PLANNING BOARD
TOWN OF PETERBOROUGH, New Hampshire

Minutes of July 26, 2010

The Peterborough Planning Board held a Public Hearing on Monday, July 26, 2010 at 6:00 p.m. in the Selectmen's Meeting Room of the Town House for a proposed amendment to the wetlands ordinance. The intent of the proposal is to replace §245-15 Wetland Protection District with a new §245-15 Wetlands Protection Overlay Zone, and to add to the Site Plan Review Regulation a new Article IX Conditional Use Permits for Wetland buffer/setback reductions.

Members Present: Chairman Leandra MacDonald, Vice Chair David Enos, Barbara Miller, Rick Monahon and Carl Wagner.

Staff Present: Carol Ogilvie, Director and Laura Norton, Administrative Assistant, Office of Community Development.

Chair MacDonald called the meeting to order at 6:00 p.m. She welcomed the audience and introduced the members of the Planning Board, and appointed Alternate Carl Wagner to sit.

Chair MacDonald asked that any member of the audience that had a question or comment please state their name for the record. She went on to note the purpose of the public hearing was to further discuss the proposed wetland ordinance prepared by the Wetland Workgroup. She noted "we are not having a Special Town Meeting on this regulation" but added "nothing prevents us from having a public hearing about it, it just does not have the force of law; it is an item of discussion until posted." A member of the audience interjected "excuse me, did you say public hearing?" Chair MacDonald replied "yes" and went on to explain the difference between a public hearing and a public meeting of the Planning Board. She noted the hearing was posted as such "to give the public the ability to speak."

Selectman Barbara Miller took a moment to explain how the Board of Selectmen had voted not to put the proposed ordinance on a September ballot "because more time is needed to become familiar with it and understand it." She went on to note "we hope for more meetings to fully explain the ordinance so an educated decision can be made."

Chair MacDonald noted three of the four members of the Wetland Workgroup were present to help with any technical questions. She then turned the meeting over to Ms. Ogilvie who gave a brief Power Point presentation entitled "Wetland Proposal 2010."

As Ms. Ogilvie began the presentation she noted "I would like to take the opportunity to take you back to the beginning with some background and context of how we got to where we are today." The presentation began with the Wetland Workgroup member's names and credentials. She reviewed the Master Plan of 2003 and how it directed the Planning Board to evaluate the existing buffer protection. She touched on the 2004 Study Group and the 2009 Moosewood analysis of the wetlands. She noted the Workgroup was appointed in October of 2009 and had been meeting weekly since October of 2009 and twice a month since April. Outreach efforts of the Workgroup

included meetings with the Business Support Committee of the Chamber of Commerce, the Economic Development Authority and the Zoning Board of Adjustment. Ms. Ogilvie stated that the Planning Board ultimately determined the proposal was not ready to go to town meeting after Public Hearings in March, and the Workgroup went back to work to further review and refine the ordinance.

Ms. Ogilvie went on present the Workgroup's opinion on why the change in the current ordinance was necessary. She noted the current ordinance required a 50 foot buffer that over time has been encroached upon, that the current ordinance was 20 years old, and the report of degraded water quality from the DES Watershed Report of 2010. She added documentation provided by the OEP, DES, NH Association of RPC's and the LGC model ordinance recommending a 100-foot buffer/setback, supported by scientific evidence.

Ms. Ogilvie then reviewed the purpose and authority of wetland zoning to protect the public health, safety and welfare through preserving water quality, protecting natural resources, keeping the rivers from being polluted and mitigating the chances of flooding. She also reaffirmed that the proposed ordinance "complies with the goals and objectives of the Master Plan."

Ms. Ogilvie reviewed the highlights of the proposal and the Workgroup's position that "not all wetlands are created equal." She reviewed a slide that placed the current ordinance side by side with the proposed ordinance and reviewed them together. She briefly reviewed the criteria necessary for a Variance from the ZBA versus Conditional Use Permits using Performance Standards from the Planning Board before she concluded with Frequently Asked Questions (FAQs).

