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PLANNING BOARD

June 22, 2010 - Minutes

A meeting of the Orleans Planning Board was called to order at 7:00 p.m. in the Nauset Meeting Room at the Orleans Town Hall. **Present: Chairman:** John Fallender; **Vice-Chairman:** Seth Wilkinson; **Clerk:** John Ostman; Kenneth McKusick; Chet Crabtree; **Associate:** Gary Guzzeau. **Planning Department Staff:** George Meservey; **Also Present: Board of Selectmen Liaison:** Jon Fuller.

Approval Not Required – Williams/Harrison, 5 & 15 Uncle Jim's Lane

Seth Wilkinson recused himself from discussion and voting on this Approval Not Required plan due to his position with the Orleans Conservation Trust which is an abutter to this property.

Tim Brady (East Cape Engineering) presented an Approval Not Required plan for a land swap on Uncle Jim's Lane. Meservey stated that this plan is for a simple land swap to allow an addition to one of the houses which would otherwise cause a setback violation. Meservey stated that this meets the Approval Not Required filing requirements.

MOTION: On a motion by **Kenneth McKusick**, seconded by **John Ostman**, the Board voted to authorize the Planning Board Chairman to endorse the Approval Not Required plan prepared for John & Helga Williams and Marilyn M. Harrison, dated June 2, 2010, scale 1" – 40', prepared by East Cape Engineering.

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

7:00 P.M. – Public Hearing – Thomas & Patricia Kennedy, 40 Tom's Hollow Lane (Remand from Land Court)

Fallender opened the public hearing and Ostman read the legal ad into the record.

Fallender gave the following summary of events for this subdivision plan:

On November 2, 2007 Thomas and Patricia Kennedy sought approval for a Definitive subdivision plan and requested permission to divide lots 4 & 5 into four buildable lots. After a public hearing, the Planning Board voted to deny the subdivision plan and issued its decision on November 28, 2007.

The Kennedys subsequently appealed the Planning Board decision to the Land Court. The Kennedys sold lot 5 (known as 50 Tom's Hollow Lane) and desire to settle the case. The Planning Board as agreed to consider their request so the Land Court has remanded the case back

to the Planning Board for a public hearing (held on June 22, 2010) for approval of one additional lot at 40 Tom's Hollow Lane. Under the terms of the Judge's remand, there shall be no improvements required for Tom's Hollow Lane as a condition of the additional lot, nor any conditions imposed by the Planning Board. Lot 5 (known as 50 Tom's Hollow Lane) is subject to a permanent restriction which means it shall not be further divided or subdivided and the restriction has been recorded at the Registry of Deeds. Action on this remand with the approval of one additional lot at Lot 4 (40 Tom's Hollow Lane) and the imposition of a permanent restriction on Lot 5 (50 Tom's Hollow Lane) will serve to resolve this case without cost to either party. Based on this remand, the Planning Board has been asked to consider the following:

- ❖ 40 Tom's Hollow Lane to be subdivided for one additional lot.
- ❖ No further subdivision will be permitted for 50 Tom's Hollow Lane.
- ❖ Tom's Hollow Lane will not require any modification or improvements.
- ❖ The resolution of this case without cost to either party.

Correspondence:

John Ostman read the following letters into the record:

- Board of Health letter, dated June 22, 2010
- Fire Department letter from Chief William P. Quinn, Jr., dated June 1, 2010

Discussion:

Brad Malo (Coastal Engineering) stated that this is a proposed subdivision of 40 Tom's Hollow Lane (Lot 4) with an existing dwelling. Malo stated that the house lot would be divided and provide approximately 113,100 square feet and so called Lot 4B as it is shown on the plan is a panhandle lot fronting on the existing Tom's Hollow Lane. The upland area of that lot is approximately 63,900 square feet, excluding wetland, flood plain and panhandle areas. Malo stated that Lot 4B complies with the shape number and the upland area requirements under the regulations. Malo stated that Lot 4A is the lot with over 150 feet of frontage along Tom's Hollow Lane with a lot area of 53,500 square feet of upland area which meets the frontage and shape number requirements under the regulations. Malo explained that this is a Definitive Subdivision and plans have been submitted and waivers have been requested as a formality. Malo explained that 18" caliper trees are not shown on the Definitive Subdivision Plan, but they have been included on the topographical plan included in the package. Malo stated that there are no plans for road improvements.

