

# **Town Council Meeting Minutes January 29, 2021**

Chair Kuhn began the meeting at 8:00am.

## **Roll Call**

All councilors were present and answering roll call.

## **Item 1      Workshop discussion of street acceptance policy and pending street acceptance applications**

Chair Kuhn described the purpose of the meeting and said that there would not be a public comment opportunity. She said that she and Councilor Asherman recommended that the Council approve the three pending applications, Seaside Way, Paddock, Kilarney, and Cavendish, and Alpine Drive and Sylvan Drive. She asked the councilors for their reactions. She said the applications were not perfect but passed the straight face test. She also said that this Council and past Councils had given the applicants reason to believe that they should continue this course. She felt that it was fair to approve the applications. She did not think it served the process or the Council in the long term to act in ways that are capricious.

Councilor Asherman said he had questioned the public benefit of accepting the applications in the past but after reading the status memorandums prepared by Justin Early, Town Engineer, felt that the process was flawed in that the applicants were led to believe that having complete applications assured Council approval. He viewed it as fairness to the process. He felt that the process needed to be corrected but that the three applicants had done what was asked.

Councilor Cahan agreed that it had been a long process for all three applications. She felt it as fair to let the three applications move forward and finish up. She felt that the Town should be reviewing the street acceptance application process. She wanted to consider ways to make it clearer to residents when they purchase property whether the streets are public or private and whether they could ever be public.

Councilor Johnson was supportive of moving forward with the three applications and reviewing the process. He also wanted to evaluate the associated costs.

Councilor DeLima said it would be one thing if the process had been long because the Council or the staff had messed up or not been clear but that the timing of the process was due to the specifics of the applications. She asked the other councilors for clarification on their decisions to move forward with the applications. She felt that applicants should be told that it would be a long process and would cost a lot of money but that the timing and cost should not outweigh the question of whether there is a public benefit. Chair Kuhn said that under the current process the applicant digs into all the technicalities and investment up front before the application comes before the Council. She felt that the process ought to be flipped. Councilor DeLima agreed with Chair Kuhn but provided the example that no one could have envisioned the situation of needing the Seaside Way residents' mortgage companies to sign off on the easements. She said the process will always be long and expensive and there is no guarantee that the applicants will be able to complete their applications.

Councilor Asherman felt it did not make sense to require applicants to have their applications complete before Council review. He said we are where we are with the pending applications and the applicants have been led along. He did not think it was fair not to move ahead. Chair Kuhn added that Town staff and the Town Attorney had spent an enormous amount of time on this.

Councilor Cahan agreed with Councilor Asherman's comments. She said it was challenging to have the applications pending through multiple Council and staff turnovers. She said all these three applications had done their very best and met the standards in the policy. She felt the Council should move forward with the applications and should re-do the policy.

Councilor LaFond said he had looked at the policy, ordinance, and process not just in Falmouth but in other communities. He said there were many similarities because the question put before the Council is whether the applicant meets the standard set forth in the ordinance and that involves also considering the policy statement made by the Council. He said that the process is set forth and the Council is supposed to comply with it. He said it is another question all together whether there is a change to the ordinance or a change to the policy in the future. He said the process is meant to make sure that when the Town takes on the responsibility of accepting a street that it does so in a rational way that protects the interest of all Town members. He said he was sympathetic that the process is long and expensive, but perseverance is not compliance. He said that he had not seen anything indicating that staff or the Council had been capricious. He said the three pending applications appeared to be almost there but the notion of pre-approval seemed capricious.

Chair Kuhn said she did not think anyone wanted to move forward until the applications were finalized. She asked if Councilor LaFond would be in support of moving forward on the three applications if they were finalized. Councilor Lafond said yes.

Councilor Cahan clarified that when she said she was supportive with moving forward with the three applications it was because they were already so far along in the process and with the caveat that the applications were finalized. She felt that the applicants deserved assurance.

Councilor Trickett felt blindsided by a recommendation to conditionally approve the three applications without ever having the discussion on the agenda item. He said these three applications are not the only applications that have been pending for a long time. He said it would be unfair to the other applicants who have also been working to comply with the current policy if only these three applications were approved. He was opposed to the idea of approving the three applications just because it had been a long and expensive process. He said he also researched the history of street acceptance in Falmouth and other towns' ordinances. He did not believe that the Council was apply the same rules across the board when reviewing the proposals. He said that the Council needed the weigh accepting streets against the perpetual public maintenance requirements. He said there was no reduction of costs associated with the connectivity provided by each of the applications. He reiterated his opposition to accepting Seaside Way with the eyebrow. He was supportive of revising the application process. He said that the Council's obligation was not to the private benefit of these applicants but to all the other residents. He did not think that the Council should approve applications unless it could articulate why the benefit of accepting the streets outweighed the maintenance cost.

