

NASHUA CITY PLANNING BOARD
April 11, 2019

The regularly scheduled meeting of the Nashua City Planning Board was held on April 11, 2019 at 7:00 PM in the 3rd floor auditorium in City Hall.

Members Present: Adam Varley, Vice Chair
Mike Pedersen, Mayor's Rep.
Edward Weber, Secretary
Ald. David Tencza
Gerry Reppucci
David Robbins

Also Present: Linda McGhee, Deputy Planning Manager
Scott McPhie, Planner I

Approval of Minutes

March 21, 2019

MOTION by Mr. Pedersen to approve the minutes of the March 21, 2019 meeting.

SECONDED by Mr. Robbins

MOTION CARRIED 4-0-2 (Tencza, Robbins abstained)

COMMUNICATIONS

Ms. McGhee went over the following items that were received after the case packets were mailed:

- Amended Agenda
- Correspondence from Corporation Counsel Atty. Bolton re: Case #1
- Correspondence to postpone Other Business #3 to May 2, 2019
- Addendum for Capital Improvements Program proposal

REPORT OF CHAIR, COMMITTEE & LIAISON

Mr. Weber attended the Nashua Regional Planning Commission, and they approved a regional capital improvements program.

PROCEDURES OF THE MEETING

As there were no members of the public in the audience, Mr. Varley did not go into the procedure of the meeting.

OLD BUSINESS - CONDITIONAL/SPECIAL USE PERMITS

None

OLD BUSINESS - SUBDIVISION PLANS

1. David M. & Pamela L. Peabody (Owner) - Application and acceptance of proposed lot line relocation and two-lot subdivision. Property is located at 58 Linton Street. Sheet 129 - Lots 251, 252, and 253. Zoned "RA" Urban Residence. Ward 7. **(Tabled from the March 21, 2019 Meeting)**

MOTION by Mr. Reppucci to remove this application from the table.

SECONDED by Mr. Robbins

MOTION CARRIED 6-0

Mr. Varley said that the case was previously tabled was to obtain further guidance from Corporation Counsel as to the correct classification of this plan, and specifically whether this was a subdivision plan and whether the sidewalk ordinance applied. The Board received a letter from Atty. Steve Bolton, as well as correspondence between Mr. Maynard and Atty. Bolton.

Richard Maynard, Project Engineer, Maynard & Paquette Engineering Associates Inc., 31 Quincy St, Nashua NH

Mr. Maynard introduced himself to the Board as representing the applicants, David & Pamela Peabody. He said that they are going from three existing lots of record down to two by what is essentially a lot line relocation plan. He displayed the preceding tax map, which shows the three individual lots before somebody merged them into one big lot on the current map, which is under the State RSA's as an involuntary merger. This has been deemed to be improper through the RSA's because it did not have the concurrence of the property owner.

Mr. Maynard cited RSA 674:14-I in his definition of a subdivision as a division of a parcel of land into two or more lots. He said that means you have to increase the number of lots

to call it a subdivision. They are proposing fewer lots than the three that currently exist. He referred to Atty. Bolton's description of the application as a "resubdivision", and said that the word is not in the RSA itself. He said that the word resubdivision is only used in a commentary on a court case regarding subdivisions, not in the RSA itself. He said that in those advisory notes the word resubdivision was used when a developer wanted to reconfigure several lots into several different lots. He reiterated that these are three legal nonconforming lots of record. They were created in the early 1900s, and have been that way for decades.

Mr. Maynard said that Corporation Counsel Atty. Bolton was asked for a ruling, but it appears to Mr. Maynard that instead of giving a ruling he advocated for a position and was not acting as a neutral interpreter. He said that Atty. Bolton leaves the decision up to the judge, which is the Planning Board in this case. He said Atty. Bolton is one advocate and he is the other advocate, and that is not nearly what was intended for the case. He said that no additional lots are being created. Therefore, as implied by Atty. Bolton's letter, no sidewalk contribution should be due. The only time sidewalk contribution is required is when we're creating additional lots.

