

**Hopkinton Planning Board**  
**Minutes**  
**January 5, 2005**

Chairman Bruce Ellsworth opened the Hopkinton Planning Board public hearing of Wednesday, January 5, 2005, at 7:00 PM in the Town Hall to review petitioned amendments to the Hopkinton Zoning Ordinance. Members present: Jane Bradstreet, Celeste Hemingson, Edwin Taylor, Timothy Britain and Bethann McCarthy.

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Chairman Ellsworth opened the hearing expressing concern with a perception that the Board's vote to either recommend or not recommend the petitioned amendments will have on those that are either in support or opposition to the Bio Energy matter; therefore, Chairman Ellsworth requested that that there be no comments in reference the Bio Energy matter.

Chairman Ellsworth then began the hearing by explaining the process by which he will ask each member to vote on each petitioned amendment. The Board's vote will occur following the final public hearing which is scheduled for Tuesday, January 18, 2005. Furthermore, he advised those present that the petitioned amendments will be placed on a separate ballot from that in which residents will vote on officers and zoning amendments proposed by the Planning Board.

Attorney Scott Flood representing a group known as Residents Environmental Action Committee for Health (REACH) began by explaining the functions of the legislative and judicial role of the Planning Board. The Planning Board takes on the judicial role when reviewing applications and take on a legislative role when considering what is best for the community when recommending zoning amendments.

Attorney Flood reviewed the petitioned amendments submitted by Attorney Ronald LaJoie on behalf of REACH as follows:

- To add a new Section 4.7 Increased Shoreland Protection Standard to read as follows:

Section 4.7 Increased Shoreland Protection Standard for Certain Facilities: The State Shoreland Protection laws (NH RSA 483-B:8) permit a Town to adopt land use control ordinances relative to all protected shorelands which are more stringent than the minimum State standards. As indicated in the Master Plan, the Town's lakes, rivers, ponds and streams are a primary resource and asset for the Town. The Contocook River also serves as a drinking water sources and, as such requires special consideration. Nonconforming solid waste facilities and any proposed or existing solid waste facilities as well as nonconforming facilities and any existing facilities which store, or incinerate (or propose

to store or incinerate) solid waste, or construction and demolition debris in close proximity to lakes rivers, ponds or streams, or artificial impoundment areas which connect to lakes, rivers, ponds or streams represent an unacceptable risk to these resources and the public health, safety and welfare of the citizens of the Town. The Town hereby adopts a more stringent shoreland protection standard for such uses. No existing, nonconforming, solid waste facility, or facility which stores, or incinerates solid waste, or construction or demolition debris nor any such facility allowed by variance, (except for a facility which has, and maintains in good standing a permit which predates this ordinance, permitting the placement of solid waste in accord with RSA 483-B:9 (IV-d)) shall be allowed to place solid waste or construction and demolition debris within 300 feet of the reference line of public waters or within 300 feet of the ordinary high water mark of a river, pond, stream or artificial impoundment area, nor shall the edge of any impervious surface on which such solid waste is located be within 300 feet of the reference line of public waters or within 300 feet of the ordinary high water mark of a pond, river, stream or artificial impoundment area. In the event a pre-existing facility has its permit revoked by the State, it shall be subject to this stricter standard. Nothing in this standard shall be construed to allow a solid waste facility in a zone unless it is explicitly permitted in that zone.

Attorney Flood explained that RSA 483:B-9 specifically sets the minimum standards for solid waste facilities having to comply with the Shoreland Protection Act. Solid waste facilities are prohibited from being within 250-feet of the shoreland. REACH is suggesting that the requirement be expanded to 300-feet. Attorney Flood advised that the NH Statutes allow Towns to require more stringent requirements than that in which the State currently imposes. Attorney Flood then referenced the NH Statute which outlines the purpose of the Shoreland Protection Act.

Mr. Taylor questioned how measuring from the reference line compares with measuring from wetlands. In response, Attorney Flood believed that the reference line of a river would be the high water mark, rather than the edge of the water. Attorney Flood explained that in the case of Bio Energy's property, the owner hired a land surveyor to make the determination. Chairman Ellsworth then questioned whether the reference lines for the rivers and ponds have been defined. Attorney Flood replied no, but suggested that in the case of an application before the Planning Board that the Board may require an applicant to hire a land surveyor to make the determination.

