

**Date: November 13, 2014**

TOWN CLERK

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DUXBURY, MASS.

**BOARD OF SELECTMEN**

**EXECUTIVE SESSION MINUTES**

**Present:** Shawn Dahlen, Chair; David J. Madigan, Vice-Chair; and Theodore Flynn, Clerk

**Absent:** René J. Read, Town Manager

**Staff:** Nancy O'Connor, Executive Assistant

**Others present for this meeting:**

Attorney Art Kreiger, Anderson & Kreiger, LLP via conference call; Tom Broadrick, Planning Director

**Members of the Planning Board in Attendance (joint meeting):** George Wadsworth, Brian Glennon, John Bear (via conference call), Scott Casagrande, Jennifer Turcotte, and David Uitti

**Members of the Zoning Board of Appeals in Attendance (joint meeting):** Wayne Dennison, Judi Barrett, Kathleen Muncey, and Freeman Boynton.

**CONVENED IN OPEN SESSION**

The Selectmen's meeting was called to order at 7:00PM in Open Session.

**VOTE TO ENTER EXECUTIVE SESSION**

Mr. Flynn then moved that the Board of Selectmen enter into an Executive Session in order to discuss strategy with respect to pending litigation regarding appeal of ZBA decision of property located at 29 Summerhouse Lane since an open meeting may have detrimental effect on the Town's litigating. This Executive Session will adjourn when completed and will reconvene in Open Session.  
Second by Mr. Madigan.

As Chair, Mr. Dahlen declared that an open meeting may have a detrimental effect on the Town's litigating position so it is necessary for the matter to be discussed in Executive Session.

**ROLL CALL VOTE:** Mr. Flynn ---aye; Mr. Madigan---aye; and Mr. Dahlen---aye.

(Planning Board and ZBA also moved their respective meetings to enter an Executive Session)

**EXECUTIVE SESSION**

**DISCUSSION**

Mr. Dahlen asked the Planning Board why they want the Board of Selectmen to approve financing an appeal.

George Wadsworth, Planning Board Chairman, stated that after reading Atty. Kreiger's opinion and findings, which the Planning Board discussed, their opinion was that the lot did not have the zoning protection before 2007.

Brian Glennon, Planning Board Vice Chairman, then stated that while the ZBA decisions all contained factual findings, the outcome did not appear to be based on the facts found and internally inconsistent.

Judi Barrett, ZBA Vice Chair, asked everyone to introduce themselves before continuing discussions.

Mr. Wadsworth continued the discussion stating that this was an "odd lot" and that there are 2000 (more or less) odd lots in Town, which are not buildable. The Planning Board is concerned that by setting this precedent, all these odd lots might become buildable. There would be further concern that this would impact the odd lot program for affordable housing and would be a detriment to this program. For purposes of disclosure, Mr. Wadsworth stated that he owns an odd lot.

Wayne Dennison, ZBA Chair, described his lengthy job experience (he is an attorney) handling more than 100 cases of zoning litigation for large corporations and that he routinely works with other towns' counsel on these types of issues. He stated that he is providing advice as both a resident and as someone with knowledge about zoning decisions. Mr. Dennison provided documentation to the BOS. First item in packet is Atty. Kreiger's letter dated June 11, 2014, which was authored and considered before appeal to the ZBA, but in response to Municipal Services' letter dated 5/28/14, denying the building permit for Lot D. First appeal to ZBA was June 18, 2014. He believes that town counsel rendered an incorrect opinion before appeal. He further stated that Atty. Kreiger's opinion was based on two cases, Dowling and Jensen, on how you deal with grandfathered lots for zoning analysis and the need to establish a substantial physical barrier otherwise the applicant cannot win. Mr. Dennison said that the applicant provided a number of samples of substantial physical barriers, but does not provide support.

Discussion continued regarding highlighted sections in the documentation provided by Mr. Dennison. He referred to Page 4 of Atty. Kreiger's letter stating that Summerhouse Lane at best was paper road until 2007, which is consistent with what the Planning Board found in 2007. Mr. Dennison then referred to Exhibit B regarding the requirement of a substantial physical barrier and what constitutes a remainder lot.

Mr. Dennison then discussed Page 4 of Exhibit D regarding the question if Summerhouse Lane existed as a way when the zoning changed from 30,000sf to 40,000sf. He continued to Exhibit E regarding cases of remainder lots under c.40A §6 protection. Next Mr. Dennison referenced Exhibit F, Planning Board minutes from October 15, 2007, pages 5-7, regarding the ANR (Approval Not Required) plan of land presented by Chafik Hamadeh (builder), and the highlighted section whereas Amy McNab noted that it needs to be confirmed that Summerhouse Lane was continuous through to Torrey Lane. He then pointed out that Mr. Wadsworth noted that Board approval of an ANR plan does not guarantee that lots are buildable, the Director of Inspectional Services does. He then referred to Exhibit G, the ANR Handbook.

Mr. Madigan questioned whether the Planning Board in 2007 recognized that Summerhouse Lane went all the way through and designating as a remainder not a buildable lot.

Mr. Wadsworth stated that the 2007 plan does not show a way all the way through.

Mr. Dennison stated that the Planning Board needs to show that the ZBA got it all wrong on the law in order to merit an appeal. He also suggested that no judge would fault the ZBA on their determination. The position the Planning Board would have to take is that the ZBA acted arbitrarily because of the 2007 decision. He also stated that he thought the Planning Board was asking Board of Selectmen to fund lawyers under the assumption that the town counsel's opinion was correct.