Chair MacDonald thanked Ms. Ogilvie and asked the audience if they had any questions. John Lord introduced himself and asked about the statutory authority for protecting wetlands. A brief discussion about state regulations and the public safety, health and welfare of the town followed. Mr. Lord noted that the wetland protection ordinance, unlike in Massachusetts, was not "well spelled out."

John Stanek introduced himself and asked "as a builder, I would like to know when I come in to get a building permit, what happens?" The discussion that followed included a review of the process of reviewing the functional analysis numbers of the wetlands, seeing where he would fall on the wetland buffer/setback table and reviewing Performance Standards that may be invoked to get a reduction in that number if requested. Mr. Stanek inquired about a building addition and Ms. Ogilvie reviewed the exemption for accessory structures, noting additions are fine "as long as there is no encroachment further than the present structure." Chair MacDonald interjected "under the current ordinance this would cover only single family homes, under the proposed ordinance commercial, industrial and multi-family homes would be included."

Randolph Brown introduced himself and asked about the impact on existing structures and uses "outside the 50-foot buffer but within the 50-foot setback?" A brief discussion about the lack of vegetative buffer protecting the wetlands followed with Chair MacDonald concluding "in the end it would be legal non-conforming" with Mr. Brown interjecting "is it to simple to say it is grandfathered?"

Beth Alpaugh-Cote introduced herself and inquired about the wetland protection overlay zone and it's relationship to rivers and streams. She also asked about occasional flooding creating temporary wetlands. Matt Lundsted of the Wetlands Workgroup noted that "it really depends on the frequency; chances are that if it floods frequently it is probably already a wetland." He added "that is a wetland scientist issue, there are specific tests." He mentioned "hydrology, plant species and soils are all part of the equation."

Jack Belletete introduced himself and asked "was there any specific issue in town that inspired this?" Mr. Enos immediately replied "no, there were no specific items; this ordinance addresses the cumulative impacts that occur in town" adding "50 feet does not do what it was intended to do." Mr. Belletete replied "it seems like you are adding more regulations rather than enforcing the ones we have." Mr. Enos responded with a brief description of impervious surfaces and the direct impacts to the buffers, how to attenuate impacts to the wetlands in our everyday living, and reasonable use *and* preservation of the land. He discussed point source and non-point source pollutant that are degrading the wetlands.

Ms. Miller told the audience the Workgroup was working on two example scenarios, the first of which was whether or not the Shaw's Supermarket could have been built under the new ordinance "we are looking at that" she said, adding "the second is another privately-owned property with wetlands. We have offered to meet with the owner, look at the property and see what the new ordinance would mean if it was applied to him." Ms. Miller then asked Ms. Ogilvie to briefly describe some Low Impact Development (LID) techniques.

Mr. Belletete noted he had two properties with wetlands in town (Wilson Farm and Southfield Village). He inquired about grandfathering with Chair MacDonald replying "the proposed ordinance does not effect any current approvals at all." Mr. Belletete replied "approvals expire and when there is no development because of the economy, what happens when I come back for re-approval? Do the new regulations affect me then?" In response, Chair MacDonald stated "it has not been our policy to disadvantage a project because the market is bad." She added "as long as the approval does not expire." Ms. Ogilvie reassured Mr. Belletete by noting "the Southfield Village project is vested and the Wilson Farm project has a four-year protection from any zoning changes."

Mr. Belletete was pleased to hear that news but noted "let's take a look at the real pollution issues; we have salt on the roads six months of the year." Ms. Miller replied "we are looking at that issue, and we use sand when ever possible." Ms. Miller went on to explain the greater flexibility of the new ordinance, noting "in the end we are not treating all the wetlands the same and I am excited about that flexibility." Ms. Miller also brought up the flooding issues the Keene area experienced two years ago. "This is an example of what happens when the wetlands get filled" she said.

