Whately Planning Board

Minutes of Virtual Meeting

January 25, 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:

John Hanmer, DMCTC

Jared Glanz-Berger DMCTC

Bernie Smiarowski

Call to Order 5:00 pm

The meeting was recorded.

**Discussion of District Local Technical Assistance (DLTA) grant submission(s)**

Judy Markland explained that every year, the Franklin Regional Council of Governments (FRCOG) gets money which can be used for grants to support their work on various projects, and town commissions and boards get to apply for the grants. Judy noted that she had previously circulated the criteria used for awarding grants. The Planning Board is usually awarded some money, she said, noting that last year the Board received help with the Floodplain Bylaw, and also asked for help with research about battery storage for solar power plants. In thinking now about new applications, she stated that the town’s subdivision bylaws are very much out of date, a situation that became clear during the permitting process for Pine Plains Estates. Many of the regulation requirements are not consistent with Smart Growth principles that help the environment. Judy noted that overhauling regulations is not a trivial task and suggested requesting that FRCOG help by reviewing the bylaws and making recommendations about what they think should be changed. She said that if the process is started that way, FRCOG’s recommendations would give the town a template to start from. Judy added that the Board might want to return to this topic later tonight after first discussing other necessary bylaw revisions, in case it might want help with those as well. Don and Brant agreed that was a good idea, and Brant moved the rest of this discussion to the end of the agenda in the interest of submitting a request for help by the Friday deadline.

**Review of necessary zoning map changes and implementation process**

Brant Cheikes shared his screen and provided background information:

There is a resource available to the Board for free through FRCOG – a Geographical Information System (GIS) specialist to help the Board with making necessary changes to Whately’s various zoning maps. Brant observed that the Board has been asked to accomplish several such tasks and that he is compiling a list of all the items and will send them to the GIS specialist. He stated that the specialist wants access to any existing digital shape files that we may already have, and asked Don Sluter to send

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him any such files to forward to the specialist. Don explained that what he has on his home computer includes more than the shape files and is too large to send by email. He has put the information, which already includes a number of corrections, on a portable storage drive and will bring them to the FRCOG resource, Sr. GIS Specialist Ryan Clary.

Asked whether all of the aquifer overlay districts appear on the map, including the tiny ones around the wells, Don answered Yes, noting that the tiny districts around the wells must be removed because that water cannot be used. Judy noted that this requires a town meeting vote, since it’s the vote that’s binding rather than the use changes.

Brant mentioned that there is a readability issue if all the various overlays are shown on the map simultaneously, and Judy noted that Peggy Sloan has stressed that the Floodplain overlay district should not be on the zoning map but only available via the assessors’ office. Brant noted the pressing need is for an accurate printed map. Don noted that in the meantime, if people need to see the current map without the distraction of all the overlays they can view the map on the website, turn off the overlays, and print the result. Don said the biggest concern he had discussed with Town Administrator Brian Domina had been barns that no longer exist but that still appear on the map. He said they tried using aerial photographs but that did not work. Also, he said, there are no newer quad sheets that they could put in that are downloadable.

Judy returned to the question of whether a town meeting is necessary in order to make certain corrections, and referred to Mrs. Monahan’s statement at a previous meeting that the attorney general’s letter said that the map had been approved. She pointed out that if that is the case, mistakes may also have been included in the approval. She noted that the question is whether the actual map, or just the meeting minutes, had been submitted for approval, adding that the attorney general’s letter stated that the “map” had been approved.

Brant noted that two things need to be done:

1) Correct the online assessors’ map (that is, the one on the web at

https://next.axisgis.com/WhatelyMA/).

Don will meet with FRCOG’s specialist and they will put together a new map.

2) Determine whether the corrections on the new map need to go through some kind of formal approval

process.

Brant will consult with town officials to answer this question.

**Discussion of potential zoning bylaw changes:**

• Floodplain bylaw

Judy Markland explained that Brian Domina and Town Clerk Amy Schrader have notified the Planning Board that the town is due for a National Flood Insurance Program (NFIP) monitoring meeting, which is held periodically. The last one was held in 2008, when Whately’s status with the floodplain bylaw was reviewed. The upcoming virtual meeting will include the building inspector, members of the planning board, Brian Domina, Highway Superintendent Keith Bardwell, and perhaps a zoning board member, and is scheduled for the afternoon of February 6, 2023. Questions about the flood insurance

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program will be answered, and should provide guidance about the next steps, such as how best to proceed with public education about the topic before town meeting. The board had previously delayed work on this project, believing that a revised Federal Emergency Management Administration (FEMA) floodplain map would soon be provided, and it seemed inefficient to vote on a bylaw and then have to change it once the map was finished. But, the map still has not appeared. In the meantime, comments made by Joy Duperault, of DCR, led Judy to think that the education piece of the project might not be so onerous after all. Judy has been advised by Peggy Sloan of FRCOG, not to wait for the regulations, but to get the bylaw enacted first and finish the rest later. Judy agrees that going ahead now on the bylaw is the safer thing to do, noting we should find out whether a special town meeting is planned.