Mr. Madigan then asked again whether or not Summerhouse Lane went all the way through – did it exist or did it not exist prior before 2007.

Mr. Wadsworth stated that in 2007 minutes there was a question as to whether Lot C was a buildable lot (difference from 2006 and 2007 – boundary line with a dash line). Chafik (builder) wanted to maintain Lots C & D in common ownership. In 2008, Lot C had insufficient frontage.

Mr. Dennison said that if you look at the plan, Lot D has a dotted line while Lot C has solid line.

Mr. Madigan asked again if prior to 2007 did Summerhouse Lane exist through to Torrey Lane or did it change in 2007 to make Lot C buildable.

Mr. Dennison stated that the Planning Board cannot create a road. Planning Board determined that a road, not paved, in fact existed dependent upon a 1944 assessor map that shows road going all the way through and was certified by the Town Clerk, Nancy Oates, in 2007.

Ms. Kathy Muncey said that she didn't think there was enough information and that the remainder lot's frontage was on Bay Road. If it was a paper street, it took frontage on Bay road so the focus was not on Lot C, only Lot D.

Mr. Dahlen stated that he has heard the persuasive arguments, but that there is still a problem. Where is the team spirit. We are only volunteers all helping the Town of Duxbury. He continued to say that he was most distressed because we shouldn't be doing battle with ourselves and was hoping it wouldn't get to this point and doesn't like how this plays out publicly.

Mr. Uitti (Planning Board) stated that there are two ways to make the procedure better: 1. While one board has the right to appeal another board, maybe each Board should find out why the other Board made the decision they did; and 2. Mrs. Curtis received a letter from the building inspector stating that the lot was buildable, she paid money to buy the lot, and then was told that it was not -- the building inspector should be told to not send such a letter as it's not binding.

Mr. Wadsworth stated that at the last ZBA meeting, it was requested that the chair submit all information to Atty. Kreiger and that didn't happen. If it did, maybe Atty. Kreiger would have revised his letter.

Mr. Dennison talked about the statutory deadline to render a decision and already had one extension to write decision. Stated that he had a busy work schedule and reminded everyone that this a volunteer board and you do with what time you have.

Mr. Wadsworth asked what Atty. Kreiger thought.

Mr. Madigan stated that he thought someone from Anderson & Kreiger was approved to go to ZBA meetings. Ms. Barrett confirmed that was on another matter, but continued to state that the Town of Duxbury needs a planning and development board, which would be available to all boards, but Duxbury doesn't have that.

Mr. Wadsworth again asked for Atty. Kreiger's thoughts.

Atty. Kreiger stated that the heard a lot of discussion about his decision being wrong, but still stands by his decision. He sent his letter in June, and if the ZBA decided to go in a different direction, he is just hearing about that now.

Mr. Dennison stated that he will not argue with Atty. Kreiger and stepped out this meeting to attend the ZBA regularly scheduled meeting.

Mr. Dahlen said that he has heard arguments from both sides, which is appropriate for these volunteer boards, but concerned about the negative impact on the town.

Mr. Glennon (PB) appreciates the Board of Selectmen position, but how else do you resolve these issues when both boards are working in good faith.

Mr. Dahlen suggested that a member of each board should attend the other board's meeting, but final decisions decided by each board.

Mr. Flynn stated that going forward someone from each board should talk about plans and next steps and whether there are thoughts to withdraw this request as he will not support the town suing itself.

Mr. Wadsworth stated that the Planning Board and the ZBA have had different decisions for years and that the building inspector did not have all the information when first decision was made as a buildable lot.

Mr. Flynn again stated that he will not support legal funding for town boards to fight against each other.

Mr. John Bear (PB) spoke via conference call. He stated that the final decision does not appear to come from findings of the ZBA decision and is questioning whether or not the Board of Selectmen has the right to decide what to fund and what not to fund.

Mr. Dahlen said that the Board of Selectmen decides on what's in the best interest of the community economically.

There was further discussion pertaining to whether or not a board with elected officials trumps another board. Mr. Dahlen reminded everyone that they were in executive session for legal reasons and to continue in that regard.

Mr. Casagrande commented that everyone did not have the current ZBA information.

Mr. Wadsworth again stated that the Planning Board came to the Board of Selectmen because it is their only avenue for funding an appeal.

Mr. Flynn stated that the abutter could sue the developer.

Mr. Wadsworth then stated that the abutter could also sue the Town because that was the decision by the Town.

#### **EXECUTIVE SESSION ADJOURNED & BOARD RE-CONVENED IN OPEN SESSION**

At approximately 8:25PM Mr. Flynn moved that the Executive Session be adjourned and that the Board of Selectmen re-convened in Open Session.  
Second by Mr. Madigan.

**ROLL CALL VOTE:** Mr. Madigan---aye; Mr. Flynn --- aye; and Mr. Dahlen---aye

*Minutes prepared by Nancy O'Connor*

#### *LIST OF DOCUMENTS (documents located in the Board of Selectmen files)*

1. *Agenda*
2. *Draft motion for entering Executive Session.*
3. *ZBA Decision #2014-0021*
4. *Memo from Wayne Dennison, ZBA Chair, re potential litigation along with supporting documentation*