



Town of Duxbury Massachusetts Planning Board

Minutes 02/02/09

The Planning Board met in the Duxbury Town Hall, Lower Level, Small Conference Room on Monday, February 2, 2009 at 7:00 PM.

Present: Amy MacNab, Chairman; Brendan Halligan, Clerk; George Wadsworth, Vice-Chair; and John Bear, Cynthia Ladd Fiorini, and Harold Moody.

Absent: James Kimball.

Staff: Diane Grant, Administrative Assistant.

Ms. MacNab called the meeting to order at 7:01 PM.

OPEN FORUM

Planning Director Search: Ms. MacNab reported that of fourteen resumes submitted for the position, the Search Committee has narrowed the list to three candidates and will be interviewing them on February 6, 2009. Ms. MacNab and Mr. Halligan serve as Planning Board representatives.

Mullin Rule: Ms. MacNab informed Board members that Mr. Wadsworth had received a call just prior to the meeting advising him of their concern that any Planning Board members not in attendance for prior public hearings on proposed zoning articles render a vote. Ms. MacNab offered that she was aware that the Mullin Rule applied to special permits and variances but she was not clear if it applied to public hearings held pursuant to MGL Chapter 40A, Section 5. She suggested that the Board use caution moving forward. After discussion it was agreed that it would be prudent to exercise the Mullin Rule absent a legal opinion to the contrary. This would affect two Board members who would not be able to vote on two warrant articles at tonight's meeting until they have listened to the recording and reviewed any available minutes because they were absent at a previous hearing last Monday, January 26, 2009.

APPOINTMENT WITH MARK CASEY OF SOUTH SHORE SURVEY RE: POTENTIAL ACCESS MODIFICATION FOR PATTEN LANE (REED)

Present for the discussion were the property owners, Mr. John Reed and Ms. Cynthia Reed; Ms. Marsha Johnson, landscape architect from Steven Simpson Associates; and Mr. Mark Casey of South Shore Survey. Mr. Casey distributed existing and proposed site plans. He noted that the subdivision originated in 1954, and in 1995 an amended subdivision plan was approved by the Board.

Mr. Casey noted that the owners are requesting to make a minor modification to the subdivision plan to change the roadway material from gravel to cobblestone, and they plan to create a new access to their lot. Mr. Casey noted two major reasons for this proposed change: 1) safety (current access is on

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a curve) and 2) privacy (many vehicles enter the private driveway mistaking it as an extension of the public road). Mr. Casey noted that the subdivision roadway would not be reconfigured. Fire and safety equipment would continue to be able to access and egress the roadway. It is currently the primary access used daily by the property owners.

Ms. MacNab noted that the Subdivision Rules and Regulations clearly state that amendments other than field changes require the filing of a Definitive Subdivision Modification Plan. Mr. Casey responded that the property owners do not believe the change requested is substantial. Ms. MacNab noted that the curb cut appears to be changing with the proposed plans and Mr. Bear noted that the material would change as well.

Mr. Casey noted that the roadway material changed from the 1954 approved plan to the 1995 Definitive Subdivision Modification. The road has not been built during that timeframe. Mr. Moody asked about the current surface, and Mr. Casey replied that it is gravel with an asphalt base. Approximately four years ago, Simpson Associates, landscape architects, redesigned the driveway to make it more aesthetically pleasing. Currently the driveway appears as a gravel road.

Mr. Bear stated that he does not believe that the proposal represents a substantial change. Ms. MacNab noted that the Board does not have the latest set of approved plans in front of them or prior approvals to review in relation to the proposed plans. Research needs to be done. She suggested that the property owners ask the Fire Chief to review the site and determine if emergency access would be affected by this proposed modification. Ms. Johnson from Simpson Associates stated that the Fire Chief had visited the site four years ago when the access was enhanced, and at that time the Fire Chief had no concerns. Mr. Casey offered to obtain a written statement from the Fire Chief.

Ms. MacNab asked if the roadway provided shared access to another dwelling, and Mr. Casey responded that it does, noting that the abutter, Mr. DiMatteo, accesses his pre-existing non conforming lot over an easement that previously was a cart path to the beach. Mr. Casey advised the Board that there would be no change to the DiMatteos' access, and they are in favor of the proposed changes.

Mr. Wadsworth and other Board members expressed an interest in visiting the site, noting that it would be helpful if the proposed access was staked. Ms. MacNab agreed that the Board needs more time to review past approvals, including any conditions placed on those approvals, and visit the site. It was agreed that the Planning Board would re-address this request at their meeting of March 23, 2009.

