

# **TOWN OF STOW PLANNING BOARD**

Minutes of the April 19, 2005, Planning Board Meeting.

Present: Planning Board Members: Bruce E. Fletcher, Donald G. McPherson and Ernest E. Dodd

Associate Member: Kathleen Willis (Voting Associate)

Planning Coordinator: Karen Kelleher

Also Present: Jon Witten, Town Counsel

The Meeting was called to order at 7:00 PM.

## **NON-CONFORMING STRUCTURES AND LOTS**

Zoning Board of Appeals Members' Jack Clayton, Ed Tarnuzzer and Bill Byron and Secretary Kay Desmond, met with the Board and Town Counsel to discuss the proper procedure to handle non-conforming structures and lots.

Non-Conforming Structures and Uses - Jon Witten explained that a Petition for Special Permit must be filed with the Board of Appeals for anything that is a non-conforming structure and/or use, whether or not it meets the setback requirements. The determination of whether a special permit is or is not required must be made by the Board of Appeals and not by the Building Commissioner. In practice, many Towns leave it up to the Building Inspector. However, unless the Zoning Bylaw is changed to give the Building Inspector flexibility to determine what is more detrimental, all permits should go before the Zoning Board of Appeals for a Special Permit. Jon explained that the bylaw could be amended to establish what is considered to be substantial detrimental by establishing minimum standards for expansions to be no greater than a certain number of square feet and/or limited height restrictions.

Non-Conforming Vacant Lots - Jon further explained that non-conforming vacant lots are further protected as either a single lot exemption or common lot exemption and therefore, a Special Permit is not required. These lots may, however, be subject to a variance, if the yard setbacks cannot be met. It was also noted that these lots must meet the criteria of having at least 50 feet of frontage and at least 5,000 sq. ft. in area, unless the Town chooses to amend the bylaw to relax that criteria.

Jack Clayton explained that past practice has been to not require a Special Permit, unless a variance is also necessary. He noted that many houses have been significantly expanded without the benefit of a Special Permit and questioned how we can make them whole? Jon Witten noted that without a bylaw amendment, he could not hold up an appeal on a Building Permit that was issued without a Special Permit from the Zoning Board of Appeals. He noted that you could set a date certain or remove the requirement for a Special Permit for lots with at least one acre. He also noted that you could just wait until the current practice gets tested.

Jon explained statute of limitations:

- 6 years on a structure where a building permit was issued in error.
- 10 years on structures constructed without a Building Permit,

- 0 years on an illegal use.

He noted that a non-residential use could be stripped of its right to expand. The Town has the ability to have non-residential structures frozen in time.

Jack Clayton said he is concerned that there have been a lot of buildings expanded without a Special Permit granted by the Board of Appeals. He is not uncomfortable with the way the Building Commissioner has been operating and is willing to work with the Planning Board and the Building Commissioner on suggested language for a bylaw amendment. He suggested a working group comprised of a representative from the Planning Board, Zoning Board of Appeals and the Building Commissioner.

Jack Clayton also noted it would be helpful to the Zoning Board of Appeals if any new bylaw includes an intent and purpose statement.

#### **CHAPTER 40B**

Members shared a letter from Bob Collings citing a section of Chapter 40B 26 Sec 181.

“Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on site comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use.”

In Mr. Collings’ letter, he calculated the total acres developed under Chapter 40B in the Town of Stow to be 70 acres or 1.95% of the total (4,053 acres) Residential, Commercial and Industrial Zoned Land.

Jon noted that the Housing Appeals Board has already ruled on that issue and has determined the footprint of the “affordable” structures determines the land area developed.

Members of the Zoning Board of Appeals left the meeting at this point.

#### **PERFORMANCE GUARANTEES**

Board members asked Town Counsel if they have the ability to require a bond for maintenance of roads. Bruce Fletcher said he recently attended a conference and one town mentioned that they convert the performance bond to a maintenance bond for years after completion of the subdivision. Ernie Dodd noted that Stow has not been strict enough in establishing and enforcing a schedule for completion of a subdivision. He would like to require the developer to establish a schedule when posting a bond and if they do not comply with the schedule the Board should call in the bond. He would also like to restrict the types of bonds and not accept insurance bonds.

Jon Witten advised the Board that they could say it will only accept a covenant or require a covenant until the subdivision is 75% complete. He is a firm believer in using a covenant because the lots cannot be sold or be built upon until the covenant is released. Bruce noted that such a policy could be inflationary and drive up the cost of construction. Jon agreed with Bruce, but noted that it is the best protection for the Town. He noted that the Board could allow release of a certain number of lots. He also recommends that the Board require cash for the performance guarantee.

