

Approved 10/7/15

TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
Wednesday, August 5, 2015

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

Board Absent: None

Staff Present: Code Officer Scott Bickford and Recording Secretary Deborah Sealey

1. Call to Order: Chair Remian called the meeting to order at 6:05 P.M. and a roll call was taken.

ACTION: Mr. Muddle made a motion, seconded by Mr. Blanchard, to approve the 4/1/15 meeting minutes as corrected.

Carried 5-0-0

ACTION: Mr. Muddle made a motion, seconded by Mr. Ellis, to accept the 7/15/15 meeting minutes as corrected.

Carried 4-0-1 (Mr. Blanchard abstained)

2. Amendment to the Meduncook Subdivision for Lot 19 (Tax Map 25, Lot 31) to be removed by division and

added by split to the abutters lots (Map 25, current Lots 30 & 32): Surveyor Joseph LaBranche said he was here to represent the parties that wanted to split Lot 19 and add portions of it to current Lots 18 & 22. He said abutters had been notified but he had not yet received the mail receipts from attorney Peter Lynch. CEO Bickford noted that well restriction zones had been removed by previous amendment.

Chair Remian directed Board members to Page 14 (Amendment of Approved Plans) of the Subdivision ordinance. He did not believe the Board had to review the full criterion since the lots had been previously approved. Mr. Remian said dropping a lot from the subdivision would increase costs for the remaining lot owners, so he thought proof of abutter notification should be part of any approval.

ACTION: Mr. Remian made a motion, seconded by Mr. Ellis, to approve the amendment to the Meduncook Subdivision to remove Lot 19 by division, contingent upon the condition that abutter notification receipts be in the Planning Board's hands and that the Association be notified of the removal of one lot from their accounting.

Carried 5-0-0

3. Review of slopes on Tax Map 28, Lot 18, as presented by Jim Dorsky of Gartley & Dorsky Surveyors and Engineers:

Property owner Sue Fisher, her attorney Robert Stolt, engineer Charles Wallace, and forester Walter Armstrong all attended the meeting. Mr. Stolt began by saying the agenda was inaccurate because Ms. Fisher was not looking for a zone change. He said her property was in the Shoreland Zone [SZ] and had been persistently described within that zone as Limited Residential [LR]. Attorney Stolt said one issue was whether it was better suited to that designation or as Resource Protection [RP]. Mr. Stolt said that in 2009 the Town had changed the official Cushing map, which he stated was the first such map approved by the DEP since 1991. The attorney said Ms. Fisher's property was classified as L R in 1991, and when amended in 2009 the cottage was an on-going structure that had been around for 7 years. Mr. Stolt said the PB had no authority to retroactively apply a change in the law.

Mr. Stolt said the second issue was that the new map was also a boots-on-the-ground map that had its own problems and the effort to use Light Distance and Ranging (LIDAR) mapping was selectively discriminatory. He stated that the PB was "in some mud, in some deep water." Mr. Stolt said that, regardless of what the PB decided with respect to LIDAR mapping, he was probably going on from here.

Ms. Fisher's attorney said she bought the property in 2000 and in 2002 she received two permits. Ham Boothbay, CEO in 2002, had determined that Ms. Fisher's property was not in RP, had selected the site for the cottage, supervised its construction, gave her permission to add decks, had a clear view of the property, and assisted Ms. Fisher in any way he could, Mr. Stolt said.

Mr. Stolt said the prospective buyer of the studio had offered a septic system. Ms. Fisher's house had a drywell, approved by CEO Boothbay, but in 2007 current CEO Scott Bickford had complained that she was running water from the house to the drywell. Mr. Stolt said potential buyer Cole had approached the PB in the spring with several questions and "the PB jumped all over Mr. Cole and told him all the violations that had occurred." The attorney said at that time Ms. Fisher's status began to change, in that anything she wanted to do violated the RP portion of the code.

