

Approved 03/24/2014



# Town of Duxbury Massachusetts Planning Board

TOWN CLERK

14 MAR 26 AM 10:28

DUXBURY, MASS.

## Minutes 02/10/14

The Planning Board met on Monday, February 10, 2014 at 7:00 PM at the Duxbury Senior Center, Ellison Room, 10 Mayflower Street.

Present: George Wadsworth, Chairman; Brian Glennon, Vice Chairman; Cynthia Ladd Fiorini, Clerk; Scott Casagrande, and David Uitti.

Absent: John Bear and Jennifer Turcotte.

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

Mr. Wadsworth called the meeting to order at 7:01 PM.

### OPEN FORUM

Duxbury Estates, off Summer Street: Mr. Wadsworth reported that he and Mr. Broadrick had met with the applicant, Mr. Thomas Giacchetto and his loan officer. He stated that they had a very interesting conversation that he would address under the agenda topic.

### ANR PLAN OF LAND: 34 SUNSET, 630 WASHINGTON STREET, 620 WASHINGTON STREET / LAWSON

Present for the discussion were the applicants, Mr. Ned Lawson of 34 Sunset Road and Mr. Samuel Lawson of 630 Washington Street. Mr. Broadrick provided board members with a plan with colored lot lines in order to show what the resulting lots would look like. Mr. Wadsworth asked Mr. Ned Lawson to explain the ANR.

Mr. Ned Lawson stated that they are carving up property owned by the family. A portion of 34 Sunset Road and a portion of 630 Washington Street will be added to the property at 620 Washington Street. Also, a portion of 620 Washington Street will be added to 630 Washington Street, which will add nearly 58 feet of frontage to that lot which only has 60 feet of frontage currently. Mr. Lawson explained that the lots will stay roughly the same size, within 10 square feet of difference.

Mr. Wadsworth noted that it is important to note that there is no change in frontage. 620 Washington Street will keep 234.77 feet of frontage. Mr. Glennon noted that while the frontage of 630 Washington Street is improved, it still does not meet the 200 foot requirement.

Mr. Glennon noted an error on the plan because the owner listed on the lot of 620 Washington Street is "Bluefish River Realty Trust," and a note on the plan references "Blue Fish Realty Trust." Mr. Lawson agreed to ask the surveyor to amend the plan to make sure the owner name is consistent.

878 Tremont Street, Duxbury, MA 02332; Telephone: 781-934-1100 x 5476; Fax: 781-934-1137

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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.

Mr. Glennon also questioned if the land swap can be similar but not equal. Mr. Broadrick responded that the land swap does not need to be exact because each lot already has ample lot size of at least 40,000 square feet.

Mr. Glennon pointed out that it is difficult to determine from looking at the plan which parcel is to be conveyed to which lot. Mr. Broadrick offered to ask the applicants to submit an 81X plan at a later date showing how the lots will be laid out. Mr. Glennon asked if the applicants could change the current plan to add tie lines in four places to denote the changes.

Mr. Broadrick noted correcting the property owner and adding tie lines are simple corrections, and the board could vote to endorse the plan pending a corrected mylar to be submitted to the Planning Office.

**MOTION:** Mr. Glennon made a motion, and Ms. Ladd Fiorini provided a second, to approve a plan entitled, "Plan of Land in Duxbury, Mass. Prepared for Tidewater Realty Trust, Blue Fish River Realty Trust & Blue Heron Realty Trust" scale 1" = 50' prepared by Webby Engineering Associates, Inc., 180 County Road, Plympton, MA 02367, and stamped and signed by Joseph E. Webby, RPLS on January 17, 2014, as not requiring approval under Subdivision Control Law, subject to the correction of names of owners and the addition of tie lines to connect parcels.

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

Board members agreed to come to the Planning Office once the corrected plans are available to sign the mylar and two paper copies of the ANR plan.

