Whately Planning Board

Minutes of Virtual Meeting

February 22, 2023

Present: Members Don Sluter, Judy Markland, Sara Cooper, Tom Litwin, Brant Cheikes

Members Absent: none

The meeting was held remotely, via Zoom.

Virtual Guests:

Christopher Chamberland, Berkshire Design, Jared Glanz-Berger, DMCTC

Call to Order: 5:00pm

The meeting was recorded.

**Discussion: Review of progress on zoning map changes**

Don sent Ryan Clary everything he had on his home computer and said it appeared that Ryan has used the information to update the digital property/zoning map on the town website. Brant received an email from Ryan indicating he was waiting to hear back from Don about some questions on the aquifer overlay district. Brant will forward Ryan’s email to Don so he can close the matter.

A map was approved by the Attorney General in November 2021. It was posted online but had errors and was misleading. Although the map may now have been fixed, it still has not been voted on and approved. We should remove the zoning layer from the assessors map layers until another map has been voted in, since it it does not include the aquifer overlay district. For the map posted on the PB webpage, Brant will draft a warning to put on the map saying, in effect, “You can follow this link to use the map, but be aware that the map has known errors” and Judy will get it posted. Brant will work with the town clerk or her assistant to get the right arrangement on the town website. Separately, the board will work with the assessor to get the zoning layer removed from the assessors’ map until this is straightened out.

**Discussion: potential zoning bylaw changes**

**Proposed bylaw change to add a separate, new category to the Table of Uses:**

**Marijuana Product Manufacturer (Limited)**.

Chris Chamberland said he and Jared Glanz-Berger had come to talk informally about some potential text for the zoning bylaw change to be requested by Debilitating Medical Condition Treatment Centers (DMCTC), and also to clarify how this procedure works and to explain their position for advocating on behalf of these changes.

Jared Glanz-Berger said that previously, he mentioned types of manufacturing uses that DMCTC thinks ought to be allowed in the commercial zone, differentiating between what they are calling “light” or “limited” marijuana manufacturing and “heavy” or “unlimited” marijuana manufacturing. He stated that there are types of activities and materials that marijuana product manufacturers use that are flammable or hazardous (as listed by an authoritative entity) and more dangerous than others, that require classified spaces and hazardous materials approvals and credentials, and said they are suggesting that those ought not be allowed in the commercial zone, but that activities like the filling and capping of products, the use of ice water baths for hash production, or the rolling of joints ought to be allowed in the commercial zone because they don’t pose the same sorts of risks. He said Chris Chamberland has written the proposed text for their request that these kinds of activities be allowed under the Whately marijuana bylaw.

Chris Chamberland shared onscreen a document emailed February 20, 2023 to the planning board, which uses the format and language of the bylaw to describe the kinds of activities they are requesting be permitted. DMCTC proposes to leave the original Marijuana Manufacturer use unchanged. The activities defined there now (everything between cultivation and delivery for retail use), which go along with the Marijuana Manufacturing license, would continue to be covered under the General Marijuana Manufacturer category, which is currently allowed by special permit in the Commercial/Industrial and the Industrial zones.

DMCTC’s proposal would then carve out a separate, new use, Marijuana Product Manufacturer (Limited). They suggested “Limited” instead of “Light” because the Table of Uses already has a category of “Light Industrial” and they wanted to avoid confusion. This category would cover a subset of manufacturing activities which are less intensive and don’t have certain hazardous materials associated with them, which could then be performed not only in the Industrial and Commercial/Industrial zones, but also in the general Commercial zone. The proposal also addresses setbacks and some additional requirements.

Chris Chamberland read the entire proposal. Brant explained his understanding of DMCTC’s position this way: that this subclass of activities behaves much more like the other commercial uses that Whately permits within the Commercial zone by special permit. Chris Chamberland agreed that this was a good restatement. He also noted that the state’s category of Marijuana Manufacturer is broad enough to include activities that are truly industrial, such as might be seen on a large factory floor. On the other hand, he compared DMCTC’s proposed category to that of a chocolate shop that uses a small commercial kitchen to produce food items. There is a little cooking, but not a large factory process. Jared Glanz-Berger compared their type of operation to businesses in town such as Tea Guys, or Muffin’s. Chris Chamberland mentioned that one of the most benign processes planned for their 3 River Road location will involve putting plant materials into a barrel of ice water and stirring it for a while, then filtering it. He said the language he chose for the proposal is intended to provide a reasonable demarcation between the industrial and the commercial without leaving a large amount of gray area that will confuse people about what’s in and what’s out.

