

MONT VERNON PLANNING BOARD**Public Meeting Via Zoom****September 22, 2020****AGENDA**

Times are approximate and subject to change without notice.

- 7:00 pm Informal Discussion Conceptual Subdivision Plan
 Kathy Marchocki, 93 Old Wilton Road, Map
- 7:45 pm Discussion on Legal Input on Proposed Wetlands Ordinance
 Spalding – Sample from Neighboring Towns
- 8:45 pm Other Business
 Mail & Announcements
 Review Minutes from 08/11/20, 8/25/20 & 9/8/20
- 9:00 pm Adjournment

Present: Bill McKinney, Tim Berry, Chip Spalding, Bill Johnson, Charles Baker, Rebecca Schwarz, Dave Hall

Absent: Steve Bennett, Eric Will, Jim Bird

7:00 PM – Informal Discussion on Conceptual Subdivision Plan, Kathy Marchocki

McKinney called the meeting to order and had everyone recite the Pledge of Allegiance. In attendance for an informal discussion were Kathy Marchocki and Attorney Tom Quinn. Marchocki began presenting her conceptual plan to the Board. She proposes a simple straight forward subdivision plan to create 3 5-acre lots out of her 16-acre parcel at 93 Old Wilton Road. She is ready to go to the next step and have the soil analysis done but first wants to get any insight that we may offer and hear any concerns. She has submitted the wetlands delineation done by Meridian. **McKinney** noted that this is in the Purgatory Watershed District which means that she will need 5-acres excluding wetlands in order to do this. **Berry** noted that of the 16 acres, Marchocki has 14.1 acres of dry land. She is shy 9/10ths of an acre of dry land in order to conform with the zoning ordinance to create 3 lots. He spoke of the situation on the other side of the road on Map 1-51 where a 5-acre lot was purchased and the lot did not meet the requirements of the zoning ordinance. Those people were forced to go to the ZBA for a hardship variance. The ZBA granted that variance. **Berry** gave his opinion that he does not feel there is the same hardship situation here and that Marchocki should come up with another plan. Marchocki responded that he should not presume anything in her argument. She feels the Board's interpretation of the zoning ordinance was wrong. She is not comparing herself to what happened with Lot 1-51. She has researched the way the zoning ordinances have been written and applied. As far back as 2015, there is nothing in the ordinance that says it has to be 5-acres excluding wetlands. In 2019, when Jeb Heaney came before the Board, he had just found out that he was in the Purgatory Watershed District. He was advised by this Board to get 2 5-acre lots. We did not advise him to get to 5-acre lots excluding wetlands. That is in our minutes from the June 11,

