



FAIRHAVEN PLANNING BOARD

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Planning Board Minutes
Thursday, November 22, 2022

FAIRHAVEN TOWN CLERK
RCVD 2023 JAN 30 PM 1:04

1. **GENERAL BUSINESS:**

- a) **Chair's Welcome and Media Notification:** Clerk, Ms. Jessica Fidalgo opened the meeting and advised who was present. She also reviewed the COVID Zoom Review per Governor Baker until March 2023.
- b) **Quorum/Attendance:** Present: Jessica Fidalgo, Kevin Grant, Jeff Lucas, Sharon Simmons, and David Braga. Wayne Hayward and Rene Fleurent (arrived at 7:55p.m.) both were on Zoom.

Absent: Cathy Melanson, Vice-Chair

Town Planner, Mr. Foley was also present.

- c) **Minutes:** November 10, 2022, Jeff Lucas made a motion to accept the November 10, 2022 minutes and was seconded by Kevin Grant. The motion passed unanimously. (5-0-0)
- d.) **Planning Board Bills:** \$1,780 for GCG Associates peer review of Starboard Drive subdivision. Mr. Lucas made a motion to pay GCG \$1,780 for the Starboard Drive peer review and was seconded by Mr. Grant. The motion passed unanimously.

\$97.00-Monaghan Printing for Envelopes: Mr. Lucas made a motion to pay \$97.00 to Monaghan Printing and was seconded by Mr. Grant. The motion passed unanimously. (5-0-0).

- e.) **Correspondence:** None.

2. **PUBLIC HEARINGS:**

- a) **DS 2019-01: Timothy & Hiller Avenue:** 15-lot subdivision. The applicant, Robert Roderiques requested in 2019, approval through the Definitive Subdivision review process to create a 16-lot subdivision that was unanimously denied. In June 2022, the Planning Board and Applicant agreed to a Joint Motion to Remand to review a revised plan. This hearing is the public review of the revised conceptual 15-lot subdivision plan.

As Mr. Hayward was attending via Zoom, Ms. Fidalgo acted as Chairperson.

Ms. Fidalgo read the advertisement in for the record.

Mr. Foley reviewed his staff report. He explained the joint motion that was agreed in June 2022, where both parties agreed to review a revised plan. He showed the past plans as well as the new plans. He explained what the key differences between what was denied and what has been presented. There was no narrative accompanying the conceptual revised plan, just a few notes and new areas outside the wetlands that are shown as green on the new plan. Removing Lot 11 appears to be the main change as it is labeled as Green Space but still has the house and contours showing. There is a new green area labelled 25' Tree Preservation Zone on 8 of the proposed lots on the West side of the property, and on three lots on the East side. They need

to clarify what "Tree Preservation Zone" means as leaching fields encroach into it. They are proposing three roads: one off of Timothy and a road extension from Hiller Street with a cul-de-sac coming off of that. A slide showed the wind turbine setbacks. If the houses were already there, the turbines wouldn't be allowed to be built where they are; but there is no bylaw that says you can't do the opposite, build within the setback. It never occurred to them when they developed the bylaw that someone would propose building within the setback.

The changes are Lot 11 is labelled green space; the undefined 25' tree preserving zone with 9 mature trees identified within them as being retained. There are also 4 locations for placards indicating the tree preservation zone. The proposed Hiller Street extension has been changed but the concept plan is not clear how. A few lot lines have shifted to remove the reserve strip at the entrance from Timothy Street. Revised lots are not shown clearly on the plans.

Mr. Foley said the Planning Board denied the original proposal primarily per the Fairhaven Subdivision rules and regulation Sections 322-15.C and 322-15.D. Mr. Foley reviewed the basis of the denial was the proximity to the sewage treatment plant, proximity to the wind turbines, proximity to the extensive wetlands, and wetness of the site and amount of fill that would impede stormwater runoff from its natural flow through the site as relative to 322-15.C and 322-15D.

He read from sections 322-15.C and 322-15D. **§ 322-15.C** states "The subdivision shall be so designed as to protect the safety, convenience and welfare of the occupants of the subdivision and the Town of Fairhaven, through reasonable precautions against possible natural disasters... assurance of adequate sanitary conditions and consideration of amenities. Proposed subdivision shall conform to overall development plans and policies, which may be adopted by the Planning Board, and shall adhere to the principles of sound planning and good engineering. It shall be the responsibility of the Design Engineer for the adequacy and safety of the design". **§ 322-15.D** says "No land shall be divided for residential use if it is of such a character that it cannot be used for building purposes without danger to health.

He reviewed the other concerns that lead to the denial of the 2019-2020 proposal. These included that there were streets that did not connect to other neighborhoods **{322-16(A)(3)}**; they showed parts of a hammerhead used for a driveway which is not allowed per **§ 322-16(B)**; and they did not natural features or open space per **Section 322-24** which states that "all natural features such as large trees...stonewalls...shall be preserved if in the opinion of the Planning Board they will add attractiveness and value to the subdivision". Approximately one-third of the site is wetlands and another one-third is within the 100 foot buffer. One of the main concerns from the Peer Review is that with all of the fill proposed to bring the houses up and away from the water, 7 feet in places, that flooding existing properties would become an issue.

