

Town Council Meeting

Minutes

April 8, 2019

The meeting was called to order at 7:00 pm.

Roll Call

All Councilors were present and answering roll call.

Item 1 Order to execute a notice of intent to acquire property rights relating to the Underwood Road Drainage Project and an order to accept a utility easement in the extension of Underwood Road (paper street).

Town Manager Nathan Poore explained that the notice of intent is for property taking for a drainage project on Underwood Road. One old, 24-inch outlet pipe captures the stormwater from a huge outlet area. During heavy storm events, water pours from that outlet like a fire hose. In August 2014, a heavy rain event eroded the slope. The plan is to install drainage along a paper street. This requires the town to take our incipient rights along the paper street. One area of the drainage crosses three private properties. The town has settled with two property owners for easements, and this order considers the third. The new drainage will include three catch basins to slow the water down before it reaches the stabilized stream bed. This will require permitting through the DEP.

Councilor Kuhn asked about community feedback from the neighbors in the area. Mr. Poore said the only known opposition is the property owner of the property they are taking; that is why this has taken so long. One of the neighbors will be responsible for building the infrastructure on her property, and the town will partner with her on that part of the project.

Councilor King said some of the catchment area is in Cumberland and she wondered if there was a way for Cumberland to participate. Mr. Poore said there is no obligation and he wasn't sure they were aware of it. DOT built the project originally. He would speak with Cumberland.

Chair Hemphill opened the public comment period.

Michael Doyle of Portsmouth, NH reminded the Council that Councilor Cahan was not allowed to vote on this since she has not made satisfaction to him regarding an alleged breach of Council rules. He would take legal action to invalidate any votes she participates in until then.

John Winslow of Gray Road asked who would pay if the engineering on this project fails; he wondered what the safeguard would be. He thought Route 88 in Cumberland has more state jurisdiction than in Falmouth.

Mr. Poore said the safeguards would be the same as any other project; negligence on the engineering would be the engineers, for negligence on the construction, they would go after the firm. Two different engineers have worked on this; the Town has experience with both and has a high degree of confidence in the design.

Bob Klein of Seaside Way supported the Town taking an aggressive approach to this problem. He presented some photos from the back of his property from August 2014. There was a dramatic washout there from Underwood Spring. He felt an extension of this analysis should be done. He hasn't had another washout since then. He wondered if they can increase the capacity and improve the drainage on his street.

Chair Hemphill closed the public comment period.

Councilor Svedlow asked about the size of the storm event in 2014. Mr. Poore said there were 7 inches of rain in 24 hours; he thought it was a 100-year storm event.

Councilor Svedlow asked what type of storm event the new design considered. Mr. Poore said this is designed for current flows and is meant to improve the drainage. To increase capacity, they would need a bigger pipe.

Councilor King moved order 93-2019; Councilor Asherman seconded. Motion carried 7-0.

Councilor Svedlow moved order 94-2019; Councilor Kuhn seconded. Motion carried 7-0.

Item 2 Introduction of amendments to the Tidewater Village Design Guidelines and the Tidewater Master Development Plan relative to development regulations for the area known as TV3 in the Tidewater Master Planned Development District.

Nathan Bateman of Bateman Partners, representing Tidewater, LLC, said TV-3 is the last developable commercial property in Tidewater. They are asking for an amendment to the parcel to increase the density, the allowable square footage and the footprint of the building.

Councilor Cahan suggested that it would be a good thing to have an electric charging station; she asked if he would be amenable to adding that to the project. Mr. Bateman said they would.

Councilor King said this includes an increase of 18 units to Tidewater; she asked for their rationale for that increase. Mr. Bateman said that TV-5, which was recently sold to the Town, included housing units. Those have now been eliminated due to that sale, so even with an increase on TV-3 there is a net loss of 8 units on the project overall.

Councilor King said the height of the building will increase as well but will match the other buildings. Mr. Bateman said yes, it will be the same height as the building on TV-2.

Councilor Cahan wondered about the parking for the residential units. Mr. Bateman said the units would be 800-1200 sq. feet, and a mix of one- and two-bedrooms. They would have to follow the ordinance for parking ratios. Moving to more residential units rather than commercial development reduces the number of parking spaces required.

A public hearing was scheduled for May 13. The Planning Board will hold their MRA hearing on May 7.

