

Town Council Meeting Minutes September 27, 2017

The meeting was called to order at 5:33 pm.

Roll Call

Councilors Ferrante, King, Farber, Kitchel, Hemphill and Jones were present.

Councilor Svedlow was absent.

Item 1 Discussion about the impact of a 2016 zoning amendment that increased residential density in certain zoning districts and to consider the introduction of an ordinance amendment that could address concerns previously identified by the Town Council.

Chair Hemphill moved to enter executive session pursuant to the Laws of Maine to discuss legal rights and duties with the Town's attorney, pursuant to 1 M.R.S.A. § 405 (6) (E); Councilor King seconded. Motion carried 6-0.

The Council entered executive session at 5:35 pm and returned at 5:59 pm.

Amanda Stearns, Land Use Policy Specialist, said there are two options for action for the Council to discuss this evening: adoption of a moratorium to give the Council up to 180 days to study the issue and block any permits from being issued during that time; or the adoption of a zoning amendment which would have a similar effect as a moratorium but would provide the public with more information. She provided the Council with some language staff have drafted. In July 2016, the Council passed language that changed how two- and multi-family dwellings were treated. The proposed language would turn back the clock, so that the ordinance would treat these types of developments the same way they were treated before that amendment was passed. This would give the Council time to determine how they want to treat those developments moving forward. Both the moratorium and the proposed ordinance would have the same effect.

Amy T'chao, Town Attorney, said it would be helpful for the Council to address two issues if they want to entertain any action, namely: what are the pros and cons of passing a moratorium versus an ordinance, and whether the Council wants to consider retroactivity on either of those two actions.

Ms. Stearns said the act of adopting this suggested reversion amendment is a final action, but does not preempt the Council from studying the issue and passing additional amendments in the future. She discussed the specific changes that were made in July 2016. They changed the definitions of multiplex to multi-family, and she recommended maintaining the changes to the definitions. She said the reversion would cause each residential district to revert to its previous requirements for lot area, lot width, and density allowances for two- and multi-family dwellings.

Councilor King asked if the reversion ordinance is simpler or more straight-forward. Ms. Stearns said it relates to retroactivity.

Atty. T'chao said it is permissible for towns to pass ordinances that are applied retroactively so that they would capture any applications that are pending at that time. That can be done in the case of either a moratorium or an ordinance. They can make an ordinance amendment that reverts and then do further study, make an ordinance amendment that reverts and do nothing, or do a moratorium which would give them a definite time period in which staff and Councilors are working on an ordinance amendment. There is permanence to an immediate ordinance adoption, but it still allows them to work on it.

Ms. Stearns said there is a timing issue; there are pending proceedings right now and if the Council chose to include those so that they had to meet either the amendment or the moratorium, whichever one the Council decided to do, it would have to be introduced on Monday, October 2, 2017 at the latest.

Councilor Kitchel said the issue is they have an unintended consequence of a zoning amendment; he remembers that one of the goals of the changes was to allow people to add an in-law apartment. They reduced the setbacks for those, and that was a benefit for people. What he saw happening was projects where duplexes were popping up and adding more density than he expected and were not consistent with the neighborhood. He wondered if they can mend this ordinance in parts, maintaining the ability for in-law/additional buildings on a property but excluding intense projects that have a lot of buildings on a small space.

Ms. Stearns said the draft amendment would not impact the ability to create accessory apartments or cottages. Those would remain in the ordinance as they were passed in 2016. Those uses are separate and distinct from a two-family dwelling.

Councilor Farber asked in which zoning districts the pending applications are located; Ms. Stearns said RB and RD.

Councilor Farber asked if the reversion could be drafted to allow an individual two-family or multi-family development on a single lot versus a subdivision development. Ms. Stearns thought they could draft something that could draw a line between single lot development that didn't need Planning Board approval versus development that would need Planning Board approval.

Councilor King asked what the dividing line would be; Ms. Stearns said there is bright line between projects that require Planning Board and those that do not. Defining it by subdivision law can be murky due to the number of exemptions allowed under state statute.

Councilor Ferrante said there are individual lots that might need Planning Board approval; Ms. Stearns said that was correct, if they were part of a subdivision for example.

