

STERLING PLANNING BOARD MINUTES – June 19, 2017

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**Present:** John Santoro ~ Chairman  
Michael Pineo ~ Clerk & E. D. C. Member  
Russ Philpot ~ ANR Agent  
Betty Kazan ~ Administrative Assistant  
**Absent:** Charles Hajdu ~ Vice Chairman  
David Shapiro ~ Member

Mr. Santoro called the meeting to order at 7:30 P.M. in Room 202 of the Butterick Building.

### Minutes

There were no minutes for approval at this meeting.

### Warrants & Payroll

There were no warrants or payroll for approval at this meeting.

### HEARINGS/OTHER SCHEDULED MATTERS

#### Primrose Lane Definitive Subdivision ~ Consider invoking its right under the subject Decision to Automatically Rescind the Definitive Plan approved by the Board on March 28, 2005

Mr. Philpot explained that the definitive plan which was approved March 28, 2005 has General Condition #2 Final Approval with Covenant. This is a Covenant which the applicant chooses instead of filing a bond or depositing surety. Evidently the Covenant was chosen and in General Condition #2 is the sentence ‘failure to so complete shall result in the automatic rescission of the approval of the Definitive Plan by the Board, unless the Board extends said period’.

Also in the Definitive Decision is Special Conditions #22 which is clear cut, ‘failure by the applicant to complete the construction of the way and the installation of the services shown on the Definitive Subdivision Plan within four (4) years of the date of endorsement shall result in the automatic rescission of this approval’. The time for such construction and/or installation may be extended upon the written request of the Applicant, for good cause shown, prior to the expiration of said four (4) year period, and upon a vote of the majority of the Planning Board then present.

Mr. Philpot further explained that the time was extended through a couple of authorities; one was this Board and one was the Commonwealth of Massachusetts Permit Extension Act for a total of twelve years and the project is still not completed. A year ago this past May, the applicant came before the Board requesting an additional year extension. At that meeting of May, 2016, the applicant gave the Board a short list of things to complete the project. At that meeting, Mr. Pineo requested a schedule timeline for completing which the applicant submitted a written timeline for completing these items, all of which would be done by the onset of (last) winter. Once again this May, 2017 the applicant requested an extension at which point the Board voted no.

Going back to General Condition #2 and Special Condition #22, this Board is forced into a corner. We have no other recourse and the reason is because there is no surety in place to protect the Town and to make sure that road is complete and everything is done according to Town

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(A) The Owner shall not convey or transfer title to any lot within this subdivision. A lot was sold for \$125,000 cash. (B) The Owner shall not build upon any lot within this subdivision. A house is being built on the lot that was sold. So it is evident that the Covenant is meaningless.

Mr. Philpot again asked what other choice does the Board have. Twelve years of accumulated time. The Board was given a short list. When Haley & Ward went on site they found what the applicant indicated to be about \$5,000 to \$6,000 of work to be done to complete the project was over \$19,000 worth of work to complete the project.

Mr. Santoro mentioned that there was a mortgage shown on property on Lot #2 for approximately \$9,900. So again there is no recourse.

Mr. Mike Padula of Heywood Road had a question. There is a house built on that road and it should not have been built because of the Covenant. Why did the Building Inspector approve a building permit? Mr. Philpot stated that it was issued in error. So if the Board does not approve an extension and Mr. Pichierri bails what happens? Do the taxpayers pick up the tab? Mr. Philpot stated no. Mr. Philpot stated he was not here to suggest what options are out there. The Board is here to address the issues at hand which is the Covenant has been violated twice; 1. With respect to the owner, his rights, duties and obligations, and 2. The expiration of time.

Attorney Stephen Philbin stated that the Subdivision Control Act seems to be perfectly clear. If you are going to work to rescind a subdivision, you have to take the same steps as you did to approve the subdivision which requires that you do advertising once in two successive weeks and no less than fourteen days prior to the hearing, send notices to all of the abutters and in addition to that it has to be a public hearing in which you allow people to give testimony on it as well.

