

**Harvard Planning Board  
Meeting Minutes  
February 26, 2007  
Approved: April 2, 2007**

Chairman Mary Essary called the meeting to order at 7:43pm in the Hapgood Room of the Harvard Public Library.

**Members Present:** Mary Essary, Barbara Brady, Kara Minar and Joseph Sudol

**Others Present:** Bonnie Chandler (Harvard Post), Paul Willard, Maud Ayson (Fruitlands), Karen Zarkis (Harvard Historical Society), Stephanie Upton (Fruitlands), Paige O'Brien (Fruitlands), Chris Tracey, Donald Green, Pam Durrant, Jonathan Williams, Marcia Croyle and Robert Oliva (Hamwey Eng., Inc.)

**Minutes**

Sudol made a motion to accept the minutes of February 5, 2007 as amended. Brady seconded the motion. The vote was unanimous in favor of the motion.

**Affordable Accessory Apartment Tax Exemption Home Rule Petition for Annual Town Meeting**

Brady informed the members she had circulated update information late today in regards to the Affordable Accessory Apartment Tax Exemption Home Rule Petition for Annual Town Meeting. Brady has spoken with the Housing Partnership and the Town Administrator, who are in agreement that Harvard, should follow the Providence Town version for the certification of accessory apartments. Essary asked what if it is a rental that is not an accessory apartment. Brady thinks they have decided not to open a can of worms and leave it as accessory only. Brady thinks the worry is now someone will fill their house with apartments in order to avoid paying taxes on those apartments.

Essary stated that her concern was in relation to the goal of having all existing affordable housing in town be registered, not just accessory apartments, but all rentals. She noted that any new multi-family conversions would require a special permit Brady stated the Department of Housing and Community Development (DHCD) would retroactively certify an existing apartment as long as the owners signed a deed restriction maintaining the apartment as affordable. Essary stated there would be no incentive for a multifamily unit to come forward. Brady stated they would not want to make multifamily dwellings completely tax free. Brady explained as written now the owner does not pay property taxes on the square footage of the accessory.

Essary asked if the exemption were only on the building portion, noting that the Assessors value the buildings and the land separately. Brady said that the way it is written, it exempts a percentage of the total that reflects the percentage of the buildings with the restriction. The board discussed this question, since with a single unit rental or a multi-family rentals, the same formula would lead to no taxes due at all.

Essary has spoken to the Assessor in the past; she has stated a deed restriction would lower the value of the house. Brady does not believe it is this type of restriction the Assessor is referring to, since this type of deed restriction would run with owner and not the property. Brady thinks we should be able to recognize all affordable units within Town, and suggested that it may be wiser to have separate targeted programs for different types, one geared towards multifamily or stand-alone rentals and one toward accessory. Brady does not think the formula for determining the tax exemption should be the same as for an accessory apartment. Essary is not sure how the Home Rule Petition works, can you put another one in later. Brady stated what the Home Rule Petition will be one the warrant this year and how it could be submitted later on.

Brady stated that the provisions might be different for accessory structures than for rental units as DHCD is sensitive to the fact that an accessory structure coexists with a principal residence. Essary noted that as the new bylaw allows for stand-alone structures, it may be that some existing rentals that do not exist on a separate lot would in fact be covered.

Brady requested Mark Lanza, Town Counsel, review the document sent today.

**Proposed Amendments to the Protective Bylaw, Chapter 125 Hearing.** Opened at 8:00pm

**Adjournment**

Essary made a motion to adjourn the meeting at 10:52pm. Brady seconded the motion. The vote was unanimously in favor of the motion.

