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For Official Use Only

PLANNING BOARD

July 27, 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; **Clerk:** John Ostman; Kenneth McKusick; Chet Crabtree and Steve Bornemeier. **Associates:** Chip Bechtold and Paul McNulty. **Planning Department Staff:** George Meservey; **Secretary:** Karen Sharpless. **Also Present:** **Board of Selectmen Liaison:** Jon Fuller.

APPROVAL NOT REQUIRED – ALEX AND NANCY GAMBAL, 10 NICHOLS ROAD

Peter Soule (Soule Land Surveying) explained that this is property off Nichols Road consisting of 2.038 acres with an existing dwelling to be removed. Soule stated that the owners would like to subdivide the land into two (2) parcels. Soule stated that the shed shared with Lot 1 and the abutting property will be moved onto Lot 1. Soule suggested that the existing fence could be moved closer to the property line. Soule explained that the front area and lot shape number complies with the town requirements. Soule stated that Nichols road is a 40' private way which abuts a 40' private way to the south known as Chestnut Drive.

Meservey stated that this is a basic Approval Not Required Plan submittal and meets all of the requirements in the Subdivision Rules and Regulations. Meservey stated that there would be two (2) conforming lots each with sufficient frontage on a way. Meservey noted that a question for Planning Board consideration is whether the current configuration of Nichols Road provides adequate access for an additional house lot. Meservey noted that Nichols Road is bumpy and full of potholes, but provides adequate access for an additional house lot.

MOTION TO APPROVE:

MOTION: On a motion by **John Ostman**, seconded by **Kenneth McKusick**, the Board voted to authorize the Planning Board Chairman to endorse the Approval Not Required plan prepared for Alex and Nancy Gambal, dated July 16, 2010, scale 1" = 40', prepared by Soule Land Surveying.

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

7:00 P.M. – PUBLIC HEARING – MODIFICATION TO A DEFINITIVE PLAN, (VOLLER, SMITH, GERANIOTIS, 16-23 SAGE'S WAY)

Crabtree recused himself due to a conflict of interest. Chairman Fallender requested that Associate member, Paul McNulty vote in the absence of Chet Crabtree. John Ostman read the public hearing legal into the record.

Attorney Duane Landreth (as representative for the applicant, Richard Dupont) gave a history of the Sage's Way subdivision. Landreth stated that this is Lot 1 of a 3-lot subdivision approved in February 1961 subject to the following condition: *"Only one single family dwelling with accessory out buildings be erected or maintained on each lot shown hereon"*. Landreth stated that the 3 approved lots all have frontage on town cove and all have an excess of 80,000 square feet of upland area. Landreth stated that "it is believed that the condition imposed was related to Sage's Way width of 15 feet". Landreth stated that at the time the lots were approved, there was a residence on lot 2 and an outbuilding (shed) on lot 1. Landreth explained that on September 23, 1968, (seven years after the subdivision approval), Dorothy Viprino sold Lot 1 to Harlow and Mary Louise Voller.

Landreth noted that the Assessor's records of the town indicate that a house of approximately 1,000 square feet was built in 1969 by the Vollers (referred to as the smaller house). Landreth stated that Building Department records indicate that there was an application to build a second house (referred to as the larger house) which was granted in 1981. Landreth stated that at the same time the Vollers put in a new foundation for the smaller house. Landreth stated that in 1981, the restriction was either not adhered to or was interpreted by the Building Department to mean that a guest house was a use accessory to a main house, and not a separate residence. Landreth stated that consistent with the zoning bylaws at that time, which said that if you had a lot with 80,000 square feet (or even 40,000 square feet), 50 feet of arc frontage, you could have a house and a guest house by itself. Landreth stated that this was later incorporated into the zoning bylaws referred to as §164-22.A (7) which was subsequently "sunsetted" by Annual Town Meeting in May 2005 (and the section became null and void as of May 6, 2008). Landreth stated that if that section were so interpreted, a guest house could be considered an accessory building and therefore it would be lawful.