There were three peer reviews, each one expressing many concerns with the plan. Mr. Foley reviewed the third GCG Peer Review comments from December 30, 2019 and briefly went over the key points and the numerous concerns that still persisted after multiple reviews.

There is also a potential Social Justice issue that could be brought by the future residents of such a subdivision located so close to the sewage treatment and turbines. He said that the board did not look at the applicant's response to the last peer review as the board asked if there were any substantial changes to the previous plan. After multiple continuations with new plans submitted at the hearing, when the response was that there had been no significant changes to the plan, which was essentially the exact same as the Preliminary Plan that was denied, the Planning Board closed the hearing. Citing the concerns that had been expressed repeatedly throughout the public hearing process the Planning Board unanimously denied the proposed 16-lot subdivision.

Mr. Foley presented some slides with overlays showing the preliminary plans that were denied were almost identical to the plans presented tonight with the exception of the one lot and "Tree Preservation Zone". He reviewed what he sees changed on the plans since 2018. Slides showed the water back up from pictures that exist currently with the storm water runoff in a big storm.

Attorney John Matthew and Engineer Dave Davignon represented Robby Rodrigues who was also in attendance. He said the subdivision was submitted in 2019 with several peer reviews. He said after three meetings, the Planning Board denied the plan. He said the board never rendered a decision or discussion and just made a denial. He said a subdivision requires to go to the Board of Health. He said the Board of Health (BOH) had no comment as this would be hooked up to town sewer.

Mr. Braga said they should be speaking about what is before them tonight, with the revised plan, not the review of something that may or may not have happened previously.

Mr. Mathieu went on to say that he has discussed the plan with other departments and they have no other issues with those boards. He said the plan also went to Conservation and they spent five or six meetings working with them and then got denied. They went to the state and they issued a superseding order of conditions.

He said they had a site walk with Tom Crotty and the Chair and Town Planner and the Board agreed to the remand back to the Planning Board. He said Dave Davignon will review the plan with the changes. Mr. Matthew said the plan was submitted without waivers, he quoted a general law, (Ch. 40, 81U) stating that the plan should be approved. He said they would like to see comments and will ask for a continuance to the next meeting so that everyone can get more information. He said he is requesting a proper deliberation for the subdivision on December 13, 2022.

Mr. Braga asked if it is up the applicant or the Planning Board to advise if the waivers are needed. Mr. Matthew said that the Planning Board absolutely needs to have that discussion.

Mr. Foley said there was one correction, that Conservation also denied it per their regulations – which are stricter than the state regulations. Mr. Matthew said they enacted things in their bylaw that were not in effect when they submitted the subdivision.

Dave Davignon was present as Engineer on behalf of the applicant. He has small plans from the first subdivision and where we are today with the newly revised plan. Mr. Davignon stated the parcel is 10.8 acres and what is proposed 16 lots. He reviewed the property access to Hiller Avenue and Timothy Street. He said a proposed roads, two hammerheads and one cul-de-sac, meet the standards according to subdivision regulations. He thinks of it as three different developments. It is a three-lot dead-end street, the second piece is an extension of Hiller Avenue for lots 11, 12, and 13 will meet specifications for hammerhead and road width. For the southerly lots, lots 1-10, the development would be 44' wide layout and a conventional cul-de-sac. He said they can look at individually or all 16 lots; but everything is designed per the subdivision regulations.

Mr. Davignon showed a plot plan, frontage for each lot, and identified the lot area and minimum frontage. He explained the upland area that is required. He shared the topography of existing and proposed paved roadways on sheet number 3. He showed the wetland line and most recently DEP walked the entire wetland line and approved it as well as the subdivision. Mr. Davignon reviewed the walls around the property and which can be saved and which will not be saved.

Mr. Davignon reviewed the conceptual house locations and driveways for stormwater analysis. He said there is a very large stormwater pond to collect water as well as a stormwater system that will collect and go to the

pond. He showed the different locations and how the water will flow into the pond. He said they have backup systems, so they don't go onto other properties. The site is bordered by residential neighborhoods. He showed where the treatment plant is on the plans.

Mr. Davignon continued with changes to the current plan. He said that the plan is not a formal finished product, but a settlement plan to what they are proposing as improvements to the original design. He said there is green space that is included. He said there are three large spaces of wetland areas. He said there is a bordered vegetated wetland.

Mr. Davignon explained the tree preservation zone. He said it would be put on the deed that no cutting allowed for a tree over a certain caliper and a natural buffer will exist but new trees could be planted in that area as well. He said on the opposite side, near the town property will also have the same 25' ban that will now be preserved.

