TOWN OF KITTERY
Planning and Development
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TO: PLANNING BOARD
FROM: ADAM CAUSEY, DIRECTOR OF PLANNING& DEVELOPMENT
SUBJECT: CLUSTER SUBDIVISION
DATE: SEPTEMBER 19, 2019

At the Planning Board's regular meeting held on September 12, 2019, the Board requested a legal opinion regarding the Town's cluster subdivision regulations pertaining to a proposed modification of the minimum land area per dwelling unit (MLADU) in a proposed subdivision project.

I have engaged Town Attorney Duncan McEachern for an opinion on this matter but will not have that review in time to include in the meeting packets that are released on September 19 for the next meeting on September 26. I will forward his opinion as soon as I have it.

Thank you,

Adam Causey, AICP
Director, Planning & Development Department

Cluster considerations — KK

1) How would allowing developers to increase net residential density by modifying the Minimum Land Area per Dwelling Unit satisfy Cluster development's purpose (in 16.8.11.1.I) **of "minimizing residential impact on the municipality, neighboring properties and the natural environment"?**

Increasing the number of dwelling units above what would otherwise be allowed cannot minimize impacts. The impacts of more dwellings include greater use of town services and resources, more traffic and more noise. In most cluster residential, mixed-use and site developments more dwellings will require more land to be developed and more infrastructure than if the MLADU had not been modified.

2) How would increasing density beyond that otherwise allowed in a zone be "in harmony with surrounding development" (16.8.11.1)**?**

Lot size, lot coverage, frontage and setbacks are the only dimensional standards allowed by State law **30-A MRSA §4353 4-C** in order to promote cluster development. These modifications are allowed in exchange for protecting important natural resources. The four permitted reductions create greater physical density. But cluster's modified lots can be perceived as out of character in many zones. Therefore increasing physical density and adding numerical density cannot possibly be in harmony with surrounding development in those zones as it is envisioned in the Comp Plan and codified in our current zoning requirements.

3) What is the Minimum Land Area per Dwelling Unit?

The MLADU is both a fixed number used as a regulatory device to express the desired density for each land use zone, and its 16.2 definition is a description of the buildable land area required for single family dwellings not subject to subdivision. MLADU is not a physical "dimension" on the ground such as lot size, frontage, coverage or setbacks.

4) Is it equitable to allow only clustered development to randomly increase density to the developers' preferred levels?

It is not equitable. All forms of residential development must adhere to density standards described in the Code. As noted above, MLADU applies to non-subdivision dwellings. Subdivisions are subject to the Net Residential Density calculation (16.2) to determine the land's yield. The calculations (and proposed modifications) must be shown on a cluster development's plan (16.8.11.5.A.1). The NRD yield relies on Net Residential Acreage (16.2 & 16.7.8). NRA's purpose statement (16.7.8.1) reiterates the requirement for the NRD calculation. There are only 3 exemptions to this defined process (in 16.7.8.4). Cluster subdivision is not among them. This confirms that the Town expects cluster subdivisions to comply with the calculation as it is set out in the purpose statement, just as all other residential development must comply with their own applicable land deductions and density calculations.

4) How would allowing higher buildings than permitted be in harmony with surrounding development?

Building height is a standard that causes great concern for many reasons. These include obscuring light and views, compromising privacy, etc. These concerns are usually raised where adjacent land use zones meet and building-height limits differ. In this situation, the Code requires greater setbacks for the taller structure based on it's height. If height increases were possible in all zones where cluster is allowed, these concerns could affect any lot with no codified mitigation. Harmonious? Probably not.

5) Should the Planning Board have unfettered ability to waive ANY "dimensional standard" including those not allowed in §4353 4-C?

16.8.11.3 authorizes the Board to allow modifications to "dimensional standards" "where the Board determines the **'benefit'** is consistent with this title". This statement could not be more vague.

This is from MMA:

To a significant degree, both vagueness and unlawful delegation challenges are concerned with the issue of definiteness. Thus, a statute is vague "when its language either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess at its meaning, or if it authorizes or encourages arbitrary and discriminatory enforcement." *Town of Baldwin v. Carter, 2002 ME 52, P 10, 794 A.2d 62, 67* (quotation marks omitted) (citation omitted). Similarly, legislation delegating discretionary authority to an administrative agency is unconstitutional if it fails to "contain standards sufficient to guide administrative action." *Lewis v. Dep't of Human Servs., 433 A.2d 743, 747 (Me. 1981)*. Indeed, vagueness and [***16] unlawful delegation are often raised simultaneously and properly treated as a single inquiry.

