

Town of Lenox
Planning Board
Auditorium
May 8, 2018

Members present: Chair Pam Kueber (PK); Kate McNulty-Vaughan (KMV); Kameron Spaulding (KS); Tom Delasco (TD)

Deborah Rimmmler (DR) participated remotely.

Staff present: Gwen Miller, Land Use Director, (GM); Peggy Ammendola, Land Use Clerk, (PA)

Others present:

Joel Williams of the Berkshire Record and Clarence Fanto of the Berkshire Eagle, who along with staff recorded the meeting. There were 9 other members of the public present.

The meeting was called to order at 6:03.

Documents presented at this meeting:

- Agenda
- Minutes-April 17, 2018
- Minutes-April 24, 2018
- Special Permit Decision/Proposed Findings-241 Walker
- Anticipated Construction Sequence
- Community Forum Flyer: Zoning and Recreational Marijuana in Lenox
- Recreational Marijuana in Lenox-Power Point
- Letter from Attorney Gobel

Opening of meeting

PK announced that DR was participating remotely due to geographic distance and that all votes would need to be by roll call. PK also announced that the meeting was being recorded by media in attendance and by the Board.

Approve minutes:

April 17, 2018-KS made a motion to approve the minutes as presented. TD seconded the motion and the minutes were approved by a roll call vote of 3-0-1. DR abstained as she was not at the meeting and KMV had not yet arrived to participate in the vote. PK-yes, TD-yes, KS-yes

April 24, 2018-KM-V arrived at meeting as this review began. TD made a motion to approve the minutes with two amendments. KS seconded the motion and the minutes were approved by a roll call vote of all members by a vote of 5-0.

241 Walker Special Permit Application:

Continue hearing, with potential to close hearing and vote, on the Application of Stone Path Development, Inc. for the property at 241 Walker Street (Map 8, Parcel 1 and Map 8, Parcel 6-1) in the Residential "R-1A" zoning district. Note: The proposal for this project was presented informally on August 29, 2017. The first Public Hearing was on November 7, 2017 and a site visit was held on November 17th. Continued to November 21st, but the meeting was canceled. Continued to January 9, 2018. Continued to January 23rd, but meeting was canceled. Continued to February 13th, but request to continue to February 27th. Another request to continue to March 13th, but meeting was canceled. Scheduled to March 27th, but applicant asked to continue to April 10th. Meeting was held, and continued to April 24th. Meeting was held, and continued to May 8th 2018. The Board and applicant agreed to multiple continuations.

Present were David and Matthew Ward of Stone Path, Jim Scalise of SK Design, Attorney John Gobel who represents the Board of Managers of Birchwood Village Townhouses and Linda Miller, a resident of Birchwood Village. Birchwood Village is an abutter to the proposed project.

*Update of findings-*At the last meeting April 24, the Board went through the findings and additional comments were made. GM and DR met last Thursday and merged those comments into a new document. After the new draft was distributed by email to the Board for review, PK advised GM that the Board had been very concerned about wanting approval from both the Town Manager and Town Counsel about the conveyance of land to the Town and conveying the easement given that there is substantial engineering containing the storm water drainage systems underneath the land. GM then made amendments to the document (conditions 2-4) and the findings presented to the Board tonight reflects changes to address those concerns.

GM said that with regards to accepting land, the Planning Board has the authority to determine who is getting the open space, and that approval is not required from the Town Manager or the Board of Selectmen. GM spoke to the Town Manager today and he has no problem with the Town being the recipient of the open space. PK asked whether Town Manager was also made aware that the land had stormwater management under it, and GM said this had been communicated.

GM also conveyed further information that the Town itself could not accept a donation of land -- this would have to go to the Town Meeting in November.

GM said that under condition #2, no new or additional building permits would be granted until the legal instruments necessary to convey the open space to the Town and granting an easement to the petitioner and subsequent home owner's association (HOA) so they can have access to and responsibility for the maintenance storm water infrastructure. This would have to be submitted to the Town and approved by Town Counsel before the project could move forward. This would then have to be brought to the Town Meeting for approval. It was clarified that work on the infrastructure could proceed. In the event that at the Town Meeting the conveyance was not approved the Board has the authority to convey to a different entity.

