

**TOWN OF DAY COMPREHENSIVE PLAN  
COMMITTEE MEETING  
DECEMBER 16, 2008**

**Members Present:** Ted Mirczak, Chairman      **Members Absent:** None  
Mary Ann Johnson, Supervisor  
David Cox  
David Davidson  
Larry DeRubbo  
June Dixon  
Judy Traeger  
Richard Lamb, Consultant

**Others:** David Avigdor, Town Attorney  
Duane Nealon, Town Assessor

Chairman Mirczak opened the meeting at 10 a.m.

**Minutes Review:**

The following changes were made to the minutes: Page 2, Paragraph numbered 3, line 7, “AMD with be” change to “AMD will be”; same page and paragraph, line 12, “growth is in” change to “growth in”; Page 3, first full paragraph, line 3 “graft” change to “graph”; Page 4, third full paragraph, line 5, “Heslor” to “Heslin”; and, Page 5, fifth full paragraph, line 9, “map transfers” change to “map amendments”.

**Motion** by Committee Member Traeger, seconded by Committee Member Dixon to approve the minutes of the November 18, 2008 meeting with the above referenced changes. Ayes: Mirczak, Johnson, Davidson, DeRubbo, Cox, Dixon, Traeger. Carried: 7-0.

**Town Attorney David Avigdor:**

A list of questions was addressed as follows:

**Takings Questions:**

*“There are many small lots in the “Lakeview” area, several for example are about 100 x 50 feet (5,000 square feet in area). In general, is there some size (or shape) at which denial of a permit to build a single family home would not be considered takings (assuming that the applicant does not own any adjacent properties)? Or, must a building be permitted on all lots regardless of size?”*

1. Town Attorney Avigdor, referencing a U.S. Supreme Court case from a land use regulation from California, stated while it is not a taking to restrict the building of a cliff side home; it would be a taking to prohibit any substantial economic use. The result in this case was the Court sustained the ban on single family homes and found it was not a taking because it was shoreline which had other uses (recreational, etc. which would be appropriate).

2. It would be difficult to find other uses for a 50 x 100 foot parcel located on the hillside and other uses may be too intrusive. When the ordinance was first formulated in 1991, if a property owner owned several contiguous parcels, they were deemed to be a single parcel for subdivision purposes and they would be required to appear before the Planning Board if they wished to subdivide that single parcel. This requirement has been working. There are many small lots around the lake and it is probably too late to replat those because they may have been sold to individuals. There are few instances where an individual owns contiguous parcels.

3. The Town has setback requirements along with the State septic setback requirements and legitimate health regulations would not be considered a taking. Existing wells or septic in the neighborhood prohibit building and the property owner may seek a variance for a sealed septic system or for the setback requirements. On a pre-existing parcel, the setbacks would be reduced. Policy decision was made at the time of the original adoption of the land ordinance which could be changed. It is an as of right to proportional adjustment with an absolute minimum. This Committee could remove that from the regulations or change the minimum or change the way the proportionality is calculated. If it is eliminated, it will increase the number of applications to the ZBA because property owners will believe they are putting an appropriate house on an appropriate parcel which will compel the ZBA to make the decision. The question would be is there something unique or special about the design of a particular parcel (setbacks or building size) that would bring it to a five member board for consideration or as it is currently structured, is it something the building inspector could handle through a calculation? He is unaware of any structures that would be considered as inappropriate as a result of this calculation.

4. The Committee could consider putting language in the Plan stating pre-existing, non-conforming small lots are a potential development concern and if development becomes inappropriate, the Town Board in the future could have a mechanism of changing the proportion of reduction which would not be drafted into a law but to leave the possibility to be able to do it.

5. Town Attorney Avigdor stated the quick answer to the question is no, is it good policy to make that building unusually small by recalculating the setbacks? Or, would it be good public policy to recognize that for better or worse, there are some pre-existing small lots within the Town, the neighborhood is more dense than would be preferred, and it would speak to economics to allow a building to be smaller than typical of this decade or do we want to develop in a way that is typical of current home construction despite that the parcels are small? If there is a concern with density, there

could be incentives to encourage assemblage which is economically possible taking into account the amount of money currently being spent on acreage in this area and may not cost prohibitive.

