



June 16, 2022

Via Zoom

Agenda

1. Open meeting
2. Appointment with Peggy Sloan, FRCOG
 - o Zoning bylaw changes to address short term rentals
 - o Required updates to floodplain bylaw
3. Preparation for upcoming cell tower public hearing
4. Summary of 5/25 meeting on Future Vision for 50 Conway Street (former town highway garage)
5. Review of previous meeting minutes
6. Other items unanticipated by chair 48 hours in advance
7. Adjourn meeting

Attendees

John Gould, co-chair
Michael Hoberman, co-chair
Andrea Donlon, member
Jon Wyman, member
Francis Parisi, Esq, applicant representative, Vertex Towers LLC (online)
Peggy Sloan, FRCOG
S. Doherty, public

1. Co-chair Hoberman opened the meeting at 6:32 pm
2. Appointment with Peggy Sloan, FRCOG
 - A. Zoning bylaw changes to address short term rentals
 1. Ms. Sloan reviewed options presented at the April 14th, 2022 Planning Board meeting, including the bylaw approved by the Whately Town Meeting
 2. Co-chair Gould proposed, as a starting point, to allow "one room by right, and additional rooms by permit," with additional stipulations related to owner-occupied properties and large venues, which, were noted, may need additional scrutiny. This would not be a significant departure from the traditional dynamic and the recent expansion of accessory units.
 3. Other members of the PB felt that one room, meaning one room in a house or studio, sounds stringent, especially for a stay of 1 - 2 nights.

4. Ms. Sloan pointed out that in the example from Whately, there is an allowance of 120 days for non-owner occupied properties, and no limit for owner-occupied properties.
5. Co-chair Hoberman asked if these are all "by right" conditions?
6. Ms. Sloan indicated that the special permit didn't distinguish by scale, and said the questions driving the discussion in Whately were around generating more cars/traffic.
7. PB members asked
 - a. Is it possible to differentiate by zone, or scale by zone, or limit by parking as, for example, a bed and breakfast?
 - b. Is there a survey of what short-term rentals currently exist, or what are likely to exist in the future. Ms. Sloan replied that there is a public registry, but it changes rapidly. Member Donlon noted in her work for FRCOG, she created a graph of short-term rentals as connected to income for towns. At the time she did the work, there were approximately 12 AirBnB and VRBO properties in Buckland, as well as "lodging residences" and B&Bs. Approximately 40% of such properties in Franklin County are in the west county area. Ms. Sloan said this wasn't surprising, given the amount of recreational opportunities and lack of lodging facilities.
 - c. Did Whately address the presence or use of a kitchen as a way of addressing short- and long-term rentals? Also, what constitutes a kitchen? Is this an effective way to address the issues which allow short-term rentals but don't impact long-term rentals? Ms. Sloan responded that the availability of long-term rentals is diminishing across the county. It was noted that "owner-occupied" seems a key provision in addressing this.
8. Member Donlon noted an inquiry regarding building a house exclusively for short-term rentals, and another house being renovated seemingly for VRBO rentals. In Great Barrington, Town Meeting acted on a bylaw to restrict LLCs, corporations taking over buildings and running them as short-term rentals. Co-chair Gould noted that Burlington, VT has also been in the news for these issues. Ms. Sloan wondered if having an owner-occupied requirement would help the LLC issue.
9. Next steps: determine the scope of the regulation - possibly utilize a table (for definitions) and/or a separate section (for issues to be explained) Issues to be addressed in a draft for the PB's review prior to the public hearing process:
 - a. Owner occupied
 - b. 1-2 rooms by right
 - c. Kitchens
 - d. Parking
 - e. Zones/District

