

**EAST LONGMEADOW PLANNING BOARD
MINUTES**

Date: February 4, 2020

Time: 6:00 PM

Place: School Committee Conference Room

East Longmeadow High School, 180 Maple St., East Longmeadow, MA

MINUTES

Chair Russell Denver opened the meeting at 6:00 pm and called the roll.

CALL THE ROLL

Present: Russell Denver, Chair
George Kingston, Vice Chair
Tyde Richards, Clerk
Jon Torcia
Pete Punderson

Staff Present: Constance Brawders, Planning & Community Development Director (arrived 6:07 PM); Bethany Yeo, Planning & Community Development Administrative Assistant

APPROVAL OF MINUTES:

January 21, 2020 

Planning Board member Pete Punderson amended the minutes to correct grammatical errors.

Motion to approve the minutes as amended made by Vice Chair George Kingston; second by Planning Board member Jon Torcia and approved as amended by a vote of five (5)-zero (0).

CONTINUED PUBLIC HEARINGS:

1. **Case SITE 2019-11: Ground Mounted Solar Facility** – Request by applicant for the installation of a 4 Megawatt ground mounted solar facility at Rear Pease Road (Assessor's Parcel ID 33-1-0) located on a 21.26 +/- acre site in the Residence AA zoning district. Applicant: Steve Broyer, PLH, LLC, 222 South 9th Street, Ste. 1600, Minneapolis, MN 55402. (Cont. November 19, 2019; December 3, 2019; December 17, 2019; January 21, 2020)

Clerk Tyde Richards read the legal notice into the record.

Applicant Steve Broyer [PLH, LLC 22 South 9th Street, Ste. 1600, Minneapolis, MN 55402] and applicant's attorney James Martin [Robinson Donovan, P.C., 1500 Main Street, Suite 1600, Springfield, MA 01115] were present for discussion. Also in attendance was attorney Michael Pill [Green Miles Lipton, LLP, 48 East Silver Street, Ste. 5, Westfield, MA 01085] representing the Town of East Longmeadow in place of the Town Attorney Kevin Maynard [Bulkeley, Richardson and Gelinas, LLP, 1500 Main Street, Ste. 2700, Springfield, MA 01115].

Chair Russell Denver explained attorney Michael Pill had been retained by the Town to provide legal opinion on the case. Chair Russell Denver also stated that the comment had been received

from the Department of Public Works regarding the revised plans submitted on Friday, January 17, 2020 and the comment contained nothing of substance.

Attorney James Martin informed the Board he had not been notified of Attorney Michael Pill's presence at the meeting in attorney Kevin Maynard's absence until 5:07 PM of that day 2/4/2020, nor had he received the memorandum containing Attorney Michael Pill's legal opinion on the issue of frontage in advance of the meeting. Attorney James Martin reminded the Planning Board the matter of frontage had received Attorney Kevin Maynard's opinion several months ago; the applicant had complied with the Town in their requests and the topic had not been re-addressed by the Town. Attorney James Martin expressed his opposition in the Town seeking a separate legal opinion, by way of attorney Michael Pill, claiming the Town had led him and the applicant to believe the matter had been resolved. Attorney James Martin also reminded the Planning Board that the matter is ultimately under the jurisdiction of the Land Court, which has been monitoring the case, including the frontage issue, based on report updates submitted by the litigants.

Chair Russell Denver apologized on behalf of the Town and explained he had received the news on Thursday 1/30/2020 after which he had asked that the change in legal representation and Attorney Michael Pill's memorandum be shared with Attorney James Martin.

Attorney James Martin opined he found it troubling that the Planning Board had not reached out to him or the applicant directly, as an independent board rather than communicating via the Town Manager. Chair Russell Denver stated, as the on-going Land Court litigation was between the applicant, PLH, LLC and the Town of East Longmeadow, not the Planning Board, it was appropriate for communication to originate from the Town Manager. Chair Russell Denver opined given the circumstances, it should not have been a complete surprise that the Town would seek a second legal opinion.

Chair Russell Denver asked Attorney Michael Pill to address findings as they relate to the Planning Board's ability to vote on a site plan given the factors that have been discussed and reviewed up until that point. Attorney Michael Pill apologized and took responsibility for the misunderstanding resulting in the applicant not receiving Attorney Michael Pill's opinion of the case prior to the meeting. In response to Chair Russell Denver's question, Attorney Pill explained according to Mass. General Laws, Chapter 231A. Declaratory Judgement Statute, for a court to rule all administrative remedies must be exhausted, therefore, Atty. Michael Pill opined that the Planning Board is an independent land use regulatory body and therefore has every right to make its own independent determination on whether the proposed use is allowed in a residential zone.

