

## NEEDHAM PLANNING BOARD MINUTES

December 21, 2021

The Needham Planning Board Virtual Meeting using Zoom was remotely called to order by Paul Alpert, Chairman, on Tuesday, December 21, 2021, at 7:15 p.m. with Messrs. Jacobs and Block and Mmes. McKnight and Espada, as well as Planning Director, Ms. Newman and Assistant Planner, Ms. Clee.

Mr. Alpert took a roll call attendance of the Board members and staff. He noted this is an open meeting that is being held remotely because of Governor Baker's executive order on March 12, 2020 due to the COVID Virus. All attendees are present by video conference. He reviewed the rules of conduct for zoom meetings. He noted this meeting does not include any public hearings and there will be no public comment allowed. If any votes are taken at the meeting the vote will be conducted by roll call. All supporting materials, including the agenda, are posted on the town's website.

### **Board Deliberation and Decision: Amendment to Major Project Site Plan Special Permit No. 2009-06: Town of Needham, 1471 Highland Avenue, Needham, MA, Petitioner (Property located at 1471 Highland Avenue, Needham, MA).**

Mr. Alpert noted Ms. Newman has circulated a draft decision with red line changes. There are 2 changes. One change is in style, changing paragraphs recommended by Town Counsel and some grammatical and stylistic changes suggested by Mr. Alpert. There is one substantive issue in the decision. Ms. Espada was not at the last meeting. She has viewed the video and submitted the Mullin Certificate. He noted the issue is with the decorative catenary lights suspended on cables between the 2 shade structures. Mr. Jacobs was not pleased with the lights and suggested not allowing them or making changes. Ms. Espada is an architect. He would like to hear her opinion on this.

Ms. Espada stated she appreciated Mr. Jacobs' comments. She has no problem with the lights. She assumes if the Board does not feel they are effective the lights could be removed. She stated she likes them and likes the feeling that they create a space underneath them. She understands Mr. Jacobs concerns, but noted that the town center is being used in the evening for the last couple of years. This will bring life to it and gives flexibility such that there are no poles, and the lights could be removed. She wants to make sure the project is as sustainable as possible. With porous pavement and storm water management she wants to confirm these pieces are included. She wants to make sure the metal is not hitting the ground so the salt hitting it will not rust it and the metal should be galvanized or color galvanized so it does not rust.

Ms. McKnight noted she has a minor change in the Findings and Conclusions on page 4, Subsection 1.5(g). Oscar Mertz said the lights may droop down. She suggests adding "and additional poles may be installed to support the cables if the petitioner determines such support is needed" and "or the lights may be removed." This may be added in Section 3.2 on page 7. She just wants to make sure the applicant does not have to come back to us. Ms. Espada asked if the lights are on a timer. She does not want them on all night. Ms. McKnight thought that was asked and the response was the lights would be on a timer. Mr. Jacobs does not remember that but noted there would be an on/off switch. He has no problem adding language the catenary lights can be removed. He does not like adding poles and does not think catenary lights will add anything and may actually detract.

Ms. Espada noted wording should be added about the need for the lights to be on a timer and make sure the lights are LED and as sustainable as can be. Ms. Newman noted a condition would need to be added. Mr. Alpert stated he agrees with Ms. Espada. A condition should be added that catenary lights should be on a timer and may be removed by the Petitioner if the DPW decided to, without Planning Board approval. There is no provision about poles. The Board discussed a time the lights should go off. Town Counsel Christopher Heep noted the lights should be turned off no earlier than 11:00 p.m. as a baseline and let the DPW decide. The Town wants them on as long as there are people there. If the Board is willing to let the lights stay on later with DPW discretion he would prefer that.

Mr. Jacobs stated he is not comfortable leaving it at the DPW discretion. He wants the time defined. It was noted restaurants are open until midnight. Mr. Heep stated he wants to keep the common alive at night. Ms. Espada suggested 11:00 p.m. weekdays and 12 midnight on Friday and Saturday nights. Mr. Block agreed. Ms. McKnight noted the second paragraph on the first page says "1)" but there is no "2)." On page 6, it is the same thing. It does not need the 1).

