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*In Memoriam*  
C. Wesley Crowell  
1955-2015

March 7, 2018

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**VIA FIRST CLASS MAIL AND EMAIL**

Ms. Ann Grinnell  
Chair, Planning Board  
Town of Kittery  
200 Rogers Road Ext.  
Kittery, ME 03904

**Re: Homestead Subdivision – Tax Map 60, Lot 24**

Dear Ms. Grinnell:

This office represents Landmark Hill, LLC, (“Landmark Hill”) in connection with its development of the Homestead Subdivision (Tax Map 60, Lot 24) (the “Project”).

As you know, Landmark Hill appeared before the Planning Board on February 8, 2018 for a completeness review of the Project. The Board eventually voted 6-1 to find the project complete; however, during the course of the meeting the Board raised two particular concerns: (1) the proper calculation of net residential acreage, and (2) the proper setback for the Project’s proposed stormwater pond. We hope the following analysis of both issues is helpful, and provides the Board adequate certainty that as presented, the Project complies with all requirements of the Kittery Land Use Ordinance (“LUO”).

**I. Net Residential Acreage**

During its review of the Project, the Board raised concern about whether the total amount of area deducted from the Project’s net residential acreage was appropriate.<sup>1</sup> In particular, the Board focused on LUO Section 16.7.8.2.F, which requires that “[a]ll land located within proposed rights-of-way including parking and travel ways” be excluded from NRA.

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<sup>1</sup> Currently, the NRA calculations for the Project are contained in Plan Note 6 on Plan Sheet 1.1 of the application.

In its comments, the Board was of opinion that this section requires an applicant deduct to all land located within proposed rights-of-way *and* all area within a proposed parking lot or other travelled way. Respectfully, this does not sync with the plain meaning of this Section, which cuts against the Board's apparent interpretation. Section 16.7.8.2.F begins within the clear requirement that in order to be deducted, area must *first* be within a "proposed right-of-way." As such, any area that is *not* within a proposed right-of-way need not be deducted. The inclusion of "parking and travel ways" afterwards merely gives two examples of areas that would be deducted if placed within a right-of-way. This would include situations where parking within a subdivision was leased or otherwise granted to an adjoining property owner, or other situations where easements and rights-of-way were reserved for other uses.

The Planning Board's apparent departure from the LUO's plain meaning is troubling for two reasons. First, it breaks dramatically from how the Town of Kittery has dealt with such issues in the past. While the Board's previous approvals are not legally binding on future applications, both Town staff and this Board have consistently determined that parking areas and travel ways were *not* excluded from NRA. This certainly was the case with Landmark Hill's previous application for Landmark Hill Plaza, approved last year. Second, the Board's apparent reliance on the "intent" of this section, rather than the plain meaning of its text, runs contrary to Maine law. The Maine Supreme Judicial Court has stated clear that it is the plain meaning of an Ordinance that controls, and when the words themselves are clear, there is no need for further analysis.<sup>2</sup> As such, the Board's reliance on any supposed intent of this section's drafters, when that intent cuts against the plain meaning of the words themselves, is legally prohibited.

## **II. Stormwater Pond**

Second, the Board made clear at the last meeting that it considers the stormwater treatment pond a "structure" within the meaning Section 16.2.2 of the LUO, requiring such ponds to be outside of the required 100-foot setback from the wetland of special significance existing on the parcel.<sup>3</sup> As above, we respectfully disagree with this position. Many projects within the Town of Kittery, including that proposed on the Sowerby Parcel, immediately adjacent to the Project, have been approved with identical treatment ponds situated within this purported setback.

Moreover, the Planning Board's interpretation of the term "structure" to include such a pond, simply because it contains a system of below-ground pipes, does not fall within the clear

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<sup>2</sup> See *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, --- A.3d ---.

<sup>3</sup> As required by Table 16.9 of the LUO.

