



Halifax Planning Board Meeting Minutes March 5, 2020

Official

A meeting of the Halifax Planning Board was held on Thursday, March 5, 2020 at the Halifax Town Hall, Meeting Room #1, 499 Plymouth Street, Halifax, Mass.

Members Present: Mark Millias, Karlis Skulte, Amy Troup and new member, Ashley DiSesa. Gordon R. Andrews arrives at 7:55pm. (Skulte is acting Chairman until Andrews arrives.)

The meeting was called into session at 6:35p.m.

Skulte reads the agenda into record. **M/Troup, S/Millias** to accept agenda with all in favor.

Members review mail, notices and paperwork pertaining to this evening's meeting.

Appointment/Hearing

6:30pm - 319 Monponsett St., Receipt of Site Plan Review - Santander Bank ATM modification

The proposal is presented by Santander employee. The new canopy is a cleaner look as opposed to the bigger building. Presents the before and after photos for comparison of ATM to Board with new, safer, cleaner, more open, simplified branding. The building was already approved. No change in footprint. The installation is explained. Cable and wiring is already there and some removal. Nothing needs to be added. Canopy is low-voltage and 10 feet high. There will be added vinyl and clearance bar will be removed. They will reapply if it is decided to use a clearance bar in the future. The slab is not changing. The Board reviews the site plan packet submitted to the Board.

M/Millias, S/DiSesa to approve the site plan for 319 Monponsett Street, Santander Bank ATM with all in favor.

6:45pm - 241 Franklin Street - Consolidation Plan for Solar Project (continued)

Timothy Boda - Coneco Land Surveyor is present. Boda prepared the consolidation plan. Millias states that the Board wondered what was being asked of them for this project. Boda responds nothing that he knows of, and that it's simply the combination of two lots, there are no new lots. It has been recorded, the deed has been recorded that combines the two lots into one. The plans were sent to all Boards. Boda states that the reason these plans were sent to the Board is most likely just for their records. He is not from the engineering department but as far as he knows the final signing off from the Building Department is all that is needed at this time. Building Inspector Rob Piccirilli elaborates on solar project/consolidation plan including history up to this point. The issue was the potential building of a single-family home on the front property, however the front property was also purchased by Green Apple Farms to use for easement of solar panels to solar field on larger back property. Piccirilli states if for any reason the front lot was deeded out, owner would be in violation. This was the purpose of the consolidation. Troup questions the lot line between the solar farm and Form A lot. Boda explains that the lighter-colored line is there just to depict the two lots that were consolidated. Deed is very specific.

Abutter Michael DiBona 229 Franklin Street asks the Board if they know what the proposal actually is with all the different variations. There were some storm water basins that were on that front property that went away during the process and he would like to see the plan that was approved by Planning Board. There was supposed to be a basin built that is not being built, states DiBona, and at Conservation it was said that the basin was engineered out. Piccirilli points out that the plan approved by the Planning Board did not show the easement. Piccirilli confirms to Gordon C. Andrews that there is a permit to build the solar array. Andrews asks Piccirilli if the site plan with drainage system matches the final plans and construction documents submitted to Building Department. Piccirilli explains that the approved Planning Board plan is submitted to him. Piccirilli explains that some submittal documents come after things are built. He is asked to locate the Building Department's copy of site plans approved by the Planning Board. The Board discusses the permits

for the project amongst themselves. It is decided that there will be a note to make sure the plans are located for matching and inviting the DiBonas to return for discussion of findings and answer to their question.

Discussion

Zoning By-Law 167-22 and Zoning Board Decision regarding Petition #915 - Amanda's Estates

