



October 19, 2011

BOARD OF APPEALS

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CLERK

Dear Councilors,

On behalf of the Board of Zoning Appeals (the "Board"), I would like to bring to the Council's attention an issue which has caused some concern and controversy among the Board in recent years. The issue is the lack of a clear standard for interpretation of Section 8.3(e) of the Zoning and Site Plan Review Ordinance (the "Ordinance"), which requires that a conditional use "will not have a significant adverse impact on water views from adjacent and nearby properties and public right of ways" (emphasis added). The problem lies in determining what level of "significant adverse impact" is enough to preclude (or require modification of) a proposed conditional use.

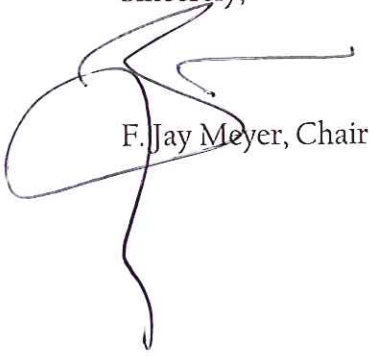
The Board voted at their September 27, 2011 meeting to request that the Council either clarify or consider the repeal of Section 8.3(e), which was originally enacted as one element of an Ordinance amendment adopted in July, 2006. The Board's reasoning is that Section 8.3(e)'s "significant adverse impact" standard is so ambiguous that it should either be amended to provide greater clarity, or repealed. At least one member of the Board also believes that Section 8.3(e) could work a regulatory taking, by essentially granting a view easement to upland owners without compensation.

Submitted herewith are three different proposals from Board members for possible resolutions of this problem through clarification of the "significant adverse impact" standard. Unfortunately it is not possible for the Board to provide the Council with a single recommendation because various members have divergent views on the issue. One member believes that a very specific and strict mathematical method should be used to determine whether an impact is or is not significantly adverse. It should be noted that this same member feels that he has been personally affected by the issue, and it was a focus of proceedings between him and the town. Another member has suggested a new definition for "Adverse Visual Impact" which could be added in Section 2 of the Ordinance. I have suggested an amendment of Section 8.3(e) which would identify specific factors which should be considered in assessing the significance of the potential adverse impact.

271 Falmouth Road • Falmouth, ME 04105
Telephone (207) 781-5253 • Fax (207) 781-3640
www.town.falmouth.me.us

I, or the entire Board, would be pleased to discuss this issue in greater detail with the Council or any of its committees or members. For example, I could frame the issue for the Council at a regularly scheduled Council meeting, or any of the Councilors would be welcome to attend a Board meeting and engage the Board in a discussion. Please let me know how you would prefer to proceed.

Sincerely,

A handwritten signature in black ink, appearing to read "F. Jay Meyer". The signature is stylized with a large, sweeping initial "F" and a long, thin tail that extends downwards and to the left.

F. Jay Meyer, Chair

Zoning ORDINANCE, Section 8.3(e) - Suggested Ways to Clarify Intent

Proposal from Board Chairman F. Jay Meyer (language in red would be added)

8.3 Conditional Uses

Conditional uses may be granted by the Board of Appeals after considering the characteristics and location of the proposed use and of other properties in the surrounding neighborhood, provided that the petitioner shall submit to the Board statements in writing, which may be accompanied by diagrams or photographs which shall become part of the record of such petitions, demonstrating that the proposed use:

- a. will meet the definition and specific requirements set forth in this Ordinance for such particular use;
- b. will be compatible with the general character of the neighborhood with regard to design, scale, and bulk of proposed structures;
- c. will not have a significant detrimental effect on the use and peaceful enjoyment of abutting property as a result of noise, vibrations, fumes, odor, dust, light or glare.
- d. will not have a significant adverse effect on adjacent or nearby property values;
- e. will not have a significant adverse impact on water views from adjacent and nearby properties and public right of ways, taking into due consideration the number, extent, scenic value and seasonality of the affected and remaining views and the availability of practicable alternatives; [Adopted 7/24/06]
- f. will not result in significant hazards to pedestrian or vehicular traffic or significant traffic congestion;
- g. will not result in significant fire danger;
- h. will not result in significant flood hazards or flood damage, drainage problems, ground or surface water contamination, or soil erosion;
- i. will be served adequately by, but will not overburden, existing public services and facilities, including fire protection services, sanitary sewers, roads, water and storm drainage systems.
- j. upon a showing that a proposed use is a conditional use in the district where it is to be located, a conditional use permit shall be granted unless the Board determines that the proposed use will not meet one of the standards set forth in paragraphs a. through i. of this subsection, or paragraphs a. through g. of subsection 8.7, due to unique or distinctive characteristics or effects associated with the proposed use or its location which differ substantially from the characteristics or effects which would normally occur from such a use in that district. [Adopted, 4/27/87.]

Proposal from Board Member Donald Russell

I hereby propose that the ZBA interpret 8.3(e.); “will not have a “SIGNIFICANT” adverse impact on water views from adjacent and nearby properties and public right of ways” , as follows:

1. The loss of 50% or more of the field of view AREA showing water from the BEST SINGLE, Winter, (no foliage), view from the complainants HOME.

- a. The area of this view , before and after the proposed construction, shall be calculated using a normal camera lens, (no magnification) and superimposed simulation of new construction to the same scale.

- b. Public Comment by Falmouth residents will be heard , but opposition to the proposed construction by relatives, friends and neighbors shall not be decisive in determining the outcome of the challenge.

2. The loss of 50% or more of the field of view AREA showing water from the BEST SINGLE, Winter, (no foliage), view from an adjacent PUBLIC RIGHT of WAY by a Falmouth resident complainant must meet the same tests as a. and b. above. Views from Driveways and Private Rights of Way are not subject to this criteria.

Proposal from Board Member Jonathan Berry

Adverse Visual Impact: An effect that unreasonably interferes with someone's visual enjoyment and appreciation of a scenic resource, or one that otherwise unreasonably impairs the character or quality of such a place. Appropriate criteria for consideration regarding the reasonableness of a proposed project's interference include the existence of practicable alternatives, availability and feasibility of alternatives, existing technology and logistics, the overall purpose of the project, the cumulative impact of the project, the expectations of the typical viewer and the significance of the scenic resource.