Upon a motion made by Ms. McKnight, and seconded by Mr. Block, it was by a roll call vote of the five members present unanimously:

VOTED: to grant (1) the requested Major Project Site Plan Special Permit amendment under Section 7.4 of the By-Law and Section 4.2 of Major Project Site Plan Special Permit No. 2009-06, dated November 17, 2009, subject to and with the benefit of the following Plan modifications, conditions and limitations.

Upon a motion made by Mr. Block, and seconded by Mr. Jacobs, it was by a roll call vote of the five members present unanimously:

VOTED: to approve the decision as drafted with the changes previously submitted and conditions discussed tonight.

Ms. Espada recused herself from the next hearing. Mr. Block became Acting Chair of the next hearing.

**Board Deliberation: Major Project Site Plan: Needham Enterprises, LLC, 105 Chestnut Street, Suite 28 Needham, MA, Petitioner (Property located at 1688 Central Avenue, Needham, MA). Regarding proposal to construct a new child-care facility of 9,966 square feet and 30 parking spaces, that would house an existing Needham child-care business, Needham Children's Center (NCC).**

Mr. Block noted the hearing was held open to receive a number of items including: a letter from Attorney Patrick Moore, dated 12/20/21; a letter from Evans Huber, dated 12/16/21; a letter from Attorney Holly Clarke, dated 12/18/21; materials from Joe Abruzese and Maggie Abruzese; a letter to the Planning Board from John Diaz, dated 12/17/21; a memo from the Needham Board of Health with recommendations; a plan for snow storage and conditions for the road or sidewalk return condition. Mr. Alpert asked if the Board received the last 2 communication items. Ms. Newman spoke with the DPW regarding restoration of the street and whether it should be paved or trenched. There is no response yet. She will have it at the next meeting and also the communication regarding snow removal.

Mr. Block noted there are 14 issues to decide on for the application. The Board needs to determine what is the number one issue they need to decide to make the rest possible. He reviewed the list. He noted the light mitigation includes headlights that would go right into the houses across the street. Ms. McKnight noted the added plan still shows a white vinyl fence. The applicant stated they would put in any kind of fencing the Planning Board wants. Mr. Block stated that is part of the screening. Mr. Alpert stated his opinion of the biggest issue is the scope of authority. Mr. Jacobs feels the biggest issue is if there can be 2 non-residential buildings or uses on one single family residential lot.

Mr. Alpert explained how he reads the cases and statutes and reasonable regulations. He reviewed the cases again. The Board can condition the project to enforce any provision of the By-Law they feel are appropriate. They are limited to what the By-Laws provide. He stated it cannot be done if the By-Laws do not provide for it. The Dover Amendment limits that. Regulations cannot be unreasonable, but the burden of proof is on the Petitioner if it goes to court. There are gray areas as relates to setback and the barn. Mr. Block stated, for points of clarity, he asked Town Counsel to complete a spreadsheet with information on the decision to help give the Board guideposts on unreasonable or reasonable regulations. Most answers are functions of dimensional requirements.

Ms. McKnight stated parking requirements may be applied under the Dover Amendment. Mr. Alpert stated the Supreme Judicial Court's 1993 Tufts vs. Medford case says local zoning requirements adopted under the provisions of the Dover Amendment which serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting public health and safety or preserving the character of the adjacent neighborhood or one of the other purposes sought to be achieved by local zoning, may be permissibly enforced consistent with the Dover Amendment against an educational use, not just bulk and setback. He noted the letter from the Building Inspector who feels the second structure is a permissible structure. He agrees the barn is a permissible use and disagrees with Ms. Clarke that it is a second structure that needs to be removed.

Mr. Jacobs stated it may not be in M.G.L. Chapter 40A, Section 3, but is in the courts reading of it. Mr. Block stated a second structure is allowed under the Dover Amendment as an accessory use. Mr. Jacobs noted the Building Inspector did not say accessory building. He said accessory use. Ms. McKnight feels accessory building is implied. Mr. Alpert feels an accessory use in the Dover Amendment is an accessory purpose to the child-care, not an accessory use. Mr. Block stated the history of the use of the barn has changed and evolved through this process. Mr. Alpert stated it has been acknowledged

the barn will be used exclusively for the daycare use and not necessarily for storage only. He has no problem with that if the Board determines the barn is an accessory use.

