



TOWN OF WELLS, MAINE PLANNING BOARD

Meeting Agenda
Monday, February 10, 2020, 7:00 PM
Littlefield Meeting Room, Town Hall
208 Sanford Road

6:15 PM EXECUTIVE SESSION

Hold an Executive Session, pursuant to 1 M.R.S. section 405(6)(E), to consult with the town attorney regarding the Board's legal rights and duties concerning a letter to Chairman Millian dated January 31, 2020 from Attorney John Bannon re: Parker Ridge Subdivision.

Documents:

[L- CHAIR MILLIAN 01 31 2020.PDF](#)

7:00 PM CALL TO ORDER & DETERMINATION OF QUORUM

MINUTES

PUBLIC HEARING(S)

DEVELOPMENT REVIEW & WORKSHOPS

OTHER BUSINESS

- I. PARKER RIDGE SUBDIVISION**
- II. POSSIBLE ORDINANCE CHANGE PROPOSALS**
- III. SRC & CEO SITE PLAN APPROVALS**

DOCUMENTS:

[02-04-20 SRC AGENDA.PDF](#)

ADJOURN

January 31, 2020

Mr. Charles Millian, Chair
Town of Wells Planning Board
Town of Wells
208 Sanford Road
Wells, Maine 04090

Re: Parker Ridge Subdivision Plan – Map 37, Lot 6 / Parker Development, LLC / Planning Board Refusal to Respond to Pre-Application Sketch Plan

Dear Chair Millian and Members of the Board:

I represent Troy Parker and his business, Parker Development, LLC. For the sake of brevity, in this letter I will refer to both my clients collectively as “Mr. Parker.”

A. Introduction.

On August 21, 2019, Mr. Parker submitted to the Town a Pre-Application form, sketch plan, and other attachments relating to a proposed amendment to the “Final Subdivision Plan of Parker Ridge Subdivision” by Lower Village Survey Co., dated May 7, 2012 and recorded at the York County Registry of Deeds in Plan Book 355, Page 16 (hereafter the “Pre-Application”). The Planning Board placed Mr. Parker’s Pre-Application on the agendas for its meetings on September 8 and 23, 2019.

The Planning Board evidently believed that the purpose of those agenda items was to allow the Board to decide whether to “receive” or “accept” Mr. Parker’s Pre-Application. However, that belief was mistaken.

Under Part II, Chapter 202 of the Town of Wells Code (hereafter the “Subdivision Ordinance”), the Planning Board is neither required nor authorized to decide whether to “receive,” “accept,” or take any other action signifying approval or disapproval of a pre-application sketch plan. To avoid perpetuating that error, I will refrain from using the words “receive,” “accept,” or anything similar to describe the action the Planning Board is authorized to take with respect to Mr. Parker’s Pre-Application.

Celebrating over 40 years and thousands of valued relationships

This not merely a word-game. The procedure by which the Board must respond to a subdivision pre-application is expressly set forth in § 202-6(A) of the Subdivision Ordinance. That procedure consists entirely of the following:

- (1) Applicant presentation and submission of sketch plans.
- (2) Question and answer period. Board makes specific suggestions to be incorporated by the applicant into subsequent submissions.
- (3) Scheduling of on-site inspection.

For the purposes of this letter, therefore, I will use the broader term “response” to summarize the actions the Planning Board was authorized to take with respect to Mr. Parker’s Pre-Application under § 202-6(A).

At its meetings of September 9 and 23, 2019, the Planning Board refused to respond to Mr. Parker’s Pre-Application in any of the ways required by § 202-6(A). The Board neither (a) allowed Mr. Parker’s representatives to make a presentation of the pre-application sketch plan, (b) asked or answered any questions about the pre-application sketch plan, (c) made any suggestions for incorporation into Mr. Parker’s subsequent submissions, or (d) scheduled an on-site inspection of the project site.

By failing to respond to Mr. Parker’s Pre-Application in the manner required by § 202-6(A), the Planning Board violated § 202-6(A) and thereby exceeded its authority under the Subdivision Ordinance.¹

¹ At the Board’s meeting of September 23, 2019, the Board noted that the Town Attorney’s opinion to the Board dated September 19, 2019 had not advised the Board on the specific issue of whether the Board may reject a *pre-application sketch plan* on the ground that the applicant is in default on a prior approval. As is apparent from the streaming video of the September 23rd meeting, the Town Attorney’s failure to answer the question the Board had actually asked resulted from how the Planner had phrased his question to the Town Attorney:

The first question I believe the Board had was, “can the Board reject *an* application or not accept *an* application based on a piece of property being in default or the developer being in default of a previous approval?” And then my second question to the Town Attorney was, “who determines the default issue?”

