

## **Medway Planning & Economic Development Board Meeting December 9, 2008**

PRESENT: Robert Tucker, Karyl Spiller-Walsh, Andy Rodenhiser, Chan Rogers

ABSENT WITH NOTICE: Tom Gay and John Williams

ALSO PRESENT: Gino Carlucci, PGC Associates  
Susy Affleck-Childs, Planning Board Assistant  
Jan Fish, FinCom  
Phil Giangarra, FinCom

Chairman Rodenhiser called the meeting to order at 7:09 pm

**CITIZEN COMMENTS** – none

Andy Rodenhiser – How does the board feel about setting aside some time to work on just goals and priorities as a separate meeting? Neither Tom nor John can attend tonight.

Susy Affleck-Childs – John is not able to attend any Tuesday meetings in December – is there another night we could meet?

Chan Rogers – We should try to make it possible for him to participate, but if he cannot do so, well . . .

Bob Tucker – I think having a separate meeting with just that to talk about would be more productive. I would be palatable to having a separate meeting.

Chan Rogers – What is the urgency?

Andy Rodenhiser - May Town Meeting – if we work backwards, we will need to file articles probably in early march

It was agreed to have a Planning Board Special Meeting – Monday December 22, 2008 – 7 pm – Susy Affleck-Childs to check with Tom Gay and John Williams – Dec. 23 meeting to be cancelled.

### **Public Hearing Continuation - Williamsburg Condo OSRD**

Susy Affleck-Childs - They have asked for it to be continued. They are meeting with the DRC on 12/15 and want to wait until after that meeting

Public hearing was continued to January 13, 2009 at 7:15 p.m.

### **Birch Hill Subdivision Request for Bond Reduction**

Ellen Rosenfeld  
Mark Rosenfeld

Andy Rodenhiser – An opinion letter was mailed to you from Town Counsel. Certainly the text of the letter up to the last paragraph spoke pretty clearly with regard to what the Planning Board's position seemed to be at the last meeting. Does anybody want to talk about the last paragraph? There are some fairly detailed cases that support our position. Should we share the opinion letter? There is the confidential nature of the legal communication - It is my personal belief it is in the town's best interest to keep the information to us. It is in our realm whether to release it or not.

Chan Rogers – I don't think the opinion she has rendered is going to change my opinion. – It is along standing practice to hold a bond for streets to be accepted. The issue is the amount of money held as a minimum. We have agreed that everything has been done because we have a bylaw, or standard practice to keep a minimum until acceptance. That may be up for discussion

Ellen Rosenfeld – So Town Counsel says it is OK? I still think it is illegal and I will pursue my remedy, which I don't want to do but what the heck!

You have \$5,000 of my money on the side (in the construction inspection account) for legal and inspections for engineers outside of the bond amount – you are looking for another \$3,000 to bring it up to the total amount she (Susy) invoiced me for

What is the minimum bond for? Presently you require \$40,000 – what is that to ensure?

Andy Rodenhiser – To ensure that the legal work that is supposed to be done is actually done properly, and that Town Meeting can in fact accept the streets – If you don't reserve the fee in the road, if additional work or takings is necessary there is more expense – It is essentially an insurance policy - If you want to provide an alternative bond type, that is your option

Chan Rogers – The purpose of doing this is not discussable - it is obvious, - you may have a question as to the amount of money – The principle is very firm in the Commonwealth.

Ellen Rosenfeld – I beg to differ with you. The principle of holding money for bond surety against street acceptance is not well established.

Andy Rodenhiser – As part of this decision, it was written that way

Susy Affleck-Childs – No, this provision was part of the (subdivision) rules and regs (in effect in 2002)

Ellen Rosenfeld – I did not know that the subdivision rules and regs included that provision.

Mark Rosenfeld - If the town does not vote to accept the street, is there a check waiting for us that night?

Karyl Spiller-Walsh – I think it is a multi faceted issue. If the town votes not to accept the street, why? – probably because something is wrong with the street – and the money being held in the bond is to ensure that the repairs can be made.

Andy Rodenhiser – I think it is difficult to hold over - Our (Town) Moderator has told us that one town meeting cannot hold over another town meeting in the future.

Chan Rogers – The board is at liberty to set a threshold to protect the people who bought lots on the basis that the street would be accepted. It can't be a blanket number.

Andy Rodenhiser – What if Town Meeting doesn't approve it?

Chan Rogers – Then the Planning Board can look at the reasons why and decide.

Andy Rodenhiser – What if 50 people show up at Town Meeting and they all don't like the Rosenfelds?

Chan Rogers – The Planning Board is at liberty to make the decision, then, as to how much money is kept to ensure that it meets standards.

Ellen Rosenfeld – To assure that it could be accepted . . . not to assure that it must be accepted. That is what bonds are for – to assure that the ways and means are there so it is up to street acceptance standards, but not that it actually be accepted.

Chan Rogers – If that isn't what I said, that is what I meant. I agree it has nothing to do with what is accepted.

Ellen Rosenfeld – He is right.

Ellen Rosenfeld – I came here tonight – I said to myself you (the Planning Board) are in a tough spot – I know you were going to say Town Counsel supports us (the Planning Board)

Andy Rodenhiser – In this discussion, we are learning about a potential inequity (in the rules and regs) – I would suggest that if we went through a Town Meeting cycle we would be in an awkward situation - the fact is that you didn't ask for a waiver (to this regulation to retain \$25,000 until street acceptance) – consistency that is reflective of how this board tries to act is a principle that needs to be upheld as well –

Susy Affleck-Childs – There are two key issues here - the road status and the paperwork to convey the road

Ellen Rosenfeld – We don't need to do anything. – Forget street acceptance. – Get it out of your heads. If I meet with my property owners – if they want to pursue it, I will pursue it with them. I will do it all. I will come to you. If you want the street, take it; if you don't, then don't. I don't want you to have it.

