



*OLD VALUES - NEW HORIZONS*  
**COMMUNITY DEVELOPMENT**

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**Planning Board Minutes**

February 1, 2023

7:00 pm at Community Development Meeting Room  
3 North Lowell Road

**Attendance:**

- Chair Tom Earley, Present
- Vice Chair Jennean Mason, Present
- Derek Monson, Present
- Jacob Cross, Present
- Matt Rounds, Present
- Alan Carpenter, Excused
- Joe Bradley (alternate), Present, seated for Mr. Carpenter
- Dave Curto, (alternate), Excused
- Pam McCarthy (alternate), Excused
- Dan Spalinger (alternate), Excused
- Bruce Breton, Board of Selectmen ex Officio, Present
- Roger Hohenberger, Board of Selectmen ex Officio (alternate), Excused
- Alexander Mello- Planning Director, Community Development
- Chris Sullivan- Assistant Planning Director, Community Development
- Renee Mallett- Minute Taker

The meeting opened at 7:01pm with the pledge of allegiance and the introduction of members. Mr. Bradley was seated for Mr. Carpenter.

**Case 2022-37 –72 Range Road (Parcels 17-H-30); Major Final Site Plan, WWPD Special Permit, WPOD Site Plan / Subdivision Land Development Application, and Final Subdivision; Zone – Gateway Commercial District, WWPD, and WPOD**

Mr. Karl Dubay, representing the applicant for this proposed 8,364 sq. foot commercial building with associated site improvements. On January 18, 2023 the Planning Board voted to extend the deadline to consider this application complete and continued it to February 1, 2023, with the condition that abutters be re-notified of the hearing.

Mr. Rounds made a motion to separate the subdivision and site plan portions of this plan and to hear the subdivision part first. Mr. Rounds withdrew the motion when Vice Chair Mason said she'd like to hear from staff regarding the completeness and appropriateness of the application.

Mr. Mello reviewed the staff report for the application, showing that the application was complete and that all required documents had been received by the deadline.

43 Mr. Rounds made a motion to separate the subdivision from the site plan and to open Case 2022-  
44 37 as a subdivision. Mr. Mello said the case was posted as one case and that the staff report listed the  
45 considerations for each part of the application separately. He said the subdivision would have to be settled  
46 first, regardless. Mr. Rounds retracted his motion.

47  
48 **Mr. Monson made a motion to open Case 2022-37. Vice Chair Mason seconded the motion. The**  
49 **motion passed with the following roll call vote:**

50 **Chair Earley, aye**  
51 **Vice Chair Mason, aye**  
52 **Mr. Monson, aye**  
53 **Mr. Cross, aye**  
54 **Mr. Rounds, aye**  
55 **Mr. Bradley, aye**  
56 **Mr. Breton, aye**  
57

58 Mr. Dubay reviewed the history of the application and parcel. He explained the DES septic lot  
59 loading that was shown on the plan, which shows that both proposed lots meet all guidelines. The new lot  
60 this application would create is just over an acre in size. A state subdivision permit has been issued, based  
61 on a previous Planning Board approval that was allowed to lapse. Excess right of way owned by the state  
62 will be annexed to the applicant. Mr. Rounds asked if a conveyance letter had been received from the state.  
63 Mr. Dubay said the town and state agencies had already passed on the land and that the applicant has the  
64 right to purchase it.

65 Mr. Monson noted a variance had been granted for the parking. Mr. Dubay said the variance had  
66 no impact on the subdivision. Mr. Monson said he had concerns that the subdivision created a hardship  
67 that did not otherwise exist. Mr. Dubay said in the Gateway District subdivision lines could go through  
68 parking lots or structures, so long as appropriate easements existed between all involved parcels.

69 The board asked staff for procedural guidance. Mr. Rounds questioned if the site plan could be  
70 approved without the subdivision being approved. Mr. Mello said calculations would be reviewed but that  
71 should be the case. M. Dubay said he would testify at this moment that the building would meet all  
72 regulations regardless of the annexation.

