

**Kingston Planning Board
November 15, 2011
Public Hearing**

Minutes

The Chairman called the meeting to order at 6:35 PM; there were no challenges to the validity of the meeting.

Members Present:

Rich Wilson, Chair	Jay Alberts
Adam Pope	Ernie Landry
Richard St. Hilaire (Alternate; joined the meeting in progress)	
Ellen Faulconer (Admin. Asst., Board Alternate)	

Members Absent: Glenn Coppelman, Mark Heitz, BOS representative.

Also present: Glenn Greenwood, Circuit Rider Planner

Groundwater Management Zone Proposal

Representatives from the US EPA, Jim Brown and David Peterson, introduced themselves and explained that Drew Hoffman from the NH DES would be joining the meeting shortly. Mr. Brown explained that the purpose of the proposed ordinance was to protect public health and prohibit the use of groundwater on the site; there were still some chemicals in the groundwater that were still above health levels and would be for years to come; because of this, there is the need to control the use of the groundwater at this Superfund Site. Due to the current clean-up levels, the EPA would be on site less and less in the future and they depended on the Town to act as the first line of defense through the adoption of this ordinance. A map was distributed showing the proposed groundwater management zone; the northeast corner of R13 already has a groundwater well in place; north of the north brook has no groundwater concerns.

Mr. Brown noted the amendments they made to the ordinance since they had met with the Board of Selectmen on October 17th; paragraph A was amended to make the wording consistent with the last paragraph; the main change was done in Section 209.2, Prohibited Uses: "shall be prohibited" was removed as this language might be too conservative and put too much of a hardship on the property owners particularly on the western side of the utility easement on lot 16; he added that, to the east, the use of groundwater should be restricted but to the west may not be as much of a concern so the language, instead of being prohibited was changed to not allow the use without prior consultation.

Mr. Alberts suggested that, due to the meeting being televised, it would be good for the EPA representatives to inform the public on the hazards that are in the groundwater. Mr. Brown said that, at much lower levels than originally found, the groundwater contained

benzene, PCB's, vinyl chloride, arsenic, lead and other contaminants that were carcinogens; there were still many chemicals that were at levels unsafe to use as drinking water.

<Board note: Mr. St. Hilaire arrived at this time.>

Mr. Alberts noted that the line for the zone was inclusive of the Country Pond Marsh and asked the EPA representatives to explain how they can reassure residents that the water in Country Pond is okay. Mr. Brown explained that they are comfortable with the results of the testing wells which show that contaminants are not leaving the proposed zone.

Drew Hoffman, from NH DES, introduced himself and explained that residential well sampling was also being used to confirm the groundwater; about a dozen private wells around the perimeter have been checked for about 10 years with no contamination shown.

Mr. Greenwood asked if this type of proposal was standard protocol as they EPA approached the end of a Superfund Site. Mr. Brown stated that it was not necessarily standard but was becoming routine to use institutional controls such as a Town Ordinance; every site has an institutional control of some type to limit or prohibit the use of groundwater at Superfund Sites; layers of control are used; sometimes easements are used. Mr. Hoffman explained that the State administers a Groundwater Management permit that can be issued to responsible parties; the State took this site by eminent domain and owns the property.

Mr. St. Hilaire said that one reason that the Town needs to adopt this ordinance is based on issues raised by the Town and residents when the contamination first came to light; the Town doesn't want everyone to "fall asleep" and forget what is in the groundwater on this site. Mr. Wilson questioned the EPA representatives about the level of activity anticipated on the site; they answered that they have previously been out there 6 to 7 times a year; they anticipate moving forward with just visits a couple of times a year at most; mostly once a year; there is no more active mitigation out there and they are waiting for the final report; it's possible they may try to enhance the natural biodegradation to accelerate the clean-up or decide to simply let "Mother Nature do her thing"; regarding future clean-up, Mr. Brown noted that it would be at least a decade before the groundwater would get to safe levels. Ms. Faulconer asked why, based on that information, the use would not be prohibited until the levels were found to be at safe levels; the EPA representatives explained that it gives the landowners the option of some activity if it could be permitted. The ownership of the affected lots were reviewed. Mr. Brown explained that Lot 16 to the east of the utility corridor is in a lot worse condition than to the west of the utility corridor.