- f. Events (limit by number of times/year)
 - g. Special Permit conditions
 - 10. Co-chair Hoberman noted that he may need to recuse himself from the discussion at some point given his personal involvement in short-term rentals.
 - B. Required updates to floodplain bylaw
 - 1. Ms. Sloan reviewed the regulations which apply to proposed development within a designated floodplain, noted the new requirement for towns to appoint a Flood Plains Administrator (FPA), and reviewed the FPA responsibilities. In other towns, someone in the role of a paid Planner has been the primary FPA, with the Town Administrator as backup. Ms. Sloan suggested the Buckland Town Emergency Management Director serve as the primary FPA, and the Conservation Commission as backup. The PB asked if the Town Assessor could serve in this role? Ms. Sloan replied that there is a requirement that the primary FPA be an employee of the Town.
 - 2. FEMA maps must be on file with the Town Administrator and Building Inspector. FIRM maps are being updated; until they are available, some towns are using overlays. Updates are required in order for homeowners to obtain flood insurance from the Federal Flood Insurance Program. PB asked why this didn't happen directly after Hurricane Irene? Ms. Sloan replied that both MEMA and FEMA have been engaged in updating the processes and regulations due to increased flood events.
 - 3. PB asked if the regulations would address hazardous materials on sites within floodplains, such as propane tanks stored on site? Ms. Sloan indicated the model bylaw comes from the state, and if additional restrictions were wanted, she can check to see if that is possible.
 - 4. PB asked if this is meant to restrict all development in a floodplain? Ms. Sloan replied that the regulation is designed to elevate the understanding of the impacts and risks of development in a floodplain, which may require a higher and/or different standard, and also result in higher insurance costs
 - 5. Next steps:
 - a. PB to review bylaw
 - b. Town to identify FPA to be appointed by Selectboard
 - c. Suggest to Conservation Commission they serve as the alternate FPA
 - d. Loop ZBA into the conversation
 - 3. Preparation for upcoming cell tower public hearing

In preparation for the planning, member Wyman asked when it is appropriate to share thoughts about the PB's site visit and the balloon test. Co-chair Gould

responded that material facts (not opinions) can be shared at this meeting; however, no opinions can be shared prior to the Public Hearing. Member Donlon asked about the role of the Town's consultant, Mr. Goldstein, in the Public Hearing process. Co-chair Gould responded that, following the presentation by the applicant, certain assertions may be corroborated by the consultant.

A. Town Counsel guidance

1. Question for counsel: who acts at what point?
2. Co-chair Gould read from information provided by Town Counsel Jonathan Eichman via email:

A. Regarding the joint public hearing:

A "joint hearing" is actually two individual hearings before two boards held simultaneously at the same time and location. The purpose of a joint hearing is to allow the applicant and the public to submit and hear the evidence once that may apply to both hearings, as opposed to splitting it between the two required hearings. It is assumed that some of the evidence, in particular the evidence regarding compliance with Federal Law, will be the same. However, although they are sitting together in the same room, each board must notice and conduct its own public hearing, apply the relevant legal standards and decide the application before it, and issue a decision on that application within the time required by both State and Federal Law. That means that each board must ask questions and allow for presentation and public comment as it sees fit on the application before it. In their consideration of the application, each board should only apply the legal standard that applies to that application, and should not consider or apply the legal standard applicable to the other board's application. Each board should treat its public hearing as a separate hearing, and while it may coordinate with the other board when continued sessions of that public hearing take place, it may continue or conclude its public hearing as it sees fit. The boards do not, however, have to be rigid within the hearing about taking evidence and comment only on one application at a time. It may make sense to do that to avoid confusion, but it is up to the individual boards as to how they want to conduct their business. When meeting together, the boards should open their respective hearings at the same time so that each board can consider any evidence offered during that meeting. A board would close its public hearing once it is satisfied it has heard all the evidence it needs to decide the application before it.

B. Regarding the time frame for the variance:

State law (G..L. c.40A, s.15) requires that the ZBA decide the variance application within 100 days of the date the application was filed, and must file its written decision with the Town Clerk within 14 days of the conclusion of the 100-day period. Those times may be extended only by written agreement between the applicant and the ZBA and filed with the Town Clerk. I understand that the variance application was filed on March 24, 2022, meaning that it must be decided by July 5, 2022 (100th day falls on Saturday, July 2, and is thus extended to the next business day), and the written decision must be filed by July 19, 2020 (sic).

