

TOWN OF NEWTON
PLANNING BOARD
MAY 16, 2018
MINUTES

The regular meeting of the Newton Planning Board took place on the above date. Chairman Le Frois read the Open Public Meetings Act and requested Mrs. Citterbart to call the roll. Board Secretary Mrs. Citterbart stated there was a quorum.

SALUTE TO THE FLAG: Was recited.

OATH OF OFFICE: None

ROLL CALL: Was taken

Attendance: Mr. Flaherty, Mr. Wink, Mrs. Vrahnos, Mr. Ragsdale, Mr. Levante, Mr. Elvidge, Chairman Le Frois

Excused: Mr. Marion, Mrs. Larsen, Mr. Butterfield, Mr. Russo

Professionals present: David H. Soloway, Esq. of Vogel, Chait, Collin & Schneider
Jessica Caldwell, J. Caldwell & Associates
David Simmons, Harold E. Pellow and Associates

THE SUNSHINE STATEMENT: Was read.

CONSIDERATION OF MINUTES

April 18, 2018

A motion was made by Mr. Flaherty and seconded by Mr. Levante to approve the April 18, 2018 meeting minutes.

AYE: Mr. Flaherty, Mr. Wink, Mr. Ragsdale, Mr. Levante, Mr. Elvidge, Mr. Le Frois

The motion was carried.

HISTORIC RESOLUTIONS

None

RESOLUTIONS

Rockywood Property, LLC (#MSV-2-2018)
Block: 14.04, Lots: 27, 29, 35
77 Madison Street, 71 Madison Street, 55 Madison Street

The resolution grants minor subdivision, conditional use and bulk variance approval with no livestock.

Mr. Ragsdale stated: I found something that might be misstated in the resolution. On page 9, number 2 the resolution states that no livestock is permitted to be housed in the structure

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referred to as the chicken house. As I recall from the testimony and in the minutes we decided no livestock period. Not just in the chicken house.

Mr. Soloway stated: It's a little subtle. The application for conditional use variance is denied and the resolution reflects that. I added that because I wanted to make clear that even though the conditional use for agricultural purposes was granted outside of the specific denial to the chicken house, the approval they got was conditioned on the fact that they weren't going to have any livestock in that structure.

Mr. Ragsdale stated: If you look at page 28 in the minutes it says no livestock. That's what we voted on. The resolution says to the structure, not to the property.

Mr. Soloway stated: I don't think you can validly prohibit all livestock on the property. I think that under the ordinance you would be allowed to have a horse as long as it wasn't housed in a structure within 200' of the property line. That is what the conditional use variance is about. It's a specific requirement in the ordinance that you can't have livestock in any structure 200' from the property line. It otherwise complies with the conditional use requirements. I don't know that you are necessarily prohibited from having any livestock on a property that meets the conditional use requirements.

Mr. Ragsdale stated: That is not what was discussed as I recall.

Mr. Flaherty stated: I agree with Mr. Soloway that it was clear that it was pertaining to the structure and that was what the variance was for. You wouldn't normally house a horse without a structure but it fit the parameters of the ordinance. You could leave them outside.

Mr. Ragsdale stated: I didn't understand that. I requested clarification.

Mr. Soloway stated: It's actually a good and a fair question but the ordinance is complicated in a way. The application was for a conditional use variance to allow livestock in that structure, particularly chickens. But again, if you meet the requirements for agricultural use in that zone which we determined that they do if you eliminated that you can do that under certain circumstances. You can have livestock on the property. You wouldn't have the right to prohibit that.

Mr. Ragsdale stated: My understanding was that there would be no livestock. That is why I voted yes.

Mr. Soloway stated: There will be no livestock within 200' of any adjoining property line.

Mr. Le Frois stated: And that is all we have authority to prohibit.

Mr. Ragsdale stated: Would it be fair to put that in section number 2 to make that clear?

Mr. Soloway stated: Ok. We can add to the end of the sentence or within 200' of the property line.

Mr. Soloway stated: The ordinance reads there can be no building or structure used for shelter or enclosure of fowl, game, farm livestock, or adult dogs can be closer to any property line than 200'. That was what they were asking for a variance from. You denied it. The ordinance does

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not prohibit the housing of any livestock elsewhere on the property. The ordinance specifically says that one domestic horse for personal use of the occupants or the residence may be maintained on any lot provided it is at least 5 acres in size, which this one was. So you couldn't prohibit that?

Mr. Ragsdale questioned: How about other livestock? The neighbors were concerned with chickens and livestock. I believe they thought the approval was based on no livestock as well.

Mr. Soloway stated: If you have chickens, you are going to have them inside a structure.

Mr. Ragsdale stated: They don't need a structure. They can be loose.

Mr. Le Frois questioned: Does the ordinance address loose animals running around?

Mr. Soloway stated: No. I don't think it does. The only other portion of the ordinance that addresses that in any way is that buildings used for the shelter of fowl shall have maximum usable floor area of 2,000 square feet for the first 10 acres, and 5,000 additional for each additional doesn't otherwise address it at all. I don't know that you have the right to prohibit anything and then it qualifies as agriculture. This isn't legal magic. The ordinance doesn't address it.

Mr. Le Frois stated: I thought we were talking about the building. I didn't think she was intending on maintaining any animal without a shelter.

Mr. Soloway stated: Frankly, the fact that the ordinance specifically prohibits having a structure within 200' of a property line certainly implies if it is 201' it is permitted.

Mr. Ragsdale stated: I don't think the public took it like that. I think they believed it was no livestock.

Ms. Caldwell stated: It didn't sound like she was likely to have animals without a shelter and there was nowhere on the property that a shelter could be located that would be more than 200' from a property line. From that standpoint, the likelihood of these animals is pretty unlikely. I agree with Mr. Soloway that I don't think we have legal right to prohibit it based on how the ordinance is written.