Andy Peterson introduced himself and asked "why do we need a new wetlands ordinance?" He added "no one is in favor of building boathouses on wetlands." He advocated calling the proposed ordinance a setback ordinance which sparked a brief discussion on the difference between a buffer and a setback. In conclusion everyone agreed "it is hard to get the terminology straight."

Mr. Peterson noted "the town has already said no to 100 feet, now another group and proposal similar to the ones we have seen in the past is before us. How many times does the town have to say no?" he asked. Mr. Peterson advocated that the current 50-foot buffer "is already very strong." Chair MacDonald replied "you missed the slide show, I would be happy to review it with you after, but we do not feel the current buffers are working and the wetlands have been degraded."

Sharon Monahan asked about bordering vegetative wetlands, the Shoreline Protection Zone and wetlands along the river. She added "as a wetland scientist I will be asked and I would like to know what to say." A brief discussion on what board to go to for what relief followed with Ms. Monahan noting "there is overlapping jurisdiction with two different boards. Who do you go to first?" Chair MacDonald replied "the reduction process remains the same, but you would go to the ZBA first if you needed to and then the Planning Board." She added "way back when, an applicant went to the Planning Board first, then to the ZBA and then back to the Planning Board."

Ms. Alpaugh-Cote asked about the direct or indirect impacts wetlands had to bedrock, water supply and aquifers. Jo Anne Carr of the Wetlands Workgroup noted "wetlands are the surface expression of our water resources, there are direct connections." Se added "any pollutants on impervious surfaces that end up in wetlands are transported to ground water resources and there is not a lot of filtering once in the groundwater." Ms. Carr noted "our best line of defense is the protection of the surface areas along the wetlands."

John Stanek asked again about an addition to a building on a lot of record. "What happens?" he asked. Ms. Ogilvie replied "what does Tom do now?" and a brief discussion about the current duties of the Code Enforcement Officer followed. Ms. Ogilvie concluded the discussion by noting the site plan and septic system would have to be reviewed and approved and if the addition was within the setback the process would not be any different than it is today. Mr. Stanek replied by noting "here is the nightmare I see" and proceeded to give any example of the Code Enforcement Officer coming out for (say) a footing inspection "and finds some ferns." Mr. Stanek added "which is a plant indicative of wetlands." A brief discussion about the compliance with building codes and the diligence of the current Code Officer followed. Mr. Stanek concluded "I want to honest, I am a builder and I am interested in generating income. I am not a soil scientist and it is not under my purview. Unless it is obvious I might not know there are wetlands on the lot. I am interested in building, not interested in creating a problem." Mr. Stanek also noted that he might have to tell a client he cannot "do anything until a soil scientist is hired" adding "I have competitors who will not say those words." A brief discussion on identifying wetlands through the data the town currently maintains (USGS mapping and aerial photography) followed. Mr. Belletete complimented Mr. Weeks (the Code Enforcement Officer) on his due diligence for identifying wetlands early in the process.

Larry Schongar introduced himself and asked about non-delineated wetlands on a neighbor's property. You have this situation "and you fall within the 100 feet of it, what happens?" he asked. He added "it can happen in many areas of Peterborough, what happens when that occurs?" This sparked a review of §245:15 (zoning) and §233 (site plan review). The members briefly discussed distance, applicability, and standard zoning uses.

Mr. Lord stated "I think increasing the 50 to 100 feet is a taking." He referred back to the purpose and authority for wetland zoning discussed earlier but questioned several of the functional values used by the Moosewood study. He noted wildlife as one example adding "we have wildlife up the kazoo." A brief explanation of how the New Hampshire Method was developed followed with Ms. Carr noting while the New Hampshire Method identified 14 elements for functional assessment "we used eight. We did not include certain functional values including Aesthetics and Educational Value." Ms. Carr went on to mention §674:21 and the delegated authority to adopt ordinances that address environmental characteristics." She added "we chose those functions we felt were more tangible to the town." Mr. Lord replied "like Aesthetic Values" with Chair MacDonald interjecting "beauty is in the eye of the beholder, so we chose not to use that one."