Brant referred to issues of community trust, especially involving future Marijuana Product Manufacturers (Limited), such as a company that starts doing business in a limited way but then scales up beyond that, behind closed doors. Jared Glanz-Berger observed that it would be hard to hide such activity because if a company were using pressurized gas in the process, to do it right they would need to get permission and even if they didn’t, people would see the gas tanks coming and going and that would draw the state fire marshal’s attention. Chris Chamberland added that there would also be an electrical fire code problem. Mr. Glanz-Berger and Mr. Chamberland described some of the regulation of hazardous locations, with code C1D1 as the highest “classified space” designation – for situations *likely* to have air concentrations of ignitable fumes, and C1D2 for an area that *could* create ignitable fumes but uses mitigation methods that would have to fail before ignitable fumes could accumulate. Besides gases, Classes 2 and 3 cover such air concentrations of dust or fibers. They stressed the seriousness of violations of these regulations and the attendant penalties, adding that DMCTC’s proposal recommends against allowing *any* “classified space”. Chris Chamberland asked Jared Glanz-

Berger whether there are processes that involve hazardous materials which are not so regulated and was told No, the company is really seeking to regulate such things as ethanol, propane, butane – things that require third party inspection to certify correct installation with all required safety measures in place.

Judy asked how the risk of the proposed type of operation compares to that of a marijuana testing operation. Jared Glanz-Berger replied that they are about the same. Judy stated that marijuana testing operations are not allowed in the Commercial district. Mr. Glanz-Berger asked about the reasoning behind that position, and Judy said she thought the reason was to keep commercial businesses in the Commercial district and to allow space for them, while putting manufacturing and operations like bio-testing in more industrial zones. Mr. Glanz-Berger said that perhaps they could talk about also adding marijuana testing operations to the list of allowed activities since its space is similar to a cleanroom where liquid chromatography, a non-hazardous process, is performed.

Chris Chamberland read three selections from page 10 of the Bylaws, ~ 171-8. Table of Use Regulations, Light Industrial Uses:

“Warehouses, wholesale trade and distribution, bulk storage or the storage of materials, merchandise, products or equipment, provided that the use is within an enclosed building and is not hazardous

Enclosed assembly, bottling, packaging or finishing plants of nonhazardous materials

Other light industrial uses not involving the use of hazardous materials as a principal activity, provided that the use will not be offensive, injurious, noxious or hazardous”

He commented that these general uses are pretty consistent with the uses under discussion, and are currently allowed by special permit in the Commercial zone.

Judy noted that where we do have prohibitions against hazardous materials, they have been defined in terms of the DEP’s hazardous waste regulations which are in the National Electric Code (specifically 310 CMR 30) and not the ones Chris Chamberland cited. She asked why he chose the ones he cited. He replied that he hadn’t been sure what standard to cite, so he started there, as a draft, for discussion purposes. Judy commented that the regulations cited focused on water contamination and well pollution, but that flammability and other risks must also be considered. Chris Chamberland responded that the standards for C1D1and C1D2 spaces he included are typically used in general marijuana manufacturing facilities that use hazardous materials.

Don observed that normally, packaged marijuana products state content, concentrate, etc. that define the quality of the THC or CBC, and wondered whether DMCTC would be testing for product potency the way a third-party testing lab would, as part of their manufacturing process. Jared Glanz-Berger noted that such testing is not their intent. He agreed with Don that they are required to put such information on their labels, but said they are also required to send their product to a third party with a different owner, at a different location, to be tested for potency, contamination, other safety considerations, etc.

Don stated that he thinks the DMCTC proposal is a good idea, even though it is clearly spot-zoning. Brant agreed, noting that residents in the Commercial zone would have the opportunity to participate in Zoning Board of Appeals public hearings about future proposals, and that the ZBA would be able to either deny such a proposal or permit it under certain rules without the need for a variance.

Brant noted the need for holding a public meeting to finalize the language of DMCTC’s proposed bylaw change, and at that time schedule a public hearing to explain the proposal to the public. Judy noted that the planning board must suggest such changes directly to the selectboard – or citizens can do that if the planning board doesn’t want to pursue it. She advised checking with Town Administrator Brian Domina. She said she thinks Chris Chamberland’s language is good enough to take to Town Meeting, but she is not in favor of the proposal because Whately has such limited commercial space that it doesn’t seem appropriate to add another use that isn’t commercial. She thought the board should vote on whether to approve the concept, and if the board votes to take the matter further she thought the public hearing would probably not be needed before April. Brant said he would first make the motion and the board would then explain their thinking about it.

Brant moved that the planning board vote on whether to approve the general concept of revising the bylaw in this way, and Tom seconded the motion. Brant explained that the reason for this vote is to provide feedback to DMCTC about whether the board wants to see this proposal further developed and taken to a public hearing.