Mrs. McCarthy noted that in reviewing the Statute it appears that not all of the words in the amendment are defined. Mrs. McCarthy suggested that word "public waters" could be interpreted as including any water body of 1-acre.

Mr. Britain then questioned whether the proposed amendment is intended to expand beyond public waters. In response, Attorney Flood stated that the intent is not to expand that for which the Statute covers. In writing the amendment REACH had tried to follow that language within the Statute that addresses shoreland protection.

Mr. Taylor then questioned why the amendment only includes an additional 50-foot setback from that what is required in the NH Statute. In response, Attorney Flood believed it was an arbitrary number as is the 250-foot referenced in the Statute.

Mr. Britain asked Attorney Flood to explain the benefits to be gained in requiring 300-foot versus 250-feet. In response, Attorney Flood believed that the rivers within the community are worth protecting. Again, he stated that the distance is arbitrary, but would allow protection of a broader area of the shoreland.

Mr. Taylor questioned whether there is any language within the Statute that allows the State to override the setback standards imposed by municipalities. In response, Attorney Flood explained how the State has the ability to grant variances from the setback requirement. RSA 483-B: 9 allow the community to grant variances from their own shoreland setback requirement. Attorney Flood stated that there is nothing in the petitioned amendment that affects the State's ability to grant variances from the State standard.

Attorney Ronald LaJoie addressed the Board explaining how the Planning Board has an opportunity to make changes to the Zoning Ordinance without there being any prejudice concerning future applications that may come before the Board. Additionally, Attorney LaJoie advised of the Board's ability to present their own amendment if they wished to see different language than that proposed by the petitioned amendment. In response, Chairman Ellsworth recommended that the Planning Board not embark on writing its own amendments as it relates to the petitioned amendments presented.

Attorney LaJoie reiterated comments as to the Planning Board's role in evaluating whether the amendments are good for the community. With respect to the Shoreland Protection Act, the State has interpreted and waived certain matters in which the language was unclear. The amendment to the Ordinance is to allow the Planning Board to clarify these matters. In particular, Attorney LaJoie referred to a situation that involved a course of the river running under a road through a factory and whether that should be considered under the Shoreland Protection Act.

Mrs. McCarthy questioned whether the petitioned amendment would apply to any pond of any size that does not abut public water. Attorney LaJoie replied yes. Mrs. McCarthy noted that currently the Shoreland Protection Act does not apply to man-made ponds.

Additionally, Mrs. McCarthy questioned whether a manure pile on a farm would be considered solid waste under the proposed amendment. In response, Attorney Flood stated that the Shoreland Protection Act refers to solid waste facilities, questioning whether a manure pile on a farm would be considered a solid waste facility.

Byon Carr addressed the Board explaining how the NH Department of Environmental Services recently proposed an increase in the shoreland protection requirements for the Contoocook River, due to the fact that the river is part of Concord's water shed. Mr. Carr did not believe it to be unreasonable to require a stricter setback than that of the State. Mr. Carr questioned if the Town were to adopt the petitioned amendment would the Town be precluded from granting a variance from the standard. In response, Attorney Britain stated that any zoning ordinance maybe subject to a petition for a variance.

- To add a new Section 5.6 Open Storage in the Industrial (M-1) zone to read as follows:

The open storage of raw materials, finished goods or construction equipment requires a special exception in the Industrial (M-1) zone. The following conditions shall be imposed as minimum conditions on the grant of any special exception for the open storage of raw materials. All manufacturing materials, stockpiles, raw materials, and finished goods shall be screened from the view of abutting parcels and public roads. The Planning Board, for good cause shown, may waive or reduce the screening requirement in the context of site plan or subdivision review. In order to allow for fire suppression, stockpiles and raw materials shall not exceed a height of twenty-five (25) feet and shall be fully accessible to fire and emergency equipment. Flammable stockpiles, including mulch piles, compost piles and wood piles shall be arranged in windrows in order to permit access by fire equipment and prevent the spread of fire. Any stockpiles with the capacity to leach chemicals or metals into the ground shall be stored on an impervious surface and shall be subject to all necessary State approvals. The Planning Board shall have the authority to review open storage as part of its site plan review process, to impose supplemental conditions beyond the conditions imposed by the Zoning Board of Adjustment on any special exception and to adopt regulations pertaining to open storage including the authority to require that monitoring wells be installed on the perimeter of stockpiles.