PRELIMINARY SUBDIVISION PLAN: ADAMS COURT / WASHINGTON STREET (HINKLEY)

Mr. Bear recused himself and joined the audience for this discussion. Present for the discussion were the applicants, Mr. Clark Hinkley and Ms. Jane Hinkley; Atty. Peter Freeman and Atty. Stephanie Kiefer of Freeman Davis; and Ms. Carmen Hudson of Cavanaro Consultants, the project engineer. Ms. Geraldine Camilli of Horsley Witten was present as the consulting engineer.

Mr. Hinkley described the history of his lot, distributing a copy of his presentation. Then Atty. Freeman distributed a memorandum to the Board dated February 2, 2009 with references to two legal

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case summaries that he asserted would address the enforceability of the Inclusionary Housing Bylaw: Wall Street Development Corp v. Planning Board of Westwood (Mass. Appeals Court, 2008) and the U.S. Supreme Court 1994 case of Dolan v. City of Tigard, Oregon. Atty. Freeman noted that the intent of MGL Chapter 40A, Section 9 is to give the applicant increased density. The applicant in this situation is not seeking increased density.

Ms. MacNab stated that her interpretation of Wall Street Development v Westwood is that the Planning Board in that case refused to accept and/or act on a subdivision application until the applicant obtained a special permit. Ms. MacNab asked Atty. Freeman if he had in any way been denied access to the Board or the ability to file an application, and he replied that he had not.

Atty. Freeman explained that the case of Dolan v. City of Tigard concerned an instance where there is a high value of land and suggests that there is a two-pronged test where there are permits required: 1) is there an excess between the bylaw and the benefit to the Town, and 2) the determination of rough proportionality regarding monetary impact. He stated that the current application is not consistent with rough proportionality.

Ms. MacNab asked why the applicants are choosing to file through the subdivision process rather than filing an Approval Not Required (ANR) Plan of Land. Atty. Freeman noted that a subdivision process protects the applicant against zoning changes for eight years, where under an ANR the applicant would be protected for three years. Ms. MacNab asked if the applicants intend to file any other lots other than the two proposed with this preliminary application, and Atty. Freeman responded that they do not.

Ms. MacNab asked for comments from the Consulting Engineer, Ms. Geraldine Camilli of Horsley Witten. Ms. Camilli referenced her firm's letter of January 26, 2009, noting that if the cul de sac remains, she recommends putting the drainage within the center of the cul de sac with a bioretention area. The applicants should show that they can meet sight line requirements. If the properties go into construction, the owners should file with the Natural Heritage and Endangered Species Program Priority Habitats of Rare Species and Estimated Habitats of Rare Wildlife.

Ms. Hudson of Cavanaro Consulting presented the engineering aspects of the Preliminary Subdivision Plan on behalf of the applicants. She stated that the applicants would consider a hammerhead driveway to the subdivision using vegetated swales, or else if the cul de sac is built, it is a possibility that drainage could be put in the island, which would mean that a separate lot for drainage would not be required.

Ms. Hudson showed the Board a new set of plans dated February 2, 2009 in response to comments made at a Development Review Team (DRT) meeting of January 12, 2009. An eight-inch main hydrant was added to the plans, with specifications to be included in Definitive Subdivision plans. In addition, Ms. Hudson submitted an email dated January 27, 2009 from Ms. Amanda Veinotte of the Natural Heritage and Endangered Species Program Division of Fisheries and Wildlife. In the email, Ms. Veinotte stated that the proposed lots are no longer mapped as Priority or Estimated Habitat in the 2008 Natural Heritage Atlas.

Ms. Hudson noted that the Commission on Disabilities and Highway Safety had comments that sight line figures need to be included with plans. She stated that 300 feet of sight line are required, and the proposed plan has a sight line to the west of 412 feet and to the east 517 feet. Although the Board of Health states in DRT minutes that no perc tests have been performed, they were done under the address of 154 Washington Street, not the current address of 0 Washington Street.

Mr. Wadsworth questioned the possible slope of a drainage basin if it is located within the cul de sac, and Ms. Hudson responded that the island would be flat. She stated that it may be possible to place the drainage in the rear of the lot where there is a natural slope. She stated that the applicants will try to minimize pavement.

Atty. Freeman re-emphasized the monetary impact to the owners of the Inclusionary Housing Bylaw and stated that they are interested in dialogue regarding this matter. Ms. MacNab noted that three people in the room tonight helped to create the Inclusionary Housing Bylaw to capture exactly this type of scenario. This property had been divided into five lots through the ANR process and now the applicants are attempting to create an additional two lots. Under the Inclusionary Housing Bylaw, the sixth lot is the trigger. She stated that she believes the inclusionary provision applies, a bylaw that passed with a two-thirds vote of Town residents present at Annual Town Meeting. The Planning Board's job is to uphold the Town's Zoning Bylaws.