*“If the subdivision law were amended to include a provision similar to the following, could it be considered a taking if there were no such buildable areas on the entire parcel? If the number of buildable areas were extremely limited?”*

*Lots to be Buildable. There shall be a buildable area on each proposed lot of sufficient size and suitably located for (a) a building, (b) an on-lot waste water disposal system except where a community sewage system is proposed, and (c) a well except where a community water system is proposed. Such buildable area shall be free from such restrictions as wetlands, wet soils, ponded or wet areas, flood hazard, slope greater than fifteen (15) percent, rock outcrops, soil with bedrock close to the surface, and other conditions which would create difficulties for home construction or for sewerage treatment. Such buildable area shall be suitable for an on-site waste water treatment system consistent with the requirements of the “On-Site Wastewater Treatment Local Law” of the Town of \_\_\_\_\_.*

1. It would not be a taking because it is speaking to a subdivision where in the first instance you are speaking to assets rather than an attempt to create. The denial of the first parcel would not be a taking as long as the existing parcel has an economic use which would be an existing home or the credit to build a home.

2. Any proposed subdivision lot shall show an area of buildable size which can accommodate a well and septic system. There is more leeway in addressing subdivisions but the language could use fine tuning. There is so much steep slope in the Town, the majority being over 15 percent. If a property owner owned a large parcel in the interior with most of it being over 15% slope, how far can the regulations go in respect to that parcel? While it does not prohibit development, it does require the landowner to go through additional paperwork to file the application which would discourage development in that area. The Planning Board would have to consult with a soil scientist or engineer to solve the potential erosion problems.

3. Regulation would prohibit subdivision but may not prohibit the development of the first single family home. Suggestion was made that at the time of subdivision review when the plat is submitted, the surveyor would be requested to provide specific information. Based on that information, in a calculation of area, net out any environmentally sensitive areas such as steep slope, rock outcrop, state or local designated wetlands, historic or cultural elements in a site, viewsheds, etc. The net area would be what is used to calculate the area requirements. This would address the calculation issue and it is standard in many communities.

4. Town Attorney Avigdor stated his initial response to the question was a strictly legal interpretation. In regard to public policy, he did not believe denying subdivision because development would be difficult is acceptable. A property owner may purchase

the land and overcome the difficulty of rock outcropping which may make construction more expensive. He can understand the existence of historical elements of cemeteries. Rock outcropping may bring into play some of the viewshed regulations which are currently in place. If viewshed was not an issue or rock outcrop, and there is soil and bedrock close to the surface, it could be a matter of policy to have the Planning Board require a note on the map indicating the development experience so that the buyer would be aware and realize they are purchasing a buildable lot but one with certain constraints rather than prohibit it altogether. Committee Member Cox stated he would agree with Town Attorney Avigdor that you can deal with slopes albeit expensively and comply with all regulations of the ordinance. He further stated if a landowner can comply with the driveway regulations regarding slope, he did not believe 15% slope would indicate an unbuildable lot.

5. Town Attorney Avigdor stated it is a common legitimate perception that if the Town or Park Agency approves land for subdivision that the resulting lots are buildable. Therefore, if there are constraints, it is incumbent on the Planning Board for those constraints to be cited on the map. He stated the language is already contained in the ordinance where the Planning Board could require slope information. It would be divided into two categories: Wetlands, wet soils, and flood hazards are legitimate public policy bars to construction which would affect how or if the subdivision could be accomplished. Others issues such as rock outcropping, soil with bedrock close to surface, etc., it is fair to put the public on notice there is an issue to be managed? It would be helpful to the definition if wetlands, wet soils and floor hazards could be simply designated as wetlands; however, it would be dependent on the criteria used, whether it is APA designated wetlands map or the Federal or State definition. Town Attorney Avigdor stated under APA regulations, it must be a contiguous acre but not necessarily a contiguous acre on the subject parcel.

6. Assessor Nealon stated relating to valuation and environmentally sensitive issues would be the presence of mature trees which should be attempted to be preserved. He further stated they would add 10-15% to the valuation of the property compared to a lot which is clear cut. Mature trees also add to ambiance, climate control, and preserve natural landscape. Town Attorney Avigdor stated the Town of Day and APA have cutting restrictions in place which exempt dead, dying or diseased trees and landowners can directly affect the health of a tree. Chairman Mirczak stated while this cannot be rigorously enforced, it can be reasonably enforced. Town Attorney Avigdor stated if it cannot be rigorously enforced, would it be reasonable to impose on the property owners of the Town of Day the economics of defining the health status of trees, placing them on a survey only to discover the Town cannot enforce the law regarding tree cutting. The cost of surveys would become prohibitive if all mature trees were required to be located on the survey map.

