

City of Newburyport
Planning Board and Planning & Development Committee Joint Public Hearing
November 13, 2013
Minutes

The meeting was called to order at 6:07 PM.

1. Roll Call

In attendance: Planning Board members Dan Bowie, Henry Coe, Paul Dahn, Sue Grolnic, Noah Luskin, Jim McCarthy, Bonnie Sontag, Don Walters and Cindy Zabriskie; Planning and Development Committee members Councilor Brian Derrivan and Councilor Barry Connell.

Absent: Councilor Tom Jones

Andy Port, Director of Planning and Development and Gary Calderwood, Building Commissioner, were also present.

2. New Business

Planning Board and Planning and Development Committee of the City Council Joint Public Hearing on Proposed Zoning Amendments

Councilor Connell opened the public hearing.

Chairman Bowie recommended addressing three amendments with minor housekeeping changes first. Director Port summarized proposed zoning Amendments 5, 6, and 7 as corrections of typographical errors that should be fixed ahead of the complete zoning rewrite for 2014.

Amendment #5: Amend Zoning Ordinance Section XX, entitled “Personal Wireless Communication Services” to correct a Scrivener’s error, replacing the words “districts: 11, and 12” with “11, and 12.”

Director Port said this amendment would replace two numbers with the correct zoning District references, I1 and I2.

Amendment #6: Amend Zoning Ordinance Section III, entitled “Establishment of Districts” to list additional Zoning Districts and Zoning Overlay Districts, already defined elsewhere in the Zoning Ordinance, but not previously included in this comprehensive list of Newburyport Zoning Districts.

Director Port said this amendment would list every zoning district called out on the map because a few are missing.

Amendment #7: Amend Zoning Ordinance Section XXI, entitled “Plum Island Overlay District” to correct a Scrivener’s error and provide that “No building permit shall be issued for a lot with its sole frontage on an unconstructed way”.

Director Port said this amendment would correct the omission of the two words “sole” and “on.” The implementation of the ordinance would remain exactly the same.

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Councilor Connell asked if the Plum Island consent agreement between Newbury and Newburyport would require a modification? Director Port said there would be no impact by correcting the language. Councilor Derrivan asked what was incorrect in Section XXI: Plum Island Overlay District, Subsection XXI-I (Unconstructed ways)? Director Port said the substance of the sentence would not be altered by inserting the missing words, underscored here: “No building permits shall be issued for a lot with its sole frontage on an unconstructed way.” Councilor Connell ask if the DEP needed to be notified if the proposed change goes forward? Director Port said only when a substantive change to zoning occurs is it necessary to notify the DEP. This change doesn’t require written approval from DEP.

Councilor Connell closed this portion of the public hearing.

There were no questions from the board or the Committee.

Bonnie Sontag made a motion to recommend approval for zoning Amendments 5, 6, and 7. Henry Coe seconded and all voted in favor.
Motion approved.

Councilor Derrivan made a motion to recommend approval zoning Amendments 5, 6, and 7. Councilor Connell seconded and all voted in favor.
Motion approved.

Chairman Bowie said Amendment #2 was also relatively simple and should be taken up next.

Amendment 2: Amend Zoning Ordinance Section IX, entitled “Nonconforming Uses, Structures and Lots” to allow extensions or alterations to pre-existing nonconforming single- and two-family residential structures and uses (including new non-conformities) by Special Permit, rather than by Variance.

Director Port explained that an applicant with an increase in a nonconformity required a Variance. The Planning Office recommended, and the Building Commissioner agreed, that a special permit, still requiring approval by ZBA, would be preferable.

Councilor Connell asked what the worst possible scenario of someone exploiting this proposed amendment might be? Director Port said the applicant had to demonstrate a hardship and that was a high threshold already. An abutter could appeal because they didn’t like it, but the ZBA still had the authority and an abutter’s appeal shouldn’t have any negative impacts. Councilor Connell said it was still subject to interpretation.

A member said a huge percentage of houses were non-conforming. There would be advantages to requiring a Special Permit rather than a Variance. If a building had a nonconforming set back, by right the applicant can keep extending the house. As a result we see some odd shapes. Extending the nonconformity into the setback or creating a new nonconformity would be good, but the proposed language is not. Director Port said an applicant must still go before Zoning Board of Appeals for changes. The member thought the paragraph preceding the amended paragraph made the amended paragraph confusing. The only ‘by right’ aspect would be when an

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applicant built within the setback. For explicitness, clarify language to indicate no 'by right' privilege is indicated for extending a nonconformity within the setback. Commissioner Calderwood said the Amendment offers needed flexibility.

