

## MEMORANDUM

TO: Cape Elizabeth Town Council  
FROM: Planning Board  
DATE: June 21, 2017  
SUBJECT: Agricultural Easement Amendment

### Introduction

The Planning Board is recommending an amendment to the Zoning Ordinance in order to clarify an existing provision that agricultural land may be preserved as part of open space in new development.

### Time Sensitive

The Planning Board is currently conducting major subdivision review of Maxwell Woods, a 46 unit multiplex development located on Spurwink Ave. Forty-five percent of the gross land area will be preserved as open space and a portion of the open space is proposed to be preserved with an agricultural easement. Maxwell Woods was granted preliminary subdivision approval May 18th and is expected to apply for final subdivision approval in August.

The town has received documentation that legal action against the town is under consideration due to how agricultural land is defined in the ordinance. The Planning Board met with Town Attorney John Wall in Executive Session to receive legal advice, and then discussed a possible amendment at the June 6, 2017 workshop. The Planning Board held a public hearing on June 20, 2017 and is recommending, by a vote of 5-0, the attached amendment.

### Proposed Amendment

The amendment clarifies provisions located in Sec. 19-7-2 Open Space Zoning, Section D Open Space Design Standards. This section establishes standards for the open space preserved as part of new development. Priorities for open space are listed as:

1. Wetlands/environmentally sensitive areas/wildlife habitat
2. Agriculture
3. Greenbelt and Recreation area
4. Scenic character

The agriculture priority references the state definition of farmland as it relates to the state's agricultural land tax program. The state farmland definition requires a 5 acre minimum area and a minimum income of \$2,000, among other provisions.

It is the Planning Board's position that the definition applies to a farm, but that an agricultural easement may cover only a portion of a farm. Public comment supports requiring that any agricultural easement must be at least 5 acres in size, as well as comply with all other provisions of the state farmland definition. The Planning Board

notes that no other priority open space category has a minimum size. Applying a 5 acre minimum to agricultural land will be a disincentive to preserve farmland. The open space zoning provisions provide the Planning Board with substantial qualitative review standards for open space rather than only quantitative standards. If the interpretation is litigated, the decision will be left to a judge and the town will incur legal costs.

### Planning to preserve agriculture

Both the 1993 and 2007 Comprehensive Plans promote preservation of agriculture. The 2007 Comprehensive Plan identifies the economic viability of farming as a major challenge to preserving agriculture (p. 127). Recommendation 88, which recommends creating bonus TDR (Transfer of Development Rights) rights for agricultural land, is a clear example of connecting new development to farmland preservation.

The Future Open Space Preservation Committee (FOSP) was created by the Town Council in 2012 to implement the Recreation and Open Space recommendations in the 2007 Comprehensive Plan. FOSP committee charge #7 reads:

7. FOSP shall develop a range of tools and approaches to preserve/protect/enhance critical parcels. These tools should be expansive and include innovative approaches that have been successfully employed nationwide, including zoning, outright land purchases, elimination of incentives for development in critical parcels, methods by which land can be purchased in public/private partnerships, and any other creative approaches other towns have taken. At the same time, all of the approaches that are considered and recommended have to avoid infringement of personal property rights.

This charge demonstrates support for using innovative approaches to preserve land.

As part of its work, FOSP developed an open space definition, " Land and water areas, either public or private, maintained in an essentially undeveloped state (which may include athletic fields) for use as active or passive recreation, wildlife habitat, agriculture or preservation." This definition explicitly incorporates agricultural land, and illustrates that open space can have different attributes, and be privately owned.

The final FOSP report included the following recommendation:

- **Recommendation 21.** FOSP recommends that the review of growth areas be referred to the Planning Board as part of the resumption of the Planning Board's comprehensive plan implementation work. The Planning Board's comprehensive planning implementation work should include public outreach about the benefits of open space zoning. The Planning Board should also recommend ordinance amendments that make preservation of agricultural land a higher open space priority when preserving open space as part of new development. [underline added]

This recommendation was implemented with the Zoning Ordinance provision now proposed for revision.

The FOSP report includes priority setting for open space (p. 17) as follows:

- Agriculture
- Greenbelt Trails and recreation areas
- Wildlife Habitat
- Other

The FOSP report also considered and rejected creating an agriculture viability fund. (PEVA p. 28) As part of the consideration of this proposal, FOSP discussed how to define farmland. They considered using the current farm list, land with prime agricultural soils, any land that had been farmed in the past and other factors. Developing a farmland definition became problematic and no farmland definition was recommended by the committee, and certainly nothing with a minimum size.

The Town Council adopted the Land Use Amendments in 2015. This package of amendments updated the Open Space Zoning provisions, including establishing agricultural land as a high open space priority for preservation in new development. The state farmland definition was referenced in the ordinance to avoid the difficulties experienced by FOSP. At no time was there an intent to establish a minimum size for agricultural land preservation.

### Conclusion

The Planning Board acknowledges that processing ordinance amendments during a development review process is awkward. It is not uncommon, however, to identify the need for clarification when applying ordinance provisions to a real world situation. The Planning Board takes seriously its responsibility to make legally defensible decisions. For this reason, it recommends the Town Council adopt the Agricultural easement amendment.

**Draft  
Agricultural Easement  
Zoning Ordinance Amendment**

**SEC. 19-7-2. OPEN SPACE ZONING**

**D. Open Space Design Standards**

In addition to other standards of this Ordinance and of the Town's Subdivision Ordinance, the following design standards shall apply.

