



Approved 10/17/11

# Town of Duxbury Massachusetts Planning Board

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11 OCT 24 AM 11:39

DUXBURY, MASS.

## Minutes 10/03/11

The Planning Board met at the Duxbury Town Hall, Small Conference Room, on Monday, October 3, 2011 at 7:00 PM.

Present: Amy MacNab, Chairman; George Wadsworth, Vice-Chairman; John Bear, Josh Cutler, and Brian Glennon.

Absent: Cynthia Ladd Fiorini, Clerk; and Jennifer Turcotte.

Staff: Thomas Broadrick, Planning Director; and Diane Grant, Administrative Assistant.

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

### OPEN FORUM

Alternative Energy Committee: Mr. Cutler reported that the Alternative Energy Committee will be awarding a contract to American Capital Energy to enter a long-term lease for a project that would utilize the capped landfill on Mayflower Street to install solar arrays.

Finance Committee: Mr. Wadsworth reported that he attended a recent Finance Committee meeting on the topic of the two zoning articles for which public hearings are being held tonight. He invited the Finance Committee to attend tonight's public hearing.

### PUBLIC HEARING ON A PROPOSED ZONING ARTICLE FOR SPECIAL TOWN MEETING 2011 RE: AMENDMENT TO WETLANDS PROTECTION OVERLAY DISTRICT MAP FOR ONE CAPE VERDE TERRACE / DRIVER

Ms. MacNab opened the public hearing at 7:05 PM. Present for the discussion were the petitioners, Mr. Bill Driver and Ms. Doreen Driver, and their representatives, Atty. Robert W. Galvin and Mr. Brad McKenzie of McKenzie Engineering. Mr. Wadsworth read the public hearing notice and correspondence list into the record:

- Landowner petition submitted to the Board of Selectmen on 09/15/11 (*revision to article submitted 07/18/11*) and proposed map submitted 07/18/11
- Public hearing notice
- Letter from S. Pons dated 09/22/11 re: abutter change of position to no opposition to rezone
- Supporting materials submitted by petitioner on 09/23/11
- Letter from J. Grady dated 06/20/11 re: Conservation Commission recommends WPOD map amendment
- Original Definitive Subdivision plan approved by PB 11/08/1999
- Wetlands and Watershed Protection District Map dated 03/04/1971 re: Cape Verde Terrace
- Assessor's property card and Pictometry orthophoto
- Memo from R.S. Troy dated 03/08/10 (*sic*) re: Spot zoning case law (*should be 2011*)
- "Wetland Protection Zoning" Clipper article dated 03/25/1976
- Letter from L. Bennett dated 08/15/1975 re: intent of WPOD map
- Letter from L. Bennett dated 01/03/1973 re: PB direction on WPOD change requests
- *Handbook of Massachusetts Land Use and Planning Law* (Bobrowski) "Spot Zoning" chapter

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Mr. Broadrick stated that the article is sponsored by a landowner petition, not by the Planning Board. However, the Board is responsible for holding the public hearing prior to Town Meeting. The Board may submit either a verbal or written report to Special Town Meeting on October 29, 2011. The purpose of tonight's public hearing is for the Board to hear input from the proponents and public for the Board to consider in rendering its report and for the public to become informed before voting.

Ms. MacNab then invited the proponents to present their article. Atty. Galvin provided some background, stating that the applicants submitted an article at Annual Town Meeting 2011 but the article could not be amended in time for Town Meeting consideration and was indefinitely postponed. Atty. Galvin stated that the Conservation Commission had requested that a fifty-foot buffer be placed around an isolated vegetated wetland and a fifty-foot buffer around a bordering vegetated wetland. He stated that now that plans have been changed to reflect this request, the Conservation Commission supports the proposed article.

Atty. Galvin stated that the Wetland and Watershed District was established by the town in 1971; however the process for changing WPOD zoning used to be by special permit. The applicants believe there is an error on the WPOD map when it was created. Atty. Galvin stated that the map was created by "educated guess" by Charles Downe, noted environmental planner, using United States Geological Survey (USGS) maps and topographic resources. Atty. Galvin stated that Mr. Downe made generalizations and judgments to establish the closest buffer to wetlands. Atty. Galvin asserted that a 25-foot setback from wetlands was assumed and an error was made for this property to protect far more than the wetlands.