Another member asked the meaning of "less detrimental?" Director Port said 'less detrimental' meant a change was not viewed as a detriment. Chairman Bowie said the phrase was often litigated. Another member said the board agreed on the special permit.

Public comment opened.

Jeff Roelofs, 266 Water Street, said "less detrimental" meant that what an applicant proposed was not substantially more detrimental than what was already there.

Public comment closed.

Jim McCarthy made a motion to recommend approval of Amendment #2. Bonnie Sontag seconded and all voted in favor.

Motion approved

Brian Derrivan made a motion to recommend Amendment #2. Barry Connell seconded and all voted in favor.

Motion approved.

Amendment #1: Rezone parcels 109-4 (81 Storey Avenue), 109-5 (83 Storey Avenue), 109-7 (87 Storey Avenue) and 109-8 (89 Storey Avenue) on Storey Avenue from R-2 (two-family district) to B-1 (business district).

Director Port illustrated on the map the residential district in the midst of commercial properties and proposed to extend the business district to incorporate two parcels by rezoning them from R-2 to B-1. This idea came up about a year ago. The gas station creates unfortunate traffic situations. Having two residential properties near the highway interchange is incongruent. Rezoning could potentially expand to two additional properties on the same side of Storey Ave. Freeing up these two inappropriately zoned properties could bring development along the lines of the new Institution for Savings building, a great improvement to the area because it was in keeping with the architectural character of Newburyport.

Councilor Derrivan recalled reviewing the previous zoning change proposal over a year ago, when a full project and many other things were attached to it. The new proposed amendment had nothing to convolute the fact that the zoning change made sense. Councilor Connell asked if abutter notices had gone out? Director Port said there was a notice in the newspaper. Councilor Connell asked if there was any feedback from abutters? Director Port said no; whereas the previous development proposal surfaced abutter concerns about Low Street access, those concerns were not relevant now. Chairman Bowie was fully supportive of this rezoning last year, but was concerned by the inclusion of two additional lots that had residential uses directly behind and directly across the street from them. His concern was the impact on those residences of a B1 development. The original two parcels made sense.

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Director Port said the two larger parcels are the most important for consistency, and the other two are of lesser concern because of their smaller size. Councilor Derrivan agreed with Chairman Bowie. A member asked where the new B1 line would run if all four lots were rezoned? The member felt the line would be cleaner if the original two lots were rezoned and asked the rationale for including the other two parcels in this rezoning? Director Port said Merrimack Place is quasi-residential, quasi-commercial. Councilor Derrivan said Merrimack Place served as a good buffer between the businesses and the Russell Terrace neighborhood.

A member asked what would happen to the existing properties? Director Port said they would become non-conforming, which was wanted because preferred uses were also wanted. The parcels could also continue to exist as they were. Another member was surprised no one from the nearby neighborhood was present to weigh in and concerned whether adequate notice had been given because the proposal resulted in a non-conforming use. Director Port said the affected residents could always apply for a special permit if they wanted to become two-family residences, but they would also be gaining the right to develop commercially, with the effect of gaining more flexibility. The member asked if the residents had been notified properly. Director Port said the developer had done so. Another member, referencing the two smaller lots, added that those residents might want the same flexibility. Another member pointed out that a property in Russell Terrace was 'group housing,' therefore more commercial, but across the street the situation was different. A member said the board could decide that the two larger parcels make sense right now, and if residents of the two smaller parcels wanted rezoning, the board would have a stronger rationale for their rezoning at a later time. Councilor Connell said more transparency was needed for the folks in Russell Terrace.

A member pointed out that this was not the first time the area had come up before City Council, and the issue could be handled differently this time around. Councilor Connell said if the Council were to cast aside or modify the rezoning recommendations, they would most likely act more conservatively than more expansively. Director Port said the parcels closer to Russell Terrace were roughly half an acre each.

Another member was not ready to support rezoning because the list of uses in Table B contained undesirable uses for the gateway. Did each lot have sufficient frontage for development? Director Port said a developer would need two out of the three. The member noted the board's tools for creating a nice gateway were limited, but agreed with spirit of the rezoning. How best to avoid a used car lot or fast food business given what the table of uses contained? Director Port said adding provisions that limited the uses for any developer could be done. The site plan could be found inadequate for a proposed use with respect to traffic and safety issues. Another member said a developer could appeal a provision. Another member asked how the board would deny a project under a site plan review? Director Port replied that the board had certain criteria called out and could require a peer review to send a developer back to the drawing board. A member asked how the board could accommodate a suitable gateway development when construction trailers were an acceptable use? Before recommending any rezoning the board should review and revise the table of uses. Director Port preferred not to segment every parcel in the city with a different table of uses in the creation of new zoning districts. The member said the requirements for Storey Avenue were different from everywhere else in the city. Councilor Derrivan agreed. The member was uncomfortable with the site plan review tools for discouraging undesirable uses

