



## **BERWICK PLANNING BOARD**

Municipal Meeting Room, Town Hall, 11 Sullivan Square, Berwick, Maine 03901

### **November 1, 2012 Meeting Minutes**

#### **I. CALL TO ORDER – 6:30 P.M., Chair Kerry Ashburn**

**A. Pledge of Allegiance**

**B. Introductions / Roll Call**

*Regular Board Members Present:*

Kerry Ashburn; Peter Perri; Judy Burgess; Paul Boisvert

*Regular Board Member(s) Absent:*

Ron Morrell

*Alternate Members Present:*

Ken Poirier; Niles Schore

*Staff Members Present:*

Patrick Venne, Town Planner & Land Use Counsel; Joe Rouselle, Code Enforcement Office; Joan Michaud, Former Planning Coordinator/Staff Consultant

#### **II. APPROVAL OF MINUTES**

**October 18, 2012 Minutes**

The Board made no changes to the 10/18/12 minutes as presented by staff.

Mr. Perri moved to accept the minutes as written; Mr. Boisvert seconded the motion.

**VOTED: 4-0 to approve, Morrell absent.**

#### **III. REGULAR BUSINESS:**

**A. Public Hearing:**

**a. Project:** Rental Unit Consolidation

**b. Location:** 11 Berwick Road, Map R-47, Lot 31, R1 Zone

**c. Applicant/Representative:** Shawn Fahy on behalf of Lamb Pond, LLC

**d. Application:** Conditional Use

Applicant's Presentation: Chair Ashburn turned the proceeding over to Applicant Lamb Pond, LLC, represented by Mr. Shawn Fahy, who explained intent to consolidate a pre-existing seven (7) unit residential rental structure consisting of all one (1) bedroom units into a four (4) unit rental building. Mr. Fahy explained this would enable larger units and at the same time permit additional subdivision of the parcel for three (3) house lots located to the rear of the property at a later date.

Noting no members of the public present, Chair Ashburn opened the item up to the Board for discussion.

Board Discussion: Alternate member Niles Schore asked a clarifying question regarding the number of bedrooms which would result from the consolidation. Mr. Fahy confirmed the resulting structural arrangement would house two (2) two (2) bedroom units, and two (2) one (1) bedroom units. Mr. Fahy further clarified that no contemplation of potential house size in terms of bedroom counts had occurred at this point for the three subdivided lots envisioned, because he merely intends to sell any lots approved for later subdivision rather than build upon them as Lamb Pond or personally. Chair Ashburn confirmed Mr. Fahy merely intended to subdivide the land at a later date for individual lot sale, not construction. Mr. Fahy again confirmed this.

Paul Boisvert inquired about the access road along the existing structure (Hickory Lane), which would serve any potential subdivision lots at a later date. Mr. Fahy confirmed there is at present no water or sewer serving Hickory Lane, and further confirmed his understanding that before any subdivision could occur as presently envisioned the access road would need to conform to Town road acceptance standards.

Judy Burgess asked the Applicant whether he understood that this hearing was relatedly solely to consolidation of the rental unit structure and that later subdivision approval would be necessary before any of the additional development plans are able to proceed as envisioned. Mr. Fahy confirmed this as his understanding. Ms. Burgess stated that the purpose of the hearing was to document a reduction of the units in the property file.

Peter Perri asked the Applicant whether any modifications had been made to the application from the time the Board first reviewed it as a workshop item. Mr. Fahy stated there had been no modification of the application materials submitted.

Mr. Boisvert asked what would occur if the Board approves the consolidation plan and development plans do not proceed as envisioned. He wondered whether in such case the Applicant could simply pull the plan and support this move by affidavit in order to go back to seven (7) units as an approved use, or whether instead a new application would be necessary.

Code Enforcement Officer (CEO) Joe Rouselle answered the question by noting that the applicant had a certain amount of time to commence construction after being approved and permitted, and thereafter a certain amount of time to substantially complete such construction otherwise by default the approval and

permit would be void and the structure would return to a seven (7) unit building. Mr. Boisvert indicated the reason he asked the question is because this situation is atypical, and CEO Rouselle agreed. CEO Rouselle clarified that the only reason he sent the consolidation application to the Planning Board as a conditional use despite the fact that the request is for a reduction in units is because of the Applicant's longer-term subdivision plans. CEO Rouselle wanted to create a paper trail so if at some point in the future the rear of the subject property is subdivided abutters know how the process unfolded and understand how such a development is possible. Technically, according to CEO Rouselle, multi-family structures are listed as a conditional use in Berwick's Land Use Ordinance (LUO). Since the LUO lists multi-family as a conditional use subject to Planning Board review, CEO Rouselle took advantage of this technical interpretation to create a paper trail for public notice benefit.