Item 3 Report from the Long Range Planning Advisory Committee (LPAC) regarding proposed amendments to the Residential A (RA) zoning district, and other options at the request of several Councilors.

Becca Casey, acting chair of LPAC, said there were no black and white options. The recommendation presented by LPAC significantly rolls back the dimensional standards created in the 2016 zoning. This has been a difficult process, and LPAC can't please everyone. All the committee members care about Falmouth. They support further work, including education and communication with the community on how to control growth in town. LPAC's majority and minority opinions have been distributed and are identified as options A and C in the Council's packet. 3 out of 5 members recommended option A, the dimensional requirements recommended by LPAC on February 28; 1 member recommended option C, a full roll back of the dimensional requirements to pre-2016 levels, and 1 member was undecided. LPAC also discussed subdistricts, and the Committee unanimously felt there is merit in discussing this further. They discussed the treatment of lots that become non-conforming by passage of any of these options and recommended that treatment of those lots be in accordance with current standards. They felt communication and information sharing can be improved. They discussed retroactivity but had no recommendations on that.

The Council thanked LPAC for their service. They worked under tremendous time pressure and scrutiny.

Chair Hemphill outlined the 5 options:

Option	Zoning District	Description	With Retroactive Effective Date of Amendments
A	RA	Largely roll back to pre-July 2016 dimensional standards	no
B	RA	Largely roll back to pre-July 2016 dimensional standards	yes
C	RA	Full roll back to pre-July 2016 dimensional standards	no
D	RA	Full roll back to pre-July 2016 dimensional standards	yes
E	RB + RD	Full roll back to pre-July 2016 dimensional standards	no

Ms. Casey explained that A refers to the 2/28 recommendation of LPAC without retroactivity; B is the same recommendations with retroactivity. C and D are a full return to the pre-2016 dimensional standards in RA only; C without retroactivity, D with retroactivity. E considers the RB and RD districts, which isn't something LPAC reviewed.

Councilor Svedlow clarified that, while they can send all of these to public hearing, they can only vote on two of them at most – one on RA and the one on RB & RD. Mr. Poore said that was correct.

Councilor Cahan said there has been a lot of discussion and good feedback on the RA district, but not on RB or RD. She felt it was premature to move that to public hearing without LPAC reviewing it.

Councilor King sponsored that introduction with Chair Hemphill but after reflection she agrees with Councilor Cahan. She thought it was premature and needs more review and more data. She didn't support moving it forward.

Chair Hemphill felt it was helpful and important to have it on the table but agreed it may be premature. He thought in all fairness they should ask a committee to review it.

Councilor Asherman wanted them to lay out a process to look at zoning town-wide.

Councilor Svedlow asked the rationale behind the RB/RD proposal. Councilor King said they had been hearing the public talk about a full roll back a lot, and it came out of that. She thought that they did the best they could on the RA process to come up with improvements to dimensional standards; she would like the same for RB/RD. She hoped there is some learning out of the recent process, so they can make the next process better.

Councilor Kuhn supported deferring option E; she agreed that it is premature. She thought people wanted them to look at the zoning overall and she wants to do that, but she didn't think they were ready to do a full roll back.

Councilor Ferrante agreed. She asked what has been done to notify the people in town about this conversation. Mr. Poore said the town sent a mailer before the LPAC forums. There has been discussion about a mailer to the entire town for the hearings that are scheduled tonight.

The Council discussed whether to assign a review of RB/RD to LPAC. Councilor King felt there should be a period of reflection on the past process before they decide on who should move forward and with what. Councilor Svedlow agreed; he felt RA is an urgent issue, and growth/RB/updating the comp plan are

important, but he didn't support moving them into the urgent category. Councilor Asherman wanted to see broader representation in the process moving forward, not just the committee but people from all areas of town, including representatives from each district and how they are going to structure this moving forward. Councilor Kuhn agreed.

Councilor Ferrante felt they have to look at everything in town; they are in a time of change and transition into something different. There is a lot of work ahead. She felt LPAC's recommendation covered enough of the urgent need for her to support it. It was important to her that they get balanced and fair representation; they have heard from a lot of people, but a lot still don't know. She didn't see the whole roll-back; she would like to see them move forward from where they are now, knowing that they all feel that this is not the last revision, it was just the most urgent.