Mr. Davignon said that the water department suggested a 2" line for the north side of the development. On the South side, there were different ideas kicked around. He said the water department changed its mind and the 8" main remains straight across, so they can connect directly to the treatment plan when they upgrade.

Mr. Davignon said that the current proposal eliminates lot 11. He said by eliminating lot 11 they are removing 3,300 sf of pavement. He said the proposal is not to change the drainage system.

Mr. Grant said he sees a lot of changes but he doesn't know if the changes are related to any of the reasons why the planning board denied them. He said what he is hearing is that because the other departments say they are "ok" with the plans; then the Planning Board should be "ok" with it as well. He said if it was that easy then he wonders why the Planning Board would need to exist. He said there were reasons to the denial in the first place and that should be reviewed and take into consideration as they review the new changes proposed

Mr. Davignon said it was his opinion that a lot of the pieces of peer review added to the denial along with the Board of Health agent denial added more information.

Mr. Foley and Ms. Fidalgo stated that the Board of Health agent denial letter was after the Planning Board denial and was only mentioned in reference in the Planning Board denial. Mr. Matthew argued that was submitted with the denial.

Mr. Davignon said there were Conservation issues mentioned but DEP approved the project. He said there were stormwater issues. He said they need to create infiltration. He said they had to provide information to DEP. He said that DEP approved the stormwater plan. He said that the Board of Health is on record of approving the subdivision as they have no issues because it's a sewer project. He said there were items from sewer and water department. He said they have sat down with the Board of Public Works and worked out all issues with them. He said he believes they have no issues with BPW. He said when you start eliminating the issues and review the peer review letter, the issues are all gone. He said the board didn't want to hear what their comments were from the last peer review, as the board went ahead and made the denial immediately.

Mr. Davignon said that the concern was the catch basins couldn't handle the water. He said those basins are inadequate already. The last revised plans show the enhancements on Hiller Avenue which elevates the flooding at the intersection. He said there is a culvert that will catch and flow the water, diverting the water to where it goes currently. That was one of the biggest issues with the peer reviews. He said they did satisfy the peer reviewer eventually with the water flow.

Mr. Grant said that he wanted to be clear about where they are coming from. He said that he was looking for clarity. He said what he is hearing from them is that the plan should have never been denied.

Mr. Davignon stated that they believe what may have been the final issues were, came from a conceived pre-judgment of the project. He said that the reserve buffer was stated as negative. He said that the previous Planning Director was also the Conservation Agent and didn't like it as a Conservation Agent, so she may have followed that judgment as the Planning Director.

Mr. Fleurent announced he was in the meeting at 7:56 p.m.

Mr. Braga asked if there were any concerns that this development would have an adverse effect on the wetlands in that area or dry them out in that area.

Mr. Davignon described pre and post construction that is mapped out to drainage basins. He said the idea is to mimic pre and post-construction conditions to receive and discharge water. He said especially with the bypass, they are taking out the water and putting it back.

Mr. Braga asked about the tree preservation areas.

Mr. Mathieu said he and the applicant reviewed the tree preservation areas with a site walk. He said there is poison ivy and invasive species in that area. He said they want to plant more evergreens. He said the goal was to keep the canopy for the abutting property (Teal Circle). He said he believes it will become more treed and healthy in that area. He briefly spoke about the windmills in that area and that the Town is utilizing them. He thinks they will be coming down sooner or later.

Mr. Braga asked about air quality in that area. Mr. Braga asked Mr. Foley about clear-cutting trees in that area. Mr. Foley said if they wanted to clear-cut trees they would need to be reviewed and approved for a disturbance permit to cut more than 40,000 sf, about an acre.

Ms. Fidalgo said she had a concern about the tree line in the area. She said that is an issue to the neighborhood and how they are going to be affected. She noted there are a lot more people than usual in the room who obviously have concerns. She said she also has some concern with the wind turbine setback. She said she's glad they are not asking for waivers.

Mr. Mathieu said they had three public hearings and people came and they listened. He said the sewerage treatment plant is going to be upgraded; it's still going to happen. He says they came up with the 25' barrier to help with a wall to help the neighbors.

Mr. Lucas believes the quality of life is a concern. He doesn't agree that these are three different projects and that connectivity with Timothy & Hiller is possible. He said three-dead ends for three subdivisions isn't a plus for the Town. He referenced the flooding and is afraid what we now call 100-year storms are going to be blown away. He is not sure that this proposed subdivision community won't be affected by 100-year storms. He said his concerns for the neighborhood to the windmills as well as to the sewer treatment plant.

Mr. Davignon said he showed the breakdown of three subdivisions was to break it down. Mr. Lucas said he believed that a road could be connected from Timothy to the Hiller Extension, perhaps not with sixteen lots, but it could be connected. Mr. Davignon disagreed and said they would have to build the road up and it would pinch with the wetlands. Mr. Lucas said so they would have to lose a lot.