Mr. Le Frois questioned: From a procedural standpoint, we can't go back and reopen this?

Mr. Soloway stated: You can't reopen the hearing, the hearing is closed. You could say that you want to change or add something to the resolution because it hasn't been adopted yet.

Mr. Le Frois questioned: But wouldn't we have to get the applicant to review it so it is consistent with their understanding of what they agreed to?

Mr. Soloway stated: It would be preferable.

Mr. Le Frois stated: I don't think it's appropriate to change it without them knowing it.

Mr. Flaherty stated: It is not very likely that anyone would house animals on the property without a shelter. Chickens or other small animals will be eaten by coyotes by morning.

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Mr. Le Frois questioned: Do you have a recommendation Mr. Soloway?

Mr. Soloway stated: I recommend that you leave it as is. I'm confident that you don't have the authority to prohibit the sheltering of livestock more than 200' away from any property line.

Mr. Le Frois stated: From an enforcement standpoint, if the Town gets a complaint they could respond to that and it could be dealt with if such a case arose. But I'm not sure that something like that would arise.

Mr. Soloway stated: For the record, is there anyone here representing Rockywood?

Mr. Le Frois stated: No.

Mr. Flaherty made a motion to approve the resolution. The motion was seconded by Mr. Le Frois.

AYE: Mr. Flaherty, Mr. Wink, Mr. Le Frois

Nay: Mr. Ragsdale

The motion was carried. Resolution approved.

DISCUSSION

Ordinance 2018 – An Ordinance amending sections 320-3 "Definitions" and 320-2.C "Permitted Uses" of the Newton Town Code to Permit Light Industrial Uses in the T-4 and T-5 Zones.

Ms. Caldwell stated: The Town Council referred two ordinances that are in draft form right now under Section 64 of the Municipal Land Use Law which requires any Land Use Ordinances to be referred to the Planning Board for two things, the consistency with the Master Plan and then any comments or recommended changes that the Planning Board has under their expertise as the Planning Board.

The first ordinance is proposing changes to permitted uses in the T-4 and T-5 zones which are the neighborhood commercial and town center commercial zones. We are clarifying two definitions. One is for warehouse and storage and one is for product filling and assembly. We are also adding as permitted uses warehouse and storage, light manufacturing and product filling and assembly. In these zones we anticipated that there would be some type of light industrial type uses. Without being more covered under research and development for Thorlabs and the ancillary uses for Thorlabs in that area. With Thorlabs existing structure, the main headquarters in on a redevelopment site and is covered by a Redevelopment Plan. Now they are expanding in that specific area which is T-4 and T-5. To ensure that they don't get tripped up by anything we have added these uses such that any anticipated site plans that come in would be largely conforming. It was always the intention to have that area include those uses. So we want to make sure that those site plans go well so we are just clarifying and adding the uses for those two zones. So that is the proposal for that.

Mr. Le Frois questioned: Changing the permitted uses within those two transect zones, does that mess anything up with entities that already exist? Does it do anything to uses that already exist within the T-4 and T-5 zones?

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Ms. Caldwell stated: All the uses that already exist, remain. It doesn't change any of that.

Mr. Le Frois questioned: Does it affect any of the existing companies?

Ms. Caldwell stated: Not to my knowledge. There may be some existing non-conforming uses that would be brought into conformity. We have research and development as one use thinking that that would cover what is needed and really it doesn't. All of those uses are encompassed in the existing Thorlabs structure. There are really no offsite impacts from that use and it's in that same specific area and we don't feel that it would negatively impact the area.

Mr. Le Frois questioned: Could it create a single use of a warehouse to be located in a T-4 or T-5 zone?

Ms. Caldwell stated: Yes. If it met the requirements with site plan approval.

Mr. Le Frois questioned: Based on your expertise, adding these three uses to the zones is not inconsistent with the Master Plan?

Ms. Caldwell stated: That is correct. We have had the intention all along but it just wasn't clear that they had as much potentially to do with building warehouses and it would be an ancillary use. But it does turn out that the work that they do and the products and the additional structures it may occur and we want to make sure it is not an issue.

Mr. Le Frois stated: My concern is that we are making this change for a known reason. Does it mess something up by adding these such that you could get a warehouse where you might want something that is more sophisticated with R&D and the internal storage and internal light manufacturing in one complex instead of a warehouse?

Ms. Caldwell stated: It would have to be a smaller type of use. From a practical standpoint there isn't much property and the larger pieces of property there is an existing industrial area that are adjacent to the area we are talking about like the E.J. Brooks area. It is in a light industrial type zone so it's not unheard of in that area. Also, along Water Street and light industrial is permitted along that area as well. So you have that mix in another part of Town. This type of industry, manufacturing is something that is very desirable. We've had a lot of inquiries and they tend to be low impact uses. Uses that really have no impact on the exterior but they are business uses that provide employment in the community. I think from a practical standpoint we are not going to get anything large enough because there is not enough land.

Mr. Flaherty questioned: So someone could build rental storage units and that would be permitted? Where I could store my furniture and such?

Mr. Soloway stated: That kind of storage is different.

Mr. Wink questioned: What about the square footage of the warehouse? Could you potentially limit it?

Ms. Caldwell stated: You potentially could. The main issue I would see is that the proposals that we are looking at are multi-story so they may be much larger than you expect from a square footage standpoint.

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Mr. Soloway stated: Certainly storage facilities are separately defined.

Mr. Le Frois questioned: Speaking of numbers, do both T-4 and T-5 allow multi-story facilities?

Ms. Caldwell stated: No more than five stories.

Mr. Le Frois stated: And that is already in the ordinance.

Ms. Caldwell stated: Yes. There are other standards that are required. They need to meet the parking standards and building size they have to come before the Board. For these types of uses some of it is going to be access. I would tend to think that they are going to be more low impact uses because they are not on a major highway or on large tracts of land. With Thorlabs they have very small products. They use larger trucks but it takes a week to fill it up because the products are very small.