Mr. Stolt said there were five characteristics of RP that were not possible to be raised here. The 5th was slopes of 20% or more within a 2-acre contiguous area. He said he had previously provided the PB with an explanation of LIDAR's weaknesses in a heavily-wooded area.

Attorney Stolt said tonight was very dangerous for the PB because he did not know how many times they had used that map, which he said had serious errors and serious intentional oversights. Chair Remian asked Mr. Stolt to explain where he thought the PB was in serious jeopardy with the map. Attorney Stolt replied that the map was inaccurate and the person who created it knew it was inaccurate because he didn't have all of the equipment to meet all of the standards, and the ordinance required accuracy. Mr. Remian replied that the map in question was not based on any LIDAR data. In 1991 the maps were done on the ground by visual and inclinometer; the other maps were done on an algorithm based on USGS slopes. He agreed it was not accurate to the pinpoint, but the maps were as good as they could be at the time without a survey of the entire town.

Mr. Ellis said Ms. Fisher's application was for a district, rather than zoning, change. He said a lot could be in more than one district and that the only criteria for the RP district was that there be two or more acres containing the 20%+ slopes. Mr. Ellis said the PB was not saying the town expected the applicant to change her zone, but rather it was the physical characteristics of the RP district outlined that allowed it to be more accurately defined if she protested the Town's boundaries. Neither was the PB here to change her zone, but rather it was the physical characteristics. Mr. Stolt replied that there had been conversations with other people about having to go to the townspeople to change a zone, for which Ms. Fisher had never asked. They had asked because the PB had been using, without statutory authority, the RP language classification and they were asking the PB to change that usage to LR.

Chair Remian said that despite Mr. Stolt's claim that Ham Boothbay had said the studio was not in RP, the previous CEO had written a letter to Ms. Fisher and Ms. Falbo alluding to the studio as being in RP. Mr. Stolt said Mr. Boothbay had added the words, "at the end of RP" to his first permit. Mr. Stolt said in the second permit Mr. Boothbay had taken his note about RP out of the decision. He said Mr. Boothbay knew how to be a CEO, determine slopes, and how to put buildings where they were no harm to the environment.

Mr. Muddle responded that Mr. Boothbay had made some mistakes near the end of his career. Mr. Muddle did not like the adversarial approach taken by Mr. Stolt and said the Board followed the rules from the State it was sworn to obey. He said the PB was trying to help Ms. Fisher get out of this as easily as possible; however, a violation remained a violation as long as it existed. Furthermore, he said what was built was not what was permitted. Mr. Stolt countered that Ms. Fisher had built a structure approved by the chair of the PB (Mr. Boothbay) and the CEO (Mr. Boothbay) and the present Board could not now change that. Mr. Muddle responded that the code was still the same.

Mr. Stolt then said the PB could not produce approved maps and that the Town had not sought approval of them from the DEP until 2011. Mr. Ellis said once maps were submitted for approval from the DEP, they were automatically approved after 45 days if no contact was initiated by DEP. He said the town had made all kinds of changes that could not be implemented without DEP approval.

Mr. Muddle clarified that Ms. Fisher's structure under contention was not a cottage, but a studio.

Chair Remian said he had an email from DEP's Colin Clark saying that the ordinance and amendments were approved on June 18, 2009 and had two designations for RP. Engineer Wallace said he had spoken with the man who prepared the 2009 map and asked what its basis was. The preparer, a Mr. Rogers, had said the basis was USGS. Mr. Wallace said it was important to understand that Mr. Roger's original request from the Town was to prepare an aerial map of the town. Mr. Rogers had drawn his line 250' back from the high water mark. Mr. Wallace said the Town had then come back and asked for a slope map. Mr. Wallace said Mr. Rogers had told him he had said he couldn't do a slope map and the Town had said he must. Mr. Wallace went on to explain Mr. Roger's methods and then said there were serious mapping errors in the 2009 map, which he thought should be considered when working toward a friendly resolution.