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for the gateway. Councilor Derrivan said the city was a good judge of what would be in character. Director Port agreed to review the uses, noting that a construction trailer would be temporary, only allowed for two years. The member said B1 lot lines could move, making enough room for a Walmart. Councilor Connell asked if there were agricultural restrictions? Director Port said no. Another member shared the same gateway development concerns and assumed the city was in conversation with an interested developer. The member said the board should not be zoning individual lots. What control existed if a resident sold their house to a commercial interest? Councilor Derrivan and a member said the comments were valid but were not the issue under review.

Another member envisioned something in between the two points. Outside of changing or creating a new district or an overlay district, the board should consider if what existed now was better for the gateway than some 'worst case scenario,' such as fast food? The board would have some control to define how any development looked with screening, lighting, and things that could improve the gateway. The board could help a developer with design aesthetics. The current island of residences didn't look 'Newburyport.' Director Port said in considering types of uses allowed and changes of ownership in the future, the board had established a couple of restrictions previously that were in perpetuity. Councilor Connell said comments should be limited to the appropriateness of rezoning these parcels as part of the business district. The member said if the rezoning proceeded, would the 'in perpetuity' restrictions include the two smaller parcels, regardless of changes in ownership? Director Port said yes. Chairman Bowie concluded that the board understood the issues were not similar for the two smaller lots.

Public comment opened.

Rob Germinaria, 2 Ashland Street, asked why the two small parcels would not be included? Director Port explained that the two larger parcels were included in a previous proposal from an interested developer. The proposal to add the two smaller properties was more problematic in terms of how much was residential and how much was commercial so they would remain residential for now. Mr. Germinaria asked if they could become commercial by special permit. Director Port said no.

Jeff Roelofs, 255 Water Street, said the covenants entered into with the previous development proposal died with the project last year. The tripartite agreement with the developer was different than use restrictions.

Public comment closed.

Chairman Bowie said there was a large distinction between the two lots next to the gas station and the two outer, smaller lots. As a purely zoning matter it made sense to make the B1 change, but was the board complicating the change by reviving past agreements with any potential developer? A member said past agreements muddled the issue; a cleaner approach was preferred. A member agreed to stick with the amendment as written for the two larger parcels nearest Low Street.

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Bonnie Sontag made a motion to recommend approval of Amendment #1 for rezoning 81 and 82 Storey Avenue from R2 to B1. Noah Luskin seconded and eight voted in favor. Jim McCarthy opposed the motion without a review of the table of uses.
Motion approved.

Councilor Derrivan made a motion to recommend for approval Amendment #1 for rezoning 81 and 82 Storey Avenue from R2 to B1. Councilor Connell seconded and all voted in favor.
Motion approved.

Councilor Connell said there were many ways the amendment could be discussed at a council meeting.

Amendment #3: Amend Zoning Ordinance Section VI, entitled "Dimensional Controls" to allow a reduction in the dimensional requirements within the B-2 (Downtown Business) District for Use #105, Hotel or Inn (and all Accessory Uses in conjunction therewith), Use #413B, Parking Structure (Parking Garage) or Use #405, Mixed Use Building by grant of a Special Permit, issued by the Zoning Board of Appeals, without the need for a Variance.
Director Port said the downtown business district had height and setback restrictions for smaller infill projects, such as for a hotel and a parking garage in relation to the Titcomb Street site. The Planning Office's goal with this amendment was to allow some flexibility. The city had zero setback; buildings came right up against the sidewalk. In general, that created walkability character. A 20- foot setback from the tree line did not always contribute positively to a project. Flexibility by special permit was recommended compared to how the city's hands were tied in granting a project if it violated setback today. The city would maintain the same level of control and the process would be by Special Permit, not Variance. The Planning Office proposed changing only the mechanism while retaining the control.

Chairman Bowie agreed that getting away from Variances was better. Every ZBA existed to get around legal requirements. Hopefully that would change at the state level in the near future. A member asked what were the other uses in the B2 downtown business district that were not affected by this change? Director Port listed churches, fire stations, City Hall, B&Bs, among others. The member asked if those would still be covered by Variance? Director Port said yes. He said the board could always look at expanding the amendment in the future. The member said by allowing only three uses, the notion of doing something a little different with uses for some and not others comes into play. What was the downside for allowing a Special Permit for all uses? The board didn't usually change ordinances for particular projects. The board also didn't rewrite ordinances every day. Director Port preferred to look at all sections of B2 uses for a broader discussion next year during the full zoning rewrite. Making a little change like this now didn't cause him concern. Chairman Bowie said, in the context of heading into a rewrite of the entire code, the proposed amendment is acceptable because it allowed for progress on two desirable projects. A member supported the concept but pointed out that the proposed amendment carried the same risk as doing spot zoning.

