

AMHERST PLANNING BOARD
Wednesday, October 30, 2019, 7:00 PM
Town Room, Town Hall
MINUTES

PRESENT: Michael Birtwistle, Maria Chao, Christine Gray-Mullen, Chair, Jack Jemsek,
David Levenstein, Janet McGowan

ABSENT: None

STAFF: Christine Brestrup, Planning Director
Pamela Field-Sadler, Administrative Assistant

7:05 pm: Chair Christine Gray-Mullen opened the meeting.

I. MINUTES - None

II. PUBLIC COMMENT PERIOD – None

III. PUBLIC MEETING – SUBDIVISION

Amherst Hills Subdivision – SUB 1989-13

Request by residents of Amherst Hills Subdivision that the Planning Board rescind the release of lots that were released by the Planning Board on May 1, 2019, from the Approval with Covenant Contract, dated July 2, 2003, recorded in Hampshire County Registry of Deeds, Book 7555, Page 61

7:06 p.m. Ms. Gray-Mullen explained the Planning Board (Board) would continue their discussion regarding the request to rescind the release of the Amherst Hills Subdivision lots approved by the Board on May 1, 2019. Ms. Gray-Mullen explained a Site Visit summary by the Board would follow the petitioners' presentation.

Attorney Tom Reidy, Bacon and Wilson, introduced himself as the representative for the Amherst Hills petitioners, as well as Jim Masteralexis who is an attorney and resident of Amherst Hills. Mr. Masteralexis clarified that although he is an attorney, he is participating in this discussion as an Amherst Hills resident.

Mr. Reidy began the presentation stating the request before the Board is to rescind the decision to release the Amherst Hills Subdivision lots granted by the Board on May 1, 2019. Mr. Reidy pointed out that 4 of the 13 lots released on May 1, 2019 have been sold, so the request refers only to the remaining 9 lots. Additionally, the petitioners are requesting that Tofino submit justifiable documents showing the current cost to fix and finish the roadway, and for the Board to increase the Performance Bond accordingly. Mr. Reidy pointed out that without the rescission, nothing prevents

Tofino from selling the 9 lots and it is unclear if the Town could then rescind the release of the lots if they are owned by another party. If Tofino conveys the lots without an increased Performance Bond and fails to meet its obligations, the road would remain incomplete with only the security to ensure a top coat at a cost estimated 2 years ago, without any recourse.

Mr. Masteralexis reiterated he is participating in this discussion as a resident and Mr. Reidy represents the petitioners. Mr. Masteralexis shared his opinion that this case is important. The Amherst Hills roads are substandard and the roadwork was incomplete on June 30, 2019. Allowing a developer to forego their obligation to complete the roads sufficiently, and instead require homeowners to assume the cost and responsibility while continuing to sell lots is setting a bad precedent. The roadwork was not completed as directed by the covenant on June 30, 2019. He characterized the release of the lots as an honest mistake. Mr. Masteralexis supports the request to rescind the release of the lots and increase the Performance Bond.

Town Engineer Jason Skeels provided an historical summary of the Amherst Hills subdivision. Mr. Skeels explained that when Tofino purchased the property, it began to work on the road. At that time, some of the existing infrastructure was usable; some had to be removed and replaced. Once the infrastructure work was completed and approved, Tofino began to lay the binder course which serves as the foundation for the top coat in order to begin to sell the lots. As more lots were sold, more of the road was constructed.

Mr. Skeels pointed out the original binder course has sat for roughly 15 years and because it is porous, the binder course has deteriorated considerably. Mr. Skeels also noted the detention ponds which are set off from the road in the woods have not been maintained properly and are now overgrown with woody shrubs 1" to 2" in diameter.

Mr. Skeels shared that he developed a punch list regarding work to be done at Amherst Hills including replacing the binder course in some areas and sealing it in others to prepare for the top coat. After the maintenance process is complete, all the structures would need to be raised about 1 ½" and then the surface paved with a 1 ½" top coat to achieve a finished road. The top coat is usually applied when the residences are 90% built and developed.