Mr. Alpert noted on the bottom of page 33, Section 3.2.1 of the Zoning By-law, he has a problem with the wording in the By-Law's definition of uses. There is a question whether the barn fits that. Uses as of right says "other customary and proper accessory uses, such as, but not limited to, garages, tool sheds, greenhouses and cabanas." Then go to Section 3.2.2 on page 44, and it has exactly the same language but farther down the same page there is another use for other accessory uses incidental to the lawful principal use. A distinction is being made between cabanas, garages, and such. He asked if a 2,500 square foot barn is equivalent to a garage, tool shed, cabana or greenhouse or is it an incidental use to the primary lawful use? Ms. McKnight noted the definition in the By-Law of accessory use is "a use subordinate to, and customarily incidental to, the principal use." Mr. Block asked when the use table was modified in the Business District was it an oversight? Ms. Newman believes it was added at the time the Center Business District was created in 1989. She will go back and look. Mr. Block stated they need to go with what they have. It is clear the intent of the barn is for storage. His question was how can you design a 10,000 square foot building and not factor in up to 20% of the whole of the building for storage. Mr. Alpert stated he is not advocating the barn is not a permissible use. If the other 3 agree with the Building Inspector, he will go along with it. He noted the Board has the ability to enforce their By-Laws. To him a garage is maybe 600 square feet. Permissible accessory buildings would be garages and sheds.

Ms. McKnight stated her view is if the barn is used by the daycare center for storage, it is an accessory use and an accessory building. The size of the barn is not the biggest factor here. Mr. Jacobs noted the size of the barn factors in if it is a customary use. This is a big barn. He asked if this is what daycares customarily use. Ms. McKnight stated it was originally built as a barn and was an accessory building to the original house. Mr. Alpert stated they are talking about all structures for which building permits were issued by the Building Inspector and were not appealed. Mr. Jacobs noted the "customary and proper" phrase and asked what members thought customary and proper is. The 10/16/21 memo from Holly Clarke, Section 3, discusses customary and cites case law. This barn fails the accessory use test. The barn alone is larger than a 2,500 square foot daycare use. The proposal for the barn does not meet the accessory use.

Mr. Block stated the size is not customary for a daycare. There was no discussion on the original application regarding the use of the barn. Mr. Jacobs stated the whole application is backwards here. It is all built around keeping the barn. It should be about the daycare center. It is not permissible under 3.2.1. Mr. Alpert commented, if the Board finds the barn is a permissible accessory use and they want to move the building back, does the Board have the authority to make them take the barn down. Ms. McKnight stated she thinks the setback is fine. The landscaping is fine, the driveway loading is fine, and the traffic would work. However, the neighbors feel strongly that Mr. Diaz is wrong with regards to traffic. She would impose a condition for a police detail to make sure traffic is moving adequately for however many months is necessary. She wants to have the applicant meet and address any traffic problems. If there's a problem, additional parking could be included, rearrangement of the driveway may be needed, and it may include removal of the barn. She is prepared to approve it as proposed, but it would need post occupancy studies on a regular basis.

Mr. Block agrees with post occupancy studies. This is a ripple effect. Mr. Alpert stated traffic issues could force remediation of the barn issue. He does not agree with Ms. McKnight. Once the Board approves this with a setback at 64 feet and allows the barn to stay it cannot be changed. There is plenty of land if more parking is needed. It is a much more costly project to have the applicant get rid of the barn after the 10,000 square foot building is built. He feels there may need to be police detail(s) not only at the drive but farther down the road. The mitigation may be permanent police details. The decision for the barn is a permanent one. He does not see that the Board can force the removal of the barn later, if they decide now that it can stay. Mr. Block noted the barn can be incorporated into the structure. Mr. Jacobs stated, if the barn issue of 2 buildings on a lot is resolved, do they try to write a decision with a list of conditions included? Do we want to move it back X feet, which may require the barn to be removed, or do we say if the applicant cannot meet the conditions that are imposed the Board denies the special permit?