Mr. Greenwood asked that, since this was a zoning ordinance, was there any understanding of liability on behalf of the Town; his concern that an aggrieved property owner would think of the Town as the first place an attorney would come to see. Mr. Brown explained that the EPA has no enforcement powers except through the Superfund Laws; a new property owner would need to do their due diligence for the site and nobody that understands the law would proceed without due diligence; he added that the Superfund is

not to lock-up the properties if the site is cleaned up. Mr. Peterson continued that, for liability purposes, it falls to the owners and operators of the site; the Town is the regulator so there is no liability to the Town. Ms. Faulconer asked why the ordinance would read that it requires “consultation” with the agencies, why wouldn’t it need “approval” from the agencies instead.

ACTION ITEM: Per Board consensus, change out “prior consultaion” to “prior approval” in all sections of the proposal; add “until” to the first sentence in the last paragraph after “in effect”.

MM&S to move forward to the January 3, 2011 public hearing as corrected; listed first on the agenda. (Motion by Mr. Alberts, second by Mr. St. Hilaire)

Discussion on the motion: Mr. Greenwood commented on section 209.3 questioning how the language impacts ZBA action and whether an ordinance can limit ZBA authority. Mr. Wilson wondered if an overlay zone was the appropriate type of zoning or whether it should be its own zone so people would be more aware of the restrictions. Questions were raised regarding any possible issues with spot zoning; Mr. Greenwood thought these were specific conditions for the lots keeping this proposal from being considered spot zoning. Mr. Brown said that the boundary for the zone could be defined as the brook on Lot 16; they would work with the Board on any required changes suggested by the attorney.

ACTION ITEM: Send the proposed ordinance to Attorney Loughlin for review; including questions regarding ZBA limitations; overlay zone versus its own zone; spot zoning.

Vote on the Motion: Passed Unanimously

Board Business

Stanley Shallette asked Mr. Wilson if the Board would be discussing the possible purchase of the Alberts property. Mr. Wilson explained that was a topic for the subcommittee which would be meeting on December 6th at 6:00.

Mr. Wilson read the Sad Café’s notification that they were withdrawing their application and the request for the release of their bond.

ACTION ITEM: Ms. Faulconer to confirm that all pending bills for the Sad Café application have been submitted; then notify the Financial Officer to release the funds.

Correspondence:

- Lepage auto license application received; approved by the Board to be forwarded to the Board of Selectmen

- Wholesale Dealer license application received from 62 Marshall Road; the applicant had been told to send a letter to inform the Planning Board about the intended use of the property which had not yet been received.

ACTION ITEM: Ms. Faulconer to send a letter to the applicant explaining that the Board needs further information.

- Report received from Town Engineer re: the new Lepage auto site which is progressing satisfactorily; Mr. Wilson gave an update of the property per passing visual inspection.
- Letter from Cars “r” Us asking for a 3 week extension to have the site come into compliance due to delays caused by Unitil; the Board agreed to the request.

ACTION ITEM: Ms. Faulconer to send letter to Cars “r” Us regarding the granting of the extension.

- Letter from DES received regarding topics available on preservation of water which the Board can review at another meeting.
- Governor’s executive order regarding water guidelines on preserving water.

ACTION ITEM: Copy executive order; distribute to Board members.

- Legal correspondence received regarding Diamond Oaks; to be reviewed at end of meeting as it was a legal question.

MM&S to accept the October 18, 2011 minutes as written. (Motion by Mr. Landry, second by Mr. Alberts) **Motion passed 4-0-1 with Mr. St. Hilaire abstaining.**

Plan Review

Mr. Geoffrey had submitted his plan for expedited site review; Mr. Wilson noted that the required pavement painting was done and the dumpster had been moved; the Board of Selectmen had granted the 90 day extension of the RV being on the property; it wouldn’t be shown on the plan since it was a temporary item.

