

Town Council Special Meeting

Minutes

January 8, 2018

The meeting was called to order at 6:30 pm.

Roll Call

Councilors King, Farber, Hemphill and Jones were present and answering roll call.

Councilors Kitchel and Ferrante arrived after roll call.

Councilor Svedlow was absent.

Item 1 Order to go into Executive Session pursuant to the Laws of Maine to discuss and consider real estate rights, pursuant to 1 M.R.S.A. § 405 (6) (C).

Councilor King moved to enter executive session; Councilor Jones seconded. Motion carried 4-0.

Councilors Kitchel and Ferrante arrived during executive session.

The Council returned from executive session at 7:03 pm.

Item 2 Order to amend the Council Rules, Policy Two regarding the appointments procedure.

Councilor Ferrante explained that the Appointments Committee has requested to amend this rule to remove a provision that the chair of a board or committee should be contacted by the appointments committee about a potential applicant. They are also suggesting adding a clause that any committee member shall be re-interviewed along with other applicants when they have served two consecutive terms on the committee. This will allow volunteers to consider whether they wish to continue, and provide more opportunity for new volunteers to be considered.

Councilor King made an adjustment to the language to fix a grammar error.

Chair Hemphill opened a public comment period; there was no public comment.

Councilor Farber moved the order as corrected; Councilor King seconded. Motion carried 6-0.

Item 3 Discussion regarding a citizen request to amend the Land Use Ordinance to allow contract zoning applications to be made for projects located in the Village Center 1 (VC-1) district.

Mr. Poore said VC-1 was created several years ago after a long visioning process. When the Council enacted an ordinance to permit contract zoning in certain districts, they exempted VC-1 and VC-2 from that provision. Ford Reiche has now requested that the Council allow contract zoning in VC-1 to provide more flexibility for certain development proposals.

Councilor King said a lot of thought went into the zoning and visioning for this district, and it was part of the revitalization of the area. One of the main objectives was to make this a walkable, bike-able town center and to encourage buildings to come to the street whenever possible. The two amendments for minor site plan review have softened the standards somewhat. The district is 4 years old, and the ink is barely dry on the most recent amendment. She felt the Council is open to reviewing what is happening in those districts, but they weren't at that place right now. She said contract zoning is designed for a project that meets most of the underlying zoning, is unique, and will bring the Town public benefit. She didn't see how this request met that

goal. She felt allowing contract zoning in this district would open the barn door; it is not a small adjustment. She did not support contract zoning at this point, but was not opposed to a review.

Councilor Farber said it would help her to understand what the perceived limitations are. The changes that were put in place are relatively new; she asked if the property owner feels that there are flaws in the existing zoning and if so, what those are and whether those are things that should be globally changed in the district.

Councilor Kitchel saw the value of a contract zone here; there are some special circumstances with the lot on the corner of Depot and Route 1. He didn't want to see that remain vacant; he wanted to make that site usable. His concern about a contract zone is that other things might happen in that zone that they don't want to see but he thought they had the authority to block that. He wanted to know what the Council's latitude and parameters are with regards to a contract zone. He asked if the CDC could review a proposal and veto it.

Councilor Ferrante agreed with Councilor Kitchel. She would like to help the property owner. She didn't know if contract zone is the right remedy, but she didn't think the Town had a good mechanism to help property owners deal with hardships. There are issues with certain lots and not with the whole districts. She asked where contract zones are allowed and why it is allowed in Route 100 and Route 1 North.

Mr. Poore said it is allowed in all residential zones as well. He said it made sense to allow it in those two districts while the Town did visioning for them. Once the Council approves new zoning in those areas, they can discuss whether to continue to allow contract zoning there.

Councilor Ferrante supported contract zoning in all areas; the Council doesn't have to approve a contract zone if they don't like it.

Councilor King said the infrastructure project on Route 1 and the large sum of money they spent on it was married to the vision they created with the zoning. They need to remember where this came from.

Chair Hemphill agreed that they have a well-designed district with VC-1; a lot of time was spent on it, and a lot of money was spent with the infrastructure. He wasn't sure allowing contract zoning in this district was the best solution. He thought staff were working on a plan to meet with business owners in the district.