Attorney Philbin stated the notice of this meeting is dated June 13, 2017 for a meeting scheduled for June 19, 2017, not even six days' notice of this meeting. The statute also says that no rescission shall take effect on lots within a subdivision that have been sold or mortgaged in good faith or valuable consideration without consent of the mortgagor or with purchaser. There are two people who are going to be late for this meeting Robert and Gail Lent. Their bank is Fidelity Cooperative Bank with a mortgage of \$225,000. Their property is Lot#3 of this subdivision. They are not here to consent and the owners of the other lot have not consented. The question of good faith is only if it was a conveyance or mortgage for valuable consideration. Good faith means it wasn't done fraudulently. In addition we have the sale of Lot #1A to the Charets and that was for \$125,000 on January 17, 2014 after the subdivision was approved. It should be noted that was for valuable consideration. Mr. Santoro asked if Attorney Philbin could explain that to him. Attorney Philbin explained good consideration was given to Mr. Pichierri for the purposes of him signing a note and mortgage to Attorney Philbin whether it was money or services consideration was exchanged. In addition to this Mr. Pichierri was divorced from his wife and there is a judgement in the Worcester Probate Court that says the wife will receive from the sale of lot 2A the sum of \$85,750. If lot 2A disappears then her judgement from the divorce disappears as well. Mr. Charette is affected by the lot that he paid \$125,000 for and Gail and Robert Lent are affected because they purchased a lot through Fidelity Cooperative Bank a

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mortgage for \$225,000. Attorney Philbin stated all of this cannot happen because you revoke a subdivision and give a notice on June 13, 2017 for a meeting to be held on June 19, 2017 to rescind a subdivision. No bank will ever lend any money to anyone on an un-approved subdivision. If the Board revokes the subdivision, the Lents will have a substandard lot. All of Mr. Pichierri's property at this time is for sale, that's the good faith he has shown. There is a small amount of money to complete the subdivision. Mr. Pichierri went out to his property with the Board's engineer for a site review and completed the things that he could afford to do. Mr. Pichierri is going to need some money to finish this project.

Attorney Philbin stated again the case law seems to be clear that you cannot revoke a subdivision without the written consent of the banks that have lent money for the approved subdivision. Owners have purchased property based on the Planning Board's approval. If the Board is going to rescind then you are required to hold a public hearing per MGL Chapter 41, 81W and 81T.

Mr. Philpot stated he spoke with Town Counsel Carolyn Murray, Esq. of KP Law at length about this and interestingly enough neither (Chapter 41) 81W or 81T mention anything about an automatic rescission clause. It has been written into the decision as well as the Covenant which was recorded at the Worcester Registry of Deeds. It is Attorney Murray's opinion that Board is not required to go through a formal hearing process as we are not invoking 81W or 81T. The Board is invoking its rights under this agreement.

Mr. Philpot stated that this Board is dealing with the Covenant that is derived from the definitive subdivision. We are not invoking 81W or 81T; we are invoking the written agreement. The Sterling Planning Board and the applicant signed this agreement.

Mr. Pichierri stated that what the Board is doing is affecting everybody else including mortgage lenders. Mr. Philpot stated that is certainly true. Mr. Pichierri's questioned whether notices were sent to banks. Mr. Philpot responded that he spoke extensively the Town Counsel and she was clear that the Board was not required to send formal notice or hold a public hearing because they were not acting under 81T or 81W. They were simply enforcing the terms of the written contract – the Definitive Decision – between the Town and him – Mr. Pichierri. Further to the point there is a 2004 email from Mr. Mark Brobowski, Esquire, well known as an expert in Law. He writes here the definitive plan decision calls for the completion of all infrastructures in a fixed number of years. The period has now expired and is not extended. The definitive plan decision (as is our custom) contains an automatic rescission provision. The plan may be reestablished as an approved plan after resort to the procedures of MGL Chapter 41, Section 81W. At this point he says it may be reestablished which clearly infers that it has already been rescinded. He clarified that it would be the applicant who makes the request and pays the fees to modify the rescinded decision. The Board then must hold a public hearing and notify all appropriate parties of interest with respect to reestablishing the plan.

Attorney Philbin asked about the Covenant and the fact that the Lents were not given notice about this Covenant. Mr. Philpot responded that it is not this Board's responsibility to give notice to people about what they are buying in terms of real estate.

Mr. Philpot stated that this Board wouldn't be here if the applicant, Mr. Pichierri, had simply honored his agreements with the Town, had abided in the Covenant and had performed in

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accordance with the Definitive Decision. The Board didn't bring this on. This is a reaction of this Board to the situation that was presented to us.

Attorney Philbin stated that Mr. Pichierri has just about everything on the market for sale. But right now it is a soft market.

Mr. Philpot stated this has been discussed on two previous occasions with Mr. Pichierri (May, 2016 and May, 2017). The applicant's personal and business finances are no business of this Board. What they can or cannot afford is none of the Board's business. The reason Mr. Philpot says this is simple; if you were standing here presenting a plan for approval and this Board said we would like to add six or seven more things on there that were not necessarily required but we know you can afford, and I was interrupted by the applicant twice who stated what I can afford is none of your business. I agreed, and therefore what you cannot afford is also none of our business. We had an agreement which was violated.