So friends, I continue to believe that we are neither allowed to modify any other "dimensional" standards than lot size, lot coverage, setbacks and frontage nor would it be prudent to do so even if we were. THANKS for considering. — KK

From:	Dutch Dunkelberger
To:	Jamie Steffen; Adam Causey
Cc:	karen@kalhill.com
Subject:	Fwd: Cluster Development
Date:	Tuesday, September 17, 2019 8:46:29 PM
Attachments:	City of Biddeford, ME Performance StandardsSearch Section 16 Cluster developments..pdf ATT00001.htm Title 30-A, §4353 Zoning adjustment.pdf ATT00002.htm

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Jaime, please for this to the Board and include it in the next package. Thanks

Dutch
Sent from my iPhone

Begin forwarded message:

From: Ronald Ledgett <rledgett@comcast.net>
Date: September 17, 2019 at 3:14:04 PM EDT
To: Dunkelberger Dutch <dutchdunkelberger@gmail.com>
Cc: Ronald Ledgett <rledgett@comcast.net>
Subject: Cluster Development

Dutch, I am on our boat down east with a low likelihood of returning in time to attend our September 26th Planning Board Meeting.

With regard to the Vice Chair's concern expressed at our last meeting that the Planning Board not exceed the authority for cluster development granted by the Maine State Statue (attached below) and Title 16:

My review finds the State Statute concerning zoning adjustments does three things:

1. Establishes powers and processes for a Board of Appeals
2. Specifies and limits what is included in "dimensional standards" - "As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements".
3. Permits a zoning ordinance to "Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this
subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals that do not meet the dimensional standards otherwise required, in order to promote cluster development, to accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by municipal zoning. As long as the development falls within the parameters of such an ordinance, the approval is not considered the granting of a variance. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter 1, article 2-B."

Items 2 and 3 are pertinent to the Vice Chairman's concern. From my review I

conclude the Vice Chairman is correct that the number of dwelling units on a specific property is not a dimensional standard as specified by Title 30-A 4353, and not a number the Planning Board can modify as the delegated reviewing authority for a cluster development.

The number of dwelling inits allowed is the property size divided by the area required for a dwelling unit by the zone in which the property is located. In the case of Old Post Road/ Bridge street this is 113,901 square feet divided by 20,000 square feet, which is 5.695.

A check of some other municipalities in Maine found they are consistent with this conclusion. I have attached the code for Biddeford ME as an example. See Section 16.C.# on page 10. We might want to consider more detail in Title 16 similar to Biddeford's code as part of recodification.

Title 30-A: MUNICIPALITIES AND COUNTIES

Part 2: MUNICIPALITIES

Subpart 6-A: PLANNING AND LAND USE REGULATION

Chapter 187: PLANNING AND LAND USE REGULATION

Subchapter 3: LAND USE REGULATION

§4353. Zoning adjustment

Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

1. Jurisdiction; procedure. The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance. The board of appeals is governed by section 2691, except that section 2691, subsection 2, does not apply to boards existing on September 23, 1971.

[1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW) .]

2. Powers. In deciding any appeal, the board may:

A. Interpret the provisions of an ordinance called into question; [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

B. Approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance except that, if the municipality has authorized the planning board, agency or department to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and [2011, c. 655, Pt. JJ, §24 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF).]

C. Grant a variance in strict compliance with subsection 4. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

[2011, c. 655, Pt. JJ, §24 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF) .]

3. Parties. The board shall reasonably notify the petitioner, the planning board, agency

or department and the municipal officers of any hearing. These persons must be made parties to the action. All interested persons must be given a reasonable opportunity to have their views expressed at any hearing.

[2011, c. 655, Pt. JJ, §25 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF) .]

4. Variance. Except as provided in subsections 4-A, 4-B and 4-C and section 4353-A, the board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The land in question can not yield a reasonable return unless a variance is granted; [1991, c. 47, §1 (AMD).]

B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

C. The granting of a variance will not alter the essential character of the locality; and [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

D. The hardship is not the result of action taken by the applicant or a prior owner. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.

[2013, c. 186, §1 (AMD) .]

4-A. Disability variance; vehicle storage. A disability variance may be granted pursuant to this subsection.

A. The board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this paragraph solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability.