Mr. Maynard said that this could be three individual houses on three legal nonconforming lots of record. He referred to correspondence from Atty. Bolton, saying that he claims that at least two of the lots on the right hand side were merged for two reasons. One is because there is a second driveway onto one of the empty lots and he considers that a form of merger, which Mr. Maynard thinks is ludicrous. If someone wants to access his empty lot, he needs a driveway. The driveway for the house is on the right hand side of the house. The other point Atty. Bolton makes is that the house is into the property side setback. Mr. Maynard said that's the current side setback. He said that the house was built decades ago, and the fact that it might encroach into a setback is not a form of merger. He said if the house is over the lot line that would be a form of merger. Encroaching into the setback is a violation, but not a voluntary merger. Mr. Maynard said that the property owner did not voluntarily merge these properties. They have insisted that there are three legal nonconforming lots of record, and the assessor's map should reflect that as it used to in the 90s.

Mr. Maynard restated that there are no new additional lots. Therefore, this is only a lot line relocation. Therefore, no sidewalk contributions should be required.

Ald. Tencza asked Mr. Maynard if any of the other parcels on Linton St have sidewalks.

Mr. Maynard said no. There are no sidewalks anywhere in that neighborhood.

Ald. Tencza said it looks like it's right in the area of Sunset Heights Elementary School.

Mr. Maynard said that's neither here nor there regarding the ordinance. The school is a block and a half to two blocks away, in back of these lots. To get to the school, you have to go down a side street and go two blocks.

Ald. Tencza asked if there wouldn't be a need for sidewalks for children living there to access the school by a main road.

Mr. Maynard said it might be nice to have sidewalks in all these neighborhoods. These are all neighborhoods created in the 1950s-1960s, and if there are sidewalk funds donated from other projects in this quadrant, the city can decide that it might be a necessity to do sidewalks at this school. He said that the amount of walking traffic from this neighborhood is minimal. He reiterated that it's not relevant to the issue tonight.

Mr. Reppucci asked if nonconforming lots would be unable to be developed without zoning relief.

Mr. Maynard said that they are legal nonconforming lots of record. They're buildable. He said what happens is that the Zoning Administrator sends somebody to the Zoning Board of Adjustment just to make sure. And what happens is that the Board routinely approves them.

Mr. Reppucci asked if they comply with the zoning lot requirements.

Mr. Maynard said no, they are undersized. They are 5,000-sqft lots where 7,500-sqft is required.

Mr. Reppucci said you couldn't build a house on those lots without zoning relief.

Mr. Maynard said that's not correct in his opinion.

Mr. Reppucci asked how he could build on those lots.

Mr. Maynard said they are legally created building lots. When they were created they were building lots. Subsequent to that, the city ordinance changed the rules for lot requirements. If you look in the tax map for that neighborhood currently, there are numerous houses built on similar lots in this neighborhood.

Mr. Reppucci asked, since the ordinance required 7,500-sqft?

Mr. Maynard said since the subdivision was approved.

Mr. Reppucci said, isn't there a period of time that you have to initiate developing the lot for that to apply? In other words, that doesn't go on into perpetuity. If there's a subdivision or the lots are defined, an effort has to be made to develop those lots within a window of time in order to keep the rules as they are.

Mr. Maynard said the word he is looking for is to divest the lots. And there is no time period. What happens when you have a subdivision approved, you must make improvements towards that subdivision, which means building roads and utilities, and getting them accepted. These lots exist into perpetuity, because the subdivision is vested. There is no requirement whatsoever.

Mr. Reppucci asked about requirements like setbacks. Are the current rules applying to those lots or the rules from 1900?

Mr. Maynard said that in his opinion the rules from 1900 should apply. However, in this community the Zoning Administrator has said that the current zoning rules should apply for setbacks. If you don't like that ruling you have to appeal it to the Zoning Board.

Mr. Robbins asked if he is correct in presuming that the owners could build three houses on these lots right now.

Mr. Maynard said yes.

Mr. Robbins asked if even though they do not meet current standards for lot size, in Mr. Maynard's opinion, that wouldn't matter and they still could build on the lots.

Mr. Maynard said yes, they would just build a small house like many of their neighbors have done.

Mr. Robbins asked if they are combining the three lots into two, essentially subdividing the center lot.

Mr. Maynard said no, they are moving lot lines. They are not subdividing anything.