Gil Duval introduced himself and stated "I am 100% in favor of saving the wetlands." He went to note however, "you have not said what is wet and to what degree it is wet" adding "all ground is wetland when it rains." Mr. Duval warned that it might be a lot more expensive to the town to identify all the wetlands. "People will put their wetlands in current use" he said. He gave an example of a building lot valued at $100,000 with newly identified wetlands on it. "You go right to the state for abatement" he said" Ms. Monahan agreed saying "you can do that and there is no size limit so that in a way there is an economic benefit to having wetlands on your property."

Mr. Peterson stood and stated "I am at a loss of where to begin or where to end." He gave a scenario of limiting owner access to their land because of wetland pollution only to have the water quality further diminish and find the powers to be saying "oh, I guess it was something *else*." He was eager to suggest this kind of thing might happen if the ordinance passed. Mr. Peterson spoke further on the detriments of the ordinance and stated "I am sorry but I think this group has heard no from the town before and I suggest you rethink it."

Mr. Peterson went on to say "we need to care about people and be fair when they come in and invest in the town." He noted the individual's problems with this become the town's problem when they believe their land may be snatched away from them. He stated the expectation of value and stability in the town that has been around for years and noted his concern that "that value may be zoned out of existence." Mr. Peterson concluded by saying "I do not oppose the intentions of the group; I am trying to explain the unintended consequences that are real." A brief discussion about the hypothetical situations on lost property values and connecting the science to the ordinance followed with Ms. Carr reminding the group that the wetlands are defined by statute and that "there is no vagueness about what *is* and what *is not* a wetland." Ms. Carr concluded by asking "how do developers comply with the current ordinance?" adding "because the rules are the same." She concluded by noting "as a property owner it is my responsibility to comply with the ordinance, that doesn't change with the new ordinance, there is no new burden for compliance." Ms. Carr also offered "the public is always welcome at our meetings Monday mornings at 7:30 a.m. or with the Planning Board by appointment."

Mr. Belletete echoed several concerns stated by Mr. Peterson adding "you have no clue to the amount of area you are affecting; this is an exponential thing that is happening here." He read from the Findings, looked up and said "they are all fuzzies." He went on to ask for definitive actions that have effected the groundwater, "give me an example of this or of that" he said. Mr.

Belletete repeated "this is fuzzy" pointing out wildlife as a functional value to be used in a wetland assessment. "We are overrun by wildlife" he said. "Is this bad, Sir?" asked Chair MacDonald. Chair MacDonald then noted "let's get back to the dilemma of the Planning Board." She gave an example of two neighbors, one who properly preserved their natural vegetative wetland buffer and the other who brought their lawn to the edge of the wetland. "How about rewarding the homeowner that does the right thing?" she asked.

Mr. Stanek spoke again about the need for clarity in the ordinance. Ms. Miller suggested offering roundtable discussions with developers for greater understanding and clarification of the ordinance. Mr. Stanek replied "that may help but developers don't know what they are going to develop until an opportunity comes along."

Mr. Duval asked about the legality of passing an ordinance "when you don't know where all the wetlands are."

Mr. Schongar interjected "you have a Water Resources Committee, shouldn't they be dealing with this stuff?" He went on to ask "have you consulted them about protecting our water supply?" Chair MacDonald replied "we are meeting with them on Monday if you would like to attend." Mr. Schongar spoke briefly about contamination from acid rain and arsenic, the connectivity of our water supplies and the apparent gap between testing and actuality. In response Ms. Carr spoke about point source and non-point source contaminants and sampling stations. She noted the need for control over these non-point sources adding "either way it takes a long time for water quality changes to be observed."

Ms. Monahan distributed a handout to the members and audience regarding the proposed amendments and asked to read from her statement. She noted she was pleased that the Board of Selectmen had agreed to wait until May of 2011 to bring the proposed ordinance forth.