Mr. McKenzie further explained the petitioners' interpretation of the background and methodology used for the 1971 WPOD study. He stated that although the town of Duxbury created the WPOD to protect wetlands, the town did not define the limits of the resource area to be protected. In 1971 Mr. Downe mapped only 75 acres; the area not mapped had at least 25 feet of upland. The study provided what Mr. McKenzie portrayed as a "broad brushed" depiction of wetlands resources. The USGS maps Mr. Downe used were from 1947 data and were accurate to plus or minus five feet. Mr. McKenzie submitted an Historic Topographic Overlay Plan to show Board members where the buffer would extend.

Mr. McKenzie noted that Mr. Brad Holmes has been hired to confirm the limit of the Bordering Vegetated Wetlands (BVW) line on behalf of his clients. Mr. Downes had identified the wetlands and then looked at the next highest contour map at 90 feet. Since the property is fairly flat, the WPOD line appears to have been marked 250 feet from the BVW and 400 feet from the isolated vegetated wetlands. Mr. McKenzie stated that he considers this a very broad-brushed depiction.

Mr. McKenzie stated that the applicants retained a soil evaluator to test the site, and soil logs were submitted to the Conservation Commission with results corroborating the site has well-drained soil. Mr. McKenzie stated that the water table is at a depth of twelve feet, and therefore not close to being a wetlands resource area. He asserted that a 50-foot buffer from the limit of vegetated wetlands is an adequate buffer.

Mr. Glennon asked the proponents what constitutes the underlying WPOD district other than the map. Is the main criterion a 50-foot buffer from a wetlands resource? Atty. Galvin responded that the 50-foot buffer was a compromise with the Conservation Commission. Mr. Glennon asked if this sets a precedent for a 50-foot buffer as the determining factor for WPOD lines throughout the town, and Mr. McKenzie responded that the current line is 250 to 400 feet from flagged wetlands, and his clients are being penalized for having a flat lot. Every site has its own unique characteristics.

Mr. Glennon asked if there is a distinction between wetlands protection and watershed protection, and Mr. McKenzie responded that the intent of the protection is the same: for water and wildlife.

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Mr. Bear asked if the rationale of the Conservation Commission request was based on compromise and not scientific evidence, and Mr. McKenzie responded in the affirmative. Mr. Bear asked if the applicants applied a compromise to the isolated vegetated wetlands as well, and Atty. Galvin responded, "Yes."

Mr. McKenzie showed on a site plan how water flows from the wetlands. Mr. Wadsworth asked if the drainage flow is a result of looking at the aquifer or looking at the surface, and Mr. McKenzie responded that it is a result of looking at the surface, showing that water flows to the southeast of the property. Mr. Wadsworth asked if water on this site goes anywhere other than wetlands, and Mr. McKenzie responded, "No."

Mr. Wadsworth stated that the WPOD district is designed to include both wetlands and upland. Mr. McKenzie stated that he agreed; however, the buffer does not need to be 250 to 400 feet to protect the wetlands. Mr. Wadsworth stated that he is trying to understand where the error was made. He stated that he would expect a septic system on the property would have an impact on wetlands. Mr. McKenzie disagreed, noting that that water table is twelve feet and would meet local septic requirements which are among the most stringent in the state.

Ms. MacNab wanted a broader view of the area that shows the WPOD line. Mr. Broadrick showed a print-out of the 1971 map that displays a broader view. Ms. MacNab expressed concern that removing the WPOD from only one property would look like a "chop out." Atty. Galvin noted that the petitioners can only speak for their own property.

Mr. Glennon asked if the petitioners are proposing a remedy that would draw a line fifty feet from wetlands, and Mr. McKenzie replied that the Conservation Commission had suggested the fifty-foot buffer. Mr. Glennon asked if it is the Conservation Commission's jurisdiction to correct a WPOD line because there is no recourse in the Zoning Bylaws. Atty. Galvin suggested that Town Meeting could adopt a change to the WPOD to define it as 25 feet from the edge of an isolated vegetated wetland.