Mr. Mathieu said that everyone needs housing. He said that these are single-family dwellings that will fix some of the water issues in that area. He said they are not going to be secretive about the treatment plant or the windmills in the area. He said people want to live in Fairhaven.

Via Zoom, Mr. Hayward said a lot of the issues have revolved around trees. He said there are a lot of mature trees in this area. He said that our regulations require us to address keeping mature trees. He said that is one of the functions of the board. He said that this property has over 700' of stonewalls that are protected under Massachusetts state law and Fairhaven regulations. He said almost all 700' were proposed to be removed. He said the layout is pitched from the North to the South. Mr. Hayward said that about 7' of fill is proposed in the upper land portion. He said that means trees will come down. He said if the subdivision would've followed the grade and run to the South instead it would have made the subdivision much better and they could have addressed the mature trees. When proposing to bring in thousands upon thousands of yards of fill they would be killing every single tree in that area.

Mr. Hayward explained his concern about all the fill. He said the lotting plan is the same from 2018 to current. He said he does see minor changes, but overall it's the same plan. He also said the previous Professional Town Planner wrote in her decision why the subdivision was denied.

Mr. Hayward went out to say that Conservation denied the plan and then the state superseded that. He said that the Board of Health agent also denied the project. He said there are more than nine hundred documented complaints that the BOH has regarding the wind turbines, and he was sure that was part of the reason why the agent denied it. He said that the BOH has the duty to protect the health and wellness of Fairhaven residents. He said there will be sixteen houses in the subdivision of people whose health and wellness should be a priority. He said they could ultimately file their own lawsuit against the town in the future.

This subdivision is entirely in the setbacks of the wind turbines and they have asked the developer to acknowledge that and address that. Normally you would see abutting neighborhoods on the plans and here you do not on these plans. He said they have asked for some mitigation in that area and haven't seen much. Mr. Hayward said most of the green on the plans are wetlands and they can't build in them. They are showing us green space as if it's a gift or an extra. You are not allowed to build there.

He said they have been in court since February 2020 and now he understands that there have been Town agencies or people that the applicant is negotiating with. Mr. Hayward asked who the person is that the applicant is negotiating with in the Town if it's not the Planning Board, while they are in a court.

Mr. Foley said the only phone call he was aware of was with the Town's new counsel and Attorney Mathieu on how they wanted tonight to go. He said that's the only phone call he is aware of. Mr. Mathieu said he is the attorney of record and can talk to the attorney of the town at any time.

Mr. Hayward asked if they have the right to negotiate with other town departments while in a lawsuit with two other Departments. Mr. Mathieu said they have the right to discuss this with other town departments. He said he has submitted a subdivisions to their regulations. He says they are doing something they have a right to do in this area.

Mr. Hayward asked specifically who he was negotiating with and stated that the Planning Board should have been involved in any discussions with other boards and they were not, especially since they've been in court this whole time. Attorney Mathieu continued to try to speak over Mr. Hayward as he was talking.

Via Zoom, Mr. Fleurent asked the chair for point of order in the meeting as both people shouldn't be allowed to talk or talk over each other. Resident, Mr. Doug Brady asked for a point of order as well, as they should speak through to the Chair. Ms. Fidalgo said she would like to hear Mr. Hayward's comments. She did say that both should not be talking as it's very difficult to hear.

Mr. Hayward continued to express that the Board had multiple hearings and two professional planners said this should not be approved. He said they asked for some type of mitigation and still have not seen much. He said they are proposing 25' buffer zones that aren't appropriate in this area. He said they will be clear cutting all the way down Hiller Street extension and creating a clear view of the treatment plant and expanding shadow flicker in the area, which doesn't occur currently. He says they have been trying to negotiate mitigation designed to protect the neighborhood.

Mr. Hayward said this is the same exact subdivision layout they denied in 2018 and 2020. He said the engineer is very good and he can design a stormwater plan but the lotting plan is the exact same as it was in the preliminary stages.

Ms. Fidalgo stated that Mr. Davignon passed out a plan and asked him to identify what he passed out. Mr. Davignon said that a new lot line was changed for the hammerhead at the end of Hiller Street extension changing the access between Lots 12 and 13; moving the house to the side.

There was a brief discussion of the frontage on lot 13. The Board will need to look at this more closely but it appears that the hammerhead just becomes the driveway. The same issues as the previous reserve strip crop up. If the neighbors have issues one can put whatever they want in front of the other person's house. This does not look like legitimate frontage.

Mr. Mathieu said these are their proposed changes for settling and if he goes back to court it will be with the original plan, without the no cut zones or buffer zones; they will ask the court for those plans instead of what they are asking for now. He said that he thinks Mr. Hayward likes to throw out adverse objections. He said he is familiar with tens of thousands subdivisions with tons of fill in Fairhaven and other areas where grades have to come up. He says they are saving almost 45% of the trees on the property.

Ms. Fidalgo said that this isn't much change on this plan versus the previous plans. She said that she doesn't understand some of the clear-cutting and tree planting plans.

