

TOWN OF CAPE ELIZABETH
DRAFT MINUTES OF THE PLANNING BOARD

September 15, 2015

7:00 p.m. Town Hall

Present: Carol Anne Jordan, Acting Chair
Josef Chalot
Elaine Falender
Jonathan Sahrbeck
Henry Steinberg
Victoria Volent

Absent: Peter Curry

Also present was Maureen O'Meara, Town Planner.

Ms. Jordan called the meeting to order and called for the approval of the minutes of August 18, 2015. The minutes were approved, 6-0. The minutes of the September 1, 2015 Workshop were amended and approved 6-0.

OLD BUSINESS

Berry Subdivision and Broad Cove Subdivision Amendments - William S. Holt is requesting amendments to the previously approved Berry Subdivision, located on Two Lights and Hannaford Cove Rds, and the Broad Cove Subdivision, located on Running Tide Rd, to amend lot lines to merge abutting land, Sec. 16-2-5, Amendments to Previously Approved Subdivisions Public Hearing.

Ms. O'Meara said the proposal is to amend two subdivisions. The lots are increasing in size. This application was tabled from last month's meeting.

John Mitchell, of Mitchell and Associates, represented Dr. Holt. He showed a plan of the Holt property of 27 acres. He also showed the proposed changes to the Holt land, the Wasserman parcel and lot 4 of the Berry subdivision. He said they have addressed all the comments of the Planning Board and the public.

They now propose to merge the 13 acre parcel with lot 4. This provides road frontage to the back land. The subdivision covenants will now encumber the entire 16 acres. The building envelope has been decreased in size from their prior proposal. The traffic was reviewed during the 2010 Berry subdivision approval, and since Dr. Holt is only proposing one lot, traffic is not an issue. They have a letter from Charles Katz-Leavy regarding the private rights to the Tote pathway.

Any future division of lot 4 would have to come before the Planning Board. Dr. Holt is not interested in entertaining any access restrictions on lot 4. He also stated that any

future development of the Wasserman land would have to come back to the Planning Board. He also explained why there can be no further development of the Estate Lot.

Mr. Chalot asked if there was a building envelope on the new parcel to be conveyed to the Wassermans.

Mr. Mitchell said there is none, and if they choose to build back there they will need to come back to the Planning Board.

Ms. Jordan opened the public comment period.

Jim Atleson of 7 Winding Way asked what is the potential for development of the land to the left of the Wasserman lot. That is the Holt lot.

Ms. Jordan said the potential for development of anyone's lot is always there. They need to come to the Planning Board and meet all the rules of the ordinance.

Mary Costigan, of Bernstein Shur, was here on behalf of Tom Egan. She wants a condition on the lot that there be only one single family home on the lot. By increasing the development potential, they believe it is a violation of the subdivision plan. Limiting the lot to one single family home reflects Dr. Holt's current intentions and stops any private action by the other neighbors. She addressed the contention of Mr. Mitchell that the building envelope has been reduced in size. She sees it as increased as it exists today. She noted that the conditions were to be carried over, but that Note 12 was carried over, but also amended.

Patty Morris, of 26 Hannaford Cove Road said their stories are all important. They used to live in the "Cookie Jar" area of town. She said they gave up a great deal to move to have more privacy. They researched and they got as close as they could to what they wanted. Now they are facing a loss of \$40,000. They relied on the Planning Board and the covenants. She proposed mediation and would like the Board to table the application for more mediation.

Florence Pratt of 69 Hannaford Cove Road asked about the effect on beach access. If the access is conveyed to the additional 10 acres, it would have an effect on the beach.

Richard Berman of 58 Hannaford Cove Road said Hannaford Cove Road is a neighborhood street. It is a family oriented street. Lot 4 should be restricted to 1 house. This is not a collector street. There will be unintended consequences that will make life miserable for the people on Hannaford Cove Road. He doesn't mind the change as long as it's restricted. If the restriction is unacceptable, he wishes the Board would deny this.

Tana Leonhart of 48 Hannaford Cove Road said when she heard Dr. Holt's lawyer speaking she thought he said he would entertain no access restrictions on lot 4. Could you explain what that means?

Nancy Bagin of 7 Running Tide Road is to the immediate right of the right of way. She wants to know what are the restrictions on the lot behind her. Why is that access road so prominently featured?

Eileen Kalikow of 53 Hannaford Cove Road wants to talk about the quality of life they have enjoyed for the last 40 years. She would not like to be equated with "not in my backyard". There is an existing character of the neighborhood that does not allow for development or change in a large way. We are a welcoming community. She hopes to ensure that the quality will remain the same.

Carol Atleson of 7 Winding Way wants to know if there is access, or potential access from Jordan Farm Road.

Ms. Jordan said there is no access from Jordan Farm Road.

No one else came forward to speak, so the public comment period was closed.