Ms. Monahan made several points including her feeling that "not all projects are equally impacting and not all wetlands are equally sensitive." She noted that a 100-foot setback for *all* wetlands, across the board, "is too controlling, it gives all the flexibility to the Planning Board and none to the landowner." As she read her statement she noted "most people want to comply, given the choice between going before the ZBA, the Planning Board or no board at all, people will choose no board at all!" She went on to note "residents own and maintain their property, and pay high taxes to do so. They expect the town to realize and respect their rights through the zoning ordinances." Ms. Monahan offered specific suggestions and changes for the proposed wetland ordinance and after review of each one she told the Board "I think you have made excellent bath water around the wrong baby." She added "that is how it is perceived, you are impacting people and it is a hardship for them." [Ms. Monahan's statement in its entirety is attached at the end of the Minutes.]

The public hearing adjourned at 8:30 p.m.

Respectfully submitted,
Laura Norton
Administrative Assistant

Sharon Monahan
3 Central Street
Peterborough, NH 03458

July 22, 2010

TO: The Town of Peterborough Planning Board
RE: Proposed Amendments to the Wetlands Ordinance

Dear Planning Board:

I am pleased that the Town has agreed to wait until May for an amendment to the wetlands ordinance. Many of us do understand the proposed ordinance, object to it, and would like the Board to be open to the public's input and recommendations. I am in agreement with both sides about what is wrong with the current ordinance and what is right with the current ordinance. This is why both sides need to be open to revising the wetlands ordinance so that it works for our community.

It is true that our current wetland ordinances are outdated, gives inappropriate exemptions to some properties, no protection to some wetlands, and does not address all the situations that come before the planning board and zoning board. However, the public is right in claiming that the proposed ordinance is too complicated, costly, and controlling.

Without getting into explaining why it is too complicated, I will simply state that no other towns in the State take 10 pages to explain a wetlands ordinance. In fact, most of them are able to explain it in less than 3 pages. The proposal is too costly. Landowners are forced to hire expensive professionals in order to seek relief from the 100' setback whether it is for a carport or a major shopping center. Not all projects are equally impacting and not all wetlands are equally sensitive. The proposed ordinance is too controlling. Bottom line, it gives the Town control over all construction and excavation within 100' of ALL wetlands. Flexibility is given to the planning board and NOT the landowner. More control to a municipality is less control to a landowner, no matter if it is a ZBA or a Planning Board. If you did a survey and asked people which board they would prefer to determine the wetland setback; a planning board, zoning board, or no board at all; they would choose no board at all. Most people prefer to comply and avoid any board. So it is important to have reasonable wetland setbacks to begin with. Those of you who know me are aware of how disheartened I have become with the revised Shoreland Protection Act when the State extended and enforced its jurisdiction to limit all construction and excavation within 250' of public waters. The impact and hardship it has created for these landowners is tremendous. People of these properties have to seek permission from the State to do any work on their property. So when a town decides to get in on the action and claim control over all the land within 100' of ALL wetlands in town, this is a hardship on everyone, because a wetlands zoning ordinance impacts an entire community, not just a few property owners. Residents own their property; maintain their property, and pay high taxes to do so. They are not serfs on a

private estate. They expect a Town to recognize and respect their ownership and property rights through the zoning ordinances.

Two important differences that I like about the old ordinances are that there are two wetland setbacks: 100' from surface waters and 50' from "other wetlands" - instead of the proposed 100' from ALL wetlands; and that relief to the setbacks is before One Board - instead of the proposed going before the ZBA as a special exception for surface waters and the Planning Board as a conditional use permit for all other wetlands.

A special exception or conditional use permit is supposed to be easier to obtain than a variance. What has been proposed is now more difficult to obtain than a variance. There is no question that the proposed zoning ordinance itself creates a hardship to individuals that public benefit does not outweigh.

