

Town Council Meeting Minutes October 23, 2017

The meeting was called to order at 7:02 pm.

Roll Call

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

Councilor Svedlow was absent.

Pledge of Allegiance

Chair Hemphill led those present in the Pledge of Allegiance.

Item 1 Public Forum

Karen Farber of Foreside Road addressed some errors reported by the local press in relation to contract zoning. Neither LPAC nor the Route 100 Committee were asked to review or approve the Homestead Acres application or any other contract zone application; they were asked to review a concept plan for the area. The Planning Board did review the application and she discussed the comments made by the Board. The CDC also reviewed the application at the conceptual stage and issued several findings, including that the proposal is consistent with the comp plan, though this should not be considered a statement of endorsement. No committee or body in the Town has approved this or any other contract zone. Only the Town Council can do that and this process has only just begun.

John Winslow of Gray Road said there is a citizen initiative to put a referendum in front of voters to rescind the ordinance passed in July 2016 to allow high-density development in certain areas of town. He encouraged interested citizens to contact him if they are interested in helping with this effort.

Item 2 (Consent Agenda)

- **Order to approve the minutes of the September 11, 2017, Town Council Special Meeting.**
- **Order to approve the minutes of the September 25, 2017, Town Council Meeting.**
- **Order to approve the minutes of the September 27, 2017, Town Council Special Meeting.**

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

Councilor King amended the minutes of September 11.

The minutes passed unanimously.

Item 3 Report from Council Committees and liaisons regarding updates on assignments.

Councilor King said LPAC is in the process of updating the Greening of Falmouth, the Town's open space plan, and have issued a survey to get public feedback on open space issues. It is posted on the town's website and will be open until Nov 5. The Tercentennial Committee's plans are coming along well. The second

annual Volunteer Fair is scheduled for Sunday, November 12 from 1:00-3:00 pm at Mason/Motz. Representatives from non-profits will be there. The goal is to increase volunteerism in town.

Councilor Ferrante said the FEIC is planning a business forum for January to provide an opportunity for businesses and the Town to discuss business issues and needs.

Councilor Farber said CDC is meeting Thursday at 5:30 to discuss zoning recommendations in the Route 100 plan.

Councilor Kitchel said the Finance Committee met on October 6 to kick off the annual budget process, which will conclude in April 2018.

Item 4 Report from the Appointments Committee relative to filling various vacancies on Boards and Committees.

Councilor Ferrante moved the following appointments; Councilor Farber seconded.

Board of Zoning Appeals: Nick Guerrette – Alternate member; Jay Trickett – Regular Member; Anthony Derice – Regular Member

Recycling & Energy Advisory Committee – Donna Lee Cheney

Harbor Waterfront Committee – Skyler Fugelso, Handy Boat Representative

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

Motion carried 6-0.

Item 5 To authorize the Town Manager to execute a quit claim deed for R05-012-00B, after receiving payment in full for the delinquent taxes.

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

Councilor Farber moved the order; Councilor King seconded.

Motion carried 6-0.

Item 6 Public Hearing and Order to approve a new victualer license for Esidore's Bistro @ Night.

In response to Councilor Farber's question, Jason Harris, owner of Esidore's, explained that he came out to help Adam Shapiro, the owner of Bernie's operate the dinner service at night. When he came out he changed the name and the menu. Now, they are transferring ownership and management of Esidore's entirely to him, which requires the license to be issued to him.

Chair Hemphill opened the public hearing; there was no public comment.

Councilor Farber moved the order; Councilor Kitchel seconded. Motion carried 6-0.

Item 7 Public Hearing and Order to approve a new liquor license for Esidore's Bistro @ Night.

Chair Hemphill opened the public hearing; there was no public comment.

Councilor Ferrante moved the order; Councilor King seconded. Motion carried 6-0.

Item 8 Public Hearing on an ordinance to adopt the maximum levels of income and expenses for the General Assistance program, Chapter 6, Article 6, Section 6.68, Appendices A-D of the Falmouth Town Ordinance.

Chair Hemphill opened the public hearing; there was no public comment.

The order was scheduled for November 13.

Item 9 Public Hearing on amendments to the Zoning and Site Plan Review Ordinance Sec. 19-23.11 Master Development Plan Time Limits, in order to extend the Tidewater Master Development Plan an additional one year.