#### **Land Posting, Trails:**

*A suggestion was made at one of the committee meetings that some incentive should be offered to subdividers who agree to write something into the deeds that would*

*prohibit future owners from posting certain lands so that the public could use them as walking areas. Could this be done? One way might be to require public right-of-way easements on designated trail areas such as along old logging roads, ridgelines, or stream banks. Do you believe this is workable? What about providing public access to large open space parcels?*

1. Opening up an entire parcel would make it available to anyone as opposed to creating easements to public trails which would limit the public use to only the trail. Prohibiting posting would allow someone to walk very close to your home. Would the public remain on trails even in winter when they are not as clearly marked? In regard to parcels which have traditionally over the years been used for hiking, this type of incentive would make sense. Landowners will have concerns with liability which could include the Town if it is mandated. Indemnification for the Town would be a necessary consideration regarding mapping out trails. Town Attorney Avigdor stated he is aware that there are an extensive number of snowmobile trails over private property but he is not aware of how that is managed. He does know there are clubs which are private entities which raise funds and purchase liability insurance which names landowners as additional insureds. The snowmobile population is more organized than the hiking population in this regard.

2. Paddlers have a right to navigation according to Federal Courts on streams but are not allowed to traverse on private lands. Problems include: Issues with litter left behind, destruction by overuse, exceeding the limits of the use that was created, homeowner's insurance issues on parcels with hiking trails and an increase in premium. How would the Town deal with a trail user who clears trails with chainsaws each spring? Who deals with this debris and does it cause a fire hazard? There may be the ability to partner with the State through the sale of rights to the land and they would indemnify the landowner from liability from damages. Town Attorney Avigdor stated the State has the right to deny purchase if they do not feel it is an enhancement to the existing trail system in terms of it being useable, being actually used or linking into another existing trail.

3. Town Attorney stated there was a fee which was part of the subdivision application which was applied to recreation as long as it is related to the recreational needs. It would be necessary to put together a coherent trail system which would include insurance and clean up crews which could be funded by the fees collected from applications. The subdivided parcel must benefit from it. A conservation subdivision is benefited by an interlinked system of trails with additional subdivisions adding more trails. A master plan of this type can be obtained through Assessor Nealon. Research supports conventional housing in a conservation subdivision is more readily saleable. It also supports forestry and agricultural management. Model ordinances and model homeowner's agreements which administer these lots are available. Benefit of conservation lots is that up to 70% of the parcel would not be build out. Assessor Nealon has furnished the Secretary with a CD "Massachusetts Smart Growth Toolkit" and recommended "Rural by Design Handbook".

#### **Responsibilities of Consultant and Town Attorney:**

*The consultant has been retained to prepare the Comprehensive Plan and revisions to the Town of Day land use regulations, as well as to consult with APA and attend public meetings with regard to the Comprehensive Plan and regulations. It is assumed that at some point in the process the materials will be handed off to the Town Attorney for further revisions and legal adoption by the town. Is this agreeable, and at what point should the Town Attorney take over?*

1. Town Attorney Avigdor stated currently preparing the plan and preparing change to the land use ordinance have been merged together. The preparation of the plan should be undertaken first and adopted with a draft proposal of changes to the land ordinance which can be discussed prior to adoption but not formalized. If public hearings are held and the public has opposition to proposed changes that would affect the proposed draft changes to the land ordinance. Any proposed changes should be forwarded to Town Attorney Avigdor as drafts.

2. It was established that Professor Lamb and Town Attorney Avigdor would work on draft changes. When the Committee feels the draft of the laws are appropriate, there would be more of a hand off to Town Attorney Avigdor for public hearings at the Town Board level. Professor Lamb would handle matters with APA. The Town Board would do a "sense of the Board resolution" which would not bind them to adopt the final plan and would not require APA to waste their effort reviewing something that we may not adopt. When a plan is sent to APA, they would have comments and if those comments speak more to the land use plan, those comments would be referred to the Committee. Technicality of the language would be referred to Town Attorney Avigdor.