Landreth described how the Vollers continued to use the property and in 1994 they installed a Title 5 septic system for the cottage. Landreth stated that the Board of Health recently determined that the septic system for the main house had failed and required an upgrade. Landreth stated that Mary Louise Voller (a widow) was now living out of state and intended to sell the property when the order was issued. Landreth stated that the new owners of the property (named Dupont) will be installing a compliant septic system for the main house. Landreth noted that the smaller house is currently compliant with their septic system.

Landreth stated that his office assisted the Duponts in the purchase of the property and an examination of the title which revealed the Planning Board condition. Landreth stated that an inquiry was made to the Building Inspector of how he viewed the situation, and his opinion is set forth in a letter dated June 11, 2010 to the effect that as a matter of zoning the Building Inspector's opinion was that a guest house could **not** be considered an accessory outbuilding to a main residence, and the second dwelling was a violation of the Planning Board restriction. Landreth indicated that the Building Inspector went on to talk about the implications of that with regard to the zoning bylaw. Landreth expressed his opinion that Massachusetts General Law Chapter 40a Section 7 (the statute of repose with regard to zoning bylaws) will not cure this condition, even though it existed for 29 years. Landreth expressed his opinion that planning and zoning are separate in this regard. Landreth stated that "the Building Inspector's zoning opinion, for which he is competent, that in fact at the time that it was granted he didn't consider it an accessory outbuilding". Landreth explained that as a result of the Building Inspector's letter, the applicant applied to the Planning Board for a modification of a condition of approval for the subdivision plan by waiving the condition of

approval in order to legitimize the condition which has existed for almost 30 years which would be to allow the small house to remain. Landreth reported that after the application was filed, it became apparent that the neighborhood at large did not wish to see the conditions modified with respect to all three lots in the subdivision. Landreth stated that the applicant is seeking a waiver of conditions for one lot (known as Lot 1) only, subject to the following conditions, which have been discussed with the neighbors:

1. There should be no more than nine bedrooms on the lot based on a vote by the Planning Board consistent with the regulation that you can't have any more than one (1) bedroom per 10,000 square feet of upland.
2. There shall be no more than two (2) residential structures on the lot.
3. The owner has one year from the date of Board of Health approval to bring the septic system into compliance with Title 5.
4. The cottage on the lot shall be limited to 1,200 square feet of living area. The footprint of the exterior and the deck shall not change. (i.e. The house will stay within its current footprint with regard to its interior and the deck).
5. Lot 1 shall not be further subdivided and the two (2) residential structures shall not be in separate ownership by the creation of condominium, or otherwise.
6. Both structures may not be rented out at any one time to separate parties.

Landreth finished his remarks with the request that the Planning Board allow the modification request since the public interest would seem to dictate it in light that the condition has existed for 29 years without any serious detriment to anyone and would result in destruction of private property.

Planning Department Comments

Meservey noted the Board of Health letter dated July 19, 2010 states the following:

After reviewing the plans and meeting with the proponent, the Board of Health voted to approve the modification to the subdivision plan with the following conditions:

1. There shall not be more than 9 bedrooms on Parcel #16 (lot #1 original plan).
2. There shall not be more than 2 residential structures on Parcel #16.
3. The owner has one year from the date of the Board of Health approval to bring the septic system serving 18 Sage's Way into compliance with Title 5.

Meservey reviewed the following excerpts from The Massachusetts General Laws with Planning Board members:

The General Laws of Massachusetts

Chapter 41: Section 81W. Modification, amendment or rescission of a approval of plan; conditions

The first two paragraphs state the following:

"Section 81W. A planning board, on its own motion or on the petition of any person interested, shall have power to modify, amend or rescind its approval of a plan of a subdivision, or to require a change in a plan as a condition of its retaining the status of an approved plan. All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the approval of the modification, amendment or rescission of such approval and to a plan which has been changes under this section."

"No modification, amendment or rescission of the approval of a plan of a subdivision or changes in such plan shall affect the lots in such subdivision which have been sold or mortgaged in good faith and for a valuable consideration subsequent to the approval of the plan, or any rights appurtenant thereto, without the consent of the owner of such lots, and of the holder of the mortgage or mortgages, if any, thereon; provided, however that nothing herein shall be deemed to prohibit such modification, amendment or rescission when there has been a sale to a single grantee of either the entire parcel of land shown on the subdivision plan or of all the lots not previously released by the planning board."