Mark Rosenfeld – The bond is to be able to get it at a level to be able to turn it over you

Ellen Rosenfeld – You say you want to see how it sets up – It was done on November 15. Give me the list – whatever isn't up to par – he (Mark Louro of VHB) was making all his notes – I was paying for that.

Andy Rodenhiser – None of that is disputed.

Ellen Rosenfeld – I can't go any further with it. I have done what I have contracted to do. I am asking you to stand up and do your part of the bargain

Karyl Spiller-Walsh – I agree with Ellen Rosenfeld and with the Planning Board with the intent – I think there was a calamity – She didn't request a waiver, and that was unfortunate. The rules and regs were there. The Planning Board goes along with its procedures –

Andy Rodenhiser – She is questioning the validity of the rules.

Karyl Spiller-Walsh – So am I –

Ellen Rosenfeld – I thought we were all really working off this same surety list (2005 bond estimate) – there is nothing on that bond list about legal work

Chan Rogers – They want to make sure that the work that is done in the fall holds up thru the rigors of the winter - I think we need to get to the specifics of the amount

Andy Rodenhiser – The principle is the difficulty

Ellen Rosenfeld – I am going in front of Medfield at the same time – wrapping up a subdivision — there is no 6 month or 3 month requirement there

Chan Rogers – The next step is to determine what is reasonable to take care of the contingencies that are in front of us for approval by next spring.

Ellen Rosenfeld – You have already determined it to be \$25,000.

Andy Rodenhiser – The only reason to hold the \$25,000 is for street acceptance.

Ellen Rosenfeld – I want you to chew on it.

Andy Rodenhiser – Turn around and look our there. Those are Medway residents. There are people who live on Azalea Drive whose contractor walked away and who have never had their street accepted. From year to year bylaws exist or get changed. They are what we are operating on right now. We have done a lot of work over the years. This is what we are operating under. I don't think any of us have a lack of compassion

Ellen Rosenfeld – Just sometimes, boards really don't get it. \$25,000 is a lot of money

Bob Tucker - You are most likely an exception.

Andy Rodenhiser - Not accepting a road is not fair to the residents who expected to have a public street.

Ellen Rosenfeld – If there is a problem between the builder and the residents, it is not your problem – you are making it a problem and you are making us pay for the bad ones (developers) - This is just another example of that –

Andy Rodenhiser – We are not taking on too much. I think as soon as we are able to come to some type of agreement, you will probably see us tackling our rules and regs

Ellen Rosenfeld – It doesn't matter how you tackle that

Andy Rodenhiser – No, we are talking about making a change to address this issue

Ellen Rosenfeld – Is there any movement in the \$25,000 (minimum to be retained)?

Chan Rogers – All the work physically is done?

Andy Rodenhiser – You do not have a final sign off from VHB -

Andy Rodenhiser – We had voted previously to reduce the bond to \$25,000 which was the amount in effect in the rules and regs. We have already reduced it to a minimum.

Andy Rodenhiser – She is asserting we don't have the right to hold the money till town meeting.

Karyl Spiller-Walsh – I kind of agree with that point. I think we do have the right to hold off until the engineer signs off. I uphold the rules and regs reluctantly.

Andy Rodenhiser – You have a public road on one side (lower part of Hunter) and a public road on the other side (upper part of Ivy). A private way is not what was intended when the subdivision was granted.

Karyl Spiller-Walsh – In writing the rules and regs – the bond is to ensure that the road is built

Chan Rogers – We are well in our authority to ensure that it is done so it can be accepted

Andy Rodenhiser – So lets say Mark Louro (VHB) goes out and signs off on it and says it is complete – are you willing to refund the money?

Chan Rogers – Yes

Andy Rodenhiser – Why would you hold the money – for purposes of warranty?

Chan Rogers – I feel we have a perfect right. That is the sole purpose - to ensure that the streets meet the town standards. And the only way we have to make sure they are constructed is to hold the bond.

Karyl Spiller-Walsh – Ellen Rosenfeld is saying that Town Meeting and street acceptance are separate from the bond.

Andy Rodenhiser – I am almost in. There is no provision to hold it for warranty purpose. She is asserting . . . .

Karyl Spiller-Walsh – It is a little bit of a dilemma. You are not entirely without blame.

Ellen Rosenfeld – You are right.

Ellen Rosenfeld – I had an offer for you two weeks ago

Karyl Spiller-Walsh – Could I hear it again? I wasn't at that meeting.

Ellen Rosenfeld – There is still \$4,400 needed for street acceptance/as-built plan - I was willing to leave that in there plus more up to a total of \$10,000 (in the bond) plus the \$5,000 she (Susy) has in the other account and I will work with Town Counsel to get the paperwork ready

Chan Rogers – I am willing to listen to a reduction. It is not going to be based on acceptance or not. It is whether it is done in terms of the requirements.

Andy Rodenhiser – That is not congruent with what Town Counsel has recommended – there is not good legal ground to take that position on

Chan Rogers – It will take a majority vote of the board

Andy Rodenhiser – Any further discussion?

Ellen Rosenfeld – Can I just say one other thing? I really don't want to do this. I am ready to go in and challenge this. I don't want you to go in and spend money on legal fees challenging this. I think it is ridiculous. I will prove it is invalid, you will return all bond money to all other people. I am ready to do that.

Andy Rodenhiser – That is your belief. That is why we sought opinion of Town Counsel

Ellen Rosenfeld – Can I just say this? So basically, she is telling you it is legal

Andy Rodenhiser – I think it is legal because it exists in our regs

Karyl Spiller-Walsh – I think it is legal in terms of black and white. We are like a little grey here – in terms of the intent and what we are looking to end up with as a product, it is a good street with good houses and to ensure that the product that you make is going to survive

Ellen Rosenfeld – I also thought we would all be thrilled that it would all be done.

