**1. Call to Order:** 6:38 PM
Andrew called to order.

**2. Attendance**

- PB Members present: Andrew Brosnan (Andrew), Diane Caracciolo (Diane), Rose Micklon (Rose), Heinrich Wurm (Heinrich), Dave Durrenberger (Dave)
- CEO Present: Alan Broyer (Alan)
- Also present: Chris Brink (Chris), Paul Dennis (Paul), Jill Rundle (Jill) and other members of public

**3. Review, Accept / Correct Minutes**
Andrew minutes from 4/5/23 vote to approve: 5 Yes.

**4. LD 2003**
Heinrich stated minimal impact. Andrew suggests looking at Paul's suggested Amendments and deciding if that is what we want (see Exhibit A). Andrew said that we need to get something in place by July 1. Paul Dennis mentioned we need to correct back to our 2-acre minimum, after 2008 mistake, or LD2003 would be more severe. Put back using Lot Area per Dwelling Unit instead of Dwelling Unit per Acre. Jill Rundle suggested a moratorium. Paul suggests we should pass the Amendment. Chris advised 1500 sq ft minimum is 700 sq ft bigger than what other towns allow, and they are putting in things like "similar architecture."
Andrew motioned to send what Paul wrote to the Select Board, subject to any final changes, and move forward and schedule the public hearing: 5 Yes.

**5. Dock Ordinance**
Andrew suggests giving the discussion about required depths on different water bodies to the Ordinance Committee.

**6. Information Amendment**
Andrew mentioned removing the information at the time of application. Many thought it makes sense specifying it must be PDF documents, the portable document standard now and for the foreseeable future. Jack Jones mentioned discussing Informational Requirements with Selectmen, and a system to accommodate was $10,000. The 2-day requirement is too tight. Others felt it is easy enough to change the number of days to what isn't too tight.

**7. Mineral Exploration and Mining**
Chris advised it is being tested in Maine right now based on definitions, suggests a lawyer check it to see what may be at risk for Lovell.

**8. Section 9.9.I and Planning Board inability to utilize its powers under Section 9.9.I**
Paul's suggested language (see Exhibit B below) was regarded as a good stop gap, so conditional applications must be expressly listed and have performance standards. All were favorable given the Planning Board's past inability to make use of Section 9.9 to affect application outcomes, to the benefit of the people of Lovell.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*

9. **Old Business Conditional Use Application –** None

**10. CEO Report** – No report presented.

11. **Public Hearing** – None

**12. Meeting Adjourned:** 8:08 PM
- **Date and Time of Next Meeting –** June 7, 6:30 PM

**Additional Exhibits**

**Exhibit A**
April 25, 2023

TO: Planning Board

CC: Ordinance Review Committee

Alan Broyer

FROM: Paul Denis

RE: LD 2003 Compliance and Revisions to Section 6.3 of the Lovell Zoning Ordinance

Attached are drafts of three proposed amendments which address a maddeningly interconnected set of issues raised by LD 2003, by regulations issued only last week by DECD purporting to clarify application of LD 2003, and by ambiguities in the current Lovell Zoning Ordinances. This memorandum summarizes the issues and the amendments, noting policy issues that need to be considered by the Planning Board in recommending the amendments to the voters.

Issues

LD 2003 amended the Maine statute regarding land use regulation to impose three obligations on municipalities:

(a) Dwelling Unit Allowance (now codified at 30-A MRSA § 4364-A) – Municipalities must allow multiple dwelling units per lot in areas in which housing is allowed. The precise number of dwelling units that must be allowed is a function of the number of dwelling units on the lot as of July 1, 2023, whether the lot is within a designated growth area or is served by certain specified water or sewer systems, and whether an ADU has been added pursuant to 30-A MRSA § 4364-B. *See* 30-A MRSA §§ 4364-A.1 and 4364-A.2.

