

**Scituate Planning Board, July 26, 2012**

TOWN OF SCITUATE MASSACHUSETTS

SCITUATE PLANNING BOARD

MINUTES

July 26, 2012

Members Present: Mr. William Limbacher, Chairman; Richard Taylor, Clerk; Eric Mercer and Robert Vogel.

Members Absent: Daniel Monger. Alternate member seat vacant.

Others Present: Ms. Laura Harbottle, Town Planner

See Sign-in List for names of others present at this meeting.

Location of meeting: Selectmen's Hearing Room, Town Hall

Mr. Limbacher called the meeting to order at 7:30PM. He announced the meeting was being audio recorded and asked if there were any other recordings being taken. The meeting was being recorded for viewing on the local cable television station.

Documents

7/26/12 Planning Board Agenda

ACCEPTANCE OF AGENDA: Mr. Vogel moved to accept the agenda. Mr. Taylor seconded the motion and the vote was unanimous in favor.

Form A Plan – 153 and 159 Hollett Street

Assessor's Map/Block/Lot #153 20-06-20A; #159 20-06-21F

Applicant: Diamond Development

Owners: #153 Paul F. & Nora Donelan Finnegan

#159 Anthony D. & Audrey R. Filippone

Documents

Application and Plan of Land in the Town of Scituate, Massachusetts 153 and 159 Hollett Street prepared by Ross Engineering Co., Inc for applicant Diamond Development and Owners Paul F. & Nora Donelan Finnegan and Anthony D. & Audrey R. Filippone dated July 16, 2012.

Letter to William Limbacher from John P. Whittaker dated 7/20/12

Plan references Book 3725 page 779, book 4825 page 212

Comment from the Water Division received July 24, 2012

Chairman Limbacher indicated the Board received a Form A from Diamond Development for 153 & 159 Hollett Street. He indicated that in the interest of full disclosure, he serves on the Community Christmas Board of Directors and has no financial interest in it. He indicated he would step down if there was an objection. There was no objection so he asked the applicant to continue.

Steve Bjorklund and Paul Mirabito were present for the applicant. Mr. Mirabito indicated that he is a professional land surveyor and prepared the ANR. He indicated there is a contract purchaser for the land, Diamond Development. He indicated they are purchasing the existing home at 159 Hollett Street. They need more upland for the property so they are purchasing land from the abutter at 153 Hollett Street so that they can have two buildable lots – Lot 1 and Lot 2. The septic systems have been approved by the Board of Health. The wetland line has been confirmed by the Conservation Commission. There is the required upland for two single family homes.

There are also two non-buildable parcels proposed. The land to the rear is part of the well field for the Town of Scituate taken in the late 1980's. The plan is based upon a field survey. The survey for the Finnegan house at 153 Hollett Street was done for the Bonomi's three to four years ago. He has surveyed the other house and has also surveyed other properties along Hollett Street as well. One survey was stuck into the other and that is how they came up with the current property lines.

Town Planner, Laura Harbottle indicated that each lot has 100 feet of frontage on Hollett Street, a public way, and there are some parcels that are unbuildable. There has been discussion on measurements on the south property line. There is a question if the electronic file is tied to the Mass State Plane Coordinate system. This is a requirement so that when the town goes to GIS the data will be available.

Mr. Mirabito inquired if this was a requirement. Ms. Harbottle said she believed so as part of the electronic file. Mr. Mirabito suggests that if the Town is going to require this they ought to set the points as it costs an extra \$1,000 to do this and the surveyor could make this information up. Norwell requires plans to be tied to the grid. Some monuments have been set on Route 3A in Cohasset. Monuments on the plan are record monuments and they are not tied into the Mass grid system. He indicated he cannot go onto a railroad right of way to obtain data as it is considered trespassing. Mr. Mirabito indicated he has never tied into the Mass grid in Scituate. Mr. Mirabito reiterated the difficulties of tying into the Mass Grid.