***1. Land to be preserved as open space***

- c. Preservation priorities. Consistent with the standards set forth above, the land within the residential development to be preserved as open space shall be determined using the following priorities, in the order that they appear. To the extent priorities that are higher on this list are met by the proposed open space provisions in a residential development, the landowner shall have satisfied the requirements of this subsection even if the proposed open space design does not preserve lower priorities.
  - ii. Agriculture. In a manner that preserves active agricultural fields for agricultural use. The agricultural land to be preserved as open space must meet the requirements of "farmland" as that term is defined in the Farm and Open Space Tax Law, 36 Farm Land under 36 M.R.S.A. Sections 1101-1121, Farmland Tax Law, but does not need to be registered under this state program. The agricultural land to be preserved under this subsection shall be deemed to meet the requirements of "farmland" if it is part of a parcel or parcels that meet the farmland definition referenced above, even though the agricultural land to be preserved does not independently meet all the criteria in the definition.

***4. Other Design Elements***

***6. Density Bonus for additional Public Benefit***

- b. Density Bonus. The total density bonus allowed under the provisions in Sec. 19-7-2 (E), shall not exceed thirty percent (30%) of the base density determined for each zoning district. The base density for subdivisions and multiplex housing in the RB District is determined in Sec. 19-7-2 (C)(1). Any combination of the following density bonuses may be proposed.
  - i. Agricultural land. When agricultural land is permanently preserved in compliance with Sec. 19-7-2 (D), Open Space Design Standards, a density bonus of one (1) unit per thirty-thousand (30,000) square feet of agricultural land preserved may be applied to the development. The

agricultural land to be preserved as open space may be located on the development parcel or anywhere in the Town and must meet the requirements of "farmland" as that term is defined in the Farm and Open Space Tax Law, 36 Farm Land under 36-M.R.S.A Sections 1101-1121, Farmland Tax Law, but does not need to be registered under this state program. The agricultural land to be preserved under this subsection shall be deemed to meet the requirements of "farmland" if it is part of a parcel or parcels that meet the farmland definition referenced above, even though the agricultural land to be preserved does not independently meet all the criteria in the definition.

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What do you think?

Regards, John

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**From:** Maureen O'Meara [mailto:[maureen.omeara@capeelizabeth.org](mailto:maureen.omeara@capeelizabeth.org)]  
**Sent:** Wednesday, June 14, 2017 2:09 PM  
**To:** John Wall  
**Subject:** Re: for 2 pm

[Quoted text hidden]

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**Maureen O'Meara** <[maureen.omeara@capeelizabeth.org](mailto:maureen.omeara@capeelizabeth.org)>  
To: John Wall <[JWall@monaghanleahy.com](mailto:JWall@monaghanleahy.com)>

Wed, Jun 14, 2017 at 3:20 PM

Looks even better. Are we set?

M

[Quoted text hidden]

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**John Wall** <[JWall@monaghanleahy.com](mailto:JWall@monaghanleahy.com)>  
To: Maureen O'Meara <[maureen.omeara@capeelizabeth.org](mailto:maureen.omeara@capeelizabeth.org)>

Wed, Jun 14, 2017 at 3:26 PM

Maureen,

In my view, the reformulation we have just discussed now indicates with greater clarity what is intended with regard to the criteria in the ordinance for agricultural open space and the significance of the state definition to those criteria.

Let me know if you require any additional comments.

Regards, John

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**From:** Maureen O'Meara [mailto:[maureen.omeara@capeelizabeth.org](mailto:maureen.omeara@capeelizabeth.org)]  
**Sent:** Wednesday, June 14, 2017 3:21 PM

Begin forwarded message:

**From:** "Paul S." <paulthepony@gmail.com>  
**Date:** May 22, 2017 at 9:09:31 PM EDT  
**To:** "Adam D. - CE Maxwell Woods Dev" <day.adam@gmail.com>, "Andrew G. - Maxwell Woods Dev" <atigilbert@gmail.com>, "Becky F. - CE Maxwell Woods Dev" <kiyotabery@gmail.com>, "Carissa H. - CE Maxwell Woods Dev" <carissa.d.hanratty@gmail.com>, "Carrie G. - Maxwell Woods Dev" <carriecgilbert@gmail.com>, CE Maxwell Woods Dev - Cathie <seajay04107@maine.rr.com>, CE Maxwell Woods Dev - Lynn <sk8ingchauffeur@yahoo.com>, CE Maxwell Woods Dev - Mark <cheeseair@gmail.com>, "eanette B. - CE Maxwell Woods Dev" <jbaum@cjee.org>, "Emily H. CE Maxwell Woods Dev" <emilyhelliesen@gmail.com>, "Joe B. CE Maxwell Woods Dev" <joseph.p.baum@gmail.com>, "John & Leika P. - CE Maxwell Woods Dev" <jpowers5@maine.rr.com>, Layton - CE Maxwell Woods Dev <mlayton@maine.rr.com>, "Phil H. - CE Maxwell Woods Dev" <phil.hanratty@gmail.com>  
**Subject:** next...

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It has been recommended to me by a source that will remain anonymous that you/we take our emails to the PB about the co-application fiasco and edit them down to 250 choice words and points and get them into the Courier. Next deadline is this Friday, May 26th. And while we're at it, also get an interview on this with the Forecaster and Current. Their lawyers need to know they're on thin ice. We need a big ol' spotlight on this one.

Paul