Mr. Katz-Leavy said there cannot be further division of the Estate Lot because of the wetlands and the dead end road. He addressed the question of appurtenant rights of access to a beach area. Right now lot 4 is allowed to have 1 single family home and that family would be able to enjoy any appurtenant rights that run with the land. If the lot is further developed, and that is not being proposed, it would have to come back before the Planning Board. Those rights would carry forward unless there was an overburdening.

Ms. Falender had a question about the tote road and where the Rich property is located.

Mr. Katz-Leavy said this is a path, not a road. It is a mown path. There are a limited number of people who have private easement rights, either pedestrian access or an occasional tractor.

Ms. Falender asked if these easement rights affect the subject project. And she wants them to be identified on the plans.

Dr. Holt said the 1928 easement was to the Duffets. They granted an easement to Mr. Rich. When he sells his property he will have no further rights to that easement. There was a lengthy discussion of whether Dr. Holt has a right to that easement to go westerly to Two Lights Road. The result is that Dr. Holt has no rights to any easement

going westerly from his land, but he can reserve a private pedestrian easement to get from his property to the shore if he so chooses.

Ms. Falender asked about the possibility of adding more lots to the Wasserman property and how the dead end road standard applies.

Ms. O'Meara said that both the Wasserman lot and the Estate Lot could possibly add one more lot each by applying for a private accessway permit, which is in the Zoning Ordinance and not the Subdivision Ordinance, where the dead end road standard is located.

Then the Board and Ms. O'Meara discussed the wetlands and wetland buffers that exist on the Estate Lot and the Wasserman Lot and how those affect the possible access to another lot being added.

Mr. Mitchell then showed the plan that shows the wetlands and the 250 ft. buffer.

Mr. Katz-Leavy was asked to explain the position of "entertaining no restriction on access". He replied that in 2010 during the original proposal of the Berry Subdivision, Mr. Egan made the same request. The same concerns were addressed about traffic and future development. At the time it was stated that there was no proposed development and any such discussion was speculative and inappropriate. We continue to hold that position. If any future development is proposed, it will have to come before the Planning Board at that time, but that is not what we are seeking to do here.

Ms. Jordan addressed the building envelope on Lot 4, and said that on the original proposal it was huge, and now they have scaled it back to a much smaller size. They need to add agriculture to the permitted uses outside the building envelope to allow the vineyard.

Mr. Katz-Leavy then addressed the court case cited by Ms. Costigan and others. It concerned a house being built over a road that was shown on a subdivision plan. It said that the other lot owners have a right to use that road and you cannot build your house and block that access. This case is only about moving a lot line. It is not about the inability to change anything on a subdivision plan because all the other lot owners expect that nothing will be changed.

He once again addressed the access to the back acreage and the need for a traffic study. He said there is no road proposal now, no effect on traffic, and if there is a proposal, it would have to come to the Planning Board at that time. This exact exercise took place 5 years ago, and the Planning Board accepted that proposition.

Ms. Volent asked if there were a condition of approval, could a future Planning Board override that condition.

Ms. O'Meara said this Board has been asked many times to amend prior conditions or plans. There is very little that a future Board cannot change. The Subdivision Ordinance specifically anticipates amendments to a subdivision plan. Not all the lot owners need to agree to the changes. Requests for amendments do need to meet the right, title and interest submission requirements, so that you do not apply to change something that you do not have ownership rights in.

Ms. Falender said she strongly disagrees that we have already considered the traffic access question. We have not considered traffic in connection with the addition of a significant parcel of land that could, in the future, have access to Hannaford Cove Road. You have presented zero traffic information with respect to Hannaford Cove Road. She does not think this Planning Board can make a finding that the traffic question has been resolved.

Mr. Katz-Leavy responded by saying we can only have one single family residence as currently allowed. Any future division must come before the Planning Board. It is speculative and hypothetical and should not be at the expense of this applicant at this time.

Ms. Falender again outlined her reasoning for requiring a traffic study at this time.

Ms. Jordan then said she would poll the Board on their position on this issue.

Mr. Sahrbeck said that there is one house being proposed here and he does not see the need for a traffic study. He said he will take Dr. Holt at his word that he wants to build his retirement home here and grow his grapes. If in the future someone wishes to develop the land further, it will have to come before the Planning Board at that time.

The other Planning Board members agreed that no traffic study or restriction was needed.

Ms. Falender said that she thinks the Planning Board is in the position of approving a project that has significant development potential with only one possible access. That is Hannaford Cove Road. We are creating a situation for the Planning Board that pre-addresses the traffic problem without having the traffic information.

There was a lengthy discussion about the "tote road" and possible easements that could be granted or reserved by Dr. Holt across his land when he conveys the Estate Lot and the Wasserman Lot.

Mr. Katz-Leavy said they are comfortable with a restriction on any easement granted or reserved that is not just a way for Dr. Holt to walk or drag a canoe from Lot 4 to the shore.

The Board agreed that there be a condition that says vehicular or utility easements must come before the Planning Board.