Mr. Taylor inquired about Parcels B and C. Steve Bjorklund indicated they are additional upland areas that aren't required for upland for the lots. Future options are being left open by keeping these parcels. Mr. Vogel asked about water availability. Water is only available from Country Way and not Hollett Street. Mr. Bjorklund indicated it is only 100 feet to Country Way which is not that far and since Hollett Street has just been paved and there is a moratorium on road cuts. A well could be an option on Lot 2. He indicated there are options for water and gas and they will be addressed prior to a building permit.

Dr. John Whittaker and his wife Joan were present as abutters to the southwest of the site. He indicated he is retired from public education and had oversight of Planning and construction in three universities. He sent a letter to the Board about plan and deed discrepancies of the Filippone property. The plan on file with the registry is different and gives specific metes and bounds that are not in conformity with what is presented here. He is giving notice to the Board as his due diligence and to protect his property. The proposed lot has a two foot strip next to his property and is proposed as 20,271 sq. ft. This is very tight and should there be a discrepancy, his lot area could be affected. Mr. Whittaker indicated a mortgage company could have a problem. There is a major town drainage system along the property border and he is concerned with flooding as it happened a few years ago. The water now goes to the wetland in back. Mr. Whittaker indicated Diamond Development has had informal discussions with him about joining the 2 foot strip to his property. He indicated he does not wish to join his property. Mr. Whittaker said he wishes to provide public notice so his property is not taken through adverse possession.

Chairman Limbacher asked Mr. Mirabito to address Mr. Whittaker's concerns. He said 3 – 4 years ago he surveyed the area based on the plans on file and record deeds. He does reference all the plans and has looked at all the deeds. The property line is based on the record information and field verified. The bearing system is being held. Nothing is being done to change Mr. Whittaker's property line. The plan is based on a field survey. It is an ANR Plan division. The Board is required to endorse and he asks the Board to endorse it as it meets the regulations and professional standards. Chairman Limbacher asked if Mr. Mirabito's stamp was on the plan. He confirmed it was.

Mr. Whittaker indicated that the plan on file shows the line being 92.25 feet for this property. The proposed plan shows something different. The deed says the bearing is S8721W. He does not understand how the reference in his deed and the plan shown do not conform to each other. Mr. Mirabito indicated the property line measures 89.95 feet down to the beginning of the 2 foot strip. He didn't show the other dimension because that goes down to the corner of the Whittaker property. He said they are not going to the back of his land and showing his property. Mr. Whittaker indicated the ANRAD plan for Conservation shows a different dimension and it is still off by one foot and the angle of the line is different.

Chairman Limbacher indicated that each side has made their point and he asked the Board for a motion. Mr. Vogel asked about the purpose of the 2 foot strip. Mr. Mirabito indicated it provides upland out to Parcel C which has upland. This may be of value later to someone else. Mr. Bjorklund indicated that it provides upland for anyone in the future. He indicated there is more upland than is required on the lot adjacent to Mr. Whittaker and he has a commitment to title insurance. Mr. Mirabito indicated if there was a problem with the survey, then a commitment to title insurance wouldn't have been obtained.

Mr. Vogel moved to endorse as approval under the Subdivision Control Law Not Required a Plan in the Town of Scituate, Massachusetts located at 153 and 159 Hollett Street prepared by Ross Engineering Co., Inc. for applicant Diamond Development and owners Anthony D. & Audrey R. Filippone and Paul F. and Nora Donelan Finnegan dated July 16, 2012. Mr. Taylor seconded the motion. Motion was approved unanimously.

Mr. Bjorklund reiterated that just because Dr. Whittaker does not want to purchase the 2 foot strip and back upland, does not mean that it won't be desirable to someone else in 15 or 20 years. The upland wasn't needed for the proposed lots so it was separated. Chairman Limbacher informed Dr. Whittaker that all the documentation will be in the file and in the minutes. Dr. Whittaker indicated the very latest plan will come up to the Conservation Commission next week. Mr. Bjorklund indicated the just approved plan will be the record plan and it would be referenced on the Conservation Commission plans.