Mr. Wallace said there was no guideline in the ordinance that spoke to mapping methods and how to account for errors. He said the PB should acknowledge that Ms. Fisher got her permit based on the best evidence at the time. Mr. Ellis said he agreed with Mr. Wallace's grievances about the map and reminded him the PB had said several times that it did not consider the map definitive. Mr. Wallace said Ms. Fisher got her permit and the change since then was LIDAR, which had inherent errors, which he hoped Mr. Dorsky would discuss. Chair Remian told Mr. Wallace that the PB's intent with LIDAR was to help them determine if they should go further, which they had determined to do.

Chair Remian said in March 2002 Mr. Boothbay had stated in a letter that he had made an error and should go back to the PB because Ms. Fisher's land was in RP. Ms. Fisher told a story about a composting toilet and Mr. Boothbay's letting her access electricity from his pole: she said the Chair of the PB had told her what to do. Mr. Muddle commented that what she had been told to do and what she had done were not the same: he could not believe Mr. Boothbay had sat and watched her add 10' to the structure.

Chair Remian asked surveyor Jim Dorsky of Gartley & Dorsky Engineering & Surveying to present the results of his work. Mr. Dorsky said he had used a combination of LIDAR and a topographical survey. Pointing to the survey plan, he said the section within the green outline was from an on-the-ground topographic survey he had done. There were 3D positions on the ground at intervals of 10' – 15': a horizontal coordinate and an elevation were figured at each. Each of the triangles was also a flat plane and Mr. Dorsky had configured the software to color all slopes of 20% or greater red. DEP's Colin Clark had emailed today to say that Mr. Dorsky had used the correct method to determine the slopes, measuring perpendicular to the contour.

Mr. Dorsky said that within the green outline of the topo survey he had also used boots-on-the-ground. He reported that all the points were within an inch or two of having the same elevation as determined by LIDAR, so it was accurate. Mr. Dorsky said the slopes he determined were all over 30%, so not even close to the 20% minimum. He said there were 4.1 acres of contiguous slopes of above 20% and more. In his professional opinion, therefore, there were more than 2 acres of 20% and greater slopes.

Mr. Wallace provided a research report on the accuracy of LIDAR to Board members. He then questioned Mr. Dorsky extensively on aspects of his work. Chair Remian told Mr. Wallace that the area within the green was not done with LIDAR. Mr. Wallace told Mr. Dorsky what measurements and analysis he would like Mr. Dorsky to do. Mr. Dorsky pointed out that several of Mr. Wallace's suggestions would not serve the purpose he (Mr. Wallace) wished. Mr. Muddle told Mr. Wallace that if he required more information from Mr. Dorsky, he would have to hire him. Mr. Remian said when the PB questioned Mr. Wallace's information, the Town had hired Mr. Dorsky.

Mr. Ellis asked if Ms. Fisher's application was still asking to change all of the acreage in the lot to Limited Residential and Mr. Stolt replied in the affirmative. Chair Remian said the PB had heard both Mr. Wallace's and Mr. Dorsky's presentations and would now discuss the matter.

In regards to changing the zoning district to Limited Residential, Mr. Remian believed the property was already LR, with a RP zone of well over 2 acres within it. Mr. Ellis said the Board needed to make a Finding of its opinion of the two submittals. Mr. Muddle said the request was really for a zoning district change because it was already LR. Mr. Ellis said the LR determination was based on the primary structure; cutting it up to sell a piece put the area without the primary structure in question. CEO Bickford said he believed Ms. Fisher's entire lot was fully in the 250', though there was RP intrusion, and would be LR even without a structure. He noted Mr. Dorsky's opinion that it clearly met the 2 contiguous acres of 20% or more in slopes.

ACTION: Mr. Remian made a motion, seconded by Mr. Ellis, that the designation of Limited Residential on this application cannot be changed based on the engineering information presented to us.
Carried 4-0-1 (Mrs. Kalloch abstained)

4. Adjournment:

The meeting adjourned at 7:42 P.M.

Respectfully submitted,

Deborah E. Sealey, Recording Secretary