

Approved 8/5/15

TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
Wednesday, July 15, 2015

Board Present: Chair Dan Remian, Bob Ellis, Evelyn Kalloch, and Frank Muddle

Board Absent: Andrew Blanchard

Staff Present: Code Officer Scott Bickford

1. Call to Order: Chair Remian called the meeting to order at 6:00 P.M. and a roll call was taken.

2. Review of engineering data of Map 28, Lot 18 submitted to the Code Enforcement Officer and Planning Board for review of slopes in Resource Protection in the area of the “studio” building.

Property owner Sue Fisher’s attorney, Robert Stolt, introduced Charles Wallace as a State of Maine licensed engineer, with many years of environmental engineering and general civil engineering experience. Mr. Stolt said the packet the Board had today arose from the CEO having informed his client that he was going to try to verify Mr. Wallace’s earlier report on the basis of Light Distance and Ranging [LIDAR], which he believed to be a new technology.

Mr. Stolt said Mr. Wallace’s simplest analogy was the speed gun that a police officer uses when he decides you’re going too fast. Basically, it is using radar technology to take a measurement of the ground from a satellite. Mr. Remian corrected him to say LIDAR was utilized from an airplane, not a satellite. Mr. Stolt said this was the same technology used to take Cushing’s tax map photographs this year, but those were taken from too high and they couldn’t get good photographs that would allow measurement of the ground. The attorney said the result of the mapping that the town did was to demonstrate that the conclusions that Mr. Wallace had presented to the Board a month ago were correct and accurate. In fact, that the slope of Ms. Fisher’s property was 1% lower than had been projected from boots-on-the-ground, using the mechanical equipment that an engineer or surveyor might use.

Mr. Stolt said the bottom line for his client was that what we have told you in the earlier report is confirmed by the LIDAR efforts and that Ms. Fisher’s property was not qualified as a Resource Protection [RP] piece of land. He said a RP zone has several criteria that must be met. The attorney said he had some issues with where the protected area started and ended, but that was not of significance here. He continued that the significance here was that, of the five criteria in the ordinance definition of the protected zone, Ms. Fisher’s property didn’t meet any of them. Mr. Stolt said it was correctly classified as a Limited Residential area and he was asking the PB to properly classify it.

Mrs. Kalloch said that one of the articles in Mr. Wallace’s presentation attested to the fact that the property was 100’ back from the high water mark. Mr. Stolt responded that it was 100’ back from the 75’ that the town’s permit required. Mrs. Kalloch said previous CEO Ham Boothby had said it was at least 75’ back. Mr. Stolt said CEO Boothby used a stick to measure slope, as had been done for 100’s of years, and he was right on the mark.

Mr. Muddle confirmed his understanding that Mr. Stolt was saying that the report he’d given the Board tonight proved the facts that he had presented in the previous application. He asked if there was any new information in this new submission. Mr. Stolt said the only new information was the LIDAR. Chair Remian said there was more new information than that.

Mr. Ellis said changing the property designation would require an application. The details were in the ordinance on Page 42, Section 16 C, and required that an application be made with the submittals; after the Planning Board ruled on it, the town would have to vote on it, and then it would go to the DEP to be approved, because it would be a change to the district boundaries.

CEO Bickford said he thought Ms. Fisher's property was already classified as Limited Residential, but within the district boundary there was some RP; therefore, the PB was looking at an area within the boundary. Chair Remian said it would still require a map change and Mr. Ellis said RP was the district.

Mr. Wallace said the ordinance stated that the Shoreland zoning maps were not definitive, except with regard to slope and slope was to have been established on a definitive basis by a qualified professional. Mr. Ellis and Mr. Remian confirmed this. The engineer said the work before the Board, both the previous and current submittals, used three methods of definitive determination of slope. The first was boots-on-the-ground where common surveying instruments and a rod man measured the grade. The United States Geological Survey [USGS] mapping process was also a recognized definitive process. In both reports, the land was sliced and diced with a computer program (Terrain Navigator Pro) of the USGS to check slope. In the supplemental report there was more slicing and dicing of the lot using the Terrain Navigator Pro, clearly showing that somehow the person who drew the original map in 1991, or whenever, had not known how to do definitive work on the ground or how to read a USGS map, Mr. Wallace said.

He said he had contacted the Maine GIS program, downloaded their LIDAR map for the town, put it in his program, and created a contour map of Ms. Fisher's parcel. The engineer said that, within 1% or 2%, all three methods pointed out that the map that was drawn on the Fisher property was wrong from the beginning. The zoning ordinance was from 1991 and, as far as he knew, was never approved by the DEP. Mr. Wallace stated that the only approval of Cushing's Shoreland zoning map the DEP could find was from 2011. Chair Remian and the other Board members said it had been approved by the DEP more recently.

