

BOLTON BOARD OF APPEALS
MINUTES
July 8, 2008 at 7:00 p.m.
Bolton Town Hall

Present: Chairman, Gerard Ahearn, Brad Reed, Jacqueline Smith, Alexander Kischitz, Kay Stoner, Town Planner, Jennifer Atwood Burney and Town Counsel, Ellen Doucette.

HEARING

7:00 p.m. Continued Hearing for Modification of Comprehensive Permit - Regency of Bolton, Main Street
Applicant: Toll Brothers – Shawn Nuckolls, Project

Present: Applicant – Toll Brothers - Shawn Nuckolls, Project Manager and legal counsel, Mark A. Kablack from M.A. Kablack & Associates, P.C.

At the ZBA meeting on May 27, 2008 the Board voted that the requested modification to the Comprehensive Permit was deemed substantial. The Hearing was opened on June 17, 2008 and continued to this evening.

Attorney Kablack explained that he was representing Heritage Manor Development LLC for Toll Brothers and seeking to modify condition #11 of the Comprehensive Permit which modifies the Residential Use and Occupancy restriction of the Comprehensive Permit which restricts all units to persons 55 years and older. At least 80 percent of the occupied units would be occupied by at least one person who is 55 years of age or older and no person eighteen years of age and younger may be a permanent resident of any unit. This restriction is based on the Federal Fair Housing Act (FHA) guidelines.

Attorney Kablack had submitted additional information requested by the Board on July 3, 2008. This included:

1. Modified decision, reviewed by town counsel.
2. Policies and Procedures Regarding Age Restriction.
3. Traffic report from Abend Associates dated June 25, 2008
4. Parking report from Ducharme & Dillis dated July 2, 2008
5. Clarification on septic design
6. Uxbridge Decision as an example of another 80/20 development.

Mr. Reed asked if the applicant was willing to give back to the town by changing two market rate units to affordable units. Attorney Kablack stated that the affordable units were priced at \$150,000 and the market rates at \$350,000 and this request would not be feasible to the applicant. The applicant felt that they would be able to sell units under the proposed 80/20 modification. Mr. Reed disagreed and stated that the request would be difficult to manage. Attorney Kablack stated that it is difficult to achieve 100% and under the FHA program it will be easier to achieve the 80/20.

Jackie Smith stated that the project was sold to the town with the age requirement being over 55 and now questioned supporting the 80/20 concept. She questioned whether the applicant would be back for another provision at a later date and requested that the applicant at least consider giving the town one more affordable unit.

Mr. Nuckolls stated that the survival of the community was important and under the current age restriction only 2 units have been sold in 3 years. Attorney Kablack stated that the applicant can't guarantee they won't be back, that many developers are changing the over 55 status, such as Hudson (MA) and some are changing from for sale to rental. Mr. Nuckolls said that this modification would allow their feet to get wet by getting a few more people into the units. People don't want to be the first ones in a development. Mr. Nuckolls stated that the applicant is already required to provide a total of \$90,000 (\$2,000 per market rate unit) as well as the 15 affordable units.

Kay Stoner asked if the 80/20 would solve issues. Who would police and enforce the 80/20 and who is "it" as referred to in the documents? Attorney Kablack responded and stated that the FHA has set standards as well as the state. The condo association would monitor on a day-to-day basis, the survey would be done every 1 to 2 years and the ZBA (if it would like) could be included in the process.

Ms. Smith stated that she had asked the Town Planner to inquire about increasing the age restriction from 18 to 22, out of concern over children attending the school system. Town Counsel had determined that this concept was not legal. Kathy Giunta, representative for the Noshoba regional school system said under current state law children under the age of 22 can attend school. Ms. Giunta asked if a study had been done to project school age children. She was told no.

Mr. Kischitz indicated that, since the survey was simply a snapshot in time, the percentage might actually be lower than 80% at other periods. Attorney Kablack agreed that this scenario was possible and stated that the survey could be done more frequently if the board would like although, under the FHA program guidelines, it is required that a survey is done at least every 2 years. Mr. Reed asked how the 80/20 is corrected if not compliant. Attorney Kablack stated that it would be the same as what is required in the Comprehensive Permit and FHA program. Attorney Kablack stated that the next sale of a unit would have to reflect the percentage inconsistency. He stated that the 6D certificate gets recorded and the requirement of 80/20 could be added to this certificate. The Board stated that they are concerned about the enforcement of the deed. Attorney Kablack stated that the board must rely on attorneys doing their due diligence during a title search. If this fails then it is because an attorney has not carried out a search or done due diligence. Kay Stoner expressed concern about the homeowners wanting to further amend the 80/20 ratio at some point in the future.

Town Counsel stated that the condo association documents would have to be filed with the registry of deeds at a certain percentage of occupancy. The master deed would be recorded and reference the individual deed. At the time of issuing a 6D certificate, age could be verified. Town

Counsel also suggested that one of the conditions in the amendment of the Comprehensive Permit be that the certification of age is done at the time of purchase similar to the 6D.