Chair Kuhn suggested pivoting to the bigger questions about forward looking and policy.

Nathan Poore, Town Manager, reviewed the street acceptance ordinance concept revisions prepared by staff. He said there were two categories of potential changes, procedural and policy discussions such as around public benefit and connectivity. He said that the concept revisions address the procedural items. He said the first suggestion was to come up with some sort of pre-application process that requires less initial upfront investment of time and money and gets applicants before the Council earlier. He said staff reviewed other towns' policies and ordinances but did not find anything that would be useful for moving forward. He asked the councilors to forward any policies or ordinances that they liked to forward them. He said staff recommended requiring an escrow up front to cover legal review. He said staff questioned whether 30 days was enough time to turn around staff applications reviews. He said that if there would continue to be policies guiding street acceptance outside of the ordinance that those policies would need to be addressed in the

ordinance. He said staff recommended adding a provision that full payment of outstanding expenses was required in advance of Council approval of applications.

Chair Kuhn ask for clarification that the pre-application process would delve directly into public benefit or whatever criteria are established. Mr. Poore said that was correct. He said a submission checklist could be part of the pre-application phase.

Councilor Trickett said a lot of the applications involved subdivisions where extra money was spent to build things out in conformity with Town requirements and standards with the hope that at some point the street would get approved and would not have done that if they thought there was not chance that they would get approved in the future. He asked if this pre-application step could be used by developers and homeowners' associations at the outset. He said the issue is that all the construction costs are spent long before anyone applies for public street acceptance. He asked if the pre-application step helped developers or just the post application expenses. Mr. Poore said he did not know whether the developer or applicants would have a choice at the Planning Board stage as to whether to build these extra things. The Planning Board makes that call. He said we could create an initial step at the Planning Board phase, but it could take 10 or 15 years for the subdivisions to be built out. Councilor Trickett suggested that developers could apply for street acceptance at the point of coming before the Planning Board for a proposed development that requires the building of new roads. It could be treated like a building permit where the Council considers it before it is built and is approved as submitted. It would not become a public street until the requirements are met but the actual council action happens at the outset. Mr. Poore said having the Council review the plans would still be guidance only but could put something on record. He said the Ordinance Committee had discussed how to get something in the record right at the beginning. Staff had suggested adding language to the plan set that at the time of approval by the Planning Board all streets are deemed private until considered by the Council later. Councilor Trickett said he was suggesting that the Council would accept the street before it was built as submitted. He said he wanted to hear from staff if there was no way to do that or if it would just require a rethinking of how the ordinance is written. Mr. Poore said he did not think it was possible to accept a street before it was developed or to accept with conditions. Lisa Magnacca, Town Attorney, said that was correct. There was no mechanism for a town to conditionally accept a road and usually towns will want to observe how streets handle a few seasonal cycles prior to acceptance. Councilor Trickett suggested an option agreement so the Town would be entering into a real estate contract. Chair Kuhn said that Councilor Trickett raised a good point.

Councilor DeLima asked whether staff would be in a position at the early application stage to provide the reports described in the ordinance. She wanted to have staff make presentations on whether the applications met the criteria. Mr. Poore said yes and when the ordinance language is developed the Council can layout the type of things it wants the applicant to submit for that type of discussion.

Councilor Cahan felt it was important to get input from people who have been through this process. She felt it would help the Town establish clearer definitions. She said staff need to work with prior applicants to improve the timeline. She suggested creating a fee calendar. She liked the idea of looking at projects before they are being developed. She felt that the Town should be requiring all streets that are five or more homes to be built to the requirements of public roads standards. She felt that would alleviate a lot of the expense for residents and the Town.

Chair Kuhn said this meeting was intended to be a high-level concept discussion. She said staff could take the different themes coming out of the discussion and develop them further. She asked whether the councilors wanted the review to come back to the full Council or for the Ordinance Committee to work on it first.

Councilor LaFond agreed that we should try to front end. He discussed shifting the responsibility, expense, and time involved to apply for street acceptance from the homeowner to the developer. He felt the developer

should be required to either apply for streets that will be accepted and show that they will comply or make a commitment that they will not apply to have the streets be accepted.

