

PLANNING BOARD
Minutes of January 7, 2009
Approved March 3, 2009

MEMBERS PRESENT: Tom Vannatta, Chair; Barbara Freeman, Vice-Chair; Jim Powell, Ex-Officio; Bill Weiler; Ron William; Ken McWilliams, Advisor.

Mr. Vannatta called the meeting to order at 7:05 p.m. and opened the meeting to a public hearing on the Planning Board's proposed 2009 amendments to the Zoning Ordinance as noticed:

Notice is hereby given that the Newbury Planning Board will conduct a public hearing on Wednesday, January 7, 2009 at 7:00 p.m. in the Newbury Town Office Building, Route 103, Newbury, NH to receive public input on Amendments to the Newbury Zoning Ordinance proposed by the Planning Board...

Planning Board Proposed Amendment No. 1:

The Planning Board's Amendment No. 1 to the Zoning Ordinance proposes to add a new ARTICLE XXII (Small Wind Energy Systems Ordinance) in response to new state legislation that encourages small wind energy systems and requires that ordinances adopted by Towns to regulate the installation and operation of small wind energy systems shall not unreasonably limit such installations or unreasonable hinder the performance of such installations.

Mr. Vannatta opened the hearing to the public for discussion on Amendment No.1.

Linda Powell suggested some minor editorial corrections and suggested that reference to an applicant receiving approval from the Code Enforcement Officer should be changed to an applicant receiving approval from the Board of Selectmen or their designee, such as in proposed Article 22.1.1.

Dick Wright stated that he had several questions. He asked for clarification regarding enforcement of the proposed regulation.

Mr. McWilliams explained that this article would be enforced in the same manner as the existing articles per the existing Article XXII Enforcement of the March 2008 Zoning Ordinance.

Mr. Wright asked how a Meteorological tower (ref. proposed Article 22.1.1) differs from a Small Wind Energy System.

Mr. McWilliams explained that a meteorological tower would be a small antenna erected to monitor wind speed and wind flow characteristics over a period of time and not intended to produce energy. It is strictly a monitoring device.

Mr. Wright asked, "How many of the Board members know what a SWES is?"

Ms. Freeman informed Mr. Wright that the Board members are familiar with SWES, but Mr. McWilliams is more knowledgeable than the Board members.

Mr. McWilliams stated that a SWES can produce a minimum of 2 to 5 kilowatts of power up to 100 kilowatts. Wind systems producing more than 100 kilowatts are regulated by the State.

Mr. Wright advised the Board that there are other wind systems available to consumers that do not require hardly any height at all; therefore they would not be covered by this proposed amendment. He commented that the Board should allow a carbon-free, safe, renewable energy source regardless of how it looks.

Ms. Freeman stated that there is no denial of wind energy systems in this ordinance. This ordinance does not prevent anyone from having a wind energy system. The proposed ordinance does not allow for wind farms which can be considered sight pollution. In light of the fact that Newbury is an area which depends on tourism and its natural and scenic landscape, the Board felt that wind farms would detract from aesthetics, which matters a lot.

Mr. Wright suggested that the definition of a commercial wind farm should be added to Article II (Definitions). He asked why noise is a concern and needs to be regulated since the wind systems are virtually silent.

Ms. Freeman explained that the proposed Article 22.2.3 allows for up to 55 decibels. Therefore, the sound should not be an issue.

Mr. McWilliams explained that Noise is listed under Article 22. 1.3.3 Abutter and Regional Notification as a reason for abutter notification, not as a measure of decibels.

Ms. Powell asked if anyone in Newbury currently has a SWES that would not comply with any of the provisions in Article XXII and how many towers would be allowed on one property.

Ms. Freeman explained that the Planning Board gives direction to Mr. McWilliams, not only one member of the Board. Wind farms are regulated by the State. This ordinance is a regulation for *small* systems, which depends on wattage, not the number of towers.

Henry Thomas asked if the legal language will be made available in detail to the voters.

Ms. Freeman explained that the legal language is always available to the public. It is not placed on the ballot for several reasons, legal and practical, one being length.