Land Use Counsel Amy Kwesell of K-P Law is present to answer Planning Board member Troup's questions. Troup states she has questions regarding Bylaw 167-22 and the ZBA Decision for Petition #915 that she would like to discuss with Kwesell. Millias questions Troup, asking why there is a discussion and invitation of Attorney Kwesell to the Planning Board meeting as he wasn't aware that, as a Board, they had any question regarding this matter. Kwesell explains that Troup called her the week before asking for Kwesell's presence at the Planning Board meeting to address Troup's concerns. Millias further argues that this should have been discussed by the Board first as Troup's question could possibly have been answered without asking for Kwesell's presence, which is costing the Town money. Troup and Kwesell explain that Kwesell received permission from the Town (Town Admin Charlie Seelig) to attend tonight's meeting. Seelig explains that Troup contacted Kwesell, Kwesell contacted Seelig who said yes, as the policy for at least 10 years is if Land Use Boards and Commissions want assistance from Land Use Counsel, it is okay as long as they tell Seelig first. Millias states that typically as a Board they come up with their questions and follow-up questions together for the attorney so as not to spend money. DiSesa would like to hear Troup's question. Millias argues that this legal advice Troup is seeking was not agreed upon by the Board to ask Counsel and states to DiSesa that this may have been a question they could have asked Kwesell via email instead of costing the Town hundreds of dollars as Counsel may have to go back and research to give Troup an answer. Troup states that she won't use email due to the ethics violation Charlie Seelig put on her for group emailing. Millias asks why they didn't discuss Troup's question as a Board "here first." Seelig clarifies that he filed an Open Meeting Law complaint, not an ethics complaint against Troup. Seelig further explains that if a Board member emailed the group asking to add an item to the agenda or asking when or where they're going to meet, that is fine and not a violation of the Open Meeting Law according to the Attorney General. If the Board gets into deliberation about the topics on the agenda, on the other hand, that is a no-no. Seelig explains that he understands what Millias is saying, however because things happened recently regarding the ZBA's decision on Petition #915, Kwesell is as prepared as she can be this evening. Millias states again that he feels this is expensive to ask what he thinks is a personal question from Troup. Troup states that Kwesell brought this up to the Zoning Board and responds that 167-22 was waived. Troup adds that she is an elected official that works for the Town and is asking for the Town of Halifax. Millias states that Troup does not speak for the Board. Skulte states that, in the future, it makes sense to talk amongst themselves first before engaging an attorney to come and speak at the hearing. Skulte thinks it makes sense to ask for some sort of correspondence or questions that the Board may have and approve and consider collectively if the Board should be engaging an attorney. However, Skulte states that he would think in the future that the Board would want to deliberate first as a group and make decisions to ask for things to happen but for now, asks Troup her question.

Troup reads Bylaw Section 167-22. Kwesell confirms to Troup that she advised the Zoning Board, based on 167-22, not to vote on the Party Trust's Modification to the Special Permit (ZBA Petition #915) for Amanda's Estates. Kwesell goes over the background of the Party Trust's Petitions: Zoning in November 2019 (ZBA Petition #910) where the ZBA denied the Petition as they voted 3-2 which is not the necessary super majority needed (four votes) for approval; then to Planning for Modification of Site Plan Approval, which was granted 2-1 (only majority was needed); then finally to Zoning Board (ZBA Petition #915) for Modification to Special Permit to match the Planning Board approved site plan to their special permit. Kwesell states that her opinion when Petition #915 application was filed (re: K-P Law letter dated January 10, 2020 from Kwesell) was that 40A Section 16 (repetitive petition statute which somewhat tracks the language of Halifax Zoning bylaw, but is more stringent) and Section 22 of the bylaw apply in this instance, in other words Kwesell felt that this application was repetitive. Kwesell states that in this area of repetitive filings (40A Sec 16) there is not a lot of caselaw and the caselaw that is out there is not clear and does not apply to the situation that "we" are in. She did not have a lot of guidance so she took it from a practical standpoint which is to modify a special permit one must file a new application, notify abutters and publish so it's like filing a new special permit thus, Kwesell's opinion is that 40A Sec 16 and 167-22 of bylaw would have applied to a modification of a special permit. The Party Trust's attorney (Brodsky) gave an alternative argument referencing 40A Sec 14 (statute that gives the ZBA their powers which states that the ZBA has the power to modify or amend permits) and the ZBA felt that they had that power, they could do this on their own without triggering 40A Sec 16 or 167-22 of bylaw. Kwesell disagrees with Troup that the ZBA waived 40A Sec 16. Kwesell states in essence they did, but they (ZBA) just didn't think it applied in this instance and there was no formal action to waive. The ZBA didn't even get to that step. Kwesell advised the ZBA at the ZBA meeting on 2/20/20 to make a decision

to go forward or not—does the ZBA feel they have the power to make the decision to approve the modification and, if so, vote on the Petition to modify the special permit per the Party Trust's request OR do they agree with Kwesell that the Planning Board should determine if this is a repetitive decision first (would need super majority). The ZBA determined they had the power under 40A Sec 14 to hear the Petition and vote. Kwesell's states there's absolutely no caselaw in Sec 14 about amending or modifying special permits. Skulte confirms with Kwesell that this was a modification of a previously approved plan, the denial of a modification is not perceived as a denial of a site plan application, thus one can modify without triggering that threshold. Kwesell states that the Party Trust's attorney also pointed out that in Sec 16 (no filing for a special permit or application for a special permit may be accepted within two years) doesn't say anything about a modification however, conversely, Kwesell's argument is that when one goes to modify a special permit you have to file an application, advertise and notify abutters. The Board and Kwesell clarify and give answers to DiSesa as she is a new member and wasn't present for the hearings. Kwesell explains the repetitive petition statute, which the Halifax Bylaw is based off of, and how it stops repetitive petitions. In Sec 16, if you are denied, go back to the drawing board and redo your project, you have the opportunity to go back to the ZBA providing that your changes/modifications are substantial. Kwesell states that in this instance it didn't get to that step as the ZBA determined that the repetitive petition in Sec 22 does not apply to the modification of a special permit.