Mr. Skeels pointed out this subdivision suffered a recession. The town had asked Tofino to finish parts of the road; however, Tofino wanted to wait and finish it all at once. Ms. Gray-Mullen asked if the date of June 30, 2019 as stated in the Performance Agreement was a firm date. Mr. Skeels responded saying the date of completion is not always firm, and his opinion is this was not a firm date, but it would have been better to finish the road sooner.

Mr. Birtwistle reported on the Site Visit. The group met at the intersection of Hawthorne Road and Station Road, and proceeded to walk up the hill to the subdivision. A variety of qualities of the asphalt paving were observed. At the lower

end, significant signs of degrading were seen while the upper side appeared in slightly better condition. The group observed significant evidence of recently repaired potholes. Mr. Birtwistle shared that when leaving the site visit, a long stretch of new paving was seen suggesting it had been very dangerous before paving. However, it is unclear if this portion of road is in Amherst.

Mr. Birtwistle stated a number of catch basins and other structures which are deteriorated and dangerous were observed. Ms. McGowan added the group witnessed uncleared drainage easements which prohibit access to the detention basins. The group witnessed pedestrian trail easements that were full of trees, and some houses where water from roof drains flows directly across the sidewalk. The two detention ponds observed were overgrown with shrubs and small trees.

Ms. Brestrup noted that Mr. Skeels had pointed out that about 1/2 of Hawthorne Road and 1/3 of Linden Ridge Road need to have the binder course removed and replaced, but the remaining road is in reasonably good shape. Mr. Skeels agreed with Ms. Brestrup and shared the town has been plowing the roads as a courtesy, but is unable to continue because the current condition of the roads will damage the plows. Tofino has patched the potholes and contracted with a company to treat all the manhole structures with mastic epoxy. Tofino has ordered new slab tops required to repair the two collapsing catch basins. Mr. Skeels stated when these repairs are complete, the town will inspect and determine if the roads are plowable.

Mr. Skeels shared the remainder of the punch list items are tasks for the long-term construction of the roads required for the town's acceptance of the roads, including the top coat. Mr. Skeels explained the original cost estimate developed in 2013 was much larger. It took Tofino several years to finalize a signed three party agreement. Tofino has taken care of some minor items on the list, but not all of them. In 2017, the cost estimate agreed upon in the Third Party Agreement includes the top coat, raising structures, some ramps and some sidewalk touch ups.

Mr. Birtwistle asked about the estimated average life span of a binder course without a top coat, and when was the first base course laid in Amherst Hills. Mr. Skeels explained that determining an average life span is difficult because of the many variables. The town's preference is to allow a binder course to remain without a top coat for no more than a year or a maximum of 5 years. Mr. Skeels said the first portions of base course were put down in 2005, and estimated the continuous loop was completed in 2015. Mr. Birtwistle noted that the first base course portions are past the estimated life span, and the loop portion, at best, is within a year of its estimated life span.

Ms. McGowan asked if the base course was observed as failed at the time the Three Party Agreement was signed in 2017. Mr. Skeels said at that time the base course was in fairly good shape; however, once deterioration begins, a base course fails quickly.

Ms. Gray-Mullen shared this is a process that requires balance. It can take years to build 90% of a subdivision, and the town does not want to take ownership of a new road prematurely because the integrity of the road can be effected by construction traffic. In this case, the binder course has sat a long time. Mr. Skeels stated he is requesting Tofino address the roads, and Tofino has said they are interested in placing the top coat in the spring of 2020. Mr. Skeels is unsure if Tofino has estimated the cost of any of the punch list items.