Mr. Le Frois questioned: You are speaking about tracts of land within the T-4 and T-5 zones, correct?

Ms. Caldwell stated: Yes. There are really not many large pieces of property in Town that are available without some type of redevelopment.

Mr. Soloway stated: Just so the public and the Board understands, this is informative. It is not before the Board to vote yay or nay. The ordinance under the statute requires you to evaluate the proposed ordinance to determine if it is inconsistent with the Master Plan. If so, to identify the inconsistencies and the Board is allowed, but not required, to make any recommendations that they may have to the Town Council. The Town Council will actually vote on whether they adopt this ordinance. It's the Town Council who will have to formal public hearing after this Board acts.

Ms. Caldwell stated: These are in draft form now and they haven't been introduced and there is no date set as of yet for a public hearing.

Portion opened to public.

1st Public: Steve Kelmer, 21 Diller Avenue. Has lived here for 18 years. How will changing the zoning across the street from my house to allow a 4 or 5 story building to be built do me any good? Or my neighbors, or the residents in lower Spring Street? How is it going to help them with their property values? And it will be two years of construction. The only one being helped by this is Thorlabs. Do you poll the residents of the Town or the man with all the money?

Ms. Caldwell stated: In terms of the size of the structures that is already set and permitted. This doesn't change that.

Mr. Kelmer questioned: So they could put a five story building across from my house right now?

Ms. Caldwell stated: I'm not sure. It depends exactly where your house is.

Mr. Kelmer stated: It is across from the old Moose Lodge.

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Ms. Caldwell stated: Then it would be four stories.

Mr. Kelmer questioned: What is the purpose of changing it?

Ms. Caldwell stated: It is for the use.

2nd Public: Mary Lou Hennigan, 17 Diller Avenue. I have lived here 30 years. We've had to deal with the Moose Lodge, which was really loud. There were a lot of people and drunkenness. When this changes to light manufacturing, what kind of noise can we expect? How is it going to change our neighborhood? I would just like you to consider that our side of the street is residential. We try to get the property improvements and it is not working for us. We have paid taxes a lot of years. E.J. Brooks is on the other end and they have 70 acres. I hope you consider the residents on Diller Avenue.

Mr. Le Frois stated: Relative to noise, there are ordinances that are in place and certainly those are always adhered to at the best of the ability of the enforcement. That is definitely taking into account at the time the applications are considered. It is a question we all ask when the application is in front of us. There will always be residents or different uses or zones that are adjacent to one another and you happen to be on the edge of the residential zone that meets up with a light industrial zone. What we try to do as a Planning Board is balance everything. The Town needs businesses to collect taxes and keep people employed, but at the same time we've got a commitment to balance those needs with the residents that live near those businesses. We take that all into account. Your input is gladly accepted. Our legal counsel said it is not up to us how the ordinance is written.

Ms. Hennigan stated: I understand the ordinances. The amount of time I've spent over the years calling the Town Manager and calling the police to please get them to turn the music down. People sometimes take advantage of the ordinances and don't care about their neighbors. It can be really tough. Things are going to change for us and I hope that you consider us.

Mr. Elvidge stated: Alex Cable in building the headquarters was very concerned with how the neighbors on Pine Street and Merriam Avenue were affected by it, above and beyond many other applicants who have come before us. Whether it be about light shining on a piece of product, or going off his property to help any homeowners who might be affected with shrubbery or buffers. He wants to make sure the people around are satisfied as well. I'm very comfortable with that.

Mr. Levante stated: About two months ago, Kevin and I met with Thorlabs to view preliminary plans of the project. I was quite pleased with them and I think you would be, too. I live on Trinity Street within walking distance of the project. I drive past here every single day. What is there now and what was there before in regards to the Moose Lodge building and Able Oil, that whole site needs some work. I think you will be impressed when it is complete. I moved here 12 years ago and my property value has gone down 25%. I'm hopeful that as our part of Town develops our property values will come back up as they are within walking distance to Thorlabs. A lot of the employees who currently live in Town actually walk to their current building. Like I said, the preliminary plans show that traffic would not enter on Diller but on Sparta Avenue between the church and Camp Hill. You would basically see the façade as well as some nice greenery and shrubs on your side. I think it is really going to help the property values in the area. I don't think it will be an increase in traffic. As Kevin said, they seem to have cared very much

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about the neighbors and our Town. This Board and the next Board will take those into consideration when they view the plans.

No more public stepping forward. Portion closed.

Ms. Caldwell stated: Unless you have further recommendations I will request that Ms. Citterbart send a letter to the Council indicating that it is consistent with the Master Plan.

Mr. Wink stated: I would like to make a recommendation that the Town Council limit the height, number of floors, and square footage so it does not create a nuisance and it would not be counter to the Master Plan or the quality of life of the neighbors.

Mr. Soloway stated: If you are inclined to go that way, you can recommend that the Council give consideration to the permitted height of the buildings to allow for square footage.

Mr. Le Frois stated: I am fine with adding that.

Mr. Flaherty made a motion finding that the proposed ordinance is not inconsistent with the Master Plan. However, we would add a recommendation that the Council will consider limiting the height or square footage of such facilities that would be considered under these two transect zones. Mrs. Vrahnos seconded it.

Aye: Mr. Flaherty, Mr. Wink, Mrs. Vrahnos, Mr. Ragsdale, Mr. Levante, Mr. Elvidge, Mr. Le Frois

320-3 "DEFINITIONS"

This ordinance is in respect to signs. Specifically signs in the area 116-118 Spring Street which is the former Plaza Restaurant. The issue here is we have, like the theatre, a grandfathered marquis sign. There is a request from the property owner in respect to a sale of their property. They have a sign that they have had on the property for a long time that they are attached to and they are potentially entering into an agreement to lease or sell their property to another entity to conduct a different type of restaurant use that wouldn't utilize the sign. But the concern is that at a later date, if that entity goes away they would still be able to use the existing sign on their property. In order to have the Council facilitate the use of this property which has been vacant for quite some time the request was to grandfather the sign so that when it came down, at a later date it could be put back up if so desired by the property owner. The Council has considered and drafted an ordinance for it. I would say it is not inconsistent with the Master Plan.