Mr. Alpert stated that his reading of the Canton case is, unless we have a project sitting in a one-acre lot that is totally wetlands the Board cannot deny the project. He believes that, if they deny it, the Land Court would be on them. Mr. Block added unless they have not met the burdens to demonstrate our regulations are unreasonable. Mr. Alpert stated the Board needs to come up with regulations to allow the project. Mr. Jacobs stated the decision they write should be the Board cannot agree the plan as presented satisfies us but with the following changes and conditions we can approve this even if those

changes and conditions would require the applicant to take down the barn. Ms. McKnight stated she agrees with Mr. Alpert. They could grant the Major Project Special Permit with the following conditions. If the applicant feels it is unreasonable, the applicant can appeal. Mr. Jacobs stated it is a de novo appeal. He suggests the decision the Board writes does not say anything about the barn. It could be approved with a long list of changes to landscaping, lighting, recommendations of the Board of Health regarding testing and such. The decision could be issued based on conditions. Then what does the Board say? To come back when the conditions are satisfied or what?

Mr. Alpert stated some conditions to be satisfied are to get a Building Permit and other permits before the Occupancy Permit. Mr. Block stated, per Town Counsel, the Board cannot put any condition that leads to subsequent unspecified conditions. Ms. Newman stated the Board often requires plan modifications subject to Planning Board approval. There will be a condition that the applicant must comply with the Board of Health recommendations for testing of the site, for example. That is the Board of Health's jurisdiction, and they will need to make sure it is implemented. There will be a condition the Town shall hire an Environmental Engineer to conduct an environmental assessment. Ms. McKnight stated the conditions need to be clear.

Mr. Alpert asked if it is the setback provided through the Dover Amendment or through the uniformity of our own By-Laws that is lawful? He would advocate the Temple is the most analogous use in the neighborhood. As part of the Temple decision the attorney for the Temple chose to set the building back as far as possible in keeping with the character of the neighborhood. This Board should match the setback of the neighborhood. He is not moved by the cost of demolition and reconstruction, noting that the applicant has not given supporting evidence of the \$50,000 cost to demolish the barn. The applicant is already demolishing the garage, so a crew and all equipment is already on site. It would be an incremental increase to demolish the barn. He would advocate this building be set back in keeping with the Temple. It is the applicant's choice to demolish the barn. It would enable greater parking and more efficiency and would get more cars off Central Avenue. It would be a benefit in easing the traffic burden and create more safety.

Mr. Jacobs stated the initial question is do all members agree with the Board's authority to change the setback to more than it is now. This exceeds the existing minimum setback now. Ms. McKnight stated the authority would be determined by the court if it is appealed. The question would be whether the setback the Board sets is reasonable. The Board has the burden of proof that the setback that is set is reasonable. She is satisfied with the setback as proposed by the applicant. Mr. Alpert disagrees with Ms. McKnight on who has the burden of proof. The Board would have authority to enforce the Zoning By-Laws under Major Project Site Plan Review and imposing of conditions to preserve the integrity of the neighborhood. The Board's enforcing of legitimate By-Laws puts the burden on the applicant to say the conditions are unreasonable. Mr. Jacobs agrees.

Mr. Block asked what is regarded as reasonable regulations – solely dimensional guidelines or other aspects of the By-Law. He feels the Board should wait until there is clarity from Town Counsel. Ms. Newman stated the Temple is set back 276 feet. Mr. Alpert feels the barn could be incorporated. It could be designed in a way that preserves the barn and he is fine with that. His objective is to move the building back. If they can do it without removing the barn that is great. If not, does the Board have the authority to have them remove the barn. Mr. Jacobs believes the Board does have the authority. He agrees the new building should be set back but is the Board in a position to satisfy their desire and what Ms. McKnight wants. Is the Board equipped to write such a condition? He agrees it should be as clear as possible.

Ms. McKnight stated she is trying to avoid the need for a whole new site plan that may have all new conditions. If the applicant takes the building and moves it back, they would need to redesign the drop off and parking. The Board would be reviewing a whole new site plan. She noted the Board would need to make their conditions clear. The building was redesigned to make it look more residential with cornices, fancier windows and nice landscaping. She feels a 64-foot setback for a building like this on this site is reasonable. Mr. Alpert noted all other houses are setback 100-150 feet except for the house next door. The Temple is setback over 200 feet. He thinks this building will stick out like a sore thumb and be ugly. If it was a different neighborhood and all the houses were setback 30 feet that would fit into the neighborhood.