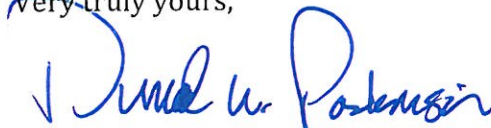
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definition contained in Section 16.2.2.<sup>4</sup> The proposed pond is not “constructed or erected” like a traditional building – it is created by arranging rip rap and other materials to form an indent sufficient to collect water. The use of pipes to remove water from the pond cannot logically convert the pond into a structure that is subject to the applicable setbacks. This would lead to absurd and illogical results, both of which the Maine Supreme Court have repeatedly prohibited when interpreting a municipal zoning ordinance.<sup>5</sup> For example, if a treatment pond were considered a structure, presumably a septic system, lawn irrigation system, or similar devices placed in the ground would be structures as well.

Further, because the purpose of wetland setbacks is to protect wetlands, it would logically follow that only those things that would be placed within, or otherwise damage a setback due to their proximity, would be prohibited.<sup>6</sup> The purpose of these treatment ponds is exactly the opposite – they enable wetlands to properly function, by diverting stormwater that would otherwise flow into them. In this vein, we hope the Board will accept our argument that as proposed, the stormwater pond does not require a 100-foot setback.

We appreciate the Board’s attention to these matters, and would also appreciate the Board forwarding our concerns and arguments to the Town’s attorney for further review. We look forward to working with the Board throughout the remainder of the review process.

Very truly yours,



Durward W. Parkinson

DWP/btm

cc: Kathy Connor, Interim Town Planner  
Michael Brigham, Landmark Hill, LLC  
Attar Engineering

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<sup>4</sup> Structure is defined as “anything built for support, shelter, or enclosure of persons, animals, goods, or property of any kind, or anything constructed or erected with a fixed location on or in the ground, or attached to something having a fixed location on or in the ground.”

<sup>5</sup> *Fryeburg Tr. v. Town of Fryeburg*, 2016 ME 174, ¶ 5, 151 A.3d 933.

<sup>6</sup> This intent is highlighted by Section 16.9.3.1.B of the LUO, which was brought up at the last meeting. This section states that the Planning Board “will review plans for proposed development within 100 feet of a wetland to determine if wetlands of special significance are impacted.” Clearly, the intent of setbacks in this scenario is to prevent harm to wetlands, particularly those of special significance.



# Town of Kittery, Maine

## *Conservation Commission*

P.O. Box 808, Kittery, Maine 03904

DATE: February 15, 2018

TO: Kathy Connor, Interim Kittery Town Planner  
Ann Grinnell, Planning Board Chair

FROM: Earldean Wells, Chair

RE: Land Mark Hill LLC, Michael Brigham, Rte 1, Map 60, Lot 24

The Kittery Conservation Commission has concerns regarding the two proposed stormwater retention ponds to be located within the 100 foot setback (just 30 feet) the from the wetlands associated the existing natural pond, which makes these wetlands of special significance.

It was mentioned several times during the Planning Board discussion with the applicant, Michael Brigham, at the February 8, 2018 Planning Board meeting that these retention ponds were beneficial to the natural pond and the wetlands. The Conservation Commission wishes to stress that the retention ponds are only beneficial IF they are functioning properly. To be functioning properly they must be maintained properly.

Sand, soil, salt and other debris from the surrounding structures and road in this proposed development will wash into the retention ponds during storm events and spring thaws. This material settles in the retention ponds impairing their ability to filter the storm water. Also during storm events the retention ponds can become overwhelmed and allow untreated water to overflow into the wetlands and existing natural pond impairing their ability to function properly.

If the retention ponds are allowed by the Planning Board, to be located within the 100 foot setback of the wetlands and existing ponds in opposition to Kittery Ordinance, there must be a note on the plans that requires that the these retention ponds are inspected by a certified person not only in the spring and fall of each year but must also be inspected after each storm event during the year for the life of this project. Certification of these inspections must be in writing and must be delivered to the Kittery Code Enforcement Officer to ensure that the retention ponds are not, in fact, impacting the functioning and health of the wetlands of special significance and the natural pond.