73 Mr. Cross asked about Item 4 from the most recent Keach-Nordstrom memo on the application.  
74 Mr. Dubay said he was asking for a waiver of the 90 degree standard for lot lines. Mr. Cross said this lot line  
75 was the consequence of the decision of the developer to build the existing and proposed lots in such a way  
76 as to get two lots out of a parcel that should just be one. Mr. Dubay said straightening the lot line did not  
77 impact the development beyond having to create an easement. He said the line was off angle just to make  
78 things simpler from an administrative standpoint. Mr. Dubay offered to withdraw the waiver and to return  
79 to the board showing an updated plan that would not require the waiver. Vice Chair Mason said the  
80 subdivision had been previously approved and was still under approval from the state and she did not see  
81 how that lot line was an issue now. Mr. Rounds was also nonplussed by the proposed lot line but had  
82 questions about how the previously issued parking variance is impacted by the potential division.

83 Mr. Cross raised questions on the history of zoning. Mr. Dubay reviewed the zone lines and how the  
84 changes to Range Road occurred on this parcel. Mr. Cross asked Mr. Mello for confirmation of Mr. Dubay's  
85 conclusions. Mr. Cross said the board was not prepared to address the lot lines until review of the zoning  
86 had been confirmed. Mr. Mello said in this instance it was a moot point but said staff was prepared to show  
87 the board confirmation if needed.

88  
89 **Chair Earley opened the session to public comment about the subdivision.**  
90

91 Jacques Lopez said he had formerly submitted an application to purchase the state-owned land. He  
92 said he was told he was not an abutter and that the land had been in discussion with Mr. Dubay's office for  
93 the past year. Mr. Lopez said he asked the state for more information on why he was not considered an  
94 abutter or in consideration to buy the land. He has not heard back from them since his proposal to buy the  
95 land was denied.

96  
97 Patrick Nysten asked if all votes could be deferred until the end of all discussion as he felt  
98 subdivision and site plan overlapped in some instances. Mr. Nysten asked if the town had granted  
99 concurrence, calling them a co-applicant in this plan. When asked to explain this comment, Mr. Nysten said  
100 town land was involved and he thought the Selectmen should grant concurrence before the application was  
101 heard. Mr. Breton asked where the land was. Mr. Nysten said he didn't know where it was on the plan but  
102 thought he remembered seeing a note on the plan that town owned land was involved. Mr. Mello said no  
103 town land was involved.

104  
105 Vanessa Nysten said the Existing Conditions plan which is sheet 3 of the plan set was not stamped  
106 by a certified wetlands scientist. She said the existing conditions plan did not show all of the wetlands until  
107 just recently. She said the plan should not have been accepted or continued as it was unstamped. Ms.  
108 Nysten has hired her own wetlands scientist and she says he is prepared to show that potentially more  
109 wetlands exist than has been reflected in the plan set.

110 Chair Earley said there is a stamp from Luke Hurley, who is a certified wetlands scientist. Ms.  
111 Nysten maintained that the Existing Conditions Plan was not stamped and that the plan should not be  
112 discussed while the wetlands are still in question. Ms. Nysten said the application did not conform with the  
113 Windham Master Plan and that the proposed development would overburden the land. Ms. Nysten said  
114 that what she called "the parent lot," as far as she can tell is not in compliance and that no further  
115 development should occur on the parcel because of this.

116 Ms. Nysten said she had called the state regarding the alteration of terrain permitting. She provided  
117 the Board with an email from the Alteration of Terrain Bureau. She said it appears that the existing animal  
118 hospital should have filed for an Alteration of Terrain permit during its' development and no record could  
119 be found of one being issued. Ms. Nysten said a PE at the state level told her that this parcel was in a place  
120 of five environmentally sensitive overlay districts and that if the AoT permit had been pursued as it sounds  
121 like it should have been it appears the parent parcel would have been held to a higher standard and it  
122 appears that the proposed development would also need an AoT permit.

123  
124 Steve Andrews said the subdivision created a new parcel but that the site plan was predicated in  
125 vesting rights from the former parcel. He didn't think the applicant could claim both these things at the  
126 same time.

127  
128 Robert Comtois shared his concerns about the environmental impact of the parking lot and  
129 proposed building. He is asking for a peer review of the site and the area within 200 feet of the proposed  
130 development. He would also like the applicant to be required to submit a wildlife study.