The board may impose conditions on the variance granted pursuant to this paragraph, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this paragraph, the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure. [2009, c. 342, §1 (NEW).]

B. If authorized by the zoning ordinance establishing the board, the board may grant a variance to an owner of a dwelling who resides in the dwelling and who is a person with a permanent disability for the construction of a place of storage and parking for a

noncommercial vehicle owned by that person and no other purpose. The width and length of the structure may not be larger than 2 times the width and length of the noncommercial vehicle. The owner shall submit proposed plans for the structure with the request for the variance pursuant to this paragraph to the board.

The person with the permanent disability shall prove by a preponderance of the evidence that the person's disability is permanent.

For purposes of this paragraph, "noncommercial vehicle" means a motor vehicle as defined in Title 29-A, section 101, subsection 42 with a gross vehicle weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to Title 29-A, section 521 and owned by the person with the permanent disability. [2009, c. 342, §1 (NEW).]

The board may impose conditions on the variance granted pursuant to this subsection.

All medical records submitted to the board and any other documents submitted for the purpose of describing or verifying a person's disability are confidential.

For purposes of this subsection, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A.

[2015, c. 152, §1 (AMD) .]

4-B. Set-back variance for single-family dwellings. A municipality may adopt an ordinance that permits the board to grant a set-back variance for a single-family dwelling. An ordinance adopted under this subsection may permit a variance from a set-back requirement only when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; [1991, c. 659, §3 (NEW).]

B. The granting of a variance will not alter the essential character of the locality; [1991, c. 659, §3 (NEW).]

C. The hardship is not the result of action taken by the applicant or a prior owner; [1991, c. 659, §3 (NEW).]

D. The granting of the variance will not substantially reduce or impair the use of abutting property; and [1991, c. 659, §3 (NEW).]

E. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available. [1991, c. 659, §3 (NEW).]

An ordinance adopted under this subsection is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to

exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner.

[1993, c. 627, §1 (AMD) .]

4-C. Variance from dimensional standards. A municipality may adopt an ordinance that permits the board to grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood; [1997, c. 148, §2 (NEW).]

B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties; [1997, c. 148, §2 (NEW).]

C. The practical difficulty is not the result of action taken by the petitioner or a prior owner; [1997, c. 148, §2 (NEW).]

D. No other feasible alternative to a variance is available to the petitioner; [1997, c. 148, §2 (NEW).]

E. The granting of a variance will not unreasonably adversely affect the natural environment; and [1997, c. 148, §2 (NEW).]

F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435. [1997, c. 148, §2 (NEW).]

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals that do not meet the dimensional standards otherwise required, in order to promote cluster development, to accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by municipal zoning. As long as the development falls within the parameters of such an ordinance, the approval is not considered the granting of a

variance. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter 1, article 2-B.

[2005, c. 244, §2 (AMD) .]

5. Variance recorded. If the board grants a variance under this section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be recorded in the local registry of deeds within 90 days of the date of the final written approval of the variance or the variance is void. The variance is not valid until recorded as provided in this subsection. For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.

[1989, c. 642, (AMD) .]

SECTION HISTORY
1989, c. 104, §§A45,C10 (NEW). 1989, c. 642, (AMD). 1991, c. 47, §§1,2 (AMD). 1991, c. 659, §§1-3 (AMD). 1993, c. 627, §1 (AMD). 1995, c. 212, §1 (AMD). 1997, c. 148, §§1,2 (AMD). 2005, c. 244, §2 (AMD). 2009, c. 342, §1 (AMD). 2011, c. 655, Pt. JJ, §§24, 25 (AMD). 2011, c. 655, Pt. JJ, §41 (AFF). 2013, c. 186, §1 (AMD). 2015, c. 152, §1 (AMD).

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Biddeford

Section 16 Cluster developments.

[Ord. No. 2000.70, 8-1-2000]

A. Purpose.

1.

(a) The purpose of these provisions is to allow for new concepts of residential, commercial and industrial development where variations of design and dimensional requirements may be allowed, provided that the new net density shall be no greater than that normally permitted in the zoning district in which the development is proposed;

(b) These provisions may be used when considering affordable housing projects; and shall be used when parcels of land sustain significant wildlife habitats or other significant natural features that would be destroyed if ordinary development approaches were used.

(c) Clustered development shall be encouraged as a means of preserving open space and land of value due to the natural resources found on it, limiting the costs and impacts of development, lowering maintenance costs, and reducing impervious surfaces.

