

FINAL
Planning Board Minutes
April 26, 2022 Meeting

Members in attendance: Pam Kueber, chair (PK), Tom Delasco, vice-chair (TD), Kate McNulty-Vaughan (KMV), Jim Harwood (JH)

Members absent with notice: Susan Lyman

Also in attendance: Town Counsel Joel Bard; Town Planner Gwen Miller, ZBA members Judy Turtz and Shawn Leary Considine (SLC), Ellen Jacobsen, Susan May, Scott Barrow, Robert Pellicciotti, Diane Sheldon, Amy Judd.

Documents:

- PB April 26, 2022 Agenda, Planning Board question for Joel Bard, PB April 12, 2022 minutes for approval, Correspondence from Isotrope

Meeting was recorded.

PK opened meeting, explained that we are meeting with Town Counsel Joel Bard related to the work being done on our Educational and Religious uses bylaw. After introductions JB presented a powerpoint, with ongoing discussion, about so-called Dover Amendment uses - Religious and Non-Profit Educational uses. PPT and tape will be retained for future reference. Some key points were:

What is or is not religious / educational use:

- State law MGL 40A section 3 covers a number of exempt uses including paragraph 2, which is commonly referred to as Dover Amendment covering Educational and Religious uses
 - Note, solar is covered under Section 3 - SJC has recently heard case on solar dispute and we expect ruling within the next month
 - Note, we cannot regulate interior of buildings e.g. we cannot require net zero as it relates to interior use; a hot topic in legislature as we speak
- Responding to question, don't try and define Religious Uses, let case law determine that.
- Subject to "reasonable parking and dimensional regulations" = what Dover Amendment says we can regulate (see list in law)
- Scores of cases in Massachusetts law
- What determines Educational Use → Regis Test -- bona fide goal be "educationally significant" and must be primary or dominant purpose for which land or structure shall be used.
- To define what is religious or educational often must be determined on a a case-by-case basis but Regis test is a good one.
- Does not protect only schools – can be analogous facilities e.g. variety of group homes, see slide for case law examples. Examples found to be not educational: e.g. commercial dance school, nursing home without any educational component, gym-type uses.
- KMV heard Don Dubendorf talk about ability of universities to have pretty substantial sports facilities and those are deemed part of their educational purpose; JB – yes.

- PK – are things like non profit nature centers, libraries, house museums “educational”? JB – does not recall any cases with word museum in them, would need to research it, answer would be a fact-based determination.
- SLC recalls ZBA was reversed on a case Riggs house on Main St. proposed as educational use. Appeal court ruled for Riggs as did subsequent similar cases in presentation. JB: read Maclean v Town of Lincoln. about two years old.

What is “reasonable” regulation:

- Tufts parking and loading requirements upheld
- Bible Speaks – we can do non-discretionary site plan approval – administrative approval, no “discretionary” requirements only those in bylaw
- Belmont Mormon temple – compare proposed steeple to other such steeples in the area
- When do reasonable requirements become unreasonable? JB – no discretionary permits, be careful not to nullify qualified use with unreasonable requirements.

Note JH left meeting at this point in conversation.

Other notes

- Cemeteries – Hints from MA courts that cemeteries not considered religious uses.
- In determining qualification for exemption, tax law may be a consideration although not necessarily final.
- There has been little RLUIPA litigation in MA because Dover Amendment is so extensively protected. RLUIPA subsumed by Dover Amendment
- Other considerations: Scope of use, how is property currently utilized, see slide.

Q&A

- Summary: For Educational and Religious uses, we can regulate: bulk, height, yard sizes, lot area, open space, setbacks, parking, loading, building coverage. But the use must be by right if all standards are met; standards must be reasonable.
- Two approaches – most communities just apply standards from underlying zones, would get addressed in site plan review process – in that context have discussion what would be reasonable for that particular use. Note that in either category, it could be a small institution; hard to have a one size fits all for Dover uses because they vary.
- PK – main concern is we have so many old and redevelop-able properties in residential districts, trying to think through impacts in residential districts, establish a setbacks for ALL institutional uses so that it would be the same for a museum etc. as well as religious or educational uses. SP to go to basic setback of zone. Would that pass muster? JB – thought it was fine except Site Plan Review instead of SP. GM – we have a site plan approval only for commercial zones; treated much like a special permit process, can ask for a waiver. JB – suggests we also craft an institutional site plan review process including publication, public hearing because of potential impact on neighbors. KMV – we can use a specific site plan review for this type of use? JB – yes; confirm what the reasonable regulations would be for this proposed use – not trying to exclude it but to find what’s reasonable.