Signed: \_\_\_\_\_  
Barbara Brady, Clerk (in McGuire Minar absence)

## Harvard Planning Board

### Proposed Amendments to the Protective Bylaw, Chapter 125 Meeting Minutes

February 26, 2007

The hearing was opened at 8:00pm by Chair Mary Essary in the Hapgood Room of the public Library **125-31D (2) and §125-31B (3)**

At the previous hearing, comments were received by Pablo Carbonell and Rob Oliva; Sudol had sent around a potential update. Sudol noted there is a section about driveways within the backland lots section of the Bylaw on lot size standards, §125-29F (3) (b). Essary is not sure this information should be deleted from the backland lots; because this whole section has some cross-referencing that have led to questions in the past. Essary would prefer to reference the changes in this section rather than deleting it. Sudol stated in that section you are going to allow a building permit before the driveway is completed. Essary asked if the only way it could be a backland lot if it had a longer driveway, in other words if you did not have long driveway you would have a hammerhead lot and not a backland lot; Oliva agreed. Oliva suggested that it could refer to the Site Standards, §125-39. Essary suggested inserting a reference to §125-31D (2). Essary does not want to delete something when we do not have time to review its implications completely.

Comments submitted by Sudol do not include Carbonell's comments, but do include Oliva's. Oliva had minor changes in wording. Oliva stated historically what the driveway inspector wants to see is access for emergency vehicles to the location of the house, and that the location is consistent with the site plan or special permit. On a long driveway, it maybe a burden to finish the construction of the driveway to this level prior to the house construction. Most often they will finish it prior to getting the occupancy permit. Essary suggested deleting utilities from the wording and change drainage and erosion controls to "as required". Sudol stated changes to §125-31D (2) includes utilities because in some cases they could be under a portion of a driveway. It was recommended to change to "for construction purposes". Essary stated we need to make sure it is clear that an inspection of the driveway needs to part of the building permit application.

Oliva stated that for construction purposes, a driveway may not necessarily be built up to where drainage and other conditions are required, for example swales and culverts. He agreed with Pablo's previous comments requiring essentially a finished driveway before the building permit is issued could be very difficult on smaller companies because there would be a much larger up front cost.

Regarding what is needed for an occupancy permit, Essary asked Oliva if you pave the driveway all the way, can it stand up to construction vehicles. Oliva stated it is his belief that if you can wait to build the driveway in its entirety you should do so. He said that even with the finish coat, construction vehicles can damage the driveway, particularly the edges. Oliva stated what required in the past by the driveway inspector, was up to and including the gravel base. Chris Tracey asked what happens when the last house gets stuck completing the driveway, what mechanism protects this person? Oliva stated the thing you have is someone always owns all of those lots. However, if the last house is not built, then the owners of the other houses are left with the responsibility; you want to prevent a situation where the driveway is never finished.

Essary asked if what Tracey would suggest is there be a bond tied into completing the driveway. Tracey stated you may want to ask Town Counsel about that. Lanza stated you could require a bond in the Special Permit conditions, but you could also bring it to the Zoning Enforcement Officer to enforce the Special Permit. He stated that because the possibility of a bond had not been advertised, it could not be included this year, but could be part of a Special Permit condition; it would be better if the possibility were specifically mentioned in the bylaw. You may not want a performance bond, but

rather an escrow account. There were no other comments from the public. The chair noted that the board should remember this possibility if faced with such a permit in the coming year; Sudol noted that this is another example of why the applications need to be reworked.

There were no comments on increasing the number of hammerhead or backland lots on a common driveway. Essary noted that a reason was being inserted and that as suggested at a previous meeting, we should include “and encourage” after permit.

### **Museum Bylaw**

Essary circulated a revision of the proposal after the last meeting. She attempted to break up the provision into more pieces to make it easier to read and understand. Essary has had a conversation with the Police Chief and understands better the pouring laws and that there is no difference between serving (pouring) and selling; she would change her revision to keep the statement “serve or”. Lanza stated there is a difference between serving invited guests and serving the general public. Essary noted that sometimes museums have openings to which the general public is invited, and they may serve wine and cheese, for example. Essary stated one thing she did not realize it that there is a difference between bringing the alcohol and pouring it and giving alcohol out at a function. Her understanding from talking with the Chief was that, once Harvard is no longer a dry town, one-day licenses can be issued for special functions. Lanza disagreed, stating that the particular license that we are allowing, with a minimum of 100 seats, does not allow for this possibility. In any case, with respect to the bylaw, the 500 foot set back only applies to a dedicated onsite facility. Lanza further clarified the reference to “any such” in Section H (e) refers to Section H (c); the board felt that this should be stated, so that there can be no other possible interpretation.