(b) Accessory Dwelling Unit (ADU) (now codified at 30-A MRSA § 4364-B) – Municipalities must allow one accessory dwelling unit to be added to any lot with a single-family dwelling unit in an area where housing is allowed. There is an exception, however, where more than one

dwelling unit or ADU has been added as a result of the allowances in Section 4364-A and 4364-B. *See* 30-A MRSA §§ 4364-A.2.A.and 4364-B.3.B.

(c) Fair Housing – Municipalities must ensure that ordinances are designed to affirmatively further the purposes of the federal Fair Housing Act. *See* 30-A MRSA §§ 4364-C.1.

Compliance with the Dwelling Unit Allowance and ADU Provisions will require Lovell to amend Sections 6.3 and 6.2 of the Zoning Ordinance. Compliance with the Fair Housing Provision can be achieved with minor amendment to Section 10.17 of the Subdivision Regulations.

Alan Broyer noted that the 2008 revision to Section 6.3 inadvertently may have created a question regarding whether density requirements apply to lots located outside of subdivisions. While there is an argument that a density requirement is implied by the minimum lot size requirement, the matter is not free from doubt. As discussed below, amending Section 6.3 to eliminate any possible question on this point is particularly important given the role density requirements play in the application of the Dwelling Unit Allowance.

The 2008 revisions also may have created ambiguity as to the applicability of other dimensional requirements to lots in subdivisions and as to the calculation of net residential density within subdivisions. In addition, in several other respects, Section 6.3 is not well drafted and could be made simpler and clearer.

Amendments Regarding Dimensional and Setback Requirements:
<u>Changes Necessitated by the Dwelling Unit Allowance & Ambiguities in Section 6.3</u>

The effect of the Dwelling Unit Allowance is to override one form of density requirement, specifically local law that limits the **number of dwelling units per lot**. Additional dwelling units authorized by the Dwelling Unit Allowance may, however, be subject to dimensional and setback requirements provided that those requirements are not greater than the requirements applied to single-family housing units. *See* 30 MRSA 4364-A.3. The Dwelling Unit Allowance also expressly provides that another form of density requirement is allowed and not overridden. Additional dwelling units may be subject to that same (but not greater) "**lot area per dwelling unit"** requirements as are applied to existing dwelling units. *Id.* This is a significant limitation on the application/effect of the Dwelling Unit Allowance.

The Lovell Zoning Ordinance has no limitation on the number of dwelling units per lot and, therefore, does not require amendment for Lovell to comply with the Dwelling Unit Allowance. Alan Broyer has pointed out, however, that the 2008 revision to Section 6.3 inadvertently may have raised a question as to whether Lovell has a lot area per dwelling unit requirement.

The 2007 version of the Lovell Zoning Ordinance effectively had a lot area per dwelling unit requirement articulated in terms of its inverse, dwelling units per acre, which was designated as "maximum residential density" (in numerical terms, a lot area per dwelling unit requirement of 2 is equal to a dwelling unit per acre requirement of 0.5). But this requirement was garbled in the 2008 revisions.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*

The Amendments Regarding Dimensional and Setback Requirements provide the changes necessary to resolve the ambiguities created by the 2008 amendments and to ensure compliance with the Dwelling Unit Allowance. Those changes largely occur in Section 6.3 (Dimensional Requirements) but also, to a lesser extent, in Section 2.2 (Definitions) and related cross references in the Zoning Ordinance.

To avoid any possible confusion, the amendments adopt the "lot area per dwelling unit" language of LD 2003 rather than the "dwelling unit per acre" language used in the 2007 version of the Lovell Zoning Ordinance. The lot area per dwelling unit requirement is made express and set at 2 acres in all but the CI District (where it is "n/a" because dwelling units are prohibited). Minor revisions to Footnote A are made to conform the footnote to the table. Footnote B is eliminated as it was rendered unnecessary by the express inclusion of lot area per dwelling unit. Footnote E is applied only to the CI as it is the only district with a lower minimum lot size.

Those amendments also improve Section 6.3 by clarifying the titling of requirements; revising the definition of "acre" to be consistent with the multi-century understanding that an acre is 43,560 square feet, not 42,500 square feet; and expressing the minimum lot size in acres rather than square feet.