Mr. Mathieu said there are plantings going on lots 10 and 12 that will create a wall in that area with fast growing trees. He said they have spent tens of thousands of dollars to design that water detention basin in that area so they are not going to change that. So it will have excess capacity. He said they have gone through the DEP and the stormwater basin has calculations set that DEP has approved. He said his client is going to clear what he has to in order to put up houses. He said his client wants to preserve some of the trees in the area. He said there are stonewalls that they will have to leave up and some that they will need to take down.

Mr. Braga commented that Mr. Mathieu said that if they go back to court they will ask for the first plan to be approved. He said he wanted to understand what the applicant was saying; that if the Planning Board denied them with this new plan, he will then go back to ask the court to approve the older plan.

Mr. Mathieu said that the prior Town attorney and he agreed that the court was going to remand back to the Planning Board. Mr. Mathieu said that they have tried negotiations with this stuff in the past and it didn't work out that way. He said they are discussing with other boards what they oversee. He said the Planning Board is not to oversee all the other departments.

Mr. Braga said he had questions, but they didn't have to answer them tonight. He wanted to know if there were any concerns with living that close to the sewer treatment plant, an EPA filing or something; he would like to see it in writing, or the document itself. Mr. Braga also said it is the Planning Boards concern to determine the health and wellness of the residents in that subdivision. He said if they deem there are safety and/or wellness risks in that subdivision, they can base their decision to approve or deny on that. He said he would appreciate any information that can be forwarded to the board on that.

Mr. Hayward stated he has been pretty consistent with specific objections since this applicant came before them. He reiterated many of the things he spoke about. You cannot just walk in at a public meeting with a brand new revised plan, as the applicant did repeatedly in 2019 and 2020. He asked the applicant at the January 14 meeting if they had made any substantial changes, and they had not. There were small engineered changes to the plans that wouldn't change his mind after all of the previous meetings and concerns that were never addressed. He said that he doesn't know any Planning Board in Massachusetts that has a regulation regarding wind turbines and/or sewer treatment plans. He said when the 2018 plan first came in as a preliminary plan it was submitted as a complete full plan at that time. It was virtually the same as it is now four years later. Mr. Hayward said the preliminary plan is the time to bring in a concept plan and iron out what concerns the Board and public may have.

Mr. Davignon asked the new four planning board members to revisit and review the September 10, September 17, 2019, meetings as well as January 14, 2020 meeting. Mr. Mathieu referred to Mr. Hayward's 20-page memo that he wrote for the January 14, 2020.

Mr. Hayward said that he handed out the memo and supplied his written copy of the statement to the applicant. He said that a buffer zone was written in that memo to the board. He said it was his written comments on the January 14, 2020, meeting and handed it out to the applicant.

Mr. Braga said they are not here to decide whether the decision from two years is right or wrong. He said they are reviewing the new plans that are in front of them right now. He said perhaps they will take some of the previous issues into account.

Mr. Grant stated that he agrees, and would not like to go over the past over and over. He said a lot of this hinges upon the wording from the January 2020 decision. He asked Mr. Foley to bring up the language of the regulations.

Mr. Grant read from the Subdivision Rules and Regulations, section 322-15 C – "...subdivision shall be so designed as to protect the safety, convenience and welfare of the occupants of the subdivision and the Town of Fairhaven through reasonable precautions against possible natural disasters, provisions for traffic safety and convenience, assurance of adequate sanitary conditions and consideration of amenities..." He said that some of the regulations are subjective things that the Planning Board has the power to take that into consideration. He said that recently a project was trying to conform to water runoff and 18' from the ocean. He said that was a case where they didn't know if conformity had to happen. He said it's not appropriate in some cases and with some bylaws.

Ms. Fidalgo asked for public comment and stated that they would first take a five-minute break.

Karen Isherwood of 3 Teal Circle was present to speak. She said there were more neighbors that are concerned but not present because of COVID still. She said that the health concerns that she brought up to the Board of Health in the past were silenced at the Board of Health meetings. She said she doesn't believe the new Board of Health had a chance to comment. She said maybe the new Board of Health needs to be included. Ms. Isherwood feels that she believes the diameter of the trees has been calculated incorrectly.

She asked if the fill would encroach on that area. She said some of the trees are huge and fill may suffocate the trees. She said the shadow flicker will be more pronounced within this new subdivision. She said the Conservation Commission is still in court currently and there has not been any outcome as of yet.

Mike Thomas, 1 Teal Circle also spoke. Mr. Thomas said that a 25' buffer for trees is not going to survive. He said that he doesn't think that anyone did a study to find out how to protect the big trees in that area. He said he gets flicker about two months a year. His concern was the 25' buffer zone for the trees.

Chelsea Isherwood of 3 Teal Circle. Ms. Isherwood clarified that what we have are wind turbines not windmills. She said that when the wind turbines went up they fought against them.