ACTION ITEM: Add Mr. Geoffrey’s expedited site plan to the next agenda; contact him to come for that meeting in case the Board had any questions.

Board Business, continued:

Mr. Alberts wondered if it was necessary for the EPA representatives to attend the January 3rd public hearing; Mr. Wilson thought it might be a good idea in case there were any questions from the public that the Board couldn’t answer; Mr. Greenwood added that if there were any liability issues it would be good to have them at the meeting to answer those questions. Questions were raised concerning the cost of the clean-up.

ACTION ITEM: The Board confirmed that any ordinances that the Board had already approved to go forward to Town meeting could now be posted.

Solar Hills Subdivision

Mr. Wilson stated that he had a question for the Board to answer before proceeding with the discussion; he noted that the purposed of the 8 lot requirement was to create tax dollars; the proposed road does not have 8 new lots. Mr. Lavalley read the ordinance; he added that the plan is to continue past the cul-de-sac area to continue to the Conant property. Mr. Wilson reminded the applicant that the property has the room to create the 8 lots which is what the Board said they wanted done at the last hearing; he did not believe that the road services 8 new lots. The applicant said that he sees the plan as servicing 8 lots; it is not financially viable at this time to do the 8 lots. Mr. Lavalley said that he didn't understand the Board's reluctance to phase the development. Mr. Wilson explained that it is the Board's decision based on the ordinances and what is in the Town's best interest; the applicant's financial concerns are not the Board's concerns; he stated that the Board made this point at the last meeting. Mr. Lavalley agreed that it is the Board's choice to end the road where they want to; he suggested the possibility of going to the ZBA. Mr. Greenwood corrected Mr. Lavalley by reminding him that this was an interpretation of a regulation which does not go to the ZBA for relief; it goes to Superior Court. Mr. Wilson said that he was only one person on the Board; his interpretation is that the front two lots were existing lots and did not count toward the 8 lot subdivision requirement. Mr. Pellegrino stated that the housing market is worse; requiring the additional lots puts his project in jeopardy; he needs to put the project in two phases. Mr. Wilson asked Mr. Greenwood what could the Board do if Mr. Conant never developed the adjacent property and the other two lots weren't developed; Mr. Greenwood answered that the Board would have no recourse. Mr. Wilson continued that the Board had to look at the proposal from the Town's interest. Mr. Pellegrino said that his interpretation was that the road serviced 8 lots; he added that they had been here for a year with this proposal. Mr. Wilson stated that this was the fourth plan that the Board had received. Ms. Faulconer stated that, based on a statement made at the last hearing, she had reviewed this application: there had been a preliminary design review in April; an application was received in May for the June hearing but since it was received incomplete it was not able to be put on the agenda until July; that hearing was continued to August; the applicant asked that the August hearing be postponed until September; she added that she wanted it clarified for the public that it had not been a year; this was the fourth meeting with the applicant and the fourth plan. Mr. Lavalley stated that he has not been upset with the Board's handling of the progress of the application; he wanted the Board's permission to speak with Dennis Quintal directly about the issues he had raised in his review of the plan.

Mr. Wilson noted for the record that both Mr. St. Hilaire and Ms. Faulconer would be voting members for tonight's hearing.

Mr. Alberts questioned the possibility of having a legal interpretation of the ordinance. Mr. Pope reviewed the past discussions of the application beginning with a proposed road with 8 lots that wasn't long enough for more than 6 legal lots; it is do-able to have the road

service 8 lots and then the Town can recover the taxes for the road length. Mr. Lavalley stated that he understood that the Board directed them to make 8 lots; it seemed to make sense to move the two driveways. Mr. Wilson agreed with moving the driveways onto the new road; he added that Mr. Lavalley was interpreting the ordinance one way; he was interpreting it differently. The possible temporary nature of the cul-de-sac was reviewed.