Mr. Wallace said the bottom line was that there were no slopes on the Fisher property inside the SZ that were anywhere near 20%. In addition, he said, if you looked at the shape of the RP district map, there was no real world slope structure that took the shape of the cottage/studio. Mr. Ellis said the ordinance did not say it was definitive, which is why the Board asked applicants to bring in their own submittals, with a licensed engineer to determine exactly what they were on the ground. The ordinance didn't say it was definitive and the PB understood that it wasn't. Applicants had the right to prove whether the town's depiction was correct or not.

Mr. Ellis said the procedure, as laid out in the ordinance, was that the grades were supposed to be measured at a right angle to the contours and he didn't see one that was at a right angle. Mr. Wallace said they were laid out in several different directions relative to the shoreline and the contours. Mr. Ellis said he could find only one that looked even close to a right angle. He wanted someone who represented the town's interests to look at this and see if what we're looking at conforms to how we're supposed to have these measured, according to the ordinance.

Mr. Wallace made some drawings and explained the right angles to contours. A brief discussion followed. CEO Bickford said he had already engaged Jim Dorsky to verify this area since the Selectmen approved the funding Monday night.

Chair Remian said he took exception to Mr. Wallace looking at the square around the cottage as something that was deliberate. If you looked at some of the other lines, they were very close to a similar type of structure, he said, depending on the slope.

The Chair said there was obviously a difference of opinion between engineering firms. Mr. Stolt asked if the Board had an engineer. Mr. Remian said Gartley & Dorsky Engineering & Surveying were the town's engineers in this matter. Mr. Stolt said they were not engineers, but Chair Remian corrected him, saying Will Gartley was an engineer.

Ms. Fisher asked to look at what Gartley & Dorsky had done so far. Mr. Remian pointed out that the area in red was RP. Mr. Wallace asked what it was based on. When informed it was based on the LIDAR information, Mr. Wallace said he "can't buy that." Chair Remian responded that we would not know until some survey work was done. When questioned by Mr. Wallace, Mr. Remian said the work was LIDAR based on 2' contours. Mr. Wallace responded that that was not what it was. He continued that he was glad the town had a qualified engineer and advised that the person who did the peer review of an engineer must be an engineer.

Chair Remian brought CEO Bickford's attention to Item 10(F) (Interpretation of District Boundaries) on Page 7 of the SZ ordinance, which involved responsibility for expenditures. The CEO said he had no interest in that section because this was to correct a problem and his association with this was the Selectmen, not the PB, and he was at the resolve. Chair Remian asked why the PB had anything to do with this. The CEO responded it was because they

were being asked to look at a potential problem. If the Board thought it was proper to have it rectified and was saying Ms. Fisher should get an application, he thought that's what she intended to do. We're in the middle of a discussion about whether or not this land is what is indicated on that mapping could be wrong, he said. Ms. Fisher's staff had indicated they believed it was wrong. The Selectmen had given him the funds to do this and he was going to follow through: it would be boots-on-the-ground and LIDAR.

Mr. Ellis said the town had the obligation to do this through the application process, as laid out in the ordinance, unless the CEO was talking about a consent agreement. Mr. Wallace said they had presented the PB with a consent agreement last time. Mr. Ellis said when it involved district boundaries, the town had to follow its ordinance and state law. Mr. Stolt said they would take a look at that issue.

Ms. Fisher complained that this had been going on for months and months. She said she had a buyer for the property and she would be damaged greatly if the PB did not speed this up and make a decision. Chair Remian asked who was actually slowing this thing down. He said the PB made a decision on the application and denied it. Ms. Fisher said it had been denied on a fallacious basis because the cottage was not as the PB described it. Chair Remian said it was denied based on the town's maps. Mr. Ellis said if Ms. Fisher thought it was wrongfully denied she ought to have appealed the decision. Mr. Remian said Ms. Fisher was not the applicant, so she could not appeal it. Mr. Ellis suggested Ms. Fisher file an application of her own.

Ms. Fisher said she was following instructions to prove it was not a 20% slope. Chair Remian said she felt she had proven that and the PB disagreed. Mr. Ellis said he did not believe the PB had directed Ms. Fisher to do anything, but maybe the CEO had. Mr. Stolt said it was not the CEO. Mr. Ellis replied that Ms. Fisher had then brought this submittal on her own and the PB did not have an application from her. Mr. Stolt asked Mr. Ellis if he was suggesting Ms. Fisher go to Superior Court and get it settled there. Mr. Ellis said that was not what he was saying, he was simply saying that Ms. Fisher did not have an application.