Mr. Robbins asked what the impact of moving those lines is.

Mr. Maynard said they go from three lots to two, and can build a larger house with a garage.

Mr. Robbins asked if they would be able to do that without Planning Board approval.

Mr. Maynard said no, you cannot move any lot line without Planning Board approval.

Mr. Robbins said, so they are changing lot configurations and coming to the Planning Board for approval, which is required for them to do that. Then assuming the Board approves it with any stipulations and agree they can go forward. Is that correct?

Mr. Maynard asked for clarification.

Mr. Robbins said, assuming the Planning Board approves the request and they accept any stipulations the Board places on them, they can then go forward?

Mr. Maynard said correct.

Mr. Robbins asked if Mr. Maynard has a sense of the dollar figure in question.

Mr. Maynard said that the dollar figure in question is sidewalk construction, which is roughly \$5,000.

Mr. Reppucci said it is a contribution in lieu of sidewalk construction.

Mr. Varley said that there was no one in the room to speak in opposition or support. Ordinarily the Board would go into public meeting and have deliberations, but given that he suspects they would need to have further discussions with Mr. Maynard, he would suggest they just have a discussion about this sidewalk issue. Unless the Board has remaining questions from the last meeting, the only issue is whether they think the sidewalk ordinance applies, and in that case whether they would grant a waiver request. The request is contingent on the agreement of the applicant to make a contribution in lieu of construction, so they will need confirmation one way or the other from Mr. Maynard.

Mr. Maynard said his position is that no sidewalk contribution is required. The only reason they have a waiver letter is that Staff insisted they submit it. His position is that there is nothing to waive.

Mr. Varley said that depending on their discussion the Board may come to a different conclusion.

Mr. Maynard said the Board could come to the conclusion that sidewalks are required and entertain the waiver. He agrees that could happen.

Mr. Varley said that if they came to the conclusion, Mr. Maynard would presumably want to request the waiver as it would be less than the cost to build a sidewalk, in which case the Board would need to know if he is agreeable to paying the contribution in lieu that is part of the water.

Mr. Maynard said that's why they agreed in the waiver request letter. If the Board concludes that sidewalks would ordinarily be constructed here, he would want them to then consider the waiver for sidewalks. There are none for thousands of feet.

Mr. Reppucci said if the Board decides that the plan should be approved with the sidewalk fee, would that be acceptable?

Mr. Maynard said it has to be, even if he doesn't agree. He still has the right to appeal. He said for whatever it's worth, this is an interpretation of the regulations, and therefore it is potentially appealable to the Zoning Board and court.

SPEAKING IN OPPOSITION OR CONCERN

None

SPEAKING IN FAVOR

None

Mr. Varley closed the public hearing and moved into the public meeting.

Mr. Varley said he thinks there are two issues here. The first is the legal definition of a subdivision. The Board has a letter from Atty. Bolton indicating that in his view this does meet the definition for a subdivision because it is a resubdivision. Contrary to what Mr. Maynard said, the word resubdivision does

appear in the statutory language. The second practical issue is, even if they determined that it meets the technical definition of a subdivision, is there some other reason why they would say it wouldn't apply here? He thinks that it meets the technical definition of the statute because it includes the word resubdivision, and also based on Atty. Bolton's letter and subsequent correspondence. Secondly, he thinks that if the purpose of this plan is to create an opportunity to build on a "new lot" and obtain the benefit of the subdivision statute and create an opportunity to build on that lot, this request practically as well as technically meets the definition. To him, that means the sidewalk ordinance applies.

Mr. Reppucci handed out a municipal association document that makes the conclusion that all lot line adjustments, being subdivisions, may be subject to Planning Board regulations and review. They refer to lot line adjustments as subdivisions. He referred to the intent of the sidewalk ordinance, and said that if you are increasing the use of the area, you should contribute to its development, even if it's not directly in front of the house. That was the standard this requirement was based on.