Mr. Block stated, on sheet 3 of the site plan from 11/22/21, when you compare the mass, it is substantially out of character. The sheer mass of the building would be more in keeping with the Temple setback. It will be dwarfing Mr. Heideman's house. He referenced Section 4 noting the municipal interest in uniformity of districts compels the Board to maintain the character of the neighborhood. Mr. Alpert commented the setbacks in Section 4 are there because that is where the builders

decided years ago to build the houses. Mr. Jacobs stated the Board could find the setback needs to be more than 64 feet, but he does not know how to make that clear. He noted John Glossa added \$50,000 for removal of ledge. He has not seen where the ledge is or how much there is. Mr. Jacobs noted Mr. Block asked Town Counsel for some information. He feels they should hold the record open for further information they do not have. He suggests continuing the hearing to the next meeting.

Upon a motion made by Mr. Jacobs, and seconded by Mr. Alpert, it was by a roll call vote of the four members present unanimously:

VOTED: to continue the hearing to 1/4/21.

Ms. Espada rejoined the meeting. Mr. Alpert resumed as Chair of the meeting.

### **Consideration of zoning to allow brewery uses in Needham.**

Ms. Newman noted she was not at the Select Board meeting but there is interest in moving forward so that brewery uses would be allowed. The Select Board is interested in the Planning Board perspective to move forward and, if so, which districts. Cambridge and Natick have Craft Manufacturing Districts. Is there interest in proceeding? Are there specific areas of town where breweries might be allowed, as of right or special permit? Mr. Alpert stated that Mr. Jacobs said at the Select Board meeting he was not sure we need to have a zoning amendment, stating his opinion that under the current By-Laws there can be breweries if deemed similar to already allowed uses. Medfield approved 2 breweries in the Industrial Executive District under special permits and Norwood approved 2 under special permits.

Mr. Jacobs commented on Section 3.1 of our Zoning By-law – Basic Requirements, last paragraph, Industrial, Business and Mixed-Use Districts as of right or special permit can be allowed as similar in kind and impact. Industrial 1 already allows restaurants by special permit, food processing for wholesale by special permit and (all inclusive) any lawful purpose not enumerated elsewhere. Ms. Newman agrees with that. She feels it was drafted broadly to cover uses like this. Mr. Alpert discussed which districts allowed what. He feels districts with light manufacturing and restaurant uses would allow it. He does not think they need to go through the process to Town Meeting for a use already allowed. Mr. Jacobs stated Ms. Newman is correct that the paragraph on similar uses was drafted broadly. The whole point is to not have to come back every time there is a new type of use.

Ms. Newman stated the Building Inspector did not read it that way. He felt it needed to be a specified use. His interpretation is there needs to be a zoning change. Mr. Block stated one section specifically calls out a bottling plant use in Industrial and Industrial 1. It seems it has a specific purpose. He feels there should be a joint meeting with the Building Inspector. Ms. Newman noted he will be out until February. Mr. Jacobs noted Section 3.1 says the Board can make a determination if it is a special permit or as of right. Mr. Alpert feels it is manufacturing and not a bottling plant.

Ms. McKnight agrees with Mr. Block. A bottling plant is the closest to what we have. She feels it is allowed only in Industrial and Industrial 1 Districts. If the Board wants breweries to be allowed in other districts they could amend the words to include craft beer manufacturing and bottling and bring it to Town Meeting. Or they could have breweries as a similar use to bottling plants only in industrial districts. Brewery and restaurants would be 2 uses on a lot. That would be a special permit. Ms. Espada stated it should be designated in industrial districts and look at commercial districts to see if the Board wants it there. She noted they talked about food trucks and pop ups separately. Mr. Alpert commented he does not like the idea of beer going out to dining areas associated with food trucks. Ms. Espada stated they are talking about 3 separate things.

