

DRAFT
Planning Board
Minutes of January 28, 2009

Members Present: Tom Vannatta, Chair; Barbara Freeman, Vice-Chair; Deane Geddes; Jim Powell, Ex-Officio; Bill Weiler; Ron Williams; Ken McWilliams, Advisor

Mr. Vannatta called the meeting to order at 7:05 p.m. and read the public notice.

Notice is hereby given that the Newbury Planning board will conduct a public hearing on Wednesday, January 28, 2009 at 7:00 p.m. in the Newbury Town Office Building, Route 103, Newbury N.H. to receive public input on amendments to the Newbury Zoning Ordinance proposed by the Planning Board. The proposed amendments to be discussed at this public hearing are summarized below. Copies of the full text of the amendments proposed by the Planning Board are available in the Town Office Building.

Planning Board Proposed Amendment No. 1:

The Planning Board's Amendment No. 1 to the Zoning Ordinance proposes to add a new 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 unreasonable limit such installations or unreasonably hinder the performance of such installations.

Mr. Vannatta opened the meeting to the public and discussion on Amendment No. 1 followed.

Linda Powell asked for clarification on Article 22.1.2.8 regarding certification of SWES specifications.

Mr. McWilliams explained that this article was amended from the last meeting. It is in the list of application requirements and this article further explains that certification on the specifications is required.

Mr. Weiler further explained that the intent is to provide the Building Inspector some specifications on SWES; therefore, they need to come from an authority.

Helen Wright asked where the wording of this proposed ordinance came from.

Mr. McWilliams explained that the State has passed a law that encourages SWES and discourages municipalities from leaving in existing ordinances in their zoning that precludes or discourages SWES. This ordinance is a model ordinance from the State of NH, Office of Energy and Planning to help Towns create their own ordinances. The Planning Board did tweak it a bit, but not in a major way.

Ms. Wright asked if this ordinance encourages or discourages SWES.

Mr. McWilliams explained that this ordinance is allowing for people to install a SWES. The existing ordinance would not allow this to happen due to the 35 ft. height restriction. If a property owner wanted to erect a SWES under the current ordinance, they would have to apply to the Zoning Board of Adjustment for a variance from the height issue. This ordinance is a way of providing for these types of systems. Under the proposed ordinance, if the SWES exceeds a height of 150 ft., they would need to go to the Zoning Board of Adjustment for a height variance. But, generally, they would not need to go to the Zoning Board of Adjustment since the majority of the systems will not need to exceed 150 ft.

Bob Morris asked who will enforce Article 22.2.6., code compliance.

Mr. Vannatta explained that the Code Enforcement Office would probably be assigned that duty by the Board of Selectmen.

Mr. McWilliams explained that Code Compliance falls under the part of the ordinance that talks about the Board of Selectmen being the enforcing entity. They have the ability to designate the Building Inspector to review and oversee the SWES.

Mr. Powell stated that the Board of Selectmen will not enforce State ordinances.

Dick Wright asked what is the procedure for applying for a SWES.

Mr. Vannatta explained that the property owner would have to submit an application, similar to applying for a building permit.

Mr. Wright commented that the applications go to the Board of Selectmen or their designee. He stated that he would be very reluctant to sign any SWES Applications because the conditions are very subjective regarding color and flutter, which could open the town up to litigation. The regulation should not knit-pick color and style. The proposed ordinance will be very difficult to enforce because it is very arbitrary. The ordinance should be more specific regarding color in order to be enforced. There is nothing in the budget to pay for the enforcement of this ordinance.

Ms. Freeman commented that she would counter Mr. Wright's statement. She stated that this ordinance is not arbitrary. These are standards that are modeled after the State regulation provided by the Office of Energy and Planning. One could argue that this ordinance may open the town up for litigation, but one could also argue the other way; that it protects the Town from potential litigation.

Ivor Freeman commented that the definition of shadow flicker is quite clear and is therefore not subjective. Additionally, Article 22.2.7.2 says that the color has to blend with the surrounding environment. Therefore, it is not arbitrary.

Dan Wolf commented that if this ordinance is not in place, then he will not be able to erect a SWES without going to the Zoning Board of Adjustment, which in his opinion is more arbitrary than the proposed ordinance. At least this ordinance provides guidelines so that the property owner is able to be prepared.

Mr. Wright commented that he believes it would be very easy to list wind towers under those things that are not limited by height restrictions and just use the State law and let the State regulate the towers.

Mr. Weiler asked if this ordinance has been reviewed by Town Counsel.

Mr. Vannatta stated that this ordinance has not been reviewed by Town Counsel to the best of his knowledge.

