

PLANNING BOARD
Minutes of the Meeting
Tuesday, February 2, 2010
Town Hall, 120 Main Street
Top floor conference room
7:00 PM

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Members present: John Simons, Chairman
Richard Rowan, regular member
Timothy Seibert, regular member
Michael Walsh, regular member
Courtney LaVolpicelo, regular member
Michael Colantoni, alternate member

Staff present: Judy Tymon, Town Planner
Mary Ippolito, Recording Secretary

Chair called the meeting to order at approximately 7:15 pm.

**Chair called for WITHDRAW WITHOUT PREJUDICE:
PUBLIC HEARING:**

Muffin Realty Trust, 351 Willow Street, Special Permit for a reduction in parking as a result of converting 11,000 s.f. of warehouse to 11,000 s.f. of manufacturing within the I-1 zoning district.

Robert M. Ogan, representing Bake'n Joy & Muffin Realty Trust is present to explain the reason to withdraw their application. Mr. Ogan decided to look at different alternatives for future parking, and he will be back to look for a variance for parking. Has space in front of the building to extend parking 16 spaces. John Morin, Engineer, Neve Moran Group, is preparing to move forward with the issue. Judy is working w/Mr. Ogan regarding any issues relative to procedures for filing a new application.

Motion by RR to accept the withdrawal without prejudice, 2nd by MW, vote was unanimous.

Chair called for DISCUSSION: Telecommunication fines.

Attorney Urbelis was present: As a general proposition, Zoning Bylaw fines are enforced and collected by an application for a criminal complaint in the District Court by way of indictment in Superior Court; and 2nd if a particular bylaw has provisions for non-criminal dispositions and there are areas scattered thru the Town's general Bylaws, but not in the general bylaw regarding wireless communications, so you can pursue a non-criminal disposition action under Chapter 40 Section 21. Any action to try to enforce fines means it would have to be an application for criminal complaint in District Court.

1 Regarding telecommunications facilities, he's not personally aware of any place that
2 issued fines against the carrier which may challenge under the Telecommunications Act.
3 Doesn't know of any cases where that has been upheld. Look at the factual circumstances
4 first. Attorney Urbelis and Judy are working on a re-write and he's recommending taking
5 out the fines completely. He'll submit a list of other communities that don't have fines in
6 their bylaw.

7
8 MW: what if SP lapses? What is the alternative to have a party comply or reapply to
9 come into compliance w/bylaw? Atty. Urbelis: file an application for a criminal
10 complaint. Atty. Urbelis: doesn't know of any community having done this under the
11 Telecommunications Act.

12
13 RR: if PB requires reports due on certain times, maybe fines, if they reapply within 3
14 years they can reapply/renew their SP on the same basis that it was approved originally.
15 In lieu of fines would it be enforceable when 3 years are up? Do they have to re-apply
16 for a totally new application? Atty. Urbelis: doesn't know if they rewrite the bylaw if it
17 will present this kind of information. When re-application is filed is that technical report
18 current at the time of reapplication, even though it may not have been submitted for 2 or
19 3 years in a row? Atty: Urbelis: many engineers would say that nothing has changed.

20
21 RR: do most towns require reapplication after a certain time is up? Atty. Urbelis: no, it's
22 mixed, he couldn't say.

23
24 TS: Board of Health situation, fine involved, do they have to go thru criminal complaint
25 action? Atty. Urbelis: no, they have a provision in the umbrella which has non-criminal
26 disposition, issued a ticket, if they don't pay the assessment they can appeal thru District
27 Court, but wireless bylaw doesn't have that.

28
29 TS: has ZBA ever levied a fine? Chair: doesn't remember any being done. Atty. Urbelis:
30 we've sued them with a Court order. If they are violating the bylaw it's typically based
31 on use.

32
33 Atty. Urbelis: Town sued people for injunctions for a Court order to do other things,
34 that's another weapon the Town has and it's not uncommon, but it's definitely an avenue
35 to get an injunction if someone is violating either the Bylaw or a use.

36
37 RR: the two houses located at the corner of Mass Avenue by the common - the Building
38 Inspector stopped them because they were violating the Bylaw. Atty. Urbelis: Building
39 Inspector can issue a cease and desist order but those go to the ZBA not to the PB.

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41
42 **Chair called for DISCUSSION: BOND RELEASE:**

43 **Salvatore & Marie Vaudo** – requesting a \$2K bond release/close out for 38 Saile Way,
44 a street located in Great Pond Estates subdivision.

1 Judy did a site visit. Applicant submitted an as-built, everything looks fine. Motion by
2 MW to release and close out the \$2K bond, 2nd by TS, vote was unanimous.