Andy Rodenhiser – We are, but we have rules that govern the conduct of what happens. It is there. It may not be fair. The principle of consistency is important to us, but not to a fault. If we can make some changes or modifications to this that reflect what the members of the board feel is fair and protects the interest of the town, you would benefit from that.

Andy Rodenhiser – My one concern – we don't know whether \$5,000 is really going to be enough (for legal work) considering that there are multiple mortgages on those properties of 9 home owners that need releases

Bob Tucker – Did you save the fee in the road?

Ellen Rosenfeld – No. I can't even ask you to accept the street as I don't really own it

Susy Affleck-Childs – But the mess ends up here at Town Hall.

Chan Rogers – Are we agreeing on \$15,000?

Ellen Rosenfeld – I will leave \$10,000 in the bond.

Andy Rodenhiser – She is actually requesting \$15,000 back.

Chan Rogers – The board needs to agree on a bottom figure which we hold. Is that \$15,000?

Andy Rodenhiser – She is asking for \$15,000 back.

Andy Rodenhiser – Can we have town counsel give us an idea of the legal cost for this?

Ellen Rosenfeld – I told her I would do all the (legal) work.

Andy Rodenhiser – But you don't represent the Town's interest. We still have to pay her to review your work and make sure the Town's interest is protected – The cost of that work should be considered.

Chan Rogers – What is the engineering and construction amount that remains?

Andy Rodenhiser – It is virtually done.

Andy Rodenhiser – What if we get an estimate from Town Counsel?

Karyl Spiller-Walsh – How many houses?

Ellen Rosenfeld – 9 homes

Karyl Spiller-Walsh – Could we get some definite response from VHB to say where it stands

Andy Rodenhiser – If we don't have that as a rule, we don't recommend acceptance

Bob Tucker – If the road has been built and inspected right along, I disagree with having to wait a winter –

Karyl Spiller-Walsh – The engineering on the project should be done to survive

Andy Rodenhiser – That is why we have rules and regs –

Karyl Spiller-Walsh – Is it a rule about waiting for the winter? – What is the regulation?

Bob Tucker – That would be lunacy for a building – Would a building inspector not give an occupancy permit for a year after the house is built?

Chan Rogers – If there is any opportunity for streets to go wrong – it is the rigors of the winter – it is best to look at it in the spring – I am willing to hear what is left to be done

Andy Rodenhiser – Let's move this along. We need to get an estimate from town counsel for whole legal package would be – we need to ask town counsel to ascertain what the facts are for an accurate estimate – and then get a recommendation from VHB as to whether it needs to go through the winter and if so, what are the boundaries of that – is it rooted in an engineering principle, standard of care, common practice?

Ellen Rosenfeld – I would like a letter from them as to outstanding issues

Andy Rodenhiser – ask VHB if they are prepared to recommend street acceptance at this time? Does he think it – we will try to give you additional clarity from Mark Louro –

Andy Rodenhiser – Any dissenting?

Karyl Spiller-Walsh – I kind of agree with her on the street acceptance –

Andy Rodenhiser – I think we need to address this at our next meeting

Chan Rogers – We moved the next meeting to Dec 22

Karyl Spiller-Walsh – Let's meet with Ellen Rosenfeld on that day too

Monday December 22 – 7:00 pm

Ellen Rosenfeld – Thanks

**ANR Plan: Cedar Farms Road – Map 4, Parcels 53 & 52A**  
Applicant: Mike Curatola  
Property Owners: Joe Griffiths/Tri Valley Realty Trust & Vincent Ozella

Present: Mike Curatola, applicant  
Paul DeSimone, Colonial Engineering  
Stephen Kenney, attorney

Andy Rodenhiser – As there are residents here, we will hear information first from the applicant and address questions – please raise your hand and identify yourself and address so we can type into the record

Stephen Kenney – representing Michael Curatola – I have an affidavit from Michael Curatola to present to you - It addresses some of the factual issues, what we are dealing with here, an ANR plan in which there is adequate frontage and the issue of adequate access to the buildable portion of the lot. Apparently there is a guardrail that covers a portion of the frontage. Michael Curatola went to the site yesterday in order to view the site and measure. He states the opening in the guard rail is 30 feet wide – He then has driven his truck through the opening 28-30 feet into the parcel – the rear of his truck is about 18 feet from the guardrail – The land on which the truck sits is level. Mr. Carlucci had mentioned there is a retaining wall and that the retaining wall went to the area where the guardrail opening was. That is not the case. I went there myself. The retaining wall is to the right of the guardrail opening – approximately 45 feet down the way – there is also a drainage easement that is shown on the plan – and an opening in the guard rail to provide access (for the Town) to get to the detention pond (for maintenance) – it provides access



to the lots so the detention basin can be dealt with – if you follow the lot down, it is a 4-5 feet drop – photo #4 shows a pole to measure the slope – photo #5 is the pole showing 4.5 feet – we are attempting to show that there is adequate access from Cedar Farms Road onto the lot and it is not a drop off – it is a gradual decline of 4-5 feet and it levels off once again – the retaining wall is 45 feet away from the opening –

Chan Rogers – The retaining wall does exist as retaining from the so called opening all the way west to the first house which is built about 20 feet lower than the street – from that point east, the retaining wall extends about 4 feet high all the way

Stephen Kenney – It doesn't go all the way to the opening. It goes to about 45' away from the opening of the guard rail - there is no wall where the guardrail breaks

Chan Rogers – but there is several hundred feet of retaining wall

Stephen Kenney – yes, no question – but our point is that the wall doesn't go to the opening, and that there is not a sharp drop off.