131  
132 **Chair Earley closed the session to public comment on the subdivision.**

133  
134 Mr. Dubay said the applicant was happy to have the town coordinate an independent wetlands  
135 scientist to review the parcel. Mr. Dubay said stamped copies of the plan have been submitted to the state  
136 and the town for many years. Mr. Hurley's stamp is visible on several pages of the plan set in front of the  
137 board tonight. Mr. Dubay said even if the land indicated by the abutters was delineated as a wetland the  
138 one hundred foot buffer would extend only onto a small strip in the front of the parcel where there is not

139 planned development outside of landscaping. He explained the title issues surrounding Class Six roads and  
140 excess right of way, regarding the abutter comments that town land was involved in the application. Mr.  
141 Mello was asked his opinion on the matter. Mr. Mello said he was not aware of any town owned land in this  
142 part of town. Mr. Dubay said the email to Ms. Nysten regarding the AoT was dated several weeks prior but  
143 that this was the first he was seeing it. Mr. Dubay reviewed the criteria that would trigger the need for an  
144 AoT permit, he said attorneys could review the matter but that if the email had been received prior to this  
145 meeting he would have addressed it with the state in advance. Mr. Dubay said the plan met all of the  
146 increased guidelines that would be needed even if the AoT permit was found to be necessary. Mr. Dubay  
147 reviewed the variances that allowed for the septic and other systems that abutters had called out for being  
148 located within the WWPDP.

149 Mr. Dubay reiterated his interest in having a review by an independent wetlands scientist, but felt  
150 the abutter requests for further drainage and hydrological studies was not across the board as those items  
151 had already been reviewed by the town's own engineer.

152 Board consensus was in favor of the waiving of lot line angle, with the exception of Mr. Cross who  
153 felt it should be held to the 90 degree standard. The Board expected that the plan set stamps would be  
154 updated for the next hearing. Mr. Cross said he would like staff to look into the purchase of the excess right  
155 of way. Mr. Mello said it was not at all under the purview of the town or the community development  
156 department. Mr. Cross thought staff should review the vesting of the zoning and variances. Staff was  
157 directed to get feedback from Attorney Campbell. Mr. Mello said the vesting occurred when the  
158 preliminary discussion was held, plus twelve months. Mr. Mello said the final plan was submitted in time.  
159 Mr. Cross said the plan had changed. Mr. Mello said the submitted plan was not significantly different and  
160 that the impact was lessened not increased.

161  
162 Mr. Cross made a motion to direct staff to submit an RFP for a wildlife study. The motion did not  
163 receive a second and failed.

164  
165 **Mr. Cross made a motion to direct staff to hire an independent wetlands consultant to review the**  
166 **site in person, to explore possible un-delineated wetlands, and to review the impact to tributaries and**  
167 **the lakes. Mr. Monson seconded the motion. Mr. Mello said the town engineer has a wetlands scientist**  
168 **on staff and said he would ask that expert to do the review but cautioned that in these instances the**  
169 **scientist did not usually do a wetlands study from square one but rather that they reviewed the**  
170 **information already submitted. Mr. Mello did not know that the town had the authority to complete a**  
171 **wetland's study independently from scratch in the way being requested by Mr. Cross's motion. Mr. Cross**  
172 **said a review of submitted information was not his motion. Mr. Rounds concurred, adding that in the**  
173 **past the board had third party flagging of wetlands, so he did think it was the purview of the board. Mr.**  
174 **Cross said he wanted the full study from scratch and that he also wanted this person to evaluate the**  
175 **application in context of the town's wetland's ordinances. Mr. Dubay said the timing of the motion was**  
176 **not conducive to what the board was asking for and said the motion was also otherwise illegal. Mr.**  
177 **Monson said his second stood as amended with the condition that Attorney Campbell said it as a legal**  
178 **motion and that the review was completed to the full extent allowed under the RSA. The motion passed**  
179 **with the following roll-call vote:**

180 **Chair Earley, aye**  
181 **Vice Chair Mason, aye**  
182 **Mr. Monson, aye**  
183 **Mr. Cross, aye**  
184 **Mr. Rounds, aye**  
185 **Mr. Bradley, aye**  
186 **Mr. Breton, aye**

187  
188 Mr. Cross made a motion to direct staff to review the email from the state regarding the AoT  
189 permitting and see how it applied to this application. Mr. Mello said the email referenced state regulations  
190 and that the community development department was not in the position to adjudicate state regulations in  
191 that way. Chair Earley said Mr. Dubay had already indicated that he was going to address the matter with  
192 expediency. Mr. Dubay said he would CC staff in all correspondence to this effect. Mr. Cross withdrew the  
193 motion.