Councilor Farber clarified that, in addition to extending the master plan one year, this also prohibits development on the lots known as TF-2 and TF-3 until such time as the Town and developer have settled some additional details.

Chair Hemphill opened the public hearing; there was no public comment.

The order was scheduled for November 13.

Item 10 Public hearing on an ordinance to establish a moratorium on two-family and multi-family subdivision development in certain residential districts.

Chair Hemphill opened the public hearing.

Leslie Riversmith of Middle Road is in favor of the moratorium and in favor of retroactivity. She understood the Council is concerned with the money the developers have spent in good faith to this point; she pointed out that the town residents have also spent a lot of money in good faith in their taxes. She felt that since the Council has admitted that they made a mistake with this ordinance, that good faith should be returned to the residents.

Don L'Heureux of Brook Road also spoke about the developers' costs; the development started with 5 homes, and now has 32. He understood the drive to make a profit, but the community is looking for a sensible sized-development; he would be satisfied with 16 units. The developer can sell the property to someone who could develop a reasonable sized development. The town has seen these types of septic systems and have seen them fail. They know how much it cost to bring sewer to Falmouth Country Club. Once a development is built, it will be there forever. If it has soil, traffic, or pollution problems, they will have them for a long time. As a real estate agent, he understands the effect this development will have on home values on Brook Road; the construction trucks will have a negative impact until the project is done in two years or so. That may change after it is built.

Ron Dearth of Falmouth Road supported the moratorium. He is an abutter to the proposed development on Middle Road. The proposed duplexes are completely out of scale with the homes in the neighborhood and would change the character of the area. He spoke about the visual impact they would have. The residential density that would be created would be out of proportion to the surrounding neighborhood. It is possible to cram 6 families on a 1.5-acre lot under the new zoning; this density is harmful to the quality of their neighborhood and should not be allowed. He strongly believed that this development will have a negative impact on property values. He said his home and property are his biggest assets, and will support he and his wife in their retirement. He spoke with a couple real estate agents and appraisers; one of them issued an unofficial opinion that it "does not look good for your neighborhood. He supported retroactivity and stopping the two developments that are possible due to the unintended consequences. He rejected the argument that retroactivity is unfair to the developers.

George Tarbox of Middle Road, distributed a letter to the Council that his wife wrote. He agreed with Mr. Dearth. He spoke about the history of the lot proposed for development on Middle Road. The owners had been told for years that it isn't big enough for one home, and now it is proposed for condos. If you make a mistake, stop and fix it. If you are in business, it's a risk.

Carrie Riley of Lakeside Drive said she doesn't care about the developers; she serves on the PTO and she cares about the schools. The elementary school is almost at capacity and the middle school is embarrassing from a health and aesthetic standpoint. She wondered if there was a study about the impacts of development prior to now.

Steve Hundley of Brookfield Road was in favor of the retroactive moratorium. He said they have heard about the impacts of the proposed developments. He asked if it was more unfair to one or two developers or the hundreds of families that live around these developments. He argued that Mr. Cummings still owns the land and could reduce the development; he hasn't lost the money he spent to buy it. He paid for a stormwater management plan, soils investigation, septic design and CAD drawings. He argued that these would either still be valid with a reduced proposal or could be altered without significant costs. The only thing they have lost is time because they have refused to listen to the neighbors and the Town. If the Council doesn't pass the retroactive moratorium, they will send the message that they care more about the developers than the hundreds of residents that will be impacted.

Scott Walker of Gray Road spoke about rentals in Falmouth. He had a 3-bedroom rental in town and he said the rentals are very expensive, and people pay them to get their kids in the schools. The high-density rentals will flood the school system, and he was strongly against that.

William Gary of Stone Ridge Road was concerned about impact on the schools.

Whitney Bradford of Brookfield Road read letters that were printed in the Forecaster about the proposed Tuscan Way development. She supported the retroactive moratorium and wondered why the residents should have to live with the unintended consequences of the Council's action. There will never be sewer brought to this area. Buildings should have to provide their own septic system, and not use a cluster system. The town has seen them fail in the past.