Councilor Connell said everyone wanted some consistency in the downtown area and this change gave these two projects the opportunity to be consistent. What was the setback and where did it extend to on the parcel in question? Director Port said the setback extended from the property

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line up to the building. A portion of the building would be nonconforming for the 20-foot; it was a little bit angled. When he originally heard of this, he thought it was very specific to the two large projects, and an overlay could be considered instead. A member asked how the proposal would affect other properties in the downtown zone? Director Port said ideally, the comprehensive rewrite would provide for special permits. Rather than spot zoning, it made sense to apply the same flexibility to all other infill projects. It was more common in the Newburyport business district to see a setback less than 20-feet. The broader district should be permitted the flexibility of the Special Permit. Director Port didn't want to overwhelm people with the issue at the larger scale and limited it to these two projects. The member asked what would happen to the Waterfront West overlay district? Director Port said nothing. The member said the proposal affected only the city side of Merrimac Street.

Another member said the approach was backwards. The board should say what it wants for the entire business district. If the member owned property downtown and heard this was done for one developer and not for the member, the member would be furious. The board should err on the side of the global change. Director Port agreed that it would be more fair, but as a planner he was looking at the city's capital projects. The situation required balancing the significant timeline to get a project going. There was the timeline of the zoning rewrite to consider. Time matters and Director Port would regret a delay that jeopardized good projects with federal funding. The funding wouldn't wait for a six months-to-a-year project to complete. The member asked how including the entire business district would slow the amendment down? Otherwise, the proposed process is a bad way to do zoning.

Chairman Bowie said approval was in the hands of the City Council. The proposed amendment bought time to allow the projects to keep going forward. Councilor Connell acknowledged the amount of dialogue that would be required for a comprehensive change and saw no harm done by the proposed amendment. He said it made sense to most people in the room to harmonize the streetscape for these two, large projects. Greater harm would be done to let a restriction stand and cause big publicly supported projects lose viability. A member said the proposal reflected things that already existed. Another member thought it was less controversial to include everything. Another member said there was no large constituency of any councilor asking for less setback. Councilor Derrivan saw the necessity for the amendment and thought the council would too, in light of their support for the two projects. Director Port pointed out that a zoning change was made for the senior center; otherwise the project wouldn't have gone forward. A member sought to clarify if there was a risk of losing federal money if the projects were to slow down. Director Port said the state money required moving at a certain speed on meeting zoning requirements.

Rob Germinaria, 2 Ashland Street, said the taxpayers should be the first consideration. More citizens should be interested and be here. I support the amendment.

Director Port said even with the change, timing would be a consideration for the permitting process.

Paul Dahn made a motion to recommend approval of Amendment #3: allowing a reduction in setback in the downtown business district for specific uses by Special Permit. Henry Co

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seconded and seven members voted in favor. Sue Grolnic opposed.
Motion approved.

Councilor Derrivan made a motion to recommend approval of Amendment #3: allowing a reduction in setback in the downtown business district for specific uses by Special Permit. Councilor Connell seconded and all voted in favor.
Motion approved.

Amendment #4: Amend Zoning Ordinance Section II, entitled “Definitions” to provide that, on corner lots (having frontage on two ways), the primary front lot line shall be determined by the street address of the property.

Public comment opened

Director Port said lot shape and dimensions were not clear enough for the purposes of establishing the rear lot line on corner parcels. It was more logical to depend on the longer lot line but not entirely clear when a builder didn't know yet where the front door would be. While it was clearer to use the longer length for abutters to know where their lot lines were, he was not opposed to the front being determined by the address. A member asked if a house was torn down, could the street address of the lot switch? Director Port said yes, but people didn't do that very often. The member said using the property address to make houses line up on a street seemed consistent with other things the board had done. Councilor Derrivan asked why the issue was proposed when the ZBA did not recommend it?