Revising the definition of an acre could result in prior non-confirming uses if there are lots in Lovell that meet the current Zoning Ordinance minimum lot size (generally 85,000 sq. ft. but 42,500 in the CI, where dwelling units are prohibited) but fall short of the generally accepted definition of 2 acres (which is actually 87,120 sq. ft.). I am not aware of any such circumstances but have not combed a map of the plots looking for them either. Even if there are some, I think Lovell would benefit from abandoning effort to redefine the concept of an acre. Maintaining this definitional oddity could work against us in any judicial review of the exercise of the town's authority to engage in zoning.

Amendment Regarding Accessory Dwelling Units:
<u>Changes Necessitated by the ADU Provision</u>

The effect of the ADU Provision is to override municipal zoning limits on the number of dwelling units per lot AND limits on lot area per dwelling unit to the extent necessary to allow one accessory dwelling unit on each lot with a single-family dwelling unit in an area where housing is allowed. This override may itself be limited by prior exercise of the Dwelling Unit Allowance.

The Amendment Regarding ADUs builds on the draft prepared by Ben McCall of Jensen Baird. Ben suggested a definition for ADUs, minor revisions to the Article VII General Performance Standards for parking, and a new Specific Performance Standard.

Attached are two versions building on Ben's draft, one labeled "Clean" and the other labeled "marked to show changes from JB draft." As seen best by looking at the markup, the amendment adds an entry in the Table of Uses expressly listing ADUs with the same zoning district permissions as Single-Family Dwellings. A new Footnote 6 is proposed to impose the statutorily authorized limitation based on prior exercise of the Dwelling Unit Allowance.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*

Without an express listing in the Table of Uses, ADUs arguably would be prohibited. Also, the structure of our ordinance suggests that there should only be a specific performance standard for a use if the use is expressly listed.

There is also a minor amendment to the definition of net residential density that was necessary to ensure that Lovell's net residential density requirement did not preclude ADUs.

One change to Ben's specific performance standards was the inclusion of an express provision stating that no more than one ADU is allowed on a lot, which is all that LD 2003 requires. Absent this provision, it could have been argued that the amendment allowed unlimited ADUs.

Most of what is in the amendment is required for LD 2003 compliance. There are, however, several policy issues related to the specific performance standards proposed for ADUs. LD 2003 allows municipalities to set a maximum size for ADUs and to restrict the use of ADUs for short-term rentals (STRs). The amendment sets the maximum at the lesser of 1500 square feet or 40% of the principal dwelling unit. STRs are not addressed directly but effectively are handled by Section 8.26.G which precludes leasing ADUs for a period of less than 60 days. The Planning Board could consider different thresholds on each point or omitting them entirely.

There has been discussion in other towns about imposing an owner-occupancy restriction on ADUs. It is unclear whether that is allowed under LD 2003 or Fair Housing laws. Prior versions of LD 2003 sought to limit owner-occupancy restrictions. The amendment does not include one.

The Planning Board could consider other limitations on ADUs. If you do, legal counsel should be consulted to determine the scope of permissible limitations.

<u>Amendments Regarding Fair Housing</u>

This is a simple amendment transferring whatever obligation the town might have under the Fair Housing Provision to developers of subdivisions. Apparently, some other towns are ignoring this issue. Legal counsel has not taken a position on whether this is necessary but is of the view that this is sufficient to satisfy whatever obligation the town might have.

<u>Things Not Done/Changes Not Made</u>

Preparation of these amendments revealed a host of inconsistencies between the Lovell Zoning Ordinance and state law. For the most part, I decided against recommending changes. While the inconsistencies initially were confusing to me, I did not see that they precluded compliance with or enforcement of either state or local law. Also, the ripple effects of eliminating some of these inconsistencies were potentially enormous.

For example, state law distinguishes between dimensional requirements and setback requirements. The Lovell Zoning Ordinance combines the two concepts and expressly defines "Dimensional Requirements" to include setback requirements before making over a dozen references to dimensional requirements.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*

There are also numerous inconsistencies in defined terms. In trying to sort them out, I prepared a concordance which now runs to eight pages. Fighting through these definitional inconsistencies certainly makes our ordinance less user friendly but I did not see any problems of compliance or enforcement.