Emily Thompson of Brook Road agreed with the impacts on the schools and the traffic. She was also concerned with the impact of Councilor Ferrante's involvement with the development on Gray Road.

Jim Cummings, developer of Tuscan Way, said his retirement is riding on the vote tonight. He has tried to do everything the Town has asked of him over the last year plus; he has offered more than was required. It was patently unfair for anyone to deal with retroactivity and it sends the wrong message. He said the property is 18.8 acres; the subdivision on Hamlin Road includes lots of 18,000 sf and averages 15,000 sf per lot. It was done in the late 1960's/early 1970's and was developed prior to zoning. It has done fine. His condos average 25,000 sf/unit with a very rigid standard set by the Town. He felt his development would have less impact than the Hamlin Road project. All the interest he has received for the project so far has been from empty nesters. There is a lot of interest in this type of development. He said the development would not be seen from abutting homes and would house mostly retirees. It would have less impact than the developments around them. He spoke about the impact of retroactivity. He said the development will generate taxable real estate and virtually no impact to schools. It will have minimal impact on traffic and will allow for a place for older people to downsize.

Bruce Delugo of Brook Road said it is ridiculous to believe that people aren't going to bring school-aged children into the town. If this development was restricted to 55+, there would be a lot less concern, but there is none of that. This is a large parcel and the developer is using a small section; the Town has likely asked him to set aside a portion for open space, but he wondered about future development on the site. He was a school teacher and knew the impacts of an influx; he worried about the negative impact on the school.

Susan Wrisley of Twin Ponds Drive said a first-floor bedroom would not deter families from buying; she called the superintendent's office and they told her the elementary school could take 10 more students, the middle school could take 50, and the high school could take 15. She said they need to look at stopping development. She argued that residents have their retirement and inheritance in their homes.

Mary Morin of Brookside said there have been mixed messages about whether the condos were for retirees. These units are 3 bedrooms; those are for families. She said the development is not reasonable with regards to density and supported the retroactive moratorium.

Ellen Bois of Gray Road agreed with what people are saying about the impact on the schools. She was concerned about the schools and that the Council is looking out for the developers and not the residents. She didn't think the Council was considering their concerns. A retired person without kids is not going to want a 3 bedroom condo.

Tim Flaherty of Woodlands Drive is opposed to the moratorium. He has been in real estate for 38 years. While everyone has an opinion, they also need facts to back those up. He built a development twice the size of the Tuscan Way development a few years ago; the landscaping grows in and with the cluster design, you can't see the homes and they preserve open space. He argued that the residents of the development would use Blackstrap and not Brookside. The septic systems are environmentally friendly. He said increasing density in some areas is a good thing; it allows developers to meet the demand for people to downsize and still stay in their hometown once the kids are grown up. He said they have sold 114 condos similar to these in Westbrook and there are no children. They have not attracted families. He said developers put the capital up and take the risk to build homes; towns don't build homes, neighborhoods don't build homes.

Kate Griffin-Peelen of Falmouth Road said there have been two developments proposed for her neighborhood in the last 6 months. She said the homeowners contribute to the community and are not respected by these rules change. She said the schools are at capacity. This is a good school system and a great community. She supported the moratorium.

Dan Green of Kimberly Lane wondered about the role of the Planning Board. He said Tuscan Way is out of character of the neighborhood. He said the residents of the area don't oppose development; that's how they all got their homes. No one opposed development along Brookside.

Judy Crosby of Brookfield argued that the traffic study used numbers from a national study; she didn't think that applied to Falmouth since you can't walk anywhere. They will need to drive everywhere. She said people will buy 3 bedroom condos in order to get their kids in the schools; that's why she moved here. She supported the retroactive moratorium.

Michael Traister, attorney for Jim Cummings, argued that a retroactive moratorium would be fundamentally unfair. The Tuscan Way development is in a growth area and the zone was designed to include two-family and multi-family homes. This area was rezoned after a comprehensive public process including multiple committees. The result was that it was determined that it was in the public's best interest to designate growth areas. He said Mr. Cummings is not in mid-stream; he is scheduled for final approval at the Planning Board. Mr. Cummings relied on the lengthy process that led to the zoning change. There are strict building caps that apply in this town; 65 units per year are allowed. The Council discussed those and felt those caps would sufficiently limit growth. Mr. Cummings is willing to impose a requirement on his project that it be age-restricted to 55 and over. He said the Council doesn't have the authority to impose a retroactive moratorium; the state code says there needs to be an emergency that would include serious public harm or overburdened public facilities. He didn't think the proposed developments would overburden public facilities. He didn't think they had the basis to find serious public harm in this instance.

