

WEST NEWBURY PLANNING BOARD
MINUTES OF EXECUTIVE SESSION
February 16, 2016

Pursuant to a meeting notice posted by the Town Clerk and delivered to all Board members, an Executive Session was conducted by the West Newbury Planning Board on February 16, 2016 in Planning Board Office at the West Newbury Town Offices, 381 Main Street. Board Members Ann Bardeen, Rick Bridges, Raymond Cook and Brian Murphey were present. Board Member John Todd Sarkis was not in attendance. Planning Administrator Leah Zambernardi, Town Counsel Michael McCarron and Associate Member Dennis Lucey were also present.

During the preceding open meeting, the Board had taken a roll call vote to enter Executive Session as follows:

“Cook then made a motion to recess the regular meeting of the Planning Board and to enter Executive Session under the provisions of G.L. Chapter 30A, Section 21(a)7 to comply with or act under the authority of any Act or Special Law and that the Board reconvene in Open Session immediately after the Executive Session. Bardeen seconded the motion. The Board then took a roll call vote as follows: Cook – yes; Bardeen - yes; Bridges – yes; Murphey – yes.”

Town Counsel Michael McCarron discussed shared septic systems, particularly the Planning Board’s concerns and the legalities associated with regulating them through zoning. Cook referred to a recent definitive plan proposal by Cottage Advisors LLC on the Daley property at 365 Main Street. He stated that the plan included a shared septic system owned by a condominium association, which took the Board by surprise. McCarron stated there are several theories that need to be looked at, the first being that zoning laws cannot govern ownership and a condominium is just that, ownership. He stated a developer could therefore have a regular subdivision with each lot dedicated to a condominium ownership. He stated such a zoning regulation in Rowley was attempted to prohibit condominiums but allow apartment houses because apartment houses were being considered affordable housing. He stated that this Bylaw was ruled beyond the authority of the Zoning Act. Bardeen stated she does not think the Board is trying to regulate this by zoning.

Bardeen stated her understanding was that there were going to be individual lots owned solely by the individuals living upon those lots, with nothing in common with the other lots in terms of the structure or the land. However, a condominium ownership was going to exist for a jointly owned septic field, which is questionable to her. The Board then compared this scenario to the Cottages development on Follinsbee Lane and to the Ocean Meadow development off Main Street. Cook stated the difference is that the structures would be on individual lots. McCarron stated one could create individual lots for zoning purposes in order to be permitted to build. There is nothing to stop someone from taking those lots and dedicating them to a condominium form of ownership. Bardeen stated the Daley property proposal differed from that scenario and she does not see how there could be a dual ownership situation. McCarron noted the condominium association for the Cottages’ development on Follinsbee Lane also had a non-traditional element where the owners of the structures are responsible for maintenance of the entire structure, not just the interior. The benefit of having the condominium documents is the association has the power to put a lien on the property.

Cook stated the Board's understanding with the Daley property proposal is that there would be individually deeded lots. Murphey concurred and added they intended to have a common septic system. McCarron stated there are two methods to doing a common septic system. The first is to do it under the Board of Health regulations. For the most part, the Board of Health is only going to approve a shared septic system that is in a condominium form of ownership. He stated this is because the association has the statutory power of lien. In the event that the system breaks, everyone in the association would have to contribute to the repair. Murphey stated that the Cottages had a discussion with the Board of Health on this. McCarron confirmed that the Board of Health stated that if they want to do a shared septic system, it has to be done as a condominium. Zambernardi gave McCarron the Board of Health letter dated October 26, 2015, which he read for the record. Cook noted the developer interpreted this letter or wanted the Planning Board to believe the "project" as referred to in the letter, didn't refer to the whole development but that it referred to the common septic system.

McCarron referred to a letter dated January 5, 2016 submitted by the Cottages' attorney, Mark Johnson. He stated Johnson's position is that the exclusive use area would be larger. Cook stated that when you get in to exclusive use areas, this means the development is a condominium and there are not individual lots. McCarron referred to Johnson's letter which stated "each lot would be a unit within the condominium. McCarron stated that a lot cannot be a unit and a unit has to be a building. He noted an example of this concept involving "dockominiums". He also noted the concept of a cooperative as another form of ownership.

