

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

APPROVED
Thursday, August 27, 2009

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

Members Present: D. Scott Mangiafico, Vice-Chairman, Michael Luekens, Joseph Carleton, George Burke, Doug Muir and Ernest Evancic
Members absent: Russell White
Staff: Gerry Mylroie, Interim Town Planner

Planning Board, August 13, 2009 Minutes:

Mr. Carleton motioned to accept the minutes as amended

Mr. Luekens seconded

Motion carries 6 in favor, 0 opposed

Site Walk, July 9, 2009 Minutes:

Mr. Burke motioned to accept the minutes as amended

Mr. Evancic seconded

Motion carries 5 in favor, 0 opposed, 1 abstention (Luekens)

PUBLIC COMMENT – There was no public comment.

ITEM 1 – Sluiceway Condominiums - Minor Subdivision – Preliminary Review (continued) – Tudor and James Austin, Owners, propose a four (4) unit condominium development on a 6.25 acre parcel located at 37 Pepperrell 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 recused himself from this item due to a conflict, and noted that he will not return to the meeting due to a prior engagement.

Mr. Mylroie reviewed the following outstanding issues:

1. Roadway design and fire truck turnaround;
2. Setbacks and screening along Sparhawk Lane;
3. Location of driveways to and septic tanks on the proposed developed areas within the subdivision;
4. Discrepancies in the condominium documents as submitted by the applicant.

Thomas Harmon, agent, responded:

1. The 40' setback and arborvitae screening was placed along a portion of Sparhawk Lane, however his client has no rights to the remaining ROW and does not believe he should be held to the same setback requirement;
2. The Fire Chief reviewed the location of the fire hydrant and the proposed turnaround and supports gravel construction, providing a maintenance condition be included on the plans;
3. The condominium documents will be reviewed and corrected as needed;
4. Driveways are not shown on the plan because it is unknown where the homes and garages will be built within the building envelope and limited common areas;
5. Only one pier is allowed on the property as it is one lot.

Mr. Mangiafico asked about a shorefront development plan, stating that a narrative of the plan will be needed. **Mr. Mylroie** noted that the dock is not in a common area, located in limited common area A. The condominium documents outline the ownership and permitted use of the dock. **Mr. Mangiafico** stated that the dock was approved for single owner use only, not multi-users, and recommended that the plans state such, and further noted that owners of areas B and C will not have shorefront or riparian rights. Discussion followed regarding shoreland zone restrictions in the 100 foot setback from the water. **Mr. Muir** noted that he felt the vehicle turn around should be paved so that it is kept plowed and does not

deteriorate. Discussion followed regarding the turnaround and using a driveway as a turnaround for emergency vehicles.

Mr. Mangiafico opened the meeting to audience members for comment.

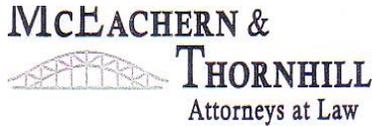
Patrick Bedard, representing abutters to the project: William & Susan Treadwell, 9 Sparhawk Lane, Kathy Conner and David Gibson, 31 Pepperell Road, John and Ann Boardman, 8 Sparhawk Lane, Mary & Jonathan Carter, 10 Sparhawk Lane, Robert and Carlene Baime, 15 Sparhawk Lane, Sarah and Snowden Smith, 41 Pepperell Lane, spoke in support of:

1. A 40 foot setback. Sparhawk Lane continues to the Baime property and, as a right of way, requires a 40' setback;
2. A landscape plan, green strips, street trees, and a minimum 10 foot buffer easement;
3. An opinion letter of August 12, 2009 from the Town Attorney, re: subdivision and condominium law, arguing that vertical and horizontal building elements and other details are missing from the proposed plan.

Mr. Bedard voiced concern regarding:

1. The financial capability of the applicant to complete the project;
2. Whether septic calculations need to be revised;
3. Location and impact of lighting.

There was no further public comment.



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BY:.....

August 12, 2009

Ms. Sandra J. Mowery, P.E.
Kittery Town Planner
200 Rogers Road
Kittery, ME 03904

Re: Austin/Pepperrell Road

Sluiceway

Dear Sandra:

At the request of the Planning Board, you asked that I review "The Declaration of Condominium Property Sluiceway Condominium" submitted in support of a pending application before the Planning Board for the Austin property. The Board was apparently concerned with whether the submitted condominium documents raise issues regarding the Planning Board's consideration of this development.

After reviewing the Declaration of Condominium, I have the following comments.