Meservey stated that this case was remanded back to the Planning Board and a public hearing is being held due to the proposal to create a panhandle lot which does not have sufficient street frontage according to the zoning bylaws. Meservey explained that they are seeking a waiver from the street frontage to allow the 30' panhandle instead of 150' road frontage which would be the central focus of the Planning Board discussion. Fallender questioned a previous panhandle waiver request. Meservey stated that the Planning Board's November 2007 denial of the Definitive Subdivision plan included a number of waiver requests. The Planning Board approved the same panhandle waiver.

Crabtree questioned the current driveway access to Lot 4 along abutting property. Malo responded that the applicant has a right of access over the abutting property and that will continue if the subdivision is approved to access Lot 4.

Crabtree questioned the missing reference to the 18" caliper trees on the Definitive Subdivision Plan. Meservey responded that there is no proposal to construct any roadway, and the clearing necessary for a

house may impact some trees, but the Planning Board must make a determination whether that is an important waiver. Meservey explained that one of the requirements for a submittal of a definitive plan is to show trees over 18" and this was not done on the 40 Tom's Hollow Definitive Subdivision Plan. Malo explained that the approximately five 18" caliper trees scattered around the property are shown on the topographical map which was included in the submittal package. Crabtree stated that none of them interfere with the panhandle.

Public Comments:

Sheldon Brier (Tom's Hollow Lane) explained that he lives on a lot adjacent to the lot where subdivision is proposed. Brier stated his opposition to the subdivision proposal based on the expected increase in traffic, and the number of people on that road.

Attorney Bill Hammatt (representing Mr. & Mrs. Samuelson – owners of 50 Tom's Hollow Lane) explained the Samuelson's serious concerns about the creation of a lot which is less than half the size of other lots in the area. Attorney Hammatt stated that the Samuelson's have agreed to a restriction on their lot and have indicated that they had no knowledge of any immediately pending subdivision on the neighboring lot. Attorney Hammatt stated that the Samuelson's do not agree with the pending subdivision as it will encroach fairly closely on the Samuelson's property and will impede their household privacy, traffic will increase, and the value of their property will be reduced as a result. Attorney Hammatt suggested a building envelope be shown on the plan. Attorney Hammatt stated the Samuelson's concern with the 18" caliper trees (not shown on the Definitive Subdivision plan) which currently provide them with privacy. Attorney Hammatt stated that Samuelson's have owned 50 Tom's Hollow Lane for less than a month and would like time to work with the neighbors on a mutually agreeable plan. Attorney Hammatt mentioned the need for review of the existing septic system and suggested that the septic system for the new house be located in the area between the two properties in order to provide as much distance between the dwellings as possible. Attorney Hammatt brought up the issue of fire safety concerns from the Fire Department. Attorney Hammatt reiterated the request to provide the Samuelson's with more time to work with the proponents on a more amicable solution to this situation.

George Meservey stated that the recorded Grant of Restriction that the Kennedy's placed on the lot for 50 Tom's Hollow Lane recently purchased by Mr. & Mrs. Samuelson was filed at the Registry of Deeds prior to the purchase of property by the Samuelsons which clearly states that the restriction on 50 Tom's Hollow Lane could be released for a number of reasons including: (1) if the Planning Board denies the application for the subdivision at 40 Tom's Hollow Lane, or (2) if the Planning Board approves the application with conditions that were not acceptable to the Kennedy's in their sole discretion; or (3) if the Planning Board approved the application, but it was appealed by a third party, and the appeal resulted in an annulment of the Planning Board's decision. Meservey reiterated that the Grant of Restriction was on file at the Registry of Deeds before the Samuelsons bought 50 Tom's Hollow Lane so they should have been aware of what it meant.

Attorney Preston Halperin (counsel for Thomas and Patricia Kennedy) explained his involvement in drafting of the restriction. Attorney Halperin stated that the Samuelson's were represented by counsel who had the opportunity to review the restriction and there was a provision in their Purchase and Sale Agreement that alerted them before they bought the property that there was litigation with the Town of Orleans that was in the process of being resolved.

Mary Lou Brier (Tom's Hollow Lane) stated her opposition to the proposed subdivision due to several reasons including an increase on traffic in the road, an additional house which will further pollute Pleasant Bay, more people on the beach and moorings in the bay, and a reduction in the woods and wildlife.

Marcia Galazzi (24 Tom's Hollow Lane) thanked Planning Board members for working out a compromise (under pressure). Galazzi stated that you (later indicating everyone in the room) are either going to make a decision on the side of open space, conservation of space, and conservation of the waters of Pleasant Bay and this area of critical concern or you are not. Galazzi stated you are stewards of a precious and diminishing resource, as shown by how rapidly our world is disintegrating in front of us. Galazzi stated that this is a place where we can save something important since it contains two vernal pools, a wetland, and a 20 acre conservation area tied up in the center of this land. Galazzi stated that even though the land doesn't directly touch the vernal pools and wetlands, the traffic and use makes a difference.