Mr. Steinberg made the following motion:

Findings of Fact

1. William S. Holt is requesting amendments to the Berry Subdivision, located on Hannaford Cove Rd, and the Broad Cove Subdivision, located on Running Tide Rd, to amend lot lines, which requires review for compliance with Sec. 16-2-5, Amendments to Previously approved subdivisions.
2. The application is limited to merging existing subdivision lots with adjacent vacant land.
3. The application substantially complies with Sec. 16-2-5, Amendments to Previously approved subdivisions.

THEREFORE BE IT ORDERED that, based on the plans and materials submitted and the facts presented, the application of William S. Holt for amendments to the Berry Subdivision, located on Hannaford Cove Rd, and the Broad Cove Subdivision, located on Running Tide Rd, to amend lot lines be approved, subject to the following conditions:

1. That the Wasserman lot be merged with the existing lot owned by the Wassermans' located on Running Tide Rd.
2. That any easement for utilities or vehicular access granted to the Wasserman lot or Estate lot from Lot 4, as part of the division of the properties, be shown on the subdivision plan.

Mr. Sahrbeck seconded the motion and it was passed 5-1.

OTHER BUSINESS

Village Green Town Center Zoning Amendment - The Town Council has referred to the Planning Board an amendment to the Zoning Ordinance to alter the maximum front yard setback in the Town Center District when a village green is proposed, Sec. 19-10-3, Zoning Ordinance Amendment Public Hearing.

Ms. O'Meara said this item was referred by the Town Council to amend the Town Center zoning provisions if a village green is proposed. The Town Center is designed to be developed as a village. The buildings are pulled closer to the street, there is a sidewalk and landscaping, and no parking allowed between the building and the street. We not only have a minimum setback, but we have a maximum setback. According to the existing zoning, if you wanted to build a village green you would have to put it behind the buildings. The proposed change says if you want to have a village green, you do not have to meet the maximum setback. There are other requirements proposed, such as the size of the parcel and the green itself.

The Town Attorney has said the conditional municipal approval provision appears to be backdoor contract zoning. Ms. O'Meara said there is an alternative version of the proposed amendment that addresses his concerns.

Ms. Jordan opened the public hearing.

Paul Seidman of 21 Oakview Drive had a question for Ms. Volent. He asked if she believed a multiplex and village green development, including significant deforestation and destruction of RP2 wetland and/or vernal pools, is what the majority of Cape Elizabeth citizens would like to see occur?

Ms. Jordan said we are not talking about multiplex, so please focus on the village green. It is not part of any project.

Mr. Seidman wanted it on the record that at the August 4, 2015 Planning Board workshop, local developer Steve Mohr, speaking on behalf of Rhode Island developer Harry Angevine, stated the following: "we need you to endorse that ordinance."

Ms. Jordan restated that the intent is to develop an ordinance that allows for a village green, not an ordinance that allows for the development of that lot.

Stephanie Carver of 40 Stonybrook Road is the Chair of the Town Center Plan update committee. She is in favor of the ordinance. One of the goals of the plan was to create a village green that will serve as a gathering place for the community. It will encourage and support our small businesses. These small businesses have improved the way of life for many of the Town residents. We are faced with a unique opportunity. There are several parcels that could be developed, and could incorporate a village green. She enumerated the benefits of a town green and said it would be a centerpiece for our trails that we have.

Anne Carney of 21 Angell Point Road said she is concerned that this ordinance surrenders control over a village green to private businesses and private landowners.

She thinks a village green will have tremendous value to the Town if it is something the Town will control, not the private landowners. She feels the ordinance creates a lot of inconsistency. Is each parcel that is facing development going to have a village green? We've seen how the ordinance has created this nice feel, and is concerned the Town is surrendering control to the whims of private landowners. She would like this motion to be tabled.

No one else came forward, so the public hearing was closed.

Mr. Steinberg addressed the last speaker and said the proposal has design guidelines. You can't just design what you want and have it pass. It has to meet specific requirements. It will be controlled by the Town.

Mr. Sahrbeck said they want to make sure the Town has ownership.

Ms. Falender suggested that they change the drawing at the back of the ordinance to be more generic and not be reflective of a specific project. She also wants to move it to the Town Council.

Ms. Jordan said they can refer it to the Town Council with a revised drawing, and prior to it going to the Town Council, it be reviewed with the Board Chair.

There was a brief discussion on the specific points in the revised amendment.

Ms. Falender made the following motion:

BE IT ORDERED that based on the materials prepared and the information presented, the Planning Board recommends the Village Green alternative Amendment to the Town Council for consideration with the following condition:

That the illustrative drawing at the end of the Amendment be modified to show all access on Ocean House Road, and that parking areas and building areas, be clearly denoted and that the drawing be in a generic fashion not relating to any particular proposal that may have been presented.

Mr. Chalot seconded the motion and it was passed, 6-0.

Ms. Jordan opened the public comment on items not on the agenda.

Paul Seidman of 21 Oakview Drive said a lot of people wanted to be here but the open house at the high school is taking place concurrently so they were not able to be here.

The Board then voted unanimously to adjourn at 9:05 p.m.

Respectfully submitted,
Hiromi Dolliver
Minutes Secretary