Discussion

Planning Board members discussed whether the current owners and mortgage holders of all of the lots in the 3-lot subdivision would need to be notified and sign in consent for the modification of conditions for this application. Meservey indicated that if a change is only being made to one lot in the subdivision, then there is no need for written consent from other lot owners, and their lots will remain under the same condition from the original subdivision approval. Planning Board members agreed on the need for Town Counsel advice on this matter before making any decisions.

Correspondence:

Orleans Conservation Trust letter dated June 28, 2010 states the following:

"This proposed project is within 300 ft of a State recognized Priority Habitat of Rare or Endangered Species and within 1,000 ft of State's BioCore Habitat. This information is based on observations documented within the last 25 years in the database of the Natural Heritage & Endangered Species Program (NHESP)."

"Priority and BioCore habitats were designated by NHESP scientists from documented observations of state-listed rare species and are based on such factors as reported species movements and known habitat requirements. Town Cove's tidal waters are home to a number of protected species and the Planning Board needs to take this into consideration. The expansion or maintenance of any more homes abutting Town Cove could negatively effect [sic] the water quality, in turn, negatively effecting [sic] the species that are reliant upon it for survival."

Fire Chief William P. Quinn, Jr., states the following concerns in his letter, dated June 21, 2010:

"As in the past, I would like to voice two concerns over Sage's Way. The entrance to Sage's Way is less than desirable to turn our Tower Ladder on to that road without the risk of damage. There has to be some common ground to allow for a slightly wider entrance to the road".

"My second concern is the distance from the hydrant out on Freeman's Lane. To purposely add additional homes to protect on such a narrow road is not property emergency planning in my view. We need to place an additional pumper in the middle of any hose lay to the end of this road to supply adequate water flow in the event of a large fire. There is no room in many areas of this road to place a second pumper".

Public Comments:

Attorney Benjamin Zehnder stated his representation for a number of neighbors in the area including the following families: Geraniotis, Karter, Karlson, White, Crowley, some of whom own the two other lots in this subdivision. Zehnder thanked Landreth for working with neighbors on the conditions stated in his summary of the past Sage's Way subdivision activity. Zehnder reported that there is a difference of opinion between the Geraniotis and White families of whether the removal of the restriction should apply equally to all of the lots in the subdivision as opposed to just removing the restriction from one lot. Zehnder stated that if you remove the restriction from one lot, you essentially benefit that lot by allowing two (2) dwellings to remain, but at the same time you are burdening that lot with some restrictions on the

size of the guest house, and on the lot itself. Zehnder stated that the remaining two lots don't get the same benefits. Zehnder requested, in light of the possible inequities of this case, to give his clients a chance to explore their options and the implications of a possible approval of the modification applicant's request. Zehnder explained that due to conflicts of interest on behalf of his multiple clients, they have been unable to come to an agreement on what they want in light of the modification request.

Fallender questioned whether the road would have to be widened if the restriction was removed on the remaining two lots in the subdivision. Fallender also questioned whether any additional houses could be built on the lots under the sunset of §164-22.A (7). Meservey responded that §164-22.A (7) referred to a 40,000 square foot lot and each of the lots in question has 80,000 square feet and except for the condition imposed on this subdivision in 1961, they would all be entitled to two (2) dwelling units on each lot. Meservey stated there is no requirement to widen the road and the Planning Board only has to make a decision of whether to lift the restriction, and how many of the lots would be affected.

McKusick suggested that the Planning Board needs to further study the concerns of the Fire Department, particularly the location of local hydrants. McKusick noted there is a water main that goes part way down the road that may need to be lengthened to get water pressure to the three large houses and a cottage at the end of Sage's Way. McKusick questioned whether the applicant could be requested to put in a water main for the remainder of Sage's Way (approximately 300' per Meservey). Fallender suggested getting information from the Fire Chief on the location of fire hydrants in this area.