Mr. Thomas asked what is the principle of this ordinance, and why can't a wind tower be called a structure to satisfy the setback requirements.

Ms. Freeman explained that this ordinance regulates the normal things that are regulated for other activities such as setbacks and abutter issues. For safety reasons, such as if the tower falls down, the setback need to be more than the allowable 15 ft. for a building.

Mr. Thomas commented that if the Board is concerned with noise, perhaps it should think about regulating generators and not silent windmills.

Mr. Weiler explained that the Board was forced into creating this regulation by the State. The State opened a can of worms by putting certain ambiguous language in their regulation which forces the towns to address the specifics.

June Fichter commented that since the State regulates 100 kilowatts or above, that leaves a hole under 100 kilowatts. Therefore, this proposed ordinance fills the general framework. She commented that she does not see anything in this ordinance that would prohibit someone from constructing a wind system. She commended the article on Abandonment, which is important.

Ms. Powell commented that the FAA requirements probably would not affect a SWES; therefore Article 22.1.2.11 could be withdrawn. Additionally, she asked why Article 22.1.2.13 is needed since there are already requirements for land clearing.

Mr. McWilliams explained that there could be a factor on visual impact.

Ms. Freeman commented that the Board would also need to make sure the clearing was not taking place on a ridgeline, steep slope, shore line, in a wetland, etc. The breaking of the skyline has been overwhelming disapproved.

Ms. Powell asked where the reference to **55** decibels came from and the idea of regulating *shadow flicker*.

Mr. McWilliams explained that this ordinance was prepared after a model ordinance from the New Hampshire Office of Energy and Planning. Fifty-five decibels is a typical sound level for a residential area. Regulating the shadow flicker was also suggested by the State.

Ms. Powell asked why Article 22.2.7.1 suggests screening when other activities upon private property do not require screening. Additionally, she asked why a limit is put on clearing per Article 22.2.11 when other activities upon private property, such as clearing for a garden, are not limited.

The Board took note and consideration of Ms. Powell's questions. No immediate answer was given.

Ms. Powell asked for an explanation of the last sentence in Article 22.4.

Mr. McWilliams explained that the intent of that sentence was to say that if there is already a SWES in place, it is grandfathered. He agreed to try to reword the sentence to make it clearer.

Mr. Wright commented that in reference to Article 22.2.8 Approved Wind Generators, whatever type of equipment can be put on location depends on the topography and wind conditions. He asked why it is suggested SWES need to be approved by the California Energy Commission or the New York State Energy Research and Development Authority. The topography and wind conditions are much different in CA than in NH. He suggested that the reference to CA and NY be left out of the article.

Ms. Freeman explained that those two Boards have researched and created a process and **standards** for the mechanics of SWES. Aside from the references to CA and NY, Article 22.2.8 also states ...*'or a similar list approved by the state of New Hampshire, when available.'* Therefore, when the State of NH finally prepares a list of standards for SWES equipment, we can use that instead.

Mr. Vannatta explained that this ordinance was based on a model that was prepared by the State of NH. In place of something we do not already have in our state, NH has accepted their (CA & NY) standards. He commented that the argument Mr. Wright is making should be taken up with the State of New Hampshire not the Town of Newbury Planning Board.

Mr. Weiler commented that there are many other situations that underwriter laboratories are referred to for safety reasons that are in other states. They are recommendations regarding the physical piece of equipment, not necessarily topography and wind conditions.

Being no further comments from the public, Mr. Vannatta closed the hearing to the public. The Board began deliberation.

Mr. Weiler suggested holding deliberation on Amendment No. 1 until after Amendment No. 2 is discussed in case there are members of the public that would like to go home as early as possible.

Consensus of the Board was to discuss and deliberate proposed Amendment No. 1 first. Deliberation on Amendment No. 1 continued.

Mr. Weiler commented that in his opinion the typographical, editorial and reference to the enforcing authority are not substantive.

Mr. Vannatta reopened the hearing to the public to bring in additional thoughts.