Mr. Moody noted that it appears that the existing lot has more than 400 feet of frontage. He asked if Atty. Freeman agreed that the Inclusionary Housing Bylaw applies, whether through an ANR or a subdivision filing, and Atty. Freeman stated that after reading the bylaw, he believes it does. The "gray area" is that only four new dwelling units are proposed beyond what originally existed. Mr. Moody noted that since the proposed lot division facially appears to fall within the Inclusionary Bylaw, he asked how the Planning Board could waive it. Atty. Freeman agreed that it would not be a "normal" type of waiver because it involves a bylaw. He stated that he believes a way can be found that would find the bylaw not to be applicable without setting a negative precedent. He recommended that the Board consider consulting with Town Counsel on how to proceed.

Mr. Moody asked if the applicants had considered the viability of paying a fee in lieu of affordable housing, according to ZBL Section 560.11. Atty. Freeman agreed to run those calculations for a future meeting with the Board. Ms. MacNab noted that the applicants' financial situation is not a concern of the Board. Atty. Freeman responded that, according to *Dolan v. Tigard* the financial impact must be considered.

Ms. MacNab invited public comment, and there was no response from the audience.

Ms. MacNab summarized the situation, noting that one parcel existed in 1991. The parcel was divided into five lots in 2006. The lots created with this current application represent the sixth lot, which triggers the Inclusionary Housing Bylaw. She stated that she does not believe the *Wall Street Development v. Westwood* case applies to this application because the Planning Board is not denying the applicant a process. Whichever way the applicant goes from here, whether ANR or Definitive Subdivision filing, triggers the Inclusionary Housing Bylaw. She recommended that the applicants consider filing a special permit for the inclusionary housing which can be done in tandem with a definitive subdivision filing.

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Atty. Freeman agreed that the bylaw is silent as to sequence. He asked if the applicants chose to not apply simultaneously, could they obtain an endorsed subdivision plan? Ms. MacNab stated that she did not want to speculate, noting that there are safeguards in place and that the Town departments work together to help ensure compliance with Zoning Bylaws. Atty. Freeman responded that the applicants are willing to go to court if necessary. Their goal is to divide two lots that are legally dividable and to find a way to prove that the Inclusionary Housing Bylaw is not valid or applicable.

Mr. Wadsworth noted that the Planning Board does not have the ability to waive a Zoning Bylaw. All building permits would be subject to the Inclusionary Bylaw. Atty. Freeman stated that he reserves the right to the one percent chance of finding a way to not apply the Inclusionary Housing Bylaw.

Ms. MacNab noted the decision deadline of February 12, 2009, and stated that the Board could choose to approve, deny or continue the Preliminary Subdivision application before them.

MOTION: Mr. Halligan made a motion, and Ms. Ladd Fiorini provided a second, to approve a Preliminary Subdivision Plan entitled, "Adams Court Preliminary Subdivision, 0 Washington Street in Duxbury, MA" dated December 22, 2008 and revised on February 2, 2009 (two sheets) stamped by Carmen Campos Hudson, RPE, with the following conditions to apply to any subsequent Definitive Subdivision filing:

1. The applicant will comply with recommendations provided in Horsley Witten's engineering memo of January 26, 2009.
2. Proposed plans shall be revised to include drainage within a cul de sac, with a recommendation that a hammerhead within a cul de sac should be considered.
3. The proposed right of way shall remain private.
4. A homeowners' association shall be recorded upon definitive subdivision approval.

Further, it should be noted that the applicants were given the choice to file either an Approval Not Required Plan of Land or a Definitive Subdivision Plan. The applicants were also advised to file a special permit with the Planning Board with either future filing, as the further division of the owner's original lot triggers the Inclusionary Housing Bylaw according to ZBL Section 530.2.

DISCUSSION: There was no discussion regarding the motion.

VOTE: The motion carried unanimously, 5-0.

**PLANNING BOARD RECOMMENDATION FOR ANNUAL TOWN MEETING 2009
RE: PROPOSED REVISION TO ZONING BYLAWS ARTICLES 300 AND 400
RELATIVE TO CHANGES WITH THE DENSITY AND DIMENSIONAL
REQUIREMENTS WITHIN A NEIGHBORHOOD BUSINESS ZONE**

Ms. MacNab noted that although the public hearing for this proposed warrant article has been closed on January 26, 2009, a proponent has requested that the Board re-open the public hearing. Mr. J.R. Kent, the proponent mentioned, retracted his request.