Again, Kwesell confirms to Troup that in her opinion, 40A Sec 16 and bylaw 167-22 would have applied to a modification of a special permit. Troup states that she feels this is an injustice to the Town of Halifax and that the Town of Halifax has the bylaws here and haven't voted to change those bylaws. Troup adds that their attorney states that 167-22 applies. Troup doesn't think that the Board should ignore this. Skulte states he thinks that they've tried changing the Zoning bylaw multiple times to no avail but he's happy to try again. DiSesa asks Kwesell what the Planning Board's options are. Kwesell responds that the Board's options are limited because the ZBA did not say that Sec 167-22 and Sec 16 don't apply, they said that under 40A Sec 14 "we can do this." Millias asks Kwesell if her opinion is that the ZBA did what they felt they had the right to do. Kwesell responds that her opinion doesn't matter, and adds that the ZBA did something that, in their opinion, they had the right to do and they have that right. Kwesell states again that she explained to the ZBA that there is no caselaw - if she had a case where this fit in the four corners of that case, she would be throwing that case everywhere. Troup doesn't understand how the bylaw can be ignored.

DiSesa reviews the ZBA Decision Letter for Petition #915. Troup states that she thinks it's a dangerous slope to go down to ignore certain bylaws when the Town doesn't agree, meaning the residents that the Planning Board represents. These laws are supposed to be followed, states Troup. Troup adds that the Board is opening up the Town to more lawsuits which is why she called Kwesell in, because she doesn't think it's right. Skulte agrees that the Board should follow the bylaw, however, this action was already taken so he's not sure there's much more they can do as a Board. If residents are unhappy they have the opportunity to vote out the officials. DiSesa asks what the actions are if the Board feels like it was not favorably...what they went against, as she states there should be some checks and balances. Skulte explains how the ZBA and Planning Board act independently. DiSesa asks Kwesell again what can be done and asks if the Planning Board can appeal the ZBA's decision. Kwesell responds that anyone can file an appeal but there is caselaw that says Planning Board doesn't have standing (cites a Pembroke v. Marshfield case). Kwesell adds that the Planning Board would have to prove individualized harm which is almost impossible for a Board to claim individualized harm. Millias adds that if there were groups of individuals that could prove this harm, they could appeal on a private individual basis. Kwesell confirms this to be true. DiSesa doesn't understand how it got to this point. Kwesell responds that the ZBA never addressed this point. The ZBA never said Kwesell's opinion was wrong or ignored her, they just determined that 40A Sec 14 gave them the power to modify the special permit and it doesn't make it applicable to Sec 16 and 167-22. The ZBA didn't say "it's applicable to Sec 167-22 and we're going to ignore that," they just said "it's not applicable."

Kwesell explains that the Party Trust went to the Zoning Board with a plan that showed lots which was denied. The Party Trust then came to the Planning Board with a slightly different plan which showed four (4) lots with frontage on that internal drive, the plan was approved and they took that exact plan back to Zoning. Skulte asks how that plan differed from what was originally approved triggering the need for modification. Kwesell answers that the buildings went from six to four. DiSesa asks if the four lots meet all the requirements of frontage. Troup asks if there is a definition of an internal drive in town. Kwesell answers no. Troup asks if the Town doesn't have internal drives why the Party Trust doesn't need a variance for it. Kwesell responds that this doesn't necessarily have to do with 40A Sec 16 or 167-22, it goes to the merits of the ZBA decision. In her opinion this is the result of the very confusing bylaw that they're currently

working off of for multifamily. Troup states she doesn't find it confusing. Troup states that 40A Sec 14 is not in the Halifax bylaw, it may be in the state bylaw but the Halifax bylaw supersedes that. Kwesell responds no, the statute overrules a bylaw unless there is specific language in the bylaw that makes it more stringent under Sec 14. Building Inspector Rob Piccirilli confirms with Kwesell that the Halifax bylaw does refer to Section 40A. Kwesell reviews bylaw Sec 167-21 and states there is no language there on what can be modified and how they would modify so then it would go over to statute. Troup reads 167-21(2). Troup asks how it is not detrimental if we do not have a defined internal road to the people of Halifax. Kwesell responds that it would be up to the Board who made that decision, not her. Troup responds that the future of this town could be that this would set precedent that the Planning Board would have to allow certain things based on this in the future. Skulte responds that the future is always set by past precedent. Kwesell states that there is no precedence set with administrative decisions, particularly in the land use context because every plan that comes before the Board is different because every piece of land is different. Kwesell goes on to say that because of this, the Planning Board is not setting precedent such as caselaw. Human nature, yes, a precedent would be set. From a legal standpoint, it's not.