2. Notwithstanding other provisions of this and other ordinances relating to dimensional requirements, the Planning Board, in reviewing and approving proposed developments located in the City, may modify said provisions related to dimensional requirements to permit innovative approaches to site design in order to achieve the stated purpose of this section, and in accordance with the following standards.

3. The use of this section shall not be construed as granting variances to relieve hardship because of the nature of the land or other conditions or situations.

B. Application procedure.

1. The Planning Board may allow subdivided development on reduced lot sizes with reduced frontage and setback requirements in return for open space where the Board determines that the cluster approach will prevent the loss of natural features without increasing the net density of the development.

2. The developer shall submit a written application to the Board for a cluster development which shall include all plans and materials required for a conventional subdivision under Chapter 66 of the Revised Code of the City of Biddeford.

3. Two sketch plans shall be submitted: one layout as a standard subdivision meeting the standards of the particular zone; the second as a cluster development indicating open space and significant natural features. Each lot in the standard subdivision shall meet the minimum lot size and lot width requirements. The number of lots in the cluster development shall in no case exceed the number of lots in the standard subdivision.

4. If the cluster option is elected for use by the applicant, the applicant shall provide a written justification or statement. The written statement shall describe the natural features which will be preserved or enhanced by the cluster approach. Natural features include, but are not limited to moderate-to-high value wildlife and waterfowl habitats, moderate-to-high yield aquifers, important natural or historic sites, and soils that are identified as being of statewide significance, prime agricultural, or unique. The statement shall also compare the impacts upon the City from each plan. Examples of impacts are municipal cost for roads, school busing, solid waste removal, utility efficiencies, recreational opportunities, protection of floodwater storage areas, and environmental impacts on sensitive lands.

C. Requirements for cluster developments.

1.

a. Cluster developments shall be a minimum of five acres in area.

b. The Planning Board shall determine whether to allow the subdivision to be developed in accordance with the cluster standards of this section based upon findings that:

(1) The site contains natural features of the type described in Subsection B4 above which are worthy of preservation; and

(2) The site includes critical natural resources identified in the City of Biddeford 1999 Comprehensive Plan; and

(3) Those natural features could not adequately be preserved in a standard subdivision layout; and

(4) A clustered development will permit more efficient creation and utilization of infrastructure and provision of municipal and quasimunicipal services than would a standard subdivision layout; and

(5) The clustered development achieves maximum preservation of agricultural and forested land, in particular those soils identified by the soils conservation service as being of statewide significance, as prime agricultural soils, and as unique soils. These soils are identified on a map prepared by the Southern Maine Regional Planning Commission based on Soil Conservation Service data and available in the City Planner's office; and

(6) The open space that is preserved as described herein shall be considered for agriculture and natural resource-based uses where appropriate.

2. Each building shall be an element of an overall plan for site development. The site plan shall illustrate the placement of buildings, open space, paths, roads, service areas, and parking areas, and in so doing shall take into consideration all requirements of this section and of other relevant sections of this ordinance.

3. The maximum net density allowable in cluster developments shall be calculated on the basis of the net density calculations standards found in Article VI of this ordinance. In order to determine the maximum number of units permitted on a tract of land, the total net acreage shall be divided by the minimum lot size required in the district.

4. A copy of that portion of the York County Soil Survey covering the proposed development shall be submitted.

a. In addition, the Board shall require a high intensity soils survey or a report by a registered soil scientist or a registered professional engineer experienced in geotechnics, indicating the suitability of soil conditions for those uses.

b. If the proposed development is in an area featuring soils identified by the natural resources conservation service as being of statewide significance, as prime agricultural soils, and as unique soils, the Planning Board shall require a high-intensity soils survey or a report by a registered soil scientist or a registered professional engineer experienced in geotechnics, indicating the suitability of soil conditions for those uses.

5. Minimum lot area.

a. No lot serviced by a subsurface septic disposal system shall be smaller in area than 20,000 square feet.

b. If a cluster development will be serviced by public sewer, no lot shall be smaller in area than 75% of the minimum lot size requirements established in Article V of this ordinance, except in the Rural Farm Zone where no lot shall be smaller than 20,000 square feet.

c. If a cluster development will be serviced by public water, no lot shall be smaller in area than 75% of the minimum lot size requirements established in Article V of this ordinance, except in the Rural Farm Zone where no lot shall be smaller than 20,000 square feet.

d. If a cluster development will be serviced by both public sewer service and public water, no lot shall be smaller in area than 75% of the minimum lot size requirements established in Article V of this ordinance, except in the Rural Farm Zone where no lot shall be smaller than 20,000 square feet.