194  
195 Mr. Rounds said it was important to settle the issue of the land purchase. Mr. Monson said any  
196 approvals could be made conditional on the land purchase.

197 Mr. Dubay reviewed the site plan. In response to the concerns about the parking spaces and  
198 variances Mr. Dubay said it was needed only for those spaces in the WWPD. Reviewing the changes since  
199 the plan was seen previously Mr. Dubay showed where pavement had been reduced and the footprint of  
200 the building made smaller. The plan utilizes porous pavement, night sky friendly LED lighting, and other  
201 features. Green Snowpro will be used for weather maintenance.

202 Mr. Cross asked about the possibility of flipping the plan and moving the building away from the  
203 road. He as told that would move the building into the WWPD.

204  
205 **Chair Earley opened the session to public comment.**

206  
207 Robert Comtois wanted to be sure that any vernal ponds were marked by the independent  
208 wetlands scientist put in place by the board.

209  
210 Jacques Lopez said the wetlands scientist already hired by the abutters was present if the board  
211 would like to address any questions or ask for clarification from him.

212  
213 Patrick Seekamp, a certified wetlands scientist, said he was hired to address the possibility of a  
214 tributary stream on the property owned by Jacques Lopez. He said in his review of the plan there were a  
215 few items he wanted to address. Mr. Seekamp said he was familiar with Gove Environmental and Luke  
216 Hurley and that they did excellent work, but that professionals did not always agree. Mr. Seekamp said he  
217 was duty bound to identify vernal pools and intermittent, perennial streams. Referencing the stamped plan  
218 he said it was unclear what might exist on abutting parcels. Mr. Seekamp agreed with Mr. Dubay's  
219 assessment of the parcel to the north as a wooded swamp. He indicated on the plan where some red  
220 maples could be seen near the front corner of the lot, indicating where surface water could possibly be. Mr.  
221 Seekamp said he was not able to discuss that pocket of trees with Mr. Hurley to see if it had been explored  
222 as a wetland. Mr. Seekamp said he did not see any vernal pools in his review of the area. Mr. Monson said  
223 he thought vernal pools could only be decided at certain times of year. Mr. Seekamp said you could see  
224 possible vernal pools but it could not be confirmed until the spring.

225 Mr. Seekamp noted a deficiency in the Windham ordinances, as they noted streams as a feature  
226 but did not give any guidelines as to what the town considered a stream, such as depth of channel or height  
227 of bank. Chair Earley asked Mr. Seekamp about the impact to the lake if this development moved forward.  
228 Mr. Seekamp said he was hired by the abutters to address the question of the wetlands and streams on Mr.  
229 Lopez's parcel and not to analyze the potential impact to the surrounding area. Mr. Cross said Item 3 of the  
230 Keach-Nordstrom memo said an onsite assessment should be completed by an independent wetlands  
231 scientist.

232  
233 **Mr. Cross made am motion to do business after 10pm. Mr. Rounds seconded the motion The**  
234 **motion passed with the following roll-call vote:**

235 **Chair Earley, aye**  
236 **Vice Chair Mason, aye**  
237 **Mr. Monson, aye**  
238 **Mr. Cross, aye**  
239 **Mr. Rounds, aye**  
240 **Mr. Bradley, aye**  
241 **Mr. Breton, aye**  
242  
243

244 Patrick Nysten reiterated his previously stated opinion that the vesting of this application ended on  
245 12/1/22 and it was his contention that the plan was incomplete. Mr. Nysten said the existence of any town  
246 owned land meant this plan should not be heard or considered until the land was divested. He shared a  
247 map of the parcel which he had marked with what he believed the appropriate set-backs should be, taking  
248 into account everything he thought were possible wetlands. Mr. Nysten said the land would be severely  
249 overburdened by this development. Mr. Nysten said while development could happen in the WWPDP he said  
250 the regulations were very clear that all activity and development had to happen outside of the 100 foot  
251 buffer zone. Mr. Nysten said while a variance was granted for the parking spaces to be in the WWPDP they  
252 did not receive a variance to put those spaces in the WPOD, which was a separate ordinance.

253 Mr. Nysten felt that this development would harm resident health and the quality of the local  
254 aquifer. He said the plan did not meet any of the regulations and that they could not meet any of the  
255 criteria needed for a waiver. Mr. Nysten's opinion was that the variance would not have been granted if the  
256 wetlands across the street had been delineated sooner in the process.