Mr. Reppucci said he was under the impression that the other two lots couldn't be built on without zoning relief, but that's not apparently true. He said you could develop the nonconforming lots provided they comply with other requirements. That means they are looking at a situation where the possible density is being reduced. Mr. Reppucci has a subdivision coming to the Board soon, where one lot is being divided into two. That increases the intensity of the use in the neighborhood, whereas this request decreases it. They are going from three potential houses to two. Looking at it that way, whatever the technical terms are that caused the Planning Dept. to put it forward this way, if the applicant is decreasing the intensity of use it seems hard to justify that they should have the burden of adding a sidewalk. Based on that logic, he would say it isn't fair to apply the sidewalk regulation because the applicant is decreasing density.

Mr. Robbins said he has to presume that there is a financial benefit for the owners to go from three lots to two lots, and building on two larger lots as opposed to building three smaller houses. He doesn't necessarily think there would be a reduction in intensity, depending on house size. He thinks that by coming to the Board with this request, they are getting something more out of this than if they didn't come to the Board. They would be increasing the value of their investment.

Mr. Reppucci said that anybody who develops land is doing it to make money. Very rarely would someone come before the Board who doesn't stand to gain.

Mr. Robbins agreed.

Mr. Varley referred to Mr. Reppucci's handout about a lot line adjustment, and said he thinks they're talking about more than just adjusting a line. He agreed with Mr. Robbins presumption that it's not economically viable to develop the lots as is. Practically, the reason they are subdividing is to create an economically viable lot. He agrees with Mr. Reppucci's point that if Mr. Maynard is correct, the lots could be developed. It ultimately seems to him that if the applicant is recognizing a benefit of building a larger house rather than two smaller ones that they could legitimately say the sidewalk ordinance does apply.

Mr. Reppucci said he doesn't question that it should be treated as a subdivision.

Mr. Weber said it is a subdivision plan and should be treated like one, no matter what.

Ald. Tencza agrees that it is a subdivision. Toward Mr. Reppucci's point, he doesn't see any language in the ordinance about how the subdivision is going to affect the area or intensify traffic. He thinks it's a slippery slope if they start trying to make decisions about what subdivisions the ordinance applies to. Based on the information they have, it is a subdivision and either construction of sidewalks or contribution in lieu should apply.

Mr. Reppucci said this is the biggest bone of contention he has with the interpretation. He says that the ordinance empowers the Board to control the fee for each individual applicant. The Board has the discretion to require sidewalks and set the payment. He said he wasn't referring to the ordinance that lays out the reason they collect contributions, he was referring to the workshop they held on this and the reason the Board does this. He thinks it's unfair and not a legal thing to do. His personal opinion is that it's an impact fee, and that the city is not following the rules to impact fees. But in their discussion, the reasoning they used to apply sidewalk fees is that subdivisions increase the intensity of use in the area.

Mr. Varley said if they were looking at a different set of circumstances, with a larger subdivision, he doesn't think there would be any debate as to whether the sidewalk ordinance applies. And ordinarily, they would not accept a request for a waiver on a 30-35 lot subdivision. He thinks that the justification there is safety and pedestrian access. The exception is recognizing that there are circumstances where that rationale doesn't apply, the 2-3 lot subdivisions, that there is a justification for a lack of sidewalks. But because the developer is availing themselves of the opportunity to develop that land, the Board still believes they should contribute in some way.

Mr. Reppucci said that's exactly what an impact fee is. His argument to the city is that there are very specific statutory rules to apply impact fees. And if you do it wrong, it can cost a city or town millions of dollars. His concern is that the way they're doing this is like an impact fee, but they're not following the rules.

Mr. Varley said he doesn't think they should be making legal conclusions. He understands Mr. Reppucci's concerns, but doesn't think they should be making legal conclusions about whether it's an impact fee and whether it meets the requirements for an impact fee. The reality is that the ordinance and this waiver exception have existed for a long time, and as far as he can tell the exception has existed successfully. He said he's not in a position to decide whether it's an impact fee or not, but that's beyond the scope of what we're talking about tonight.

Mr. Reppucci said that the RSA's put the burden on planning boards to determine that. As far as he's concerned, it's their job to tell the city that if they're going to do it this way, they have to follow this rule.

Ald. Tencza said it sounds like a great topic of discussion for the next meeting.