6. The total area of open space within the development shall equal or exceed the sum of the areas by which any building lots are reduced below the minimum lot area normally required in the district.

7. The Planning Board shall consider the purpose of said open space, and shall require the developer to provide access or to restrict access based on the stated purpose of the open space land.

8. Distance between buildings shall not be less than 30 feet.

9. No individual lots shall have frontage on an existing road at the time of development. There shall be a setback of 40 feet from the main public access road and 25 feet from interior roads that are constructed as part of the clustered development.

10. In no case shall shore frontage and setback be reduced below the minimum shore frontage normally required in the district.

11. Where a clustered development abuts a body of water, a usable portion of the shoreline frontage shall be a part of the open space. Said shoreline frontage shall be no less than 100 feet. Deeded access to said frontage shall be conveyed to each lot owner in the clustered development.

12. When individual wells are to be utilized, a drilled well, with casing, shall be provided on each lot by the developer/builder. The applicant shall demonstrate the availability of water adequate for domestic purposes as well as for fire safety. The Planning Board may require the construction of storage ponds and dry hydrants.

13. Utilities shall be installed underground wherever possible. Transformer boxes, pumping stations, and meters shall be located so as not to be unsightly or hazardous to the public.

D. Siting and buffering standards.

1. Buildings shall be oriented with respect to scenic vistas, natural landscape features, topography, south-facing slopes (where possible) and natural drainage areas, in accordance with an overall plan for site development and landscaping. A site inspection shall be conducted by the Planning Board prior to approval. Once approved, the plan shall not be altered without prior approval of the Planning Board.

2. Residential buildings shall be designed and laid out to protect bedroom windows from light invasions by vehicle headlights or glare from existing outdoor lighting or illuminated signs where allowed, insofar as practicable.

3. Where parking spaces or storage areas are located in areas abutting existing residential properties, a permanent wood or masonry screen at least four feet high shall be erected along the property line in addition to the green perimeter strip described below.

4. Other than in the resource protection district, a green perimeter strip not less than 20 feet wide shall be maintained with grass, bushes, flowers, or trees all alongside lot or rear lot lines of the property as a whole, and (except for entrance and exit driveways) along the entire front of such lot. Such green strip shall not be built on or paved or used for parking or storage. There shall be no removal of trees over four inches in diameter within this buffer. The Planning Board may require a green strip of up to 50 feet in width if, in the judgment of the Board, the preservation of natural features or of the character of the area in which the clustered development is proposed would be enhanced by a green strip greater than 20 feet in width. In the resource protection district, vegetation shall be retained in its natural state.

5. Except for removal of dying or diseased trees, existing vegetation shall be left intact to prevent soil erosion.

E. Dedication and maintenance of open space and facilities.

1. In Planning Board review and approval of a clustered development, the following requirements shall apply and shall supersede any inconsistent or more restrictive provisions of this Zoning Ordinance or Chapter 66 of the Revised Code of the City of Biddeford.

   Open space set aside in a cluster development shall be permanently preserved as required by this performance standard. Land set aside as permanent open space may, but need not be, a separate tax parcel. Such land may be included as a portion of one or more large parcels on which dwellings are permitted, provided that a conservation easement or a declaration of covenants and restrictions is placed on such land pursuant to this section, and provided that the Planning Board approves such configuration of the open space.

2. Open space uses. On all parcels, open space uses shall be appropriate to the site. Open space shall include natural features located on the parcel(s) such as, but not limited to, stream beds, significant stands of trees, individual trees of significant size, agricultural land, soils as identified in Subsection C1b(5) above, forested acreage, wildlife habitat, rock outcroppings and historic features and sites. Open space shall be preserved and maintained subject to the following, as applicable:

   a. On parcels that contain significant portions of land suited to agricultural production, open space shall be conserved for agriculture or other consistent open space uses such as forestry, recreation (active or passive), and resource conservation.

   b. When the principal purposes of conserving portions of the open space is the protection of natural resources such as wetlands, aquifers, steep slopes, wildlife and plant habitats, and stream corridors, open space uses in those portions may be limited to those which are no more intensive than passive recreation.

   c. Open space areas shall be contiguous, where possible, to allow linking of open space areas throughout the town.