Now that the Board is open to public input for revisions. I would like to present a summary of my recommended changes to the proposed wetlands ordinance:

1. Retain the proposed exemptions and omit the existing exemptions. Exemptions (iii): *Construction of accessory structures and or additions to existing primary structures are permitted provided that the structure does not encroach any closer to the wetland than the primary structure.* This is a gem because it does not discriminate between commercial/residential use or zoning districts. A person can know what the setback is without having to go before ANY board, still protects wetlands, and encourages conformity. The additional definitions of structures: primary and accessory, are a necessary improvement to the current ordinance.
2. Have One Wetlands Ordinance and One Board for relief: whether it be a special exception to the ZBA or a conditional use permit by the Planning Board. Combine the Shoreland Conservation District with the Wetlands Protection District and let an applicant go before one board for relief, not two different boards.
3. Have One set of Criteria for the One Board's consideration in seeking relief. My understanding of why the Shoreland Conservation District was not proposed to be changed is because the Wet Group felt that that ordinance was working and already flexible for relief. Expand on what works and expand the Criteria that already exists for a special exception in the Shoreland Conservation District since it has non-wetland considerations as well, and incorporate some of the new proposed additional criteria.

a) Instead of requiring applicants to hire professionals to do in-depth analysis prior to applying to a board, require all applicants to perform a Natural Heritage Database check prior and submitted with the application. It is free and accessible to the public and only costs $25.00 if a flag does comes up, and for Fish and Game to do an in-depth analysis of the project and make recommendations. If it works for DES to pre-screen potential secondary impacts to all of the wetlands in the State from large and small projects it will work for the Town of Peterborough as well. I have included some samples of how well this works for large and small projects.

b) Do not require landowners to perform wetland function and value analysis to determine a setback. It was not intended for this purpose. Allow applicants to use the results of the Moosewood Ecological Study if it aids their case without the Town tampering with and perverting the results. Let it be consideration criteria for relief to the setback but not to determine a setback.

c) Incorporate slopes and low impact development techniques under criteria for consideration.

d) Criteria should be used to grant relief from a setback- NOT to Determine the setback.

e) Site visits and the public hearing portion has always worked in the past for all the "other considerations" and I anticipate it will continue to work. If more in-depth analysis or design is needed it can be part of the process but not a pre-application requirement.

4. Allow for ALL construction and development to seek relief from a setback as it does already in the Shoreland Conservation District. What was not working in the Wetlands Protection District is that relief from the setback could only be sought for roads and access ways and not structures or accessory structures too.

5. Make it One Wetlands Protection District but Retain Two different setbacks from the wetlands based on the type of wetland: Sensitive or Non-Sensitive.

a) 100'setback with a 50' vegetated buffer for Surface Waters, Vernal Pools, and Sensitive Wetlands. Downtown Commercial, Village Commercial, and West Peterborough Districts just have the 50' vegetated buffer. If it is not a CSPA property, relief can be sought and further reductions granted through the Board.

b) Keep the 50' setback from all the "other wetlands." Consider these non-sensitive wetlands. Have a 50' setback with a 25' vegetated buffer. Relief can be sought and further reductions granted through the same criteria and Board as (a).

c) The Moosewood Ecological Study suggested that a 25' vegetated buffer would greatly increase water quality and prevent further wetland degradation. Nowhere in the results did it propose what has been put before the Public in this current wetlands ordinance. 85% of the wetlands were inventoried. Use the results to predetermine what constitutes a sensitive wetland and a non-sensitive wetland. The Town is responsible for disclosing to a property owner upfront what the zoning setbacks are - including wetland setbacks- not the other way around.

6. Stop including size of wetland anywhere in the ordinance. It is an additional determination that is difficult to make and a burden to the applicant to determine. Also wetlands can not be delineated past property lines due to trespass issues. Also, a small wetland can be a vernal pool, bog, or other sensitive wetland so their protection does matter.

7. Omit Wetland Boundary Monumentation. It is offensive. It is like having your own property posted for trespassing against yourself. Also, wetland maps can not be recorded in the registry of deeds. All recorded plans must have a licensed surveyors stamp and the registry of deeds only accepts boundary plats. I have included a licensed land surveyor's response to this section of the ordinance where he explains two RSA's regarding this.

Thank you for your time and consideration.

Sharon E Monahan

Sharon Monahan

Enclosures