

Planning Board - Meeting minutes for Nov. 18, 2021

Approved Nov. 30, 2021

Attendance: Pam Kueber (PK), Tom Delasco (TD), Kate McNulty Vaughan (KMV), Jim Harwood (JH), Sue Lyman (SL)

Also attending: Town Counsel Joel Bard (GB), Town Planner Gwen Miller (GM), and attorney Jeff Lynch (JL).

Documents for this meeting:

- Agenda
- PK questions to JB (not distributed to Board)

The meeting was recorded on zoom. It opened shortly after 6 p.m.

PK reminded the Board that the meeting is not a deliberation on 390 Housatonic application although questions may have arisen based on elements within the application; please be attentive to not getting into deliberation (discussion) on that application and keep questions focused on legal questions.

PK note that there is a site visit for 390 Housatonic application the next day. JB clarified that site visits are not public meetings subject to the open meeting law. Site visits can be limited only to board members and the applicant and their representatives; public does not need to be invited, although there are some cases this may happen with the permission of the owner and at the invitation of the board. Meeting still can be posted, note on the agenda there will be no deliberation.

PK had submitted questions to Joel regarding application of the Subdivision Control Laws and Town Regulations of same including asking for a high level view of role of state and local subdivision laws. JB started the discussion by describing the reason(s): Orderly process for a property owner to take a larger parcel of land to create more smaller lots. Enables registration and recording of land; this need arose in early 1950s when development of land took off. Process – orderly system to create new lots.

JB: Down a layer from that -- for communities to have a planning process to oversee installation of roads utilities and public services. Regulations include important nuts and bolts – eg road width, sidewalks, design of roads and thickness of pavement to withstand storms and drainage given that private roads will likely one day become public ways. Roads – built to a standard that they can become a public way. Nearly all communities ultimately accept private ways as public ways when affected citizens come forward and say, “we need to you plow the roads, take school buses...”

JB: Preliminary plan process -- is voluntary. Point is to have conversation. Noted that the attorney for 390 Housatonic applicant is at this this meeting. 45 days to make decision, no

public hearing. Decision not binding or appealable. Planning Board (PB) can approve, disapprove, approve with (nonbinding) conditions.

JB: Subdivision rules and regulations are adopted by PB, do not need to go to Town Meeting, they need only be reasonable. Appeals will look to them. Example: Roadway widths must bear some relationship to town. Can deny a subdivision on failure to comply if rule provisions are there to back decisions.

JB: Waivers from PB vs variances from ZBA: One of the roles of PB in this process is to enforce zoning – we can disapprove a plan if there is a violation of zoning alone. Waivers – we can grant; they would still need a variance from ZBA for the noncompliance. Standard for waivers loose.

JB: Simple majority votes required for both Preliminary and Definitive plans; also for granting a waiver.

JB: In a typical subdivision when an applicant requests waiver they should list every waiver on application and also on plan.. Statute says if you approve – deemed to have approved all waivers even if they are not articulated. For small subdivisions, recommendation is to put them on plan; for larger subdivisions, list them point by point so PB can list in our decision.

GM: PB should create a written decision for definitive plan – it gets recorded with deed. JB: For preliminary plan? Up to us. Not recorded, not binding, probably a good idea. SL – should waivers be an appendix with written request? JB - Subdivision rules & regs contain forms. SL -- Is there anything in our rules that say requests for waivers should be submitted in a particular way [suggestions seems to be that we do this]. GM - notes 390 Housatonic has a table of requests. KMV – would like to see the facts related to the waiver request, including “why” behind the waiver request – don’t simply repeat our rule; we need facts to analyze discussion. JB: Level of detail different in preliminary plan and definitive plan. Eg definitive plan will show important details on drainage. KMV – p. 7 of Subdivision Rules for Preliminary Plan lists requirements re drainage. PK – how much can we ask for in Preliminary Plan? JB: Have more detailed discussion about what you want in definitive plan. Prelim Plan – get a sense of where the board is on the overall scheme; reasonable. TD – his take too. GM - see Subdivision Rules, we have specific submittal requirements for Prelim Plan; applicant must check those boxes just to submit it. In discussion with applicant on Preliminary Plan, we can highlight we’re worried about this or that, don’t need to fix it with Preliminary Plan; we will look closely at Definitive Plan and may not grant a waiver on it. KMV - site visits important.

GM – How do PBs tend to work with outside experts? JB: Bigger towns have a single engineering firm or engineer on standby to review detailed plan review at applicant’s expense. Check our Subdivision Rules to see whether we allow for this, especially to avoid having to go to Town Meeting for a budget request. This rule just needs to be adopted by the Board (does not have to go for a vote at Town Meeting). Important detail.

JB – Discussed how to address mentions of ANRs in a Preliminary Plan submittal. Noted that one of lots being developed in 390 Housatonic plan is being done so via the ANR process. ANR – 21 days to act once it's filed. The filing of this subdivision is not the filing of the ANR. TD – does that come after approval of definitive plan? JB - I would think so, but they could file at any time. PK - we can discuss Nov 30 next meeting with applicant. KMV - mere mention of it on this plan does not mean an ANR is being file. JH-simpler to do ANR first? PK-we can discuss Nov. 30 what applicant's plans are.

Discussion of things that can go wrong:

JB: Fewer appeals now on Subdivision plans now since they are bigger with so much riding on them, they tend to do it right the first time. TD-denial needs to be specific, for specific reasons.