Bruce Fletcher noted that he is thinking about the smaller subdivision (3 to 4 lots) where the developer is not a multi-millionaire. Jon Witten said you could issue partial releases for the smaller developers and ask for a passbook guarantee.

Bruce asked if the Board could require a greater amount for a bond vs. a cash surety? Jon said you could argue that because of the risk involved and the cost to recover the Bond. Jon noted that with a covenant, at least you won't have unhappy homeowners.

Don McPherson noted that the Board had had several instances where the subdivisions lingered on and on before completion.

Jon noted that the statute allows the applicant to have a choice, however, the Town needs to make sure it is the Town's tool of choice. You could consider only releasing lots upon completion of the binder. He also noted that the Board could always relax its standards in certain instances.

Jon also noted that maintenance and snow and ice removal is not part of the Subdivision Control process.

### **SNOW AND ICE REMOVAL POLICY**

Members discussed the Town's Snow and Ice Removal Policy. Jon advised that the Town is exposed, if it has not accepted the terms of G.L. c. 40 s. 6C.

Jon noted that the Board's decision should include language to ensure that the developer or homeowners association is responsible for maintenance until the road is accepted. He further stated that plowing is not a municipal function on Private Ways. He advised that the Planning Board should leave this issue up the Selectmen, as the Board has no jurisdiction under the Subdivision Control Law.

Jon said the Board could hold a bond through a winter season.

Ernie Dodd recommended that the Board come up with a policy for Jon to review. He suggested that the Board should insist that the developer has a contract for snow removal for a certain period of time. Karen Kelleher questioned whether or not the Town could enforce such a contract.

Karen Kelleher asked if the Board has the ability to hold back the amount of a bond that exceeds the work to be completed. Jon responded that you could require a certain percent of the total bond amount to be retained until completion of the subdivision, as long as it is proportional to the total bond amount.

### **EXECUTIVE SESSION**

***Ernie Dodd moved to enter into Executive Session to discuss potential litigation and to reconvene in Open Session at the conclusion of Executive Session. The motion was seconded by Don McPherson and carried by a unanimous roll call vote (Bruce Fletcher, Ernie Dodd and Don McPherson).***

### **RECONVENED IN OPEN SESSION**

## **ONE-LOT SUBDIVISIONS**

Members explained to Jon Witten that they are currently deliberating on a one-lot subdivision with a request for waivers from most of the requirements of the subdivision rules. Ernie noted that he does not believe a one lot subdivision is allowed because the Definition under the Subdivision Control Law is "“Subdivision” shall mean the division of a tract of land into two or more lots .....” Jon Witten noted that a Subdivision is also interpreted as regulating the laying out and construction of ways. The parcel subdivision now before the Board is proposed for development of one single-family dwelling; however, it has insufficient frontage on Red Acre Road. A petition for variance was filed with the Zoning Board of Appeals for a frontage exception. The Zoning Board of Appeals denied the petition, as the applicant created the hardship. The Board is concerned about setting precedent in making a non-buildable lot buildable. Karen Kelleher reported that she spoke with the applicant and explained that the board is concerned about setting precedent and cannot grant substantial waivers unless it can find there is a public benefit. The applicant advised that they are willing to grant an easement for sidewalks and might consider an affordable deed restriction.

Jon advised that the Board has a choice in granting waivers if it can determine it is in the public interest or deny the subdivision as incomplete. Jon said, in granting waivers, the Board needs to show that it is offsetting public benefit, otherwise, you would be giving away the purpose of the Subdivision Control Law.

Bruce Fletcher questioned if the Board could legally approve the road as laid out on the plan as submitted. It was also noted that the plan as proposed locates a driveway outside the road layout and there is no mention of utilities or drainage.

Jon said the Board's decision would be considered arbitrary, unless it had good reason for waiving requirements of the subdivision rules. It would technically be a variance.

## **ACTIVE ADULT NEIGHBORHOOD BYLAW**

Don McPherson did not take part in this discussion.

Ernie Dodd asked how the Town could go about defining the "qualified pool" under Section 8.8.9.b of the AAN Bylaw. He is concerned that many seniors who own their home and want to downsize qualify based on their income, however, because of the proceeds of the sale of their home, they are disqualified. Jon suggested adding language to define assets.

The meeting adjourned at 10:15 PM.

Respectfully submitted,

Karen Kelleher  
Planning Coordinator