Mr. Weber said they have had this discussion, and it's been thoroughly vented and we know what our guidelines are. Now they have made adjustments from those guidelines, but mainly the Board has certain regimental guidelines. He thinks if they stray from those guidelines, they would get into more trouble.

Mr. Reppucci asked how they would get into trouble. He said they have complete discretion to apply that fee however the Board chooses. They can apply it to one application and not another, and it wouldn't cause them any trouble.

Mr. Weber said they can get into trouble if they continually change everything. They're going to get applicants who ask why someone else got a waiver and they didn't.

Mr. Varley agreed. He said they should apply the rule consistently. There may be some unusual circumstances that may justify reconsideration in a particular case, but in general they should be applying a consistent framework to decide how the rule is being applied. To him, the only question here is whether the sidewalk ordinance applies, and if it does, if the applicant meets the criteria for a waiver. If they find here that this doesn't meet the criteria for a subdivision, then that's a reason for departing from the general rule.

Mr. Pedersen said that according to the New Hampshire Municipal Association a lot line adjustment is considered a subdivision, so they're going to treat it as a subdivision. As to whether the waiver applies, it's a long established neighborhood with no sidewalks.

Mr. Varley said that if they consider it a subdivision, then the sidewalk ordinance applies. He thinks they are in agreement that they meet the criteria for a waiver.

The Board expressed agreement.

MOTION by Mr. Weber to approve New Business - Subdivision #1. It conforms to § 190-138(G) with the following stipulations or waivers:

1. The request for a waiver of § 190-282(B) 9, which requires physical features on site and within 1,000 feet be shown, is granted, finding that the waiver will not be contrary to the spirit and intent of the regulation.
2. The request for a waiver of § 190-221(C), which requires underground utilities for new subdivisions, is granted, finding that the waiver will not be contrary to the spirit and intent of the regulation.
3. The request for a waiver § 190-212(A) (1), which requires that a sidewalk be located on at least one side of the street, is granted, finding that the waiver will not be contrary to the spirit and intent of the regulation. The applicant has agreed to make a contribution in the amount of \$5,700.00 in lieu of sidewalk construction pursuant to §190-212(D) (2), payment to be made **prior to recording the plan.**

4. Prior to the Chair signing the plan, the proper 54 Linton Street address will be added to the plan as required in the January 17, 2019 e-mail from Mark Rapaglia, Nashua Fire Department.
5. Stormwater documents will be submitted to Planning staff for review and recorded with the plan at the applicant's expense.
6. Prior to the issuance of a building permit a pre-construction meeting shall be held.
7. Prior to the issuance of a building permit, an electronic copy of the plan shall be submitted to the City of Nashua.
8. All minor drafting corrections will be made.
9. Any work within the right-of-way shall require a financial guarantee.

SECONDED by Ald. Tencza

MOTION CARRIED 6-0

OLD BUSINESS - SITE PLANS

None

NEW BUSINESS - CONDITIONAL/SPECIAL USE PERMITS

None

NEW BUSINESS - SUBDIVISION PLANS

None

NEW BUSINESS - SITE PLANS

2. John J. Flatley Company (Owner) - Application and acceptance of proposed site plan to construct a 255,272 square foot Research & Development facility. Property is located at 100-300 Innovative Way. Sheet A - Lot 798. Zoned "PI" Park Industrial and "RC" Urban Residence. Ward 8. **(Postponed to the September 12, 2019 Meeting)**

OTHER BUSINESS

1. Review of tentative agenda to determine proposals of regional impact.

MOTION by Mr. Weber that there are no items of regional impact.

SECONDED by Mr. Robbins

MOTION CARRIED 5-0

2. Referral from the Board of Aldermen on proposed amended O-19-038, amending the sign ordinances relative to address numbers on ground signs.

Linda McGhee, Deputy Planning Manager

Ms. McGhee said that on March 7, 2019, the Planning Board gave a motion of favorable recommendation to the Board of Aldermen. The Board of Aldermen has referred the ordinance back to the Planning and Economic Development Committee (PEDC) and the Planning Board with two changes. There was a minimum height of 4-in and they are proposing a maximum height of 8-in as well. They also propose a maximum area of 10-sqft. They are asking for a favorable recommendation on those minor changes.

Mr. Reppucci asked if the 4-in and 8-in sizes are for lettering.