Ms. Gray-Mullen asked Mr. Skeels if he could develop a new cost estimate. Mr. Skeels agreed he could and would base his costs on the MA DOT running averages data. Using this data, the estimated cost tends to be a little higher than what is typically paid in Western MA because the data is an average from across the state. Mr. Skeels agreed a current cost estimate will determine if the Performance Bond needs to be increased.

Ms. McGowan asked Mr. Skeels to confirm that he has had conversations over the years with Ted Parker regarding what needs to be done with the roads. Mr. Skeels stated that in ongoing conversations with Tofino he has made many suggestions about patching, laying the top coat in portions and plowing. Ms. McGowan asked if Mr. Parker, during that time, ever referred Mr. Skeels to the homeowners association to fill pot holes, repair catch basins or replace the binder course. Mr. Skeels responded that Mr. Parker has never referred him to the homeowners association. Mr. Skeels explained their relationship was based on good faith. Mr. Parker would follow through with his agreements; however, sometimes it would take a little longer than others.

Mr. Jemsek expressed his apologies to the residents of Amherst Hills that there is not a mechanism for abutter notification when a request to release of lots is submitted. Mr. Jemsek shared his opinion that a notification procedure is important to avoid this from happening again. Ms. Brestrup confirmed that a notice regarding this meeting was sent to all Amherst Hills property owners, Greenfield Savings Bank and Tofino Associates as recommended by Town Attorney Joel Bard.

Mr. Jemsek asked why the Board based the release of lots on information written in 2017. Mr. Skeels said he did not recall being asked for his opinion; however, the release of lots is presumably a step toward a finished road that the town could accept. Ms. Brestrup stated that when a request to release lots is submitted, the consideration is if the road is passable and able to allow access to a home construction site versus the specific condition of the road. Mr. Skeels agreed with Ms. Brestrup.

Mr. Birtwistle asked if Ted Parker was notified of this meeting. Ms. Brestrup confirmed, as an Amherst Hills property owner, he was sent a notification, as well as a personal invitation from Ms. Brestrup in a phone conversation. Ms. Brestrup stated Mr. Parker sent an email saying he would not be in attendance for this meeting, and the Board received a copy of Mr. Parker's email.

There was a discussion regarding the amount of time needed to develop a new cost estimate, as well as who is responsible to create a new tri-party agreement. Ms. McGowan pointed out a new tri-party agreement may not be necessary because the current agreement contains a clause to allow for increasing the security and the Board could seek guidance from Town Counsel. Ms. Brestrup explained that Tofino wrote the original tri-party agreement and Town Counsel reviewed it.

The Board discussed if the cost estimate should be done by Tofino. Ms. Brestrup reminded the Board that in his letter dated October 30, 2019, Attorney Mark Tanner from Bacon and Wilson, strongly suggested Tofino develop the cost estimate to be reviewed by Mr. Skeels. Ms. Gray-Mullen asked how long it might take to create a new Performance Bond Agreement. Ms. Brestrup shared that is hard to estimate because it would depend on how agreeable Tofino is, and if the Board is asking for an increase, Tofino may be less eager than he had been originally. Ms. Brestrup pointed out that withholding building permits and/or rescinding the release of the lots could provide initiative for Tofino to update the agreement. If the Board chooses this route, town staff will convey the request to Tofino; if Tofino doesn't want to develop the cost estimate, town staff will ask Mr. Skeels.

Ms. Gray-Mullen summarized the current state of events. Ms. Gray-Mullen suggested the Board take some time to allow Tofino to continue the road repairs over the next several weeks, and allow for the time to develop a new cost estimate.

Mr. Jemsek shared his support for increasing the bond, and that he finds it difficult to go back in time to access the situation when considering rescinding the release of the lots. Mr. Jemsek said that Tofino is currently working to bring the roads into compliance in order for the town to continue plowing, however, he questions the longevity of the repairs and affirmed the need for ongoing road maintenance. Mr. Skeels confirmed an updated Performance Bond Agreement would determine a new road completion date in writing.