(Video of 09/23/2019 Meeting at 2:40 – 2:59) (emphasis added)

The question of whether the Planning Board can reject or not accept “*an* application” because of the applicant’s uncured default on a prior approval is distinctly different from the inquiry, “Can the Board refuse to *respond* to a *pre-application sketch plan* in the manner set forth in § 202-6(A) because of the applicant’s uncured default on a prior approval?” Given how the Planner worded those questions, it is no wonder that the Town

B. The Controlling Principle of Zoning Law.

The above conclusion rests upon one of the most fundamental principles of Maine zoning law: that a municipal land use agency has only the authority expressly granted to it by statute or ordinance. Such an agency has no authority to deny a permit or approval on a ground not expressly allowed by the governing state or municipal regulations. *See, e.g., Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶ 35, 45 A.3d 707, 719; *Sanborn v. Town of Sebago*, 2007 ME 60, ¶ 6, 924 A.2d 1061, 1063; *Oeste v. Town of Camden*, 534 A.2d 683, 684 (Me. 1987); *Spain v. City of Brewer*, 474 A.2d 496, 498–99 (Me. 1984); *Ullis v. Inhabitants of Town of Boothbay Harbor*, 459 A.2d 153, 158–59 (Me. 1983). Indeed, a municipal board cannot even *delay* the processing of a permit application unless an ordinance or statute expressly

Attorney responded by saying, “The short answer is yes,” because § 202.9 does give the Board such authority in the specific context of an application for *final* subdivision approval. However, the Town Attorney immediately limited his “short answer” by cautioning that § 202.9 “gives the Planning Board the authority to disapprove a subdivision plan amendment at the *final plan* stage – but there is *no* language in Chapter 202 which specifically grants the Planning Board this authority at the *earlier* stages in the approval process.” (emphasis added). Because he was not asked whether the Board could apply the prohibition in § 202.9 during the pre-application process described in § 202.6 specifically, he had no reason to answer that question. In turn, because, in paragraphs 1 and 2 of his opinion, the Town Attorney had only confirmed the Board’s authority to disapprove an application because of the applicant’s noncompliance with a prior approval at the “*final plan stage*,” it logically follows that the advice he offered in paragraphs 3-5 of his opinion was intended to relate only to the “final plan stage” as well.

Because the Town Attorney had not answered the question in which the Board was actually interested, at the end of the September 23rd meeting, the Board asked the Planner to obtain a supplementary opinion from the Town Attorney concerning the scope of the Board’s authority when responding to a *pre-application sketch plan*. However, the Planner has not yet requested that supplementary opinion from the Town Attorney. In an e-mail to me dated November 26, 2019, the Planner explained why he had not done so:

I have attached a memo I prepared on the 26th to request a proposal for the 3rd party inspection costs as voted on by the Planning Board and the resulting agreement. ...The additional legal opinion would be done *in coordination with report to the Planning Board of the results of the 3rd party inspection*.

(emphasis added)

With all due respect, the Planner’s rationale puts the veritable cart before the horse. If the Town Attorney ultimately advises the Board that it *cannot* refuse to respond to Mr. Parker’s Pre-Application on the ground that he is allegedly in default on a prior approval, then whether Mr. Parker is, or is not, in compliance with the 2012 Subdivision Approval is immaterial. In that case, there would be no valid grounds for the Town to hire a third-party engineer to determine Mr. Parker’s compliance with the 2012 Subdivision Approval before responding to his Pre-Application. Yet under the procedure advocated by the Planner, the third-party engineer would already have completed his investigation at Mr. Parker’s expense and prepared a report to the Planning Board, before the Board would receive the Town Attorney’s opinion about whether it had authority to refuse to respond to Mr. Parker’s Pre-Application in the first place.

authorizes it to do so. *See, e.g., Ray v. Town of Camden*, 533 A.2d 912, 914 (Me. 1987) (planning board could not decline to review application for site plan approval based on its opinion that applicant must first obtain a variance, where ordinance authorized only the Code Enforcement Officer or the Board of Appeals to determine whether the applicant's project required a variance).

The Board seemed to believe that it is free to act unless the Subdivision Ordinance expressly *bars* it from acting. That is the reverse of the true legal principles of Maine zoning law. The correct formula is that unless the Subdivision Ordinance expressly *authorizes* the Board to take a specific action, the Board has no power to take that action.

C. The Wells Subdivision Ordinance Prohibits the Planning Board from Refusing to Respond to a Pre-application Sketch Plan Based on Whether the Applicant is in Strict Compliance with All Prior Approvals.

As noted above, the only provision of the Subdivision Ordinance that expressly addresses the procedure by which the Planning Board may respond to a pre-application sketch plan is § 202-6(A). That procedure is limited to the following:

- (1) Applicant presentation and submission of sketch plans.
- (2) Question and answer period. Board makes specific suggestions to be incorporated by the applicant into subsequent submissions.
- (3) Scheduling of on-site inspection.

The rudimentary *submission requirements* for a pre-application sketch plan set forth in § 202-6(B) of the Subdivision Ordinance underscore the limited extent of the Board's capacity to respond to a pre-application sketch plan under § 202-6(A). The only mandatory² submissions are:

- a pre-application sketch plan, "which may be a *freehand penciled sketch*," that shows "*in simple form*" the proposed layout of the lots, streets, and other features within the proposed subdivision relative to existing conditions;
- if the subdivision exceeds 10 acres, an *outline* of the proposed subdivision drawn on the USGS topographic map showing the area of the project; and

² § 202-6(B) "recommends", but does not require, that the sketch plan be superimposed on the tax assessor's map of the land on which the project is proposed to be located.