Mr. Soloway questioned: What is the consistency with the rest of the Zoning Ordinance? The Master Plan doesn't really address the structure which is what this is really regarding.

Ms. Caldwell stated: As I said, we do have another sign on Spring Street that is grandfathered in the same way.

Mr. Le Frois stated: So they want to sell it, the new owner will take it down and if the old owner gets it back and wants to put it back they want to have ability to do that.

Mr. Soloway stated: Anything that is lawfully there, if you change the ordinance continues to be lawful. It's a little tricky if a non-conforming structure is totally destroyed it loses its protected

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status. If it's partially destroyed, it may not lose that status. I guess the sign is a tricky thing. You have a new occupant that puts new stuff on the sign is it the same sign. I think this is just clarifying with this particular property that they can continue to have a sign of the same dimensions and type at that property even if they plan to put on something different.

Ms. Caldwell stated: It is likely that the new occupant would not utilize those signs and if something changes back, it may be a lease scenario, they may want to put them back up and a later date.

Mr. Levante stated: To clarify, the current owner is not looking to sell the property but he is looking to lease it. So the current owner just wants some assurance. This is the same thing we did with Newton Theatre. We grandfathered that in for some security in case it was taken down or a truck hit it. This property owner would like to be able to see that sign put back up on the structure.

Mr. Wink questioned: Should the arguments be specific that it be the same size and type?

Ms. Caldwell stated: The difference is the sign is existing. It might be beneficial, although it is a little hard to figure out without some extensive research on the property. After ten years we probably won't know what was on that property. It's a fair comment.

Mr. Wink stated: If somebody buys it later on, it should be the same size and type, not necessarily that exact sign.

Mr. Soloway stated: The suggestion is that the Council consider qualifying what might exist in the sign. Perhaps referencing the dimensions and type.

Mr. Le Frois stated: Take a picture.

Ms. Caldwell stated: Yes. We could.

Mr. Le Frois stated: Take a picture and supplement it with dimensions.

Mr. Wink questioned: Would it go with the owner or the building?

Mr. Le Frois stated: By the way it is worded it would run with the land. It has the block and lot and address.

Mr. Levante made a motion to find the ordinance not inconsistent with the Master Plan with the recommendation that the Council considers further clarifying what's meant by existing and grandfathered, perhaps referencing the dimensions, type of sign, and a photograph be included. Mr. Flaherty seconded.

Aye: Mr. Flaherty, Mr. Wink, Mrs. Vrahnos, Mr. Ragsdale, Mr. Levante, Mr. Elvidge, Mr. Le Frois

Ms. Caldwell left at 8:00 p.m.

OLD BUSINESS

James Devine (#ASP-3-2018)

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Block: 3.01, Lot: 22
29 Slate Hill Road

The applicant is requesting an amendment to previously approved plans from June 20, 2007. Carried from the April 18, 2018 meeting with no further notice required.

Mrs. Vrahnos signed a certification that she has listened to the cd of minutes from the April 18, 2018 meeting.

Mr. Devine is being represented by Ms. Megan Ward, Esq., from Kelly & Ward, LLC.

Ms. Kelly stated: As the Board knows there was a minor subdivision application approved in 2007 that created two lots from the existing lot. Mr. McCabe testified at that hearing. Mr. Mulhern, who is here with us, was then the property owner for the minor subdivision. In 1985 an access easement was created for benefit of the property that is just over the line into Fredon that was owned at the time by Mr. Bellush who sold the property to Mr. Mulhern. So that provided access for benefit of that property. At the time of the 2007 application the property was owned by Joseph and Diana Guerra. The application approved in 2007 created two new lots on either side. One was the lot that is currently owned by Mr. Devine and his wife and the other is a lot that technically on paper has access on Swartwood Road. The County didn't permit access on Swartwood Road so it has access also off of a 20' wide common access easement. That is currently owned by the D'Annibales and the Danza's own the property in Fredon. At the time of the hearing in 2007 Mr. Guerra was represented by an attorney from Dolan and Dolan, Mr. Anand Dash. Mr. Dash objected to the proposed use of the access easement for the one property which is the property that's owned by Mr. Devine. For no particular rhyme or reason an objection was raised and the idea was put out to put in a separate driveway for that lot. The lot owned by Mr. D'Annibale would use the 20' wide access easement and there is actually a 30' wide access easement from there along the property line to that new lot. It was an off the cuff appeasement to an unexpected objection. So that is why we're here. For purposes of this hearing we are not going to dispute or raise an issue as to the easement. It exists. We are solely here to address the one condition that there be a separate driveway from the cul-de-sac terminus at Slate Hill Road to the property that is owned by Mr. Devine and Ms. Nichols. We are going to address that for purposes of the hearing strictly from a land use perspective. I'm not discounting other issues but that is the purpose and plan and what we are here to address. I understand that Mr. McCabe previously testified.

Mr. Soloway stated: Mr. McCabe testified at some length about the circumstances that led to this condition. He testified that it was suggested to him when he was doing the application that in order for things to go smoothly he should offer this condition. Mr. McCabe did address the land use justification that brings the application now before the Board meritorious, in particular he testified about disturbance to the environmental quorum that would be caused if they had to cut through this driveway from the cul-de-sac more than 600' to the home the disturbance would be significantly more than what would be caused by using the easement. He also testified that in his opinion the easement was adequate to provide access. I agree with Ms. Ward when she says what should be addressed is the land use justification related to the initial condition and vacating it. There has been some discretion by Mr. Devine and the objectors about elements of the easement and who has the right to use the easement and things of that nature. That is for a Court of the Law and is not for this Board to decide. For purposes of this hearing the Board should assume that specifically deciding it that hopefully the documents of record and Mr. Devine if the condition is eliminated does have the right to utilize that easement

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and if somebody wants to argue that he doesn't have that right. Again, that's for a Court not the Board to decide.

