the watershed, we've already gone well past that "tipping" point and are now seeing a negative affect on water quality with every rain event.

Developments such as the proposed condominiums on Pepperrell Road represent a high-impact in terms of impervious surfaces. Situations where special exceptions could be extended to developers to enable a greater density of structure on a parcel of land only further over-burden and over-develop a piece of property that is so valuable to the natural infrastructure of the whole watershed and the Gulf of Maine.

As Kittery continues to feel the pressures of development, we hope developers as well as homeowners will also want to become good stewards of Kittery's largest watershed and one of its most valued ecological and scenic resources. As we have seen, some owners and developers can and will go beyond the levels required by the ordinances to incorporate advanced and environmentally-friendly stormwater control systems into their

building plans. But until we can count on the majority of applicants to willingly do the right thing, we must count on our boards to provide guidance and oversight.

So tonight we ask the Planning Board to be good stewards and to ensure that the Town Ordinances and Kittery Comprehensive Plan are fully considered when deliberating the various aspects of this application. We ask the Planning Board as well as other boards in the town of Kittery to consider the impact of their decisions on this significant and fragile waterbody.

Sincerely,

  
Phyllis Ford & Paula Ledgett  
Steering Committee

cc: Jonathan Carter, Kittery Town Manager  
Kittery Planning Board Members

**Mr. Harmon** responded that the proposed development is one lot, owned by the condominium association, as limited common areas, A,B,C, and D. Any changes after approval as presented would be brought back to the Planning Board.

**Earldean Wells** noted that the Conservation Commission is concerned about the number of trees that have been removed and that there be a notation on the plans that there be no further tree cutting; a notation dealing with the signage over the shoreland and wetland areas; that the covenants include, in detail, restrictions on tree and vegetation cutting in the shoreland area; and that varied types of vegetation be planted.

There being no further comment, the **Public Hearing closed at 8:10 pm.**

**Mr. Harmon** stated that each lot is limited to 10,000 square feet, and is well below the 20% impervious coverage and the density calculations submitted illustrate this; the erosion control plan meets state standards and has been peer reviewed; the only areas to be developed are the road, driveways and the 10,000 square foot lots, all other areas will remain vegetated; the condominium documents were prepared and reviewed by two attorneys who are experienced in condominium documentation.

**Mr. White** stated that the legality of the condominium plan will be reviewed by the Town Attorney and requested further information regarding setbacks, lighting location and impact, and a landscape plan noting re-vegetation. The **Town Planner** noted that the areas of no-disturbance are clearly marked, and development may occur in the building envelope, up to those areas of no-disturbance.

**Mr. Evancic** requested further information regarding the direction of surface and subsurface water flow.

**Mr. Harmon** stated that the erosion control plan illustrates the flow of water, but that he could provide further information.

**Ms. Kline** requested that street trees be included along the road at approximately 25 foot intervals.

**Mr. Luekens moved** to continue review of this item at a later date, to be scheduled by the Town Planner.  
**Ms. Kline** seconded.  
**Motion carries unanimously**

## **BREAK**

**ITEM 4 - Plenary Site Plan – Preliminary Review continued/Discussion with Action:** B & F Land Development, Owner, proposes to remove the existing building and parking lot and to construct two new office buildings and parking lot on 1.29 acres at 240 US Route 1, located on Map 22 Lot 13 situated in the Commercial 1 (C-1) zoning district. The Owner's agent is Christopher Baudo, RA.

**Chris Baudo** reviewed documents presented to the Board members regarding the right-of-way between the applicant's parcel and the McCarthy parcel that provides access to the Durling and Rossiter parcel as part of a subdivision approval requiring 150' of frontage on an approved right-of-way. Mr. Baudo argued that his property does not abut a residential property but a road, by ordinance definition: *A street means a way, established or maintained under public authority, or a minimum forty foot side private way constructed to town standards as contained in Chapter 16.32, approved by the planning board and plotted, dedicated and recorded, or a way shown on a plan of a subdivision duly approved by the planning board. Also included are such ways as alleys, avenues, boulevards, highways, roads, streets, and other rights-of way. And, Street frontage means a continuous portion of a boundary of a lot which abuts a street, ordinarily regarded as the front of the lot. When a lot is bounded by more than one street, any one of them, but only one, may be designated as the frontage street by the owner, provided that the lot meets the frontage requirements on that street, front, side and rear yard setbacks, and that the principal building is numbered on that street. And, Street line means the exterior line of a street right-of-way which separates it from abutting lots.*

Mr. Baudo presented legal documents (deed descriptions, surveys, and conveyances) dating to 1939, 1955, and 1997 where the strip of land separating the two parcels was referenced as a right-of-way. A 1984 subdivision approval for lots A & B (Durling and Rossiter) required 150 feet of street frontage. The question before the Board is whether the proposed development parcel, in a C1 zone, abuts a residential zone, though the McCarthy property is a residential use within the C1 zone. Dividing the development lot from the McCarthy lot is a right-of-way and, according to ordinance definitions, is a street. The subdivision creating the Durling and Rossiter lots illustrated the lot frontage is on a street, and the original 15 foot-wide right-of-way accessed these lots. In 2006, the McCarthy's opened a bed and breakfast within two feet of the existing right-of way and were not required to meet any set-back or buffer requirements that are being imposed on the commercial application under review. Mr. Baudo stated that the proposed non-residential use abuts a street, not a residential district or use, and the buffering required by 16.12.110.5 does not apply.