Vince Ollivier (representing Galazzi and Brier) agreed with Attorney Hammatt on the issue of the need for more time for the proponents and opponents to come to an agreement. Ollivier stated that the abutting neighbors have not had much standing in presenting their issues in the case as the agreement has mostly been between the Town of Orleans and the Kennedys. Ollivier expressed his concern with the increase in nitrification problems in Pleasant Bay. Ollivier reminded Planning Board members of the wastewater and denitrification problems that the Town of Orleans has been dealing with for the past few years, and stated that additional people in dwellings add to the problems. Ollivier suggested that the same type of restriction could be placed on both 40 and 50 Tom's Hollow Lane. Ollivier agreed with Attorney Hammatt's suggestion of requiring a building envelope. Ollivier suggested that the issues of gross floor area, limiting the number of bedrooms and denitrification could be addressed as well. Ollivier stated his concern with the wildlife disruption on property that is on the fringes of approximately 60+ acres of property owned by the Orleans Conservation Trust and linked to other conservation protected properties. Ollivier stated his opinions on the idea of underdevelopment on this property or a requirement for denitrification. Ollivier questioned whether a package treatment plant could be considered.

Attorney Preston Halperin (counsel for Thomas and Patricia Kennedy) stated that there is a requirement in the Land Court Order of Remand that the attorneys report back to the court by July 21, 2010 so that the court would know if the case has come to a resolution.

Attorney Halperin made the following responses to some of the issues brought up by neighbors:

1. As of right now, no decision has been made as to what the Kennedys will do with this lot if it is approved. It is within the realm of options that it might be desirable for this to be conserved, either through a Conservation Restriction or it may be more desirable for it to be developed. There has been no decision, since currently there is no lot to be considered. No decision will be made under after the Planning Board approves the subdivision.
2. There has been no decision on the issue of a building envelope and there has been no attempt or testing to site a house so this discussion would be premature.

Attorney Bill Hammatt (representing Mr. & Mrs. Samuelson – owners of 50 Tom's Hollow Lane) reiterated a request for his clients to have an opportunity to discuss options with the Kennedys. Attorney Hammatt reiterated that his clients have only been owners of 50 Tom's Hollow Lane for less than a month and are unaware of their options. Attorney Hammatt stated that his clients did

sign an agreement not to subdivide, and had the restriction Attorney Halperin referred to recorded, but it was recorded simultaneously with the deed, not in advance which did not allow time to review it ahead of time. Attorney Hammatt stated that a few days before the closing, a restriction was added to the property that prevented the property from having more than five bedrooms, of which they were totally unaware, and it was not in the agreement that they recorded.

Kenneth McKusick requested a history of the property and the subdivision requests previously requested by the Kennedys since November 2007. Meservey responded that the Kennedys submitted proposals that the two (2) existing lots (a total of approximately 7½ acres) be divided into four (4) building lots {two existing homes and two additional building lots}. Meservey stated that a long discussion ensued on the impacts on Tom's Hollow Lane and the necessity to improve the lane for access in order to approve the subdivision pushed back by all the conservation issues such as wetlands and vernal pools in that area. Meservey reminded Planning Board members of the 1975 Planning Board approval for six (6) lots in which the decision had conditions that any further subdivision of these lots would necessitate full compliance with the Subdivision Rules and Regulations as they were in effect at the time of the next application. Meservey stated that Planning Board members researched the issue of whether the proposals and/or waivers were in compliance with the Subdivision Rules & Regulations. Meservey stated that a four (4) lot subdivision was proposed and denied by the Planning Board, which subsequently went to the Land Court. Meservey stated that a significant amount of time has elapsed since the appeal was filed, and the offer compromise is for one additional lot and one of the lots conserved in perpetuity and not further subdivided.

Gary Guzzeau questioned the 18" caliper trees and their proximity to the property boundaries and whether they are within setbacks. Brad Malo responded that there are four trees shown on the topographical drawing. Malo showed the topographical plan which places two of the trees within 25' of Tom's Hollow Lane, and two within 25' of southerly boundary of 50 Tom's Hollow Lane, one of which is on the existing house lot and one is in the vicinity of a well that serves 50 Tom's Hollow Lane.