- Any other towns with bylaws to recommend? JB: Maybe Lincoln, will take a look and get back to us.
- PK – there were no standards for the other institutional uses; we were creating them for the first time.
- Is a free-standing sign considered a sign therefore be regulated? JB – regulate it under sign bylaw.
- Okay to call a buffer requirement same as saying open space requirement? JB – yes.
- TD – 501c3s all qualify? JB – Mass Hospital a 501c3 but not educational use. Determinations are fact dependent.
- GM – read museum and library line from use table; JB – they way we have it now is most typical. Leave it; let them make the case.
- JB – child care facilities. Say ‘Child Care Facility’ – that’s the statutory phrase – includes two types – a (1) day care center and (2) school age child care program. Family Daycare Home is a separate, third type, and it is permitted by right unless you regulate it in your zoning bylaw.
- PK – we can impose bulk height etc. regulations for Child Care Facilities but they must be by right.

Also asked JB about Approval Not Required plans - how do we assess and what evidence can we reasonably ask for to provide adequate entry/egress to buildable portion of property. JB – ton of case law on this; you basically assess it; detailed case law re wetlands on frontage. Phrase: “Viable access” – can they really get onto the property from the road; not “illusory access.” Entire frontage wetland – no viable access. 40 feet accessible/160 feet of wetland – yes there is viable access. Land abutting a limited access road – no. JB – go look at it/have site visit, but you only have 21 days from when they file with Town Clerk. KMV – if topographical concern, could we ask DPW to look at it? JB – yes, a good resource for you.

April 12, 2022 minutes:

- KMV motion to approve as amended, TD – second. Roll call vote all ayes PK, TD, KMV.

Wireless Facilities – GM and PK reported that they both spoke with David Maxson of Isotope LLC and believed he answered all questions satisfactorily and both agreed it looked great. GM explained her conversation with him and how Isotope would approach; funding is available and costs seem reasonable \$8,300 total with a do not exceed also in contract. PK – Maxson identified by GM outreach to other planners; he has consulted for some 44 other Mass. municipalities; a neutral consultant who does not build cell towers. He will do drive test, identify pressure points, model what a zoning plan including such things as setbacks to fill the gaps could look like; will read draft bylaw to see if it dovetails with his knowledge of MA and federal law; sounds like someone who we could have a long-term relationship. KMV – asked about Cityscape; PK – on hold with this consultant right now; GM – financial arrangements are settled up for the work they’ve performed so far. KMV – in favor, paperwork looks good and seems to provide what we are looking for, TD – agree, reasonable and the firm is very familiar with towns in the Commonwealth and has done this work.

- TD – move that Town engage Mr. Maxson for the gap analysis and bylaw review as he outlined in his April 19 proposal; KMV – second. PK – we will ask him to also coordinate with DPW, Fire and Police on drive test route. Roll call vote: PK – aye, TD – aye, KMV – aye.

Correspondence: Scott Barrow sent info from group about Pittsfield cease and desist order to Verizon; PK also mentioned Eagle story this week about Otis residents evaluating a cell tower there; timely reminders that we have a big job ahead of us and are committed to doing it the best we know how.

Comments: Scott Barrow, 14 Old Stockbridge Road, thank you for the effort to get non biased group to help us with wireless work; PK – special thanks to GM for finding the contact; Robert Pelliciotti 32 Old Stockbridge Road, asked if consultant had ever advised town they did not need any more cell coverage, PK – we know we have gaps; Amy Judd, 6 Main St., president of new Lenox Tenants Organization, asked where to find draft bylaws – PK, they are on Planning Board page of Town website, PK – we need to update website with where we are. PK – actually glad we are doing needs analysis now after we did so much work on the bylaw, feel much more capable of asking questions. Diane Sheldon 32 Old Stockbridge Road – thanks for work and finding this consultant, asked re seeing Isotrope proposal; GM – email her at gmillier@townoflenox.com and she can send materials. Susan May – asked about Isotrope’s background, PK – look up Isotrope LLC online for more; time it will take? PK – he indicated desire to wrap this up before summer/July/August, he is going to start fast in the near term. Ellen Jacobsen – thanked the Board for their due diligence, good feeling that we are being listened to. KMV – thanks to Scott for sending the information.

Niagara Mill – TD, JH and GM had a positive phone call with Eric Spiritas, set the groundwork for a few of us meeting him or a representative to tour the mill site. Housing use was mentioned, but TD reiterated his belief that Lenox has a very limited amount of Industrial zoned land and would like to see it used that way, in a not-intense or -invasive manner. GM – next steps – talking again tomorrow morning, lot of info sharing and brainstorming going on at this point, he is glad to have the Town interested.

GM update re DLTA grant to help update our solar bylaw – BRPC planner now assigned. GM to meet with her Monday to go over bylaw and plot next steps. PK – open to new bylaw benchmarked from other community? TD – our existing bylaw was a BRPC model bylaw and we adapted it for our use, KMV – we added things. TD – definition of ground mounted solar arrays above a certain kw/h, sure acreage coverage per kw/h has changed since then. KMV – solar no longer new, so there is likely more openness to loosening originally tight guardrails. GM – interest has also been expressed in neighborhood solar – smaller installations.

Respectfully submitted,

Pam Kueber
May 9, 2022