Tom asked how the board can find a third party with the expertise required to determine whether the chemicals and processes used by those applying to be a Marijuana Product Manufacturer (Limited) under the proposed change are all acceptable. Brant noted that this is a good question and that the board can either vote not to pursue this matter further or vote to let development continue, which will provide more time for discussion and to get such questions addressed. Also, he said, if a public hearing is held such questions can be discussed there as well, and answered satisfactorily or not. At the end of a public hearing, the board can vote whether or not to recommend the bylaw revision. Right now, we are really voting on whether or not to cut this off early.

Don stated that many home users of marijuana are performing the same activities in their home kitchens, and he sees no problem with any of the activities DMCTC is proposing that a Marijuana Product Manufacturer (Limited) be allowed to do.

Judy observed that the question is more whether the things that are banned are adequate. She noted that if passed, the bylaw revision would apply to anyone who wants to do this, and other applicants may not be so well prepared. Then, she said, it becomes about enforcement. Tom agreed, stating that although the draft is very well done and thought out, the board cannot count on other applicants being trusted to follow the limits, and it comes down to enforcement.

Tom asked what “moving it forward” means in terms of tightening up the language into a form that the board is comfortable about taking to a public hearing for feedback. The applicants can represent it themselves, as they wrote it, he said. If the board is going to represent it, he continued, the board needs to be comfortable with the language and fully understand it.

Brant suggested that instead of NO in the bylaw, the board could make it a situation that *may* be granted a special permit by the ZBA, adding that he is confident that the ZBA will make a good decision. Tom agreed. Also, Don added, the town’s voters will decide. Brant said he would like the proposal to be voted on at Town Meeting.

Since the motion to vote had already been made, Don called for a voice vote. Don, Tom, and Brant each voted Aye; Judy and Sara each voted No, and the motion passed by a majority of 3 – 2.

Chris Chamberland observed that the Whately Meetings Calendar says, “May 23 – Annual Town Meeting – Time TBD”. Judy noted that town counsel must review the proposal and the selectboard must sign the warrant and post it 14 days before the ATM, so the public hearing would need to happen by late April.

Brant asked for feedback from DMCTC about how urgent this proposal is for them, given the fact that the planning board has a list of additional items pending and the deadlines for more discussion and a public hearing are approaching, Jared Glanz-Berger answered that if the proposal were to pass the Town Meeting vote it would be a significant change for them, allowing them to expand their operation in facilities they already own.

Brant noted that the board must table this discussion for the time being, to address the remaining agenda items and to determine whether the DMCTC proposal will fit the schedule. Judy suggested that DMCTC think about an independent resource that the board can consult, and make a recommendation to the planning board before the next meeting (the last Wednesday of March). Jared Glanz-Berger agreed. Brant advised DMCTC to work on the assumption that the board will take another look at this at its next regularly scheduled meeting (the last Wednesday in March), and that if they decide to move up their schedule and have an ad hoc meeting in March they will let DMCTC know.

**• Floodplain Bylaw Change**

Judy reported that she, Brant, Conservation Commission Chair Scott Jackson, and Town Administrator Brian Domina met by telephone with two Massachusetts representatives of the National Flood Insurance Program (NFIP) about new maps for this area from the Federal Emergency Management Agency (FEMA). They learned that updated flood zone maps would not be ready until the end of 2025, if then.

The deadline for implementing the required bylaw change continues to be extended but they would like to have it in place as soon as possible, partly to avoid jeopardizing any FEMA funding for the town. The group discussed agricultural exemptions, which affect floodplains and wetlands independently of this bylaw, she said, adding that the state people don’t seem to understand this. She explained that Scott Jackson said that according to a ruling, he cannot enforce floodplain regulations on agricultural property.

Brian said he thinks it is more important to get the bylaw change in place quickly and that he worried about precise enforcement in terms of the state people, and Judy agrees that that is a fair assessment. Those on the phone call agreed to meet and talk again, and Judy has asked Amy Lavallee to schedule that phone call. Judy doesn’t think it is possible to prepare the proposal for the bylaw change in time for a May 23 Annual Town Meeting.

Don offered to check with the state geologist, who was involved in updating some of the flood zone maps in Massachusetts, to see what kind of changes he actually found, to help the board in crafting the bylaw. Judy agreed, adding that the state floodplain bylaw template only requires inserting the date of the FEMA map, which in Whately’s case is 1979. When the new map is issued, the board would just insert the date of the new map. That’s the binding document, so that bylaw would be affected by that.