Special Permit – Accessory Dwelling Unit – 33 Garden Road  
Assessor's Map/Block/Lot 34/26/3  
Applicant: John Townsend, Sandcastle Group  
Owner: Maria Marcelino

#### Documents

Application and supporting documents for Accessory Dwelling Special Permit file 6/25/12  
Comment from Director of Public Health dated 6/ 27 /12  
Comment from Water Division received July 16, 2012  
Comment received on 7/16/12 from 10 abutters and residents  
4 pictures of the site taken by Town Planner, Laura Harbottle in July 2012

The Chair outlined how the hearing would operate. He called upon the applicant, John Townsend of Sandcastle Homes to make his presentation. Owner, Maria Marcelino was also present. Mr. Townsend indicated he was the general contractor representing Maria Marcelino for an Accessory Dwelling Special Permit at 33 Garden Road. He said the gross floor area of the accessory dwelling would be about 748 sq. ft. He said utilities would be separate as required. Parking would be to the right of the accessory dwelling. It is about 50 feet deep and 10 feet wide. It is on Town sewer and has been reviewed by the Board of Health. The accessory dwelling meets the zoning setbacks and front yard setback which is why it is setback from the existing dwelling.

Chairman Limbacher interrupted the proceedings. He indicated that the accessory dwelling is not by right, but by Special Permit. It requires a supermajority or 4 out of 5 member's votes or a 4 out of 4 vote of the members present tonight for the Special Permit. The applicant can choose to continue immediately or go forward tonight or wait until all 5 members of the Board are present. Mr. Limbacher indicated that if the applicant chose to go forward now, the votes of all 4 of the voting members would be needed. The applicant asked if they could do the presentation and the other member review the information. Town Planner, Laura Harbottle indicated no as the Town has not accepted those provisions. Mr. Vogel confirmed that if they had the presentation tonight then only the members present could vote. Chairman Limbacher confirmed this and asked the applicant what he wanted to do. The applicant asked to confer with his client. Chairman Limbacher asked for a 5 minute recess.

Chairman Limbacher reconvened the meeting. He indicated that the next time certain for a meeting would be on August 9 at 8:00 pm. He asked what the applicant would like to do. The applicant indicated they would like to continue until that specified date and time. Chairman Limbacher informed the audience that a

super majority is needed, which is 4 out of 5 votes in favor to recommend approval. The applicant would need all 4 votes of the members voting tonight and have no access to the fifth member. The next meeting should have all 5 members present. The applicant would like to continue the hearing until August 9 at 8:00 pm. Mr. Taylor moved to accept the applicant's request to continue the public hearing for the Accessory Dwelling Special Permit for 33 Garden Road until August 9 at 8:00 pm. Mr. Vogel seconded the motion. Motion was approved unanimously.

Form A Plan – 2 Bailey's Island  
Assessor's Map/Block/Lot 4-01-9-0-R  
Applicant/Owner: Elinor P. Nichols

#### Documents

Application and Plan of Land Bailey's Island Scituate, Massachusetts prepared by Cavanaro Consulting for applicant/owner Elinor P. Nichols dated 9/22/11

Decision from the Scituate Zoning Board of Appeals dated June 19, 2012

Memorandum from Jeff DeLisi, Esq. to Bernice Brown, Scituate Town Clerk dated 2/24/2011 regarding date of acceptance of the Subdivision Control Law - Town of Scituate received with the application on July 19, 2012

Memorandum from James B Lampke, Esq. on the Effective date of the Subdivision Control Law in Scituate received March 23, 2009

Comment from the Fire Department received July 25, 2012

Comment from the Water Division received July 24, 2012

Attorney Richard Henderson was present along with Elinor Nichols. Mr. Henderson indicated that Mrs. Nichols wants to dispose of her assets. She sought the advice of a Boston estate attorney who advised her that her real estate was a disproportionately large part of her estate and she would be wise to dispose of it to her family in this tax year. She needs to do this in 2012 as she has a binding contract to give a lot to her daughter and one to her granddaughter. If it is not done in 2012, her granddaughter will receive nothing. Mrs. Nichols did not intend to deprive her granddaughter of anything. However, she signed a contract and is bound by it.