Essary added “Town Uses” to section D. Lanza suggested the addition of “eating establishment before “on-site” in Section H (d) to make the wording consistent; the board agreed. Brady asked if there were any other towns that have a museum bylaw. Lanza stated not like this.

Essary stated after the last meeting the members reviewed the ZBA’s Fruitland decision. Essary stated that as she reads this decision, this new bylaw essentially codifies portions of that Special Permit. There are conditions that would be more appropriate for the licenses that would be required s others such as the Board of Selectmen (BOS).

Essary did have some questions about the findings of the Special Permit that Fruitlands is a not an educational use. Essary asked Lanza where the language of this finding came from. Lanza stated a court case from 1880’s which is still good law, which was in fact cited in the recent Metro West YMCA land court case.

Jonathan Williams, speaking for Fruitlands, thinks the ZBA ruling on education is the point Fruitlands would like resolution on. He does not think there were any museums in 1880, and so this citation isn’t a good one to use. Lanza stated the issue at the last hearing was the ruling and what would happen if the bylaw is passed. If passed it would allow, as a matter of right, the two museums that exist in Town now, which currently exist in a limbo with regard to their zoning. This would give them legitimacy.

Tracey stated he want to be clear that he is not here as a member of the ZBA, but as a resident of the Town. Tracey stated the Bylaw does not resolve the issue of a museum claiming they are exempt from zoning as an educational use. Essary asked Lanza if we defined museums as institutional use we are exempting them from Special Permit requirements. Lanza stated yes, but Site Plan Approval would be needed as well as any other licenses they may need from any other board, including victolor’s license for food, a liquor license to serve alcohol, and an entertainment license for any entertainment functions.

Brady asked if this bylaw would not accept a museum as an exempt use, but it would be allowing it as a matter of right. Lanza stated yes.

Essary asked Lanza if you and the attorney of Fruitlands both agree that the 1880 case is the one that is applicable, then what is the appeal about? Lanza stated that Fruitlands feels that it meets this definition, therefore it is exempt from zoning, and ZBA and I say it is not exempt.

Essary asked about the court case that Minar cited, where the SJC overruled a lower court, and determined that “education” need not be the only, or even the main, activity of the organization. Lanza stated that that case had other factors that were under discussion, which made that ruling non-relevant. When asked, he stated that the YMCA land court case ruling was that the YMCA was not an educational use; this is a lower court ruling (Worcester).

Sudol asked if the legal case would still go forward if the bylaw passes. It is Lanza understands that the case would be moot if the bylaw is passed. Williams stated throughout the ZBA process Fruitlands presented information proving they are an educational use and the ZBA presented nothing, but just determined we were not educational. Williams sees the bylaw as a compromise.

Paul Willard asked in terms of what Fruitlands would be allowed to do, what is the difference between being an educational institution and this bylaw. Lanza stated there is a difference of being exempt from zoning bylaws and a matter of by-right. Exemption differs from by-right because site plan approval would still be needed for by-right.

Don Green asked does Lanza feel this change is taking away any of the concerns of the abutters. He wants to make sure their concerns are not being lost just to save on court cost. Lanza stated we are where we are now for a few reasons; one is the issue of the use of this facility. The purpose of this bylaw is to allow Fruitlands and the Harvard Historical Society (HHS) to function as a matter of right. Essary stated the difference here is that we are taking some of the limitations that were conditioned in the permit and codifying them here in the bylaw and applying them to all museums present and in the future. Lanza added any museum in the future will need to meet these limitations which are very restrictive.