CEO Rouselle also clarified that in this case there is no need for an occupancy permit until each new consolidated unit is created, and moreover clarified that once the Planning Board approves the consolidation the additional units do not become illegally non-conforming. CEO Rouselle indicated the project meets dimensional requirements and simply wants to consolidate rental units to free up land for later subdivision at a later date.

Mr. Perri asked whether the Applicant would have to come back to the Planning Board for conditional use review in the future if it completed the instant project, and later desired to turn the building back into a higher density residential structure. CEO Rouselle confirmed this would be the case.

Ms. Burgess asked whether anything done in the building after a conditional use is granted for this consolidation would have to come back to the Planning Board for amendment to the conditional use. CEO Rouselle said this is correct, and confirmed that, at present, there is *no* conditional use approval for this property because it is unnecessary given that the structure and density predate the LUO and are therefore legally non-conforming, i.e., "grandfathered." Ms. Burgess indicated that this consolidation would change that, and make this a conditional use, meaning future changes would have to be an amendment to that conditional use approval, and require Planning Board approval. CEO Rouselle confirmed.

Mr. Perri asked CEO Rouselle to clarify whether there were any parking requirements or any other conditions in place at the moment given that the existing structure was never permitted under conditional use review. He asked whether the Planning Board would now need to specify such things or whether they would apply automatically. CEO Rouselle confirmed the conditions related to parking etc. would apply automatically and did not require affirmative action by the Planning Board.

Mr. Boisvert said that it was not an issue if parking spaces were lost if or when Hickory Lane has to be widened and brought up to Town standards because there would be fewer units in need of parking.

Ms. Burgess asked whether in light of that whether the findings of fact would reflect what the *required* parking is, whatever it may be, and that in the conditions

there be enough set aside for the number of units contemplated. CEO Rouselle confirmed this could be done.

Chair Ashburn asked whether the Planning Board had any remaining questions and, seeing none, indicated that with no members of the public present the public hearing would be closed. She further indicated no site walk was necessary because the modifications were all internal and no changes to the footprint were contemplated. Chair Ashburn requested a motion regarding the modification contemplated by this conditional use application.

**MOTION:**

On the basis of the application, plans, and presentation by the Applicant, and recommendations of staff relevant to the standards for conditional use approval, as will be detailed in subsequent adoption of formal findings of fact and conclusions of law, and further noting no public comment or testimony, Board Member Judy Burgess moved: *to approve the conditional use for Lamb Pond LLC to reduce the number of apartments from seven (7) to four (4): two 2-bedroom and two 1-bedroom, according to the conditions set forth in the conditional use letter.*

Paul Boisvert seconded the motion.

Chair Ashburn noted that in light of the absence of regular member Ron Morrell she would and did appoint Niles Schore to the Board.

**VOTED: 5-0 to approve**  
Motion passed unanimously.

In Favor: Peter Perri; Judy Burgess, Kerry Ashburn, Paul Boisvert, Niles Schore

Opposed: None

Abstain: None

Absent: Ron Morrell

**IV. NEW BUSINESS:**

**A. Preliminary Workshop:**

- a. **Project:** Addition of three (3) antennae and associated equipment to existing telecommunications facility
- b. **Location:** 19 Little Harbor Road, Map R-36, Lot 46-A, R1 Zone
- c. **Applicant/Representative:** New Cingular Wireless d/b/a AT&T as represented by Kristen Smith on behalf of Tilson Technology Management, sub-agent of NexLink Global Services, agent of AT&T
- d. **Application:** Conditional Use

Applicant's Presentation:

Kristen Smith on behalf of AT&T introduced herself and her status as agent for AT&T. She indicated AT&T is presently located on the tower situated at the site in question, with equipment already functioning, including equipment shelter at the compound as shown in the application. Ms. Smith proposed addition of three (3) LTE antennae to the existing tower, as well as a 19" rack with technical equipment for electrical backup of the antennae.

Ms. Smith indicated the RRUS11 data sheet filed with the application displays what the cabinet unit will look like. No square footage would be added to the compound because AT&T proposes to go into the existing shelter already in operation. The antennae would be added to the same locations on the tower now occupied. This concluded the Applicant's presentation.

Board Discussion:

Judy Burgess asked whether there was an original permit on file for the Tower. The Applicant indicated the Tower itself is permitted as well as the original antennae of AT&T. Ms. Burgess clarified for the public that this is not a public hearing and thanked the Applicant for her patience.