Cavanaro Consulting was hired to come up with a plan to divide the property. They show a plan with two lots each having frontage on a way shown on a land court plan and the plan presented. Attorney Henderson then went to 81L and selected the provision that each lot had frontage on a way in existence at the adoption of subdivision. A 1939 land Court Plan shows Bailey's Island with no way existing. A 1974 land court plan shows the existing way. The issue is when the subdivision control law was adopted in Scituate. Last fall the Planning staff indicated that they were using the Lampke opinion that subdivision control was adopted in 1947. Mr. Henderson indicated he did not have any evidence to show the way existed in 1947.

He indicated that if you can show you have no frontage at all, you are entitled to endorsement. Mr. Henderson filed for a variance from the Zoning Board of Appeals. All the abutters came and spoke in favor of the variance and it was granted. He indicated that should be enough for ANR endorsement, but has since spoken with Jeff DeLisi who indicated he wrote an opinion and filed it with the Town Clerk that he believes the date of acceptance of the subdivision control law in Scituate is in 1954. Assessor's records indicate one of the houses was constructed in 1956. Another section of 81L says that if the roads are shown on a plan previously adopted under the subdivision control law, then you are still entitled to frontage. In 1962, there was a Form A endorsement that the access to the property was cut off. The Board can endorse under the provision that the plan is a prior endorsement with ways shown on the plan and the changing shapes and sizes of lot provision so long as the frontage provision has been met without violating frontage as the frontage has been waived. The lot can never be subdivided as that is a condition of the frontage variance. Mr. Henderson does not see any violation of 81 L or 81P.

Town Planner, Laura Harbottle indicated that included in 81L there is a definition of ANR and when the Board can endorse. There are 3 possibilities – a) Is it a public way – Ms. Harbottle indicated no. b) is the way shown on an approved subdivision plan – Ms. Harbottle said no. Attorney Henderson indicated the way

was shown on a plan under the subdivision control law that the Board endorsed. Ms. Harbottle read from the statute and asked if Mr. Henderson was saying it could be any plan approved under the subdivision control law. He indicated he was. Mr. Mercer read the third possibility as a way in existence when the subdivision control law became effective in the city or Town having in the opinion of the Board adequate width, grade and construction to provide for vehicular traffic. Mr. Mercer questioned if that was what Mr. Henderson was asking for. He indicated he was no longer asking for that provision.

Mr. Henderson indicated it was the provision of "conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot without the frontage". The frontage is waived. Ms. Harbottle indicated that her experience leads her to a little different interpretation. The frontage waiver from the Zoning Board is one piece, but the Planning Board needs to waive the frontage requirement under subdivision control too. Mr. Henderson disagrees. He said the frontage is no longer a statutory requirement by virtue of the variance. Other than the frontage depicted on the plan which was incorporated in the Zoning Board which is the normal 110 feet required on that way. The variance overcame the ability to determine what happened between 1939 and 1958. That was the point of getting the variance.

Ms. Harbottle indicated there is no intent here to make it hard on the family, but the Board has to be consistent and keep a level playing field for all applicants. Mr. Henderson indicated that he cannot prove that the way was there in 1954, so that is why he got the variance. It is the minimum frontage for both lots and it will only be one lot forever and it will probably not be developed. It is intended to be gifted to Mrs. Nichols' 27 year old granddaughter.

Chairman Limbacher indicated he understood. He said the variance was granted and that eliminated the frontage requirement. Mr. Henderson indicated that they are changing the shape of the lot so as to not leave any lot without frontage as they have a waiver. Chairman Limbacher said to endorse it, it has frontage and that implies the frontage (110 feet) is on a way. Mr. Henderson said he wants to be in compliance as much as possible. He can't prove beyond a reasonable doubt the way was there in 1954 as he can't find the evidence.

