



# TOWN OF NORTHBOROUGH PLANNING BOARD

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Approved 12/3/13

## Planning Board Meeting Minutes October 23, 2013

**Members Present:** Rick Leif, Leslie Harrison, Theresa Capobianco, George Pember, Michelle Gillespie

**Others Present:** Kathy Joubert, Town Planner; Fred Lonardo, Inspector of Buildings/Zoning Enforcement Officer; Fred Litchfield, Town Engineer; Fran Bakstran, Tom Racca, Greg Roody, Lorraine Leland, Mark Rutan, Amy White, Marshall Gould, Tom Reardon, Amy Poretsky, Brian Smith, Rob Berger

Chairman Leif opened the meeting at 7pm.

### **Public Hearing to Consider Proposed Zoning Amendments for 2013 Special Town Meeting**

Chairman Leif read the legal notice for this public hearing.

### **Section 7-10-060 Solar Photovoltaic Systems Moratorium**

On September 16, 2013, Greg Roody, 28 Moore Lane, submitted to the Town Clerk a Citizen's Petition Request for Special Town Meeting that included signatures from at least 200 registered voters of the Town of Northborough. He distributed to the board and amended version of his original article for a Moratorium on Solar Photovoltaic Systems (solar farms) to be heard at Special Town Meeting on Monday, October 28, 2013. The three changes Mr. Roody made to his original proposed Section 7-10-060 – Solar Photovoltaic Systems Moratorium are as follows:

- a) Definitions:
  - Remove the definition of **"On-Site Solar Photovoltaic System"**
  - In the definition of **"Rated Nameplate Capacity"**, remove the words **"Direct Current (DC)"** and add the word **"Watts"**
- c) Temporary Moratorium:
  - Remove the wording **"or an On-Site Photovoltaic System"**

Mr. Roody stated he is not seeking a ban on solar power. His amended article would allow the use of any rooftop solar installation, no matter how large, and any ground-based systems smaller than 250 kilowatts. The purpose of this amended article is to regulate or stop what may be proposed in residential districts in the future. A moratorium would give the Planning Board time to propose a zoning bylaw that would restrict large farms in residential districts.

Mr. Pember motioned to support the proposed article for a Moratorium on Solar Photovoltaic Systems at Special Town Meeting, as amended. Ms. Harrison seconded the motion and the vote was unanimously in favor of the motion.

### **Section 7-03-030B and Section 7-08-030 To Prohibit Use Variances**

Lisa Maselli, 13 Maple Street, presented information on her proposed article for amendments to the Zoning Bylaw that would prohibit the Zoning Board of Appeals from granting use variances, which are as follows:

#### **7-03-030. Board of Appeals**

- B(2): (Regarding the powers of board): Remove the word “use” and insert the sentence “use variances are prohibited”.

#### **7-08-030. Variance required**

- At the end of the paragraph, insert the sentence “Notwithstanding, the provisions of this Section, use variances are prohibited.”

Ms. Maselli read from a document. She did not distribute copies of this document to the board members or any others present.

Ms. Joubert reviewed a spreadsheet that had been distributed to the board members which summarized use variance permitting activity by the Zoning Board of Appeals from 2002 to the present, which is attached to these minutes.

Mr. Leif noted that in the use table, there are uses that are both allowed and not allowed. In the Groundwater Protection Overlay District bylaw, there were some variances granted that have nothing to do with the use table, and for which the ZBA made decisions that what was proposed was not detrimental.

Ms. Joubert noted a Major Commercial Overlay District was put in place, after Northborough Crossing was permitted, to allow certain uses by special permit in that part of town. Certain uses that are not referenced in that overlay district are prohibited, such as a drive-through service for a restaurant. A variance was recently granted for that use on the property located at 333 Southwest Cutoff for New England Baseball LLC.

Mr. Leif confirmed that, in the absence of the ability to grant use variances, if an opportunity came to town that was proposed in an area in which the use was prohibited, a change in zoning would have to be done at Town Meeting.

Ms. Capobianco asked if the mixed-use development recently permitted by the ZBA for 61-65 West Main Street was granted any uses variances. Ms. Joubert replied no use variances were granted for that project.

Ms. Capobianco stated the 2009 zoning amendments accounted for many projects that the town would want to see. The dramatic decrease in use variances indicates the Planning Board got the zoning right. Use variances should not be on our books.

Mr. Pember stated he has been before the ZBA many times representing clients and the Board does a very thorough job of asking questions of the applicant. Also, everyone in the surrounding area gets notified and if a project doesn't make sense, those people will let ZBA know in no uncertain terms. He stated he feels very strongly that ZBA should have the right to consider use variances in a situation that makes sense and he would be very disappointed if the town did away with them.

Mr. Pember stated zoning parcel by parcel is spot zoning.

Ms. Joubert stated most often the Attorney General's office does not support spot zoning for looking at just one lot. That is a very serious risk. It would require a zoning article and would be done through the Town Meeting process.