Ms. Ward stated: Thank you. I was not here last time so I'm not sure what testimony was put on the record. It may be a little bit of repetition but I will try and avoid that. I believe Mr. McCabe and Mr. Devine are still under oath.

Ms. Ward submitted Exhibit A-1 dated 5/16/18, sheet 3, a driveway proposal: This was done in 2007 and submitted to the Board as part of the package.

Ms. Ward questioned Mr. McCabe: Did you prepare this in 2007?

Mr. McCabe stated: Yes.

Ms. Ward questioned: The purpose of this was to demonstrate that a driveway from the cul-de-sac could be constructed?

Mr. McCabe stated: Yes. Technically it could be.

Ms. Ward questioned: So the length shown there is roughly the equivalent of the existing common driveway that is on 23 Slate Hill Road?

Mr. McCabe stated: Actually it's a little bit shorter. It is 600' plus.

Ms. Ward questioned: What can you say about the profile of this possible driveway?

Mr. McCabe stated: If you notice the inset in the bottom left corner. In terms of starting from 0 plus 50 it goes to a 12% grade which follows the contour of the existing land. In order to maintain that we have less than a 15% grade which is the maximum you're allowed from station 0 plus 75 to slightly more than 100' 1 plus 85. You would have to do a fairly deep cut into the ground in order to get it 14.66% grade on the driveway which as you can see the plan view on the top of it. We will have to cut through rather dramatically to get that grade in there.

Ms. Ward questioned: What is the existing condition of that property?

Mr. McCabe stated: Very heavily wooded. To put this driveway in we would have to be taking out a considerable amount of forestation especially near the cul-de-sac because it is not just cutting a trench in to the ground but you have a side slope and it requires removal of live trees. Similarly coming up parallel to the existing driveway we would have to take out a large number of trees so as to afford the proposed driveway to get up through that area.

Ms. Ward questioned: Are you a licensed Planner and is your license current?

Mr. McCabe stated: Yes.

Ms. Ward questioned: From a Planning perspective can you address the purposes and goals of planning that might apply to this possible driveway on Mr. Devine's property?

Mr. McCabe stated: Generally when you are looking at a project you want to achieve what your client wants which in this case is to have a house built on the property and have access to

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that. One of the goals set forth in the Municipal Land Use Law and in some of our own ordinances is that you are trying to preserve the character of the community. This includes its natural resources, the grading, forestation and other growing matter. The idea is to try to prevent, for lack of a better term, a considerable deforestation of an area of land in order to get a driveway in. That is unfortunately what we are faced with in this case. The driveway itself is just a hair under the 15% grade and that is not a good grade to have on a driveway. It could be evened out further by extending the amount of cut further along into the grade or the length of the driveway. It would require more soil, rock, and tree removal. But you would only be talking a few more degrees. The problem is trying to gain access up this hill in order to get onto the site with the shallowest pitch possible for your driveway. In order to do that you have to do a lot more cutting and filling.

Ms. Ward questioned: From the opposite side of the coin is there a benefit to using instead the existing common access?

Mr. McCabe stated: You have a driveway that has been there and serving this property for a little over 20 or 30 years. It is used now by three households. In my opinion as a Professional Planner, adding a fourth household with the number of cars that would be generated would not be detrimental to the driveway. The question also came up at the last meeting about pull-offs or pullovers so you can allow a car coming down hill to pass someone coming down hill. There are four points along the road that I believe could qualify for that. Some are already there and one additional that could be put in without any significant problems. By using the existing driveway you're not going to be diluting the adjacent properties which belongs to Mr. Devine. You'd also be allowing the neighbors as they pass down through there to allow the vegetation to remain and be an attribute to the community.

Ms. Ward questioned: From a Planning perspective, from a risk/benefit analysis, what is the better option?

Mr. McCabe stated: The better option would be to allow the existing paved driveway to be used that was part of the minor subdivision in 2007. I feel that the detriment of having to do significant excavation and the stormwater that would be created, the loss of trees and other vegetation is a significant negative when looking at the site and what could have happened. On the other side of the coin, by using the existing driveway it can be repaired and you can add pull-offs to the side, it can be done with the most minimal of effort. Again, you have an existing paved driveway that is there and when you are looking at houses coming up the applicant's access would be right about where the access is for Judge Mulhern's old house. Which is basically a horseshoe. So basically it would not be interfering with the existing driveways of any of the other property owners that use it.

Ms. Ward questioned: This application is not for a variance, is that correct?

Mr. McCabe stated: Correct.

Ms. Ward questioned: This is an application to revise a condition of the 2007 approval.

Mr. McCabe stated: Yes.

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Ms. Ward stated: Nevertheless, for purposes of discussion are there any negative criteria that you can identify with regard to Mr. Devine and his wife's property utilizing the existing shared driveway?

Mr. McCabe stated: No I don't see any negative impact on that. They have a permit for the house construction, the septic that will be installed there issued by the County Health Department. Because of that, he has gotten all of his other permits and design work done. The addition of a single family home on the lot that is in question, lot 2.10, in my professional opinion would not be detrimental to have the few vehicle trips from that property on the existing paved driveway.