Town Planner, Laura Harbottle indicated that we have looked at old maps. The 1948 USGS map shows no way. Mr. Henderson said he has retrieved information from 1939 up to 1956 and is missing 24 months in 1954. The Zoning Board granted the variance to have one more lot. Chairman Limbacher indicated the Zoning Board decision says that the Planning Board still must divide it into two lots. He read from the decision. Mr. Henderson said that is statutory. Under 81 L of the subdivision control law you can only file a plan for 3 reasons -1. Subdivision approval is endorsed on the plan 2. Plan complies with 81 L endorsed under 81P 3. Plan signed by civil engineer under 81X that creates no new boundaries, no new frontage and no new division between lots. The Board should sign. He said the part under 81L does not apply as the frontage was waived. Ms. Harbottle indicated that the Zoning Board alone can waive frontage and she believes the Planning Board also needs to waive the frontage. Mr. Henderson indicated that once the zoning board acted under ch 40 A, that section cannot be violated and plan should be endorsed under 81P as it must be recorded.

Ms. Harbottle said that the definition of lot frontage in the subdivision rules and regulations ties into the subdivision control law. She agrees with all the other dimensions except frontage as the Planning Board has a unique role in determining access and approving Form A lots. Mr. Henderson inquired if it was a reasonable disposition of the property. Mr. Taylor surmised that the Board needs to feel comfortable waiving the frontage requirement.

Mr. Vogel wanted to look at it from a different perspective. Assume the proof of the way existed in the timeframe, does the way meet the sufficient width, grade and construction requirements. Does the Board think the way as it exists today meets those requirements? Ms. Harbottle said likely it does. The issue is likely having the services installed. 81L also says the road has to provide for installation of municipal services. There are memos from the Fire and Water Dept. If those services can be brought there, she indicated it probably makes sense to endorse the plan. The Planning Board requires the services to be

upgraded prior to signing off. It is similar to Harbor Heights. Mr. Vogel indicated the Board just endorsed a plan for Diamond Development with no good way to get water. Ms. Harbottle indicated that was on a public way and there were options. She indicated the Fire Department is concerned about water pressure and if a hydrant can't be located close to the property they would require a sprinkler system. That would be a building permit issue.

Mr. Henderson indicated that the key language in the statute was that it would be one lot. Chairman Limbacher said that the ZBA inference is that it was adequate for 1 additional lot. Steve Bjorklund indicated that the ZBA grants Special permits for 50 foot frontage lots and the Planning Board always signs them and this situation is no different. The ZBA reduced the frontage to 0. Mr. Bjorklund indicated he sees no difference here. Ms. Harbottle indicated she saw a difference.

Chairman Limbacher indicated he had no problem endorsing the plan. He wants to know by what authority he is endorsing it. Mr. Henderson indicated it is 81 L. It is under the provisions of the chance and shape of the lot leaving neither without frontage and it was endorsed by a prior Planning board in 1992 under the subdivision control law. It does not violate 81 L.

Mr. Vogel indicated that if a previous Board endorsed an ANR did it in effect they endorse the way. Mr. Henderson said the 1962 plan for John Lerner, who bought it from Parker Schofield, that is in the Planning Board office has a Planning Board endorsement. Chairman Limbacher said zero frontage eliminates the 81 L requirement. Ms. Harbottle indicated that the file has an ANR Plan for 1962, but her interpretation is that it needs to be a subdivision road. The Board was concerned how the 1962 plan got approved. They indicated it must have had the access and frontage. Ms. Harbottle indicated that Planning Boards did all sorts of things in the 60's and 70's. Property rights and values were different then, it was a different world and things happened then that wouldn't happen today.

Mr. Vogel indicated the Board is bound by the present statute. Chairman Limbacher is going back to if there is no frontage required as a result of the variance the public way disappears. Mr. Vogel indicated there are a lot of reasons not to stand in the way of this. Among them are the physical realities of the way being adequate and any fire department restrictions are not part of this process, but the building permit process. Common sense is saying it is adequate and we are here to protect the citizens of the town. He has no problem.