McKusick questioned the size of the cottage and Meservey responded that the existing cottage has 1,029 square feet of living area, and could potentially be increased by a couple of hundred feet. Meservey stated that an application for the main house has already appeared before the Conservation Commission and has been approved for an addition. Meservey stated his opinion that there is no significant renovation change planned for the cottage. Fallender questioned whether a building change to the cottage would change the degree of non-conformity and Meservey responded that this is not a zoning violation; it is a Planning Board condition violation. Meservey stated that some relief is needed to correct this issue, either from the Planning Board or possibly through the court system, such as a Land Court appeal.

Landreth informed Planning Board members that Sages Way is not the subdivision way, but rather it is the subdivision way for the previous subdivision. Landreth stated that when the Planning Board imposed the condition in 1961, it was because of exterior access. Landreth stated that the town is partially responsible for the failure to enforce the covenant which was in place in 1981. Landreth suggested that the interpretation of "accessory use" may have been misinterpreted by the Building Inspector in 1981.

Landreth stated that an investigation of bringing in water along a road indicated that it is very expensive. Landreth stated his belief that this is a unique case with regard to the subdivision because it is a set of existing conditions. Landreth stated that if this were in front of the Zoning Board of Appeals, he would be prepared to argue that it is a variance because of the unique man-made (so called) topographical conditions.

Landreth explained that there is a plan to rebuild the main house which requires Zoning Board of Appeals approval because of the following reasons:

1. Currently it is set back less than 50' from the existing wetland and is subject to that provision of the zoning bylaw with regard to a setback which states that you have to be either 50' away from a wetland or you have to be 1½ times the height. Landreth stated they will be moving the house back, but will need a Special Permit from the Zoning Board of Appeals.
2. This proposal will exceed the 4,000 square feet lot coverage with regard to building coverage, but the overall coverage will be less than 6%.

Landreth stated that having gotten the final configuration from the Conservation Commission, they intend to file with the Zoning Board of Appeals.

Jerome Karter (10 Sages Way) explained to Planning Board members the fact that when he and Jeff Karlson constructed new homes last year, they were required by the Fire Department to put in a new 8" water main at considerable cost as well as considerable benefit. Karter noted there is a new fire hydrant in front of their homes, as well as good water pressure. Karter requested that if water is required to the new property, that it be conditioned as follows:

1. The road be replaced/repaved to the same condition as when Karlson and Karter repaved the road.
2. A special agreement be provided to assure that the road remains open and passable during any construction/repaving.

Jerome Karter expressed concerns with the possibility of construction of many more houses and the resulting increased traffic load on a narrow road.

Fallender questioned what would happen if the Planning Board did nothing and everything remains the same as it is now. Landreth responded that there is an outstanding condition and a letter of record from the Building Inspector referring to a violation of a restriction which has to be cleared up. Landreth alluded to the possibility that the outstanding condition issue could undercut the value of the property.

Planning Board members requested that Attorney Landreth and Attorney Zehnder submit a list of conditions they would like the Planning Board to consider in their deliberations of this issue. McKusick reminded Planning Board members that the issue of water pressure is important to the case.

MOTION: On a motion by **Kenneth McKusick**, seconded by **John Ostman**, the Board voted to continue the public hearing for a Modification to a Definitive Subdivision Plan, (Voller, Smith, Geraniotis, 16-23 Sage's Way) to the Planning Board meeting on August 10, 2010 at 7:00 p.m.

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

VILLAGE CENTER ECONOMIC ANALYSIS

Using Powerpoint slides, Peg Barringer gave a summary of the results of the business survey recently conducted in town as shown in the slides at the end of these minutes.