Ms. Ward questioned: For purposes of the record the property that Mr. Devine owns is 29 Slate Hill Road. It was block 301, lot 2.10. It is now block 3.01, lot 22. The property in Fredon that Mr. Danza owns is 27 Slate Hill Road, it was and is still block 101, lot 12. The property that the D'Annibale's own is 25 Slate Hill Road. At the time of the 2000 approval it was block 301, lot 2.09. It is now block 3.01, lot 21. Finally, the property that was formerly owned by Mr. Mulhern, 23 Slate Hill, was block 301, lot 2.01. It is now block 3.01, lot 20 and it is owned by Steven and Maya Biscayne. It is that property in particular that is subject to the 20' wide access easement that was created in 1995 from Slate Hill Road, the cul-de-sac to the Danza property in Fredon and subsequently in 2007 when the lot owned by Mr. D'Annibale, 25 Slate Hill Road was additionally created along that boundary line a 30' wide access easement from the common driveway. What is requested here is to go back to the original and better plan to permit access to 29 Slate Hill Road that is owned by Mr. Devine. There is no place from the existing common driveway. Questions?

Mr. Soloway questioned Mr. McCabe: Are you familiar with the so called Planning Variance?

Mr. McCabe stated: Yes, I am.

Mr. Soloway questioned: Is this a Planning Variance situation?

Mr. McCabe stated: I don't think it is. As you may recall that issue was dealt with in 2007 when we addressed the issue of access of emergency vehicles up there. And here it would not be any different to what we had there.

Mr. Soloway stated: Did you address it in the context of this? My question, just so the Board follows, some of you may be familiar with the section I'm talking about, which basically requires in any circumstance when someone is proposing a lot that doesn't front to a public street that there is a prerequisite to any building permit that there has to be adequate access to firefighting equipment, ambulances and emergency vehicles. You could argue that technically that shouldn't apply here because the lot does front on a public street. But they are not proposing access from that public street. So I think this by analogy this is in the mix. Mr. McCabe is saying that while that was already decided in 2007 in the context that the subdivision approval that allowed a couple of other lots to have access off this but not this one.

Ms. Ward stated: I respectfully disagree. While this lot does technically have frontage and approved on an existing public street that the better access is what was originally proposed.

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Mr. Soloway stated: I'm not saying its precluded from that, but I'm just suggesting to the Board that if you are inclined to consider granting this you should satisfy yourselves that there is adequate access for a fire engine and ambulance there.

Ms. Ward stated: There are three existing residences that access off of this and that was specifically addressed at the time of the 2000 application. More specifically in regard to 25 Slate Hill Road owned by the D'Annibales because while that technically has frontage on Swartswood Road, County Route 622, the County required that no access from the lot be from there. That was specifically addressed at the time and that is why the access off the common driveway is 30' wide from that lot to address any issue of accessibility. So this is a proven entity. It is not a new notion. The access easement has existed for 33 years. For 11 years the approval has existed so there are three residences that already exist and that already have satisfactory access of off this. This would not change that.

Mr. Flaherty questioned: Has anything changed on the property that is different from when the original condition was made and from what was agreed upon then?

Ms. Ward stated: Nothing has changed. It just came up on the fly during the hearing process and what we marked tonight as A-1 was a plan that showed it was possible to do a driveway. It is possible, it's just a much worse alternative. It's not better.

Mr. Soloway stated: That was Mr. McCabe's testimony.

Mr. Wink stated: Somewhere along the line Mr. McCabe testified that there was no intention for that lot. Somewhere in the documents back in 2007.

Ms. Ward stated: Yes. You are referring to the resolution. This came up in the hearing process when Mr. Dash on behalf of the Guierra's objected and didn't want somebody else to use the existing driveway.

Mr. Wink stated: Members of the public who testified at the last meeting knew that that particular lot would need a driveway if a house was ever built on it.

Ms. Ward stated: Again, that was not the proposal and part of what's before the Board is the minor subdivision proposal that was submitted in 2007 and you will see that it does not have a driveway off of Slate Hill Road. All four lots as the application was filed were proposed and intended to have access from the existing common driveway.

Mr. Soloway stated: The applicant backed off that. The entire reason that we're here tonight is that the applicant agreed to the condition that this lot should have its own driveway. I know the testimony is that they pushed it through for no good reason because they wanted to get approval that day but the fact is that it did happen, correct?

Ms. Ward stated: Yes. It did happen.

Mr. Ragsdale questioned: Is there a site plan showing all four lots using the easement?

Mr. Soloway stated: It is not a site plan it's a residential minor subdivision.

Mr. Ragsdale stated: Is there anything showing that they can use this road now?

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Mr. Soloway stated: No. Because that was not approved. I don't think there is any argument. The applicant agrees that the 2007 approval said that they have to have a separate driveway for this lot but they are here now because they think it's a bad idea and a bad condition and they want to change it.

Mr. Le Frois questioned: Does the current easement specify what lots have access to it?

Ms. Ward stated: It was originally an easement for the lot that Mr. Mulhern owned which was about 7 acres. It was just an easement to get from Slate Hill Road to Fredon. As part of the deeds in the minor subdivision there is included the property that is owned by the D'Annibales. It provides use for the 20' wide existing driveway in addition to the 30' access down the property line.

Mr. Levante stated: The decision in 2007 forcing the applicant to have the driveway was needed to pass. I drove on the easement about 2 and ½ weeks ago and it is much worse than I thought. There is really nowhere to pull over.

Mr. Soloway stated: You have to be careful as a Board member. You can familiarize yourself with the scene of the application but you shouldn't be making specific factual determinations based on a site visit you made yourself. You can ask questions or impose conditions relating to the liability. But it is not proper for you to make a specific determination.

Mrs. Vrahnos questioned Mr. McCabe: You talked about character of the community in regards to land use. Can you define that?

Mr. McCabe stated: Yes. I've lived in Newton for 44 years. Newton has many characters. In terms of our historic buildings, our modern section on manufacturing, some environmentally sensitive areas, and beautiful environmental areas. Pine Street Park would be one of them. Some of the big swamp that's in the eastern end of the Town is another beautiful area. At one time if you look at historic aerial photographs this Town was like Madison, it had a huge number of street trees all over. We lost a lot of that. We also lost a lot of open land and trees and forestation. One of the goals of the Land Use Act was to try to preserve as much of that as possible. It's even recorded in our Master Plan as such where we do try to keep that part of the character. If you look at Spring Street, we are trying to maintain a historic area. We are trying to maintain the industrial buildings for modern uses. We try to maintain those as well as it is part of the character of the community. So different aspects of our community in different areas add different parts and characters that comprise our entire Town.