Brant commented on the presentation of last year’s draft floodplain bylaw, noting feedback from the public showed that they needed to know the regulations and their likely interpretation before approving a bylaw. He acknowledged the chicken-and-egg nature of this problem, but stated his concern that the public education part of the process must be adequately addressed in order to have any hope of getting a draft bylaw approved at town meeting. Judy suggested meeting with Conservation Commission Chair Scott Jackson to discuss how best to handle this. Brant asked how much of a problem the lack of a new FEMA floodplain map will present and Judy replied that Peggy Sloan had told her the old FEMA map is not a valid concern; and to just change the date of the map in the bylaw. Brant and Judy will attend the NFIP meeting on February 6 and will report on it – at least at the regular February planning board meeting, and at an additional February meeting if necessary. Brant asked whether there were any other questions about the floodplain bylaw, and there were none.

• Necessary solar bylaw revisions?

Brant began by referring to a document he wrote, explaining that there is an error in our solar power generating facilities bylaw, and that he has used bold print in the document to call attention to the garbled portion, which appears in paragraph H.(3). He said Judy and he had researched this and found that the original bylaw was introduced in October of 2011. When a bylaw revision was presented at Annual Town Meeting in 2020, the garbled wording somehow got into the warrant, which was voted on and approved at the annual town meeting, and also appears in the minutes of the town meeting. According to the town clerk, the garbled version is now the language of record and the only remedy is to amend the zoning bylaw through the usual procedure.

Onscreen, Brant shared the language used in the original bylaw when it was introduced at the 2011 town meeting, along with the current, garbled version mistakenly introduced as part of the 2020 modification. He recommended that the board hold a public hearing about the proposed restoration of the original language, and fulfill all other requirements so that it can be voted on at the 2023 annual town meeting. Tom addressed the phrase, “requirement of the utility provider”, noting that the applicant companies had said they *couldn’t* put utility connections underground, but that this turned out to be untrue; they simply didn’t want to spend the extra money that burying the wires and cables would cost.

The last sentence says “above ground if required”. The question is, what does “required” mean? Tom suggested saying something like, “A waiver can be authorized by the planning board upon

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review”, instead of letting the applicant determine whether it’s required or not. Judy suggested that, instead of referring to the planning board as the sole party deciding this matter, the language should refer to “permit granting authorities” to include the Zoning Board of Appeals. The board will work further on this.

Brant next addressed the broader question of whether the planning board needs to make any other changes to the solar bylaw in 2023 due to a recent court case. Judy provided some background information, explaining that the solar bylaw health, safety, or welfare exemption, which governs when towns may restrict the building of solar power generation facilities, has been part of section 40A since

solar was all about small rooftop installations. As the larger solar facilities came along, she said, there was a question of whether the solar bylaw health, safety, or welfare exemption applied to them. In response to this, the Department of Energy published a proforma, typical solar bylaw that communities could use, and it was thought that this would solve the problem of the exemption’s application. Whately followed the state’s template pretty closely, she said, elaborating on it somewhat when designing the town’s own form.

Judy then described a court case involving a community that had sued a town for violation of the exemption, mentioning that two summaries of this case had been previously circulated. The court, she said, stated that the town did violate the exemption and found that the town had so constrained its bylaw that as a result, it was virtually impossible to build a solar facility there. In other words, the wording of its bylaw was too restrictive.

Brant noted that there is reason to think that Whately made a good faith effort to comply with the rule, and that the Attorney General approved what Whately wrote. Judy noted that the feedback from townspeople is that the board hasn’t been restrictive *enough*. The board just needs to keep it in mind when it works on these things, she added.

Brant shared onscreen the 2012 letter from the Massachusetts attorney general’s office to then Town Clerk Lynn Sibley approving the amendments adopted under Article 1, which made a number of changes to the town’s zoning bylaws pertaining to Solar Electric Generating Facilities. The attorney general approved the amendments but cautioned the town regarding the provisions of G.L. c. 40A, section 3, which protect solar energy systems and the building of structures that facilitate the collection of solar energy. The letter noted that this section provides that “No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare”. The letter also suggested that the town consult with town counsel to ensure that the application of the bylaw amendments comply with G.L. c. 40A, section 3. Judy said that town counsel’s advice was to think over what the town had done, and especially pay attention to whether the town has provided adequate places for solar facilities. Judy said she didn’t think Whately needed to make any adjustments to that part of the bylaw because it allows solar facilities in most areas. Brant concluded that it appeared no proactive revisions to the solar bylaw are needed at this time.