REQUEST FOR ZONING ADVISORY OPINION - AGRICULTURAL USES

Meservey explained to Planning Board members that in a memorandum dated July 6, 2010, the Building Commissioner has requested guidance as to how the Planning Board (which recommends zoning amendments) would interpret Agricultural Use §164-41.A noted in the Zoning Bylaw Schedule of Use Regulations Table. The advisory opinion is in regard to the storage of equipment related to agricultural use(s) on a premise that is not conducting the use or not immediately adjacent to a premise conducting that use. Meservey stated that the use table in the zoning bylaw provides for agricultural uses and they are allowed in all districts without limitation. Meservey stated that the Building Commissioner has a question of whether the section should be interpreted broadly so that the storage of agricultural equipment is allowed on a premise that is not conducting an agricultural use. Meservey stated that there is a ¼ acre residential lot in town where someone is storing a lot of agricultural equipment. Meservey noted that the question is whether agricultural equipment can be stored on property which has no agricultural use.

Fallender questioned the difference between agricultural and fishing storage and Meservey responded that storage of fishing gear is a separately regulated issue and also separately articulated in the zoning bylaw.

Meservey read the following excerpt from the Zoning bylaws:

"Agricultural, horticultural, floricultural, or aquaculture use and uses customarily necessary thereto except piggeries on parcels of less than five acres [as amended at the Annual Town Meeting 5/1/1978, Article 48]"

Meservey noted the above uses are allowed in all areas of town. Meservey stated his opinion that this clearly separates the difference between agricultural uses and the uses customarily necessary thereto, which seems like either/or is permissible under the way this bylaw is written. Meservey stated that there is an issue in town and the Building Commissioner has been asked to deal with the issue from an enforcement standpoint and he is seeking the Planning Board's opinion before he makes a final decision. Meservey stated that under state law, agricultural uses are allowed in all districts which protects the right to farm under state protection.

Planning Board members discussed the issue of agricultural equipment storage and agricultural uses and whether equipment storage can change the character of the use of a home from a residential use to a commercial use. Meservey questioned how to separate an agricultural use from a commercial use. Fallender questioned whether a tractor would be considered an unregistered motor vehicle.

McKusick stated his opinion that the question that was addressed to the Planning Board is to allow the storage of equipment related to an agricultural use and is that use less than an agricultural use. McKusick stated that since agricultural use is allowed, how can you not allow a component of that business or activity, which seems to mean that it is permitted.

Meservey summarized the Planning Board discussion on agricultural uses as follows: "Since the bylaw allows an agricultural use, it must by extension allow things that are a component of the agricultural use. They should be allowed to store equipment related to the agricultural uses, such as storage of equipment which is part and parcel of the agricultural use, and is customarily necessary thereto".

MOTION: On a motion by **Kenneth McKusick**, seconded by **John Ostman**, the Board voted that there was a consensus of the Planning Board that storage of equipment related to an agricultural use on a premise that it is not conducting the use does comply with the zoning bylaw which is articulated under either of the following two agricultural sections in the zoning bylaws Schedule of Use Regulations table:

"Agricultural, horticultural, floricultural, or aquaculture use and uses customarily necessary thereto except piggeries on parcels of less than five acres"

"Cultivation, propagation, storage and sorting buildings in connection with the operation or cranberry bogs"

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

OLD BUSINESS

Tom's Hollow Lane

Meservey informed Planning Board members that a legal appeal was filed by the immediate abutters, titled Martha Samuelson & Paul Samuelson (Plaintiffs) vs. Town of Orleans Planning Board et al (Defendants) in the Massachusetts Land Court case #: Misc. No. 10-433554 (CWT) regarding the Planning Board decision on the Definitive Subdivision Plan for 40 Tom's Hollow Lane. Meservey stated that the first lawsuit is essentially resolved and this is a new lawsuit. Meservey stated that due to the pending lawsuit, the Planning Board can not endorse the mylar. Meservey stated that Attorney Michael Ford (Town Counsel) has filed a legal document with the Massachusetts Land Court entitled, "Answer of the Defendant Orleans Planning Board" on behalf of the Planning Board.

PLANNING BOARD RE-ORGANIZATION

Planning Board Chairman:

NOMINATION: John Ostman nominated Kenneth McKusick as the Planning Board Chairman. Kenneth McKusick accepted the nomination.

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

Planning Board Vice Chairman:

NOMINATION: John Fallender nominated Chet Crabtree as the Planning Board Vice Chairman. Chet Crabtree accepted the nomination.