The Board and Attorney Kablack discussed whether the units have to be owner occupied. Attorney Kablack stated that all units including affordable units must be leased to people over the age of 55. He also stated that over 55 developments tend to be self regulating.

The Board reviewed an updated traffic report (June 25, 2008) from Abend Associates which conducted the original report from August 2004. The original report was based on 66 units and the development was subsequently approved for 60. Traffic usually increases with kids and the development will continue to prohibit kids under the age of 18. Therefore, projected traffic flow should actually remain less than under the previous report because the study was performed for 66 units. A parking report from Ducharme & Dillis dated July 2, 2008 was also presented which indicated the proposed changes would not increase parking needs.

Attorney Kablack reviewed the information provided on the septic system. He had provided the Board with a copy of the Nashoba Associated Boards of Health Sewage Disposal Works Construction Permit dated October 11, 2005 as well as documentation on elderly flows as defined by Department of Environmental Protection. The permit granted was for "60 Elderly Housing Units and community building. The Board of Health is questioning whether the development has adequate sewage capacity based on the original decision. There is a question on the term "elderly". Does this imply that all residents must be over the age of 55, or just one? Does it imply that the program is based on the FHA 80/20? The Board of Health has indicated that the approval was based on the residents being over the age of 55. Attorney Kablack provided DEP documentation that defines Housing for the Elderly as "a facility restricted to use by adults over 55 years of age (in accordance with 42 USC 3601 et seq.). Attorney Kablack states that this legal reference is the FHA program. Town Counsel stated that she had spoken to Bill Brooking and town counsel Judy Pickett who has indicated that the 20% should be calculated differently than the 80% which would mean the system would have to be expanded. Attorney Kablack suggested that since a resolution on the septic requirement is not met then the board could make its decision with the condition that the applicant comply with the Board of Health. The Board requested that more clarification is needed from DEP on the flows rate used for this development.

Mr. Reed stated that he was not comfortable voting on the modification without reviewing the deeds and documents. Town Counsel suggested that the board vote and work on the drafts. The Board has 40 days to make a decision from the date the hearing is closed.

The Board again asked the applicant to confirm the total number of units. They were told that there are a total of 60 units, 15 are affordable and 45 are market rate.

Kathy Giunta asked the Board why they are even considering the request if the town isn't getting anything in return. Attorney Kablack replied that the request of 80/20 is a valid exemption and allows a 45 year old to buy a unit. If the development continues with the over 55 requirements it will die, the request before the board will allow a window of opportunity. Ms. Smith agreed that the units need to be sold so that the development can become a vital part of the community.

Mr. Kischitz reiterated his concerns about treating the affordable units differently than the market rate units and requested a formal opinion from Town Counsel before proceeding. The applicant said they just want the flexibility. Mark O'Hagan the lottery monitoring agent stated that 17 people were in the first lottery. The lottery criteria are geared towards age restricted and will continue to be but a 53 year old can now get in the lottery. Attorney Kablack said all units whether market rate of affordable with have the same standards. Town Counsel replied and said she is not concerned, but will review the issue more thoroughly. Ultimately, all units have to be marketed in the same manner. She told the board they cannot impose requirements that wouldn't be imposed on other developments.

Town Counsel will look into the DEP septic flows and - whether or not a certain percentage of the affordable units has to be designated with the 80/20% FHA requirement.

A motion was made by Alexander Kischitz, seconded by Jacqueline Smith to close the hearing.

Vote: APPROVED 5/0/0

The Board set August 12, 2008 at 7:30pm as the next date for the draft decision. The applicant agreed to grant an extension if necessary.

**8:00 p.m. Riverside off of Still River Road
Applicant: Mark O'Hagan for Riverside Bolton LLC**

The applicant was present to update the board on the status of the project. Also present was abutter Roxann Burney of Autumn Lane. Mr. O'Hagan stated that he and the Burneys had been in litigation but had come to an agreement. The agreed changes include augmenting and re-configuring the parcel that will be conveyed to Mass Wildlife or be placed under a conservation restriction. As part of the settlement, the applicant will also attempt to shift the septic system by 20', provide additional vegetation as a buffer along the Burney property, and attempt to relocate one building slightly. Mr. O'Hagan stated that an ACEC application will be done and he will submit a final plan for review to the Board as well as a peer engineer review. He is not looking to modify the existing Comprehensive Permit.

Mr. Kischitz asked if the Burneys were the only abutters on the appeal. Mr. O'Hagan said yes. Mr. O'Hagan told the board he will be back with a final plan sometime in the winter. He will submit septic revisions to the Board of Health, file an application with Mass Wild Life and MEPA, and prepare the necessary documents.

GENERAL BUSINESS

1. Approval of Minutes (none approved)

NEXT MEETING

August 12, 2008 at 7:30 pm (Regency and Sunset Ridge)

Meeting adjourned at 10:00 pm

Minutes submitted by Jennifer Atwood Burney, Town Planner