2019 meeting. The Board earlier this year decided that they were going to interpret the zoning ordinance differently. Town Meeting did not vote to change the zoning ordinance, so she is not sure what is leading this change, or who is leading this change, or who is suddenly reinterpreting what is the law. She would like it explained to her where in the ordinance it says 5-acres excluding wetlands. **Spalding** stated that this is in District 3, 5-acre zoning, Purgatory Watershed Area. It reads 'District 3 Classification (5-acres) applies to all land within the watershed area, except non-buildable District 4 land, regardless of its capabilities.' Marchocki said she has no District 4 land and it says nothing about wetlands in District 4. **Spalding** went on to say that our zoning is based on soils; it's based on bedrock as well as standing water. Essentially, if you are in the Purgatory Watershed District, you also have to take out non-buildable land such as bedrock, standing water, etc. Marchocki stated that she does not have that and why would we presume that she does have that. It says nothing about wetlands; it reads 'poorly drained soils, standing water, shallow bedrock or severe slope.' **Spalding** stated this is his opinion, his interpretation based on the zoning. He is one member of the Planning Board. Marchocki said that back in 2015 we told her the smallest lot she could create was 5-acres, not 5-acres excluding wetlands. This was the same thing we told Jeb Heaney in 2019. Marchocki feels this zoning is open to interpretation. In other parts of the zoning regulations we use a concept known as net tract area. With net tract area you will extract certain areas of slope or wetlands but you don't discuss net tract area in District 3 Zoning. **Spalding** stated that he apologizes if she feels she has been misled. The zoning is made available to anyone; it is a public document. **McKinney** stated that this issue was brought up with her abutters across the street. When Heaney came before the Board for an informal discussion on subdividing, they were at the time actually in 2-acre zoning. They delayed their subdivision project until later. At that point the maps had changed based upon the Army Corps of Engineers, which actually moved the line for the Purgatory Watershed to include the abutting property. Now the property had been sold. Things became very complicated because changes had been made unbeknownst to the Town until they came before us for a subdivision. In the same sense, we also looked at that subdivision with the same belief that we are looking at here through the ordinance. Any subdivision in the Purgatory Watershed is 5-acres minimum buildable lot minus any of your unbuildable areas. That is why the abutters had to go to the ZBA for a variance; their lot was not a lot that was 5-acres minus non-buildable areas. That variance was granted. We would be in the same situation here. He would suggest that we find a way that we can create lots here that are 5-acres in accordance with the Purgatory Watershed that is minus non-buildable areas. If not, a variance may be needed based on prior cases. Attorney Quinn spoke of a 2 lot Subdivision plan that was done for Daniel Pratt in 2002. He doesn't see that the provisions of our zoning ordinance have changed since 2002. That property was shown as being in District 3, 5-acre zoning. It says right on the plan that it is 5.1 acres with 4.3 acres of total dry land. He does not feel that the interpretation we are giving tonight is the interpretation we have applied in the past. What plan are we supposed to be using as the correct plan? **Spalding** stated that the 2019 Base Map in the Town Hall is the correct plan. **McKinney** stated that there is drastic confusion that has been created by the Army Corps of Engineers with the re-mapping of the Purgatory Watershed. There is an approved Purgatory Watershed by the Town of Mont Vernon and then there is new map out that the NRPC has posted that is designated by the Army Corps of Engineers that conflicts with the approved mappings. That is what is creating the issue with the Old Wilton Road/Hutchinson Road area. **Berry** stated that the ordinance is very difficult to interpret. Fieldstone Engineering did the work on Lot 1-51. They were under the impression that was in the Purgatory Watershed yet they still made a mistake when they calculated the wetlands and drew the lines to create the two lots. **McKinney** stated that this current Board looks at the Ordinance in that certain lands defined within the Purgatory Watershed need to be 5-acres minus unbuildable areas. It seems to be that prior Boards had approved lands not minus the unbuildable area. That is what is causing the confusion. He does not believe that this Board is bound by a prior Boards decision in any legal matter. However, he thinks it is something we should consider. Attorney Quinn suggests that we check with Town Counsel on this. There is a concept in the law called Administrative Clause. When a town consistently interprets an Ordinance a given way, that becomes the guiding principal. We can't just change that interpretation because a different group of individuals find themselves on the Planning Board. We would have to amend the Ordinance. This seems like a change in direction. In the ordinance itself, in the Open Space where we want to exclude wetlands and slope from consideration, it expressly says so. That is not stated in the District 3 provisions of the Zoning Ordinance. Marchocki is not going to develop District 4 soils; she wants to develop the soils around that. There is nothing that says that you back it out in a net tract calculation; the language does not state that. **McKinney** stated that these are all good points and the Board needs to consider them. **Spalding** offered that if there is consistency with this Planning Board it is its inconsistency. We have a rotation of Board members. This town is crying for volunteers; he cannot begin to