Mr. Poore agreed; they are looking to talk with developers and property owners to raise awareness of the district and to ask questions and get feedback.

Ford Reiche said they do not have a specific zoning request. They have a year of vacancy on one lot and another has been vacant since this summer. The largest commercial broker in the state can't get tenants into the buildings. Prospective tenants are turned off by the cost of site improvements that would be required, the limitation on future expansion and the requirement for buildings to come to the street. He felt the vision has to match up with reality; the reality is that they can't bring in the tenants that they want that can benefit the town. He understood that allowing contract zoning might open the barn door, but he argued that it would allow for some flexibility and would offer the opportunity to learn something moving forward.

Councilor Farber asked for more specifics on the hurdles.

Mr. Reiche felt there will be other small lots on Route 1 that will encounter the same challenges. If they expand, they will be required to tear the buildings down and rebuild at the street, and install site and public improvements. This will incur massive costs. The broker has said that commercial tenants don't want to have parking behind buildings. They have had a list of prospective tenants that they felt would be good for the Town that decided to locate elsewhere.

Councilor Farber asked about the limitation on a minor site plan

Amanda Stearns, Land Use Policy Specialist, thought it was a 50% expansion up to 2000 sf; they would be limited by the size of the existing building. After that they would be required to meet the current zoning, including the 0-20 foot maximum front setback requirement. They could build the addition on the street side and bring it to that setback.

Councilor Farber asked how big the former Pratt-Abbot building is. Mr. Reiche said it is 1500 sf and he would be limited to a 750 sf addition. The credit union building is 3000 sf and could add 1500 sf. Building toward the street wouldn't work for either of these sites since the buildings are so far back and would lose the parking if they did that. He wanted to do the right thing and not leave these vacancies on Route 1, but he felt there was an incentive to stay grandfathered since it triggered so much expense to cross the threshold.

Councilor King was strongly opposed to putting a drive-thru in what is supposed to be a walkable district.

Mr. Reiche said it would open up possibilities if it was allowed, but he doesn't have a specific request. He pointed out that they are in a building boom, and there is a lot of opportunities if there was some more flexibility allowed.

Councilor Kitchel felt they should talk about what accommodations could be made. It was not in their best interest to have a lot of vacancies. He wanted them to be able to be flexible and pointed out that contract zoning still needs to be responsive to the underlying zoning. If they don't want to allow contract zoning he wondered if there was another policy they can implement to help these sites.

Ms. Stearns responded to Councilor Kitchel's question about the CDC's authority on contract zoning; they do not have veto authority, but can vote not to recommend it. She also clarified that contract zoning is not allowed in Farm and Forest.

Councilor Farber was concerned that this was not the right tool for this situation. She wondered if there was a way to move the smaller properties closer to the vision without compromising the vision. The former Pratt-Abbot property is unique in several ways in terms of location (corner lot) and site limitations (the creek behind the lot). She agreed that expecting these smaller properties to rip down and move the building is maybe unrealistic but she wasn't sure contract zoning was the right tool. She saw contract zoning as more suitable for big projects.

Mr. Poore wondered if an inventory and review of the smaller properties would be helpful.

Councilor Ferrante wanted to find a way to help the property owners; new construction is expensive and if they want local businesses they can't make it a hardship. Councilor King wanted to explore how they move toward the vision, incrementally if necessary.

Mr. Poore said VC-1 created a lot of development incentives compared to what was there before.

The Council asked staff to move forward with some research and bring it to CDC for review.

Item 4 Discussion about the Charter Review process.

Chair Hemphill said they are required to review the charter every 10 years with a commission that includes 6 elected representatives and 3 council appointees.

Mr. Poore said the proposed process is the same as the process in 2008 and includes the election of commissioners in June 2018 and a vote on the charter in November 2018. They could decide to push the election of commission members until November and then take the charter vote in June 2019.

Amy Lamontagne, Assistant Town Manager, explained that the charter doesn't take effect until the start of the fiscal year after the charter is approved by the voters. They addressed several substantive issues in 2008. They were very efficient with their time and held 4 meetings in all. Mr. Poore said he didn't expect there to be many large issues this time; he has not heard any requests for substantive changes so far.

Councilor Farber supported holding the charter vote in November; there are more voters that come to a November election on average.