Mr. Broadrick explained that the original 1971 WPOD map used a 90 Mean Sea Level (MSL) line on some wetlands, but there are different ways the line was laid out. Sometimes an MSL was used, sometimes a 25-foot setback, sometimes 100, 200 or 300 feet; each parcel was unique. Mr. Cutler noted that while Mr. McKenzie is concerned with his clients, the Planning Board's concern is for the town. He asked what is unique about the petitioners' land. Atty. Galvin noted that the map has been corrected before. Mr. Bear asked if Atty. Galvin could recall the most recent WPOD change, and Atty. Galvin replied that Mr. Shawn Dahlen (current Board of Selectmen chairman) proposed a change on a property on Gurnet Road ten to twelve years ago.

Mr. Cutler asked if the proponents would consider tying the buffer areas together rather than isolating the WPOD areas as shown on the proposed map. Atty. Galvin expressed his concern that this would be a substantive change to the article and therefore could not be presented for Special Town Meeting.

Ms. MacNab opened the floor to public input, and no one from the public spoke.

Mr. Wadsworth asked about a memorandum sent at the time of Annual Town Meeting 2011 from Town Counsel, Atty. Robert S. Troy, to Town Manager, Mr. Richard MacDonald, concerning spot zoning. In that memorandum, Atty. Troy suggested that to avoid spot zoning, a petitioner needs to provide evidence of public good. Ms. MacNab noted that an example of the intent of spot zoning is to allow a town to create spot zoning for a school or water treatment facility.

Mr. Broadrick noted that landowners typically do not sponsor petitions on their own, although they have a right to. Typically the Planning Board would be asked to sponsor an article. Atty. Galvin stated that his clients are simply trying to correct an error due to science. Mr. McKenzie added that the underlying zoning of

Residential Compatibility District would not change. Mr. Wadsworth asked if the petitioners' position is that this proposal is not spot zoning, and Atty. Galvin replied that spot zoning would require complete removal of the zoning district, and his clients are proposing only to reduce the WPOD area.

Mr. Bear noted that a change in the WPOD line would be an economic benefit to the petitioners, who would be able to add an additional lot to their current two-lot subdivision.

Ms. MacNab proposed continuing the public hearing in order to gather more information. Mr. Cutler stated that the Planning Board has plenty of information. Mr. Bear stated that he is interested in continuing the public hearing in order to hear from the Conservation Commission concerning the description of the error that is causing this proposed amendment to the WPOD zone.

**MOTION:** Mr. Wadsworth made a motion, and Mr. Bear provided a second, to continue the public hearing regarding a proposed zoning amendment by landowner petition for Special Town Meeting 2011 to remove the Wetlands Protection Overlay District from a portion of a property at One Cape Verde Terrace, to October 17, 2011 at 7:30 PM.

**VOTE:** The motion passed 4-0-1, with Mr. Cutler abstaining.

**PUBLIC HEARING ON A PROPOSED ZONING ARTICLE FOR SPECIAL TOWN MEETING 2011 RE: AMENDMENT TO WETLANDS PROTECTION OVERLAY DISTRICT MAP FOR 1053 TREMONT STREET / DACEY**

Ms. MacNab opened the public hearing at 8:14 PM. Present for the discussion were the petitioners, representatives, Atty. Robert W. Galvin and Mr. Rick Grady of Grady Consulting. Mr. Wadsworth read the public hearing notice and correspondence list into the record:

- Cover letter from R. Galvin dated 09/15/11 re: Landowner petition submission with proposed map
- Public hearing notice
- GIS map, Assessor's property card, Pictometry orthophoto.

Mr. Broadrick noted that although the Board is in litigation regarding this property, the Board is required by law to hold the public hearing. He cautioned Board members to limit the questions they ask. Atty. Galvin asked if that had any bearing on the right to submit, and Ms. MacNab responded that it was simply a caution.

Atty. Galvin stated that the litigation is not pertinent to this petition, because the litigation is about unrelated issues regarding a subdivision application. He stated that the petition came about from a discussion he had with two members of the Zoning Board of Appeals and Town Counsel, who suggested that the owner submit a Wetlands Protection Overlay District (WPOD) amendment. If the district is amended, all three court cases would become moot.