Chair Russell Denver asked Atty. Michael Pill to confirm and elaborate upon part of his written opinion which states:

- The Planning Board does not have the authority to waive the frontage requirement
- The petitioner, PLH, LLC's land does not have the frontage required in East Longmeadow
- If the Planning Board did grant Site Plan approval, it would not be valid without the frontage requirement

Atty. Michael Pill confirmed the above and stated that the Zoning Bylaw clearly states the frontage requirement is a subject for a Variance from the Zoning Board of Appeals. Atty. Michael Pill emphasized the lack of frontage brings up two more issues:

- 1) Access to the Site- currently proposed and available only via Somers, Connecticut
- 2) The split-lot issue- defined as when a piece of land is in two different zoning districts, two different municipalities, or/and, in this case, two different states

Atty. Michael Pill explained access to the Use is part of the Use, therefore, the applicant must demonstrate compliance with the zoning ordinance/bylaw of two municipalities (Somers and East Longmeadow). Atty. Michael Pill noted to his knowledge, there has never been a case where the two municipalities were in different states. Atty. Michael Pill suggested the applicant could demonstrate that access to the proposed project complies with Zoning in Somers, Connecticut.

Atty. Michael Pill raised the question: how can the Planning Board and the Town be absolutely sure that access to the site via Somers, Connecticut will be legally guaranteed throughout the project?

Atty. Michael Pill explained the easement as drafted is not valid as PLH, LLC holds ownership of both parcels in Connecticut and Massachusetts and easements cannot be granted over one's own land; easements must be granted over the land of someone else. Atty. Michael Pill further explained that for a land use restriction there has to be benefitted land and it must be clear who will enforce it and how (G.L. c. 184, §§ 23 & 26-30). In the case that one does not have benefitted land, there is a possibility it could be held by the Town. Atty. Michael Pill noted that the holder of the land use restriction would incur the obligation of enforcing restrictions.

Chair Russell Denver asked for confirmation that the Planning Board cannot approve the Site Plan without the applicant acquiring a Variance from the Zoning Board of Appeals. Atty. Michael Pill confirmed.

Chair Russell Denver asked Atty. Michael Pill to explain in layman's terms the following statement taken from his legal opinion: "Raising legal issues late in the site plan review process

does not give rise to any estoppel because that doctrine does not apply to municipal zoning enforcement.”

Atty. Michael Pill gave an example of an estoppel in a commercial transaction: if person A makes representations to person B and person B relies on that to their detriment, person A is bound by those representations. Atty. Michael Pill explained a good faith mistake made by the town is not a municipal estoppel as public officials have an obligation under the Zoning bylaw to do their due diligence.

Atty. James Martin reminded the Planning Board that the Town, through its council, had agreed with the applicant on a deed restriction which would be placed on both properties in Somers, CT and East Longmeadow, MA requiring the properties always be held in common ownership and be subject to Site Plan Review. Atty. James Martin noted Atty. Kevin Maynard had drafted deed restriction to be recorded once it was approved by both parties and argued this deed restriction would ensure that access to the site is available via Somers, CT.

Atty. James Martin opined the applicant has demonstrated that the project in Somers, CT is compliant with the Zoning bylaws of Somers, CT illustrated by the Somers, CT decision of approval, issuance of a Building Permit and active construction work for the project occurring on the Somers, CT property.

Atty. James Martin asked that the legal opinion of Atty. Kevin Maynard on the frontage issue be read into the record, if available.

Atty. Michael Pill contended the deed restriction is fatally flawed because it does not comply with any of the sections in G.L. c. 184 governing land-use restrictions and stated his willingness to litigate the issue if need be.

Comment taken back to the Board:

Vice Chair George Kingston expressed his concern with the frontage issue and inquired if the applicant is permitted to petition the Zoning Board of Appeals for a Variance while the case remains open before the Planning Board or, if the Planning Board would need to take a vote prior to the applicant petitioning the Zoning Board of Appeals.

Atty. Michael Pill stated he saw no reason the applicant could not go before the Zoning Board of Appeals prior to the Planning Board taking a vote on the Site Plan Review.

Atty. James Martin stated the applicant had not pursued a petition for Variance because the Town Council had informed the applicant the frontage issue had been satisfied.

Atty. Michael Pill pointed out the applicant, PLH, LLC has the Burden of Proof to identify all issues and demonstrate compliance.