Chan Rogers - but only at the break in the guardrail

Stephen Kenney – exactly and the wall is 45' away

Andy Rodenhiser – Gino, based on this info, does this change anything in your comments?  
REFERENCE 12/5/08 review memorandum (attached).

Gino Carlucci –The issue is whether it warrants endorsement – There is no access to the second lot. It doesn't meet the requirements for ANR endorsement. Therefore it requires subdivision approval

Stephen Kenney – This document shows there is adequate frontage and there is access available to the lot

Andy Rodenhiser – How is it you are claiming ability to access both lots? You have access to one and not to the second How is this not a subdivision?

Stephen Kenney – There is adequate frontage. We have adequate frontage and we have access to one of the lots upon which we could have an easement to (access) the other lot. There is access available to these lots thru this opening in the guardrail

Andy Rodenhiser – Gino Carlucci, you are saying that they have access to only one of the lots

Gino Carlucci – yes

Stephen Kenney – That is where we are in disagreement.

Andy Rodenhiser – You are seeking an ANR endorsement based on the granting of the easement. Can you go right to that?

Stephen Kenney – We have the frontage for 2 lots. We have access to one of the lots. It could be used for that lot and then an easement can be granted (over it) to get to the other lot, and that is able to be done. You are saying that you are taking away a buildable lot because of the guardrail. We believe the opening provides access - What is the issue?

Gino Carlucci – The guardrail and the retaining wall

Karyl Spiller-Walsh – and the land itself - that is a lot of area to traverse to get to where the house would be built

Stephen Kenney – We are talking about ANR plan approval. We will deal with Conservation on our own

Andy Rodenhiser – The standard for us to consider is whether it is traversable

Stephen Kenney – I believe it is traversable.

Stephen Kenney – I disagree it is not eligible for ANR approval. The fact is that you have an opening in the guard rail – if the drop off was 25 feet down, that would be a problem – but we have a gradual slope – the Planning Board has the ability to approve an ANR plan and allow the owner to grant an easement from one lot to another

Gino Carlucci – In my memo to the board I cited the case of Gates vs. Planning Board of Dighton. The court ruled in favor of the Planning Board – “*the adequacy of such a road system, as prescribed by the rules and regulations of the planning board is precisely what the subdivision control law is all about. As in the Gifford case, the plan proffered is ‘an attempted evasion of the duty to comply with the regulations of the planning board.’*” this situation is almost identical – they are proposing access from Fisher Street that already serves 4 houses

Stephen Kenney – The Giovanella lot goes back to 1800’s

Stephen Kenney – In terms of the ANR plan that was presented in the Gates case, it is certainly not analogous to this situation at all – that needed a 2000’ bridge (to cross wetlands) to get to the buildable portion of the lot

Also, there is another 30 foot wide access easement down the road which serves as another means of access for the lot – my point is that you have the frontage – you have actual access available to one lot at the present time and he has an ability to grant an easement from one lot to another – he could use the other access from Fisher Street and not deal with actual access from Cedar Farms Road – that may be the best approach

The ANR plan is adequate for signature – it is not a subdivision of land – the access is available to one lot by easement over the other lot

Chan Rogers – but that doesn’t constitute frontage on a street

Stephen Kenney – There is frontage, but it is blocked

Gino Carlucci – There is another case where it says that a guardrail doesn't allow for frontage to count (Poulos vs. Planning Board of Braintree)

Chan Rogers – I don't challenge the fact that by subdivision you create two lots and create a street that – right now you have frontage to both but access to only one

Stephen Kenney – So what we are dealing with here is this - I think that the board could do this if they wanted to – adequate frontage and access to both lots – it may not be direct access to the second lot – there is an ability to access a second lot through an easement – the alternative is a subdivision with the building of a road and all that goes along with that – that doesn't seem to be the best situation where the board legally, in my opinion, has the ability to sign an ANR plan – in essence not have the cost, additional burden to the neighborhood – that is not what we want to do here – there is a lot of case law – there is case where portions of a lot that were covered by jersey barriers and by guardrails and the court said there was an ability to access the lots because there were breaks in the guardrail

Gino Carlucci – that is not the case here – the entire frontage of lot 1 is covered by the retaining wall and guardrail

Karyl Spiller-Walsh – isn't the opening for emergency access?

Stephen Kenney – why is that considered emergency?

Gino Carlucci – the opening is for access to get to the detention pond – not emergency

Chan Rogers – the purpose of the easement is to maintain the drainage system that serves the entire subdivision or a major portion of the subdivision and that is the purpose of the opening in the guardrail - the main purpose of the opening is to allow for maintenance vehicles to get to the detention structure for cleaning – I don't see how that could also serve as frontage for a building lot

Stephen Kenney – it is frontage on a parcel of land that is subject to the easement

Chan Rogers – it is frontage but not access available to the public to serve a building lot

Stephen Kenney – it is access available to the landowner – the owner of the land can use it to enter the property

Chan Rogers – did we ever determine who has responsibility for the guard rail

Stephen Smith, 45 Cedar Farms Road – The original builder built the guardrail because the town required it because of the drop off for safety reasons - that is why it was put in there for safety reasons

Andy Rodenhiser – Who installed it?

Mr. Smith – Tanial Bedrosian – He was asked by the town to do that - probably in 2001

Andy Rodenhiser – Is there anything else you want to present?

Stephen Kenney – I heard a member say that it is not traversable – is the board of the opinion that an individual can grant an easement to another to cross the property – that is certainly in the right – it is well within your ability to approve it as an ANR plan – if not, then it becomes a subdivision approval – it appears that there is more than one means of access here – more economical and more aesthetically pleasing to the neighborhood and a better overall plan to allow an ANR plan to be approved and to have the access from Fisher Street

Andy Rodenhiser – So you suggest that the driveway that presently provides access to 4 houses would now serve 6 houses and it would not be a street?