#### **DISCUSSION OF CONCEPT PLAN: MYLES VIEW DRIVE / PETERSON**

Present for the discussion was the property owner, Mr. Stephen Peterson of 80 Myles View Drive, and his representative, Mr. Rick Grady of Grady Consulting in Kingston. Mr. Broadrick explained that Mr. Peterson would like to subdivide his property, which would require extending the public way. Mr. Wadsworth asked Mr. Grady to present the concept plan which board members had not yet seen.

Mr. Grady stated that Mr. Peterson is interested in determining the feasibility of dividing his property at 80 Myles View Drive that has just under three acres of land adjacent to the Myles Standish Monument. The existing dwelling is at the south end of the lot and in the middle there are wetlands that have not yet been delineated through the Conservation Commission. Mr. Grady stated that Mr. Peterson recently purchased an adjacent property to the east that would be considered part of the new four-lot subdivision.

The property is at the end of Myles View Drive which is a cul-de-sac off of Standish Street, and the area cuts through a property known as Phelps Lane. The part of Phelps Lane that abuts Mr. Peterson's land is a paper road and another part is a deeded right-of-way that neighbors use regularly. Mr. Grady has been researching to find evidence that Phelps Lane existed prior to the adoption of Subdivision Control Law in the Town of Duxbury.

Mr. Grady described the lots proposed on a concept plan that he displayed. Current regulations require a 50-foot right-of-way and a 150-foot cul de sac. The question Mr. Grady raised is whether the Planning Board would rather leave the cul-de-sac in place and extend it, or remove the cul-de-sac and construct a minor street within the 50-foot right-of-way.

Mr. Broadrick noted that only Annual Town Meeting can modify an existing public way, or in some interpretations the Board of Selectmen can approve modifications to a public way. He recommended that the Department of Public Works Director, Mr. Peter Buttkus, should be consulted first for feedback on how the



roadway would be configured. Mr. Broadrick noted that there is a precedent of extending a public way on Island Creek Road, where a cul-de-sac was removed and a public way was extended.

Mr. Glennon asked if the cul-de-sac would be required for frontage purposes, and Mr. Grady said it would not. Mr. Casagrande asked if the access could tie in from Crescent Street, and Mr. Grady responded that it is not wide enough to provide emergency access.

Mr. Wadsworth advised Mr. Grady to consult with Mr. Buttkus. Mr. Grady thanked the Planning Board, noting that their advice was consistent with the advice that Mr. Broadrick had given them.

### **ZBA REFERRAL, SPECIAL PERMIT AMENDMENT (CONTINUED): DUXBURY ESTATES, OFF SUMMER STREET / GIACCHETTO**

Present for the discussion were the applicant, Mr. Thomas Giacchetto, and his representative, Atty. Robert W. Galvin. Also present were approximately 16 members of the public. Mr. Wadsworth reported that he and Mr. Broadrick had met with Mr. Thomas Giacchetto and his loan officer, Mr. Robert Corcoran of Rockland Trust. Mr. Wadsworth reported that the original bank, Commerce Bank, had a set-aside in place for the inclusionary payments. The new bank, Rockland Trust, had not made such arrangements and there was no set-aside.

Mr. Broadrick explained that the total inclusionary fee due was \$1,350,000.00 and the Town of Duxbury and the applicant signed an Inclusionary Payment Agreement on October 1, 2007 with an installment schedule that is currently in place. The applicants have paid \$135,000.00 to date and have received 21 building permits. The next installment of \$270,000.00 is now due before the 22<sup>nd</sup> building permit can be issued. This payment would allow the applicants 11 additional building permits through the 32<sup>nd</sup> building permit. The applicants have stated that they cannot pay the \$270,000.00 due and have requested a modification to their special permit to change the inclusionary fee schedule.

Board members reviewed a proposed Inclusionary Payment Schedule submitted by the applicants on January 24, 2014, showing the \$135,000.00 currently paid and then an additional \$135,000.00 to be paid upon the sale of each unit from the 31<sup>st</sup> unit through the 39<sup>th</sup> unit.