To begin with, the state statute regulating condominium development [33 M.R.S. § 1601-101 et seq.] provides in § 1601-106:

§ 1601-106. Applicability of local laws and regulations

A zoning, subdivision, building code or other real estate use law, ordinance or regulation may not prohibit the condominium form of ownership. **Otherwise, no provision of this Act invalidates or modifies any provision of any zoning, subdivision, building code or other real estate use law, ordinance or regulation.**

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WICEACHERN & HORNHILL
Attorneys at Law

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No county, municipality, village corporation or other political subdivision . . . may adopt or enforce any law, ordinance, rule, regulation or policy which conflicts with the provisions of this [condominium] Act. [Emphasis added]

30-A M.R.S. § 4401 regulating subdivisions defines a

"subdivision" in § 4401(4) as:

"Subdivision" means the division of a tract or parcel of land into 3 or more lots within any 5-year period that begins on or after September 23, 1971. This definition applies whether the division is accomplished by sale, lease, development, buildings or otherwise. The term "subdivision" also includes the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period, **the construction or placement of 3 or more dwelling units on a single tract or parcel of land** and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. [Emphasis added]

§ 4401(2) of the state subdivision statute defines a

"dwelling unit" as:

"Dwelling unit" means any part of a structure which, through sale or lease, is intended for human habitation, including single-family and multifamily housing, **condominiums**, apartments and time-share units. [Emphasis added]

The proposed Sluiceway Condominium development proposes to construct 3 new condominium units to add to the existing dwelling on the property. The Declaration of Condominium also reserves

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Attorneys at Law

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the development rights for the construction of 2 additional units to add to this development in the future. Given the above, this condominium development as proposed constitutes a subdivision under state statute and, as such, the Planning Board must review the Sluiceway Condominium development as a subdivision subject to the terms of Kittery's subdivision development standards.¹

Discussion

The Planning Board must be satisfied that the title ownership of the parcel to be developed is in the name of the applicant. The Board must also be satisfied with the location of the building envelope for each proposed structure and that the residential units will be compliant with such Ordinance requirements such as, but not limited to, size and height. The

¹For purposes of classifying and determining the scope of subdivision review, Kittery's Ordinance contains the following definitions in Section 16.08.020:

Subdivision, Major. "Major subdivision" means any subdivision containing more than four lots, or any subdivision requiring any new public street extension, or the extension of public or municipal facilities.

Subdivision, Minor. "Minor subdivision" means a subdivision containing not more than four lots.

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Attorneys at Law

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Planning Board may require the applicant to produce adequate evidence to satisfy the Board that the development meets the requirements of the Ordinance on these issues but it need not require the same detailed information that is required to be set out in the recorded Condominium Declaration.²

The Planning Board's conditions of approval should address any proposed development relating to the shoreline including any limitations on future structures such as additional piers on this property. Board-required conditions should clearly be spelled out in detail in the Board's approval. The Board should also spell out whether the exercise of future reserved development rights will require further Board review and whether that review would proceed as a minor or major subdivision development.

Finally, any Board approval should be conditioned on the applicant's satisfactory compliance with the provisions of the

²The Maine Condominium Act [33 M.R.S. § 1601-101 et seq.] requires the condominium plans to be recorded in the Registry of Deeds showing, in addition to numerous other requirements, the vertical and horizontal boundaries of the proposed condominium structures.

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Maine Condominium Act.³

Should the application be approved by the Board, I expect that the CEO would issue no building permits for development of the site or dwelling units unless satisfied that the construction of the proposed dwelling units and planned improvements are totally compliant with the ordinance standards and any Board imposed conditions.

Should you want more from me on this, please advise.

Very truly yours,



Duncan A. McEachern

DAMCE/cn
Copy to
Ms. Heather M. Ross, CEO

TOK-LTRS\Austin-Pepperrell

³Nothing that is said herein is intended to relieve subsequent purchasers of any condominium units approved by the Board from determining that the condominium declaration and documents as hereafter recorded in the Registry of Deeds are in strict compliance with the provisions of the Maine Condominium Act. That assessment must be made by prospective purchasers and their legal counsel where applicable.

Mr. Mylroie stated that he agreed with the Town Attorney's opinion that this is a condominium development and must comply with state condominium law, clarifying the vertical and horizontal dimensions, the common areas, limited common areas, etc. **Mr. Mangiafico** questioned the ownership of Sparhawk Lane beyond the cul-de-sac, and who accesses the driveway, stating that it could be a shared driveway, not a roadway. **Mr. Harmon** had not researched this issue [inaudible]. **Bill Treadwell**, 9 Sparhawk Lane, stated that Baime and Nagle access the Lane, noting that Sparhawk Lane splits, providing access to Borkowski as well. **Mr. Muir** noted that if a property abuts two streets, the owner may only have access to one, and if the owner cannot access that street, a front yard setback would not apply and, therefore, the setback should be 15 feet. Lengthy discussion continued regarding whether the project faces two streets and, therefore, has two front yard setbacks. **Mr. Mangiafico** requested that the Board obtain an opinion from the CEO on this issue, including how she makes these determinations.