Councilor Cahan felt the LPAC recommendation solves the urgent issues they are aware of but she was concerned about making another change that they might change again in the future. It is a lot of different standards to keep track of. She thought going back to pre-2016 while they look at it might be easier. She spoke about the idea of sub-districts and talking with the residents of those neighborhoods to help identify the problems they are seeing and what they want. That will take a long time.

Councilor Kuhn felt that the best decision for RA in the long run is the sub-zones; there is such a high degree of variation in the district that a one-size-fits-all approach will not be sufficient. Whatever they move forward is a temporary solution; she was willing to support a roll-back if that is where the votes are, but she didn't like that approach. It throws out a whole lot of work and returns them to the Falmouth of 1965. The LPAC proposal, with some caveats, is sufficient to protect the district. She would want to move the two- and multi-family units to a conditional use; they are not consistent with every neighborhood. The Council has received a lot of letters, including those that love the 2016 zoning. No one has emailed her supporting the LPAC recommendation, but she feels it might be the right decision.

Chair Hemphill appreciated the hard work and specific consideration in the LPAC recommendation; it does a lot to address the concerns and slow down the development. He said the two options are close; LPAC struggled on whether they would recommend a full roll-back. He supported a full roll-back to pre-2016 as a temporary measure.

Councilor Asherman said any of these options are for the dimensional standards only, not other aspects of the full 2016 zoning package. He was concerned that if they went with the LPAC recommendations, they have four types of zonings within three years. A full roll-back made sense to him. The two options are not drastically different. He attended all the LPAC meetings and he got the sense that they were comfortable either way on this; there was no definitive decision. The Town needs to take a hard look at this, and he thought the easiest way to do that is to roll it back and then review it.

Councilor King said LPAC has delivered quite a dramatic shift and it is a roll back of the current standards. She believed the recommendations and the full roll back are close, but she felt the LPAC are consistent with their process and good governance. She supported the LPAC recommendation. She said non-conformity is a big deal for property owners. The 2016 amendments made it so more people could improve their homes. As they close the dimensional standards, they will increase non-conformity and increase the difficulty for lots of people to improve their property. More properties will come into non-conformity with a full roll-back.

Councilor Svedlow agreed with Councilor Kuhn. He felt the amendments in 2016 went too far; he thought these changes were best made incrementally so they can test the impacts of them. He suggested that is true for the opposite as well; that they roll back incrementally. He was interested in hearing from the public on both options. He sponsored the options without retroactivity; he didn't think they do a good job on communication and there hasn't been enough communication to every land owner that could be impacted by these changes to make them retroactive. If they are retroactive, they would take effect as of today's date; without it, they would take effect as of the date of the vote.

Councilor Asherman asked about the non-conformity of the lots created under current zoning.

Ethan Croce, Community Development Director, said properties that become legally non-conforming can be non-conforming in any respect: lot size, street frontage, etc. Its impact would depend on whether there was a structure on the lot, or if it was unbuilt. As long as one can build within the current setbacks, an owner can build without board approval unless the property is within the Waterview Overlay District. If, after that, the building envelope is not sufficient, the owner can apply to the BZA for a setback variance. This is for single-family dwellings only; a multi-family home would have to apply for a standard variance, which is a much harder standard.

Councilor Asherman asked what would happen to an owner that wanted to put a garage in the side setback. Mr. Croce said if an addition can be put on that respects the new setbacks no board approval is required. If the addition can meet the old setbacks but not the new ones, the Board can approve an addition up to the placement of the existing home.

Councilor Ferrante asked if the assumption is the roll back is for the entire 2016 amendments or just for RA and if so, where would they go from there. Councilor Cahan clarified that her intent is for just RA, since they have already started the public process and received public input on that; they haven't done that for other zones. Her goal was to do a review of all the zoning.

Councilor Ferrante said the duplex issue is not part of the dimensional standard and is not covered here. Councilor Svedlow and Councilor Cahan said they wanted those to be conditional.

Councilor Kuhn said, if they go with a roll back, they should set out the process on where they go from there. To her, that is a temporary measure.

Councilor Asherman said the two options are very similar and he could go either way. He didn't want to leave without them having a definitive process on where they go from here, including all the zones and not just RA.

Chair Hemphill agreed that the difference between the two options are relatively minor, but thought going back to pre-2016 would be more understood and less controversial. Once that is done, the Council needs to work on zones. There is too much in the original intent to throw it out, but they need to think about it and have a good public process.