Ms. Smith continued by stating that included in the application is an MPE study, which stands for "maximum permissible emissions." This study occurred by engineers out of Salem, NH, and shows emissions from the tower as proposed will be far below what FCC guidelines allow. The Planning Board's attention was called to photo simulations as well.

Ms. Burgess asked about the lessor-lessee status of the property. Ms. Smith indicated that her company leases from American Tower Company, which in turn leases from the property owner in the form of a ground lease.

Ms. Ashburn clarified that no new structures were contemplated, and that only new antennae were contemplated. Ms. Smith confirmed. Mr. Boisvert asked for clarification of his understanding that this proposal would increase microwave output, but within limits. Ms. Smith confirmed this understanding, indicating further that in general the output is considerably lower than what is permissible.

Ms. Smith called the Planning Board's attention to subheading number six (#6) on page seven (7) of the MPE Report contained in the application packet. She noted FCC's "Bulletin 65" in that section contains the industry standard for emissions as outlined in most ordinances. The MPE report indicates that at ground level the emissions from the modifications proposed would still be just over 2% of the permissible limit, which leaves room for later expansion of technical devices.

Mr. Boisvert asked for reassurance that the technical details would be discussed in more depth at a public hearing, stating his concern that at ground level beneath the Tower there is no "tilt" from the point of emission which might skew the measurements. Ms. Smith confirmed that the measurements were taken with people on the ground in mind, not tower climbers.

Ms. Burgess stated that she believed the standard "fall zone" for a cell tower to be around 125% of a tower's height to protect abutting land owners and asked the Applicant for

clarification. Ms. Smith stated she has never heard of a tower collapsing, although she has heard of a few antennae falling in other cases.

Noting no further questions from the Planning Board, Ms. Ashburn summarized the Board's next steps, indicating from here a site walk and public hearing would typically be scheduled. In light of the miniscule nature of the physical changes contemplated, Ms. Ashburn asked the Planning Board whether it believed a site walk was necessary. Further discussion on the physical attributes of the tower ensued. Ms. Smith brought the Board's attention to material contained within the application materials related to antennae specifications and where each antenna would be placed on the Tower.

Ms. Ashburn stated a public hearing would be scheduled for two weeks from this meeting and again asked the Board whether a site walk was desired. Ms. Burgess indicated she did not think a site walk was necessary. Mr. Perris asked how long the Tower has existed. Ms. Burgess recalled it has been in existence since the 1990s. Mr. Boisvert asked Ms. Smith how controversial towers usually are. Ms. Smith indicated the controversial nature of cell towers has declined considerably from the 1990s. Ms. Ashburn re-emphasized that the changes contemplated were miniscule in nature. Ms. Smith indicated the primary reason for swapping equipment out relates to changing cell phone and mobile device usage patterns. Today people watch movies instead of simply making calls.

Ms. Burgess inquired from CEO Rouselle whether the height limit before a Tower must be lighted is still 200' as she recalled it once was. CEO Rouselle indicated it depends on whether the Tower is subject to FAA regulations, which is dependent on location.

Ms. Smith inquired about the process for notifying abutters. Town Planner Patrick Venne indicated staff would take care of the abutter notifications.

Ms. Smith asked the Board if it had enough color images and whether she should bring any additional information related to the plans to a public hearing. Ms. Burgess said the Board did not. Mr. Venne requested larger color copies from the Applicant for public viewing if any interested parties request to review the Applicant's proposal. Ms. Smith indicated she would send these to the Town.

Alternate Board Member Ken Porrier asked a question about Radio Frequency Energy (RFE). He inquired how often the energy is measured. Ms. Smith indicated she only measures the emission of her company on a regular basis, because she is only required to monitor the emissions of her particular antennae as she has done in the MPE report submitted to the Board, but not the aggregate emissions of the Tower. She indicated the Tower owner would not need to measure the aggregate emissions either, unless required by local ordinance. Ms. Porrier stated he was concerned because of cancer possibilities for those who live near the Tower. Ms. Smith indicated that the concern related to RFE was such a big one that the Telecommunications Act of 1996 answered it across the board, regulating at the federal level such that towers cannot be approved or denied on the basis of RFE alone; rather, the decision must relate to and be founded upon the requirements of a local ordinance and other characteristics of a particular tower application. For this reason, Ms. Smith indicated her company filed on those bases, but gave the MPE report anyway to assure the public that emissions from her particular antennae will be exceptionally low.