express how challenging it is to get volunteers to sit on these Boards. To have someone that has institutional knowledge to carry through more than ten years is a rare find on a volunteer Planning Board. The makeup of the Board this year is probably going to look a lot different than the makeup of the Board two years from now. If you're looking for consistency on decisions being ruled by the Board, it's based on the members that sit on the Board, which constantly change. Attorney Quinn thinks that is a legitimate comment with respect to the exercise of discretion. Discretionary decisions that vary based on one application to another are all fine and you aren't going to find a lot of consistency there, but the application of the Ordinance itself is basic. It is not a discretionary function. The Ordinance says what it says; you can't have one Board saying it's 5 dry acres and another Board saying not it's not. **Spalding** offered that the Planning Board takes the Zoning very seriously. We have no leeway. If we believe that something is not meeting the zoning requirements it is kicked over to the ZBA. If the ZBA feels that there is a hardship or that the Planning Board has misinterpreted they correct it. There is a check and balance here. The Planning Board is extremely sensitive to the Town Zoning. You can probably prove case after case where there has been a different ruling on a similar type of application but what **Spalding** offers is that he approaches this very cautiously because it is Town law. He does not want to be breaking the Town law. If there is a hardship being put on this, again, there is the ZBA. This is one member's voice on this Board. There are other voting members on this board, but that is his opinion. **McKinney** looked at the breakup of the land on the surveyor's plan. They seem to have done a good job of breaking up land and providing acreage to accommodate wet areas. Is there the possibility that your land surveyors could include for us some type of mapping that shows what the buildable land is for these lots compared to what the wetlands are for each of the lots? It is not clearly shown on these maps. Marchocki said she did not ask them to include wetlands because that is not what the ordinance says. **McKinney** stated that he is not a fan of sending people to the ZBA arbitrarily and adding cost to property owners but again, this current Board has their decision of their interpretation of what the ordinance says and as foggy as it is, we have sent people to the ZBA because of that. Marchocki's position is that she disagrees with this very sudden reinterpretation of our Zoning Ordinance. It is very confusing to read. Explain on the four corners of this law where it reads 5-acres excluding wetlands. Where does it say it clearly for a layman to understand on the four corners of the law? **Berry** suggested that she could go to the ZBA for a variance. There is not a lot of wetlands on this parcel. It may be that the ZBA will grant a variance to have one or more undersized lots. **Johnson** stated that his interpretation is the same as **Spalding's**. He thinks as confusing as it may be written to Kathy's point, it is pretty clear where it says 'except non-buildable District 4 areas'. Although it may not share the terminology that specifically states wetlands, he thinks when you look at District 4 it has characteristics of wetlands. As a current Board member, his position would be to support the interpretation as minimum 5-acres excluding non-buildable areas. **Baker** and **Schwarz** had nothing further of value to add. **McKinney** offered to Marchocki that in not trying to put her in the position of additional cost, and maybe further consultation with her attorney, it might be best to make the subdivision go for a variance. He suggests she speak with the land surveyors to see how they can make these lands comply best with the ordinance as the current Board is interpreting it. He would like to see her make the best decision financially in order to use her land to her best benefit. He suggested that she discuss more with her attorney and the land surveyors to determine what the best economic decision is. There may be ways to make this comply without having to go for a variance. For example, you could manipulate these lines and create 2 lots that comply with the zoning ordinance and ask for a variance on the third lot. It would be easier to ask for a variance on 1 lot vs 3 lots. **8:05pm Hall** joined the meeting. He has a different interpretation of this and is looking for clarification. The applicant demonstrates 300' of frontage, with 50' front/rear setbacks, 30' side setbacks. She meets the minimum frontage requirements. He does not see anywhere where it says 'excluding'. Are we confusing a straight up frontage subdivision with the open space ordinance where we have to take out the wetlands, the steep slopes, and then the 40% needs to be open space? Is there the chance that we are interpreting this frontage subdivision through the lens of the open space ordinance; is that clouding our vision? **McKinney** noted that we are beyond our timeline for this discussion but he believes this is important so we will delay the next item on our agenda in order to continue the discussion. He hopes we can come to some resolution tonight so that Marchocki can come back to the Board with a formal proposal. **Spalding** feels we need to give this some careful thought. He respects **Halls** opinion on this but he is not sure he agrees with it. There is no question about frontage or setbacks. It comes down to calculating the lot size itself and do you or do you not need to take out poorly drained soils, bedrocks or slopes greater than 25%. There is discussion of that in the open space requirements. He will re-examine it but he is not sure it will change his position. **McKinney** asked Marchocki what her time frame is on this project; can we table this or move this for further discussion so as to give the Board time to delve into the

Ordinance and hopefully get a better understanding of what we are dealing with. Clearly there is some conflict here at this point. We want to make sure we are making a decision that is in the best interest of the Town and the property owner. It is clear that the Board is split on this tonight. The Board will have further discussion of the District 3 Ordinance on October 13th and have Marchocki come back on October 27th for continued discussion on her subdivision plan. Marchocki and Quinn thanked the Board and left the meeting. **McKinney** thanked everyone for their input on this complicated situation. He hopes that the Board can come to some understanding as this is the second case that has caused us to be conflicted as a Board. **Spalding** feels that the other subdivision of Lot 1-51 should not be compared to this. He feels there was error on the part of the engineer design of record. That case should not be held over our heads. This is a completely different case. **McKinney** stated that we have to look at the barrier as a whole. We have confusion on how we are interpreting the Ordinance in certain areas. We need to clarify how we are going to look at this situation for future Boards. **Johnson** feels that what happened with past Boards is irrelevant. It's the current sitting Board members interpretation that matters.

8:45 PM – Discussion of Legal Input on Proposed Wetlands Ordinance

McKinney motioned to table the discussion on the Proposed Wetland Ordinance seconded by **Berry**. All in favor.

8:50 PM – Other Business

The Board reviewed the minutes from 8/11/20. **Berry** motioned to accept the minutes as written seconded by **Baker**. All in favor. The Board reviewed the minutes from 8/25/20. **Schwarz** motioned to accept the minutes as written seconded by **Berry**. All in favor. The Board reviewed the minutes of 9/8/20. **Baker** motioned to accept the minutes as written seconded by **Schwarz**. All in favor. **Spalding** was tasked with deciding where to put the Wetlands Ordinance. His recommendation is to drop that in a new Section I-408 in our Zoning Ordinance.

9:10 PM

As there was no further business before the Board, **Berry** motioned to adjourn seconded by **Schwarz**. All in favor, meeting adjourned.

Respectfully submitted,

Joan Cleary

Administrative Assistant