Mr. McWilliams informed the Board that an issue was raised in another Town regarding the tower height. There is a minimum clearance needed above the tree line so that the system is above the turbulent wind stream and within the steady-wind air space; but, that could vary depending on topography. Additionally, the standard of tower height needs to provide for the growth of trees during the life of the SWES. Therefore, alternative language was created as follows to address that issue:

22.2.2 Tower Height: The maximum tower height shall be the minimum height necessary for the system to function at its rated capacity over the estimated lifespan of the device, as certified by either the Small Wind Energy System manufacturer or, if hired, an engineer licensed in the state of New Hampshire. In no situation shall the tower height exceed 150 feet.

This would be created as a companion amendment under 22.1.2.8 to support 22.2.2.

There were no further comments or questions from the public. Mr. Vannatta closed the hearing to the public and the Board began deliberation.

Mr. Powell made a motion to withdraw this proposed amendment from this year's warrant.
There was no second to the motion. Motion dismissed.

Ms. Freeman commented that the proposed companion amendment regarding tree growth is substantial. Therefore, a second public hearing will be needed on this amendment.

The Board reviewed and discussed the comments and proposed changes provided by the public.

Ms. Freeman commented that typographical and editorial corrections are not substantial but need to be made. The Board agreed. The Board also agreed that Article 22.1.2.11 regarding Federal Aviation Administration requirements should be researched and possibly dropped; Article 22.1.2.13 should be retained so that the Board has oversight.

Mr. McWilliams commented that the standards are based on minimal clearing; therefore Article 22.1.2.13 should be retained if the Board chooses to keep those standards. It is up to the Board to determine if the standard is kept or not at all.

The Board agreed that Article 22.2.11 is not clear and the last of the sentence, beginning with ... 'and as otherwise prescribed...' should be deleted.

Mr. McWilliams advised the Board that Article 22.1.3.2 regarding Visual impact should stay. Article 22.1.3.3 regarding noise could be eliminated if the Board feels the Wind System will not make too much noise. The problem with taking it out is that if a neighboring town has a noise ordinance, and the wind system is of regional impact, the ordinances may be in conflict.

The Board agreed that Article 22.2.7.1 regarding screening could be eliminated. Other things are not required to be screened and a home owner will most likely make the Wind System as attractive as possible if it is on their own property.

Ms. Freeman suggested that 22.2.7.2 regarding color of the Wind System should be retained. Typically the manufacturers tend to make them blend with the environment, but that does not prevent someone from re-painting or decorating the hardware. The Board agreed.

For clarification purposes, the Board agreed that there is no limit on the number of wind turbines a property owner may have on their property. What is limited is the number of kilowatts.

Mr. McWilliams asked the Board if they were in agreement that if his findings with the FAA requirements are such that anything less than 200 ft. is not regulated by the FAA, he will drop Article 22.2.7.3. The Board agreed.

Ms. Freeman made a motion to carry Amendment No. 1 to the second zoning amendment hearing scheduled for Wednesday, January 28, 2009. Mr. Williams seconded the motion.
Majority in favor.

Planning Board Proposed Amendment No. 2:

The Planning Board's Amendment No. 2 to the Zoning Ordinance proposes to amend ARTICLE VII (Shore Land Overlay District) and ARTICLE II (Definitions) to be consistent with changes in the New Hampshire Comprehensive Shoreland Protection Act. (CSPA)

Mr. Vannatta opened the hearing to the public for discussion on Amendment No.2.

June Fichter commended the Town for bringing the local ordinance in line with the CSPA. Having a uniform code makes a lot of sense. She expressed concern that the proposed Article 7.8.2 and 7.8.3 opens the door for funneling. She commented that it appears as though one access easement per lot is being allowed to a third party. She commented that she is not sure that it is wise to go back to funneling. Also, the "third party" is not described. Therefore, that could be a single person or a condominium complex.

Ms. Freeman stated that there was a recent court case regarding a private home owner and use of his lake property to several unrelated people, and the court upheld the owner's rights. It sounded like there was a blanket statement about not limiting public access.