Mr. Wadsworth stated that he had advised Mr. Corcoran that the Giacchetto LLC needs a 'money man' to provide the \$270,000.00 inclusionary installment payment currently due; if this happened there would be no special permit modification needed and the developers would be able to obtain enough building permits to pay off their site loan. Mr. Wadsworth reported that he asked the bank if they could front the funding, and Mr. Corcoran had agreed to take the question back to the loan committee. Mr. Wadsworth stated that the bank created a situation where they wanted to minimize risk at the expense of the Town of Duxbury. Putting the Town of Duxbury as collection agent is risky and potentially expensive. Mr. Wadsworth stated that his goal is to put as little risk as possible onto the Town of Duxbury while staying in compliance with Zoning Bylaws as much as possible.

Mr. Broadrick stated that he had spoken with Atty. Kevin Batt of Anderson & Kreiger, Town Counsel, and Atty. Batt had confirmed that the inclusionary payments must be tied to building permits according to Zoning Bylaws and cannot be tied to sales as the applicants were requesting. Atty. Batt had said that the only room to negotiate is balancing the payments from now until the 80% completion rate (36<sup>th</sup> unit) as long as the entire inclusionary fee of \$1.35 million is paid off by that time. The installment payments can be equal or not equal as long as the fee is paid off by the 36<sup>th</sup> permit out of the 44 units approved with the original permit.



Atty. Galvin stated that he had also spoken with Atty. Batt today who confirmed that the inclusionary fee schedule could be modified without a variance only upon mutual agreement between the applicant and the Planning Board. Atty. Galvin stated that he has suggested a payment plan of \$135,000 by the 31<sup>st</sup> permit, then another \$243,000 for each building permit from the 32<sup>nd</sup> through the 36<sup>th</sup> permit. Atty. Galvin stated that the applicants are willing to provide a surety if required. Mr. Broadrick confirmed that it is up to the applicant to propose a surety and that inclusionary fees cannot be tied to sales.

Mr. Glennon stated that the original schedule was not calculated according to Zoning Bylaws so the Planning Board is now trying to 'put a square peg in a round hole.' He stated that he would like to conclude negotiations tonight with the goal of finding a payment schedule that would be paid off by the 80 percent completion rate to comply with the Zoning Bylaws. He stated that he is still interested in the discussion regarding a surety.

Mr. Thomas Giacchetto stated that the bank may be willing to set aside \$25,000 per sale over the next ten units and that funding would go toward the \$270,000 due, but this set aside has not yet been approved by the bank.

Mr. Casagrande suggested that the Planning Board consider allowing the next 10 building permits without an inclusionary payment (22<sup>nd</sup> through 30<sup>th</sup> building permit). Before the 31<sup>st</sup> building permit the applicants would need to pay a \$250,000.00 inclusionary fee, and then from the 32<sup>nd</sup> through 36<sup>th</sup> building permit, the applicants would pay an additional \$193,000.00 per building permit. That way the remaining \$1,215,000.00 inclusionary fee total due would be paid by the 80 percent threshold.

Mr. Uitti expressed concern about backloading the payments to the 31<sup>st</sup> building permit, especially if the LLC is abandoned at some point. Mr. Thomas Giacchetto stated that the current schedule is already backloaded, and Mr. Casagrande's proposal just postpones payments from the 22<sup>nd</sup> building permit (where they are now) to the 30<sup>th</sup> building permit and would also pay off all inclusionary fees earlier than the original schedule.

Mr. Wadsworth stated that he would need to see the applicants' \$25,000.00 set-aside payments in order to feel comfortable with granting that many building permits before a payment is due. Mr. Giacchetto emphasized that the bank still needs to approve the set-aside payments. He noted that the old bank, Commerce Bank, had set up an escrow account for town fees, interest payments and taxes, but Rockland Bank did not require an escrow account. Mr. Glennon pointed out that Giacchetto LLC could have set up their own escrow account for the same purpose. He asked if the LLC has any cash flow, and Mr. Thomas Giacchetto replied that the LLC has put \$900,000.00 into the project and they have to build all 44 units in order to see a profit.