Ms. MacNab noted the earlier discussion regarding the Mullin Rule that was adopted as a General Bylaw of the Town of Duxbury at Annual Town Meeting 2007, it appears that those Board members not present at the public hearing of January 26, 2009 need to listen to a recording of the meeting before they can vote on this proposed amendment to Zoning Bylaws. Board members absent at that meeting were Mr. Kimball, Ms. Ladd Fiorini, and Mr. Moody.

Ms. Ladd Fiorini asked for an update of what happened at that meeting, and Ms. MacNab responded that there was a good amount of public input, and also input from the Zoning Board of Appeals (ZBA) through its chairperson, Mr. Dennis Murphy.

Ms. Ladd Fiorini asked if the public hearing could be postponed to another date to allow her and the other absent members time to listen to the recording and review any pertinent documents. Mr. Halligan stated that his intent is to get the most input and the fairest representation of the Board possible. Mr. Moody left it up to the other Board members' discretion. Ms. MacNab noted that the Mullin Rule issue was just raised tonight. After discussion it was agreed that the Board would proceed with a vote at tonight's meeting.

Mr. Wadsworth stated his opinion that 80 percent lot coverage is too high. He recommended lowering the percentage. Ms. MacNab suggested that the Board consider recommending the proposed article with a lower percentage for allowable lot coverage.

Mr. Bear, who served on the Lot Coverage working group, noted that 20 percent coverage works, along with 20 percent open space. He stated that because the Zoning Bylaws never address building coverage for commercial zones, the Town effectively has had no lot coverage. Mr. Wadsworth noted that the amount of parking allowed has driven the size of the structure, noting that lot coverage and parking go hand in hand. He stated that the record is clear that the bylaw as proposed would have unintended consequences on the environment because more pavement would be allowed.

The Board discussed several examples of higher building coverage in Towns like Cohasset. Ms. MacNab noted that CPZBIC (Comprehensive Plan/Zoning Bylaw Implementation Committee) addressed this issue and chose to handle it by creating overlay districts. She noted that despite examples, one size does not fit all in this case.

Mr. Bear stated that the proposed bylaw amendments will apply to very few properties in the Town, mostly redevelopment. Most existing lots in the Neighborhood Business Districts are small. Mr. Halligan noted that, although this may be the case today, with the proposed rezoning of Island Creek and First Baptist Church parcels to Neighborhood Business, he is concerned with future rezoning.

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The mission of the Town of Duxbury is to deliver excellent services to the community in the most fiscally responsible and innovative manner while endeavoring to broaden our sense of community and preserve the unique character of our town.

MOTION: Mr. Bear made a motion, and Mr. Halligan provided a second, that the Planning Board recommend the proposed bylaw regarding lot coverage with a provision that the proposed maximum lot coverage allowable would be amended to 75 percent.

DISCUSSION: Mr. Wadsworth stated that the percentage is still too high. Mr. Halligan stated that because his sense is that the Board is inclined more toward a 70 / 30 ratio of lot coverage to open space, he feels that 75 percent coverage is too high.

VOTE: The motion failed, 1-3, with Mr. Bear voting for and Ms. MacNab, Mr. Wadsworth and Mr. Halligan voting against.

Ms. MacNab stated that she is comfortable with 65 percent lot coverage, as a compromise between 50 percent and 80 percent.

MOTION: Mr. Bear made a motion, and Mr. Halligan provided a second, that the Planning Board recommend the proposed bylaw regarding lot coverage with a provision that the proposed maximum lot coverage allowable would be amended to 70 percent.

DISCUSSION: Mr. Bear stated that in their research, the Lot Coverage working group found most attractive commercial properties in Town had approximately 71 to 72 percent lot coverage.

VOTE: The motion was deadlocked at 2-2, with Mr. Bear and Mr. Halligan voting for it and Ms. MacNab and Mr. Wadsworth voting against.

MOTION: Mr. Wadsworth made a motion, and Mr. Halligan provided a second, that the Planning Board recommends the proposed bylaw regarding lot coverage with a provision that the proposed maximum lot coverage allowable would be amended to 65 percent with a 35 percent open space minimum.

DISCUSSION: Mr. Bear noted that this percentage of lot coverage would eliminate the potential for properties that look like the ones that the Lot Coverage working group considered attractive. Mr. Wadsworth stated that he respectfully disagreed, noting that every existing structure is already protected.