GM briefly reviewed other changes that had been made to the Proposed Findings document as a result of the April 24th meeting and PK's comments submitted to GM on the most recent draft.

PK wanted it to be very clear that the taxpayers of Lenox would not be liable for the expense of maintenance of the storm water system that is beneath the easement and that the Planning Board was informed that the Town Manager had no problems with this. GM said that Town Counsel will review the language and that if it was not adequate the language would be changed. DR stated that she had no concerns as long as Town Counsel reviews. She said that the Town would have recourse as there are legal means to recover damages from easement holder (the HOA) in the event something went wrong and the Town had to step in to address any issues with the drainage system. PK thanked DR for her insight as an attorney and said that made her feel more comfortable with the situation.

Mr. Scalise stated that he had prepared, at the Board's request, an updated sequence in timing. At the time he created this document, he didn't have the conditions that were provided at tonight's meeting, therefore there are contradictions in his sequence as it relates to the work and the conditions. Mr. Scalise went through those contradictions and gave explanations.

Discussion ensued regarding the document "Proposed Findings" and additional revisions were made.

Attorney Gobel read from his letter dated May 8th. (He provided the Board members and the staff a copy of the letter.) There was considerable discussion regarding the responsibility of the developer and escrow account. Attorney Gobel feels that the Wards should be responsible for the maintenance of the level spreader until he sells last unit.

In the discussion related to the escrow, Attorney Gobel stated that the master deed is dedicated to the entire parcel of approximately 10 acres. The individual owners of the units own the real estate and the HOA is responsible for maintaining the condominiums, and Mr. Ward retains the right and ownership of the ability to sell the remaining units. Attorney Gobel said that there is a split in the ownership. PK asked if Attorney Gobel wanted Stone Path Development to be identified as being responsible for the entire infrastructure until the last unit, 9th unit, is sold and Attorney Gobel responded in the affirmative.

DR asked Attorney Gobel if there would be insurance for the storm water system part of the infrastructure and if so why there would have to be an escrow account to cover a significant issue that might require correction. Attorney Gobel responded that insurance leads to disputes and delays. The Board discussed and agreed that the language in a condition should state that an escrow account would be created at a level recommended by Foresight Land Services. Foresight could also determine the period for the existence of the account and if the amount held should be increased as the years pass. (They did the peer review for this project.) Attorney Gobel feels that the HOA should hold the escrow account. Mr. Ward will hold the funds in trust until all nine units are sold.

KS made a motion to close the public hearing. TD seconded the motion. The Board voted to agree by a vote of 5-0 by a roll call vote. DR=yes; KMV=yes; PK=yes; KS=yes; TD=yes

KS made a motion to grant the Special Permit request and PK seconded the motion. The Board voted to agree by a vote of 5-0 by a roll call vote. DR=yes; KMV=yes; PK=yes; KS=yes; TD=yes

KS made a motion to grant the waiver from section 9.7.12.1 to allow for the open space to a Conservation Easement as opposed to a Conservation Restriction. TD seconded the motion. The Board voted to deny the waiver by a roll call vote of 0-5. KS=no; TD=no; PK=no; KMV=no; DR=no. The motion failed.

KS made a motion to require the conveyance of the designated open space land to the Town of Lenox subject to an easement allowing access to the maintenance and management of the storm water infrastructure to be installed in the designated open space area. KMV seconded the motion. In discussion PK said that further details were outlined in the conditions. The Board voted to agree by a vote of 5-0 by a roll call vote. DR=yes; KMV=yes; PK=yes; KS=yes; TD=yes

KS made a motion to grant a waiver from 9.7.12.4 to allow stormwater mitigation within the open space as outlined in the site plan. TD seconded the motion. The Board voted to agree by a vote of 4-1 by a roll call vote. DR=yes; PK=yes; KS=yes; TD=yes KMV voted against the motion to grant this waiver.