Attorney Flood explained how the petitioned amendment concerning open storage specifies materials that would be considered combustibles and provides for a restriction as to how the combustibles are to be stacked and stored on a property.

Attorney Flood discussed how a construction and demolition pile in Maine caught fire and took weeks to put out. He believed that by managing the piles it would assist the Town in controlling a fire. The petitioned amendment requires that piles be limited to 25-feet in height. Attorney Flood explained how the Fire Chief was unable to give guidance concerning the matter, advising that for each type of combustible there is a different height standard.

Chairman Ellsworth questioned whether the petitioned amendment would affect existing businesses that currently stock pile material. Attorney Flood was not aware of a specific business, but noted that the Fire Chief referred to a wood production business that he believed did not stock piles higher than 25-feet.

Mrs. McCarthy asked whether the petitioned amendment was to include mulch and lumber piles. Attorney Flood replied yes.

Mrs. McCarthy expressed concern with the language relative to screening of the material, stating that sometimes screening can be more obtrusive than the actual material being stored. Additionally, she questioned the size and type of screening as the petitioned amendment does not specifically address this issue. In response, Attorney Flood stated that details concerning the screening would be at the Planning Board's discretion as it is currently when reviewing site plans.

Chairman Ellsworth questioned the rationale of choosing the height of 25-feet. In response, Attorney Flood stated that he believed that the 25-feet would be manageable for the Fire Department. Mr. Britain questioned the height of the stockpile in Maine. Attorney Flood was unsure, but believed that it was substantially higher than 25-feet. He further stated that with the Bio Energy proposal the stock piles may be much higher due to the elevation of the area in which the piles would be placed.

Mrs. McCarthy questioned why the petitioned amendment does not address stockpiling of material in the Village Industrial district, which is the Riverside Drive area. In response, Attorney LaJoie stated that the amendment was intended to address those areas for which they suspect substantial piles/storage of combustible materials. The maximum range in which the Fire Chief had given for combustible materials was between 25 to 50-feet in height.

Mr. Taylor reiterated the fact that as the petitioned amendment is written it would only apply to those properties within the M-1 district, not within the VM-1 district.

Mrs. McCarthy questioned whether it would be beneficial in all cases to require storage on an impervious surface, noting that in some instances there may not be proper drainage. In response, Attorney Flood believed the matter would have to be addressed by the Applicant during the site plan review process.

Attorney LaJoie addressed the Board explaining that the Planning Board will have the ability to waive requirements, such as screening, should the Board feel that it is necessary. The intent of the requirement for screening is to address situations where there may be a large stockpile adjacent to a residence.

Mr. Taylor asked whether it would be a mandatory requirement to test and control discharge from the materials stockpiled. In response, Attorney Flood advised that the State has now relaxed their regulations concerning monitoring and testing of runoff. The petitioned amendment is not intended to replace the requirements of the State, but rather to provide additional leverage to the Town in requiring applicants to address these issues.

Mr. Carr questioned the authority that would determine whether businesses are in compliance with the Ordinance. In response, Chairman Ellsworth stated that most likely the businesses will be self-policed; however, the Board of Selectmen is the enforcers of the Ordinance.

Mr. Carr noted that amendment as written does not include a definition of flammable stockpiles. He then questioned whether the storage of buses or golf carts would be considered storage of combustible materials as the vehicles have gas and oil in them. In response, Attorney Flood stated that the concept of the amendment was not to create a comprehensive ordinance, but to rather provide the Planning Board with the ability to assess each applications affects on the community.