The inconsistencies warrant further study.

Next Steps

Each of the amendments should be reviewed with legal counsel. While the text of the amendments is not lengthy, it reflects extensive and, at times, complex analysis of the interaction between state and local law.

The amendments should be discussed at the next Planning Board meeting, preferably after review by legal counsel. A public hearing on the amendments, as revised by the Planning Board, needs to be noticed and held at such time as would allow for a Special Town Meeting to be held before the July 1, 2023 deadline for LD 2003 compliance. Notice must be posted in the municipal offices at least 13 days before the public hearing and published twice in a newspaper of general circulation, once at least 12 days before the hearing and again at least 7 days before the hearing. After the public hearing, the Planning Board can recommend the amendments to the Select Board. Time will also be needed for Select Board consideration and publication/notification of the warrant.

With the appropriate notice, the Public Hearing and Special Town Meeting could also consider other amendments discussed at last week's Planning Board/Ordinance Review Committee Workshop.

**Note:** The Amendments are not attached in this Exhibit but were distributed to the entire Planning Board.

**Exhibit B**

April 28, 2023

TO: Planning Board

CC: Ordinance Review Committee

Alan Broyer

FROM: Paul Denis

RE: Further Amendment to Section 6.2

As discussed at our workshop meeting last week, some hold the view that the Planning Board either cannot or should not utilize its powers under Section 9.9.I. of the Zoning Ordinance to impose any meaningful conditions on the approval of conditional use applications. This creates a gaping hole in Lovell's ability to manage development. The town is now exposed to development that will be done on terms inconsistent with what the citizens repeatedly have told us they want.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*

Whether this restrictive view of Section 9.9.I. is an assertion of legal inability (*i.e.,* the imposition of conditions would be unconstitutional) or practical inability (*i.e.,* an unwillingness to bear the risk that imposition of conditions could subject the town to litigation given ambiguity over the line between constitutional and unconstitutional conditions) is not entirely clear. As a practical matter, it may not matter. Adoption of the restrictive interpretation as a matter of policy or enforcement practice will have calamitous consequences either way.

Without amendment to Section 6.2, it will be open season on Lovell and the town could be subjected to a wide variety of uses conducted on the terms dictated by the developers, not the town. With a simple amendment to Section 6.2, along the lines of the "expressly listed" amendment approved by the voters last year, the Planning Board can regain control of the process and develop specific performance standards that will allow those uses, but on Lovell's terms. A draft amendment doing just that is attached.

The Problem

Section 9.9.I. empowers the Planning Board to impose on conditional use approvals "such conditions in addition to those required in this ordinance that it finds necessary to further the purposes of this ordinance." The restrictive view, however, dictates that the Planning Board not exercise most or all of that power.

Where there are no specific performance standards applicable to the use under review, the restrictive view has rendered Section 9.9.I. a nullity. For those uses, which constitute 66% of the uses subject to Planning Board conditional review[1], the Planning Board has been put out of business. The review process has been rendered indistinguishable from permit review in that the Planning Board, like the CEO in permit review, has no discretion beyond approving or disapproving the application. There is no point any more in designating these uses as conditional uses (designated with a "C" in the Table of Uses). We might as well convert them all to permitted uses (designated with a "P" in the Table of Uses). Under the restrictive view, there is nothing the Planning Board can do about them.

Even where there are specific performance standards applicable to the conditional use under review, the restrictive view substantially curtails the scope of the Planning Board's powers under Section 9.9.I., leaving little difference between conditional review and permit review. It has been suggested that the Planning Board could impose conditions that fill in gaps in specific performance standards or elaborate on those standards, but in practical terms no one really knows what that means. One person's "gap filling" or "elaboration" is another's imposition of a condition not specified in the Zoning Ordinance, something thought to be beyond the scope of the Planning Board's authority. Given the town's aversion to litigation risk, the Planning Board likely will be reluctant to exercise even this limited authority.