Regarding the split decision, the majority felt that having the stormwater mitigation systems within the 100' buffer was acceptable and within the spirit of the bylaw because the land being disturbed did not include pristine forest being taken down – the land already was bare or previously disturbed. KM-V, on the other hand, believed that changes within the buffer should not be allowed.

KS made a motion to grant a waiver from 9.7.14 to allow buildings within 100 feet of residential properties and work within 50 feet of residential properties. TD seconded the motion. The Board voted to agree by a vote of 5-0 by a roll call vote. DR=yes; KMV=yes; PK=yes; KS=yes; TD=yes

KS made a motion to approve the conditions as amended and add a 21st condition that the Notice of Decision and findings be recorded in the Registry of Deeds. GM said that in the decisions rendered by the Zoning Board, there is language that the Petitioner is responsible for recordation at the Registry and suggested that this language be used in this decision. It was concluded that an additional condition would not be necessary. The Board discussed further amendments with conditions #2, #4, #19 and #20. PK asked that language in Attorney Gobel's May 8th letter, item # 2, be included in the condition #2. KS felt that it would be better to put in #4 instead. TD made a motion to approve slate of 20 conditions to the Special Permit as amended KS seconded the motion. The Board voted to agree by a vote of 5-0 by a roll call vote. DR-yes; KMV-yes; PK-yes; KS-yes; TD-yes

Update on Master Plan:

Recreational Marijuana:

- Confirm forum basics
 - Time, date
 - Publicity plan
- Review power point for Community Forum on June 5
 - Will include zoning scenarios — discuss
 - Also address possible rezoning re Medical Marijuana

The Board briefly discussed the strategy for the June 5th forum. A time has not yet been decided but it will be at the Town Hall. If the Board has any questions with regards to the presentation, they are to send to GM and then she will send to KS. It was believed that the power point could be simplified. A use table was suggested for the presentation and there will be handouts. PK will approach the Board of Selectmen about TV time to publicize the forum.

Short-Term Rentals discussion among the Board:

- Discussion topic: Commercial Activities in Residential Zones – Why Limit? KMV gave a brief history on zoning in Lenox and stated that in general a single family residential zone is considered the highest and best use. Because much of the building took place before zoning was put into place in 1969 much is pre-existing, non-conforming. In the residential zone there is a limit on commercial activities. KMV referred to the use table and said that there are very few cases where there is any kind of commercial activity allowed in a residential zone. Examples of exceptions are some home occupations.

PK noted that in the use table hotels, motels and inns are not allowed in any residential zone but are allowed by Special Permit in a commercial district.

KS said that at one point B and Bs and seasonal rentals were one thing, but later separated into two. B and Bs were made a commercial use but never moved to the commercial use table.

The impact of this commercial use in a residential neighborhood was a concern and the question raised was where can this be allowed without impacting neighbors negatively? There is concern that without some limitations an area can become nothing but a rental community.

There was discussion on different scenarios of STR. A family may choose to rent only one bedroom. One might rent out their entire home except a basement room where the homeowner

lives. Another might vacate their home and rent it out entirely. Then there could be an investor who buys several houses strictly for STR. The Board discussed limitations as to the number of days one could be a host, the number of homes in a neighborhood that could be STR and even limiting a percentage of a home that could be used for STR. KS spoke of having a limitation on the number of "room nights" one could operate a STR. An example would be if an individual had a four bedroom home and rented all four rooms that would be 4 room nights. If they rented only one bedroom, that would count as one room night.

Some communities classify STR as a home occupation. Some feel that it isn't a commercial use because the home is still being used in the same way as a property owner would use it. That is for sleeping and eating. TD argued that the difference is that is being used by transients.

PK felt that the discussion was very worthwhile and she will study more about home occupations.