Atty. Galvin stated that the easternmost portion of the property is at a modest grade and the soils at the proposed area of WPOD removal are not hydric. The owner hired a soils scientist, Mr. Peter Fletcher, to perform a soil analysis. The owners are going before the Conservation Commission on October 18 with their proposed amendment.

Atty. Galvin stated that the proposed map shows a 50-foot no-disturb line. He stated that the property contains only a vegetated wetland resource area, and no isolated wetlands. He said that there is no perennial stream running through the property. He noted that the proposed amendment brings the property more in the intended spirit of the WPOD. The Aquifer Protection Overlay District touches a small portion on the westerly side of the property, and most of the property is outside the Zone II area.

Mr. Grady noted that the estimation of the WPOD line is taken from United States Geological Survey (USGS) maps created in 1947 at scale of 1" to 32,000 square feet, not an accurate depiction. He stated that those USGS maps were never intended to delineate wetlands. Instead, he maintained, site-specific information is needed. There is a flat area to the rear of the property with elevations at a 20-foot contour. He stated that the streams on the property are intermittent, not perennial, especially to the northeast of the property. He noted that the Conservation Commission approved an Abbreviated Notice of Resource Delineation (NRAD).

Mr. Grady stated that the rationale behind the owners' proposal for a fifty-foot setback to wetlands came from the Driver case (One Cape Verde Terrace) as well as special permit criteria from Zoning Bylaws. Mr. Grady went through the criteria step by step. He noted that the proposed area of WPOD removal is not within wetlands. He noted that at the time of the Conservation Commission application for a subdivision, Mr. Peter Fletcher documented that the proposed construction area was not wetlands soil. Mr. Grady noted that the newly proposed WPOD line is more of a straight line to make it easier to re-establish in the future. He noted that approximately two acres are proposed to be removed from the WPOD.

Mr. Glennon noted the similarity between the owners' proposed fifty-foot buffer and the amendment discussed earlier tonight for One Cape Verde Terrace. Mr. Wadsworth asked where the current line exists, and Mr. Grady showed him. Ms. MacNab asked for a broader view of the property to show where the WPOD lies in a broader scope, and Mr. Broadrick offered to supply Board members with a copy of the 1971 WPOD map created by Mr. Charles Downe, which formed the basis of the current WPOD zoning map.

Mr. Bear stated that he is familiar with the land as very soft, and said he was surprised there are no wetlands. Ms. MacNab asked how many feet the proposed line is from the water area, and Mr. Grady replied that it is eighty feet. Ms. MacNab asked if the existing sports court is within the proposed WPOD, and Mr. Grady responded that he was not sure.

Mr. Glennon asked what is the distinction between the WPOD and wetlands jurisdiction, and Atty. Galvin responded that there was no wetlands jurisdiction when the WPOD was put into place.

Ms. MacNab opened the hearing to public input. Ms. Sharon Fearey of 1043 Tremont Street, an abutter, stated that she is trying to understand the amendment and how the process works. Ms. MacNab responded that the public hearing is the public's opportunity to find out more and state their position on the project so that residents can make an informed vote at Town Meeting. The Planning Board makes a recommendation to Town Meeting, but it is ultimately up to Town Meeting voters to decide.

Ms. Fearey asked if the amendment passes at Town Meeting, could the property eventually be divided into a number of lots through a Chapter 40B permit, and Ms. MacNab replied that it could. Atty. Galvin stated that it is not the owners' intent to file a Chapter 40B, noting that 40B permits waive WPOD requirements. Ms. MacNab clarified that the purpose of this public hearing is only to consider a proposed amendment to remove the WPOD from a portion of the property.

Ms. Fearey asked if the WPOD zoning had been an impediment in the previous subdivision application, and Mr. Cutler replied that it had.

Mr. Cutler asked if the Planning Board could make a recommendation regarding a property which is under litigation, and Mr. Broadrick responded that the Board could decide not to make a recommendation. Mr. Broadrick suggested that the Board wait until after the amendment goes before the Conservation Commission on October 18, 2011 before deliberating its recommendation.