Mr. Stolt said she was never asked to file an application, but to reach an amicable resolution. Chair Remian said that did not come from the PB. Mr. Stolt said he understood that the PB was a party to that and did not disagree with it. Mr. Remian said they had discussed it with the Selectmen and hoped that something could be worked out. Mr. Ellis said the PB had suggested to the previous applicant that the cottage be moved. Mr. Stolt said he did not want to argue, but the evidence before the Board was pretty conclusive and he doubted their (PB) LIDAR was going to do anything but make that evidence stronger. Stolt said they had done their best to try to resolve this in the interest of both parties, with no assignment of error to either party and they were not getting anywhere. He said they had a number of issues that they could raise directly in the Superior Court. Chair Remian asked if that was a threat. Mr. Stolt replied, "Not at all. There are some other options." He said they might take the "other pathway", which would do to both of us what neither of us wants to happen: spend an awful lot of money trying to resolve something that could be easily resolved. Mr. Remian said if this was such an important issue to Mr. Stolt's client, it could have been done with a lot less money than what he saw being spent. The Chair said that the applicant the PB denied could have had this place if he had followed the PB's suggestion.

Ms. Fisher said Ham Boothbay granted her a permit and an earlier PB granted her a permit and she asked if the PB was not complicit in this. Mr. Muddle said this PB was not there and, furthermore, Ms. Fisher had not even built what was permitted. He said he did not understand all the technology, but when he looked at the mapping they had linear lines showing slope, but that did not tell him what the slope was on the land. Mr. Wallace instructed him on the definition of slope.

Mr. Wallace asked if the red outline was Gartley & Dorsky's definitive determination of land within the SZ that equaled or exceeded 20% in slope. Chair Remian replied that he had not said it was definitive: he had said it was a LIDAR description indicative of slope. The CEO said Gartley & Dorsky were going to concentrate on the studio area and he expected to have the results within the next week.

Mr. Wallace asked if the CEO had the written scope of what Gartley & Dorsky defined as their boots-on-the-ground. The CEO said he had emailed a copy of that to Mr. Stolt. The CEO said he felt it was important for the town to do its job; hopefully, it would agree with Ms. Fisher's information. If she wanted to file an application, he would be sure Mr. Stolt would be happy to accommodate that.

Mr. Ellis said he was disappointed in the procedure that had been followed here. He said Mr. Bickford was beginning to sound as though he and the Selectmen were another Planning Board. He said the ordinance clearly told the PB to have discussion on whether more definitive data needed to be submitted, if there was an application.

Mr. Ellis said the CEO had not directed this party to submit an application, let alone go beyond that with submittals from a technical professional. He said this was what the Planning Board is supposed to be doing and commented it was no wonder Ms. Fisher was frustrated with the procedure here. He thought it should be pointed out to the Selectmen exactly how the ordinance told the PB to handle an application like this. It's crazy to be having the Selectmen and a CEO deciding to get information unless there's an application on the table and the PB votes on whether or not we need more information, he concluded.

The CEO asked if any of them could remember the Selectmen directing him to do a Notice of Violation against Ms. Fisher. Mr. Ellis said he could not, but the Board had suggested a consent agreement. Mr. Bickford said that was the second round and he had told the PB he would do a Notice of Violation as a draft and go to the Selectmen, for whom he worked, and get their advice on how they wanted to handle this. He said they had decided we should review and resolve, if possible, without finding ourselves in a courtroom. The CEO said he thought Mr. Stolt was working that way. The end result, he said, was that it would have to come back to the PB and they would have to change it if Mr. Stolt was proven correct. Mr. Bickford felt the PB owed the people the courtesy of telling them what they needed to bring the next time.

Mr. Muddle said the PB met normally the first Wednesday of each month and an application required the paperwork be submitted 15 days before. The CEO said that would be today. Mr. Wallace felt they could have the application within a day or two. Mr. Ellis said abutter notices were required, as well. He said all details of application process were on Page 42 of the ordinance.

The Chair tentatively set a meeting for August 5.

3. Adjournment:

ACTION: Mr. Ellis made a motion, seconded by Mr. Muddle, to adjourn at 6:48 P.M.
Carried 5-0-0

Respectfully submitted,

Deborah E. Sealey
Recording Secretary