Ms. Brestrup agrees that the Board needs to take time to consider the situation. She explained she has spoken extensively with Mr. Skeels who has experience in subdivisions, and he has suggested the level of security should be raised and Tofino needs to clearly understand the Board wants him to take care of the roads. Ms. Brestrup stated the existence of the Homeowners' Association is murky; Tofino has expressed that it does exist, however, at the same time, he has told Bercume it does not.

Ms. Brestrup stated the Board has received a lot of information today from Attorney Tanner, Mr. Masteralexis and herself. Ms. Brestrup pointed out the Board, after considering the situation, could recommend the Building Commissioner refrain from issuing any building permits, or water and sewer connections for the unsold lots. Ms. Brestrup also recommended the Board request Mr. Skeels to develop the cost estimate for Tofino to review. This discussion could be continued at the Board meeting scheduled for November 20, 2019.

Ms. McGowan asked if Tofino has indicated that an increased Performance Bond would be acceptable. Ms. Brestrup stated Tofino has not commented on an increased performance bond as an option. Tofino has stated they own 15 of the subdivision lots and are willing to take on a portion of the road repair cost, however, Tofino is contending the residents need to contribute too.

Ms. Brestrup reiterated there is information that is missing for the Board's consideration tonight. She also reported that Town Counsel Joel Bard has recommended the Board make factual findings, and the staff will need time to develop these findings for the Board's review.

Ms. Gray-Mullen asked Mr. Reidy if he could report on any on-going negotiations between residents and Tofino. Mr. Reidy stated he believes that is outside the Board's purview. Mr. Reidy is concerned that without action nothing prevents Tofino from conveying the lots and walking away. Mr. Reidy supports rescinding the lots as requested, and requiring Tofino to negotiate the increased Performance Bond. Mr. Reidy stated that without rescinding the release of lots, there is nothing to compel Tofino to negotiate an increased Performance Bond or complete the roadwork. Mr. Reidy is of the opinion that if nothing is done, there could be irreparable harm.

Ms. Gray-Mullen noted she had only had the opportunity to read the email from Mr. Masteralexis briefly, however, in her opinion Mr. Masteralexis' items 2, 3, and 4 are classic disputes between residents and a developer. The Board is asking if there are ongoing negotiations and communications between attorneys to reach a compromise. Mr. Reidy stated he is unsure if a middle ground could be found. Ms. Gray-Mullen suggested the conveyance of the lots, in essence, brings the subdivision closer to completion, and closer to finished roads that could be accepted by the town.

Ms. McGowan stated she doesn't want to be involved in a dispute between the homeowners and the developer. She pointed out that she was not a Board member at the time the decision to release the lots was made; however, her understanding is if what is known now was known in May, the request would not have been approved. Ms. McGowan is of the opinion that a safe subdivision is the goal. The Board has the power to provide Tofino with the requirements to achieve this goal.

Ms. Gray-Mullen explained the Performance Bond Agreement was signed in 2017. At the time of the request to release the lots in question, the roadwork was to be completed by June 30, 2019. As a result, there was no non-compliance at the time the Board acted on the request in May 2019.

Ms. Chao stated to react now seems premature. She supports basing the decision on facts, and the staff needs time to get the pertinent facts. The responsibility of road maintenance prior to the 90% completion of the subdivision is unclear.

Mr. Birtwistle suggested placing a temporary hold on the issuance of building permits, or water and sewer permits until November 20, 2019. In the meantime, the Board can acquire the facts needed to make a decision and prohibit Tofino from selling any lots in good faith. Ms. Brestrup confirmed that Tofino could be notified tomorrow if the Board decides to take this course of action. Mr. Reidy stated a notification could be recorded with the Hampshire County Registry of Deeds so any potential buyers are aware of the permitting suspension.