JB: Section 1a of our rules a recitation of purposes – per TD comment, in early days denials based on purpose -- but no longer done. Our section b – very good – lists site specific concerns – these are the kinds of things you can point to in denial.

SL – for a site visit, appropriate for PB to ask DPW, Fire, to come? JB - yes, for the purpose of asking questions, not to have a dialog.

JL – likely to come up In 390 Housatonic – can JB talk about it generally – how does board approach when there's a previously accepted public way and its dimensions, location, and distance. JB – noted exception to the rule re getting into details of an application when the question comes from the applicant's counsel. JB – you're looking to extend Orchard St. - info would have to come from the applicant. As factual matter, engineering on plan will want to show dimensions of public way, where stub of Orchard St. ends. JL: Facts come from town's records of continuance or acceptance of the public way? JB look either to registry or clerk's records, town meeting records. JB -- ultimately when it comes to litigation the burden is on the person looking to prove something. PK also asks: If a public way has been previously approved in town records, and applicant wants to build it, we don't have a role? JL: that's the consequence of the question. JB: He was addressing what's there today and to what extent does new road to the subdivision come in? Extension would not be an extension of the existing way, would be a private way. Extended road counts as frontage. Not uncommon for applicant to come before board for waiver for road serving fewer lots.

KMV-will be important for us to have a written discussion of concerns at preliminary plan stage. Give everyone what is higher vs. lower level of concern. SL's suggestion agreed – have experts on hand for site visit. JB: you can ask them the questions, "I'm going to have a question about this corner – can you look at it, can we discuss at meeting." KMV: Clarify questions on site to avoid confusion later.

PK – Where there is frontage but no viable or planned access? JB: Lenox's Zoning Bylaw calls for access over frontage via "Frontage Lot Line" definition. ANR lots – lot of litigation over lots without adequate access. Zoning requirement in Lenox – you take your access off your

frontage. When we are presented with ANR plan – it only has to show it has the required amount of frontage. JH read Frontage Lot Line definition. JB: ANR endorsement would not look at that. It would be taken up when they apply for a building permit – that’s when they need to comply. Discuss at preliminary plan. JH - so you could have an ANR lot, but our Building Permit might not be approved.

JH – Having a hard time with definition of Front Lot Line especially last sentence. Would not have to look hard to find lots in Lenox that don’t meet this, and these instances might make sense. Seems pretty restrictive. JB: A lot of communities added this in last 10 - 15 years as people were trying to develop difficult lots; eg creating lots with 15’ cliff on frontage then getting access thru easement. KMV: likely preexisting nonconforming. JH- not a problem or detriment why would we want to prevent from having again. Philosophical question. PK – pork chop lots and back lots development create frontage on shorter road access not elsewhere, solution, what does our bylaw say and how to handle. JH - might be desirable in case where frontage is on very busy street, to have access from less busy street. GM- gets lot of inquiries from engineers re shared driveways. JH – subdivision of land in ostensibly developed areas is far preferable to land in undeveloped areas / open space that we would prefer not to see subdivided. Rather see densification of infill lots. Thinks this should be an express goal of zoning and Subdivision Rules & Regs combined. KMV – was on the PB when we did the change from pork chop lots -- philosophical question – goes both ways. GM - look to new master plan, desired future land use by neighborhood. JB – repeated because JH came in late and may have missed this discussion: PB in Subdivision Rules & Regs makes sure a Plan conforms to zoning; if someone shows something on a plan that does not confirm to zoning, PB can grant waiver, then applicant would then have to go to ZBA for variance. Then building inspector could issue building permit. JH – as we think about Subdivision Rules in general note the statewide shortage of housing, idea that we can create lots that are reasonably in conformance with our zoning is preferable because we have a housing shortage – requires lots in places where lots exists not farmland and open space. KMV - public discussion over this needs to happen; pretty controversial when you start to talk to homeowners. Went from 20-30-40 lots to 1 acre lots not long ago – lost opportunity to create more housing. PK – topic can go on future agenda.

PK – Can we approve an ANR that creates a zoning violation for the existing property – where split makes existing home in some way nonconforming with zoning bylaw? Can we endorse that? JB – example: home on 4 acres, proposed new lot line that will put the house too close to the side yard; as long as two lots have required frontage would have to approve. Property owner would then create a problem for themselves. Lot of case law on this. Owner has created non-compliant lot (*not* non-conforming) – additions could be denied because home is noncompliant. SL - go before the PB? JB - no, because it would not involved per se. Go to ZBL to have the condition be made legal. SL - complicate future conveyances ? JB - yes, short sighted but they do it nonetheless. Reminded: endorse, not “approve”. We may ask them to write a caveat emptor on plan, decisions have gone both ways on this.

PK - Hynds St. example - 5 houses on one lot, preexisting -- was this 81L exemption and explain?

JB: Consider an old farm property with sizeable house and barn but only has 150' frontage.

Definition of subdivision – creation of 2 or more lots; however, the following is not – one is the division of existing parcel of land on which each new parcel will have a preexisting structure.

Very little case law. Small chicken coop didn't cut it, other was more logical, not much guidance.

PK – How to get driveway onto lot without frontage. JB: Common driveway.

PK – Sometimes split off a parcel that's embedded, we always endorse. JB: Look to definition of subdivision. Small piece is not a *lot* – it's a *parcel*. E.g. Lot 1 and Parcel A. If it's two lots they need to have frontage for ANR endorsement. Legally a "lot" is a "buildable lot."

Site visit tomorrow. Don't need a quorum. Jim going on Saturday.

Respectfully submitted,

Pam Kueber

Nov. 26, 2021