Mr. McWilliams clarified that that case was in reference to a grandfathered property and the Town was trying to take away the rights he had prior to zoning changes. He commented that he does not believe that court case has any bearing on the circumstances of this ordinance.

Mr. Weiler commented that the intent of this amendment was to allow a property owner who has shore frontage to allow, by deeded easement, another family pedestrian lake access across their lot.

Mr. McWilliams suggested the reference to "third party" should be a more specific number.

Ms. Fichter asked if this access is pedestrian access only, does it then allow for a second 4 ft. walkway. If so, this now doubles the elimination of waterfront buffers and doubles the addition of impervious access surfaces.

Mr. Vannatta read comments submitted in writing by Nancy Marashio

Dated: January 7, 2008. Regarding your propose to open up funneling, please reconsider. Shore land regs are meant as protection of precious water resources. Newbury's original leadership on shore land Regulation chose anti-funneling as proven best practice. That principle has not changed. Neither should the regs. As a 10-year Planning Board past Chair, as past Chair of the Regional Planning commission (and your current Commissioner), I ask you not to open up access rights! ... Nancy Marashio.

Peter Fichter commented that any shoreland land owner could invite a friend or neighbor to use their property anytime they want. With this proposed amendment, a system could be set up, like a time share, for people who are not abutters or neighbors to use the water access. Prior public hearings, surveys and professional opinions have decided that this is not a good practice. This sounds as though the Board is trying to open up funneling again.

Mr. Powell explained that as a result of an issue at a previous meeting, the question of property rights arose. It was quite common in the old days to grant an easement across property. This easement would be recorded in a deed at the Merrimack County Registry of Deeds.

Mr. Fichter commented that this amendment would allow an unlimited number of people to cross a property whether or not the property owner was agreeable. It is sufficient that the property owner can allow by invitation a third party to cross their land. There are very clever developers that would love to see this amendment pass and tie the access into a multiple lot subdivision. Mr. Fichter commented that in his opinion, the Town would be moving backwards if this is passed.

Ms. Powell asked if someone who is an abutter of the State Park could allow someone else to cross their property to enter State Park land. If so, then people should also be allowed to let someone cross their property to access the state-owned waters. Additionally, people are allowed to permit other people and clubs to cross their land, such as snow mobile trails.

Ms. Freeman clarified that this amendment is based on the creation of an easement. This amendment does not change the status quo of property owner rights to allow by invitation a third party to use their land for water access as guests.

Mr. Wright asked how this regulation differs from the State's CSPA.

Mr. McWilliams explained that there is not a lot of difference. The intent of this amendment is to make Newbury's ordinance more consistent with the State. It is not exactly verbatim.

Mr. Wright explained that people have been coming to the Board of Selectmen for permits to cut trees that they can cut by right. The Board of Selectmen have not seen any abuse of the rules, generally speaking. The regulations of the State are very flawed. There are supposed to be 50 points determined by the Board of Selectmen. He asked does this potentially mean that the Board of Selectmen need to record every tree on every lot around the Lake and then require a pre-examination of tree inventory as well as a post-examination for every cut. As a result of these regulations, there will be an opening up of the shore land and the Board of Selectmen is left to run around and enforce the ordinance. The State should have to enforce their own laws. The CSPA is an unfunded mandate and will be very costly for municipalities. The minute you tell people you can't cut more than 50 points, they will be cutting 50 points even if they don't need too.

Ms. Fichter suggested that if someone takes more than the allowed 50 points, they should have to replace in kind instead of paying a token fee.

Mr. Wright stated that the Board of Selectmen has in the past required replacement in kind.

Mr. Weiler commented that the point system is something the State legislature passed and disagreement with the point system should be taken up with them.

Mr. Wright commented that he resents the fact that the State is passing this off to the Town to do their dirty work for them.