Stephen Kenney – it would remain as a driveway – that is a plan – the access that the board can rely on is from cedar farms road –

Andy Rodenhiser – I think that is dangerous – we have subdivision rules and consistency of following the rules – we follow our rules –

Chan Rogers – The instant question before us, dividing a single lot into two lots in the approval not required (ANR) which means that you have no discretion except the conditions Gino Carlucci has articulated. If you agree, it would not be approved. There is only access to one lot. They both have frontage. Given the Planning Board not approving it, the applicant has the right to come in with a subdivision plan to extend the easement through the guardrail as a street to then provide frontage for any number of lots back there. But a few moments ago, you said the other access was from Fisher Street

Andy Rodenhiser – They are proposing a driveway that would support 6 houses

Gino Carlucci – The pavement on the ground is 12 feet wide

Chan Rogers – It also violates a cul de sac being more than 600 feet long

Gino Carlucci – which they also propose to relocate – and they need to cut down trees to extend it – it doesn't exist on the ground today . . .

back to the guardrail issue, there is another court case that addressed this - Poulos vs. Planning Board of Braintree – *“It is not enough that the plaintiff proposes to regrade the land in a manner satisfactory to the CPS and that the DPW may respond by removing the guardrail.”*

Stephen Kenney – My point is that you do have a way to access

Karyl Spiller-Walsh – it has been referred to that there is agreement that there is access to one lot – I disagree – it has to be traversable to the building site – I see that is impossible – due to wet, water, constraints of the site

Stephen Kenney - Our opinion is that it is traversable.

Gino Carlucci – Right now, it is an existing lot, and you could try to build on it

Stephen Kenney – We are not sure where the buildable portion is

Karyl Spiller-Walsh – To call it access is an incomplete idea

Andy Rodenhiser – Under the guise of a single lot, they would go in and go to ConCom and they could do that – if they were denied by ConCom – it is not our process to regulate – the issue of the ANR is before us

Karyl Spiller-Walsh – I see zero access

Bob Tucker – I am going to side with Gino Carlucci's conclusion that it doesn't quality. I don't see access onto lot #1 that our rules and regs talk about and therefore it may be appropriate for a subdivision

Chan Rogers - That is exactly the way I feel.

Bill Sharpey – 50 Fisher Street – Is there a maximum number of homes to put on a common driveway?

Susy Affleck-Childs – We don't have any language in the zoning bylaw to specifically allow or disallow common driveways.

Chan Rogers – we don't allow access to more than 1 house from a common driveway

Andy Rodenhiser - A common driveway means there is more than one house using it

Chan Rogers – I said we don't allow access from a street to more than one lot

Bob Tucker – I don't think we do it generally

Andy Rodenhiser – If you have the ability to have access off a public street, there are occasions where people share a driveway.

Susy Affleck-Childs – The zoning bylaw neither requires or prevents common driveways.

Andy Rodenhiser – he could come back in here with a subdivision plan with a road going into this - he may propose to upgrade the Fisher Street access

Bob Tucker – It is very confusing.

Karyl Spiller-Walsh – It isn't. What you have to do is prove that you can produce a (subdivision) plan according to the rules and regs. And then the applicant and board have an opportunity to waive rules and regs for betterment of a project such as doing a common driveway in lieu of multiple driveways to reduce number of curb cuts. But the applicant has to come in with a plan that they can do to meet the regs

Andy Rodenhiser – And the applicant has to make a case that is it better to waive a regulation

Neighbor – What is maximum amount of land that could be filled in wetlands?

*12/9/2008 Planning Board Minutes*  
*Approved 12-22-2008*

Gino Carlucci – Generally you can fill up to 5,000 sq. ft with replication of wetlands elsewhere, but you can go more than that if the ConCom will allow it.

Paul DeSimone – Anything over 5000 square feet is a 401 water quality cert – and that is on a limited project

Jan Fish, 4 Fisher Terrace – Could the road be built over a town drainage access easement?

Bob Tucker – It is subject to being torn up if access is needed.

Jan Fish – And at that point, the road is on top of the drainage easement – whose responsibility would it be to repair that road?

Andy Rodenhiser – The easement is granted to maintain the drainage easement

Andy Rodenhiser – I would imagine where it existed first without the driveway . . .

Susy Affleck-Childs – I think that is something we need to find out more about

Jan Fish – Can a road expansion be built over a right of way – if that old right of way (off of Fisher Street) is made wider and it is going over easements or rights of way – do those easements and rights of way have to condone that work

Karyl Spiller-Walsh – There is already a 25 foot common driveway

Bob Tucker – You would have to see how it was written –

Jan Fish – What does ANR mean

Andy Rodenhiser – If we sign it, we agree that it does NOT need subdivision approval –

Jan Fish – Can plans for one house per lot be expanded?

Andy Rodenhiser – They could come in the future for an OSRD or an ARCPUD in the future - as a special permit

Bob Tucker – What is land zoned for?

Andy Rodenhiser – AR2

Chris Giovanella– The right of way is 25 foot to my mother's property. They had to get a variance for that lot - My parents purchased the right of way from all the neighbors –

Andy Rodenhiser – Those other lots were before the lot shape factor requirement in the zoning bylaw

Stephen Kenney – There was an original right of way. The Giovanelli purchased the right of way 20 years ago.

Andy Rodenhiser – Do they have a right to grant further easements for other properties?

Bob Tucker – If they own it.

Stephen Kenney – The Ozella parcel has the same right of way.

Stephen Kenney – There is an old right of way plan that was never recorded.

Andy Rodenhiser – How is that relevant?

Stephen Kenney – it exhibits the right of way referred to in a deed

Gill Martin, 41 Cedar Farms Road – representing my son – I want to go on record that he is against the Planning Board approving this ANR

Andy Rodenhiser – They assert they have the right to access the site from the driveway at Fisher Street -

Gill Martin – What does it cover?