Mrs. Vrahnos questioned: So what is the character of the community in question?

Mr. McCabe stated: I would say predominantly wooded. If you drive up this driveway and you are up Slate Hill Road there is a great deal of woods and it goes to the Community College. Once you get to the cul-de-sac and you run onto the existing driveway you realize you are driving through a heavily treated wood area and that to me is the character in this site. So as you are coming to the crest of the hill passed the 600 to 650' mark you see Judge Mulhern's old house, you are coming close to the municipal boundary, and then you see to the left the D'Annibale's house, then you see the house in Fredon. You are surrounded by woods and this is the character of this particular community.

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Mrs. Vrahnos questioned: So the character of the community includes people too. So is it just not trees and woods that I think we should take into consideration but residents? Or is that not part of our purview?

Mr. McCabe stated: You are talking about the character of a community from a land use perspective, not the people who reside there.

Mrs. Vrahnos stated: I understand. I just needed you to clarify what you mean by character of a community.

Mr. Flaherty questioned: Is putting in that driveway changing the totality of the character of that area?

Mr. McCabe stated: Absolutely it would, to the negative side. You are moving a considerable amount of trees.

Mr. Flaherty questioned: How about the percentage of deforestation? How much?

Mr. McCabe stated: I haven't done a tree survey up there. In the first 200' you are going to have a significant deviation from the trees that are there and in some areas you are going to strip it naked. It would be right to the property line. You will drive down the driveway and all of a sudden before you get to the bottom of Slate Hill Road you realize on your left hand side there is no trees left. There is just a shale cut that's been regraded to accommodate just under a 15% grade driveway. As you're coming down the existing paved driveway and you get to the proposed driveway, even in the flatter areas you are still taking out a vast number of trees. I would say a couple of hundred trees are coming out.

Mr. Elvidge questioned: Has there been an estimate on what the cost would be for a new driveway?

Mr. Devine stated: The statement to me is that putting in that driveway wouldn't be worth it to build that house because of the sloping and it's on the north side of the property. We'd have to take all the trees out and let the sun in for the winter time. Then you come to the bottom of it and you have to make a quick right hand turn. It's a dangerous situation.

Mr. Elvidge questioned: Do you have the cost?

Mr. Devine stated: I don't have an exact cost. I talked to my builder. It will be costly and it destroys the view of the property and the look of the property and it's just not worth it. There is nothing in any recorded documents that a new driveway needs to be put in.

Mr. Elvidge stated: Without the cost I'm finding it hard to argue that it's profitable or not profitable.

Mr. McCabe stated: David has a better handle on this because he does it on a day-to-day basis, but from my years of experience you are looking at excess of \$30,000. It includes having excavator equipment coming through and ripping through the shale. You can't just cut through like a straight wall. You have this thing called a luge, which you don't want. You have to move a great deal of overburden. Whatever you take out you need to find a home for. You also

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need to do all the tree removal. That becomes a costly matter. With a large one you are looking at \$1,000. I would say you are looking at \$30,000 minimum.

Mr. Flaherty questioned Mr. Devine: Are you going to be living there?

Mr. Devine stated: I haven't made that decision yet. I bought it from a friend of mine and I have a builder. We haven't totally decided what the plans look like yet. Sometimes you change things around as you go through the process. The septic is approved and ready to go. The only thing we need is the zoning permit. That's why we're here.

Mr. Le Frois questioned Mr. Simmons: Is there anything you would add?

Mr. Simmons stated: The only thing I'd add is with regards to the existing driveway is it possible to get emergency vehicles up there? There are existing homes at the end of this driveway. One component is maintenance. Since it's a private driveway it has to be maintained by some entity with snow removal, sanding, and periodic paving maintenance to continue to be available for emergency vehicles to get up there.

Mr. Le Frois stated: In the case of an easement with private individuals the only way to maintain is for them to get together and make sure that it's maintained.

Mr. Soloway stated: There is language in the recorded easement which we discussed last month. It does reference maintenance and that the property owners who utilize it are responsible to maintain it.

Portion opened to public.

1st public: Joseph D'Annibale, 25 Slate Hill Road. This is lot 2.09 which encompasses the 20' wide easement and the 30' wide easement. Just passed the Mulhern property and make the left. As previously stated last month, the disrepair of the driveway, and the traffic would add to the burden on that. Not only after the house is built but during the building as well with the construction trucks and equipment. The driveway is in need of repair. We are working on a maintenance agreement. In 1985 Mr. Mulhern purchased property from Mr. Bellush. Mr. Bellush lived in Fredon which encompassed a 20' wide access easement in Fredon. The easement is on Mulhern's property. Mr. Mulhern didn't need the easement, it was his property. We were talking about come terminus with the land. When the subdivision happened, that entire driveway with the easement is now Mr. Piscaty's property. In the 1985 easement there is talk about if parcel 2 were to subdivide. Parcel 2 in that easement is Mr. Danza's property; the old Bellush property. In that easement agreement it said that if parcel 2 would ever subdivide into two parts. To me that means the property in Fredon and one more. It shall not exceed two single family lots. Both parties shall enjoy the benefit of the easement that was created. The division of parcel 2 into more than two single family lots shall be deemed unlawful, increase a burden, and use of the easement except complicated herein may be enjoyed. I can only speculate on the issue Joe Guerra brought up during the subdivision of Mr. Mulhern's property could be this statement of land being subdivided and two properties being added to this easement. It could be the reason why they were advised that the third lot would need its own driveway. I just wanted you to be aware of the wording in the 1985 easement. Fast forward to 2007 when the Planning Board approved the subdivision, we all know what it states in the resolution. I've pulled the three deeds from that subdivision. In the deed for lot 2.01 which is Mr. Pyskaty's lot and in lot 2.09 that I ended up buying, both have the wording of the 1985 easement in the deeds. The third lot, 2.10,