Chairman Bowie said the land court came down in favor of the applicant on the Jefferson Street case in 2010. The board then spent months developing front line, sideline, and rear line definitions. A proposal to revert to the previous ordinance after those efforts is a problem. When a court looked at a zoning ordinance, they wanted clarity. Today's definitions provided that clarity. Commissioner Calderwood said he supported the change on behalf of all the people in Newburyport, many of who brought the issue to his office. The Jefferson Street court case had lot lines on two separate streets and the city lost. Homeowners and their architects didn't like to hear that the front door was not facing the front yard. People were hung up on illogical and convoluted government nonsense. Those who brought the issue to the Building Department were aggravated. In 18 years as building commissioner he had been criticized for helping people too much. Everyone knew where their front door was. In the Mark DiPiero project on Woodland and High Street there were two fake doors in the front because the resident wanted a High Street address. She was approved because her address was Woodland Street. Unbeknownst to Commissioner Calderwood, the resident talked to Mr. DiPiero. Everything was signed off when the Planning Board said her front yard was on High Street, not Woodland Street. The last thing the busy Building office needed was to babysit people through the issue of why their front door wasn't at their front yard. Why should citizens have to pay architects to finesse their designs because of this ordinance?

A member said the current wording gave people the right to use the longest side with frontage because they may not get that with their street address. Was there a basis in zoning for saying the primary front lot line should be the longest line? The matter was not one of convenience.

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Commissioner Calderwood said the basis for the change was the illogical, convoluted language that residents, builders and architects didn't understand. People didn't have to change street addresses anymore because everything was a 1- or 2-family residence. Director Port was not attached to one way or the other, but thought sticking with the present ordinance would avoid confusion with the courts. He was concerned for abutters to corner lots because the owner of a corner lot could decide where to put the address. Commissioner Calderwood asked how it was possible that the ordinance was clearer than the proposed amendment if homeowners and architects didn't understand it?

Councilor Connell asked what about a corner lot that had identical lengths on each side? Director Port said the builder would designate. Councilor Connell asked what if the next owner changed it? Director Port said that was a concern because the change would affect abutters. Commissioner Calderwood said people still had to go through a Special Permit to change an address. There had been only one court case in 18 years. Councilor Derrivan asked what were possible repercussions for the city by recommending Commissioner Calderwood's definition? Director Port said abutters calling with concerns about the requirements for neighbors who change their address. Councilor Derrivan asked if there were problems with the older ordinance and Director Port said no. Councilor Derrivan said the building commissioner had good reasons for asking to go back to the old ordinance. If there were no problems in the past and Commissioner Calderwood said we needed to do this, whether we agree with him or not on anything else, why wouldn't we recommend the change? Things should be as easy as possible for everyone.

Chairman Bowie said in fact there was a problem because definitions were unclear. If the issue came up again today, the courts would say the ordinance was very clear. Without guaranteed clarity, it was a good playground for the court if the issue came up. Everyone vetted the ordinance. Commissioner Calderwood said he wasn't in favor of it. A member said the first zoning law the board changed 18 years ago lined things up on the street. Corner lots that conformed before would be nonconforming under the proposed amendment. The board wanted houses to line up on the street, but didn't want more nonconforming lots. That could be costly to make right. Another member agreed with Chairman Bowie's point about the lack of predictability and didn't think it was a worthwhile change. Commissioner Calderwood said most houses were nonconforming anyway; that didn't matter. Director Port said the ZBA usually didn't weigh in on zoning changes but recommended against this change. Commissioner Calderwood said he'd talked to a couple of ZBA members who didn't seem opposed. A member said the board's options were to support, deny or make no comment.

Public comment opened.
No comments.
Public comment closed.

A member was undecided, and appreciated clarity and the common sense approach.

Jim McCarthy made a motion for no recommendation on Amendment #4: Amend Zoning to provide that, on corner lots (having frontage on two ways), the primary front lot line shall be determined by the street address of the property. Paul Dahn seconded and all voted in favor

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Councilor Derrivan wanted to hear from someone on the ZBA.

Councilor Derrivan made a motion to recommend approval of Amendment #4: Amend Zoning to provide that, on corner lots (having frontage on two ways), the primary front lot line shall be determined by the street address of the property. Councilor Connell did not second the motion, and the vote remained one in favor and one opposed.

Councilor Derrivan was leaving the City Council after serving for six years. He thanked everyone on the board for their work.

2. General Business

The minutes of 10/2/2013 were approved as amended. Bonnie Sontag made a motion to approve the minutes. Henry Coe seconded and all members voted in favor.

5. Planning Office/Subcommittees/Discussion

The planning office reviewed the Oleo Woods project.

6. Adjournment

Councilor Connell adjourned the Planning and Development Committee. Councilor Derrivan seconded and all voted in favor. The meeting adjourned at 8:36 PM.

Bonnie Sontag made a motion to adjourn. Henry Coe seconded and all members voted in favor.

The meeting adjourned at 8:39 PM.

Respectfully submitted -- Linda Guthrie, Note Taker