Andy Rodenhiser – If we don't approve it as an ANR, it dies right there and they have to come back with a subdivision

Gill Martin – if the ANR plan was approved for Cedar Farms with access that in the future because you set a precedent for a limited access that further access is not the rest of the property, whether it is developable or not I don't know – does it set a precedent for the owner or developer to come back to the board again – could he come back?

Andy Rodenhiser – that is not likely, but what is likely is that other parcels elsewhere in town might try this approach

Stephen Kenney – if the ANR were approved, he would certainly agree to place a limit to two lots – he would agree –

Susy Affleck-Childs – would that be a private deed restriction/

Stephen Kenney – Yes

Andy Rodenhiser – We would still be subverting the principle we are trying to avoid subverting

Stephen Kenney – there is case – Gallitano vs. Board of survey & Planning of Waltham - that sets out a formula for practical access - these lots fit that formula noted in Gallitano – the lots are large enough such “*the buildable portion of each lot is connected to the required frontage by a strip of land not narrower than the required frontage at any point, measured from that point to the nearest point of the opposite sideline.*”

Andy Rodenhiser – That is just a portion of a decision and we don't know the context of the whole thing

Susy Affleck-Childs – Do you want to get legal counsel's help on this?

Andy Rodenhiser – If you want us to get an opinion from legal counsel, we will extend this thing or you can withdraw it - would you like some time to discuss with your client?

Stephen Kenney – yes

Chan Rogers – I side with Gino Carlucci, and I think Bob Tucker has stated it doesn't meet the ANR

Bill Creonte, 35 Cedar Farms Road – Traversable by what means? Is there a standard by which traversable is defined?

Andy Rodenhiser – That is left up to the board's discretion

Andy Rodenhiser – I think they are saying it would be a lot cheaper to come in from Fisher Street

Stephen Kenney – We will withdraw and come back in with a subdivision plan –

Karyl Spiller-Walsh – Maybe upgrade the easement (from Fisher Street)

Paul DeSimone – We do have another access, up the street

Nancy Peterson – 37 Cedar Farms Road – We have a 30 foot easement – On our deed it says it is a maintenance easement

Paul DeSimone – The subdivision plan it says it provides access to the rear land

Andy Rodenhiser – Your recorded plan and deed may say one thing and be in conflict with another document.

Andy Rodenhiser – I would suggest you seek counsel.

Stephen Kenney – The plan will be to seek a subdivision plan, and come in and talk with DPW about adjusting the guardrail.

Stephen Kenney – The reason we wanted to do it this proposed ANR way is that it made sense economically.

Stephen Kenney – If we are going to have to go through the subdivision process, then it would behoove us to get as many lots as possible – there is an idea based on some preliminary work that there could be 8-10 lots maximum over 30 acres which is not really what we want to do

Chan Rogers – There are some serious conservation issues on that land

Karyl Spiller-Walsh – I would be shocked if you could do that

Paul DeSimone – We do have a lot of uplands up there



Stephen Kenney – Thanks for your time

### **Revised Commonwealth Capital Application**

Updated draft – Gino Carlucci reviews with the board

Look more at density bonus for OSRD and affordable housing

Look at possibly designating some existing open space area as a town forest – ask Open Space Committee to look at that

Add one point for # 26 re: production or purchase of renewable energy

Look at #27 – as well – Gino will check the guidance on that one –

Phil Giangarra – How does this benefit Medway

Andy Rodenhiser – This is the basis for many grants the town goes after from the state - the strength of the score determines your competitiveness.

Karyl Spiller-Walsh – All the towns I like have 0 or no scores. What does that mean? I wonder about what their (state) goals are, and how are our goals different than theirs?

Bob Tucker – I am concerned about what we do here, and if this will help us in getting funds, I am for it

Karyl Spiller-Walsh – What do you end up – what do you want – some of those towns are ones that I appreciate the qualities of life – impressive affordable housing, and good open space

NOTE - send list of others towns Commonwealth Capital scores to Karyl Spiller-Walsh and Phil Giangarra

Andy Rodenhiser – Let's also review with Suzanne Kennedy

### **MAPC District Technical Assistance Proposal**

Andy Rodenhiser – You have a draft document put together by Gino Carlucci – essentially based on info we developed last year with Bellingham – looks at the border between Medway and Bellingham

Gino Carlucci – it takes a look at the land in both towns in that area along the border – West Street to the Town line and down to Route 126 and has a kind of back of envelope idea for what the development potential is – points out that traffic is a big issue – outlines 3 possible new access ways -

Bob Tucker – I spoke to Gino Carlucci earlier. I gave him a suggestion that he reference the figures that he has attached in the body of the proposal to make it easier to understand.

Andy Rodenhiser – When would this be submitted?

Gino Carlucci – any time

A motion was made by Chan Rogers, seconded by Bob Tucker to approve submitting a proposal to MAPC for their District Technical Assistance program. – APPROVED.

### **Minutes**

A motion was made by Bob Tucker, seconded by Chan Rogers to approve the minutes of November 18 & 25 and August 12, 2008. APPROVED. Karyl Spiller-Walsh abstained as she had not attended the Nov 25 meeting

**Invoices** - None

### **Reports**

Chan Rogers – Route 126/109 intersection is almost done – the separate dedicated left turn land (for east bound 109 traffic turning north onto route 126) is working well

Susy Affleck-Childs – a couple of items – the Request for Determination for 9 Walker Street has been submitted to Concom; I have completed the paperwork for submitting the approved 43D sites to the state for formal action – the state interagency permitting board may not be meeting monthly starting in 2009 so it may not be until March – we had a great session with MUNIS last week re: the permitting program – the issue of remote access is critical for ConCom and ZBA – the town will need to have VPN capability – I am working with Rich Boucher, the new IT director – the Town will be hiring a project manager for this – they went thru an RFP and have 3 proposals – I am advocating for the one firm that has MUNIS permitting experience

Phil Giangarra - Is there budget for the VPN?? How many will we need? That can be expensive - I was involved in looking over the budget for this and there were no provisions for VPN – I will mention this at FINCOM tomorrow night

Karyl Spiller-Walsh – Has anyone seen elevations or plans for building at 2B Oak Street for Camp Sunshine?