Marie Flaherty of Woodlands Drive, a realtor, asked the Council to oppose the moratorium entirely. She represents Mr. Cummings and spoke about the development. It is 32 units on 13.8 acres; it is not a danger and will not cause harm to the community. It will be served by an environmentally friendly septic system. The units will start at \$400,000. There is a pent-up demand for this type of development. She spoke about

residents who would like to retire in town to stay close to their family members. She said this development will be a beautiful addition to this area of town; it will provide trails and a sidewalk from Brookside to Blackstrap. She said home values will be maintained or increased by the development. She felt the development will have long-term appeal. She encouraged the Council to support the ordinance as it exists.

Chair Hemphill closed the public hearing.

Councilor Farber clarified that the moratorium is related to two- and multi-family developments that require approval from the Planning Board. The 151-unit development covered by recent press articles is part of a different process and is not related to this issue. The zoning amendments that were approved in July 2016 were part of a 6-year process; every property owner in Falmouth received 2 postcard mailings during that time. There were multiple public forums and multiple discussions at the Council level in front of the cameras. Sometimes it takes the reality of a proposal for everyone to see and understand the impact of the changes. This aspect of those zoning changes is one very small piece of the whole. She agreed that this one aspect of those changes is flawed, but that doesn't mean the whole thing was wrong. She said no member of the Council has a financial interest or conflict with this issue; Councilor Ferrante has recused herself from all discussions about the contract zone in which her property is involved.

Councilor King said one of the objectives was to get diverse forms of housing in town; the comp plan and economic development plan both call for it. She said the Council is talking to the school about impacts and trying to understand how they regard community growth.

Councilor Ferrante said the unintended consequence is that the math for single-family home density was not translated correctly for two- and multi-family homes. That is the only piece for her that warrants the moratorium.

Amanda Stearns, Land Use Policy Specialist, explained the land use density calculations, how they operated historically and how they operate now. The effect is that a developer can have twice as many units with two-family homes as with single-family homes and that was not what was intended.

Councilor Farber said the goal was to make two-family homes equally attractive to develop as single-family homes.

The order was scheduled for November 13. The MRA hearing at the Planning Board is scheduled for November 7.

Item 11 Workshop discussion on a proposed conditional rezoning for the construction of a Tier III Personal Wireless Facility on Falmouth Road, Map-Lot R04-022.

Ms. Stearns discussed the process that governs this application. The purpose of tonight's meeting is for the Council to review draft conditions and restrictions; staff have drafted these after review of the Council's discussions of the item to date. Once the Council has directed staff that the conditions and restrictions are finalized, staff will proceed to notice the public of the public hearing. The ordinance requires that a map of the property to be rezoned, along with the draft conditions and restrictions, be mailed to abutting property owners prior to the public hearing.

In response to Councilor King, Ms. Stearns said the entire parcel is subject to the rezoning. One reason this was done was because rezoning just the 100x100 foot area of the parcel is difficult to administer. Council also expressed concerns about the impacts of the driveway and the equipment site. The Council was concerned about public safety with regards to the proposed driveway. One of the conditions would restrict the property to one point of egress onto Falmouth Road to be shared by the property owner and Verizon Wireless. The driveway crosses a couple wetlands and the Council was concerned about further wetland and vernal pool impacts. One of the proposed conditions prohibits further impacts on the wetlands, vernal pools, and their buffers by either Verizon or the property owner. These conditions could be amended by the Council at a later

date if either the property owner or the applicant requested it. She clarified that there is no proposal to change the ownership of the property or carve out any piece of it. The entire parcel would receive the conditional rezoning. The parcel is zoned FF; the draft conditions and restrictions would limit the egress along Falmouth road to the tower and forest management only. If the property owner wanted to develop a portion of the property for a subdivision, they would have to come back to the Council to approve the use of the egress. If the development used access from another development, they could develop that way. The underlying district would remain in place; they are just adding a use that would not otherwise be allowed. Any tier III facility requires this conditional rezoning unless they are over 400 feet in elevation.