DiSesa asks Kwesell if she's saying that there's nothing they can do about this, if they feel like their Board was unfairly treated because she feels that they should have stuck by the bylaw and now the ZBA has had the last say. Millias explains that the bylaw is contradictory. Millias states that as they dug more and more into the situation, the Halifax bylaw verbiage is not good; the idea of sticking to the words only works if the words are correct and they are unclear. The Planning Board didn't disregard the bylaws or forget about them, they tried to figure out the intent and whether it fit to the plan. There are mixed discussions. Skulte asks Troup what she is looking for. Troup responds that the attorney advised the Zoning Board to follow 167-22 and they did not. Skulte doesn't know if they can force an applicant to make a new submission nor does he think they would at this point. Kwesell adds that the only thing the Planning Board would have been voting on is whether the change was substantial. Planning could not have said internal drives aren't in the bylaw, frontage doesn't matter, frontage does matter, or you need 10 acres or you don't need 10 acres - none of that could have been discussed. If it had come back to the Planning Board under repetitive petition, the Planning Board is a gatekeeper to say enough is enough, the plan is repetitive and not substantially different OR the plan is substantially different but the Planning Board does not have the ability to weigh in on the merits of that plan or application. Kwesell gives an example of a substantial change. Kwesell goes on to say her position is that filing a brand new special permit or variance or a modification to a special permit or variance is the same and they both trigger 40A Sec 16 and 167-22. Kwesell explains that from observing the ZBA, this never kicked in because they decided they have the power to modify a special permit that they issued. Skulte confirms with Kwesell that if the Party Trust were sent back to the Planning Board by the ZBA and the Planning Board decided it was not a substantial change, the Party Trust would not be able to come back again for two years.

Kwesell states that this is not the first time a Board hasn't agreed with her advice and there's not much she can do about it either. Skulte opens up to audience and asks for further discussion from Board. There is none. Troup doesn't know why they have laws and don't follow them. Kwesell departs.

Chairman Gordon R. Andrews arrives at 7:55pm.

Discussion

The Board reviews the paperwork regarding the Open Meeting Law Complaint filed by Charlie Seelig - advice from Larry Mayo email 3/3/20 and letter from Attorney General 2/24/20. The Board updates DiSesa on the complaint. The Board discusses the complaint/violation and agree that it was unintentional and will all refrain from using email in order to avoid this violation in the future and their preferred communication would be a phone call and/or message. The Board discusses a response letter to the Attorney General and Charlie Seelig. Skulte doesn't feel formal training is needed. The Secretary asks the Board how to communicate a drafted letter to the Attorney General since they aren't using email. Skulte states that the drafted letter can be distributed to them via email and they can each individually respond to secretary with comments. Andrews will sign the letter. Fourteen day response deadline has passed. Secretary will send a draft on Tuesday, 3/10/20.

M/Millias S/DiSesa to send a letter to the Attorney General in regards to the violation of the Open Meeting Law stating that the Board has found that there was an unintentional violation, addressed the issue and believe they've come to a solution to prevent this violation from happening in the future with all in favor.

Discussion

The Board discusses the Comprehensive Permit "Country Club Estates" 40B Project. Each member receives their own spiral bound copy of application. The special ZBA meeting will take place on Wednesday, March 18, 2020 at 7pm. The Board asks the secretary to post a meeting for Planning Board to attend this meeting. The Board would like to add this item for Discussion for the Planning Board meeting on Thursday, March 19, 2020.

The Board discusses when to hold the public hearing for Proposed Zoning Bylaw changes. All suggestions must be submitted by March 24, 2020.

M/Millias, S/Karlis to set public hearing on April 16, 2020 at 7:15pm for the Proposed Zoning Bylaw changes with all in favor.

The Board would like to add Pasture Lane for discussion at the March 19, 2020 meeting.

Meeting Minutes:

M/Skulte, S/Troup to approve Meeting Minutes for December 19, 2019 with all in favor.

M/Troup, S/Millias to approve Meeting Minutes for January 2, 2020 with all in favor.

M/Troup, S/Millias to approve Meeting Minutes for January 16, 2020 with all in favor.

Correspondence:

The Board reviews correspondence items. The deadline for Pasture Lane has passed. The Board would like to add Pasture Lane to the agenda for the Planning Board meeting on March 19, 2020.

Adjourn:

M/Troup, S/Millias to adjourn with all in favor at 8:37pm.

Respectfully submitted,

Gordon Andrews, Chairman

Date Approved: 5/7/20