Mr. Block noted breweries could range from business districts to industrial districts. The Board needs to determine a policy of what they want and where they want the use. Mr. Alpert stated it would take years to do this. This is why 3.1 was put in to take care of things like this. Ms. Newman reiterated that was not the Building Inspector's interpretation. Mr. Alpert stated not at the first level but ultimately this Board makes the determination. Ms. McKnight stated the Building Inspector has authority under state law. If there is a disagreement an appeal goes to the Zoning Board of Appeals (ZBA). A discussion ensued around Section 3.1 and authority.

Ms. McKnight stated that under the last paragraph of 3.1, once the Planning Board makes a determination that a use is similar, then the Building Inspector is satisfied. Mr. Jacobs stated the purpose of 3.1 was to have a gray area so people would come to the Planning Board. Mr. Block stated it is a deficient system when an entrepreneur wants to set this up and gets conflicting information from the Planning Director and Building Inspector. The Building Inspector's information is wrong based on what Mr. Jacobs and Mr. Alpert said. Ms. Newman does not agree. Mr. Alpert feels it would be helpful to have a conversation with the Building Inspector about the process, authority and what the zoning actually says.

Ms. McKnight feels it would be a better use of time to go along the path Mr. Jacobs has provided us. Then have a meeting with the Select Board to let them know the Board is thinking along these lines. Mr. Jacobs stated one thing they wanted to do with 3.1 was not make this a difficult process. Just come to the Board and discuss what they want. The point was to make it easy. Ms. Espada would love if what Mr. Jacobs said would work. She feels they need to have a bigger discussion with the Select Board and Building Inspector to make sure everyone is aligned. She would like to bring up whether this also relates to food trucks and pop ups. Mr. Alpert stated the analogy is outdoor seasonal beer gardens. Ms. Espada clarified she is talking about pop up restaurants like a caterer in a vacant retail space. It brings equity to town. Some people cannot afford brick and mortar.

Mr. Jacobs stated the Board had lively discussions back when dealing with food trucks. The brick and mortar restaurants did not want the competition. Ms. Newman noted the food trucks are away from restaurants paying taxes for real estate. There are limited numbers of food trucks allowed in limited areas. Ms. Espada agrees with Mr. Jacobs. She does not want to change anything if they do not need to. Ms. McKnight asked if Mr. Jacobs could do a memo starting with 3.1 and the districts it would be allowed in by right or special permit and similar in kind. Mr. Jacobs asked Ms. McKnight to send a quick description of what she wants, and he will do that. He feels it would be easier for someone to come in and describe what they want to do and then the Board could decide.

#### **Report from Planning Director and Board members.**

Ms. Espada stated with the Housing Plan Working Group there were positions created from different committees in town and 2 at large residents. They interviewed 5 or 6 people and selected 2 at large members. The ZBA had no one volunteer so there is one vacant spot. She noted Emily Cooper, who was interviewed, was listening as a community member at the last meeting. She proposed she would be a good candidate to fill the vacant spot. Mr. Jacobs stated he has no problem with that. He felt she was very good when he interviewed her. Mr. Alpert asked, under the current setup, does the ZBA representative have to be a ZBA member or can the ZBA appoint someone who is not a ZBA member. Ms. Newman stated it has to be a member. Mr. Alpert stated the Board has to modify the committee to take away the ZBA spot and have a 3<sup>rd</sup> member at large. Mr. Block stated the committee was created with 2 members at large slots and not 3 members at large. Ms. Newman stated the Board has the authority to do this.

Upon a motion made by Ms. McKnight, and seconded by Ms. Espada, it was by a roll call vote of the five members present unanimously:

VOTED: to agree the Housing Plan Working Group shall have 13 members with no member for the ZBA but 3 community members.

Upon a motion made by Mr. Block, and seconded by Mr. Alpert, it was by a roll call vote of the five members present unanimously:

VOTED: to appoint Emily Cooper to the working group as a 3<sup>rd</sup> member at large seat.

Upon a motion made by Mr. Block, and seconded by Mr. Jacobs, it was by a roll call vote of the five members present unanimously:

VOTED: to adjourn the meeting at 11:30 p.m.

Respectfully submitted,  
Donna J. Kalinowski, Notetaker

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Adam Block, Vice-Chairman and Clerk