

TOWN OF LEVERETT - PLANNING BOARD MEETING MINUTES

October 9, 2024, 7:00 PM

Meeting attendees:

Richard Nathhorst, Greg Tuzzolo, Swan Keyes, Kimberly VanWagner, Molly Daniell, Jacob Park

Absent: Tim Shores

Meeting called to order: 7:00pm

1. Approve minutes from September 11, 2024 meeting
So moved; seconded; approved 6:0
2. Laurel Hill Drive ANR (20 minutes)
Randy Elser, 32 Laurel Hill Drive; driveway moving from adjacent lot; granted a special permit by Zoning Board of Appeals; filed with Franklin County
Vote that proposed ANR does not constitute a subdivision and approval not required
So moved; seconded; approved 6:0
What about the fees? Attorney sent \$100; Greg will ask Lisa
3. Long Plain Flea Market
 - a. Suggested: tabling because no requester present
 - b. Same concern came up in May 2023 meeting; PB has no opinion and Greg will let requester know to go to ZBA and talk to abutters
4. Comprehensive Plan Update
 - a. Draft Letter: Molly took the lead and presented a final draft version for approval
 - b. Discussion on readiness to vote to include the cover letter as part of the release of the comp plan
 - c. Clarify the process: we are formally adding something to this document which we would post on website and post to LC and get the word out; put this on letterhead; Greg can sign
 - d. Would this initiate another round of public review and feedback collection?
Discussion summary: let's vote on the letter to join the draft comp plan; should we update language in letter to clarify process/timeline and make clear that it is a draft; OR, the letter could be a "flier" to invite structured way to receive feedback; online survey; as simple as a Google Form; with accommodations for non-online eg submit comments in writing; what do we want from the feedback? all we can do is memorialize into the appendices like all the other feedback; Should we adopt the plan if we aren't accepting more feedback/incorporating more feedback? No, time to wrap up this phase of the process and note that concept of final official comprehensive plan is already being used as the basis for decision

making eg the kittredge property; is an option that we acknowledge the plan as a work in progress; adopt as a draft and “draw inspiration from”; Molly could draft some kind of conclusion, we could release the draft plan with the letter referencing that this is a draft to “draw inspiration” from; add “draft” to the word plan throughout the letter to emphasize this

- e. Richard - move to accept the letter with an additional paragraph making clear that the plan is a draft and we will draw inspiration from it; and release the plan as a draft; so moved; seconded; 6- 0.
- f. Once that is ready, we can release the plan, and then decide if we want another round of feedback, how to incorporate, and whether/when to vote on a final plan

5. Kittredge Update

- a. Jacob - lack of clarity of COI; perhaps proximity abutting abutter; exemption for matters in which more than 10% of the Town but no data to that effect; JP intends to seek info from State’s Ethics Commission and asks SB to meet with Attorney Costa; so refraining from conversations
 - i. But on a meta-level, there should be no sense of urgency
 - ii. Request tabling discussion until ethics commission has responded to JP
 - 1. SB sent reminder to property owner
- b. Costa attorney meeting
 - Summary Notes: at bottom and send to Adam for review prior to submitting as part of the minutes
- c. MOU - tabled pending outcome of Jacob’s COI question
- d. On hold with Kittredge discussions on future PB agendas until Jacob’s COI question clarified and the property owner responds to SB

6. 2025 Zoning Bylaw Changes

- a. See Tim’s notes Here: please see [2025 Zoning Bylaw Changes](#). [suggested]
- b. Timeline to bring to Town Meeting
 - i. Draft the language - for this step we need to divide the work
 - 1. Richard - Floodplain and Ground Mounted Solar
 - a. There are some that we should not touch - storage, Rattlesnake, bus terminal
 - 2. Molly will draft ADUs
 - 3. Greg will draft Kennel and how we hold a hearing guidelines and processes
 - a. Carol - including posting in written publications
 - b. Carol - also Board of Health coordination
 - i. Maybe Molly and Richard could coordinate that approach
 - 4. Aim to have public hearing in December for 11th meeting
 - 5. 4 priorities

- a. ADUs
 - b. Solar GM
 - c. Kennels
 - d. Floodplain
 - ii. Public hearing(s)
 - 1. Need to hold them properly
 - 2.
 - iii. Town meeting vote
 - 7. Walk-In Business
 - Rattlesnake Gutter - select board knows we have no jurisdiction and we are not taking any immediate action to change the language in the overlay plan
 - the road was not in the plan
 - they will either get their permits or they won't
 - request for determination of applicability ?
 - the work to be completed is not in violation of the bylaws but the planning board is not going to vote on it because we have no jurisdiction
 - Richard has no objection to the project
 - Each attending board members declares they have no objection to the project
 - this is for CPA process preparation
 - Select Board participation
 - Need for a Vice Chair assigned to participate and comment at SB meetings
 - Somebody from planning board is supposed to be on CPA as well and that is Vice Chair
 - Vice chair also speaks for the board when the Chair isn't around and chairs the meeting if Chair is absent
- Richard nominated, seconded: Unanimous vote for Richard!