Mr. Poore said they could set an advance meeting schedule before the election of commissioners which would expedite the process.

The Council agreed to move forward with the process as presented.

In response to Councilor Kitchel, Mr. Poore said that 6 commission members must be elected, after which 3 members would be appointed. That appointment must happen within 30 days after the election.

Councilor Farber asked if the Appointments Committee or the Council would conduct the appointment process. She was concerned with the time required to go through the appointments committee process if they wait. Mr. Poore thought they could go through the interview process in advance of the election. Ms. Lamontagne said they will start advertising for interested people in February.

Item 5 Reconsideration of an Ordinance to establish conditional rezoning for the construction of a Tier III Personal Wireless Facility on Falmouth Road, Map-Lot R04-022.

Chair Hemphill explained that the Council addressed this issue at the December 11 meeting. At that time, they passed the ordinance.

Councilor Kitchel said the motion to reconsider would allow them to reopen the deliberation on this ordinance. There is no opportunity for public comment on this procedural motion. He read the council rule that allows reconsideration. He said that changes were made to the proposed ordinance at the end of their discussion that, upon further reflection, he was not happy about.

Councilor Kitchel moved to reconsider ordinance 82-2018; Councilor Farber seconded.

Councilor Farber supported reconsideration because she felt that it was not clear what the options were regarding the cell tower that they were debating at 10:30 at night. They had a recommendation from staff and legal counsel, and a recommendation from the applicant. What passed was the recommendation from the applicant. She didn't think the entire council was aware that it wasn't just an up or down vote on the tower, but that there were a group of choices. It was very confusing and was not a clear path.

Chair Hemphill had the sense that not all the councilors were clear on what they were voting on that night. It was very late and he was interested to have another chance to discuss and vote on the issue.

Councilor King agreed. She didn't think they had the time to consider the implications of the changes that were made prior to the vote.

Councilor Jones agreed with analysis of the evening and wished the process had been more clear but was frustrated with the fact that they don't have the same council makeup tonight. Councilor Farber agreed, but the rules only allow this motion at this time.

Councilor Ferrante asked if a particular someone has come to the council chair and expressed the opinion that they were confused. She was uncomfortable with this process and what it says about them as a Council. She was very clear about what she was voting on that night.

Councilor Farber said her perception at the time was that it may not have been clear to everyone what the alternatives were and that a no vote didn't mean the end of a cell tower on Falmouth Road. Chair Hemphill agreed.

Councilor Kitchel said that when he was made aware that there were some small but significant changes in the language he agreed to support this reconsideration.

Councilor King said the wrap up of that evening happened really quickly, and when she reflected on it, she felt that the changes made at the end really changed the role of the Council in the future with regards to this property. It was hard for her to appreciate the effects of that change in the last five minutes of that meeting.

Motion carried 5-1 (Ferrante).

Chair Hemphill distributed a copy of the originally proposed ordinance; the approved ordinance is attached to the Council agenda. He outlined the differences between the two versions.

Councilor Farber said she voted against the ordinance initially because she felt they had a number of resources, including the Planning Board, staff, and legal counsel, recommending one version and they threw out that advice and voted for something else. She didn't understand the reason for not taking the advice they asked for from the experts. She felt they need to rely on the expertise they have; they can't know everything.

Councilor King moved ordinance 82-2018 as originally proposed; Councilor Farber seconded.

Councilor King said the Council is not averse to the cell tower and want to protect the natural resources on the site. The intent of the language that was approved changes the role of the Council moving forward in regards to this property. It would allow the property owner to move forward with future development without returning to the Council. This took away the Council's responsibility to review this lot's future. This establishes a precedent that she was not comfortable with.

Chair Hemphill felt it was important for the Council to be included in further considerations for uses of the lot in the future. Granting a conditional rezoning is a major consideration for a property and its owner. The changes that were made on December 11 removed protections for wetlands and impacts on vegetation from the property owner. These are mechanisms that can be brought back to the Council in the future. The original language would ensure that these protections and the use of the egress would come back to Council before any changes. He felt that was important given the considerations they are granting with this rezoning.