   d. If the open space is to be devoted at least in part to a productive land use such as agriculture or forestry, the developer shall submit to the Planning Board a plan of how such use is to be fostered in the future. Such plan may include, for example, a long term timber management plan.

   e. The use of any open space may be limited by the Planning Board at the time of final plan approval where the board deems it necessary to protect adjacent properties or uses, or to protect sensitive natural features or resources. A proposed change in use of open space land, other than that specified at the time of plan approval, shall be reviewed by the Planning Board as an amendment to the approved plan.

   f. Further subdivision of open space or its use for other than agriculture, forestry, recreation or conservation, except for easements for underground utilities, shall be prohibited and shall be so stated by deed restrictions. Structures and buildings accessory to agriculture, recreation or conservation uses may be erected on open space, subject to Planning Board approval under the site plan review provisions of this Zoning Ordinance and this performance standard.

3. Notations on plan. Open space must be clearly labeled on the final plan as to its use or uses with respect to the portions of the open space to which such use or uses apply, ownership, management, method of preservation, and the rights, if any, of the owners in the subdivision to such land or portions thereof. The plan shall clearly show that the open space land is permanently reserved for open space purposes, and shall contain a notation indicating the book and page of any conservation easements or deed restrictions required to be recorded to implement such reservations or restrictions.

4. Preservation in perpetuity. The owner of a parcel of land proposed for cluster development shall designate all or a portion of the parcel for open space use in perpetuity. All requirements of this performance standard are subject to the following conditions:

a. A perpetual conservation easement, or declaration of covenants and restrictions, restricting development of the open space land shall be incorporated in the open space plan.

b. The conservation easement may be granted to or the declarations may be for the benefit of a private party, third party or other entity; the City, with the approval of the City Council; or to a qualified not-for-profit conservation organization, such as a land trust, acceptable to the Planning Board.

c. Such conservation easement or declaration of covenants and restrictions shall be reviewed and approved by the Planning Board and be required as a condition of plan approval hereunder.

d. The Planning Board may require that such conservation easement, or declaration of covenants and restrictions, be enforceable by the City of Biddeford if the City is not the holder of the conservation easement or beneficiary of the declarations, or by a third party as specified and/or approved by the Board.

e. The conservation easement or declarations shall prohibit residential, industrial, or commercial use of such open space land (except in connection with agriculture, forestry, and recreation), and shall not be amendable to permit such use.

f. The conservation easement or declarations shall be recorded in the York County Registry of Deeds prior to or simultaneously with the filing of the final, approved plan in the York County Registry of Deeds. If the final plan is not required to be recorded, the conservation easement or declarations shall be recorded in the York County Registry of Deeds prior to development of the parcel approved for cluster development, and/or prior to issuance of a building permit for any portion of the cluster development. A copy of the conservation easement or declarations shall be submitted to the planning office with a copy of the receipt from the Registry of Deeds.

5. Ownership of open space land.

Open space land may be held in private ownership (which is to be preferred) including an appropriate third party not the applicant; or owned in common by a homeowner's association (HOA); dedicated to the town, county or state governments or agencies; transferred to a nonprofit organization such as a land trust acceptable to the Planning Board; or held in such other form of ownership as the Planning Board finds adequate to achieve the purposes set forth in this section and the requirements of this Zoning Ordinance.

The appropriate form of ownership shall be determined based upon the purpose of the open space. Unless so determined, or unless deeded to the City of Biddeford and accepted by the City Council, open space shall be owned in common by the owners of the lots or units in the development. Covenants for mandatory membership in the association setting forth the owners' rights and interest and privileges in the association and the common land, shall be approved by the Planning Board and included in the deed for each lot.

The developer or subdivider shall maintain control of and responsibility for such open space(s) and be responsible for its/their maintenance until development sufficient to support the association has taken place. Such determination shall be made by the Planning Board upon request of the neighborhood/tenants association or the developer.

Section 17 **Commercial gardening/commercial greenhouses.**

A. Commercial gardens and commercial greenhouses shall control the use of chemicals so that there is no ground or air pollution. This shall include the control of drainage runoff, dust and fumes, and the storage of bulk manure or other fertilizers or other chemicals required for normal operations.

B. Plans and other documents relating to the spreading, use and storage of chemicals shall be provided to the Planning Board for review.

C. Storage of operational supplies shall be under cover to minimize the potential of groundwater pollution.