Ms. Capobianco stated a person could look for a change of use and that is not spot zoning.

Mr. Pember stated it might not make sense for the entire district and could be dangerous.

Ms. Joubert stated throughout the 3-year process to rewrite zoning, there were discussions on use variances and decisions were reached that use variances would be available. She suggested the Planning Board could review the use table and decide which use variances they would keep.

Ms. Capobianco thought the consultant for the rezoning in 2009 didn't want to include use variances. Ms. Joubert confirmed the consultant originally recommended the deletion of use variances, but based on groundwater issues, use variances needed to be allowed.

Brian Smith, 97 Main Street, stated the burden of proof is on the applicant to get any kind of variance and he wondered if hardship is considered enough by the ZBA.

Ms. Joubert explained the difference between use by special permit and by variance at the request of Amy White, 23 Brigham Street.

Mr. Leif noted different projects require different levels of approval. Some variances and special permits were requested for the project at 61-65 West Main Street. ZBA may be asked to grant both special permits and variances.

ZBA board member Fran Bakstran, 76 Cedar Hill Road, stated she thought Ms. Capobianco was going to support use variances because, looking at the 5 years prior to the 2009 amendments, there were 16 use variances granted, but in the 5 years since, there have only been 5 granted. These numbers show the zoning changes were an improvement and that there is still a need for use variances.

ZBA board member Mark Rutan, 22 Hemlock Drive, stated there are a lot of cases where the ZBA has granted use variances in groundwater areas because the overlay invalidates the whole lot for the proposed use even though the overlay district might be in a very small part of the lot.

Attorney Mark Donahue, 30 Woodstone Road, spoke in opposition to the proposed article, stating use variances allow certain developments to go forward, as was the case for Northborough Crossing, which was in lieu of a whole district change from industrial to commercial. If a use was not thought of, it doesn't mean they will be misused. Prohibiting use variances does not take into consideration the law of unintended consequences. A ZBA applicant has to meet the criteria for granting of a variance. The ZBA has to make findings that the applicant has met those criteria. If the ZBA finds there is a topographical hardship; that the proposed use will not be more detrimental to the surrounding neighborhood, and the project supports the purpose and intent of the bylaw, they will grant the use variance. If those are not proven, the use variance will not be granted. If the applicant thinks the board is wrong, the applicant can appeal the decision.

Attorney Marshall Gould, 41 West Street, stated he shares the opinions of Mr. Pember and Mr. Donahue and has experienced the same difficulty when attempting to obtain a use variance. He stated he has

brought a lot of projects requiring use variances to the board and if an applicant does not meet the criteria, the use variance is not granted. Use variances are a necessary element of towns that are doing proper planning.

Tom Racca, 121 Indian Meadow Drive, stated he understands the cases that have been brought out. All the gentlemen who spoke are attorneys. He believes the burden of proof has been on the local residents instead of the applicant. Residents have to put in quite a lot of work. From a resident's perspective, when you live in a town and know what you've moved into, and know what the restrictions are, that gives you some comfort. When it can be changed by an unelected board, that is a little unsettling. Residents have a lot of things to do than to come to meetings.

Ms. Bakstran stated that, with all due respect to Mr. Racca, they are all residents and not having time is not fair to those who volunteer. ZBA is not elected because it is a zoning board of appeals and intentionally bound by state statute. In this meeting, they are only talking about use variances, not the overall authority of the ZBA and the Planning Board.

Tom Reardon stated he understands the fear and upset about some things occurring. He stated he sits on the Design Review Board and they get projects at a very early state with fluidity and give and take. If there are concerns about the openness of the process, things are not done behind closed doors. It doesn't appear there is any abuse of use variances. Prohibiting use variances is a solution in search of a problem. The town needs them and as an architect, he doesn't want that tool to be removed. They benefit the community and people who own land.

Attorney Roger Leland, 28 South Street, stated people are forgetting the real purposes of these laws. There are times when someone wants to change a bylaw, but cannot. If ZBA's ability to grant use variances is taken away, the board is helpless and one of the main principles of zoning – the zoning board of appeals - will be destroyed for all the people, not just some.

Ms. Harrison stated she is hearing anger and frustration and thinks this is a knee-jerk reaction to take whatever power you can away from the ZBA. She stated she has reversed her position and is not in favor of supporting the article.

Mr. Leif stated his feeling is that, looking at the use variances granted over time, they have been reasonable and of benefit to the town. He would like to see that zoning approved is followed, but doesn't think the way to do it is to prohibit use variances. He is opposed to this article, but not opposed to continuing to work on making zoning better.

Ms. Capobianco motioned to support the article as presented, Ms. Gillespie seconded the motion and the vote was 2 in favor of supporting the article and 3 opposed to supporting the article.

Mr. Leif stated Planning Board members who support the article should speak at Town Meeting so the people can see it was not a unanimous decision.

The meeting adjourned at 8:45 pm.

Respectfully submitted,

Debbie Grampietro  
Board Secretary