Councilor Jones said the big difference is in section 4 and determines whether anyone is allowed to clear vegetation and disturb wetlands. The version that was passed only restricts the applicant from making those alterations. He thought the reason Verizon wanted that provision was because they are only impacting one area of this large lot. He thought it seemed extreme to prohibit the landowner from doing any removal of vegetation without review by the Town. Vegetation can mean many things. He wanted to make sure the landowner understood what this restriction means. Ms. Stearns said item 4 only restricts vegetation removal and alteration from wetlands and vernal pools and their setbacks and buffers. The remainder of the lot is unrestricted.

Councilor Jones asked if this would be a stricter rule than any other landowner would be subject to. Ms. Stearns said the Planning Board has the right under their review to place conditions and restrictions under their purview depending on the type, location and importance of the resources. When the Council rezones a property to allow a particular use they have the same right to place conditions and restrictions on that rezoning along with the review of whether the use itself is appropriate.

Councilor Jones asked about the change to paragraph 5. Ms. Stearns said the initial concern of the Council was that the frontage of the property is on the inside of a curve on Falmouth Road and the visibility was poor. There was concern that there was enough sight distance for Verizon's use. The Council originally asked for language to restrict that point of egress to Verizon's use and the existing use of the lot, which is forestry management. The ability of the Council to review any future use of that egress by the property owner was removed in the final vote. She said the Council could be asked to amend these conditions in the future to allow additional use of the point of egress, or an alternate point of egress could be approved.

Councilor Farber said this language limits this particular driveway to these particular uses without coming back to the Council. She asked what the change was that was discussed prior to them going into executive session at the last meeting. Ms. Stearns said the applicant had suggested some other, non-substantive changes to the language - references to the plan set date, the name of the d/b/a, and a reference to sheet C-17 that showed that they met both levels of sight distance requirements and the Council asked Ms. Stearns to make those changes and bring the order back to the Council.

Councilor Farber moved to amend order 82-2018 first paragraph: *and as further defined by the "Plan Set" entitled: "Verizon, Falmouth 3 ME" dated August 19, 2014 and revised through November 9, 2017 consisting of 27 sheets, prepared*

by Hudson Design Group. And paragraph 5: as further designed and represented on Sheet C-17 of the Plan Set. The point of egress shall be appropriately marked with the street number as assigned by the town's Street Addressing Officer.

Councilor King seconded.

Councilor Jones was concerned with changing this on the fly and how the landowner will feel about these changes. Chair Hemphill said they have only interacted with the applicant throughout this process and not with the landowner.

Scott Anderson, representing Verizon Wireless, said normally when you do a conditional rezoning you look at the whole lot. This process is different because they require it for a new cell tower; it is more like a permitting proceeding to show that they cannot use an existing tower. When the Council acts on a project that uses 2 acres on an 80-acre parcel, the question is whether they want to restrict further use on this large area without hearing from the landowner. The proposed driveway is the only legal frontage for this lot since they will remove the existing woods road as requested, and he argued that there are other uses allowed in this zone for this property that would no longer be allowed with this restriction. Limiting use of the drive to Verizon's use only is no longer needed since they now meet the more stringent sight distance requirements and he thought staff agreed with that request. He agreed that condition 4 only prohibits additional removal or alteration of vegetation in the wetland and vernal pool buffers and doesn't impact the rest of the lot. Given the narrow access and the location of vernal pools along the corridor that allows access to the back part of the lot where one could build, there would need to be changes to the 12-foot gravel access drive they are proposing. Changing the driveway will require additional cutting in the buffer and that won't be allowed under the proposed language. Functionally that would make the back portion of the lot unbuildable. The Planning Board had two requests of the applicant - a set aside for conservation land and a buffer around the property. They agreed to both of those requests. 2 acres at the back of the parcel will be put into conservation and abuts other conservation land; the 50-foot buffer will amount to 18 total acres due to the size of the property. This is a 2-acre development; placing 20 acres into conservation is a 10:1 ratio, a very large concession from the property owner. He pointed out that the impacts of the cell tower are very small. They were not required to receive a permit from either the DEP or the Army Corps; they only needed a permit by rule. This is not even a permit, just a notification to the DEP that they are doing the project. This is allowed because the impacts are so minor. If there was going to be a significant impact, he would understand if the Council placed restrictions on the property owner on further impacts. In this case, the impacts are so minor, they don't even require a permit. Furthermore, they are already under future restrictions from the DEP. The property owner already needs to maintain 75% of the existing forest canopy within the vernal pool buffers. The effect of these two conditions would limit the use of this 82-acre property to a single cell tower and commercial timber harvesting, which is not an economically viable use of the property. Verizon Wireless only has a lease for a small fraction of the property. If this moves forward in this way, they will not be able to build the tower because they don't have the rights to lock up the entire parcel. He thought the Council should review the implications of the Federal Telecommunications Act if they are not able to build here, and asked that they wait until the full council is here before they vote.