Councilor Asherman agreed with Councilor LaFond's comments. He did not think that every development has an intention of the street going public. He said he was under the understanding that for subdivisions the road standards must be met regardless. He suggested that there needs to be a process for providing public benefit and a way of weighing the costs and benefits. Justin Early, Town Engineer, said the Planning Board can grant waivers if the developer says that they do not intend for the streets to become public. Councilor Asherman suggested that if developers are granted waivers the Town needs to make it clear that the streets cannot become public.

Councilor Johnson was concerned about the precedent it might set to make it clear early on streets will or will not become eligible for street acceptance at any point in the future. He asked if the proposed language would preclude a development from enhancing the road to meeting the standards later. He felt there needed to be some structure around what public benefit means.

Councilor Trickett said there are examples of what Councilor Johnson was describing in which a private driveway became subdivided without receiving subdivision approval. He said Seaside Way received a waiver on the street width but felt it was appropriate to grant under the circumstances. He said he was referring to costs that go beyond the design standards related to connectivity such as setting aside land for a paper street. He said there are streets that do not meet the street standards that are still potentially good candidates for street acceptance and there are also costly decisions that are made in terms of designing a road and a neighborhood with the hope of meeting public acceptance standards that go beyond the physical and right-of-way requirements for Planning Board approval.

Chair Kuhn wanted to see more clearly articulated requirements around public benefit. She provided the example of what is required for trail connectivity.

Councilor Trickett reviewed the street design standards sections of the ordinance. He said staff make an assessment on the existing requirements which are objective standards which the Council can consider. Councilor Cahan said the street design standards help define the street connectivity but there still seems to be a lot of question regarding trail connectivity. She felt the trail connection criteria needed to be further fleshed out and clarity was needed regarding how many items on the criteria list needed to be met.

Chair Kuhn asked if the Council wanted to bring the focus back in and worth through the pending applications with more specificity against the ordinance criteria.

Councilor DeLima said there was an aspect of safety in that cutting across Seaside Way may help with the morning rush. She asked if safety could be added to the considerations for the Council.

Chair Kuhn said trail, bike, and pedestrian connections was helpful but very subjective.

Councilor Asherman said future connections to new developments was unclear.

Councilor Trickett said the list of considerations could be changed or clarified but ultimately the Council is going to have to make a judgement call. He felt having a good set of standards was useful because it allows the staff to make an assessment. He said ultimately the question is whether the public benefit outweighs the maintenance cost. Councilor Cahan added that the Council needs to be cautious when thinking about what is of value to the town or not. Amenities in one part of town might not be as valuable to people who live in

another part of town. Councilor LaFond said the connectivity, trails, and public access make a huge difference for residents.

Chair Kuhn asked whether the councilors wanted to keep developing street acceptance policy for the future at the full Council level or to send it to the Ordinance Committee for future development. Councilor Cahan was in support of having the Ordinance Committee work on it. She asked for staff to work with prior applicants first. Councilor Asherman was in support of having the Ordinance Committee work on it. Chair Kuhn added that any councilors could attend the Ordinance Committee meetings. The rest of the Council agreed.

Chair Kuhn said that the Council had been discussing three of the four pending applications. She did not think that the Stone Ridge Road, Hilltop Trail, and Rogers Trail application was at the same level of completeness as the other three applications. She said it was possible that the Stone Ridge Road, Hilltop Trail, and Rogers Trail application would come to fruition while the new and improved process is unveiled. She felt concern about the other three applications getting stuck in the middle of two processes. She said there was consensus that the three applications should be finalized before being put on a Council agenda for final action. She said there was also consensus that the public benefit piece needs to be hammered out. Councilor Trickett said there was a list of ten or so streets that had expressed interest in applying for street acceptance. He expressed concern that the Council would be treating the three applications differently because they had spent a lot of time and money when other streets may also have spent time and money.

Councilor Asherman asked for clarification that the three applications would not come back before the Council before they were finalized. Chair Kuhn asked for the councilors' thoughts. She said the problem with waiting for that time is that additional spending needs to occur before that point. Councilor Asherman asked for clarification that if the applications were put on an agenda before they were finalized it would just be a discussion. Chair Kuhn said that was correct. Councilor LaFond felt that discussions put the Council in an uncomfortable position of pre-judging. He did not think it would be efficient for the applications to come back before the Council until finalized. Councilor Trickett said there was a value to narrowing the amount of time in which applications are discussed and having more certainty because the record is not closed until the Council accepts the street. Councilor Cahan wanted the applications to come back when they are finalized. The other councilors agreed.

## **Adjourn**

The meeting adjourned at 10:00am

Respectfully submitted,

Marguerite Fleming  
Recording Secretary