257 Mr. Nysten said potential tenants would not meet the allowed uses for the zoning and that this  
258 would lead to other developments in town to adding storage units and other unallowed uses. Mr. Nysten  
259 had done his own parking calculations and felt that the plan was deficient by one parking space. On top of  
260 these issues a propane tank slated for the front of the building would not be conducive to an attractive  
261 streetscape. Mr. Dubay pointed out that the plan specified it would be an underground tank.

262 Mr. Nysten felt the building was fine aesthetically but that it did not meet design review  
263 regulations, particularly in terms of scope and scale. Mr. Nysten circled back to the matter of vesting. He  
264 said again it was a non-compliant plan so he did not believe it should be considered. Mr. Nysten said the  
265 changes made after abutter feedback was received should have negated any vesting that the plan could  
266 have had. Mr. Nysten said this process had been very taxing on the residents and he thought with so many  
267 non-compliance issues the board should vote to deny the plan outright this same evening.

268  
269 Ms. Vanessa Nysten said she had pulled plans from years previous where she thought it was  
270 possible a stream was located in the area to the north of the parcel that was now being called a swamp. Mr.  
271 Seekamp corrected the characterization saying a swamp could also have a stream. Chair Earley told the  
272 abutters that would be addressed during the independent review.

273  
274 Mr. Lopez said he was incredibly frustrated by the process. He said his home was in a direct line of  
275 sight to the vet offices and the proposed future building. Mr. Lopez thought this development was  
276 detrimental to the neighborhood and the environment. Mr. Lopez said a petition against the project had  
277 been signed by many residents in his neighborhood. He thought this was not the right place for a  
278 development.

279  
280 Chair Earley thanked the residents for their input and assured them that they would be able to  
281 continue sharing their feedback at future meetings and that no decisions would be made this evening.  
282

283 **Chair Earley closed the session to public comment.**

284  
285 Mr. Rounds assured residents that his vote was not pre-determined and told everyone assembled  
286 that his duty was to vote based on zoning. He said the land purchase would be a major factor in his vote  
287 and he wanted further direction from town council on the matter of the variance. Mr. Breton asked to see  
288 the plan that was signed by the ZBA. Mr. Sullivan showed where Mr. Keach had confirmed there were no  
289 issues with the snow storage. Mr. Dubay said the snow storage that was shown was required and was not  
290 bulk snow storage.

291  
292 **Mr. Cross made a motion to continue Case 2022-37 to 7:00pm on March 15, 2023. Mr. Breton**  
293 **seconded the motion. The motion passed with the following roll-call vote:**

294 **Chair Earley, aye**  
295 **Vice Chair Mason, aye**  
296 **Mr. Monson, aye**  
297 **Mr. Cross, aye**  
298 **Mr. Rounds, aye**  
299 **Mr. Bradley, aye**  
300 **Mr. Breton, aye**

301  
302  
303 Police and fire have confirmed they have no concerns regarding the requested bond release for  
304 Ashton Park. A \$10k maintenance guarantee will be held back, with the CDD staff suggesting an additional  
305 \$1k be reserved for any legal counsel bills.

306  
307 **Mr. Monson made a motion to recommend to the Board of Selectmen to release the bond for**  
308 **Ashton Park, as outlined by CDD staff, and accepting the road. Mr. Rounds seconded the motion. The**  
309 **motion passed with the following roll-call vote, and Mr. Breton abstaining as he would need to review**  
310 **the matter when it came before the BOS:**

311 **Chair Earley, aye**  
312 **Vice Chair Mason, aye**  
313 **Mr. Monson, aye**  
314 **Mr. Cross, aye**  
315 **Mr. Rounds, aye**  
316 **Mr. Bradley, aye**  
317 **Mr. Breton, abstain**

318  
319  
320 Mr. Rounds confirmed that the board could allow development within the WPOD. Mr. Mello  
321 confirmed there was not a formal variance or waiver.

322  
323 **Mr. Breton made a motion to adjourn the meeting. Vice Chair Mason seconded the motion. The**  
324 **motion passed with the following roll-call vote:**

325 **Chair Earley, aye**  
326 **Vice Chair Mason, aye**  
327 **Mr. Monson, aye**  
328 **Mr. Cross, aye**  
329 **Mr. Rounds, aye**  
330 **Mr. Bradley, aye**

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332  
333  
334

**Mr. Breton, aye**

APPROVED