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5 **Chair called for DISCUSSION: Recent judgments.**

6 Atty. Urbelis: gave an update on two Court cases that he represented regarding 70 Elm
7 Street. PB approved 6 antennas inside existing church steeple w/SP. Wireless isn't
8 visible from the outside of the church. MetroPCS provided engineering reports that the
9 radio frequency emissions complied with FCC radio frequency requirements. PB hired
10 their own engineer who confirmed that the radio frequency complied w/FCC
11 requirements. There were no engineering reports submitted to this Board by anyone that
12 the two reports contradicted each other. The PB issued a SP and noted that the Federal
13 Telecommunications Act of 1996 prohibited the PB from taking health effects into
14 account beyond the requirements of the FCC. Five residents filed a law suit in Essex
15 Superior Court challenging this Board's issuance of a SP. After review of the documents
16 the Superior Court decided that a trial was not necessary and entered summary judgment
17 dismissing the plaintiff's lawsuit and upheld the decision of the PB.

18
19 In the lawsuit the only basis for the residents challenge was their claim that a zoning
20 variance from the ZBA was necessary because they alleged that the zoning bylaw a 600
21 foot setback from property lines was required and that no such variance was obtained. In
22 newspaper articles and at meetings of the Board about alleged health effects due to this
23 facility, however, the Court specifically noted that residents did not argue to the Court
24 that the Board acted improperly on the basis of health concerns from RF emissions. The
25 plaintiffs did not argue to the Court that alleged health effects of this wireless facility
26 were reasons for reversing the PB decision. The Court specifically found that even if the
27 wireless carrier applied to the ZBA for a variance from the 600 foot setback the Court
28 stated "a variance could not be denied in the circumstances of this case":. Court pointed
29 out that under the Telecommunications Act of 1996 that a local government could not
30 take actions that prohibit or have the effect of prohibiting the provisions of personal
31 wireless services and that under the Federal law local governments may not limit the
32 placement of wireless facilities on the basis of environmental effects of RF emissions.
33 Court specifically stated that "the PB could not take health effects of RF emissions into
34 account to require a 600 foot setback". In its concluding statement the Court stated
35 "therefore aside from whether the Building Inspector interpreted the Zoning Bylaw
36 correctly it is clear under the undisputed facts that of this case and the governing law that
37 the Fed. Tel. Com. Act of 1996 compelled the North Andover Planning Board to grant a
38 SP". Since the Court decided that notwithstanding the 600 foot setback provision in the
39 Bylaw the Fed. Tel. Com. Act of 1996 trumped that 600 foot setback provision and
40 compelled this Board to make the decision which it made. After the SP was approved by
41 this Board the Building Commissioner issued a building permit to allow installation of a
42 wireless facility and the facility thereafter was installed. In the meantime, one resident
43 who was also a plaintiff in a case against the PB appealed the issuance of a building
44 permit to the ZBA which has the authority to overturn the Building Commissioner's
45 decision. After several hearings the ZBA upheld the Building Commissioner's decision
46 to issue the building permit. The resident claimed that the ZBA process took too long

1 and that the Board's decision was not perfected in a timely manner under applicable law
2 and that as a result the appeal to the ZBA was approved. A law suit was filed in Land
3 Court to determine the issue of whether there was a constructive approval of the request
4 to overturn the Building Commissioner's decision. The Land Court reviewed the
5 document and applicable law and determined that there was no need for an extensive trial
6 and decided against the resident and determined that there was no constructive approval
7 of the appeal to the ZBA so the decision of the ZBA upholding the issuance of the
8 Building Permit by the Building Commissioner was not reversed. Both of these cases
9 have been appealed by the plaintiff to the Mass Court of Appeals.

10
11 RR: what's the status of the installation? Atty. Urbelis, it's installed and operating.

12
13 Atty. Urbelis: look at page 5 the very last paragraph of the discussion just before the
14 order it's that paragraph therefore.....MW: aside from the Building Commissioner
15 interpreting the Bylaw are they hanging their appeal on that?...Atty. Urbelis didn't want
16 to speculate on that. MW: the Court decision is pretty clear.

17
18 Chair: were you surprised how quickly it was resolved? MW: summary judgment
19 hearing was done in October 2009. Atty. Urbelis: sometimes it takes a year; this is the
20 first time that a Court has said that 600 foot setback is trumped by Federal Law. Until its
21 reversed Atty. Urbelis suggests PB follow the logic of that decision unless an Applet
22 Court reverses it. Atty. Urbelis: maybe tell the carrier where they can go instead of where
23 they want to go.

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25
26 **Chair called for DISCUSSION:**

27 Judy talked about increasing Planning Department fees: Planning Department fees have
28 been the same since 2004.

29
30 See first column, example subdivision per lot: Newburyport fees done in 2007 they have
31 higher fees then us.