Chet Crabtree questioned the limit imposed on conditions and referred to the memorandum from the Fire Chief. Meservey stated that the stipulation is that there can't be any conditions that are not acceptable to the applicant. Meservey stated that the Planning Board must adhere to the conditions set by the Board of Health whereas comments from other departments are used for guidance and information in the decision making process. Meservey stated that the Conservation Commission has approved the installation of a water main down the Tom's Hollow Lane Layout, which may alleviate the Fire Chief's concerns.

Attorney Preston Halperin (counsel for Thomas and Patricia Kennedy) explained that the water main has been approved, but that does not mean that it will be constructed. Attorney Halperin stated that it was proposed at a time when the Kennedys were expecting that the economics would be different in terms of the number of lots. Attorney Halperin stated it is not definite whether the Kennedys will proceed with construction of a water main and hydrant. Attorney Halperin stated that the Fire Chief has indicated in previous correspondence, citing the Emergency Access Regulations in Section 90, that for any way that is in existence prior to 1993, there has to be a minimum unobstructed clearance of 10' wide and 14' high which the applicants feel this road fits. Attorney Halperin stated that this is the law and the Fire Chief has the ability to go in there at any time to trim and clear the road, which is not an issue for the applicant, but rather for the people living on the road and the Fire Department.

John Fallender questioned whether there can be a condition for an I/A system. Meservey responded that an I/A condition must be acceptable to the applicant under the terms of the Land Court remand.

Kenneth McKusick stated that the Board of Health conditions did not suggest an I/A system, but did state that the existing system must be inspected and the existing dwelling must be limited to six (6) bedrooms.

Brad Malo made a statement that he attended the Board of Health meeting on this application and the specific issue of conditions of approval was discussed and a motion was made to approve the plan without conditions with respect to the plan as proposed. Malo stated that the Health Agent at the public meeting emphasized to the Board of Health about the inquiry on the previous application regarding certain conditions such as I/A and bedroom restrictions. Malo stated that the Board of Health response was that the existing Nutrient Loading Regulations were satisfactory to protect the area.

Kenneth McKusick questioned whether the conditions written in the Board of Health memorandum dated June 22, 2010 are acceptable to the applicant. Brad Malo responded affirmatively with the following comment that the "conditions as discussed are acceptable to the applicant".

Kenneth McKusick questioned whether his recollection of a previous approval of the panhandle was correct. John Fallender responded affirmatively. Kenneth McKusick questioned if there has been any change in the application regarding the panhandle. George Meservey stated his opinion that there was no substantial change in the panhandle request and the panhandle had been approved.

Gary Guzzeau questioned the size of the septic system and the condition regarding the number of bedrooms which is limited to six. George Meservey stated that the upland area exclusive of the panhandle on proposed Lot 4B (where the existing Harry Hunt LLC House is located) is 63,000 square feet and the town has a Nitrogen Regulation limit is one bedroom per 10,000 square feet which could explain the logic behind the Board of Health condition. Gary Guzzeau calculated that between the two lots there could be a maximum of 11 bedrooms.

Vince Ollivier expressed his concern over his opinion that there is a lack of planning on the applicant's part where they have proposed to subdivide the land, but do not currently have a plan for how the land will be used. Ollivier stated that the neighbors are concerned about what the applicant's plan is to do with the land and a lack of input being solicited from the neighbors.

John Fallender stated that the responsibility of the Planning Board is to deal with the division of land, not buildings.

Gary Guzzeau questioned the issue of building envelope brought up by the neighbors which could limit disturbance to the land within and beyond the setback areas.

Attorney Bill Hammatt commented his opinion that the Land Court requires a response by July 21st, but not necessarily a final decision on this case since it was only submitted to the Orleans Planning Board a few weeks ago and the Land Court knows that final approval on a subdivision can be in excess of four months. Attorney Hammatt suggested that the Planning Board could get in touch with the Land Court, and the proponents, and explain that the Planning Board is in the process of making a decision on this subdivision request which could allow for more time for all of the parties to discuss all of the proposal options.

MOTION TO CLOSE PUBLIC HEARING:

MOTION: On a motion by **John Ostman**, seconded by **Kenneth McKusick**, the Board voted to close the evidentiary portion of the public hearing for Thomas and Patricia Kennedy for 40 Tom's Hollow Lane.

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

Planning Board Comments:

Kenneth McKusick stated his opinion that the Planning Board has dealt with this complex issue for many years and the result has been a reduction in the development of the land, if the panhandle is approved and a building is erected. McKusick stated that the road has been preserved in its present natural state without impacting vernal pools.

John Fallender noted that due to Board of Health regulations, the size of the house and number of bedrooms are limited.