- To amend subsection 5.4.5 Dumping or Disposal of Garbage and other Refuse to read as follows:

No land in any district shall be used for a dumping place for garbage, construction and/or demolition debris or refuse from either private or commercial or industrial source except the public landfill and/or transfer station, as provided by the Town. The Town hereby finds that the incineration of certain types of construction and/or demolition debris presents a hazard to the public health, safety, convenience and general welfare of the inhabitants of the Town of Hopkinton by virtue of the hazardous emissions and discharges emanating from such incineration. No land in any district shall be used for the incineration of construction and/or demolition debris. The Town hereby finds that such construction and/or demolition debris contains treated and coated woods and other materials (including but no limited to woods and other materials containing lead-based paints, lead based stains, and mercury and formaldehyde treatments), and that these items, when incinerated, pose a hazard to the public health, safety, convenience and general welfare. Further, no prior variance granted by the town for the incineration of wood or wood products shall be construed s o as to allow for the

incineration of construction and/or demolition debris, as any such use poses a hazard to the public health, safety, convenience and general welfare.

Attorney LaJoie readdressed the Board explaining how the above petitioned amendment would prohibit the incineration of construction and demolition debris in the Town of Hopkinton. He mentioned the proximity of businesses to the Contoocook River and the affects that the hazardous chemicals would have on the area.

Chairman Ellsworth questioned whether any existing business burning construction and demolition debris would be grandfathered. Attorney LaJoie indicated that it is likely that an existing business would be grandfathered.

Mr. Britain expressed concern in being asked to hereby find that the burning of construction and demolition debris is prohibited when in fact no information or rationale has been provided to the Board supporting the request. Mr. Britain suggested that the Planning Board would need to be provided with information that would allow the Board to establish findings of fact. Attorney LaJoie agreed, stating that there is substantial evidence to support the fact that the burning of construction and demolition debris is hazardous. Attorney LaJoie agreed to provide supporting documentation for the Board's review.

Mr. Taylor noted that when dealing with the disposal of buildings there are requirement concerning the sorting of materials. He questioned whether the amendment as written would provide enough latitude in distinguishing ones ability to burn wood from an old shed on the property to that of a commercial burning operation. In response, Attorney LaJoie discussed the concerns and problems that occur when sorting materials, explaining how at times there remains toxic elements on the materials that are burned. He then discussed a model of a state of the art facility that has stringent pollution devices that can control emissions. Attorney LaJoie then noted that this amendment would not be applicable to a person burning their own debris in their back yard. Chairman Ellsworth stated that the amendment as written does not address that issue.

Suzanne Covert of Cottage Street addressed the Board explaining how for years she had asthma which she believed was as a result of Bio Energy operating. Since the facility has not operated for the past year or so she has improved. Ms. Covert asked that the Planning Board protect the community by prohibiting facilities from burning construction and demolition debris.

James Clairry addressed the Board explaining that once he had realized that the State was not going to do anything to protect his family he decided that it was necessary to get involved in trying to address the safety hazards of burning construction and demolition debris. He believed that the amendment will allow

the Planning Board to take control of these issues, rather than leaving the matter to the State.

Derek Owen addressed the Board stating that he believed that the Town must be more restrictive with its Ordinance, rather than relying on the State to address this issue.

Stacey and David Price addressed the Board explaining how they are responsible for two wells that serve 130 homes. The New Hampshire Department of Environmental Services continuously requires that the water quality be tested. Mrs. Price was surprised that the Department of Environmental Services was not supportive.

- To amend the second paragraph of Section 3.6.1 to read as follows:

Any use not specifically listed as a permitted use shall not be allowed unless the Board of Adjustment determines it is substantially similar to a use listed as a permitted use in the applicable zone by virtue of an Administrative Appeal to the Board. A use shall not be deemed substantially similar to a permitted use unless it is substantially similar in all aspects to a permitted use; otherwise the use shall be deemed to be a prohibited use. Any use deemed by the Board to be a prohibited use, and any use explicitly prohibited by this Ordinance, shall only be allowed in the event that the Board of Adjustment grants a variance allowing the use.

Attorney Flood explained how the above amendment requires a finding to be made that a proposed use is substantially similar to the existing use of the property. Mr. Britain believed that the Town's Ordinance currently requires the same. The only new language would be the words, "substantially in all aspects". In response, Attorney Flood advised that Attorney Dean Eggert, who was unable to attend tonight's meeting and who wrote the proposed amendments, will be available on January 18 to speak to the matter.

Attorney LaJoie believed the intent of the amendment is to avoid someone from being able to say that what they are proposing is similar in nature, rather than being substantially similar in all aspects of the existing use.