Councilor Kitchel left the meeting.

Councilor Farber felt the question is not that there should be a cell tower; the reports have indicated the need for one. She wondered about the impacts to neighbors. This parcel is high and wet. She wondered if the required process leads the Council to look at a reciprocal benefit other than the improved cell service. She asked if the community should get more out of this. She said this abuts Land Trust property and she wondered about a public trail easement through the property.

Ms. Stearns said the state statute that authorizes conditional rezoning is the same as that which allows contract rezoning. Falmouth's conditional rezoning is unique in that the Council can only approve a conditional rezoning if it is more restrictive than the existing zoning and is only applied to this wireless facility process. Conditions and restrictions shall relate to the physical development or operation of the property.

Chair Hemphill asked how the road access can be used under these conditions. Ms. Stearns said, due to the concerns about the corner and sight distance, the property would be limited to one point of egress on Falmouth Road. Currently there is a wood road and the proposed driveway; those would have to be combined. The resulting curb cut will have to meet the DOT's driveway and entrance minimum sight distance requirement. It would also be limited for use by the current use of the property, which is forestry management, and for the Verizon tower.

Chair Hemphill didn't think this parcel would lend itself to public access or connectivity with regards to trails.

Councilor King asked if there was conservation land that was contiguous to this parcel. Ms. Stearns said there is some conservation land adjacent to this parcel, and abuts it in one location. It was created as part of the Ridgewood subdivision, is owned and maintained by the Land Trust, and has trails on it.

Councilor King said the tower would have an impact on people in the area; she asked if it was reasonable to ask for a conservation easement on a portion of the land that is not leased by Verizon but is within the contract zone. Chair Hemphill pointed out that Verizon only has interest in the tower site and the road, not the rest of the parcel. Councilor King asked about the landowner's part of all this, if the property is being rezoned at Verizon's request.

Scott Anderson, representing Verizon Wireless, said Falmouth's ordinance is unique in how it treats the construction of new towers. The goal is to prevent new towers being built unless it is proven that they are needed. This functions more like a conditional use permit, reviewing one small, discrete portion of the lot, instead of the whole parcel. He represents Verizon and not the landowner. If the Council imposes conditions that impact the landowner, they would have to go back and renegotiate their lease. He didn't think this process was designed to alter what is happening on the underlying zone. He felt the conditions should impact only that area which Verizon is using. They feel that the tower has very little impact on abutting property owners.

Councilor Farber asked if there are any paper streets that come up to this property; Ms. Stearns said she was not aware of any. There are none shown on the parcel map. Mr. Anderson said they were not aware of any and they did a title search.

Councilor King asked if anything would prevent a second or third tower on this property once this approval is granted. Ms. Stearns said the conditions and restrictions make it clear that this approval is for only one

tower as requested in Verizon's application for Verizon's use. If someone wanted a second tower, they would have to return to the Council to amend this approval. If Verizon wanted to sell the tower to someone else, the transfer of the rights to the new owner would also require an amendment.

Councilor King asked why the whole lot would be subject to the conditional zone. Ms. Stearns said it is because of the two restrictions that impact areas outside of the lease area and easement, namely the restriction of impacts on wetlands and vernal pools outside the lease area, and the driveway on Falmouth Road.

Amy Tchao, Town Attorney, said usually contract zones and conditional zones are done on a parcel basis and its impacts on neighboring parcels. In this instance, it is quite a large parcel and the impacts may not reach the limits of the parcel. The question is whether they could carve out a section of the parcel since the construction is limited in this case. It is unconventional to rezone a portion of a parcel.

Councilor King said it seemed like there was some advantage to applying the conditional use to the whole parcel; doing so would allow them to impose conditions that would impact the whole parcel.

Ms. Stearns said that is true. They have to pick a certain geographic area. Their current options are to apply the rezone to the lease and easement area, or to the whole parcel. To do otherwise would require an area to be surveyed.

Atty. Tchao said they could draft language to add to the restrictions that would address concerns about a second tower on the site.