3. Whether or not APA must approve the plan would be determined by the Memorandum of Understanding between the Town and APA. However, it would be beneficial for APA to informally review the plan. Point being: Why pass a plan which will not be approved by APA. (Subject to be discussed with Brian Grisi of APA when he appears before the Committee.)

4. It will be a two step process: Formulate and develop a Comprehensive Plan and draft changes to the law afterward. The Comprehensive Plan will be supported by the law. Formal adoption of the Plan may automatically trigger SEQR review as well as changes to existing regulations with all interested parties being contacted. Suggestions made to engage Senior groups, property owners associations, workshops to engage the interested public, etc.

#### **Land Use Regulations Bodies:**

*Relationship between APA land use, Saratoga County Land Use and Town of Day Land Use regulations. Some discussion of recent APA waterfront restrictions would be particularly useful, but the Committee will benefit from a broad overview.*

Broad overview: Town of Day has a number of components including zoning law, subdivision law, septic waste disposal law, driveway regulations and Viewshed law which together comprise our land use regulations. Saratoga County has jurisdiction over certain land use applications according to General Municipal Law which states any time an applicant appears for a zoning variance, subdivision, or a site plan review and is within 500 feet of State or County road or other State or County property, it must be referred to Saratoga County Planning. Saratoga County Planning Board only reviews county impacts and not if the subdivision would be appropriate to the Town. A county impact would be how it would affect drainage as it runs across the county highway; the addition of a subdivision may impact school bus traffic and result in the need for an additional bus turnaround, etc. Typically the County does not substitute its judgment for the Town's and does not require an appearance by the Town or the applicant before its Board meeting but makes its judgment on the record. If they decide it has a negative impact on the County, they can deny it. The Town can override their denial by "super majority" (i.e. a five member board would need four votes (super majority) to approve rather than three (regular majority)).

Relationship with APA: More complicated with a single comprehensive land use plan with subdivision regulation, land use, etc. Town of Day has an approved land use program which grants us the right to issue certain APA approvals under the auspices of the Town of Day Planning and Zoning Boards. We create a document "Adirondack Park Agency Class B Regional Permit Issued by the Town of Day." APA permissions fall into three categories: Class A Projects which are large projects (large number of lots, ski resorts, marinas, industrial projects, etc.) which we have no jurisdiction over and APA makes all decisions. Class B Projects both identified the same under local zoning law and APA regulations and we can issue a permit in all instances. APA's only right is to be notified of the application and public hearing; and, to appear as an interested party at the public hearing.

Variations: APA has a right to appear at the public hearing and overturn our decision which has been done in the past. (Example: landowner wishes to subdivide a 20-acre parcel into two lots of 15 acres and 5 acres parcels where 8.5 acres are required and one lot is deficient in acreage but not road frontage. They would need a Town of Day variance because our lot sizes are minimum lot sizes but not an APA variance because APA speaks to average lot sizes and not minimum lot sizes.) Each time an applicant submits an application, Town Attorney Avigdor and Code Enforcement Officer Metzler must determine if there are any APA permits required. They must also determine if it complies with Town of Day law and if it requires any variance.

Conservation subdivisions: Designed along APA lines comprised of average lot sizes rather than minimum lot sizes. In the area designated Resource Management which requires 42 acres per principle building, this could be designed as a conservation subdivision with smaller lot sizes and a specific number of acres to be set aside as undeveloped which may result in better land use and development. Currently, the Town has not had a subdivision application for more than three lots. However, Town Attorney Avigdor appreciates the Committee anticipates there are changes occurring in the Town

which may require these types of laws and it would be important to have the rules in place prior to a request being made.

Waterfront Restrictions by APA: APA law is a statute passed by the State Legislature. Whenever State Agencies pass statutes, there is an administrative agency which needs to determine at which time they would complete a formal rule making to be published which then become law. APA is changing the way they scrutinize shoreline setback grandfathering – in each zone there is a certain distance where a building can be placed from the shoreline. APA and Town of Day shoreline setbacks are the same. In pre-existing buildings (prior to 1973) development which done within the setbacks could be expanded on either side of the building or a second floor could be added. Presently, no expansion is allowed on these grandfathered lots. Several counties within the Park are studying whether a challenge should be warranted. APA believes it is legally sustainable and will become law effective January 1, 2009. There are two setbacks which apply on the lakeside: The setback from the water and the setback from the taking line. This is complicated and would need to be addressed case by case. Supervisor Johnson stated we would be making this decision because we have a land use law. Town Attorney Avigdor stated we may be deciding these but it may be necessary to put this new restriction in Town of Day law due to APA's ability to reverse our decision.