Tracey asked if the bylaw passes will the HHS and Fruitlands have to comply with Site Plan approval. Lanza stated only if they make changes. Tracey asked where the traffic concern is in site plan review is. Lanza stated that case law in Massachusetts has made some requirements requiring looking at on site and off site impacts. Tracey stated that is a pretty gray area the Planning Board would take on for approval if a new museum was to come along. Lanza recommends refining the site plan review section of the bylaw in the future to specifically include off-site impact.

Tracey asked if you could take all the revenue from the restaurant to fund the museum. Lanza stated that would make the restaurant the primary use. Tracey stated there are many limitations under state and federal law requiring the meeting of the criteria of nonprofit, if a museum is an allowed by right what secondary uses are allowed by right and can these change over time. Lanza stated a secondary use is on the same site as the principle use, an accessory is accessory to the principle use. This bylaw does not try to attempt to determine what a secondary use is. There is a difference between secondary and accessory use. There is no accessory use within this bylaw. It allows a restaurant (an eating facility) as a secondary use as a matter of right.

Willard stated a lot of time was spent by the ZBA on this decision, this Bylaw is a disservice to the Town and we should let the courts make a determination. Green stated it bothers him that everyone can speak but the ZBA can not. It also bothers him that another Board can roll over the ZBA decision. He would like to know if the BOS compromised. If this is the right decision I want the ZBA and the BOS to get together and decide that.

Williams agrees with Willard and the case should go to court to determine if Fruitlands is an educational institution. It was brought to the Planning Board as a compromise. Willard would hope the lawsuit would go away if the bylaw passes, but that we should know that this is the case instead of just compromising with no guarantees.

Paul Willard asked Jonathan Williams if the Bylaw passes does the court case go away. Jonathan responded that this “was an assumption”. If Fruitlands believes they are being confined by the Town under the Bylaw, then the “court case my come back.

Tracey stated the ZBA decision could be amended if Fruitlands so requested. Green wants to know who is paying for this and was it discussed with the Lanza, BOS and ZBA. There were no other comments from the public.

### **Chapter 125-1**

There was no public input as to the amendments for §125-1

Brady questioned portions of §125-1A (j). Sudol stated there is something within the Master Plan on how to regulate development of agricultural land or other type of property that no longer has value in its present use. Brady thinks as §125-1 should be very general and pertain to the character of the town, but the way this is stated “facilitate” could make it seem as though you are helping out a developer. She suggested some rewording; Sudol will incorporate these.

Sudol made a motion to close the public hearing. Brady seconded the motion. The vote was unanimously in favor of the motion.

### **The votes on the amendments were as follows:**

Chapter 125-31D (2) - Sudol made a motion to sponsor the amendment. Brady seconded the motion. The vote was unanimously in favor of the motion.

Chapter 125-31B (3) - Sudol made a motion to sponsor the amendment. Brady seconded the motion. The vote was unanimously in favor of the motion.

Museum Bylaw - Essary would like to sponsor it if the BOS will sponsor it as well, Brady does not think a recommendation should be made without the entire Board present. Sudol does not support it because it does not support the ZBA decision. Lanza stated the Board could sponsor it for Annual Town Meeting, but not recommend it to the town. Essary thinks we should at least sponsor it tonight and vote later on any recommendation; the warrant articles have to go to press. She believes that it should at least have the chance to go before the town, and not be killed “in committee”. Brady made a motion to sponsor the amendments to Chapter 125-2 to incorporate a definition of “museum, amend Chapter 125-16D and add Chapter 125-16H, but not recommend it. Essary seconded the motion. The vote was 2-1 with Sudol opposed.

Chapter 125-1 - Essary made a motion to sponsor the amendment. Brady seconded the motion. The vote was unanimously in favor of the motion.

The Board agreed to go forward with the Home Rule Petition.

The warrant will be presented to the BOS tomorrow evening; we are on the agenda for 7:30. The warrant text is due by the end of the week. Sudol will write edits for Chapters 125-31D (2), 125-31B (3), 125-1 and write a resolution for wind turbines. Lanza will prepare the final draft for the museum bylaw.

Signed: \_\_\_\_\_  
Barbara Brady, Clerk (in McGuire Minar absence)