Mr. Philpot stated that the only leverage that this Town has to ensure completion of the road is the Covenant which was ignored and violated. The only choice this Board has with its back against the wall is to invoke the automatic rescission that is stated in the Covenant and also in the definitive plan.

Mr. Philpot stated that twelve years to complete a subdivision is more than sufficient time. The Commonwealth created the permit extension act of 2010. Two years later they said things hadn't turned around so they renewed it again in 2012. Since then, they have not renewed it which is an indication that they recognize that things have turned around.

Mr. Padula stated that this is Mr. Pichierri's forte. Mr. Padula was on the Planning Board for over ten years. Mr. Pichierri had a subdivision off of 140 which was never finished. It took Mr. Pichierri six years to put a street sign up. This is what Mr. Pichierri does all the time.

Mr. Santoro asked Mr. Pichierri if he was on this Board as a developer and also was the Chairman at the time a relative of yours. Mr. Pichierri indicated yes.

Mr. Pineo asked knowing there was a Covenant and the conditions of the Covenant stated that the road would be completed before any sales were completed, where was the good faith in that? Did Mr. Pichierri tell these people that they were purchasing a property that didn't have an accepted road and that they was an existing Covenant?

Mr. Pichierri asked how many subdivisions were approved that waited until the road was accepted before they sold their first lot. Mr. Pineo stated they did not have a Covenant agreeing to it, they had a cash bond and kept their escrow up to date.

Mr. Philpot reminded everyone that as we sit here tonight, this account is approximately \$480 in arrears and no balance in a review fee account which requires a \$2,000 ongoing balance until the completion of the project.

Mr. Pichierri questioned why there was no notice on the Board's engineer performing a site review. Mr. Santoro stated they had requested a site review because the Board wanted to

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confirm that the outstanding cost for completion coincided to Mr. Pichierri's estimate of completion that was submitted in May, 2017.

Attorney Philbin asked about what will happen to the building permit that was issued in error will this be revoked? Mr. Philpot stated that would be up to the Building Commissioner (IRC #105.6).

Mr. Padula stated that Mr. Pichierri knew that he should not have gotten the building permit and that he knew about the Covenant. Mr. Pichierri stated that the Building Inspector has performed a half a dozen inspections on the property. Mr. Santoro stated that he had confirmed with the Building Inspector that she has not been at the property in over a year. Mr. Philpot stated that the status of that building permit is not the responsibility of this Board. The building permit was issued in violation of the Covenant Section 5B which states 'the owner shall not build upon any lot within the subdivision'. He also mentioned that the Building permit was issued without any knowledge of this Board. At one point in time, this Board was included in the signing off of building permit applications but it is no longer the case. We are not sure when or who made this decision.

Attorney Philbin stated his biggest concern was that the Lents purchased their property after the subdivision had been approved but the Covenant had not been recorded at the Registry of Deeds. Mr. Santoro said this was a question for Attorney Philbin's client, not the Board.

Mr. Padula asked if Mr. Pichierri and Gail Lent were partners on that piece of property and she didn't purchase it out of the clear blue. Mr. Pichierri stated she had to purchase 65 feet of frontage which changed from Heywood Road to Primrose Lane. Mr. Philpot confirmed that Robert and Gail Lent along with Mr. Pichierri were listed as applicants on the definitive plan subdivision application.

Attorney Philbin feels Ms. Lent should have a chance to be heard. Mr. Philpot stated that at last Wednesday's meeting, the Board was discussing \$2,400 from Mr. Pichierri whose response was 'you can ask for all sorts of things but that doesn't mean you are going to get them'. That doesn't suggest a very cooperative or open approach and yet if I were to reflect that you wouldn't feel too good about that would you?

Attorney Philbin expressed his concern about giving the Lents time to be heard. Mr. Philpot stated once again that this Board was not required to notify anyone but they did as best they could. Attorney Philbin requested that this meeting be postponed or extended to another date so that Ms. Lents will be heard.

Mr. Philpot moved that the Board invoke Special Condition #22 to Automatically Rescind the definitive subdivision of Primrose Lane. Mr. Pineo seconded the motion. The motion passed unanimously.

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### **Administrative Assistant's Reports/Notices**

#### **1 North Cove –**

In an email to the Board, Ms. Culgin inquired about frontage for 1 North Cove. The Board indicated that legal frontage is determined by Zoning Officer. Mr. Pineo will discuss with Sarah Culgin.

#### **8:30 P.M. MOTION TO ADJOURN**

Mr. Philpot moved that the Board adjourn. Mr. Pineo seconded the motion. The motion passed unanimously.

#### **APPROVED BY:**

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