A public hearing was scheduled for November 15, 2012. This concluded the Board's discussion

V. OTHER:

A. Land Use Ordinance Review Discussion

a. Subjects for Review

The Board discussed which items on a tentative draft of review subjects should remain for discussion. Ms. Burgess read through the list.

Building Code:

Ms. Burgess discussed the Building Code. Town Planner Venne and CEO Rouselle confirmed that Maine towns are subject to the Maine Uniform Building & Energy Code (MUBEC), which is uniform and not variable from town to town. MUBEC applies in Berwick January 1, 2013 according to CEO Rouselle because Berwick had no building code until recently, which triggered an extension under the State law for date of application. Mr. Perri stated a concern that the language in the LUO which references a prior building code should be taken out because of inconsistency.

Electrical Code:

CEO Rouselle said that electrical inspections do not get conducted by him, because he is not certified. He indicated that towns don't have to enforce electrical permit electrical work unless the ordinance says otherwise. CEO Rouselle said a homeowner may conduct their own electrical work, but above a duplex it must be by a licensed electrician. CEO Rouselle said that by ordinance the Town could require if it deemed appropriate that even homeowners get inspected by a third party inspector (TPI) at their expense.

Signage:

Ms. Burgess indicated that the LUO would have to be changed to limit or further control signs because at present it expressly states that information signs are exempt.

Residential Growth Section:

Ms. Burgess believed this should be a separate meeting in and of itself.

Private Project Funding: Escrows:

Ms. Burgess indicated a lack of understanding as to why this subject was listed, and the Board had no input.

Street lighting:

Ms. Burgess asked what the issue with this is. Staff consultant Joan Michaud and CEO Rouselle indicated the lack of standards in the LUO with respect to street lights has made it difficult in some cases to maintain such lights in subdivisions when they need to be replaced or updated. Currently, there is a lacking performance standard for street lights. Ms. Ashburn said the Board could add this to subdivision standards.

#### Timeframe for Performance Guarantees:

Ms. Burgess indicated the Board typically requires performance guarantees at the conclusion of subdivision approval but before construction, and the Board may wish to discuss requiring such guarantees earlier, before approval. Ms. Burgess indicated this discussion relates to Section 13.1 of the Subdivision Regulations. The Board determined that it should at this point stick to the LUO and leave subdivision matters for a later discussion.

#### Consistency of Residential Dimensional Requirements

Consistency here refers to across different zones, throughout the ordinance.

#### Kennels' Definition

The definition update is ambiguous.

#### Owner Occupied Definition:

This language may need to be updated as well, because some board members felt that it should be redefined to mean "attached." Ms. Burgess stated concerns about the looks of properties which house in-laws or college student renters and how that relates to the purpose of the LUO provision as originally written. No further discussion on this point transpired at this time.

#### Mass Gatherings

The Board agreed this issue had been addressed and agreed it required no further discussion at this time.

#### Landscaping & Lighting Requirements:

This was a citizen suggestion. Ms. Burgess believes this is more related to subdivision review, and the Board stated no opposition to this conclusion. No further discussion occurred.

#### Enumerated Uses:

The LUO states that any use not listed is prohibited, and this creates some practical difficulties. Town Planner Venne asked a clarifying question about the nature of the concern related to enumerated land uses and confirmed the concern related to unintentionally excluding similar uses on the one hand, or running the risk of permitting anything and everything on the other. This is a problem the Board has run into before, with Kennel applications for example, Ms. Burgess and Ms. Ashburn indicated. The intent of the discussion is to determine whether the LUO should be amended to prevent applicants from misunderstanding what is and is not permitted in Town for various land uses.

#### Air Emissions & Noise Levels

The Board discussed concerns related to the subjectivity of the air emissions ordinance language and the potential for lessening the protection of abutting landowners. A discussion unfolded with respect to noise levels as well. Points of discussion related to whether in mixed use districts the residential standards for noise should apply or industrial limits, as well as whether any ordinance language stricter than EPA/DEP Clean Air Act regulations should be pursued locally, as well as whether "detrimental to use or enjoyment of property" is too subjective to

enforce.

### Information Signs

Ms. Burgess spoke to the fact that regulations pertaining to signs apply everywhere, not just to certain types of signs. Ms. Burgess asked whether the First Amendment allowed someone to put up any sign they wanted or whether it merely pertained to free speech. Mr. Schore said it did not allow *any* sign, but that indeed the First Amendment *does* apply to “signs.” Ms. Burgess asked whether a town could regulate the location of signs. CEO Rouselle said that state statute speaks to signs that are exempted from town review because the State maintains the informational signs. Ms. Burgess was concerned that “informational sign” is broad. The Town’s land use counsel Venne spoke to the State billboard law and the origins of way finding sign laws. Mr. Venne further spoke to the restriction of free speech based on reasonable “time place and manner” grounds if “content neutral.” Mr. Venne briefly touched on the nature of speech regulated and the location of speech regulated and informed the Board of a recent challenge to Lewiston’s political sign ordinance, which is at present not being enforced on advice of counsel.