Ms. Fichter commented that the Lake Sunapee Protective Association spends a lot of time trying to educate people about the importance of vegetation. Lots of people like trees and do not cut them. Additionally, there may be an enforcement problem regarding unpermitted cutting. Leaving enforcement to “watch dogs” is not right. There ought to be a reasonable process of enforcement. Before and after photos are easy to produce, and replacing in kind beyond the permitted cutting should be expected. Fifty percent of the Town’s revenue is from the lake lots, and the aesthetics and water quality of the Lake should be a priority. There is a question as to whether or not Lake Sunapee will still be considered a Class A water body. Algae and storm water is increasing, and the need to find a way to educate homeowners and all water quality, not just Lake Sunapee, is imperative.

Ms. Powell suggested that the things that are “encouraged” should be italicized at the bottom of the page(s) and not mixed in with those that are required.

Being no further comment from the public, Mr. Vannatta closed the hearing to the public and the Board began deliberations.

Mr. Weiler commented that in reference to Article 7.8.2, he is uncomfortable with having mention of a single lot owner injected in the middle of the paragraph. Additionally, it seems as though per Article 7.8.3, the easement owner is now being loaded up with shore land requirements. Reference to “third party” needs to be clarified.

Ms. Freeman asked what is the undesired effect. The regulation should be designed to prevent the undesired effect such as crowding and density becoming a nuisance.

Mr. McWilliams cautioned the Board that if the Board does not want to allow a major condominium development from using a sliver of land for Lake access, then the Board needs to work this article very carefully.

Mr. Powell reminded the Board that the Board ruled in favor of allowing Sunapee Outfitters, a third party, access to Lake Todd.

Mr. Weiler commented that he would like to take that sentence out in order to state it more syncinctly. Additionally he suggested that the reference to “3rd party” should be pulled out of this paragraph and put in a separate paragraph and discussed at the next hearing.

Mr. McWilliams commented that he needs direction from the Board as to how it wants to define “3rd party”.

The Board discussed different variations of the definition of “3rd party”.

Mr. Powell suggested that Town Council should review the changes.

Mr. Wright stated that he is not at ease presenting these amendments to the public without Town Council's review of the amendments.

Mr. Weiler commented that from his experience, Town Council will give an opinion as to whether or not he thinks he can defend the amendment in court or not, not whether or not the language is legal.

There was no further discussion on Amendment No. 2

Ms. Freeman made a motion to carry Amendment No. 2 to the second zoning amendment hearing scheduled for Wednesday, January 28, 2009. Mr. Williams seconded the motion. Majority in favor.

CASE: 2004-006: Angel Hawk Subdivision – Jaimie Gould aka Advanced Conception Property Development, LLC – Development Agreement

Mr. Vannatta informed the Board that he received notification from Mr. Gould today via telephone conversation that Mr. Gould has signed the Development Agreement and it should be delivered to the Land Use Clerk this week. Mr. Gould has been invited to the January 21, 2009 Planning Board meeting for final discussion.

Ms. Freeman suggested that the Board may want to place a time limit on the completion of the requirements.

ADM1 – Ken McWilliams' Advisor contract

Mr. McWilliams distributed his service contract for 2009 to the Board members for review and approval.

Mr. Weiler made a motion to authorize the Planning Board Chair to sign the contract agreement as written. Mr. Williams seconded the motion. All in favor.

Miscellaneous Business

Mr. Vannatta reminded the Board that there is a CSPA presentation at the Newbury Town Office Building on Friday, January 30, 2009.

The January Planning Board meeting will be on Wednesday, January 21, 2009 in the back meeting room do to a conflict of space with the regular meeting room.

The second public hearing on the 2009 proposed Zoning Amendments is scheduled for Wednesday, January 28, 2009.

Mr. McWilliams informed the Board that there are two very well written books on Conservation Design for Subdivision by Randall Arendt available for the Board's review. The books will be left in the workstation area at the Town Office.

MINUTES

The Board reviewed the minutes of December 2, 2008.

Mr. Weiler made a motion to approve the Minutes of December 2, 2008 as written.

Mr. Williams seconded the motion. All in favor.

Ms. Freeman made a motion to adjourn. Mr. Weiler seconded the motion. All in favor.

Meeting adjourned at 9:35 p.m.

Respectfully submitted,

Linda Plunkett
Recording Secretary