#### **Zoning of the Water Surface:**

*Suppose someone proposes to build wind towers out on the lake? Who "zones" the water surface?*

APA ruled that a commercial tour boat traveling on the lake was not a land use issue which is under APA regulations of permanent or semi-permanent infrastructures. In the case of wind towers, if they were permanently fixed to the lake bottom, both APA and Hudson River Black River Regulating District would have jurisdiction. If they were floating but semi-permanent and the tour boat decision were taken into consideration, they would fall under the jurisdiction of Hudson River Black River Regulating District. Town Attorney Avigdor would not recommend the Town of Day regulate the lake because it is owned by the State whose authority supersedes ours.

#### **Private Roads and Shared Driveways:**

*We're likely to have to deal with landlocked parcels that would ordinarily be buildable, but lack the required frontage on a public road. How does land use law deal with constructs like "private roads, and shared driveways"?*

Private road and shared driveways are not legal constructs but are common terms. The Town is comprised of public roads and paper streets which are not legal public streets which were created by the filing of a subdivision map. In the modern era, if a party purchases a tract of land and wishes to construct a road, they would need approval of the planning board and the planning board would require the offering of that road for dedication to the Town which is the process of public land becoming a public road. The

road would be built to Town specifications as required by the Highway Superintendent. Once the road is completed, title of the road would be turned over to the Town but only if the Town agrees to it. Legal definition of paper streets are those streets which are shown on a filed map but have not been accepted by dedication to the Town. There are many paper streets which predate subdivision law and there are easements by implication which implies that the public is allowed to use those paper streets for ingress and egress.

Shared Driveways: Would be legally considered as easements which is the right to do something on someone else's land, the most common being shared driveways. Various easements include: Wells and water lines located on adjoining properties, views which may limit the height of a house, logging purposes, etc.

Maintenance of Private Roads: If homeowners association exists, they would be assigned responsibility. If no association exists, there is no mechanism to assign responsibility and roads do not get maintained or are maintained in the wrong location. A series of paper streets located in the town were abandoned by the owner once all building lots were sold. The County approached the Town to take over the streets which they refused to do as the streets were not the required width of a town road. The County put the parcels up for sale and there were concerns the streets could be made into racetracks. Zoning law would prevent a racetrack from being located on these paper streets. If there is any zone which would allow racetracks, it would require a site plan review. If paper streets are sold, the easement by implication would still exist for those owning parcels on those paper streets. Paper streets which come under ownership of the County can be taken off the tax rolls but title would remain with the County and responsibility for liability would also be theirs.

### **Regulating Use of the Lake Within the Town:**

*Would you opine on the practicality of limiting the size, speed, type and noise of watercraft on the lake?*

The Town would have a legal right to limit specifics of watercraft and there is regulation in limited areas which include a speed limit on the down stream end of the lake and Paul River Bay which is posted. The Town has a cooperative agreement with DEC regarding that signage (the Town has purchased the equipment and DEC maintains it). Without the cooperation of all towns around the lake, it would be too difficult to regulate watercraft. Also, police presence would be difficult to maintain at all times with other lakes taking precedence over this lake. Size would be possible to regulate but speed and noise would be much more difficult.

### **Comments from Town Attorney Avigdor:**

Questions were thoughtful and approached areas which should be addressed. The Committee should take a larger view with the possibility to leaning toward building density which may be a large change conceptually but APA already has the language. He is unaware why the ordinance addressed lot sizes other than the consultant at that time

recommended it. Professor Lamb stated there are two possibilities to consider: Average density requirement and cluster development which would not change lot size unless there was an actual application which is more publicly acceptable. Town Attorney Avigdor agreed and stated the Committee should consider themselves not as drafters of legislation but as striving toward a new comprehensive plan.

