



TOWN OF
STONEHAM
MASSACHUSETTS

PLANNING BOARD
781-279-2695

STONEHAM PLANNING BOARD EXECUTIVE

SESSION MINUTES

(in accordance with provision of M.G.L. c.30A, §§ 18-25)

Tuesday, January 30, 2024

Remote Meeting

9:30 AM

Members present remotely: Kevin Dolan, Daniel Moynihan Jr and Marcia Wengen

Also present remotely at the meeting: Town Counsel Attorney Robert Galvin, Town Administrator Dennis Sheehan and Town Clerk Maria Sagarino acting as Planning Board Clerk.

The Vice Chair brought the meeting to order at 9:33 AM. Mr. Moynihan made a motion to go into executive session to discuss strategy with respect to all pending litigation where an open meeting may have a detrimental effect on the bargaining or litigating position of the Town and the chair so declares; pursuant to M.G.L. c. 30A, sec. 21(a)(3) to wit: 62 High Street (Estate of Virginia L. Isola by and through its Executor, David J. Crotta v. Town of Stoneham). Ms. Wengen seconded the motion. A roll call vote was taken and all members present voted in favor 3-0.

Attorney Galvin explained that there had been a decision in the Isola case against the Town and a judgment was entered at the beginning of January essentially spelling out that the inclusionary bylaw with respect to 62 High Street is invalid. It conflicts with Subdivision Control Law which results in a taking of land. He reminds the Board that they had previously discussed this case with the Board when it was filed. Mr. Galvin goes on to say that there is not a lot of land left in Stoneham. So maybe we shouldn't worry about appealing. He had discussions with Attorney Houghton and Attorney Houghton has offered that if the Town does not appeal this decision, they may offer money as a donation for the affordable housing trust.

Attorney Galvin continue to say that he had received a dozen calls from municipal lawyers asking what it would do to their communities as they have similarly drafted inclusionary bylaws. KP Law alone represents 62 towns. It is felt that Judge Rubin may have misapplied the law. There are no other pending challenges. Mr. Galvin also spoke to Nicole Caprioli an Assistant Attorney General for the Municipal Law Unit who stated that the AG has not formed an opinion and they are not sure what they will do. They stand behind their approval of the bylaw when it was sent in.

Mr. Galvin also spoke to Attorney Jon Witten who had worked with the former Planning Board Chair Gus Niewenhaus on the bylaw based on a bylaw that had been written by Bob Ritchie, the former director of the Attorney General's Municipal Law Unit. This bylaw had been shared with dozens of communities.

Mr. Galvin turned to the Judge's decision that the bylaw restricts the use of property. You have to be uniform, you can't be arbitrary. This is rationally related. There are things you can do

under the Home Rule Act. Mr. Galvin goes on to say that Towns have subdivision rules and regulations and the Subdivision Control Law. Streets and Ways have to be built to certain minimum specifications. Zoning and subdivision go hand in hand. Roads look like this - they have utilities, trees, site line, sidewalks, unless you waive anything. The bylaws make sure the lots are a certain size and dimension. There is a use restriction. Is there enough frontage under the bylaws? If you meet all of those standards, it is approved but maybe with conditions. The inclusionary bylaw stated that if you divide or subdivide into 8 lots or more you apply for a Special Permit to ensure that 10% are affordable or seek a payment in lieu of. The argument is that the Special Permit is illegal and results in a taking. Mr. Galvin disagrees. The Planning Board is wearing two hats. They act first to approve the subdivision. They act again as Special Permit granting authority because the Special Permit would be required to get the building permit. It appears that the Judge is looking at it as if the subdivision approval required the Special Permit. Mr. Galvin feels that is where the Judge made the error.

Mr. K. Dolan stated that there are nuances to this. He mentioned that the Board had subsequently changed the bylaw. The current bylaw is different. Mr. Galvin added that they made their application under the old bylaw. With the new bylaw, they can buy their way out of building affordable units. Mr. K. Dolan continued to say that most of the Board wanted the affordable bylaw and wanted to try to get to the 10% safe harbor. We have Weiss and the hospital. The 40B and the 40A problem should be solved. He adds that with the inclusionary bylaw the Board was really only thinking about townhouses, condos and apartments. Doherty's Lane and Wincrest had already been built. They weren't thinking of single family homes. Now we know, so we redid bylaw.

Mr. K. Dolan wonders why we would be thinking of appealing. Mr. Galvin explained that he can't promise there wouldn't be a challenge to the new bylaw. Mr. K. Dolan asked Mr. Galvin if he believes the Judge made the wrong decision. Mr. Galvin does believe it was the wrong decision. With the statement about it being a taking. Mr. K. Dolan said that you could call anything a taking. Mr. Galvin explains that it is only a taking when it deprives the owner of all potential use. This is not a taking at all. The Judge clearly misread the bylaw by thinking that you couldn't get approval until you get the Special Permit. That is not the case, obviously. They just got their subdivision approval from the Planning Board without having a Special Permit. Mr. Galvin brings up the Wall Street Development v Westwood case. You could not get approval unless you got a Special Permit.

Mr. Moynihan asked about the Symes case. Was that not appealed? This is similar imposing two lots to be affordable. You aren't taking but minimizing. Mr. Galvin responded that the Symes case required lots to be open space under the subdivision rules and regulations. Not the case in Stoneham. It was the bylaws, not the subdivision rules and regulations.

Mr. Sheehan asked if the decision affects the new version of the bylaw. Mr. Galvin stated that is to be determined. Someone could argue the amended bylaw doesn't comply. Mr. Moynihan said that this new bylaw, however, would be a practical reason not to appeal.

Mr. Galvin added that appeals are to encourage a monetary offer. The converse is true here.

Mr. Sheehan asked what they Attorney General might do. Mr. K. Dolan asked if they had standing to appeal. Mr. Galvin stated that they do. MGL Chapter 240 Section 14A states a specific process for challenging the validity of a bylaw. You must notify the Attorney General's

Office as an interested party. They can elect to participate. Nicole Caprioli stated that if they received notice, she knew nothing about it.

Mr. Moynihan asked if there was an appetite for appealing. Mr. K. Dolan deferred to Mr. Galvin and Mr. Sheehan for a settlement agreement. Ms. Wengen asked about the cost of appealing. Mr. Galvin said it would be about \$10,000 to do the brief and argue the case.

Mr. Sheehan stated for Friday they could just file a notice of appeal. Mr. Galvin stated that would take all of ten minutes to do.

Mr. Moynihan made a motion to have Mr. Galvin and Mr. Sheehan settle by Friday or we will file a notice of appeal to continue towards a settlement. Ms. Wengen seconded. A roll call vote was taken. All members voted in favor 3-0.

Mr. Moynihan made a motion to adjourn which was seconded by Ms. Wengen. All members voted in favor.

The meeting adjourned at 10:16AM.

Respectfully submitted:

Maria Sagarino

Town Clerk

Documents and other exhibits used by the Planning Board during this meeting to be made part of the official record but not attached to these minutes:

Town Code, Chapter 15 Sections 4.25 and 6.12 (Inclusionary Bylaw)

Estate of Virginia L. Isola v Town of Stoneham Judgment by Judge Diane Rubin, Land Court, dated January 4, 2024