- To amend Section 5.1.1 Expansion of Non-Conforming Lot Area, and Section 5.1.2 Expansion of Non-Conforming Use, subsections b. and c.; and further to add a new subsection d. to read as follows:

Section 5.1.1 Expansion of Non-conforming Uses outside and within Structures – Except for agriculture, horticulture or floriculture, no non-conforming use on a conforming lot occurring outside of a structure in whole or in part, or on a lot without a structure, shall be expanded in area, density or intensity of use more than five (5%) percent from the

area, density or intensity of use on the lot at the date of non-conformity. The expansion may be done at one time or in successive stages, but shall not exceed five (5%) in the aggregate when compared to the extent of use at the time the use first became nonconforming. The expansion of a nonconforming use beyond five (5%) percent in the area, density or intensity of use shall require a variance from the Board of Adjustment. If granted, the terms of the variance shall specifically define and limit the scope of the expansion to the least amount of expansion required to provide the necessary relief. If the variance is granted, the proposed expansion shall also be subject to site plan review if the underlying use would, but for its non-conforming use status, be subject to site plan review. This section shall not prohibit the expansion of a nonconforming use within an existing conforming structure, provided the expansion otherwise complies with this Ordinance and has no adverse effect on the abutters or the zoning district. If the proposed expansion is deemed by the Building Inspector/Zoning Administrator to be a change in the type of nonconforming use, or to have an adverse effect on the abutters or the zoning district, the applicant shall be required to apply for a variance. Other than as allowed in Section 5.1.2.a., a non-conforming use shall not be permitted to expand on a nonconforming lot without a variance.

Section 5.1.2 Expansion of Non-conforming Uses - A) Non-conforming residences may be expanded by up to fifty (50%) in square footage from the square footage existing at the date of nonconformity, provided the addition does not further encroach upon non-conforming setbacks. The expansion shall meet all other applicable sections of this Ordinance and may be done at one time or in successive stages, provided the expansion does not exceed fifty (50%) in the aggregate when compared with the square footage existing at the first date of nonconformity. B) All other non-conforming, non-residential structures on a conforming lot may be expanded up to five (5%) percent in square footage beyond the square footage existing at the first date of nonconformity, provided the owner obtains a special exception from the Zoning Board of Adjustment, does not further encroach on any current setbacks for a conforming lot and meets all other applicable provisions of this Ordinance. C) Any expansion of nonconforming, nonresidential structure beyond five (5%) in square footage (as compared to the square footage existing at the first date of nonconformity) shall require a variance from the Board of Adjustment. D) Nothing in this section shall be deemed to prevent normal maintenance and repair of a non-conforming structure, provided that such repair or maintenance does not increase the degree of nonconformity.

Attorney Flood stated that the intent of zoning is to eventually have existing non-conforming uses change to conforming uses. The proposed amendment is intended to reduce the allowed expansion of a non-conformity to not more than five (5%) percent beyond the square footage that is existing at the first date of

non-conformity. With regards to expansion of residential structures, the expansion cannot exceed fifty (50%) percent. Attorney Flood stated that Attorney Eggert will further address the issue at the January 18 hearing.

Mr. Taylor noted that the language in the Zoning Ordinance allows for the expansion of a residential structure provided the structure is in compliance with the setback requirements. He believed the amendment proposed would not allow the expansion of a residence that is located on a non-conforming lot even though the residence is in compliance with the setback requirements for the district. Mr. Taylor questioned whether the restriction may be considered a taking. Attorney Flood did not believe so, but suggested that the Board wait to hear from Attorney Eggert concerning the matter.

Attorney LaJoie re-addressed the Board to submit a report from REACH entitled, Construction and Demolition Generation, Disposal and Incineration: A Major Problem for New Hampshire and the Region. Attorney LaJoie believed that the information would be helpful to the Planning Board in understanding the affects of burning construction and demolition debris.

There being no further comments, Chairman Ellsworth declared the public hearing adjourned at 9:10 PM. The final public hearing concerning the petitioned amendments is scheduled for Tuesday, January 18, 2005, at 7:00 PM in the Town Hall.

Karen L. Robertson  
Planning Director

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