**David Durling, 29 Adams Drive**, summarized his letter dated February 12, 2009 and argued that the road is a driveway to his property, and a right-of-way to the Rossiter parcel and, though the proposed development is not abutting the McCarthy parcel, it is within 150 feet.

**Patrick Bedard**, attorney, supported Mr. Durling's argument, and stated that an easement or right-of-way is a way to access a back parcel, like a flag-lot; the road is a residential use, thus requiring a 40 foot buffer; the McCarthy's bed and breakfast is a home occupation, not a commercial use.

**Mr. Carleton** argued that the use of the road is not residential but vehicular. A road to a mixed-use development could not be characterized as a residential or commercial use, but a road. **Mr. Bedard** argued that this argument splits the land, instead of the intended use of the land, and provided a hypothetical example of using a parcel of land to store equipment during property construction, making this abutting parcel non-residential [as a commercial use storing construction equipment]. Because the road leads to a residence, it is a residential use. **Mr. White** noted that the right-of-way was approved to provide the required access to a subdivision and the 15 foot portion of road does not provide frontage to an approved residence. **Mr. McCarthy** stated that "a tract or parcel of land means all contiguous land in the same ownership" as that owned by Mr. Durling. **Mr. White** stated that the Board was in agreement that the property was owned by Mr. Durling.

**Eileen McCarthy**, 27 Adams Drive, spoke against the project stating that the B&F Development had been told by the ZBA that when a commercial development abuts residential use, there are very strict guidelines regarding buffers. The area has long been residential and does not meet any of the definitions on page 295 [Street classification] of the ordinance. Businesses come and go, the residences have been here for one hundred years. The proposed development will tower over the existing homes nearby, visible from every window. The construction of a multi-story commercial building is not compatible with the existing neighborhood.

There being no further public comment, **the Public Hearing closed at 9:30 pm.**

**Mr. Carleton** noted that zoning ordinances balance interests of various parties where zones are set up and [the McCarthy's] live in a commercial zone. He noted four areas where a 40 foot buffer would be required: two are where the side-yard abuts a residential district; in this case, the district is commercial. Another instance is where a buffer abuts a residential use, and his opinion is that a roadway is not a residential use. Additionally, a 40 foot buffer is required when abutting an existing residential area. In this case, there is, effectively, a 45 foot setback by benefit of the road width. Finally, a 40 foot buffer is required when abutting a potential residential area and the prior arguments against this would apply. Therefore, it was his opinion that a 30' buffer would apply.

**Mr. Muir** disagreed with Mr. Carleton stating that the ordinance needs to apply in an even and just way in an effort to achieve compatibility between different uses. As there was a change of use across boundary lines, from commercial to residential, the 40 foot setback should apply.

**Ms. Kline** stated that the area has been maintained as a residential use and supported the 40 foot buffer standard.

**Mr. Luekens** felt that the right-of-way is a street, but that the uses in the area are residential, and that a 40 foot buffer should apply.

**Mr. White** pondered what can occur within a 40 foot buffer and what are the adverse affects as stated in the ordinance language. Discussion followed regarding buffers, non-residential set-back space, buffer strips, and buffer materials. **Mr. Luekens** asked what needs to be considered to make a decision about buffering as it applies to this application? **Mr. White** stated that the dimension of the buffer and what can occur within a buffer is needed to move the application forward. The **Town Planner** stated that the applicant has received preliminary approval with conditions and needs direction from the Board regarding buffering. The applicant still must address other issues in the staff notes.

[inaudible discussion followed]

**Mr. Carleton moved** to extend the meeting to 10:15 pm

**Mr. White** seconded

**Motion carries unanimously**

**Mr. Carleton moved** to table this item until the next meeting

**Mr. Evancic** seconded

**Motion carries unanimously**

**ITEM 5 - Plenary Site Plan – Determination of Completeness/Scheduling a Public Hearing:** Town of Kittery, Owner, proposes to construct a new 60' x 84' salt shed building and a new 50' x 48' office and operations building on ±8.25 acres at 200 Rogers Road, located on Map 22 Lot 20A situated in the Commercial 3 (C-3) and Urban Residential (UR) zoning districts. The Owner's agent is Rick Rossiter, Director of Kittery Public Works.

**Rick Rossiter**, Director of Kittery Public Works Department (KPWD) presented the site plan locating the proposed building within the municipal parcel, noting a 50 foot setback from a drainage ditch. Mr. Rossiter noted that he will be asking the Planning Board for a preservation easement that will follow the berm adjacent to his personal property and the Kittery Retirement Residence, LLC property.

**Norm Albert**, KPWD, discussed the location of the proposed salt shed in the UR zone that will allow for trucks to load and unload salt in a contained area, and outlined the planned use for the operations building by

DPW staff, separate from the garage. **Mr. White** asked if there was any other location where this operation could be moved. **Mr. Albert** stated that there had been some discussion, but there were no viable locations that he was aware of. The **Town Planner** noted that there were discussions regarding the visual appearance of the operations building as it faces the retirement complex, but felt that the application was substantially complete at this time. **Mr. Albert** noted he spoke with the Fire Chief who stated he had no problems with the location or height of the salt shed. A formal letter will be forthcoming.

**Mr. White motioned** to find the application substantially complete.

**Mr. Carleton** seconded

**Motion carries unanimously**

**PLANNER'S TIME** – No items

**Chairman White** adjourned the meeting at 10:15 pm

The Planning Board meeting of April 9, 2009 adjourned at 10:15 p.m.  
Submitted by Jan Fisk, Recorder, April 20, 2009