Ms. Freeman commented that because this ordinance is based on a model State ordinance, the Board felt more comfortable with it. If this proposed ordinance was something that the Town rafted from scratch, then it should certainly be sent to Town Counsel for review.

Ms. Powell asked why there is a restriction on clearing for SWES if there is no restriction against clearing land for other purposes such as gardens and swing sets.

Ms. Freeman explained, as discussed at the last meeting, the tree clearing restriction was put there to try to create a natural screening.

Mr. Williams asked why would someone want to clear more land than what is necessary for construction of the SWES.

Ms. Powell explained because someone may want to clear land for a play area.

Mr. Williams commented that a play area is different than a SWES.

Mr. Powell commented that people should be able to clear land just because they want to.

Ms. Freeman commented that there are certain circumstances that the Town does not allow cutting such as on the ridgeline, in and near wetlands, etc. She stated that all of the points made are points taken. The Board will take them into consideration. She pointed out that if there is an aspect of the proposed ordinance that creates undo difficulty, it can be changed next year.

Mr. Vannatta commented that the Board will not really know how it will work out until it has had a chance to work with the ordinance.

Gordon Stanley commented that a property owner could always clear their land prior to applying for the SWES. That would be a way to get around the clearing restriction.

Ms. Wright suggested that the Town should let other towns in the area test this ordinance out. There is nothing pending right now, and therefore, the Town should not rush into anything.

Ms. Freeman pointed out that Mr. Wolf has stated that he is looking into erecting one already. She commented that she does not believe the Town is rushing into anything.

Mr. Powell asked what a person would have to do to get a variance from the height restriction. It is not difficult to do because there are no windows in a SWES, and therefore, the purpose behind the height restriction is mute.

Mr. Vannatta commented that every case that goes in front of the Zoning Board of Adjustment has to be based on its own merit. There are other things other than height such as setbacks that would also need to be considered. It would be better to give the Zoning Board of Adjustment something to rely upon. Also, there is an application fee, abutter notification and public notice costs that are payable by the applicant.

Mr. Wolf commented that there is more than height to consider when erecting a SWES. Several other issues were raised by the engineer working on his system such as guy wires setbacks, noise levels, etc. Additionally, there are several things that could be complained about from an abutter under the noise ordinance. If an applicant can follow the guidelines set by the Town, then they don't need to worry about complaints from a neighbor.

Mr. Freeman commented that he is in agreement with Mr. Wolf. The Zoning Board of Adjustment still will need to have parameters for guidance. Those that need more than 150 ft. can still go to the Zoning Board of Adjustment and seek approval there.

Being no further comment from the public, Mr. Vannatta closed this portion of the hearing to public input, and the Board began deliberation.

Ms. Freeman made a motion to propose Amendment No.1 for a ballot vote at the March 10, 2009 Town Meeting. Mr. Williams seconded the motion. Discussion followed.

Mr. Powell commented that he is opposed to this ordinance as written. It came from a model ordinance and he would like to see more changes to it to fit the Town of Newbury. There are many arbitrary statements made. He commented that ordinances rarely get changed or fixed after they are in place.

Mr. Vannatta commented that in order for the Planning Board to make changes to the ordinances, there needs to be feedback and input for the change. If the Board doesn't get any specific feedback on needed changes, it assumes everything is working fine.

VOTE: Majority in favor. Motion passed.

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.

Mr. Vannatta opened the meeting to the public and discussion on Amendment No 2 followed.

Mr. Wright commented that there are 800 shorefront properties in the Newbury. There is nothing in this proposed ordinance that funds the cost for verification before and after cutting on a lot in order to provide evidence for enforcement of the ordinance. He commented that he believes there will be more cutting based on the points system. There are people that purchase property in Newbury and come in and clear cut their lots. Fines don't mean anything to people who can afford to purchase lakefront lots. He commented that he estimates it will take four hours to prepare a pre-cut survey on each lakefront lot. (Two people for two hours on each lot) There is nothing in this ordinance that puts the onus of the cost of pre-cutting inspection of the lot on the property owner. This ordinance could have made the property owner hire a licensed forester to survey and inventory the trees and also prepare an after-the-cut report. Mr. Wright commented that this ordinance is going to be too difficult to enforce. He stated that he is not against the regulation, just the way it was written. The first year it won't be enforced unless a neighbor complains because there was no money budgeted to enforce this ordinance.

Mr. Stanley asked why the Town does not follow the States rules and regulations.

Mr. Vannatta explained that the Town is currently in conflict with the new State laws. What Newbury has now is not defensible in court.

Mr. Stanley asked if this ordinance would add to the State ordinance.