PUBLIC COMMENT

Alexandra Meliou – 73 Linden Ridge Rd.; Blake Spirko – 53 Concord Way; Brian Keidan – 107 Linden Ridge Rd.; Ed Ryan – 32 Hawthorn Rd.; Angelo Mazzocco – 57 Linden Ridge Rd.; Uli Holeschovsky – 82 Linden Ridge Rd.; Brian Scully – 22 Hawthorn Rd. shared the following during the Public Comment period:

- There is no active Homeowners' Association. Ted Parker has been responsible for approving the design and placement of backyard sheds. He has also been doing the mowing and any road maintenance. Ted Parker has never placed any responsibility on the Homeowners' Association until September 2019.
- It is not a coincidence that the potholes were filled 2 days prior to the Board's site visit.
- Ted Parker has operated on good faith in the past; however, his recent action to place the responsibility of the road repair cost on the homeowners is indicative that his good faith no longer exists.
- The town has oversight over subdivision development. If the town abdicates this responsibility it is at the expense of the residents, and benefits an out of town developer.
- Tofino has told lot buyers the roads would be prepped and completed for the town to accept and this cost was included in the purchase price; placing financial responsibility for the road repair is defaulting on this agreement.
- As a developer, Tofino knew the roads were failing; the subdivision residents did not know the roads were failing.
- Tofino has benefitted from the sale of lots; however, nothing seems to have been put aside to repair or maintain the roads.
- There is concern that Tofino will walk away from the subdivision leaving homeowners responsible for all the cost of the road repair and maintenance.
- The Board has a responsibility to protect the residents of the subdivision. Ted Parker will not act unless he is legally directed.
- The roads need to be finished and maintained in order for emergency vehicles to access the neighborhood.
- The idea of withholding building, water and sewer permits for the unsold lots until a concrete decision can be made is a good compromise.

Mr. Jemsek asked how and when the subdivision residents became aware that they would be expected to take on costs associated with the road repair. In responding, Mr. Masteralexis explained the residents had invited Mr. Parker to attend a community meeting on September 6, 2019 to discuss the state of the roads. At this meeting, Mr.

Parker said it was his position that the homeowners were responsible to repair the base coat, and he would take care of the top coat. Mr. Masteralexis stated he supports the proposed compromise to withhold permits for the unsold lots, but he also expressed the importance of increasing the Performance Bond. Mr. Masteralexis believes the cost will be high, and dividing any portion of the cost amongst the property owners is unacceptable.

Ms. McGowan asked if the Board would be telling the Building Commissioner to withhold permits, or asking the Building Commissioner to withhold permits for these lots. Ms. Brestrup explained the Board would be making a strong recommendation to the Building Commissioner to withhold the permits.

Mr. Birtwistle made the motion to request that the Building Commissioner refrain from the issuance of any Building Permits and that the Department of Public Works refrain from the issuance of any water and sewer connection permits for Amherst Hills Subdivision Lots 1, 2, 5, 6, 7, 8, 29, 39 and 41 until such time as the Board has had the opportunity to make a more thorough determination as to the position it will take relative to the rescinding of lot releases, as well as to update the Performance Bond based on a new cost estimate provided by the Town Engineer, and further that notice of this vote shall be recorded with the Hampshire County Registry of Deeds. Mr. Jemsek seconded the motion.

VOTE: 6-0-0 to continue

IV. OLD BUSINESS – None

V. NEW BUSINESS - None

VI. FORM A (ANR) SUBDIVISION APPLICATIONS

A. ANR 2020-07 – Parcel 12A 35 and 48, 134 & 144 Maplewood Circle

Upon the Board’s authorization, Ms. Gray-Mullen signed ANR 2020-07 relating to property located at 134 and 144 Maplewood Circle.

VII. ADJOURNMENT

The meeting adjourned at 8:55 p.m.

Respectfully submitted:

Approved:

Pamela Field-Sadler
Administrative Asst.

Christine Gray-Mullen, Chair

DATE: _____