Board reorganization-The items below were placed on the agenda, but the only one addressed was the Conflict of Interest reminder.*

- Elect chair
- Elect vice-chair
- Conflict of Interest reminder*
- Assign committees:
 - CPC
 - Affordable Housing
 - Land Management
 - BRPC

* DR asked to discuss the matter of conflict of interest. She said that she has had people approach her about KS representing the Gateways Inn while participating in discussions on Short Term Rentals (STR). She opined that it gives a perceived appearance of a conflict of interest for him to participate, deliberate and vote on the STR proposed bylaw given that the innkeepers in Lenox have a very clear position on STR. She questioned KS on whether or not he had received clearance for the State Ethics Commission. KS responded that he had. DR requested that KS disclose the date and the name of the individual at the Ethics Commission. KS agreed to email to her that information when he got home. In responding to further questions by DR, KS stated that prior to discussions on the STR issue, he had not thought that there could be a conflict of interest and until receiving an email from DR on today's date in which she pointed this out. Prior to this email he said that no one had suggested it. He said that "I have a standing contract with Gateways Inn and a contract moving forward." As a result of DR's email, KS said that he addressed the matter today by contacting the state to discuss and filing a form with the Town Clerk. He manages the website and social media for Gateways and that he has reviewed part of the Gateway contract with the attorney at the State Ethics Commission and that it was deemed that there is not a conflict of interest. KS referred to Sections 17, 19 and 23 of the Conflict of Interest law. KS said that he in his discussion with the state an example of a conflict given was if a Board member had ever been a host or had a direct family member who had been a host for STR. In that case, a member could not participate in any discussion on STR.

KS disclosed that his single, largest financial client is a Realtor who has attended the Board meetings on STR and has formally stated that they are against KS's proposal in creating the STR bylaw. He said that this illustrates that his clients have opposing views. He suggested that if DR had objections she could file a formal complaint with the State Ethics Commission. PK said that the Ethics Commission will not comment or opine to those who call in asking about others' issues. In order to get an opinion from the Commission on a specific case or issue is to file a complaint.

GM pointed out that it is the responsibility of each member, as an elected official, to take the ethics training and file with the Town Clerk that they have done so. She cautioned that it is up to each member to think carefully about if there is a conflict or perceived conflict of interest before deliberating or participating in the decision making process and disclosing at the beginning of a meeting so that everyone is aware. She confirmed that today KS did file with the Town Clerk and conferred with the State Ethics Commission who has cleared the way for KS to participate in STR discussions. She offered that if anyone has questions regarding a conflict or appearance of a conflict, they could call the State Ethics Commission or ask staff who could put them in touch with Town Counsel.

DR concluded that she felt that KS was exposing the Board to some liability and didn't understand why KS didn't recuse himself, stating that it looks bad and puts the Board in a bad position. KMV disagreed that KS had put the Board in a bad position.

There was then some discussion of the ethics training required by all Board members. DR said that she has not taken the ethics training nor filed with the Town Clerk. PK said that tomorrow she would look into the requirements under the Commission and that the Board should be rigorous in following them. She also said, this is a reminder that at the beginning of taking on any new issue or petition, Board members together need to remember to consider whether we have any conflicts of interest, actual or perceived, that need to be disclosed, and if so, to do so.

The following items were on the agenda but not addressed.

Committee updates:

Affordable Housing (KMV)
CPC (TD)
BRPC (PK)
Land Management (DR)

Discuss agenda items for next meetings:

- May 22
 - Discuss priorities for 2018-19
 - Prep for June 25 Recreational Marijuana forum
 - STR discussion — “Neighborhoods and STR Use: Zones”
 - Master Plan update — vetting applications; setting up interviews

- Issue Solicitation: Friday, April 6th
 - Deadline for Submitting Questions: Thursday, April 19th
 - Addenda, if Necessary: Thursday, April 26th
 - Proposals Due; Thursday, May 24th
 - Interviews: May 2018
 - Award Contract: May/June 2018
 - Project Completion: November 2019

- June 5-Recreational Marijuana
- June 12
 - Master Plan update
 - STR discussion: “Why “Seasonal Rental of Rooms” Seasonality?”
- June 26
 - Joel Bard here
 - Master Plan update: Award contract

TD made a motion to adjourn. KS seconded the motion and the Board voted to agree by a vote of 5-0 by a roll call vote. DR-yes; KMV-yes; PK-yes; KS-yes; TD-yes The meeting was adjourned at 9:32 PM.

Respectfully submitted,
Peggy Ammendola