Mr. Uitti stated that the payment schedule proposed by Mr. Casagrande would have the benefit of paying off the inclusionary fees by the 36<sup>th</sup> building permit, which is the 80% mark required by Zoning Bylaws. The original schedule paid off the fees by the 39<sup>th</sup> building permit. He noted that there is still added risk in delaying inclusionary fee payments until the 31<sup>st</sup> building permit and there is no certainty that the applicants will not walk away.

Ms. Ladd Fiorini asked if the applicant would be agreeable to Mr. Casagrande's proposal, and Atty. Galvin replied that the applicants are prepared to find out if it would work. Ms. Ladd Fiorini asked if the prolonged process for the loan payoff would affect the applicants' ability to pay the \$193,000.00 that would be due for each building permit from the 32<sup>nd</sup> building permit to the 36<sup>th</sup> building permit. Mr. Thomas Giacchetto replied that although it will take longer for the site loan to get paid off to the bank, they could handle the payments due to the Town of Duxbury.

Atty. Galvin agreed to provide the following documents to be reviewed by Town Counsel:

- Amended Inclusionary Payment Schedule as proposed by Mr. Casagrande
- Promissory note

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- Mortgage
- Form for \$25,000 set-aside payments
- Partial lot release forms.

Mr. Frank Daly of 47 Carriage Lane stated that it 'sends shivers to residents' to consider that the property might be foreclosed, adding that they would like to see the inclusionary payments resolved. Mr. Broadrick responded that in event of foreclosure any future owner would need to construct according to the existing special permit. Mr. Glennon cautioned that a future owner has a right to request a modification of a special permit.

Ms. Georgeann Blatterman of 45 Carriage Lane asked if the Town of Duxbury would take over Duxbury Estates common areas if the property is foreclosed, and Mr. Uitti responded that the common area is not part of the master deed yet.

Mr. James Sullivan of 13 Carriage Lane stated that the current residents would like to be assured that a new developer would need to adhere to the special permit if the property foreclosed. He stated that he would like to review the documents that Atty. Galvin is submitting before they are finalized. Mr. Wadsworth advised Mr. Sullivan that those documents would be part of the public record. Mr. Thomas Giacchetto stated that although he understands the residents' concerns, foreclosure is unlikely.

Mr. Daly stated that he would not like to see the town settle this payment schedule without a surety. Mr. Wadsworth noted that the applicants would not be able to sell any units without the lot release which the Town would sign.

Mr. Wadsworth stated that it important to see a letter from Rockland Trust confirming the \$25,000.00 set-aside amount. Mr. Thomas Giacchetto stated that he has only had a verbal conversation with Mr. Robert Corcoran of Rockland Trust, so the set-aside is subject to approval.

Mr. Wadsworth advised the public that a recommendation will be submitted from the Planning Board to the Zoning Board of Appeals (ZBA) because the ZBA will approve the special permit modification.

**MOTION:** Mr. Casagrande made a motion, and Ms. Ladd Fiorini provided a second, to recommend that the Zoning Board Appeals APPROVE a Modified Inclusionary Payment Schedule for Duxbury Estates, off Summer Street / Giacchetto LLC to include the following future payments:

- |                                    |           |
|------------------------------------|-----------|
| ▪ 31 <sup>st</sup> building permit | \$250,000 |
| ▪ 32 <sup>nd</sup> building permit | \$193,000 |
| ▪ 33 <sup>rd</sup> building permit | \$193,000 |
| ▪ 34 <sup>th</sup> building permit | \$193,000 |
| ▪ 35 <sup>th</sup> building permit | \$193,000 |
| ▪ 36 <sup>th</sup> building permit | \$193,000 |

This modified schedule would replace the original Inclusionary Payment Schedule dated October 1, 2007, and would be subject to the following documents to be submitted by the applicant to the Planning Board, and would also be subject to review and amendment of each of these documents to the satisfaction of the Duxbury Town Counsel prior to issuance of a modification permit by the Zoning Board of Appeals:

- Promissory note from Giacchetto Duxbury LLC to the Town of Duxbury in the amount of the Inclusionary Payment Schedule current balance due of \$1,215,000.00.