Ms. Freeman explained that the section of the Zoning Amendment draft that is underlined is the State Law that the Town would also be adopting. The sections that are not underlined are in addition to the State Law. There are some issues the State does not regulate such as 3rd party access rights. She explained that if the Town does not have a regulation that mirrors what the State has, it will be a nightmare for property owners on the Lake because they will then have to follow two sets of rules.

Mr. McWilliams further explained that right now, the Town has a restriction that only 50% of the basal area can be cut and the State has a point system. A property owner now has to go through two sets of calculations to figure out which one of the two ordinances is most strict for their situation and follow that ordinance because the stricter of any two ordinances always applies.

Ms. Wright asked if the Town does not adopt this ordinance, wouldn't the State have to enforce their own laws which would take the onus of enforcement off the Town.

Mr. Wolf informed the Board that he recently went to the Board of Selectmen with a cutting plan from the State and the Town. Both were signed. The process was very cumbersome to do. Either way, with or without adopting the State regulations, a property owner still needs to bring in a cutting plan. It will not be so much expense to the property owner, and the enforcement expense would be the same as it is now. If a property owner cuts too much, they should be required to replant.

Mr. Wright commented that people do not know what the ordinance is now. Some people bring in a cutting plan when they don't need to. The ordinance is too vague. The end result will be the

opening up of the lakefront. It will be very expensive; we are going to have to verify every single existing tree. There will be no enforcement because it has not been funded.

Ms. Freeman commented that the scoring points system is the process that has been set up by the State, not the Planning Board. That will be the regulation no matter what. Dead and diseased trees are exempt from the ordinance.

Mr. Morris asked if Brooks are also included in this ordinance.

Mr. Geddes explained that named brooks and streams as well as other bodies of water that are identified in the existing zoning ordinance are all included.

Ms. Powell suggested that the wording on the ballot for Amendment No. 2 should be changed to read that the changes are made to be consistent with *some* of the changes in the NHCSPA because there are other things being done as well such as adding access rights.

Mr. McWilliams advised the Board that that change can be made and is not considered a substantial change to the amendment because it is not actually a part of the legal language of the amendment itself.

Ms. Powell suggested that the graphic on page 9 be redrawn to reflect that which is written in the text.

Ms. Wright commented that many times there are issues that come to the Zoning Board of Adjustment and they are very vague. Article 7.6.2.4.6 regarding a healthy stand of trees is too vague and subject to interpretation.

Mr. Vannatta commented that if the Zoning Board of Adjustment is struggling with the ordinance and needs legal assistance, it is available. He suggested that if the Zoning Board of Adjustment finds that Article 7.6.2.4.6 is too vague and it creates problems with decision-making, then let the Planning Board know and it can be changed.

Ms. Freeman commented that the Town can't always sit and wait for the perfectly written law or regulation to come along, because it does not exist.

Ms. Powell commented that she is confused regarding the definition of family when referring to the access rights. She asked if she can let her neighbors and family use her property without a deeded access.

Mr. McWilliams stated yes, she can let anyone she wants use her waterfront property anytime she wants. He explained that the Town has had shoreland access rights and restrictions since 1991. The intent of the deeded access right this year was to liberalize the rights within the shoreland ordinance to allow third-party access.

Mr. Weiler explained that the deeded access refers to an easement that is recorded at the Merrimack County Registry of Deeds. There is nothing in the proposed ordinance that prevents anyone from having guests on their property.

Ms. Powell suggested that the Board should clarify the difference between granting someone permission vs. granting someone a right to shoreland access.

Mr. Vannatta asked the Board's permission to close the public portion of the meeting. The Board voted 5 yeas, 1 nay to close the public portion of the meeting. The Board began deliberation.

Ms. Freeman made a motion to propose Amendment No.2 for a ballot vote at the March 10, 2009 Town Meeting. Mr. Weiler seconded the motion. Discussion followed.

Mr. Powell commented that the discussion points out that this ordinance has a lot of confusion and that it would not be bad to table it this year, research the issues and try again next year.

Ms. Freeman pointed out that that would mean a whole year with two conflicting ordinances to regulate.

Mr. Powell commented that it would be better to have two conflicting, clear ordinances than one unclear ordinance.

VOTE: Majority in favor. Motion passed.

Mr. Vannatta reminded the Board that the next meeting will be Tuesday, February 17, 2009 at 7:00 p.m.

Mr. Williams made a motion to adjourn. Mr. Geddes seconded the motion. All in favor. Meeting adjourned at 9:00 p.m.

Respectfully submitted,

Linda Plunkett
Recording Secretary