Meeting between Attorney Adam J. Costa and Leverett Planning Board members Greg Tuzzolo, Swan Keyes, and Tim Shores

10/2 12pm to 1:30pm

Informal minutes taken by Tim Shores

Highlights:

- Adam Costa has a lot of experience with 40B cases.

- When considering an appeal to a ZBA's denial of a 40B comprehensive permit, Housing Appeals Committee (HAC) usually sides with the applicant (the property owner or developer).
- Whether it's an unfriendly or friendly 40B, the process is designed by the state to be truly comprehensive, waiving any local bylaws and ordinances. For example, this could include commercial use in a residential zone, without requiring the town to change zoning. A Selectboard can use a LIP to control these outcomes in a friendly 40B, and ZBAs nearly always follow the Selectboard's lead. A ZBA can assert conditions to control these outcomes in any 40B, however these could be appealed to HAC.
- Whether it's a friendly or unfriendly 40B, a Planning Board has no official role or jurisdiction for decision-making. If a Planning Board advises the Selectboard or ZBA, the advice is not binding, and it should pertain to the normal scope of a Planning Board:
 - Potential outcomes of noncompliant principal and accessory uses, lot dimensions, and other general regulations specified in the zoning bylaw and subdivision regulations.
 - If the town has a Comprehensive Plan, advising the alignment between the proposed development and that Plan.
- COIs are case-by-case, and if the Selectboard allows it, Adam will provide counsel to any official with a potential COI.

Full notes:

- Adam has worked on over 100 40B cases. The pandemic put a damper on this workload in Massachusetts, but they've been increasing recently.
- Adam attended one Selectboard meeting in August. From Margie, he received a LIP application, an aerial photography "master plan", and Zillow listings for the properties. The documents he has seen show a plan with 165 units in Leverett, plus the existing buildings, and 250 or so in Amherst.
- Adam doesn't know when he'll meet with the Selectboard again. He's waiting to hear back.
- Greg provided some context:
 - Greg, some Selectboard members, ConCom members, and community members took a tour of the property. Last December, there was an informal public presentation at the elementary school by a representative of the property owners.
 - Selectboard has requested more concrete info from the owners: financing, development, experience. Adam reviewed that letter before it was sent. Seems there has not been a response, although Greg just heard from a Selectboard member at the Transfer Station that the owners replied to say that it will take them a long time to respond to these questions.
 - The Project
 - What pace can we afford to go at, at this stage? We don't want to fatigue ourselves, we also don't want to be underprepared.
 - Adam:

- It works better to be proactive instead of reactive.
 - He has not yet been asked to do a careful review of Town code or bylaw, but he suspects the only options for permitting this kind of dense development would be rezoning, perhaps by following 40R smart growth zoning; Or a chapter 40B application for a comprehensive permit that waives local ordinances and bylaws.
- With two towns, the developer has to deal with both towns separately but must choose the same path with both (such as a friendly or unfriendly 40B).
- Neighbors are permitted to file their own appeals.
- To reject a 40B a town needs at least 10% of its housing stock to be considered affordable. Leverett falls far short at .25% but Amherst has over 10% so they have no obligation to accept a proposal. And Amherst would provide sewage so without them the project cannot proceed.
- Despite Leverett's very limited stock of affordable housing, where we have leverage under section 6, designation of "Large Project" due to high ratio of proposed units to the town's overall existing units, so this may give us solid grounds to reject the project if that is the decision the selectboard comes to.
- When appealing 40B comprehensive permit denials, Housing Appeals Committee (HAC) has sided with the developer 17 out of every 18 cases, so the Town should avoid denying a permit that can be appealed to HAC.
 - Friendly 40B is one way to do this, driven by Selectboard.
 - The other way is for the ZBA to invoke safe harbor from 40B, which would mean the application is not within the jurisdiction of HAC.
- 40B paths
 - Unfriendly 40B: Developer sends an application to the state; In making a preliminary determination of eligibility, the state sends a letter of inquiry to the Town; Once preliminary determination of eligibility is received, the applicant applies to ZBA for Chapter 40B comprehensive permit (180 day clock); Once issued, the State reviews the comprehensive permit for compliance with the preliminary determination of eligibility.
 - Friendly 40B, using a Local Initiative Program: Applicant works with the Town Selectboard to review LIP application and get approval; then applies to the state and ZBA using the same procedure as Unfriendly. It is very rare for a ZBA to deny a comprehensive permit if a Selectboard has approved it at the outset.