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- Letter from Rockland Trust confirming the set-aside amount of \$25,000.00 per building permit to be paid to the Town of Duxbury upon the sale of each unit beginning with the 21<sup>st</sup> unit through the 30<sup>th</sup> unit.
- Unit Release Request Form for use prior to conveyance of units beginning with the sale of the 21<sup>st</sup> unit through the 30<sup>th</sup> unit.
- Second mortgage to guarantee inclusionary payment funds for the Town of Duxbury in case of foreclosure of the property.

**DISCUSSION:** Ms. Blatterman and Mr. Sullivan asked questions pertaining to how the inclusionary payment schedule would work.

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

### **ZBA REFERRAL, MODIFICATION OF COMPREHENSIVE PERMIT: ISLAND CREEK NORTH**

Board members reviewed this modification request for the Island Creek 40B development to reconfigure Island Creek North. Because materials had been distributed at the beginning of tonight's meeting, the Planning Board deferred discussion until the next meeting. Mr. Glennon stated that he would feel more comfortable reading the application materials before making a recommendation.

### **ZBA REFERRAL, APPEAL OF BUILDING INSPECTOR'S DETERMINATION: 500 FRANKLIN STREET (DUXBURY KENNEL IN THE PINES) / WALSH & JANOUSEK**

### **ZBA REFERRAL, APPEAL OF BUILDING INSPECTOR'S DETERMINATION: 500 FRANKLIN STREET (DUXBURY KENNEL IN THE PINES) / OLEKSIK**

Mr. Wadsworth asked board members to address both Zoning Board of Appeals (ZBA) referrals concurrently since they involve the same property. Present for the discussion were the applicants in one of the ZBA referrals: Ms. Pamela Webster-Walsh and Mr. Fred Walsh of 517 Franklin Street.

Mr. Broadrick explained that in September 2013 the Zoning Board of Appeals (ZBA) overturned the Zoning Enforcement Officer's (ZEO) Notice of Violation at a kennel/pet day care facility, essentially approving the current use. Two abutters requested further zoning enforcement in a letter to the Zoning Enforcement Officer dated October 9, 2013. The ZEO replied in a letter dated December 30, 2013 that he did not find violations that the abutters complained about; however, he did find other zoning violations. The abutters are now appealing the ZEO's determinations in his letter of December 30, 2013. The property owner is also appealing the ZEO letter dated December 30, 2013 because they do not agree with either the abutters' concerns or the ZEO enforcement request for the additional violations cited.

Mr. Casagrande stated that after reviewing the ZBA materials, he is leaning toward deferring judgment because these referrals involve a variance that was originally granted to allow the kennel and it is difficult to apply the Zoning Bylaw in variance cases. Mr. Glennon agreed, adding that he would appreciate hearing from those interested parties present.

Ms. Webster-Walsh stated that she is representing Mr. Janousek also tonight. She stated that this is the third time this property has been before the Planning Board. She stated that the main issue is noise, and that issue was not addressed in the most recent special permit. She stated that they filed an appeal in order to request that



the original variance to be upheld. She stated that she has reviewed over 50 years of permits and there had never been a problem until the past three years and the noise is getting louder.

Mr. Wadsworth noted that the Planning Board has been a proponent of not allowing use variances, under the theory that Annual Town Meeting should approve them instead. He noted that most towns do not allow use variances. A warrant article to prohibit use variances did not achieve a two-thirds vote at a recent Town Meeting because various attorneys spoke against it.

Ms. Webster-Walsh stated that the property has an absentee landlord who is running a commercial business with no one living there. She stated that there are several buildings on the property: a dwelling, a tool shed, and a chicken coop that became a house.

Mr. Casagrande noted that there appears to be a dwelling on the front of the lot, and Mr. Cesar Guevara of 492 Franklin Street stated that his house which is set in front of 500 Franklin Street is on a separate lot, although from the street it may appear like it is part of the kennel. Mr. Guevara stated that new kennels were built only five feet from his property line.