32 \$1K base fee plus \$175 per lot for a subdivision.

33 One fee for SP in Newburyport.

34 Andover SP \$600.00 plus 16 cents per s.f.

35 We have flat \$100.00 SP fees.

36
37 We need special filing cabinets for the wireless information, and we keep buying them,
38 recommends separate fee for wireless application. Staff costs are approximately \$4K in
39 dealing with cell tower applications. Process to approve fees is to go to the BOS.

40
41 ZBA gets \$7500.00 based on number of units for a 40B application.

42
43 Chair: we have a few SP that borders on minimums. We would probably waive stuff
44 due to a proposed deck outside of 400 feet; this could create a hardship for some people.

45 Judy: do minimum fee based on square footage.

46

1 Chair: any feed back on increasing fees? Judy: discussed this w/Curt, agrees we need to
2 change the fees because we haven't had a change in a long time. Judy: hasn't talked to
3 developers about this. RR: category called minor, charge a nominal fee for a SP.

4 RR: on definitive subdivision, go to higher base fee rather than smaller incremental base
5 fee.

6
7 Judy: salaries have not increased in a few years. Level budget now. Judy: has to do legal
8 noticing for Town Meetings, Tribune has increased their costs for these legal notices. If
9 we change regulations, there is another ad (public notice) we have to do.

10
11 MW: Law requires fees be reasonable related to the services rendered.

12
13 Judy: PB should look at these fees and discuss this at the next meeting.

14
15 TS: we have to be competitive with Towns next door, developer's look at fees charged as
16 to whether they may want to go to our Town.

17
18 Courtney: increased fees? - this would turn off residents.

19
20 TS: consider spectrum of applicants that will get hit with these fees and do a check, PB
21 doesn't want to get into that kind of situation.

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24 **Chair called for DISCUSSION:**

25 Proposed zoning changes for Annual Town Meeting

26
27 Judy: Gerry Brown, Building Inspector, wants clarification for the following: definition
28 what is area of a sign? Expansion, distinguishing between free standing as opposed to
29 sign on building. (new section, no definition). Judy read sign bylaw section 6.

30
31 Earth Removal: under section 51 it states: removal stripping earth is prohibited, unless
32 there is another section 54 where there is a permit for earth removal. We should refer
33 them back to the section in the Bylaw.

34
35 RR: if a person sticks a shovel in the ground is he violating the bylaw? Chair: any
36 reasonable person reading the bylaw knows what it refers to. RR: tidy this up to allow
37 reasonable activities. Chair: unless you move more than a certain amount you don't
38 have to worry about it.

39
40 Projections into front, side, rear yards. Gerry has worked in communities in Newton,
41 Brookline, where there are allowances for this. Chimneys, flues, balconies, open fire
42 escapes. Courtney: it would allow an overhang that goes over the setback?

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44 Judy: measure setback from foundation rather than minor projections. Judy: read there
45 are additional projections, eaves and uncovered steps. Gerry is adding open fire escapes,
46 chimneys, and flues, uncovered porch.

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MW: left the meeting at 8:15 pm.

Chair: we need to be crisp at this, this could end up a nightmare and we have to be careful on this. Gerry wants to talk to ZBA. Chair: ask Gerry to present pictures and examples and come in front of PB.

Chair: looks like an error under 31, or 71, look at yard setbacks.

Judy: front, rear, side yard in our Bylaw under definitions.

RR: if foundation is compliant if some pertinence stick out beyond foundation but don't impact the soil. Chair: agrees but that's different from a deck.

MC: get rid of porch and balcony. Chair: that one needs more work.

Judy: pre-existing non-conforming structures etc. Gerry is saying apply that to pre-existing non-conforming two-family. Judy: because there are pre-existing non-conforming two-families they currently have to go to ZBA. RR: take out single-family and change section of 9.1. Chair: ZBA changed rules so two-families were allowed by SP. Chair: A lot of work was done a few years ago regarding two-families; this is not meant to make any changes to that of a few years ago.

Chair called for future zoning changes

Chair: update PB on Rte #114 CDD1 & CDD2. Spend the next year working on doing real planning. Talk about how we do that.

Judy: has contacted a lot of land owners and had discussions with them. Met w/Al McGregor, did a walk around and met w/Patrick Larkin, property next to Al McGregor's, but had wetland issues. Met w/Scott Hajjar and walked the site there. This week met w/Lenny Annaloro and Michael Holbrook they own two properties next to Scott Hajjar. Go back and talk to Al McGregor again. Chair asked Judy to get as much of the wetland delineation on the properties because developers have issues because of wetlands. Chair: asked Judy to see where wetlands are and how big is the building footprint? Because wetlands come up to the front of the street they are not even 50 feet away. Judy: had a good meeting w/Mr. Allaloro and Mr. Holbrook, they brought up issue of mixed-use with residential which is an allowed use within that CDD - they are happy about this possibility. They need to do a wetland delineation of their property.