Ms. Isherwood of 3 Teal Circle said she has been to all the meetings since this started. She agrees this is the same plan that was presented a few years ago. She said that testing was done about the sound and it was found to be above the sound levels that are allowed. These houses would be even closer and any new homes in the subdivision would get the flicker and sound even more than their houses which are further away.

Ken Rezendes, was speaking for his mom who lives on Paul Street. He said they are concerned about the sound getting louder and she is worried about the elevation being increased with all of the fill which will cause stormwater run-off to back up into her yard. He said the ponds are mosquito magnets that is a concern.

Mr. Gary Lavalette was present to say that he has been following this project from its start. He said that a lot of these properties will be subject to Conservation regulations. He said he has concerns about the people that move in that they will have wetness issues with the water table being so high. He asked what will happen to wetland plant when the acres of trees are clear cut opening the wetlands to sunlight. What happens when in five to ten years? He says there are preexisting issues that occur in this area. He said that these are wetlands and they're just shoehorning houses in a spot where they don't belong.

The applicant, Robby Roderiques spoke as part of the public. He said they have tried to help the neighborhood. He's a contractor in this Town that has worked on every subdivision in this Town. He referred to Shannon Meadows subdivision as not having one tree left at that location. He said all the stone walls came down and even a small farm there. He says that there are new laws that have changed and that he hauls dirt every day to subdivisions to add to the project. He says new trees are planted and are recreating the area. He says many of the trees are dying and need replacing. He asked why the wind turbines have become his problem in that area. Mr. Rodrigues said they are only going to take down the trees that they need to build on and that they are not going to build on wetlands.

Ms. Fidalgo noted that some of the public comment may be repetitive, but it is human emotion.

Mr. Espindola also spoke as a resident of the area. He said he lives more than a thousand feet from the wastewater treatment plant and there are days when he can smell it.

Sue Powers, 10 Little Bay Road spoke about the wind turbines that are significant and that everyone is entitled to live in peace and harmony. She said she would hope they would consider the abutters and that removing all those trees will not be a good thing for the neighbors.

Jennifer Carter, of 21 Paul Street spoke via zoom. Ms. Carter reiterated what other neighbors were saying. She said she moved here to raise her family. She said the more and more we get congested the more and more Fairhaven is not a small town anymore. She said that when this went before Conservation there was a petition signed by all the neighbors.

Ms. Ann Espindola wrote in the chat that the windmills are actually Wind Turbines.

Ms. Isherwood again spoke that Mr. Rodrigues is correct, they cannot build in a wetland; she is concerned with all of the proposed development in the 100' buffer zone to the wetland. She said the smell spreading as a result is a fact. She agrees the turbine is not Mr. Rodrigues fault but it is there. She said this subdivision has huge environmental factors that don't exist at other sites. He was well aware of the issues in this area when he first started this process.

Ms. Fidalgo brought it back to the board members. She said they are hoping to continue for some members to review and will watch meetings as well. She would like to hear or see written documents from the different departments with their opinion on the specific aspects or regulations that their department looks at. We are at a point where we seem to be making progress.

Mr. Lucas said since the beginning the Board did not like all of the clear cutting and wanted a green buffer and this was always clear that is what they wanted from the applicant. The Board has been asking for that from the beginning. He said he feels bullied into accepting this slightly better plan. If they listened to the Planning Board and neighbors all along we could have resolved a lot of concerns a few years ago and now they are being told to either do or die; with the attorney saying accept the revisions or we go back to the original plan when we go back to court.

Mr. Lucas said he didn't feel there are a lot of changes to the buffer to the wind turbines and wastewater treatment. He said he feels constricted now.

Mr. Mathieu said he wants to remind Mr. Lucas he was on the board on January 14, 2020, and at no point did they go over this plan and go over details. He said there was just a vote to deny the project. He said they had no opportunity to respond at that meeting and the decision was littered with stuff that wasn't discussed. He said to hear Mr. Lucas say he is bullied now isn't a fair statement to make. He said they feel bullied and that they were never given a fair shake previously.

Mr. Hayward said he was able to see the plan that was submitted this evening and addressed the revised hammerhead on Hiller Avenue that was presented this evening. He said that would be a 90 degree intersection and then continue on two paths (North and East). He said the new road layout will come to an end. He said that as far as he can see from what he was sent there is no terminus, no hammerhead or any cul-de-sac, this still does not meet the Subdivision rules and regulations.

Ms. Fidalgo asked for them to explain the previous plan compared to the current drawing that Mr. Davignon handed out this evening; and exactly what the changes are.

Robby Rodrigues said they walked the site and gave up a buildable lot. What more do you want? Do you know how much that is worth? Dave Davignon added that the dialogue to give more buffer never happened in his opinion. This is a buildable piece of upland. The hearing was strange, there was very little direction, it was mostly neighbors complaining.