Mr. St. Hilaire explained that one of the reasons that he agreed to the waiver for the reduced cul-de-sac radius was due to the wetland issues on the site; he added that the cul-de-sac could be permanent forever; regarding the 6 lot issues, he agreed that the intent was for 8 new lots but by the reading of the ordinance, he thinks a judge will agree that it is not necessarily 8 new lots. Ms. Faulconer stated that Mr. Lavalley was reading language out of context; the regulation being read is specific to subdivisions and subdivisions create new lots; she added that the regulation says that the Board can deny if too many town funds would be expended; she also questioned that 25 feet of the property is not actually on the road, it is off of an easement adjacent to the road.

Mr. Pope reviewed the ordinance that had been referenced by Mr. Lavalley regarding requirements and future connections; he confirmed his interpretation that if there were phases; the six lots would be Phase I and Phase II would tie into another road; this continuance would be a further extension of the road but would not be a future connection as required in the regulation. Mr. Pope asked for examples of a future connection. Mr. Greenwood referred to Morning Dove and Kinneret which was an existing subdivision that was close to the property line of a proposed subdivision and the Board forced the connection; this was the explanation of the difference going on with the terminology and the difference between a future connection and a future extension. Mr. St. Hilaire also referenced Chet Bearse's subdivision that extended to a future connection. Mr. Landry noted that Mr. Pope's point resonated with him; the plan does not appear to have a future connection. Mr. Landry suggested that when doing an 8 lot subdivision, there is usually one lot that isn't new. Mr. Wilson stated that in the subdivision that he lives in, there were 10 lots and the originals did not count toward the subdivision. Mr. St. Hilaire added that it had been on an existing Class VI road that had been upgraded to Class V. Mr. Alberts said that he appreciated Mr. St. Hilaire's comments on a judge's interpretation that they may have satisfied the criteria and it was coming down to semantics and interpretation but he thinks they meet the requirements. Mr. Wilson reminded the Board that an approval could have the abutters also taking the Board to court; Mr. Pope added that possibility included the Board granting the waiver to the 1,000 ft. requirement.

Mr. Greenwood said that he did not have the wetland report back from RCCD. Mr. Lavalley asked to take a break to speak with his client. The Board questioned the possibility of the road remaining private until the project was continued to include the 8 lots; Ms. Faulconer questioned getting driveway permits on a road that was not a Class V road.

Mr. Lavalley returned and announced that Mr. Pellegrino agreed to maintain the road until it was accepted by the Town. Mr. St. Hilaire stated that the Town needs to proceed under some sort of assumption that it will be a Class V road; Mr. Greenwood said the Town can make that assumption because the road is bonded so the Town can continue it if necessary.

Mr. Wilson added that it is the Bond that guarantees that it will eventually be able to be a Class V road. Tim Lavalley argued against the logic of the Town requiring the extension of the road to accommodate 8 lots and the inability to always have 200 ft. of frontage on a nice, flat road; Mr. Wilson said that sometimes people try to develop land that isn't able to be developed. Mr. Lavalley said that Mr. Pellegrino is trying to work with the Town until the road is continued and constructed; he could bond for the entire length. Mr. Wilson suggested bonding for the building of the entire road within a specific timeframe. Mr. Lavalley agreed that this would be okay; Tim Lavalley argued that it would not be okay, he needed to look out for Mr. Pellegrino. Mr. Greenwood stated that it seemed silly that a developer would bond the full extent of a road when he was not willing to show the design of the entire road. Mr. Wilson explained that Mr. Pellegrino did not want to build the entire road; Mr. Pope said that the Board would want to see the entire road shown on the plan. Tim Lavalley said that this didn't work; there was a discussion regarding the number of lots a Town would require or expect to be proposed. Mr. Alberts noted that the Board could not do whatever it wants; there are regulations and ordinances that needed to be followed.