Believed the survey and workshops are very important components but when analyzing the results, the Committee should consider that this is not a representative sample, in his opinion, but a representative subset. Work will commence on the comprehensive plan and at its completion, public hearings will be held and those who have not responded as yet will bring in their issues which may represent wholly different issues. Town Attorney Avigdor stated in this town it is politically important to consider the seasonal residents and this should be considered when scheduling public hearings. Also, while many seasonal residents are not voters locally, the Committee must decide if they wish to hear them regarding the land use plan. It was agreed the Committee would consider their input important and encourage everyone to participate in the survey including tenants and other non-property owners who simply use the lake throughout the summer.

**Town Assessor Duane Nealon:**

Assessor Nealon made the Committee Members aware of a free webcasting in conjunction with APA of “Community Engagement in Small and/or Rural Communities” on January 9<sup>th</sup>.

*Question: I am interested in hearing talk about relationship between zoning and land development. The real question may be what drives land value, and is it affected by how the property is zoned. It would also be good to know the relationship between developed land value, and comparable, but undeveloped land.*

Assessments are a mass valuation which is done on every property in the taxing jurisdiction establishing a value on all parcels in the Town on a given date (March 1<sup>st</sup> of each year). A mass appraisal is done with the aid of computer modeling which is not an exact science and fine tuning is a result of direct contact with the property owner or at the time of the meeting of the Board of Assessment Review. It is at this point that the Assessor would consider the parcel from an appraisal point of view. Encumbrances on the deed which may affect value (deed restrictions, easements, etc.) would be considered which the Assessor may not be aware when the mass assessments are done. At some level both the assessed value and appraisal should be the same.

From an appraisal stand point, there is a concept called highest best use where zoning does play a role. For example, one parcel is undeveloped and one is developed at its highest best use with a single family home. The underlying land should be the same with the improvements separated in the assessment process. Real estate values are determined by allowable as of right development. If a site has been zoned industrial and there is a demand, it will be more valuable. One of the distinct, market driven aspects of

this Town in terms of supply is the lakefront property and since there is limited supply, there will always be higher demand for it. Value is based on actual sales of homes within the area. The income approach is usually reserved for income property.

In speaking to land value, parcels located in the same geographical contours with truly comparable property should be based on recent sales to define value with immediate lakefront commanding a higher price. Purchasers of immediate lakefront properties are purchasing properties which have been improved, demolishing what exists and building new. The cost of that property with improvements which were demolished has a purchase price in the range of \$300,000 to \$400,000 on a small parcel which is more indicative to land value than improvements. The difficulty of fine tuning that model is to appreciate differences in topography, direct access, etc. Sale of parcels and improvements to parcels increase the assessments; however, values over time can only be increased by a revaluation. Board Member DeRubbo stated real value can fluctuate in hundreds of thousands of dollars with real value also being determined by what the purchaser would find valuable to him. Assessor Nealon stated a median ranking is created with the highest and lowest removed from the ranking.

**Issue of Density:**

*Is there a point where too many parcels are created in a desirable area where it would affect the value?*

Committee Member DeRubbo stated purchasers from high density areas tend to want close neighbors while others desire privacy.

*If the zoning map were changed, as there are portions of lakefront property which are zoned Rural Moderate Intensity and they were rezoned Lakefront Residential which would reduce the zoning from 3.2 acres to 60,000 square feet, would that affect property values?*

Committee Member DeRubbo stated it would be not so much the acreage but the road/beach frontage. Town Attorney Avigdor stated in regard to vacant developable land, acreage has a big impact. If a purchaser was buying a ten-acre parcel in RMD and he knows he will have three developable lots, it would be more valuable. Town Attorney Avigdor stated in order to change the map, APA must change their map also. He stated map changes were made at the time of the original ordinance which included correction of errors and agreeing to swap in a very limited degree. The difficulty in doing the exchange is convincing the property owner who will lose building rights.

**Residential Cluster Development:** Deferred to next meeting.

**Survey:**

Supervisor Johnson stated the survey and letter are ready to be mailed with publicity in the Sacandaga Express to appear concurrent with its mailing.

**Meeting for January 20<sup>th</sup>:**

Supervisor Johnson will contact the County Fire and EMS representatives for January 20<sup>th</sup> meeting.

The meeting adjourned at 12:35 p.m.

Respectfully submitted,

Diane Byrne  
Secretary