Councilor King felt it was the Council's intention to look at the density of this type of development. She understood timing is tight if retroactivity is a consideration and the ordinance reversion is the most straight-forward way but she felt the moratorium better conveys to the community what they are trying to do: stop what was an unintended consequence and go forward to study it.

Councilor Jones felt that if they can make this fix and revert to rules that were in effect 14 months ago it would make it easier for developers to understand what the rules are. This is very difficult for the developers that were told by the rule change 14 months ago that they could move forward with this type of project.

Councilor Farber was leaning toward the moratorium; it gives them a fixed time frame which would prevent it from being pushed off by other work, and it sends a signal that they are not throwing out the idea of having diverse types of housing. It says they still value that type of housing but they want to see how they can make it work the way they want. The rules that were in place before do not allow two-family and multi-family housing in effect.

Chair Hemphill felt reverting would be a neater solution; he felt they were motivated to create more diverse housing options, but the current situation leads them to the need to review it. He agreed that the concept of the moratorium gives the message that they are actively working on it, but either option will give that message.

Councilor Kitchel proposed a moratorium to buy them the time to address the problem and get public comment. He was anxious to get the process started.

Councilor Ferrante liked the option of reversion with the intent to study; if someone wanted to move forward they can under the old rules; she felt a moratorium would prevent anyone from doing anything. She asked about the impact of retroactivity on those applications in process.

Councilor Farber asked Ms. Stearns to explain why the previous ordinance language was problematic for these housing types. Ms. Stearns explained that the formula that calculates the maximum number of units is different from how individual lots are laid out. For an individual lot, you have to have a minimum lot size, and then within that lot you must have a certain amount of net residential area per unit. Under the current ordinance, in cases where there are multiple units on one lot, in order to calculate the maximum number of units one must calculate the net residential area for the entire parcel and then divide it by a density allowance amount. That amount is not the same for two- and multi-family as it is for single-family; the allowable density for two-family and multi-family is twice what is allowed for single-family units. This disparity was always there, but there were never any two or multi-family units before so staff was unaware.

Councilor Farber asked if they could pass the reversion with a sunset clause; Ms. Stearns said they could. If the sunset passed with no action, it would free the existing ordinance.

Chair Hemphill asked about retroactivity; Atty. Tchao said they could enact an ordinance amendment which would take effect the date the ordinance was enacted. They could insert a retroactivity clause which would reach back and say that the standards of that amendment apply to any proceedings that existed as of a certain date. There are limits on how far back they can reach; they can reach back to capture proceedings for which there hasn't been final approval granted, and also those proceedings for which final approval has been granted as long as the ordinance is enacted within 45 days of the final approval. This would nullify that final approval. Retroactivity is legally permissible; she doesn't see it occur often.

Ms. Stearns pointed out that the Council used retroactivity in their moratorium on retail marijuana. They used the date of introduction in order to prevent any applications from being submitted during the approval process.

Councilor Farber asked if they held an introduction on October 1, for example, and it was retroactive to the date of introduction, anything that has received final approval would move forward. Atty. Tchao said with a retroactive date of Oct 1, they are looking at any pending proceedings that existed up to that date and that the pending ordinance language would apply to those proceedings. Pending proceedings are those that have received a substantive review by the Board. Typically, the rules are that if a project has received substantive review, they continue under the rules that were in effect at the time of that review. They can legislate their way around that rule. Secondly, anything that received its final approval in the 45 days preceding the enactment date would be nullified. They can limit or change the date of retroactivity.

Councilor Farber said without retroactivity it would take effect on the date the ordinance was adopted; Atty. Tchao said that was correct.

Councilor King said the original amendments were passed in order to meet the goals of the comp plan, but they had unintended consequences. She felt they want to move forward to get these amendments right in keeping with those goals. She advocated moving forward with retroactivity in such a way that they capture those projects that are being developed with these unintended consequences. She felt bad for the developers, but she felt her responsibility was to represent her constituents. She said the neighbors would be impacted for 30-50 years if those homes are built. Councilor Kitchel agreed.

Councilor Farber did not support retroactivity; she understood the concerns of the neighbors but she didn't think this was about health and safety. They can't do things like these lightly. When they made changes in VC-1 and -2 they allowed first floor retail with housing above. They haven't seen any of that developed yet, but she wondered what would happen if something came through and people didn't like it. She wondered what message they would be sending to future developers. She wondered how the community would trust that anything would stay put. It isn't perfect, but it isn't a disaster. They risk doing long-term harm of another kind if they go retroactive.