Judy reported that Scott Jackson had asked whether any area towns have implemented the bylaw, and he was especially interested in what enabling regulations they might have done. Judy contacted Peggy Sloan, of the Franklin Regional Council of Governments (FRCOG), who said that Conway had passed their bylaw last July. One of the issues in this matter is the requirement for a Floodplain Administrator (a staff person) to get all the permit clearances and report back to the NFIP. In Conway, said Judy, that is the Town Administrator, and it may work out that way for Whately as well. There is a lot of education going on about who is going to be doing what, she said, adding that at this point the group needs the input of Scott Jackson and Brian Domina, but needs to wait for the next meeting of this group, which has yet to be scheduled.

**• Battery Storage Facilities**

Judy had sent the board a document, “Zoning bylaw revisions for discussion” with proposed Table of Use language, and the board reviewed the items.

Judy said that when the battery storage facility section of the bylaw was passed, it made battery storage possible in certain solar facilities. But, in the Non-Residential Use section of the bylaws, it says uses involving hazardous materials are not allowed (except by special permit in the Commercial-Industrial and Industrial zones). This is just a housekeeping situation, but to fix the contradiction we could consider these measures:

1) take the storage battery facility out of the solar bylaw, which would overly restrict the solar bylaw in a way that violates the state exemption. Not a viable option.

2) we could allow hazardous materials and qualify this restriction so it doesn’t apply where adequate containment and overflow provisions exist. This would need to be approved by the Conservation Commission and the Board of Health, but Judy thinks it would solve the problem. She cautioned that the board wouldn’t want to allow this measure in the aquifer overlay district.

Brant asked Judy for some clarity about the nature of the problem. Judy explained that if the ZBA has an application to build a solar battery storage facility and the bylaw language says in one place that this is allowed, but in another place says it’s not, the ZBA is presented with a problem. She said we are trying to make life easier for the ZBA, and if the board had been aware of the Non-Residential Use language when the battery storage facility section was added, she thinks the board would have changed the Non-Residential Use language then. Judy offered another example: you can build a warehouse, but if it violates the lot coverage requirement, you can’t do it. She said the real question is whether this is adequate protection. Don said he thinks it is adequate, and leaves the ZBA with the flexibility to make a good decision. Judy commented that, if the board takes this approach to fixing the conflict, it can’t just be for battery storage but should include it. She said we want protection against all hazmat – not just battery storage – but we need to make the change at this time because of battery storage concerns. Brant and Judy read from the bylaws: 171.28.5. Solar Electric Generating Facilities, H (6) regarding solar battery storage units and their associated hazardous materials.

Judy noted that if the board does change the bylaw, there won’t be adequate protection for the aquifer overlay district, so the board should still ban any form of commercial or large-scale battery storage facility from the aquifer overlay district. The board agreed. Brant offered to contact Northeast Solar for information about sizes of battery units, to help determine which large sizes should be banned while still providing some flexibility for growth. The board agreed. Judy will ask the Conservation Commission and the Board of Health whether they want to be involved, and whether they think the protection is adequate.

**• Cannabis Social Clubs**

Judy said town counsel provided an opinion today – he thinks that our existing bylaw would adequately preclude cannabis social clubs, so no need for a bylaw change. If at some time cannabis social club licenses do become allowed, the town could have a referendum on whether it wanted the clubs or not. If the town were to say Yes, then a bylaw would be drafted and the board could then adjust the marijuana retailer bylaw to exclude onsite consumption. Don mentioned that the owners of the Castaway Lounge want their bar to become a marijuana social club. Judy noted that the bar is in the Agricultural/Residential 1 zone, and marijuana dispensaries are not allowed there.

Regarding the renovation of the Whately Schoolhouse (the Blue School): Brant said Lynn will not process the check even though she stamped the site plan review application, because the application is incomplete. Brant said we have sent feedback to the applicant explaining that the board needs a lot more information before proceeding. Brant will contact him further about what else is needed before a public hearing – that with nine apartments there are concerns about the septic system, as well as parking, traffic, lighting, etc.

The board agreed to meet next on March 22 instead of March 29.

**Adjourn**

At 7:15, Don moved to adjourn, Sara seconded, and the meeting was adjourned.

*Documents Reviewed (kept in the Planning Board files)*

1. An email sent by Christopher Chamberland to the planning board on February 20, 2023, which uses the format and language of the bylaw to describe the kinds of activities they are requesting be permitted for the proposed use category of Marijuana Product Manufacturer (Limited).

2. A document headed, “Zoning bylaw revisions for discussion”, emailed by Judy Markland to the planning board on February 16, 2023.

Mary McCarthy

Secretary, Planning Board

Town of Whately, MA