Mr. Greenwood said that the Board would not be creating anything unusual by phasing the road; it is a process that could be done in subdivision review. Possible phasing, timeframes, cul-de-sac requirements were discussed. Mr. Wilson suggested allowing a hammerhead for 4 years and then requiring the cul-de-sac; the cul-de-sac needed to be shown on the plan so the Town could make the decision to put in the cul-de-sac if necessary; the plan needed to show the turn-around and the cul-de-sac and the ROW easements for the cul-de-sac and the future road; the bond. Mr. St. Hilaire said that this would need to be reviewed yearly to address construction cost increases as they may occur. Mr. Alberts and Mr. Landry thought they would be okay with that; Ms. Faulconer said she would like to see the plan first before letting the applicant think there was some sort of implied approval and to make sure that the other two lots would be viable, buildable lots.

Mr. Wilson confirmed that the Board did not keep anyone from working with Dennis Quintal.

Mr. Wilson addressed another issue, this one regarding elevations between the cul-de-sac and the first big curve; there is a 7% pitch as it is going into the sharp curve which may require a guard rail on the curve. Mr. St. Hilaire agreed that the 7% grade needed to be altered; he added that there were two other notes on the plan that needed to be added: Note #10 regarding the pre-construction meeting requirements held on site prior to construction with Town representatives and note #11 stating that all permits, including AoT, Stormwater, etc., had to be "in hand" prior to the pre-construction meeting.

Mr. Wilson opened the hearing for public comment. Dan Bartley of 72 Hunt Road asked for the Board to explain the purpose of the 8 lot minimum requirement. Mr. Wilson answered that it justified the expense to the Town for services and brought in taxes for them. Mr. Bartley read section 905.4 B regarding scattered and premature development and excessive expenditure of public funds; he asked that the Board deem the subdivision premature due to the excessive expenditure of public funds. Mr. Wilson said that the

developer will maintain the road for two years. Mr. Pope added that this meant that the Town will be maintaining the road and expending Town funds based on 6 lots, instead of 8, for two years. Mr. Wilson agreed that the worse case did have the Town expending additional funds for two years. Mr. Bartley stated that the possibility was that the Town would wind up with a road with 6 lots. Mr. Wilson explained that if the owner builds two lots and then goes bankrupt, the Town would take the bond to finish the road and the Bank could then sell off the 8 lots. Tim Lavalley said that they would have a plan with 8 lots.

MM&S to continue to December 13th at 6:45 on condition that the new plan is submitted by 1:00 on December 5th. (Motion by Mr. Alberts, second by Mr. Pope) Discussion on the motion: the next plan needs to show 8 new lots, phasing of the road; the hammerhead; the 1st cul-de-sac and easements and the 2nd cul-de-sac and easements; they will need to submit a waiver for the request of the 1,000 ft. road length. **PUNA**

Mr. Wilson reminded the Board that they needed to discuss a legal matter.

Motion to adjourn the public hearing portion of the meeting prior to going into non-public session to discuss a legal question. (Motion by Mr. Alberts, second by Mr. Pope) **PUNA**

MM&S to go into non-public session to discuss a legal issue. (Motion by Mr. St. Hilaire, second by Mr. Pope) The Board was polled: Mr. St. Hilaire, aye; Mr. Pope, aye; Mr. Alberts, aye; Mr. Wilson, aye; Mr. Landry, aye; Ms. Faulconer, aye. **PUNA**

The Board discussed questions raised by Attorney Loughlin and requests received by the owner of Diamond Oaks golf course including restructuring of condo. docs, request to register plans prior to conditions of approval being met; request to meet with the Board.

MM&S to come out of non-public session. (Motion by Mr. Alberts, second by Mr. Landry) The Board was polled: Mr. St. Hilaire, aye; Mr. Pope, aye; Mr. Alberts, aye; Mr. Wilson, aye; Mr. Landry, aye; Ms. Faulconer, aye. **PUNA**

MM&S that the Planning Board will not meet with the owner of Diamond Oaks or their representative(s) outside of the public hearing process to discuss amendments to the original approval; any discussion would require a submittal and following the public hearing notification process. (Motion by Mr. Alberts, second by Mr. St. Hilaire) **PUNA**

MM&S to adjourn at 9:00. (Motion by Mr. St. Hilaire, second by Mr. Alberts) **PUNA**