Bob Tucker – The Community Preservation Committee is also looking for people to come in with proposals for ideas on 2B Oak Street – we don't want the property to sit idle – CPC is still looking and willing to consider any ideas

Andy Rodenhiser – I am working with Rob Pomponio. He is spearheading the Camp Sunshine proposal – I am trying to match up MetroWest Boys and Girls Clubs for some professional administrative help – Camp Sunshine is a 6 week program and the balance of the time would default to a camp for Boys and Girls Clubs and space for Parks and Rec

Karyl Spiller-Walsh – and a meeting house

Bob Tucker – Camp Sunshine only runs for a period of 6 weeks – what do you do with it the rest of the year

Andy Rodenhiser – a very generous benefactor has come forth to help them

A motion was made by Bob Tucker, seconded by Karyl Spiller-Walsh to go into executive session to discuss ongoing litigation with intent to not come back

ROLL CALL VOTE

Karyl Spiller-Walsh - Yes

Bob Tucker - Yes

Chan Rogers - Yes

Andy Rodenhiser – Yes

APPROVED

The board went into executive session at 10:10 PM

The board returned from executive session at 10:18 pm.

A motion was made by Bob Tucker, seconded by Karyl Spiller-Walsh to adjourn the meeting.  
APPROVED. The meeting was adjourned at 10:20 pm

Respectfully submitted,

Susan E. Affleck-Childs

Planning Board Assistant

## **Medway Planning Board December 10, 2008 Executive Session**

The Executive Session was convened at 10:10 pm for purposes of discussing ongoing litigation – Barberry Homes vs. Medway Planning Board (Daniels Village ARCPUD)

Susy Affleck-Childs – You have received an email note from Town Counsel re: this matter. See attachment. The attorney from Barberry Homes indicated the developer would make the senior center payment if the planning board would agree to amend the ARCPUD bylaw to not require 10% affordable

Andy Rodenhiser – I think we should say no thanks

Bob Tucker – I think I would let them flounder

Gino Carlucci – I think they think they are going to lose and this would bump this down to May 2009 town a meeting

Andy Rodenhiser – At worst case, it would be remanded back to us

Andy Rodenhiser – They (Barberry Homes) are facing significant issues (with their project) over in Natick – they probably couldn't get financing if they wanted right now

Andy Rodenhiser – Just in retail credit, GE Finance is the only one writing that kind of stuff – every other lender has pulled out of Massachusetts

Chan Rogers – They want us to relieve them of the 10% affordable housing requirement and they will do the contribution to the senior center? Is that is the question we are discussing now in exec session?

A motion was made by Bob Tucker, seconded by Karyl Spiller-Walsh that the PB reject the offer and not make a counter offer.

### **ROLL CALL VOTE**

Karyl Spiller-Walsh - Yes

Bob Tucker - Yes

Chan Rogers - Yes

Andy Rodenhiser – Yes

**APPROVED**

A motion was made by Karyl Spiller-Walsh, seconded by Bob Tucker to come out of executive session.

### **ROLL CALL VOTE**

Karyl Spiller-Walsh - Yes

Bob Tucker - Yes

Chan Rogers - Yes

Andy Rodenhiser – Yes

**APPROVED**

The Executive session concluded at 10:18 pm.

*12/9/2008 Planning Board Minutes*  
*Approved 12-22-2008*

Respectfully submitted,

Susan E. Affleck-Childs  
Planning Board Assistant

**ATTACHMENT to Minutes of 12/9/08 Planning Board Meeting**

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**PGC ASSOCIATES, INC.**

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**MEMO TO:** Medway Planning Board

**FROM:** Gino D. Carlucci, Jr.

**DATE:** December 5, 2008

**RE:** Curatola ANR plan on Cedar Farms Road

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I have reviewed the revised ANR plan prepared for Michael Curatola. The plan proposes to reconfigure lot lines between two existing parcels in order to create two lots. The plan was prepared by Colonial Engineering, Inc. of Medway, and is dated November 14, 2008 with revision dates of November 24, 2008 and December 1, 2008. The revised plans show a guardrail in front of the entire frontage along Cedar Farms Road except for a single opening that provides access to a detention basin within a drainage easement at the front of the property. It also shows a wetlands line on the property taken from the Assessor's Map.

I have also reviewed:

- An agreement dated December 3, 2008 between Jo-Ann S. Giovanella and Michael Curatola in which Giovanella agrees to grant an easement across her property linking the parcels to be purchased by Curatola to an existing 12.5-foot easement that provides access to Fisher Street.
- A Memorandum in Support of Approval Not Required Endorsement" for Michael Curatola prepared by Attorney Stephen Kenney.
- A Plan of Land in Medway, MA dated December 16, 1980 prepared for Millis Engineering Associates, Inc. by Clayton T. Ryan, Jr. R.L.S.
- Easement Relocation Plan of Land dated November 4, 2008, prepared by Colonial Engineering, Inc.
- Letter from Michael Curatola dated December 3, 2008 describing existing right-of-way off Fisher Street.