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which is Mr. Devine's lot clearly states in the deed that the premise will be accessed through a private driveway, not shared driveway, terminus from Slate Hill Road. Which is consistent with the testimony and resolution of the Planning Board. There is no mention of the 1985 easement in the property of Mr. Devine. I think they had mentioned it before that they are not disputing that and they are asking for approval to rescind the resolution. With that being said, the plan in front of you is dated 2007. Nothing has changed since 2007 other than someone has bought the lot and wants to build on the lot. How far is this proposed driveway from our driveway? It's not terribly far. The amount of trees that would need to be taken down in relation to my driveway is let's say 30' of trees. It was talked about how it will be a detriment to land with all these trees being taken down. But the 100 yard by 100 yard spot they took trees down to make the house, there is no talk of that. I can only say what we see in the deeds, what was presented to this Planning Board in 2007 and what was agreed upon by all parties. We just want it to stay the same. We have no problem with them building on the lot. We just want them to be their own entity. We don't need more traffic or construction on that driveway. With that being said, we hope that the Planning Board will stick with what's in black and white on paper.

Mr. Soloway stated: Last month this application was carried to see if the parties could work something out. I assume you were unable to do so.

Mr. D'Annibale stated: We were not.

2nd public: Charles Danza, 27 Slate Hill Road. I purchased the house for privacy. My lawyer told me that only three houses were allowed to use the road so that was a big deal for me and one of the determining factors in purchasing the house. The maintenance thing for three people is a lot easier than adding a fourth. We all get along. That could jeopardize it. Lastly, I just want to say that the builders built it at the furthest possible distance from the public road. This private driveway that must be built, could have been a lot closer to the public road and a lot more manageable. For us families to be negatively impacted doesn't seem right when it was their decision to build so far from the public road.

3rd public sworn in: Toni Schreyer, 27 Slate Hill Road. I live in the Fredon house. They keep talking about the trees being taken down. They had no consideration about cutting all those trees down before knowing if they could build a driveway. No disrespect, but there is a judge and builders and they must have seen that a private road was in the deed and needed to have that. So rather than cut down all the trees, they came here hoping that none of us would come and be able to use our road. They had no consideration to come to us. Maybe we would have said yes. We get a notice in the mail saying someone wants to use our road and we have no notification over it whatsoever. Then they cut down all the trees inches away from our line. Now we can see if there's a house built there. We have to count our own trees because they have cut so many down. They didn't do their due diligence or their homework. They are building the house. They could have built it closer. They went inches from our property. They took up so much and it was really unnecessary. Honestly it shouldn't be our problem.

Mr. Le Frois stated: We have to make a decision as to whether or not we will modify the 2007 resolution which required a separate driveway for block 3.01, lot 22, 29 Slate Hill Road.

Mr. Soloway stated: It's not your job to interpret the easement documents which Mr. Devine says gives him the right to use that easement. The objectors don't agree with that. For purposes of this proceeding you can assume without determining it that Mr. Devine has the right to use that easement. The only issue is whether the Board is willing to change the condition from the 2007

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approval to allow him to access his property off of that easement by cutting a driveway up the hill from where he abuts it. If you were inclined to approve this you might want to include a provision for maintenance of the common driveway. The existing easement does address that. I don't think, for purposes of this proceeding that you can really require anything more because Mr. Devine does not have the ability unilaterally to change the maintenance provisions. So if you were to impose some condition that requires some change in the maintenance agreement you are in effect giving the other neighbors veto power which I'm sure they would exercise.

Mr. Le Frois stated: The motion would be for the Board to either maintain the condition that was presented in the 2007 resolution which required a separate driveway which would be a denial of the application.

Mr. Soloway continued: And if you grant the application it would be subject to the typical conditions of any Board approval including fees, ordinances and so on and so forth. You could also consider further determination by Mr. Simmons or another individual relating to the suitability of access for emergency vehicles.

Mr. Le Frois stated: As far as maintaining the driveway we can just say there needs to be a maintenance agreement. We can't force it to happen, correct?

Mr. Soloway stated: If you say that, it is in effect a denial unless something changes. Mr. Devine can't unilaterally do that. So to change the maintenance agreement you would need a majority of the interests to do it. It is clear that the three individuals like the way things are now. They are just not going to agree to that. It does require that it be maintained.

Mr. Le Frois stated: So the resolution should be for approval of the application?

Mr. Soloway stated: If that's the way you want to vote it.

Mr. Le Frois entertained a motion to approve the application which basically is asking for the removal of the condition from the 2007 resolution for a separate driveway.

No motion made.

Mr. Le Frois entertained a motion to deny the application.

Mr. Ragsdale made a motion to deny the application. Mrs. Vrahnos seconded the motion.

Aye: Mr. Flaherty, Mr. Wink, Mr. Ragsdale, Mrs. Vrahnos, Mr. Elvidge, Mr. Le Frois

Abstained: Mr. Levante

Application denied.

CORRESPONDENCE:

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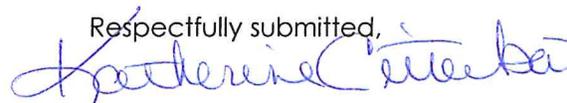
EXECUTIVE SESSION - None

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PUBLIC PORTION –

ADJOURNMENT

Mr. Flaherty made a motion to adjourn the meeting. Motion seconded by Mr. Wink. The meeting was adjourned at 9:03 PM with a unanimous "aye" vote. The next meeting will be held on June 20, 2018 in the Council Chambers of the Municipal Building.

Respectfully submitted,

Katherine Citterbart
Planning Board Secretary