Murphey stated the Board has had preliminary discussions on the Daley property project. He stated the Cottages might come back. Seeing something like that, and certainly if it had been filed, it causes a puzzlement for the Board. He asked if McCarron would be involved if they come back in, before the project gets too far. McCarron said yes. McCarron stated he took a preliminary look at case law. He stated that the Board should ask the Cottages to prove to the Town they can legally do what they propose. Cook stated Johnson submitted a letter on that. McCarron stated the letter does not explain the mechanism and has very broad and inexact terms. He stated he would want to know what the process would be, what the documents would look like, what the common areas would be, what the buildings would be, what the exclusive use areas would be and is there going to be one condominium or multiple condominiums.

Cook stated that if they have a condominium with a shared septic system and they have exclusive use areas, they do not have lots. McCarron stated that for zoning purposes there would need to be lots. He gave the example of a definitive plan with 30 lots that each have houses upon them and all 30 lots are under one ownership. Bardeen stated it is the ownership that is key. She stated it seems that it would have to be all under one ownership and that it could not be individually deeded lots. McCarron stated you would consider the whole area as a condominium. Within that area, you have areas that are the unit and then everything else is common area. Even if the ground, the lot would be common area, you could still create exclusive use areas. Cook referred to another example where there are 30 individual deeded lots. He stated that situation could not have a common septic system. McCarron questioned wthis. Cook stated it is a matter of if the unit is considered a lot or an exclusive use area. McCarron stated he has never seen a unit defined as a lot in a condominium setup. He is not sure that would be possible. He stated the tried and true

method would be to allocate exclusive use areas. Murphey stated if the Cottages come in looking just to do a subdivision, without a special permit, with the subdivision control law in place, could the Cottages do a condominium with that? McCarron stated yes. He further noted that when someone proposes a subdivision, they split the lots complying with zoning and subdivision rules. If at this time the developer wants to dedicate the subdivision to a condominium form of ownership, the developer could then go to the Board of Health and apply for a common septic system because it is under a condominium form of ownership. Cook stated if he does that, then all the lots are owned by an entity. McCarron affirmed. Cook asked what happens if the owner of Lot 8 goes to sell their property, then he can't sell lot 8. McCarron stated you would sell your unit with the exclusive use area that is associated with it. McCarron stated the exclusive use area could be the extent of the lot. Cook stated that whoever buys that, would then become part of the condominium association and McCarron affirmed. Murphey stated it seems that it would therefore be possible. McCarron stated that from a Planning Board point of view, the Board does not have a lot of power with this. The final say on the septic system is governed by the Board of Health. He stated that the Board can require some prima facie evidence but you can't deny it by stating the septic systems won't pass.

In terms of zoning, McCarron stated the only thing that might be possible is the question of whether a common septic system is the equivalent of a common driveway. He noted that access is a use, where a single family lot might have access to a house through another single family lot. This is sometimes in compliance with zoning. However, some Towns decided they wanted to regulate this, so they adopted Bylaws to say that one can't access their single family use over another lot, by right. He stated a special permit is required and that is accepted. He stated, the question becomes can treat a common septic system in this manner? He has not been able to find any examples of this, but he thinks that would be the only way to regulate this type of situation with zoning. The Board of Health, on the other hand, could prohibit common systems. The state also has limitations on them.

Lucey stated his concern that lower quality properties are available. By design one might not be able get individualized septic systems on such lots. Allowing common septic systems would make properties not otherwise developable, because of poor soils, now developable. McCarron stated a limiting factor would be the cost of a shared system. Bridges stated that one of the protections the Town was afforded, septic on individual lots, seems to disappear with this. He asked if that is a bigger picture issue for the Town. McCarron stated he could see them occurring perhaps on smaller developments. He stated that might not be attractive because there would be common ownership by small numbers. He stated that he does not believe the Planning Board can address this in this way. He stated this can be addressed by the Board of Health and it might be able to be addressed by zoning.

Cook made a motion to exit Executive Session under the provisions of G.L. Chapter 30A, Section 21(a)7 held to comply with or act under the authority of any Act or Special Law and to convene the Open Session of the regular Planning Board meeting. Murphey seconded the motion. The Board then took a roll call vote as follows: Cook – yes; Bardeen - yes; Bridges – yes; Murphey – yes.

Respectfully submitted by,

Leah Zambarnardi
Town Planner