- Selectboards want to know more information than what shows up on the LIP. Is there a standard that we can use for LIP?
 - [Falmouth LIP application](#), [Harvard LIP application](#), [Barnstable LIP application](#)
 - Other municipalities with LIP projects are listed in this 2021 presentation on LIP from what was then the Department of Housing and Community Development (see slide 12): <https://www.housingtoolbox.org/assets/files/resources/LIP-Presentation-2-24-21-DHCD.pdf>
 - Adam suggested that these three towns may have been served by similar attorneys. He recently developed a process for Chelmsford and Boyleston in which he reused content from his past work, and would likely reuse this work for a Leverett LIP process, if asked by the Selectboard. State law defines no process or standard, and he's not aware whether state agencies provide resources, like a LIP process template.
- Amenities as adjacent use to the housing: Would that require PB to engage outside of 40B to approve use? Or would the 40B waiver encompass that non-residential use?
 - Per Adam, 40B can allow commercial uses, although use cases are not specified by the statute. In practice, it's the result of decision-making by the Selectboard during a LIP, and by the ZBA during the comprehensive permit process. These are the primary determinants of uses that can proceed without changes to zoning or ordinances.
 - Adam confirmed that the Planning Board has no official role in a LIP or 40B process. Greg explained how the Selectboard has asked PB to take on specific advisory tasks, and we've spent time working out what that ask is, and what we think it should be.
 - Greg and Tim described the problem: PB wants to avoid providing advice that is misconstrued as an exercise of authority that the PB doesn't have.
 - Adam replied, there are no guiding standards or obligations of a Planning Board in a 40B/LIP situation, and the buck really stops with the Selectboard. Any work done by other Town boards and committees is more a matter of messaging and communication, providing non-binding advice to the Selectboard, and informing the public of what's happening. This applies to any internal MOU that's agreed to: such a

document doesn't change the fact that the PB has no official decision to make in relation to 40B or LIP.

- Questions on dealing with COIs
 - It's a unique area of the law. In most instances, as a town counsel, Adam replies directly to the appointing authority, i.e. Selectboard. Every situation is unique, and the COI law is the relevant guide for what counts as a COI and relevant procedures.
 - In an individual case of COI where the lines are blurred, the official herself may decide that recusal is the simplest option, and perhaps the ethical option. It may be simpler to recuse oneself than to put in the work of getting an opinion from the State Ethics Commission.
 - Adam is happy to talk to any official about possible COI, provided the Selectboard approves it. An official with a potential COI has two options:
 - Get a formal opinion from town counsel, who would send a copy to the State Ethics Commission. If the Commission does not respond within 30 days, it is treated as an opinion approving a COI exemption in that specific case.
 - Or the official could bypass town counsel, and write directly to the state ethics commission for a formal opinion, with the same 30 day clock.
 - Once you have the Commission's opinion in writing, you have a solid case for whether it's appropriate to exempt oneself from recusal.
 - COI guidance indicates that an official with a COI may exempt herself from recusal if the matter has a financial impact on 10% or more of the town.
 - Tim asked: If this matter concerned redevelopment of a \$1M property, it would have a smaller scope of financial impact, and we likely could not claim that it has financial impact on 10% of the town. However, this matter concerns redevelopment of a \$10M+ property, with significant acreage in the most densely developed part of Leverett. Is it reasonable to say that this will impact 10%+ of the town, financially, and therefore an abutter could claim exemption to COI? How does one determine the percentage of financial impact?
 - Adam replied that COIs and exemptions are always case-by-case.
 - It's true that widespread effect of a matter removes the obligation to recuse oneself from deliberation and voting. A typical example is a tax change that affects a large number of properties, including one's own.
 - In this case, the financial impact is not clearly defined --- one would not see a change to tax bill, property

value, or household expenses that could be demonstrably attributed to the development.

- There is no bright line demarcation of when the Ethics Commission renders an opinion in support of the COI exemption. It's also up to the individual official to decide whether to recuse. That official must simply write to the Commission, and get an opinion.
- Since the Planning Board has no authority in this matter aside from providing advice, the consequences of non-recusal are minimal --- Adam has no serious concerns. This is not the same standard that he would apply to Selectboard or ZBA members with COIs: in those cases, their non-recusal can make the Town legally vulnerable.