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**MOTION:** Mr. Bear made a motion, and Mr. Cutler provided a second, to continue the public hearing regarding a proposed zoning amendment by landowner petition for Special Town Meeting 2011 to remove the Wetlands Protection Overlay District from a portion of a property at 1053 Tremont Street, to October 24, 2011 at 7:30 PM.

**VOTE:** The motion passed unanimously 5-0.

### **ZBA REFERRAL: 18 MULLINS AVENUE / PRINCE**

Board members reviewed this special permit application to construct an addition to an existing dwelling within the 25-foot setback on a pre-existing nonconforming lot, increasing the building coverage to greater than fifteen percent but within the "Three Percent Rule."

Mr. Glennon expressed his position that a variance may be required because of a continued setback encroachment of the proposed addition. Mr. Bear agreed, noting that the existing dwelling has a side setback of 3.9 feet. To extend the dwelling at a continued violation of side setbacks is noncompliant. Ms. MacNab stated that she is not sure a variance would be required because it is a dense neighborhood already with dwellings taking up most of each lot. Small houses on small lots are preferable to large houses on small lots.

**MOTION:** Mr. Glennon made a motion, and Mr. Bear provided a second, regarding a special permit application for construction of an addition to an existing dwelling at 18 Mullins Avenue, to defer judgment to the Zoning Board of Appeals regarding lot coverage. However, the Board notes that a variance permit may be required in order to continue the noncompliance with setback requirements as proposed in the special permit.

**DISCUSSION:** Mr. Wadsworth noted that the applicants should either make their proposed addition conform to current Zoning Bylaws or else file for a variance.

**VOTE:** The motion passed unanimously, 5-0.

### **OTHER BUSINESS**

Conservation Commission: Board members asked staff to schedule a time for Board members to speak with the Conservation Commission at its next regularly scheduled meeting, October 18, 2011, for the purpose of understanding the Commission's position on Wetlands Protection Overlay District amendment.

### **ADJOURNMENT**

The Planning Board meeting adjourned at 9:07 PM. The next Planning Board meeting will take place on Monday, October 17, 2011 at 7:00 PM at Town Hall, Small Conference Room, lower level.

### **MATERIALS REVIEWED**

#### WPOD REZONE: ONE CAPE VERDE TERRACE

- Landowner petition for WPOD rezone of One Cape Verde Terrace submitted to the Board of Selectmen on 09/15/11 (*revision to article submitted 07/18/11*) and proposed map submitted 07/18/11
- Public hearing notice
- Letter from S. Pons dated 09/22/11 re: abutter change of position to no opposition to rezone
- Supporting materials submitted by petitioner on 09/23/11
- Letter from J. Grady dated 06/20/11 re: Conservation Commission recommends WPOD map amendment

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- Original Definitive Subdivision plan approved by PB 11/08/1999
- Wetlands and Watershed Protection District Map dated 03/04/1971 re: Cape Verde Terrace (lot drawn in by staff)
- Assessor's property card and Pictometry orthophoto
- Memo from R.S. Troy dated 03/08/10 (*sic*) re: Spot zoning case law (*should be 2011*)
- "Wetland Protection Zoning" Clipper article dated 03/25/1976
- Letter from L. Bennett dated 08/15/1975 re: intent of WPOD map
- Letter from L. Bennett dated 01/03/1973 re: PB direction on WPOD change requests
- *Handbook of Massachusetts Land Use and Planning Law* (Bobrowski) "Spot Zoning" chapter
- Historical USGS Topographic Overlay Plan dated 09/30/11 (*submitted by petitioners' representative at public hearing*)

WPOD REZONE: 1053 TREMONT STREET

- Cover letter from R. Galvin dated 09/15/11 re: Landowner petition submission with proposed map
- Public hearing notice
- GIS map, Assessor's property card, Pictometry orthophoto
- "On-Site Soil Investigations Report dated 08/20/09 (*submitted by petitioners' representative at public hearing*)

ZBA REFERRAL: 18 MULLINS AVENUE / PRINCE

- ZBA materials submitted 09/21/11
- GIS map, Assessor's property card, Pictometry orthophoto

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