Board members reviewed the August 20, 2009 staff notes:

1. Erosion control and stormwater management report waiver request was skipped as **Mr. Burke** felt that without any idea of the size of the impervious areas on the proposed envelopes, runoff and erosion control cannot be determined by peer review;
2. Extension of driveway. The Board needs a waiver request for the length of driveway;
3. Turnaround: Chief O'Brien was asked by the Board about allowing the turnaround in a driveway and his response was that this would not be an acceptable alternative. He is in favor of where it is currently located on the plan, paved, in a common area.

Mr. Mangiafico asked if horizontal and vertical dimensions are required, per condominium law. **Mr. Harmon** stated that the vertical is unlimited, and the horizontal is limited by the ordinance. **Mr. Bedard** provided extensive explanation of condominium law, arguing that dimensions are required before the plans are recorded, and should be provided during the review process. Lengthy discussion followed regarding how this information will be submitted, how the proposed plan meets State condominium and ordinance requirements, and the intent of Attorney McEachern's opinion letter in this matter. Members suggested that the Town Attorney clarify his meaning of building envelopes and structures. **Mr. Luekens** stated that he believes the setback along Sparhawk Lane is not a front yard and should be 15 feet; is in favor of a landscape plan that also includes a lighting plan; is in favor of supporting the requested waivers, and requests that additional information be provided regarding the required information for condominium plan approval.

Board members agreed:

1. The turnaround should be paved;
2. A landscape plan should be provided, and include landscape maintenance. **Mr. Harmon** asked for assistance in preparing a landscape plan as he felt the area is already well wooded.
3. Waiver summary: plan scale reduction; roadside drainage buffer strip; stormwater management and erosion control plans; road length.
4. Condominium documents be corrected and modified, addressing issues raised by the Board.

This item will be continued to the next Planning Board meeting for additional information.

ITEM 2 – Spruce Creek Subdivision – Major Subdivision – Cluster Development - Preliminary Review – Terry Gagner, Owner, proposes to construct a 10-lot cluster residential development consisting of single-family dwelling units on ±15.2 acres, Tax Map 38 Lots 13 B through 13 F, situated in the Rural Residential (**RR**) zoning district. The owner's agent is Thomas Harmon of Civil Consultants.

Mr. Mylroie summarized the applicant's request to run a roadway from the proposed development to Route 1, noting that the primary issues are lot frontage and access. The applicant is achieving the 600 feet of frontage by adding a cul-de-sac within the development. In order to access the proposed development, the existing parking alongside the access road would need to be removed or altered. Parking is currently perpendicular and parallel parking was discussed as a possible remedy. Applicant currently exceeds parking requirements by 17 spaces. There are 22 spaces along the proposed access road.

Terry Gagner, owner, addressed the Board regarding pedestrian movement through and around the parking lot of the Weathervane restaurant, and concerns over losing the parking spaces along the access road.

Mr. Muir requested that the applicant provide a plan of how the access road is proposed, and provide the necessary graphics. **Mr. Mylroie** elaborated on how the plan could be revised to accommodate the applicant's needs, and working with the abutting mall owners to better improve the access from Route 1. **Mr. Mangiafico** noted that the idea is intriguing, but securing agreement with the abutting mall owner may be difficult. Discussion continued regarding traffic flow, parking needs, access and entry design.

Members requested that further information and design be provided in order to address safety and other issues discussed.

Mr. Harmon stated that 46% of the useable area is open space, exceeding the 30% required by ordinance. He further described the areas surveyed, illustrating wetlands and shoreland setback areas.

Mr. Luekens motioned to extend the meeting an additional 15 minutes

Mr. Burke seconded

Motion carries 5 in favor, 1 against (Muir), 0 abstentions

This item will be continued to the next Planning Board meeting for additional information.

Planners Time

1. Structure definition: CEO requested that other structures be included, such as HVAC, propane and oil tanks on a limited pad size of 20 square feet. Board members agreed to include the recommended amendment, but to strike out the reference to “air handling mechanical equipment”, sending remaining definition to council [no formal motion or vote was taken].
2. Eliot Comprehensive Plan: As an abutting community, Kittery residents may comment on the Plan.
3. Shoreland zone amendments: The Council’s Ordinance Committee is recommending that the current language clearly indicate that the shoreland zone is an overlay zone, rather than as it is currently perceived as a base zone with sub-zones.
4. Per a request by Mr. Luekens, planning staff will prepare a matrix that will clearly illustrate the planning review process and types of reviews by various boards.

Mr. Luekens motioned to adjourn

Mr. Muir seconded

Motion carries unanimously

The Planning Board meeting of August 27, 2009 adjourned at 10:13 p.m.

Submitted by Jan Fisk, Recorder – August 31, 2009