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

Planning Board Clerk:

NOMINATION: Chet Crabtree nominated John Ostman as the Planning Board Clerk. John Ostman accepted the nomination.

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

COMMITTEES

Community Preservation Committee

NOMINATION: John Fallender nominated Steve Bornemeier as the Planning Board representative to the Community Preservation Committee. Steve Bornemeier accepted the nomination.

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

Board of Water & Sewer Commissioners

Kenneth McKusick agreed to remain as the Planning Board representative to the Board of Water & Sewer Commissioners – Ken McKusick to stay at as representative from Planning Board.

REPORTS:

Community Preservation Act Funding:

McKusick reported on a request to contact legislatures about Committee Preservation Act anticipated decrease to zero in funding from the state. Jon Fuller agreed that the Committee Preservation Act funding is diminishing rapidly, and there will be no matching grant. Fuller noted that ideas have been provided regarding a possible increase in fees for the Registry of Deeds.

**SIGNATURE AUTHORIZATION LETTERS TO LAND COURT AND BARNSTABLE
REGISTRY OF DEEDS**

Planning Board members signed signature authorization letters to be forwarded to the Registry of Deeds and the Boston Land Court.

APPROVAL OF MINUTES: June 22, 2010

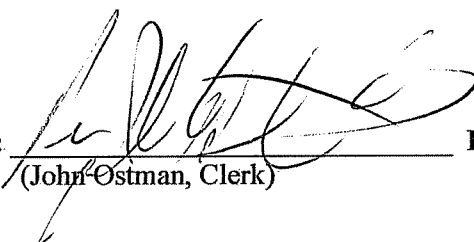
MOTION: On a motion by **Kenneth McKusick**, seconded by **Chet Crabtree**, the Board voted to approve the minutes of June 22, 2010 as amended.

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

ADJOURNMENT

MOTION: A motion was made by **John Ostman**, seconded by **John Fallender**, the Board voted to adjourn at 9:35 p.m.

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

SIGNED:  **DATE:** 8/24/2010
(John Ostman, Clerk)

List of Documents

APPROVAL NOT REQUIRED – ALEX & NANCY GAMBAL, 10 NICHOLS ROAD

1. Planning Department memorandum to Planning Board, dated July 20, 2010
2. Application for Endorsement of Plan Believed Not to Require Approval, dated June 22, 2010

MODIFICATION TO A DEFINITIVE PLAN (MARY LOUISE VOLLER TRUST, CHARLES M. & PRISCILLA SMITH, VAN & CONSTANCE GERANIOTIS, 16-23 SAGE'S WAY)

1. Public Hearing notice
2. Application for Approval of a Modification of Definitive Subdivision Plan
3. Statement of Conditions of Planning Board Approval from 1961
4. Subdivision Plan of Land in Orleans for lots 1, 2 & 3 from 1961
5. Building Department Letter to Thomas LaTanzi, dated June 11, 2010
6. Mortgage Inspection Plan for 16 & 18 Sages Way, dated June 7, 2010
7. Planning Department memorandum to Planning Board dated July 12, 2010
8. Board of Health memorandum to Planning Board dated July 19, 2010
9. General Laws of Massachusetts, Chapter 41, Section 81W
10. Orleans Conservation Trust letter dated June 28, 2010
11. Fire Department memorandum dated June 21, 2010

VILLAGE CENTER ECONOMIC ANALYSIS – FINEPOINT ASSOCIATES

1. Business District Profile and Analysis of Commercial Mix Report by Peg Barringer

REQUEST FOR ZONING ADVISORY OPINION FROM BUILDING COMMISSIONER – AGRICULTURAL USES

1. Building Commissioner letter to Planning Board dated July 6, 2010

OLD BUSINESS

Tom's Hollow Lane

1. Letter from Attorney Michael Ford to Massachusetts Land Court with attached document entitled, "Answer of the Defendant Orleans Planning Board", dated July 23, 2010

PLANNING BOARD MINUTES

1. Planning Board Minutes from June 22, 2010