Councilor King asked what the differences between the full roll back and the LPAC recommendations are; they are so close in effectiveness.

Councilor Svedlow agreed there isn't a lot of difference, and that is why he wants to hear public input on both of them. He would like to see the Council systematically evaluate the communication policy and the comp plan in each zone, and then go from there.

Councilor Cahan said the Council has discussed review of the comp plan and how it needs review more often, perhaps every couple years. The Council has been listening to the public and talking about the things the public has asked them to; trying to come up with a better plan on how they review large projects for example.

The Council discussed retroactivity.

Councilor Ferrante could not support a full roll back with retroactivity. There are people in RA that have no idea that this is happening.

Councilor Kuhn wondered if the Council would consider a compromise on retroactivity, 20 or 45 or 60 days. In her area, you would have to be living under a rock to not know about it, but she wasn't sure about the Pleasant Hill area for example. There is a rush at Town Hall of people splitting their lots, and she worried about irrevocable damage in the interim.

Staff said at least a week would be necessary to generate a mailing to all properties in RA. Mr. Poore said it would be important to set a date for retroactivity.

The Council discussed a date for retroactivity. Councilor Cahan suggested Friday, May 3.

Councilor Svedlow recommended moving forward with all four remaining options to the public hearing and determine a retroactive date later.

Councilor Kuhn recommended moving forward with both the LPAC recommendation and the roll back, amending both to make two- and multi-family dwellings a conditional use and with a retroactivity date of May 3. Councilor Svedlow and Councilor King supported that suggestion.

Councilor Cahan agreed but wondered what would happen if they heard from the public and wanted to remove the retroactivity. Councilor Kuhn said they would have to reintroduce.

Councilor Ferrante asked the impact of making the two- and multi-family units conditional. Mr. Croce said the dimensional standards for duplexes pre-2016 were more stringent. Councilor Ferrante felt those types of housing would not be built if they went back to those standards.

Mr. Croce said he spoke with the Town Attorney this evening; she felt the existing retroactivity language is sufficient, but she suggested some additional language as follows: *"Notwithstanding any other provision of this Ordinance, any lot created on or after (date of retroactivity) must conform with the requirements of these ordinance amendments and any such lot that does not conform thereto shall not be deemed a legally nonconforming lot with respect to such requirements."* This makes clear that if a lot is created after that date, it must conform to these standards the Council creates between the date of retroactivity and the date the Council takes its vote.

Councilor Kuhn said members of the public have asked on multiple occasions if it is possible to make it retro to November 2018. Mr. Croce said there is language in the statutes that says that permits that have been issued can not be captured more than 45 days from the date of the vote on the amendment.

The Council discussed how to move forward with the process beyond these amendments. Councilor Svedlow wanted a resolution; he felt they should begin with a comprehensive analysis instead of addressing specific zoning issues. Councilor Ferrante felt once they address RA, they can tackle the bigger issues. She didn't know how they address zoning without knowing what the community's values are. Councilor Asherman agreed and wants to make sure this remains on the front burner after they address the immediate fixes. Councilor Ferrante said all the members of the Council are committed to getting this done.

The Council requested a resolution before the end of the Council year to codify their commitment to moving forward. The general consensus was not to move forward with any specific zoning issues until they address the broader analysis.

Item 4 Introduction of amendments to the Code of Ordinances Sections 19-8, 19-64.2, and 19-82, to change certain requirements related to residential development in the RA District. These proposed amendments are referred to as "Option A".

The Council did not move this ordinance amendment forward to public hearing.

Item 5 Introduction of amendments to the Code of Ordinances Sections 19-8, 19-64.2, and 19-82, to change certain requirements related to residential development in the RA District. These proposed amendments would be retroactive to April 8, 2019 and are referred to as "Option B".

The Council amended the amendment to make two- and multi-family units conditional use, changed the date of retroactivity to May 3, 2019, added language as proposed by the Town Attorney, and moved this option as amended to a public hearing on May 13, 2019.

Item 6 Introduction of amendments to the Code of Ordinances Sections 19-8, 19-64.2, and 19-82 of the Code of Ordinances. These proposed amendments are referred to as "Option C".

The Council did not move this ordinance amendment forward to public hearing.