Ms. MacNab noted that she believes that it is difficult to accurately estimate the lot coverage on existing commercial properties absent a true site plan depicting lot lines. She noted that the public hearing raised issues that would not be addressed with a lot coverage of higher than 65 percent. Mr. Bear noted that factual evidence exists that the public did not have insight on. Mr. Wadsworth noted that he could live with 65 percent lot coverage because it could allow for better drainage design and would protect the Town against potential future rezoning.

VOTE: The motion was deadlocked at 2-2, with Ms. MacNab and Mr. Wadsworth voting for it and Mr. Bear and Mr. Halligan voting against.

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Ms. MacNab summarized that there is no clear consensus, and Mr. Halligan agreed that because there are clearly differing opinions, it is best for the Board to make no recommendation regarding this proposed warrant article.

**CONTINUED PUBLIC HEARING FOR ANNUAL TOWN MEETING 2009
WARRANT ARTICLE: PROPOSED REVISION TO ZONING BYLAWS ARTICLE
600 RELATIVE TO CHANGES WITH A NEW SECTION 603 RELATIVE TO
PARKING REQUIREMENTS**

Ms. MacNab opened the continued public hearing at 9:25 PM. Mr. Halligan noted for the record that there is no new correspondence.

Mr. Halligan recommended a proposed revision to the warrant article, to amend Section 603.4 Parking Spaces: Design and Layout Standards for NB1 and NB2, as follows, with new wording in boldface:

*All parking spaces in NB1 and NB2 shall be located on a bituminous concrete or cement concrete surface, unless **alternative technology which would provide equal or better treatment of water runoff than such concrete surfaces is** otherwise approved by the Special Permit Granting Authority (SPGA), and have the dimensions of nine (9) feet wide and eighteen and one-half (18.5) feet in length.*

MOTION: Mr. Bear made a motion, and Mr. Wadsworth provided a second, to close the public hearing regarding a proposed warrant article for a new Zoning Bylaw Section 603 relative to Parking.

VOTE: The motion carried unanimously, 4-0.

Ms. Ladd Fiorini and Mr. Moody, who were not present for the January 26, 2009 public hearing, did not participate in the vote due to the Mullin Rule, which states that Board members cannot vote unless they were present for all public hearings or missed one public hearing and listened to a recording of that public hearing.

MOTION: Mr. Bear made a motion, and Mr. Wadsworth provided a second, to recommend approval of a proposed warrant article for a new Zoning Bylaws Section 603 (Parking), with the amendments proposed by the Board at tonight's public hearing to be incorporated on the Town Meeting floor.

VOTE: The motion carried unanimously, 4-0, again with Ms. Ladd Fiorini and Mr. Moody not participating in the vote.

ZBA REFERRAL: ISLAND CREEK COMPREHENSIVE PERMIT

Ms. MacNab noted that the prospect of beginning to review the Island Creek comprehensive permit at 9:30 PM is overwhelming. Ms. Grant noted that there is time to review the ZBA referral at the Board's next meeting, February 9, 2009. The ZBA hearing is scheduled for February 26, 2009.

Mr. Wadsworth stated that he has some general issues with the proposed project:

- The applicant should consider eliminating the condominium design
- The proposed building height is too tall.
- The proposed commercial sector should be dealt with in another way than through Town Meeting rezoning.

Ms. MacNab noted that MEPA (the Massachusetts Environmental Policy Act) office has issued an ENF (Environmental Notification Form) that seeks comments on the environmental impact of the project. Mr. Halligan noted issues for the ENF of access/egress, the ancillary commercial use, the abutting church property that is proposed as part of the site, and the potential wastewater treatment plant. It was agreed that Ms. Grant would work with Mr. Halligan to create a Planning Board comment letter for the ENF.

It was also agreed to defer the ZBA referral of this project to the Board's next meeting, February 9, 2009.

OTHER BUSINESS

High Street Land Clearing: Ms. MacNab noted that she and Mr. Halligan had spoken with Conservation Agent, Mr. Joseph Grady, recently regarding tree clearing that appears in excess of 30,000 square feet on property owned by Mr. Edward Koplovsky. Mr. Halligan noted that some of the tree clearing appears to have occurred on Town-owned property, including a portion of Conservation-owned land. Ms. MacNab directed staff to request that the Zoning Enforcement Officer look into the matter and direct the applicant to file a special permit with the Planning Board.

Planning Board Elections: Mr. Wadsworth noted that Mr. Kimball has not yet taken out papers for re-election to the Planning Board. Ms. MacNab noted that there are three residents running for two vacancies.

ADJOURNMENT

The Planning Board meeting adjourned at 9:53 PM. The next meeting of the Planning Board will take place on Monday, February 9, 2009 at 7:00 PM at Duxbury Town Hall, Small Conference Room, lower level.