The Threat

The threat to Lovell is that developers will submit conditional use applications for uses that, absent conditions, are inconsistent with what the town wants (e.g., preservation of its rural character).

[1] See attached Table of Uses Fun Facts for a breakdown of uses requiring conditional use approval and the extent to which specific performance standards apply to those uses.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*

The Planning Board will be powerless to impose conditions that would make the use acceptable to the town, and the developers will have their uses approved, much to their private benefit and the public detriment.

There are 85 uses in the Table of Uses, 44 of which require conditional use approval in at least one zoning district but have no specific performance standards. A threat of this magnitude is substantial and could quickly undermine decades of effort by the citizens of the town to allow development while preserving what makes Lovell special.

For example, there is nothing to stop another developer from making a copycat proposal to build another warehouse in Lovell. "Warehouse, Distribution Center" remains a conditional use in the LC and CI. But there are no specific performance standards in the Zoning Ordinance applicable to warehouses of any form so the most likely outcome of this application will be unconditional approval of something completely out of character for the town.

Similarly, the town could be faced with applications to build a chemical or bacteriological laboratory, a manufacturing plant, or a chemical, petroleum or petroleum products storage facility. All are conditional uses for which there are no specific performance standards. The Planning Board will be powerless to impose on their approval the customary conditions that would make them acceptable to Lovell.

The Solution

We would not have this problem, or face this threat, if we had detailed specific performance standards for every conditional use expressly listed in the Table of Uses.

Developing specific performance standards for the 44 conditional uses not currently subject to specific performance standards will be a very time-consuming task. Without some stop gap measure, we risk getting run over by development proposals that are inconsistent with the way the citizens of the town want things done.

We need to buy time to get this right. A simple amendment to Section 6.2 would buy us the time needed to develop detailed specific performance standards for the uses that currently have none. The draft amendment attached to this memo would prohibit conditional uses for which there are no corresponding specific performance standards. The newly developed performance standards could then be added to the ordinance via the amendment process (which entails notice, public hearing, and a town vote), either all at once, in batches, or individually as development projects are proposed. The development of specific performance standards through the amendment process ensures that the Planning Board has the time to determine the standards the town wants to impose and is not pressured by the time constraints of the conditional use approval process. The next warehouse or chemical laboratory will be approved subject to the town's standards rather than on terms dictated by the developer.

At the same time, we need to be reviewing the 23 specific performance standards currently on the books for conditional uses and ensuring that they are sufficiently detailed. The proposed ordinance amendment would not buy us any time to do that, but it still needs to be done.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*

Article XX. Shall an ordinance entitled "2023 Amendments to the Lovell Zoning Ordinance Regarding Prohibited Uses" be enacted?

(The proposed ordinance is available for review and inspection at the Town Clerk's Office and will be available at the Town Meeting.)

## 2023 AMENDMENTS TO THE LOVELL ZONING ORDINANCE REGARDING DISTRICT REGULATIONS

---

The Zoning Ordinance of the Town of Lovell shall be amended as follows (additions are underlined and deletions are ~~struck out~~):

**1.** Amend Article VI, District Regulations, so that the paragraph following the Table of Uses and preceding the Notes to Table reads as set forth below:

• • •

Subject to the provisions herein governing lawfully existing nonconforming uses, any use not either (a) expressly listed in the above table as a permitted use (Y or P) ~~conditional use (C )~~, special exception (SE), or permit required from Bureau of Forestry (BFP), or (b) both (i) expressly listed in the above table as a conditional use (C) and (ii) expressly subject to specific performance standards set forth in Article VIII, shall be considered prohibited in the zoning district. When there is a question about whether a proposed use is listed in the above table, the Code Enforcement Officer shall make a formal, written determination.

Submitted by Dave Durrenberger

*Note: These minutes are a best effort written record of all actions taken, and all topics discussed by the Board, applicants and public presenting testimony, and the substance of that testimony. The verbatim dialogue for any topics listed in these minutes can be obtained from the audio recording of the meeting, available from the Lovell Town Office.*