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• Battery storage facilities

Judy noted that the Table of Use – Non-Residential Uses currently has a section that bans hazardous materials for all non-residential uses in the AR/1, AR/2 and Commercial zoning districts. However, the 2020 solar bylaw update allows them in the form of energy storage batteries. The result pits one social good (health and safety) against another (renewable energy storage). She noted that the two must be reconciled via town meeting. She noted the complexity of the required work toward a solution, and added that the discussion must also include the related topic of stand-alone batteries.

Brant said he had recently joined a town Energy Committee that is working with the University of Massachusetts Clean Energy Extension, taking an inventory of solar resources in town and the capacity for new solar facilities. The project will result in a report by the end of the academic semester and Brant will share it with the board. He has seen an early draft whose comments address not only the potential advantages of having storage batteries associated with solar facilities, but also stand-alone battery storage *not* associated with solar, because of the advantages for grid resilience. The draft suggested some potential placements for such battery systems around town on municipal buildings.

Brant said he has submitted many questions to UMass about stand-alone batteries, and noted that Whately doesn’t address stand-alone systems. Judy added that this was done deliberately. Brant acknowledged the concerns about hazardous materials. He said he would ask the UMass Clean Energy Extension, which has looked at Whately’s bylaws as part of their project, whether they are going to offer any recommendations. Judy asked whether the team would have recommendations about protections for municipalities, such as a list outlining risks and how communities might deal with them.

Tom observed that the proposal of storage capacity at the Chestnut Plain Road solar site received an overwhelmingly negative response, especially by physics professor Neal Abraham. Fire was mentioned as one danger, as well as the possibility of fire suppressant contamination of the water table. It was noted that Amherst has stand-alone storage in North Amherst, near the Sunderland line, and that Whately should look at it as one example. Judy recalled that Amherst required an enormous storage basin underneath the facility to keep any hazardous materials out of the water supply. She further noted that battery storage may now be required for the big solar projects, but that Whately should prohibit any battery storage above the aquifer overlay area. When asked, Brant said that the report he and the Energy Committee have been working on probably won’t be ready in time for town meeting.

**Cannabis Social Clubs**

It was noted that Chief of Police Sevigne is concerned about marijuana-intoxicated drivers and how to test for that. Judy asked what the goal of this agenda item is, and Brant asked whether there is any preliminary consensus about how to handle this. He asked whether Debilitating Medical Condition Treatment Centers (DMCTC), which has Whately permits for marijuana cultivation, processing and retail sales, wants to request a change. Jared Glanz-Berger, of DMCTC, replied that a license for “social consumption” exists, that they hope to make their future store a “destination” retail shop with a consumption lounge, that they would like to know the town’s thoughts on this and want to explore the

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topic. Judy asked whether any such social consumption lounges are currently up and running, so that the board could check on it. Mr. Glanz-Berger answered that he’d heard rumors about a lounge on King St. in Northampton. He added that DMCTC is starting talks with Chief Sevigne regarding safety measures required and how to accomplish them. Tom asked whether those measures have to come first, Mr. Glanz-Berger replied that although consumption is not allowed in the same place as retail, their shop is in a different building of the “condo-ized” structure.

Judy noted that it is unclear whether marijuana consumption is currently prohibited in town, noting that the marijuana retail bylaw doesn’t say there can be no consumption on-site. She suggested asking town counsel for an opinion, noting that the town has no regulations for on-site consumption.

Don mentioned an internet article that said Massachusetts had approved social consumption of marijuana. Jared Glanz-Berger stated that he thinks that only applies to towns in the state’s pilot program, and that Whately is not one of those towns. Tom asked where the authority lies, pointed out that someone who wants to open a bar wouldn’t go to the Planning Board, and wondered whether this should be considered a Selectboard issue. Brant and Judy suggested asking for town counsel’s opinion on this, saying the town needs to know. Judy added that perhaps a twelve-month moratorium might be necessary while researching this complicated issue, and said she would follow up on this.

**Discussion of DLTA grant submission(s)**

For the DLTA project, Judy moved to request from the Franklin Regional Council of Governments an analysis of our subdivision regulations and recommendations for changes. Brant seconded the motion. Don, Sara, Judy, Brant, and Tom each voted Yes and the motion carried unanimously. Judy will draft the request and Brant will review it with her.