Mr. Mercer indicated he is an attorney and attorney's look at equity among other issues. He agrees with Mr. Vogel and thinks it's unfair to say you can't have two lots. He believes the Board needs to look at substance over form. He indicated he doesn't know who has the burden of proof and sees no harm in granting the ANR. Mr. Taylor agrees. Chairman Limbacher indicated he will endorse, but doesn't follow the equity/inequity line. Having zero frontage means the Board needs to endorse. He is not concerned about the adequacy of the access because if you can get to one house you can get to the other.

Ms. Harbottle indicated she understood where the Board was coming from. It is just one lot. There were other options though from a Planning perspective. It could have been a subdivision with waivers granted from the standards. This would have given the Board more power to set conditions. The applicant chose to go the variance route instead. The applicant will have to address fire and water comments in order to obtain a building permit.

Mr. Vogel moved to endorse as approval under the Subdivision Control Law Not Required a Plan of Land Bailey's Island, Scituate, MA prepared by Cavanaro Consulting for applicant Elinor P. Nichols dated 9/22/2012. Mr. Mercer seconded the motion. Motion was unanimous in favor.

Form A Plan – 0 Mann Hill Road/0 Hatherly Road

Assessor's Map/Block/Lot 22 -10-2 & 22-10-3A

Applicant: L. Jeff Lowell

Owner: Joseph R. Stanton, Trustee, The Stanton Family Nominee Trust

## Documents

Application and Approval Not Required Plan of Land Being a Subdivision of Lot 2 Plan 5140 – D 0 Hatherly Road 0 Mann Hill Road Scituate, Massachusetts Street prepared by J. Lowell Associates for applicant L. Jeff Lowell and Owner Joseph R. Stanton, Trustee, The Stanton Family Nominee Trust dated July 19, 2012. Comment from the Water division received 7-24-12

L. Jeff Lowell indicated he represents the Stantons. They own two lots. One is 0 Mann Hill and the other is 0 Hatherly. They are lots with no buildings. The perimeter of the lots is the same, just the lot lines are being reconfigured. The configuration of the Mann Hill lot goes down to Hatherly Road to provide for future utilities to a home. Frontage on Hatherly Road is needed to connect to the sewer. Sewer and water services in Hatherly Road are shown. The proposed Lot 4 on Hatherly Road has a stub. The proposed Lot 3 on Mann Hill does not. The plan is here for approval before the paving starts.

Town Planner, Laura Harbottle indicated that both lots have 100 feet of frontage on public ways. Mr. Taylor asked if the stub was going to be put in. Mr. Lowell indicated they wanted a stub as they need sewer. Ms. Harbottle indicated that DPW will decide. Mr. Lowell indicated he heard it was DPW and the Board of Selectmen.

John Rogers of 42 Mary's Lane was concerned about the sewer. It is available on a limited basis and why should Mr. Stanton get priority. Chairman Limbacher indicated the only thing the Planning Board is concerned about is dividing the land. DPW, the Water Division and the Building Department will handle other development issues.

Steve Mosely of 382 Hatherly Road indicated that the wetland flags on the plan are not followed out to the end of the property. He questioned if the land was able to be filled with wetlands on it. Mr. Lowell indicated he has been to the Conservation Commission for the wetland line approval and will be going back to file a Notice of Intent. He indicated he has walked the entire site and surveyed the topography and wetlands. Chairman Limbacher indicated the Planning Board's job is to divide the land into two lots.

Mr. Taylor moved to endorse as approval under the Subdivision Control Law Not Required a Plan of Land Being a Subdivision of Lot 2 Plan 5140 – D 0 Hatherly Road 0 Mann Hill Road Scituate, Massachusetts Street prepared by J. Lowell Associates for applicant L. Jeff Lowell and Owner Joseph R. Stanton, Trustee, The Stanton Family Nominee Trust dated July 19, 2012. The motion was seconded by Mr. Mercer. Motion was unanimously approved.

Liaison Updates - None.

Accounting – None.

Minutes - None

Town Planner Report - None

Mr. Vogel moved to adjourn the meeting at 9:25 pm. Mr. Mercer seconded the motion. Motion was unanimously approved.

Respectfully submitted,

Karen Joseph  
Planning Board Secretary

Richard W. Taylor  
Clerk