Mr. Hayward reminded the Planning Board that we are defendants in a lawsuit and you are hearing from the attorney for the plaintiff. You are not represented here with Town Counsel. So be careful with some of the things that are being said and proposed here. We don't have our legal counsel here defending us the way the applicant does. Secondly, he believes the comments from other Departments are supposed to be directly to the Planning Board. We ask them for comments, they do not look at a project in a holistic way the Planning Board does. When you are in court these things should go through the party being accused. He then read the memo he submitted into the record two years ago addressing some of the issues the applicant said were

never discussed.

Mr. Davignon said it was submitted in writing the night of the denial. He feels he did not get any direction from the Board.

Mr. Braga said that the Board wants to help and give guidance. At the next meeting the new plans should be routed through the departments as they would normally be. He said that all department's comments should be updated on this new revised plan. Mr. Davignon appreciated that but he still does not know how much buffer the Board thinks is necessary and why.

Mr. Lavallette asked if the applicant was not being spiteful by saying take this or we go back to court with the old plan. He agreed with Mr. Lucas that the board is being bullied.

Mr. Mathieu said he was glad to hear the four new members ask questions and move forward with clear heads to listen and hear what they are proposing. He said he thought what was spiteful was how the board handled the situation on January 14, 2020. Mr. Mathieu said spiteful is not having proper hearings. At this point we have four new members who can clearly look at this. We are happy to go to the next meeting and take a clean look at this. He said they have met the technical rules with the exception that Chapter 322 (Fairhaven Subdivision Rules and Regulations) is very vague and open. Applicants have no idea what that means. In his opinion it says the Board can do whatever it wants. Developers are going to look at this and say have a nice day. That's what you don't want, is to impose too much on people trying to develop private property. That's the big thing, developing private property. Your job here is to help develop private property, not stop it. Again, you feel for all the neighbors but this is a piece of developable property.

Robby Rodrigues added that he approached the Buzzards Bay Coalition and they were not interested in this property. What you see out there the trees are getting choked out. Water and sewer has not changed since the original plan.

Mr. Foley clarified that the Planning Board reviewed all three Peer Reviews. What they did not review was the last applicant response to the third Peer Review because they handed it in at the hearing and the Board could see that the plan was the same as it had been from the beginning. We had three public hearings but we met 7 or 8 times where people showed up and we had to continue because we repeatedly got late requests for continuations. There were still a lot of issues in the third peer review. The Board has never seen the applicant's response. Now we have a slightly different plan. We should get a revised response reflecting the changes in the new plan and the DEP superseding order. I can enter your previous response or you can revise it based on the new plan and circumstances.

Dave Davignon said he could add to the letter. There is no need for GCG to look at it. Mr. Foley said the Board will decide that.

Mr. Mathieu said they would try to arrange for the plan to be reviewed by other departments. He said they are just proposing the road there and are up for discussion. He said they have heard the same comments with a common theme of the wind turbines.

Mr. Mathieu asked for a continuance to December 13, 2022.

Mr. Foley said that he believes that many of us seem to have a different memory of what was discussed and what the concerns were during the several public hearings in 2019 and 2020. Perhaps they understood or heard something different than others that were present. In any case, we are trying to move forward now with the facts and should not belabor our opinions of what was and what was not expressed.

Mr. Foley read the third item on the Joint Motion to Remand Review that returned the conceptual plan to the board for review. Number 3, "The Applicant through its Engineer shall re-present a Revised Definitive Subdivision Settlement Plan, with the addition of all changes made as a result of the review of the written decision, and site inspection and other settlement negotiations. Said Revised Definitive Subdivision Settlement plan contains no request for waivers, except as may be otherwise agreed by the parties".

It seems we are seeing the changes made as a result of the applicant's review of the written decision and a site inspection done by the applicants, the former Town Counsel, the Town Planner and the Chair of the Planning Board. I suppose that puts us at the settlement negotiations stage. Half the people on the Board were not here for the original review and now they are being presented with a settlement plan for which they have had no opportunity to consider. Everyone might have a different of opinion about whether this is good or not, but we need to make sure that this is the plan they want to move forward with. He asked if this is the beginning of negotiations or the end.

Mr. Mathieu said they will agree to tweaks but they are not going to do anything more to it. This is it. He said if they vote in favor they will move forward with this plan; if not, they will go to court with the previous plan.

Mr. Foley asked if the board comes up with different ideas or suggestions then is the applicant not open to that. Mr. Mathieu said that he knows his client isn't going to tweak a lot.

Mr. Rodrigues said they gave up a buildable lot. He said he doesn't know what else they could give up. He is frustrated, they walked the property and discussed what they were going to agree with.

Mr. Rodrigues stated at the beginning of this project he went to the Buzzards Bay Coalition to use this property and they had no interest in working with them.

Ms. Fidalgo asked for a motion to continue from board members. Mr. Braga asked what dates would be available for a continuance.

Mr. Foley reviewed the upcoming meetings. Mr. Davignon stated he could submit the plans directly to the BPW by hand to expedite things.