**Request for revision of zoning violation fees**

It was explained that Selectboard Member Fred Baron had requested a change to the zoning bylaw violation fees, which are currently set from $50 per offense, to the state maximum of $300 per offense, with each day treated as a new and separate offense. Brant said Building Inspector Jim Hawkins, who is charged with bylaw enforcement, had told him the zoning violation fees are rarely changed because of 1) the process of determining whether a particular situation constitutes a violation, and 2) the requirement that the town go superior court and make a claim for enforcement, which may send the matter to mediation, where things might be settled without charging any fees at all and leaving the town to pay court costs. Brant said Fred Baron thinks that even if it turns out that fines are effectively unenforceable, raising the legal limit for fines sends the message that Whately takes zoning violations seriously, and that this effect has value on its own. Brant stated that Fred also said that the current maximum amount is not an effective deterrent to willful violations, and that if we do raise the per offense fee to the state maximum of $300, we will have changed the enforcement dynamic even if enforcement is still challenging; it might now be more cost effective to take a case to superior court because what it could gain from fees would cover court costs. Judy added that the building inspector can issue a cease-and-desist order, which is more immediate and painful and may be the real deterrent. She suggested checking with those who would have to implement any change. Tom noted that use of

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that measure might cost the town more in lawyers’ fees, etc., than the amount of violation fees collected. He asked about the most recent such case and Don noted that in the case of Hitchcock Brewery, such an order was issued but was only in effect for a couple of days, after which a meeting was held that resolved the problem. No fee was charged, he said.

Brant raised the question of the activities of the blasting company on Chestnut Plain Road, and whether anything had been adjudicated. Judy said that the building inspector had found that the activity was consistent with the special permit that the company has, but that people don’t agree with that.

Brant said he is of two minds about this – that 1) maybe there is a good reason to be consistent with the state and charge the $300 maximum but 2) if this proposal goes before town meeting there could be reasonable push-back from people concerned that if they are found to have committed a zoning violation through some mistake, they will be faced with a lot of financial risk.

Brant asked for the board’s comments about whether to raise the fee. Responses mentioned discomfort with that since it seems punitive and that’s not our job; other pressing matters that the board has to settle, like getting a floodplain bylaw passed; the many nuances of raising the fee that have been raised by this discussion, and the feeling that it wouldn’t make a great deal of difference if approved but would require the board to use up a lot of its good will defending something it doesn’t strongly support; that such a change must be approved at town meeting by a 2/3 vote. Tom stated that it is important for Fred to know that the planning board has held a thoughtful discussion and that although they are not strongly opposed to it, as a practical matter it doesn’t make sense to go forward with it. Brant will explain the board’s position to Fred Baron.

**Approval of Minutes**

Minutes of November 29, 2022

Judy moved to approve the minutes as amended, and Brant seconded the motion.

Don, Sara, Brant, Tom, and Judy each voted Aye, and the motion carried unanimously.

**Additional items not anticipated**

Jared Glanz-Berger asked to make a suggestion about the zoning in which cannabis manufacturing is permitted: Noting that the board shapes the ways in which things may be done for cultivation, he said there are also some activities associated with manufacturing that are low risk and low intensity, like

processing, filling, capping, and solvent-less extraction – things that don’t require a C1D1 booth or a C1D2 booth because they are non-flammable. He thinks these sorts of activities should be permitted under commercial zoning, adding that there are commercial buildings in Whately where such activities might be easily done but that current bylaw does not allow cannabis manufacturing in commercial zones. He said he would like an opportunity to show the board which types of cannabis manufacturing activities he thinks should be allowed and which should be prohibited. Judy asked him to send the board a written request with information on how other towns handle this. Mr. Glanz-Berger answered that he would provide video.

It was noted that the budget is all set for 2024.

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**Adjournment**

At 6:52 pm Don moved to adjourn and Brant seconded the motion. Don, Brant, Sara, Judy, and Tom

each voted Yes and the motion carried unanimously.

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

1. A document presenting the language of the original solar bylaw introduced in October of 2011, as

well as the erroneous language that found its way into the amended solar bylaw which was approved

in 2020.

2. A 2012 letter from the Massachusetts attorney general’s office to then Town Clerk Lynn Sibley

approving the amendments adopted under Article 1, which made a number of changes to the Town’s

zoning bylaws pertaining to Solar Electric Generating Facilities.

3. A document written by Brant Cheikes dated January 25, 2023 and headed, “An Error in Whately’s

Solar Electric Generating Facilities Solar Bylaw”

Mary McCarthy

Secretary, Planning Board

Town of Whately, MA