Kenneth McKusick stated his opinion that this matter should be settled and expressed his sympathy for neighbors who feel more time would be advantageous. McKusick stated that it is unclear what more can be accomplished if additional time was taken by the Planning Board to make the final decision.

Chet Crabtree acknowledged and agreed with some of the multiple issues brought up at this meeting by the applicant and neighbors regarding extending the time frame for a Planning Board decision. Crabtree stated that the panhandle has been approved in the past, and it would be inconsistent for the Planning Board to disapprove it at this point.

John Ostman stated that with all of the time spent on this issue, there will never be a perfect answer on how to settle the issue. Ostman stated that the best answer would be to balance a way to serve as many groups as possible. Ostman noted that the Planning Board is sensitive to the interests of all parties including neighbors. Ostman stated that the Planning Board decision was arrived at through countless hours of deliberation from all parties.

FINDINGS OF FACT:

1. The granting of a frontage waiver for Lot 4B is found to be in the public interest.
2. Lot 4B is limited to one single-family dwelling under zoning (§164-22.A.(5))

MOTION TO GRANT PANHANDLE:

MOTION: On a motion by **Kenneth McKusick**, seconded by **Gary Guzzeau**, the Board voted to grant a waiver from the street frontage requirements of the Zoning Bylaw to allow a panhandle lot.

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

MOTION TO APPROVE:

MOTION: On a motion by **Kenneth McKusick**, seconded by **Gary Guzzeau**, the Board voted to approve the Definitive Subdivision Plan prepared for Thomas R. and Patricia W. Kennedy (Harry Hunt House LLC) prepared by Coastal Engineering, dated May 21, 2010, showing two (2) lots, with the following Board of Health conditions stated in a memorandum dated June 22, 2010:

1. Per the requirements of Title 5, the existing septic systems serving the existing dwelling on 4B must be inspected.
2. The existing dwelling shall be limited in use to six bedrooms until such time the capacity of the septic system is increased in compliance with the requirements of Title 5 and the Orleans Board of Health regulations. This condition must be recorded at the Registry of Deeds.

VOTE: 4-1-0 The motion passed by a majority. (Chet Crabtree voted again the motion).

Seth Wilkinson returned to the meeting at this point.

MYLAR ENDORSEMENT – HARRY HUNT, III, 232 TONSET ROAD

George Meservey reported that a covenant has been received for Harry Hunt, III for property at 232 Tonset Road

MOTION: On a motion by **Seth Wilkinson**, seconded by **John Ostman**, the Board voted to authorize the Planning Board Chairman to endorse the mylar for Harry E. Hunt, III for a Definitive Plan of Land for property at 232 Tonset Road, dated September 23, 2009 revised April 23, 2010 by Coastal Engineering Company, Inc, scale "AS NOTED".

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

OLD BUSINESS

Comprehensive Land Use Reform and Partnership Act

Meservey stated that zoning reform has been an ongoing effort and this is the first bill to come out of committee to go to the full legislature. Meservey stated that this bill deals with a variety of issues such as:

- ❖ Consistency of zoning reforms with master plans;
- ❖ A lack of prohibition single family home sizes;
- ❖ Permitting vote requirements;
- ❖ Allows for Site Plan Review;
- ❖ Setting of reasonable criteria for variances;
- ❖ Master Planning Requirements;
- ❖ Subdivision Control changes;

CORRESPONDENCE

Planning Board Resignations

Planning Board members thanked Seth Wilkinson and Gary Guzzeau for their years of service on the board and wished them the best in their future endeavors.

APPROVAL OF MINUTES: May 25, 2010

MOTION: On a motion by **Seth Wilkinson**, seconded by **Chet Crabtree**, the Board voted to approve the minutes of May 25, 2010, as amended.

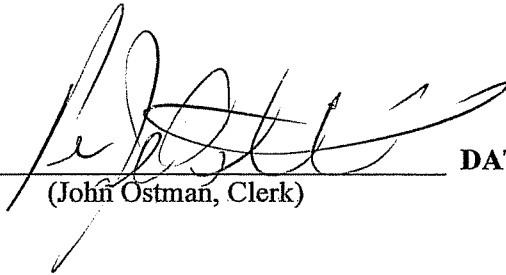
VOTE: 4-0-1 The motion passed by a majority. (John Ostman abstained).

ADJOURNMENT

MOTION: On a motion by **Kenneth McKusick**, seconded by **Seth Wilkinson**, the Planning Board voted to adjourn at 8:35 p.m.

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

SIGNED: _____



(John Ostman, Clerk)

DATE: _____

7/27/2010