Mr. Roderiques said that not much has changed. He said the water line has changed so that the DPW can hook up to flow better for the Town. He said this was a request from the DPW.

Mr. Grant said that submitting the plans to all department heads and having them signed off on it currently, right now. He said it's just to get it on record that they agree to it as it stands today.

Mr. Foley said that there were three peer reviews done and the comments from the applicant was done. He said he feels the Planning Board should be able to review the applicant's comments from that last peer review.

Mr. Foley stated there were a lot of continuances as well. He said the planning board never saw the last response from the last peer review. He asked how they want to proceed.

Mr. Davignon said he would update the letter to address some of the last peer review issues.

Mr. Braga said he would like the Town attorney to review for a second opinion. They are claiming that they need no waivers. They should be apprised of everything that is going on.

Mr. Foley said he will need to see the response to the Peer Review.

Mr. Foley reviewed the agenda for December 13, 2022, meeting. Mr. Davignon said he didn't think that the Starboard Drive review would be a long drawn-out thing. He said he would submit information for the answer to the peer review or at least update it and does not think it will be decided that night. It will either be a continuance or a short discussion.

Mr. Lucas made a motion to continue DS 2019-01 Hiller & Timothy to December 13, 2022, and was seconded by Mr. Grant. The continuance was granted via roll call vote. (7-0-0).

3. OTHER REVIEWS:

PS 2022-02 88 Hedge Street: A preliminary subdivision of a 2-lot subdivision on 88 Hedge Street.

Mr. Foley advised this was preliminary plan only. He reviewed a 2-lot subdivision. He told them in his opinion they cannot go to an ANR. He said they have enough frontage, but they are short on the area. He said they will need Planning Board approval and Zoning approval in a variance for the area, which is short. Mr. Foley said they also need Planning Board's approval. He said the zoning changed and he advised what the changes were and when they took place. They are trying to create an undersized lot. It's also kind of a chicken and egg situation between the Planning Board and Zoning Board of Appeals. The ZBA can't give a variance to a lot that does not exist.

He noted the original house was built in 1780 and it was torn down. That demolition became the inspiration for the Town adopting a Demolition Delay bylaw. He said it was routed and then reviewed the comments from the other departments. He said it is not allowed based on the current zoning that was raised from 10,000 sf minimum lot size to 15,000 sf minimum lot size in 1969.

Mr. Lucas said he has a problem creating an undersized lot due to the precedent that is set. He said it's still larger than a lot of the lots around that area. He does have reservations though about creating an illegal lot. Ms. Fidalgo stated she had some of the same feelings. She said she would be concerned about the precedent that it would set.

Mr. Lucas said it was about 8% smaller, but his concern again is precedent. He said if something comes in at 12%, what do you then.

Mr. Foley explained what the zoning board should look at when agreeing to approve lots. Frankly, a variance from the Zoning Board would not technically be allowed because a hardship is supposed to only be based on topography or shape of the lot, not size.

Mr. Hayward explained what the zoning board of appeals does for a variance. He said the only way to approve this is to have a note on the plan that clearly states this is not a buildable lot that complies with zoning until they get a variance. He said the buyer needs to be aware that the lot they are buying is not a buildable lot until the zoning variance is issued. He said they can go to the zoning board first and get a variance, then return to the planning board; or put the text "not a buildable lot" on the plan. If then they get the variance it would be a legal non-conforming lot.

Mr. Grant said they are pre-supposing that the variance will be issued but it's still that they are guessing that the variance will be issued. He said the worst case is they approve it with the text, 'not a buildable lot' and if it's not approved it would not be a buildable lot. Ms. Fidalgo asked how they would put the text on 'not a buildable lot.' Mr. Foley said the engineer or surveyor should put that on the plan. He reiterated that

technically it should not get a variance as the area for this district is 15,000 square feet. Maybe we should look at the zoning and see why they raised the minimum lot size and whether we should decrease it if those reasons no longer exist. Mr. Lucas agreed with that but that changing the zoning would be a long process.

Mr. Braga said that if the ZBA approves the variance then ultimately that is out of our hands.

Ms. Fidalgo said they would need a revised plan that says 'not a buildable lot' in text on the plans. Mr. Lucas said that the applicant would need to come back with such a plan.

Mr. Hayward made a motion to deny the preliminary plan as presented and was seconded by Mr. Grant.

On the question, Mr. Braga said the denial was just to tell the applicant to come back with a revised plan with the text as discussed.

The motion passed unanimously via roll call vote. (6-0-0). Mr. Fleurent was no longer on the call.

4. PLANNING UPDATES:

Mr. Foley reviewed the 40R meetings that are upcoming. He said it was going well so far.

Mr. Braga made a motion to adjourn which was seconded by Mr. Grant. The motion was approved unanimously via roll call. (7-0-0). The meeting ended at 11:25 p.m.

Respectfully,

Patricia A. Pacella
Recording Secretary