Ms. Webster-Walsh stated that the variance specifies that buildings should be located 400 feet from the road and 250 feet from the lot line. In 1985 the land was subdivided and the setbacks no longer complied. Mr. Broadrick noted that subdividing land does not negate a variance because variances run with the land until steps are taken to change or reverse the variance.

Ms. Webster-Walsh stated that the current owners brought the facility up to full function adding three large playfields. She stated that the business has expanded and therefore she believes that is a variance. She stated that the facility is no longer owner-occupied because the owner lives in Scituate.

Mr. Casagrande noted that the property owners do have rights granted to them through the original variance. Ms. Webster-Walsh stated that at the time of the variance the cottage was a chicken coop. She stated that it appears that the business can be expanded exponentially because of the variance. There are play yards now where there never were any.

Mr. Fred Walsh asked if there is a noise ordinance in the town, and Mr. Broadrick responded that there is a general bylaw for nuisance. Mr. Walsh stated that during the hours of 7:00 AM and 10:00 PM the police cannot enforce noise complaints. Ms. Webster-Walsh added that only the ZEO can enforce during those hours.

Mr. Casagrande asked if this might be a Board of Health issue, and Mr. Broadrick responded that there are no animal health regulations in the Town of Duxbury.

Mr. Uitti pointed out that there are certain Zoning Bylaws that may apply to the abutters' concerns. For example ZBL Section 401.1 lists "offensive noise or vibration" as a prohibited use. Mr. Wadsworth noted that Zoning Bylaws are available on the town web site.

Mr. Wadsworth noted that there should not be more than one dwelling on the lot, and if that is the case one should be removed. He also noted that a portion of the property is in the Aquifer Protection Overlay District, so there may be water issues.

**MOTION:** Ms. Ladd Fiorini made a motion, and Mr. Casagrande provided a second, to defer judgment to the Zoning Board of Appeals regarding Special Permit Case #2014-0008, 500 Franklin Street / Walsh & Janousek; and also to defer judgment regarding Special Permit Case #2014-0009, 500 Franklin Street / Oleksiak (Duxbury Kennel in the Pines).

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

## OTHER BUSINESS

### Meeting Minutes:

**MOTION:** Ms. Ladd Fiorini made a motion, and Mr. Casagrande provided a second, to approve meeting minutes of January 13, 2014 as amended.

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

## ADJOURNMENT

The Planning Board meeting adjourned at 9:55 PM. The next Planning Board meeting will take place on Monday, February 24, 2014 at 7:00 PM at the Duxbury Town Hall.

## MATERIALS REVIEWED

### ANR Plan of Land: 34 Sunset, 630 Washington Street, 620 Washington Street / Lawson

- ANR application and plan submitted on 01/17/14
- Vision GIS map, aerial photo, Assessor's property card, and Pictometry orthophoto

### Discussion of Concept Plan: Myles View Drive / Peterson

- Vision GIS map, aerial photo, Assessor's property card, and Pictometry orthophoto
- Myles View Drive original subdivision plan recorded in 1957

### ZBA Referral, Special Permit Amendment (Continued): Duxbury Estates, off Summer Street / Giacchetto

- Inclusionary Payment Scheduled signed on 10/01/07 and worksheet
- Email with proposed Inclusionary Fee Schedule submitted by T. Giacchetto on 01/24/14
- Letter from R. Corcoran of Rockland Trust dated 01/29/14

### Review of Proposed Comprehensive Permit Amendment: Island Creek Village / Beacon Communities

- ZBA referral materials distributed at meeting
- "About Beacon Communities" from web site

### ZBA Referral, Appeal of Building Inspector's Determination: 500 Franklin Street (Duxbury Kennel in the Pines) / Walsh & Janousek

- ZBA application and materials
- Vision GIS map, aerial photo, Assessor's property card, and Pictometry orthophoto
- ZBA decision dated 09/26/13

### ZBA Referral, Appeal of Building Inspector's Determination: 500 Franklin Street (Duxbury Kennel in the Pines) / Oleksiak

- ZBA application and materials

### Other Business

- Meeting minutes of 01/13/14
- Construction Cost Estimates for January 2014

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