Councilor Farber said the motion to reconsider must take place at this meeting according to council rules, but action on the ordinance can wait. She said they can table it, or withdraw the motion.

Ms. Stearns said if the restriction on the use of the egress is removed, the property owner can pursue Planning Board review for any other uses of the property that would have the right to gain access over this driveway. Any other use other than perhaps a single-family home would require further review. That review would not come before the Council; the safety of that egress point would go directly to the Planning Board. She addressed comments by the applicant. This is not a permitting process, but a legislative rezoning process. The Planning Board is directed to permit the project once the Council approves the zone. The original conditions and restrictions were drafted and fully vetted by staff and the Town Attorney. She did not believe that the proposed conditions would restrict further uses on the property. How they gain access to the property for those uses would have to come back to the Council or they would have to find another access

point. While it is true this is the only frontage, there are other abutting properties from which they could potentially gain access. The property owner is aware of the process and the staff version of the conditions and restrictions were available to the property owner prior to the December 11 meeting. Mr. Anderson was correct that, when C-17 was produced, they demonstrated they could meet the highest standards for sight distance requirements and staff agreed it was appropriate to remove that restriction. She agreed that alterations to vernal pools and their buffers are regulated by DEP and 75% of the canopy will need to be maintained, but she pointed out that up to 25% can be altered. The extent to which a future applicant could apply to impact vernal pools and wetlands is unknown. The Town's regulation only applies to vernal pools if they exist, an applicant could apply to the DEP to remove or fill them, and only applies to single-family development.

Chair Hemphill asked if the 50-foot buffer would normally be required of a development like this. Ms. Stearns said the Planning Board has a wide breadth of authority. The RCZO for singly family development requires a 50-foot buffer. She thought the applicant offered the 8-acre parcel and the no-cut buffer to the Planning Board; it was not required.

Councilor Farber said the granting of a conditional rezone would not remove or limit the permitted uses on the property; Ms. Stearns said that is correct. Councilor Farber said the current proposal on the table impacts the proposed driveway and requires a return to the Council for another use of the driveway. An alternative point of egress to the lot would not require returning to the Council. Ms. Stearns said that was correct.

Councilor Farber said the restriction on alterations to the vernal pool and wetlands buffers applies to both the applicant and the property owner, but if one got a permit from the DEP to fill a vernal pool, this would no longer apply. Ms. Stearns said the Town's regulations would not apply. The state does allow some alteration. The DEP governs significant vernal pools only. If they are pools as defined by the Town's regulations but do not meet the state's definition of significance, they are only protected by the Town's subdivision and site plan process.

Councilor Farber said this doesn't seem particular onerous. A future Council could review the use of the driveway if changes were proposed.

Councilor King said the applicant has requested a cell tower and that is what they would allow. They are not prohibiting the landowner from coming back for future uses of the lot or driveway.

Councilor Kitchel said he didn't see many other options for access for this lot. He thought they should be cautious, but pointed out that a future Council could approve use of the drive.

Councilor Ferrante felt that this wasn't going against staff and legal counsel, but they don't ask legal counsel to consider the property owner's perspective. She stood by her vote from December 11.

Motion to amend the proposed ordinance carried 6-0.

Councilor King called the question. Councilor Kitchel seconded.

Motion carried 4-2 (Ferrante, Jones).

Adjourn

Councilor Ferrante moved to adjourn; Councilor Farber seconded. Motion carried 6-0.

Meeting adjourned 9:34 pm.

Respectfully submitted,

Melissa Tryon
Recording Secretary