Ms. McGhee said correct. This is just for the addressing.

Ald. Tencza said he has no doubt that in Ms. Marchant's previous introduction of the ordinance she said that people have been having trouble with the large signs, especially on Daniel Webster Highway and Amherst St. When people were erecting the signs they didn't necessarily have to put the numbers on them. This ordinance would require them to do that for any new signage. He said that some of the aldermen had concerns that only having a minimum height of 4-in would open it up to people creating even larger signs along the main corridors. So the discussion at the PEDC meeting was to limit the numbers and lettering to 10-sqft of the signage, which would not count towards the overall square footage limit of the sign.

Mr. Varley asked if the idea was to require the address, but not create an opportunity to significantly increase the size of the sign.

Ald. Tencza said correct. They could decide whether to have the whole address or just the numerical address.

Mr. Reppucci asked if anyone considered making a requirement that everyone had to add addresses to their sign, whether it is existing or not.

Ald. Tencza said that was not a discussion item at the PEDC meeting.

Mr. Reppucci said that some towns do.

Ald. Tencza said that if this passes it will have to be for any new signs put up.

Mr. Weber said that the problem with applying it to past signs is that it's undue burden on the business community. You don't want to be negative to your business community. But if businesses want people to come to their place, they would do it.

MOTION by Mr. Reppucci to make a favorable recommendation for Other Business - #2 to the Board of Aldermen.

SECONDED by Mr. Robbins

MOTION CARRIED 6-0

3. Referral from the Board of Aldermen on proposed Petition for Street Discontinuance - Portion of Lakeside Avenue.

MOTION by Mr. Robbins to table this item to the May 2, 2019 meeting.

SECONDED by Mr. Reppucci

4. Amendment to the FY 2020 Capital Improvement Program, amending 3 items.

Linda McGhee, Deputy Planning Manager

Ms. McGhee said that the Capital Improvements Committee held a special meeting on Monday, April 8th, in order to rank three items. The reason for the meeting was that while these three items were on the capital improvements, they were not ranked on the Fiscal Year 2020. She described the amended items. They are asking that the Planning Board give a favorable recommendation so that they send it forward.

Mr. Weber asked the condition of the hydroelectric dams described in the amendment. Is there a rating?

Ms. McGhee said she doesn't know. From the presentation that the city waterways manager gave, she knows that the Mine Falls turbine is not functioning at all.

Mr. Weber recommended asking about the conditions. He said that if the dams can't be maintained, the city could be liable for a great deal of money.

Ms. McGhee said she would pass it on to the waterways manager.

Mr. Varley said that from the description it sounds like just the turbines, not the whole dam.

Mr. Weber said it's always good to have a report of the condition of the dam. It's important to inspect it frequently to avoid problems later on or downstream.

Ald. Tencza said that the Mine Falls Hydro turbine generates revenue for the city, so it's important that it's running and working efficiently. He also hopes that the city invests in the HVAC system at the police department as well, and new windows are a huge part of saving money on heat and air conditioning.

Mr. Varley asked if the city sells the power from the dam.

Ald. Tencza said yes.

Mr. Weber said as part of the wastewater treatment plan two generators were purchased, which will use methane from wastewater treatment to power their system.

Mr. Varley said it certainly seems like these are important projects, and a reasonable request to move these up the list.

MOTION by Mr. Reppucci to make a favorable recommendation for Other Business - #4 to the Board of Aldermen.

SECONDED by Mr. Weber

MOTION CARRIED 6-0

DISCUSSION ITEMS

Mr. Weber said that Eversource will be adding a gas pipeline from Canada to increase the availability of gas to the state.

Ald. Tencza led a discussion on funding to make a new Master Plan. There is money in the Capital Improvements budget amounting to \$200,000 for this. If the funding passes in June, the Board can start next year.

Mr. Weber reminded the Board to sign up for the 25'th Annual Spring Planning and Zoning Conference.

MOTION to adjourn by Mr. Robbins at 8:06 PM.

MOTION CARRIED 6-0

APPROVED:

Mr. LeClair, Chair, Nashua Planning Board

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Prepared by: Kate Poirier

Taped Meeting