- a list of the names and addresses of persons shown on the tax assessor's records as being "abutters," along with certification that the applicant has sent those abutters a Town-prescribed notice describing the project.

(emphasis added)

Both the limited procedures set forth in § 202-6(A) and the minimal submission requirements of § 202-6(B) are congruent with § 202-6(D). That subsection provides that neither the submission of a pre-application sketch plan nor the Planning Board's review of it constitutes "the initiation of the review process" or is capable of granting the applicant so-called "vested rights" under 1 M.R.S. § 302. As the name implies, a *pre*-application sketch plan itself is not an application for *any* type of subdivision approval. Because it is not an application for an "approval," the Planning Board has no discretion either to approve or deny a pre-application sketch plan. The Board can only *respond* to that pre-application sketch plan in the manner prescribed by Section 202-6(A).

D. Mr. Parker Complied with All the Pre-application Submission Requirements of § 202-6(B).

The only standards with which the proponent of a pre-application sketch plan must comply are the submission requirements of 202-6(B). There is no dispute but that Mr. Parker has complied with those requirements.

On August 21, 2019, Mr. Parker submitted to the Town a four-page form, printed by the Town itself, which the Town has entitled a "Subdivision Pre-Application Plan -- § 202.6." Mr. Parker's pre-application form proposed an amendment to the 2012 Subdivision Approval to add 11 new clustered residential lots to the 4 lots approved in 2012.

Along with the Town's pre-application form, Mr. Parker submitted to the Town: (a) a list of abutters, (b) a copy of his notice to the abutters, (c) a copy of his deed to the property, (d) an excerpt from the applicable USGS map showing an outline of the proposed subdivision; and (e) a sketch plan that vastly exceeded the minimum requirements of § 202-6(B).

The packet for the Board's September 9, 2019 meeting included a copy of the Pre-Application form on which the Planning Office had, by checking off boxes, confirmed that Mr. Parker had submitted all the information listed in § 202-6(B).

Because Mr. Parker met all the requirements of § 202-6(B), the Planning Board was obligated to respond to his Pre-Application in the precise manner mandated by § 202-6(A). The Board had no discretion to delay that response while it discussed the immaterial topics

January 31, 2020

Page 6

of Mr. Parker's alleged noncompliance with the 2012 Subdivision Approval and/or whether to hire a third-party engineer to investigate that issue at Mr. Parker's expense.

CONCLUSION

My focus on § 202 of the Subdivision Ordinance in this letter should not be interpreted as meaning that there were no other flaws in the Planning Board's response to Mr. Parker's Pre-Application. I will be addressing the Board's other errors in subsequent correspondence with the Board.

In the meantime, I respectfully request that the Board (a) place Mr. Parker's Pre-Application on its next available agenda, (b) ask Mr. Parker and/or his representatives any substantive questions it has about the proposed amendment to the 2012 Subdivision Approval; (c) make any specific suggestions it feels Mr. Parker should incorporate in his subsequent submissions to the Board; (d) schedule an on-site inspection of Mr. Parker's property; and, perhaps most importantly, (e) refrain from taking any actions other than those expressly authorized by § 202-6(A).

Thank you for your attention to this letter.

Sincerely,



John C. Bannon

JCB/kpm

cc: Durward W. Parkinson, Esq.
Jonathan Carter
Jodine Adams
Jim Genreux
Deborah Briggs
Troy Parker



TOWN OF WELLS, MAINE STAFF REVIEW COMMITTEE

Meeting Agenda

Tuesday, February 4, 2020, 9:00 AM
Town Hall Meeting Room, Second Floor
208 Sanford Road, Wells

MINUTES

January 7, 2020

DEVELOPMENT REVIEW & WORKSHOP

- I. **CURTIS FARM SUBDIVISION** – Landings Development, LLC owner; South Ash Development, LLC, applicant. Attar Engineering, Inc. agent. Preliminary Subdivision Application for a 9 lot/dwelling unit Residential Cluster Major Subdivision located off of Loop Road. The property is located within the Rural District, Resource Protection District and 250' Shoreland Overlay District. Tax Map 25, Lot 11 **Comment on Preliminary Subdivision Application for the Planning Board**

- II. **FAIRWAY VIEW VILLAGE SUBDIVISION (FKA Fieldside Lane Subdivision)** – York Building and Design Center, Inc. owner; Attar Engineering, agent. Final Subdivision to subdivide 123 acres into a 46 dwelling unit Multifamily Development Major Subdivision. 42 dwellings are proposed to be age-restricted (55 years or older). The parcel is located off of Fieldside Lane off of North Berwick Road. The parcel is located within the Rural District. Tax Map 32, Lot 13. **Comment on the Final Subdivision Application for the Planning Board**

OTHER BUSINESS

ADJOURN