Federal law: Wireless facility applications to construct towers must be decided and decisions filed no later than 150 days from the date the decision was filed, in this case by August 22, 2022. This may also be extended by written agreement between the parties.

C. Regarding the time frame for the special permit:

State law (G..L. c.40A, s.9) requires that the ZBA decide the special permit application and file its decision with the Town Clerk within 90 days of the date the Planning Board closes the public hearing on the application. The Planning Board may continue the public hearing as many times as is necessary, solely at its discretion, to allow submission of all relevant evidence. This deadline may be extended only by written agreement between the applicant and the Planning Board and filed with the Town Clerk. I understand that the special application was filed on March 24, 2022.

Federal law: Wireless facility applications to construct towers must be decided and decisions filed no later than 150 days from the date the decision was filed, in this case by August 22, 2022. This deadline may be extended by written agreement between the parties.

Neither time standard supersedes the other. Both must be complied with.

Co-chair Gould noted that additional clarity is still needed about continuing the public hearing beyond July 7th.

Mr. Parisi, representing the applicant, agreed to the time frame which opens the joint Public Hearing on July 7, 2022,

and if the Board are acting in good faith, will "extend the clock" if needed.

D. Legal standards:

Regarding the variance, the ZBA must apply two standards.

1. State Standard:

First, the ZBA must apply the State standard for a variance (below) and decide the application solely under that standard. That standard is replicated in Section 11-2 of the Zoning Bylaws, as follows:

1. a literal enforcement of the provisions of this Bylaw would involve a substantial hardship, financial or otherwise, to the petitioner or applicant;
2. the hardship is owing to circumstances relating to the soil conditions, shape, or topography of such land or structures, and especially affecting such land or structures but not affecting generally the zoning district in which it is located;
3. desirable relief may be granted without either:
4. substantial detriment to the public good; or
5. nullifying or substantially derogating from the intent or purpose of this Bylaw.
6. the Zoning Board of Appeals does not have the authority to grant use variances in any district in Town.

2. Federal Standard

If the ZBA determines that the applicant does not meet the State standard for any of the variances requested, it should then, in my opinion, determine if the application must nonetheless be granted under the Federal Law standard, specifically set forth in the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)(i),(iii)). That standard provides as follows:

- (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
 - (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
 - (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Under this standard, an applicant may prove an “effective prohibition” claim by demonstrating that:

- (1) “a ‘significant gap’ in coverage exists;” and
- (2) the proposed plan (including the chosen location) is the only feasible plan [to address the coverage gap].

These determinations are based on facts found by the Board based on evidence presented by the applicant. The burden is on the applicant to present this evidence. The Board should rely on its expert consultant for assistance in evaluating whether a significant gap in coverage exists, and what locations and other features of construction (such as height) would be sufficient to address the coverage gap.

As to the “only feasible location”, the test is whether the applicant can show that further reasonable efforts [to locate the facility elsewhere or alter the specifics of the proposed construction in some manner] “are so likely to be fruitless that it is a waste of time even to try.” The applicant has the burden to prove that it investigated thoroughly the possibility of other viable alternatives before concluding no other feasible plan was available. Relevant facts include: a) the technical feasibility of the proposed site and any alternative plans; b) the overall cost of alternatives to the provider; c) the technological efficiency of alternatives; d) whether local authorities are willing to cooperate with carriers; and e) whether a “town could prefer other solutions on aesthetic grounds.” Also relevant is the availability of alternative sites, i.e. whether owners are willing to sell or lease the land. In order for a site to be an alternative sufficient to forestall a claim of effective prohibition, it needs to be both available and technically feasible. *Eco-Site, Inc. v. Town of Wilmington*, No. CV 17-10304-MBB, 2019 WL 1332621, at *16 (D. Mass. Mar. 25, 2019)

Please note that the ZBA need only consider the Federal standard if it votes to deny the variance application under the State standard. The Board’s decision should list the reasons for its decision. Those reasons must point to substantial

evidence in the record before the board as to why the application did or did not meet the required criteria. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account contradictory evidence in the record. It is not sufficient to simply state in the decision that the applicant failed to meet certain criteria.