I do not believe that this plan is entitled to ANR endorsement and I recommend that it be denied such endorsement. To be entitled to ANR endorsement, a property must show frontage on a public way, a way approved under the Subdivision Control Law or a way in existence when the Subdivision Control Law was adopted and which the Planning Board judges to have adequate width construction

and grade. Cedar Farms Road is a public way. However, practical adequate access to that public way does not exist. A guardrail more than 500 feet long extends across the entire frontage except for the single opening (that scales to about 30 feet wide on the plan) that allows access to the drainage easement. Beyond the guardrail, the land slopes gently for 5-10 feet to a retaining wall. The grade behind the wall is about 4 feet lower than the wall and slopes gently for a short distance before dropping to the natural grade of the land, which appears to be about 15 feet or so below the grade of the pavement.

Attorney Kenney states that access could be provided from Cedar Farms Road. The Massachusetts Supreme Judicial Court ruled in Poulos v. Planning Board of Braintree:

We conclude, as did the Appeals Court, that c.41 Sections 81L and 81M, read together, do not permit the endorsement sought by the plaintiff in the absence of present adequate access from the public way to each of the plaintiff's lots. It is not enough that the plaintiff proposes to regrade the land in a manner satisfactory to the DPW and that the DPW may respond by removing the guardrail. In an analogous situation, the Appeals Court upheld the refusal of a planning board to issue an "approval not required" endorsement where the public way shown on the plan did not yet exist, even though the town had taken the land for future construction of a public street. The Appeals Court concluded that public ways must in fact exist on the ground to satisfy the adequate access standard of c 41, Section 81M. Perry v. Planning Board of Nantucket supra at 146, 150-151. While Perry dealt with nonexistent public ways and this case deals with nonexistent ways of access, the principle is the same. There should be no endorsement in the absence of existing ways of access.

The Planning Board subdivision rules and regulations (Section 3.3.2 of the Rules and Regulations adopted on April 26, 2005) contain specific rules for evaluating the adequacy of access from an abutting way to the buildable portion of a lot. The rules state:

The Board shall determine whether vital, direct, practical and traversable access to municipal services exists from the abutting way to the buildable portion of a lot. The access shall be safe and convenient for travel. Where access is illusory due to the existence of steep grades, or other physical barriers, constraints or impediments, the Board shall not consider the lot as having sufficient frontage to allow a division of land without approval under the Subdivision Control Law.

Attorney Kenney further argues that the access issue is addressed via the agreement to obtain an easement across the Giovanella property. First of all, as stated in the above-quoted court case, access must exist at the time the plan is presented for ANR endorsement. The proposed access does not presently exist on the ground; there is only an agreement to create one. Part of the agreement calls for the wood from the hardwood trees to be cut down to clear the access across the Giovanella property to the Curatola property.

Second, the proposed access is a 12.5' wide easement that would connect to a 25' easement that provides access to Fisher Street and that already serves four houses. The proposed agreement would extend that to six houses. Section 3.3.1 of the Planning Board rules and regulations pertaining to evaluating ANR plans sets a standard for road width of 18 feet. Furthermore, for actual subdivisions, the rules allow a width of 18 feet only for a private road that serves no more than lots. Furthermore, dead end streets are limited to 600 feet. The existing easement to the

Giovanella property is already more than 700 feet long. Extending it to the edge of the Curatola property would extend it to about 1300 feet to the first lot and to about 1500 feet to the second lot (which would run through another easement across the first lot).

Third, the Planning Board rules and regulations (Section 3.3.2) require that the access be from “an abutting way.” Fisher Street is not an abutting way to the subject property. Furthermore, while an agreement with Giovanella for an access through her property has been presented, it is not clear that she has sole authority to grant access to the existing 25’ easement to Fisher Street to 2 additional lots. No documentation has been presented that Mr. Curatola has rights to use that existing easement.

I wish to make one final point. Attorney Kenney cites Corcoran v. Planning Board of Sudbury for its ruling that the existence of wetlands and the need for approvals from another board is not justification for denying ANR endorsement. While the existence of the guardrail makes the issue moot, it should be noted that a subsequent Appeals Court case, Gates v. Planning Board of Dighton, involved a property with significant wetlands at the front of the property and would have required a 2000’ bridge to access the buildable portion of the property. Instead the applicant proposed extending a private way to access the lots. The private way did not conform to width, subbase, drainage or sidewalk requirements of the Planning Board rules and regulations. The court ruled

“The adequacy of such a road system, as prescribed by the rules and regulations of the planning board is precisely what the subdivision control law is about. As in the Gifford case, the plan proffered is ‘an attempted evasion of the duty to comply with the regulations of the planning board.’ We think the character of the Chase Street extension and the east-west spur is distinct from that of the common driveway commented upon tolerantly in Fox v. Planning Board of Milton. . . a case in which access from the public way was, in any event, attainable.”

The court ruled that the Planning Board acted within its authority in denying the ANR endorsement.



**ATTACHMENT to Minutes of 12/9/08 Planning Board Meeting**

**From:** Barbara Saint Andre [bsaintandre@petrinilaw.com]  
**Sent:** Wednesday, November 26, 2008 4:26 PM  
**To:** Susan Affleck-Childs  
**Cc:** Suzanne Kennedy  
**Subject:** Barberry Homes v. Planning Board

CONFIDENTIAL NOT A PUBLIC RECORD

ATTORNEY CLIENT PRIVILEGE

RELATES TO PENDING LITIGATION

Hi, Susy, I received a telephone call from plaintiff's attorney in this case. He stated that his client wanted to convey to the Planning Board that it would be willing to agree to make the contribution to the senior center if the Planning Board were to recommend to Town Meeting an amendment to the ARCPUD bylaw eliminating the requirement to provide 10% affordable housing, and if Town Meeting were to adopt the amendment. I told him that it seemed counter to the state and town policy favoring the construction of affordable housing, but that I would pass along the offer. The Board should take this up at its next meeting in executive session. I don't think I need to be there, but if you want me there I can certainly attend.

Have a happy Thanksgiving!

Barbara J. Saint André

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