Councilor Farber asked about the distance between the fenced area and any wetlands or vernal pools. Ms. Stearns said there is a vernal pool that is fairly close. Mr. Anderson said the pad is 35 feet from the pool.

Ms. Stearns asked if the pools are mapped under the DEP standards and are considered significant under state standards. Mr. Anderson said they were mapped out of season so they are treating them as significant.

Councilor Farber asked how they would place this tower without impacting that vernal pool, and whether they could site this to reduce their impacts.

Mr. Anderson said after they mapped the wetlands, they relocated all of the project components to avoid impact to the vernal pools. They will install silt fencing and mitigation controls to avoid impacts during construction. The Maine DEP regulates siting within the vernal pool buffers by requiring a permit by rule; they have received those approvals. That permit limits the amount of vegetation that can be removed to 25%, and it would impact everyone who might develop on the property, not just Verizon. None of the wetlands are deemed significant under NRPA, so they only need to avoid the wetland itself. They avoided everything but the buffers and those buffers are heavily regulated by the DEP. They are not removing close to 25% of the vegetation. They would only remove the trees that fall within the footprint of the project.

Councilor Farber asked why the tower isn't located further back; Mr. Anderson said they are trying to get a balance between the location and the height of the tower. This tower location is in the sweet spot of avoiding all vernal pool impacts and keeping the 110-foot height of the tower. They will not be allowed any impacts to the vernal pool during construction without enforcement action by the DEP.

Councilor Farber asked about replanting; Mr. Anderson said they only have the right to clear within the 100x100 foot area and the area is that size because that is the area they need to install the tower. All the vegetation outside will be maintained.

Chair Hemphill asked where the cranes would be located to install the tower. Mr. Anderson said the contractor will determine whether they will use cranes or a helicopter to install the tower; either option doesn't require a lot of clearing. This is a long access drive.

Councilor King asked who monitors the installation; Ms. Stearns said the DEP might hire a third-party inspector, usually CCSWD. The Town's Code Officer would also monitor the site during construction for the Town's permit. The Town could require a third-party expert to monitor the construction.

Mr. Anderson said DEP doesn't have an inspector for a permit by rule; he thought the Town's inspector would be the frontline monitor.

The Council discussed the proposed conditions and restrictions. Councilor Farber asked to add a condition that approval of this application does not indicate endorsement of any future towers on this parcel. She also wanted to require third-party expert monitoring of the installation of the tower and the construction of the road, to be paid by the applicant.

Councilor King asked if anyone wanted to see any public access or trails easement. Chair Hemphill said the area is very wet and is not great for walking. It might have value as a wildlife corridor. Without access to any other trails or properties it has limited benefit.

Councilor King wondered about its mitigation value. Ms. Stearns said if they are looking for some negotiation with the property owner outside of the conditional rezoning, they could pursue that separately. She asked if the goal was to conserve habitat or to gain public access. Councilor King felt it was the former. Ms. Stearns said the condition in the current draft restricts them from further impacts and applies to the entire property.

Councilor Ferrante was comfortable with the draft conditions and restrictions with the two submitted by Councilor Farber.

Mr. Anderson felt the limitations on the driveway is appropriate to put on the site. He also thought it was appropriate to limit Verizon on the buffer impacts, though he argued for changing the restriction of wetland impacts to "no net change" to allow them to move the road slightly in case they find ledge. He argued that applying the limit of further wetland impacts to the entire parcel would prevent the property owner from doing cutting that would otherwise be lawful under the DEP's permit by rule. This would take away something that the current zoning and DEP regulations would allow. He felt that goes above and beyond the impacts of this project.

Atty. Tchoa said if this project wasn't happening, it is true the landowner could use the vernal pools buffers to do other things. It shouldn't matter who is disturbing the buffer; it is limited to 25%. She said the restrictions the Council is considering apply to the impact itself and not who is creating the impact.

Staff will add the two requested conditions to the draft. The draft conditions and restrictions and a map of the parcel will be sent to all abutters within 750 feet of the parcel with the notice of the public hearing. The conditions and restrictions can still be changed as part of this process.

The public hearing was scheduled for Nov. 13.

Adjourn

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

The meeting adjourned at 10:25 pm.

Respectfully submitted,

Melissa Tryon
Recording Secretary