### Public Comment

An unidentified member of the public offered her thoughts related to signs placed on her “adopt a spot.”

Ms. Burgess indicated the sign discussion was likely a larger one which would require much more discussion to determine how it should be incorporated into the LUO, if at all.

CEO Rouselle recommended looking at the City of Dover, NH for an example of a sign ordinance.

Mr. Perri discussed concerns with the practicality of enforcing a sign ordinance. The Discussion did not conclude, but moved on.

### Increased Student Enrollment

Ms. Burgess indicated this was something that stems from public comment, and she and others did not think this should be addressed at this meeting. Peter Perri said this is an issue bigger than one the Board should look at, as it entails policy decisions related to growth control. He thought the role of the Board should be limited to merely recommending some thoughts for later policy/legislative consideration.

Ms. Burgess discussed comprehensive planning and the most recent update, which resulted in the ‘residential growth’ section of the current LUO. Ms. Burgess indicated that the intent behind the LUO as updated on the basis of residential growth considerations was for centralized growth, with higher density downtown. Growth caps are responsible for discontinued growth in the R3 District, Ms. Burgess stated. Whether growth caps should be extended elsewhere, she said, is probably a larger issue.

This concluded the discussion of items to include review.

## B. Next Steps:

### a. Approach:

The Board indicated a desire to chip away at the ordinance update and tackle some easier issues first.

Ms. Burgess indicated that it wouldn't make sense to handle a major LUO update if an update to the Comprehensive Plan is in order, because following such an update the LUO may need to be modified again.

Town Planner Venne discussed consistency requirements as relate to land use ordinances based upon comprehensive plans, and what that means for drafting a defensible ordinance.

### Impact Fees

Mr. Schore re-opened the consideration of discussion items and inquired of Town Planner Venne whether he was familiar with impact fees. Mr. Venne indicated he was familiar and spoke to the 'essential nexus' and 'rough proportionality' of impact fees required by federal case law, and used the Portland, Maine example of a 'fee in lieu' of parking ordinance to illustrate what those requirements might mean. Ms. Burgess said school impact fees are usually strayed away from in SAD districts, whereas in sewer or water districts an impact fee is more common. Ms. Burgess also indicated the Board's role here would be recommendatory and the Board of Selectmen would have to get involved. Mr. Schore suggested this be added to the list of the things to be discussed.

### Growth Cap

Peter Perri thought a loophole existed in the growth cap to the extent that the growth ordinance is based on "permits" and multi-family structures with multiple "units" only require one permit for the *structure*, meaning the intent of the ordinance may be circumvented. The growth cap applies in rural areas, however, whereas multi-families exist in the area of town where growth has been directed, the downtown.

### Subdivision and Site Plan

Mr. Perri also inquired about whether a particular parcel could circumvent subdivision review if it was a piece of property big enough to accommodate several units or houses without dividing the property. Legal counsel Venne, Board member Burgess, and CEO Rouselle clarified that subdivision law applies on the basis of units, not only actual division of land via property line adjustment.

Ms. Burgess stated that subdivision proposals could be reviewed under *either* site plan or subdivision review. Land use counsel Venne clarified that State law controlled subdivision review, which it also *requires*. Mr. Venne explained that subdivision regulations may be promulgated locally but are

defined with minimum review considerations by State law which trumps local definition. The Statutory language was read to the Board inclusive of punctuation.

Ms. Burgess clarified that multi-families may be reviewed under either site plan or subdivision review because site plan review includes the standards referenced in site plan review, but further noted that where division of *land* as opposed to division of a structure occurs, it is always reviewed under local subdivision regulations.

Mr. Boisvert indicated the local ordinance conforms to the State's definition of subdivision. Ms. Burgess stated that the site plan review includes in its performance standards and review criteria the same standards of review contained in State subdivision law.

## VI. ADJOURNMENT

Mr. Boisvert moved to adjourn. On a second by Peter Perri the Board voted unanimously to adjourn at 9:08 p.m.

Minutes prepared by Planning Director & Land Use Counsel Patrick Venne for consideration at its November 15, 2012 meeting

Signed as Amended & Approved November 15, 2012:

  
Kerry Ashburn,  
Chair, Berwick Planning Board

11-22-12  
Date