Clerk Tyde Richards and Planning Board member Jon Torcia asked for clarification on the issue of the deed restriction and why it was not enforceable as drafted.

Atty. Michael Pill explained an easement is an affirmative right to use someone else's land while a restriction is a limitation on what one can do with one's own land. In a deed restriction, there must be benefited land and a holder of the land who has the right to enforce the restriction if necessary therefore, ownership of the restricted land and the benefitted land cannot be held by the same entity. Although conceptually the restriction is sound; Atty. Michael Pill argued the document as drafted is completely unenforceable as PLH, LLC owns both properties.

Atty. James Martin noted that the deed restriction reviewed by Atty. Michael Pill was only a first draft and opined Atty. Michael Pill's critique of the document was therefore not relevant.

Planning Board member Pete Punderson, inquired if the deed restriction complied with all statutory requirements, would it also resolve the frontage issue.

Atty. Michael Pill stated the deed restriction would not address the frontage problem, only the access issue.

Atty. James Martin reiterated for the record that Town Council had informed the applicant that the frontage issue had been resolved prior to Atty. Michael Pill's legal opinion. Atty. James Martin inquired if the Board found Atty. Michael Pill's legal opinion is more or less compelling than Atty. Kevin Maynard's. The Chair stated he found Atty. Michael Pill's memorandum to be very compelling. Vice Chair George Kingston spoke in support of the applicant petitioning for Variance from the Zoning Board of Appeals to resolve the frontage issue prior to the Planning Board voting on the Site Plan Review.

Atty. James Martin asked for a few minutes to speak with his client's representative. The Planning Board granted a five (5) minutes recess.

-----Five (5) minute recess-----

On reconvening, Atty. James Martin requested a continuance to the March 10, 2020 Planning Board meeting to give his client and client representative time to review Atty. Michael Pill's memorandum and petition the Zoning Board of Appeals for a Variance from the frontage requirement if deemed necessary.

Motion for continuance to March 10, 2020 made by Vice Chair George Kingston; second by Planning Board member Jon Torcia and approved by a vote of four (4)-zero (0). Planning Board member Pete Punderson abstained from the vote.

OTHER BUSINESS:

2. Update to Mixed Use Zoning:

- a. **Case: ZN 2019-01 - Mixed Use District:** Petition by Applicant, M & A Longmeadow, LLC, to amend the Zoning By-law by adding a new zoning district for Mixed Use and to change the Zoning District Map for the Town of East Longmeadow. Applicant's agent: Atty. Jane L. Mantolesky, Fitzgerald Attorneys at Law, PC, 46 Center Square, East Longmeadow, MA 01028.
- b. **Case: ZN 2019-02 - 330 Chestnut Street:** Petition by Applicant, M & A Longmeadow, LLC, consider a zoning change at 330 Chestnut Street (Assessor's Parcel 18-38-0), a 40.35+/- acre site, from the Industrial Garden Park zoning district to a Mixed Use zoning district. Applicant's agent: Atty. Jane L. Mantolesky, Fitzgerald Attorneys at Law, PC, 46 Center Square, East Longmeadow, MA 01028.

Ralph Page, member of the Town Council, (306 Prospect Street) informed the Planning Board of Hampden, Massachusetts' new Solar Bylaw which was passed and approved by the Attorney General and submitted a copy to the Planning & Community Development Director, Constance Brawders. Ralph Page also provided an update of the Mixed Use Village Zoning bylaw as a member of the Planning Matters Sub-committee. The sub-committee most recently discussed affordable housing, language, and how to compile the information to conduct a final review prior to the matter going before Town Council.

3. Planning and Community Development Director's Report

Chair Russell Denver stated the Director's report would not be heard that meeting but thanked her for the written report she had submitted to the Board.

Planning Board member Pete Punderson notified the Board he would be absent from the Planning Board meetings from February 18, 2020 to April 4, 2020 due to a prior commitment but would like to communicate remotely if possible. Planning & Community Development Director, Constance Brawders explained comments and questions could be facilitated via the Planning & Community Development department staff however; remote participation during public hearings had not been adopted at this time.

ADJOURN: Motion to adjourn made by Vice Chair George Kingston; second by a Planning Board member Pete Punderson and approved by a vote of five (5)-zero (0) at 6:59 PM.

DATE OF NEXT MEETING

The next scheduled meeting of the Planning Board is February 18, 2020.

Tyde Richards

Tyde Richards, Clerk

3-10-2020

Date