Councilor King thought the difference in this case is that they changed the incentives to favor one specific form of housing, which was not their intention and they don't want to go forward with that. That is different

than if people just don't like something that someone built. The current incentives are not where the comp plan or the economic development plan wanted them to be.

Councilor Ferrante asked if two-family or multi-family are allowed in VC districts. Ms. Stearns said the VC districts allow any number of dwelling units as long as they are on the second floor or higher.

The Council discussed how to proceed; staff recommended that the Council decide whether they want a moratorium or an ordinance tonight. Staff could then draft two options, one with a retroactivity clause and one without, for a special meeting on October 2.

Councilor Kitchel asked about the effect of the moratorium. Ms. Stearns said the effect would be that any two- or multi-family development would be put on hold. They haven't finalized how it would apply.

Atty. Tchao said the difference between the two is that the moratorium has the proscribed amount of time of 180 days. If they don't have anything in that timeframe, the current ordinance would come back into effect. An amendment would give a certain answer, but depending on direction from the Council it could be changed. It would not be bound to a set timeframe.

Councilor Ferrante favored the reversion with the intent to study. It allows people to do something; a moratorium wouldn't allow people to do anything. She was torn on the subject of retroactivity – it was wrong with its effect on developers, but it was right to correct their mistake.

Atty. Tchao left the meeting.

Councilor Farber suggested a sunset on the reversion; she felt the appeal of the moratorium was that the deadline forces action. She agreed that the moratorium prevents action; while the old language doesn't allow these developments, it allows people to do something. Ms. Stearns said if they pass the revision ordinance with retroactivity with a sunset and they failed to act, the ordinance would revert to its current wording. They haven't left any doubt as to what the ordinance says at any time. The moratorium doesn't have that effect.

Councilor Farber thought a sunset could be added at a later date; Ms. Stearns said they would be better to introduce it with the sunset and then remove it. Councilor Farber withdrew her suggestion, in recognition of the limited time available.

Councilor King pointed that no one developed under the old language because it was so restrictive; it is not useful. Ms. Stearns agreed; there was one project developed in the 12 years they looked back. Councilor King said the Council should consider that if they were looking at revision.

Ms. Stearns said the Council could couple the reversion with a resolution in which they commit to the public that they will address the issue in a timely manner. Councilor Farber thought that was reasonable.

Councilor Jones liked the idea and intention of the sunset, but he felt that they had goals when they passed the amendment in 2016 and the application that came in after were not what they were looking for. He didn't think they need the deadline; they want to get this right. He wanted to revert with retroactivity.

Councilor King still supported the moratorium but also like the idea of the reversion with the resolution.

Chair Hemphill asked about the consequences of retroactivity of the revision; Ms. Stearns said there is no difference between the reversion and the moratorium. There are two aspects to the retroactivity: moving it to the introduction date and capturing pending proceedings as of that date; and the second is the final approvals that have occurred within the 45 days prior to the adoption date. If they don't want to capture those pending proceedings, they would just not have retroactivity. They can choose to capture the pending proceedings and not to nullify those proceedings that receive final approval within those 45 days.

Councilor Ferrante felt the Council all agrees that they need to study it. She supported either reversion or moratorium. The retroactivity is the bigger issue.

The Council agreed that the two options are functionally the same and the consensus was to move forward with the moratorium.

Ms. Stearns suggested introducing the moratorium with maximum retroactivity; since that is most restrictive option. They could relax or remove it at a later date after taking public comment and holding more discussion.

At Councilor King's request, Councilor Farber explained that she felt retroactivity set a bad precedent and sends the wrong signal. She asked how people will continue to trust that things will stay steady and they can do things with their land. She said it felt a little unprincipled; it doesn't feel right to pull the rug out from something that is in process.

The Council set a special meeting for Monday October 2, 2017 at 5:30 pm. Chair Hemphill announced that they would hold a public forum at that meeting after the Council had some discussion about their options, and then they would have an introduction of a moratorium that is retroactive to the date of introduction.

Adjourn

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

Meeting adjourned at 7:36 pm.

Respectfully submitted,
Melissa Tryon
Recording Secretary