Item 7 Introduction of amendments to the Code of Ordinances Sections 19-8, 19-64.2, and 19-82, to change certain requirements related to residential development in the RA District. These proposed amendments would be retroactive to April 8, 2019 and are referred to as "Option D".

The Council amended the amendment to make two- and multi-family units conditional use, changed the date of retroactivity to May 3, 2019, added language as proposed by the Town Attorney, and moved this option as amended to a public hearing on May 13, 2019.

Item 8 Introduction of amendments to the Code of Ordinances Sections 19-9, 19-10.1, 19-64.2, and 19-82 of the Code of Ordinances to change certain requirements related to residential development within the RB and RD Districts.

The Council did not move this ordinance amendment forward to public hearing.

Item 9 Update from the Ad Hoc Retail Marijuana Committee.

Councilor King said the committee wanted the Council's direction on whether their charge should change, whether they should continue as an ad-hoc, and if they should consider an ordinance change. The original charge was related to zoning and regulation of retail marijuana and was a response to legalization of marijuana by voters in referendum. In 2018, the law changed; towns now have to opt in by way of an ordinance amendment in order to permit retail establishments of any kind. Currently, while individuals are limited to the number of plants they can grow, there is no limit to the number of plants on one property. They could draft an ordinance to control that. She wasn't sure it was a land use issue.

Councilor Svedlow asked the status of state law on marijuana. Councilor King said personal grow marijuana is legal right now; the question is whether the town wants to limit the number of people an individual can grow for.

Councilor Cahan said the broader question is whether the committee should continue to research the town's options and whether they should recommend ordinances to address those.

Councilor King said hemp is another issue they want to discuss. The FDA has now removed hemp from the cannabis category because, while it contains CBD, it only contains a small amount of THC.

Councilor Cahan said another question is whether they should change the name and charge of the committee to address both cannabis and hemp.

Councilor Kuhn supported the committee continuing so the Town could maintain some expertise in this arena and would like them to investigate further. Councilors Svedlow and Hemphill agreed.

Councilor Ferrante would like to see a larger committee with more meetings.

Councilor Svedlow agreed and wondered if they could make it a full committee instead of a Council sub-committee.

Councilor King said unless the Town opts-in, there will be no retail recreational marijuana businesses in town, including processing and laboratories.

The Council discussed a full committee that would cover both hemp and cannabis, follow changes in state and federal regulations, and solicit public feedback on recreational and other uses of marijuana, including hemp.

Councilor Asherman suggested the existing committee draft a charge and present it to the Council.

The Council will discuss this further in the summer at their annual workplan retreat.

A resident said there is a retail marijuana business that is growing and selling. He said there is an issue that needs to be addressed. Mr. Poore said that is a code violation and they would review it.

Keith Noyes said the committee has a good purpose; he would hate to see it go away. Marijuana is coming, and they will be asked for retail, packaging, etc. The Town should be prepared.

Mr. Croce said when the state first legalized marijuana, the laws were written so that marijuana was allowed by default unless towns took steps to regulate and/or ban it. That was the committee's first focus – to draft regulations to protect the town and consider what to allow, if anything. Last summer the regulation flipped, so that marijuana is prohibited unless towns expressly allow it. This is a different discussion and leads to a need for the committee to change its discussions. The State is still finalizing its regulations for recreational adult use; the landscape is still changing, and it is unknown where the gaps are.

Councilor Svedlow reiterated his request for a full, formal committee with a balance of members.

Councilor King asked if they wanted someone to look at an ordinance to limit the number of recreational pot plants grown by an individual. It isn't easy to enforce.

Councilor Svedlow felt a formal committee could review and discuss that.

At Councilor Ferrante's request, Mr. Croce explained the allowances for personal growth of marijuana plants for adults living on a property. There are no restrictions on the number of people who don't live on a property from growing on that property.

Chair Hemphill said Rep. Pierce recommended that the Town address that as an urgent issue.

Councilor Ferrante suggested the new committee review that as well. Councilor Kuhn said it is an acute issue and should stay at the Council level. Councilor Ferrante argued that they need more feedback than a three-member Council sub-committee. Councilor Asherman supported the creation of a full committee.

Adjourn

Councilor Svedlow moved to adjourn; Councilor Asherman seconded. Motion carried 7-0.

The meeting adjourned at 10:00 pm.

Respectfully submitted,

Melissa Tryon
Recording Secretary