Regarding the Special Permit:

Like the ZBA, the Planning Board must apply two standards. First, the Planning Board must apply the standards in the Zoning Bylaws for a issuance of a telecommunications special permit and decide the application solely under those standards. Those standards are set forth in various sections of Section X of the Zoning Bylaw, and generally referenced in Section 10-21.

If the Planning Board determines that the applicant does not meet the special permit criteria set forth in the Zoning Bylaws, it should then, in my opinion, determine if the application must nonetheless be granted under the Federal Law standard, specifically set forth in the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)(i),(iii)). That standard and relevant criteria are set forth above.

B. Technology for hybrid meeting

1. Discussion of technological support (Meeting Owl and PA) to provide access for Zoom participants.
2. Possible for Falls Cable to provide support?

C. Public Notice

1. Public notice to indicate this will be a joint Public Hearing involving both the Planning Board and Zoning Board of Appeals (model of joint PB/ZBA hearing of December 1, 2021)
2. Due at the Recorder June 24th
3. Suggestion of email blast sent to all Buckland residents in addition to required abutters' notice which will be done by the applicant using the list provided by the Town Assessor

D. Parallel Public Hearings

1. With two boards and one Public Hearing, each step will need to be made clear, and the process as transparent as possible.
2. The Board Chairs should "set the stage," acknowledging the challenging situation, assuring that everyone will be heard.

3. Is there a distinction between technical questions and opinions?
4. Should there be separate comment periods for each bylaw?
5. Should questions be submitted in writing?
6. Should there be time limits? The ability to speak more than once?
7. The Buckland Code of Conduct should be shared.
8. Town Counsel's guidance provided by email provides a checklist for the Public Hearing agenda.
9. The ZBA and PB will meet jointly to plan the Public Hearing (date subsequently set for June 28, 2022 at 6:30 pm.)

E. Chairing the Public Hearing

1. Who will chair the meeting, and will there be separate chairs for the separate sections?
2. PB Co-chair Hoberman will be joining remotely, and not serving as chair or co-chair
3. Member Donlon asked that Town Counsel be invited to attend the Public Hearing

4. Summary of 5/25 meeting on Future Vision for 50 Conway Street (former town highway garage)

Member Donlon reviewed the recent presentation of possible uses for the property at 50 Conway St., a town-owned property formerly used by the highway department. A community meeting and survey have been conducted, and schematics developed. Though a small lot, changes in zoning make development more feasible. The proposed schemes showed two new buildings on one lot - possibly with different uses (such as commercial and residential) - with open space between them. Question: zoning doesn't allow for two separate buildings - they would need to be connected, as for example a covered walkway. Member Wyman noted that he was involved in a study of the building 10 or 12 years ago, and the building was not structurally sound at that time. The site would lend itself to buildings on different levels. PB members to review presentation (available on the Town website) as there may be implications for the PB in the future.

5. Minutes of the previous meeting:

Minutes of the May 19th meeting were reviewed. A correction was noted on page 2: "wireless transmission facility" instead of "coverage." Co-chair moved the minutes be approved with edit; Member Wyman seconded; all members voted in favor of the motion.

Members noted, from minutes, some follow-ups to pursue: When will pictures be available? When will larger maps be available? Was the balloon test available long enough each day for people to see it?

6. Other items:

Member Wyman extended gratitude to Co-chair Gould for the extensive work done on behalf of the PB and ZBA on the cell tower application.

Co-chair Gould noted that Member Biran Rose submitted his letter of resignation, and that the PB opening has been listed on the Town website.

7. Co-chair moved to adjourn the meeting; Member Wyman seconded the motion; all voted in favor of the motion. Meeting adjourned at 9:22 pm.

Respectfully submitted,

Alison Cornish, Board Clerk