Judy: regarding paper streets, she has a 10 page document and it depends how they are decided in what particular Court in MA they own to the center line of a paper street abutting property. There are issues of owners who are further up on the paper street. In Al McGregor's property the paper street is wet and lots of wetland along frontage along Rte #114.

1

2 TS: expand down-town, trying to connect to corner to mill up past Sutton Pond condos,
3 anything they can do to try to expand the footprint of down town.

4

5 Judy: visited with a team of civil engineers from Northeastern University who has taken
6 our potential bike path as a project to come up with a preliminary design. Professor has
7 the class look at project and area carte blanche. Talked about getting onto Walker Road,
8 over pass, high school, and getting students from there to down town.

9

10 Chair: Rolling Ridge had Harvard University people come in and helped with their
11 resources. Chair: Judy to look back at old reports done since the 70's summarize them.

12

13 RR: tie Rte. #495 into back of airport to have another exit, so when heading N on #495
14 you can get access to the business.

15

16 Courtney: Butcher Boy location seems to be under utilized there is potential for activity
17 in that area, between China Blossom up to Bei-Ging restaurant.

18

19 Chair: behind Joe Fish there is a huge manufacturing plant there. Where Forgetta Farm is
20 that's sitting open for a long time, but nothing has happened to that general project.
21 Including airport, Holt Rd. including Osgood Landing if any economic improvement it
22 will have to be there.

23

24 RR: Edgewood has done a great job. Judy: would be happy to give PB a tour.

25

26 MC: on Foster Street there are power lines going in there and lots of trees are being cut.
27 Chair; by thinning trees out on Chestnut Street it may improve the environment for future
28 trees.

29

30 MC: likes the idea of the bike path.

31

32 Chair: wants to work closer with High Street people; economic development process at
33 Ozzy Properties - we should focus on those two things. Ask Curt to come in front of PB
34 to promote economic development and brain storm ideas.

35

36 RR: what is going on with Boston Road? Brook Street is underwater? Any plans to re-
37 open it? Talk to Ben Farnum.

38

39 Judy: we have 3 renewal applications for 3 Special Permits from T. Mobile: (1) Johnson
40 Street tower; (2) 723 Osgood Street monopole; (3) Mass Avenue Church steeple (they
41 will be on our March agenda).

42

43 **Chair called for CONTINUED PUBLIC HEARING:**

44 Elm Development Services, 1275 Turnpike Street, Site Plan Special Permit and
45 Continuing Care Retirement Center Special Permit to construct a 125-unit apartment
46 CCRC within the V-R zoning district.

1 Paul Marchionda of Marchionda and Associates was present: stated he had issues with
2 wetlands and Con/Com. He used delineation wetland line; about a year a half ago they
3 demolished the existing ski building, they didn't backfill the area, they met with
4 Con/Com, has listed some alternatives. Move proposed CCRC building further up the
5 hill, same layout as last time; however, there are green areas where wetland went into
6 parking area. Con/Com agreed to keep the CCRC building where it is proposed to be.
7 Mr. Marchionda is close to getting all VHB and Lisa Egglestom issue resolved. This
8 meeting is for discussion purposes only tonight.

9
10 Chair: Proposed drive way came out it cut into the hill...why couldn't it be moved down
11 a little bit? Mr. Marchionda: building is shaped to work with contours of the hill. They
12 didn't want to fight the grade. Moving the driveway the way Chair wants its off-setting
13 the intersection of Rte. #125 or 150 feet offset. Dermott Kelly, Traffic Engineer, is
14 concerned about traffic, therefore, don't move the driveway.

15
16 Mr. Marchionda: will come back in March for the first hearing, he needs time to get his
17 information to Lisa Egglestom and VHB. Dermott Kelly sent his comments on traffic
18 report this week.

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21 **Chair called for Approve December 15, 2009 Minutes of the Meeting.**

22 Motion by Courtney to approve the December 15th Minutes, 2nd by TS, vote was
23 unanimous.

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25 Motion by RR to adjourn tonight's meeting, 2nd by TS, vote was unanimous. Meeting
26 adjourned at approximately at 9:10 pm.

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29 By order of the Planning Board

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Approved

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38 Please note: The Planning Board reserves the right to take items out of order and to
39 discuss/or vote on items that are not listed on the agenda.

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