Planning Board Meeting October 24, 2018

The meeting was called to order by Chairman David Roberson at 6:12 in hearing room 1 of the Town Hall. Also in attendance were Robin Reed, Jody Brown, Dan Burke, and Doug Wilson, scribe.

We talked about the minutes. The Board of Selectmen are getting new website software and they encourage us to prepare to put our minutes on-line. David said he hoped they will be professional looking.

The minutes from the meeting of September 12th were passed out and were tabled until the next meeting.

David gave a brief summary of an article about short term rentals from the Berkshire Eagle and passed out the article, which will be attached to the minutes.

Some months ago David received a publication from people concerned about the Deerfield River, which he made available for us to read. He is removing it from the mail slot where it had been kept and added it to the Planning Board file.

Jenn Morse, the Chair of the BoS, has indicated that the BoS might be willing to take responsibility for the publication of the Goal Post (GP). Dan thinks supervising the publication of the GP doesn't fit our mission, is taking too much of our time, and he wants the Planning Board (PB) to stop having the GP be our responsibility.

David talked about revising the by-laws. We have gotten up to the solar part of the bylaws and David talked about his conversation with Donna MacNicol and the Chairman of the Planning Board in Heath. We might be able use Heath's by-laws as a template for our own. David requested that we each bring the copy of the by-laws that were passed out to us some time ago to our next meeting.

Heath went to a town meeting to ask for a pause for a particular period of time to allow their Planning Board to finish revising the by-laws. This gave them to time to work on the part of their by-laws that relate to solar installations, which starts on page 47 of their by-laws. The board authorized David to discuss with Donna MacNicol the advisability of pursuing a moratorium on solar applications through Town Meeting to give us time to work up our bylaws. We agreed he could ask her about wind and cannabis moratoriums, too. A moratorium on solar applications, which would need to be passed by a Town Meeting, woudl give us time to work up our bylaws.

David had previously disclosed his involvement in National Wind Watch. He re-stated them for Dan Burke's benefit, since he was not on the PB when we had addressed this before. David said he didn't believe his uncompensated, volunteer work at the nonprofit National Wind Watch improperly influenced his work on the PB or constituted the appearance of conflict of interest that would necessitate a formal filing.

At our next meeting David would like us to pick up the issue of our solar by-law, but also wind installations and the possibility of discussing cannabis.

The time of the next meeting was set to be on Wednesday, the 14th of November at 6:00 pm and the meeting was adjourned at 7:36.

Attachments: The article about short term rentals from the Berkshire Eagle.

Approved 5 December 2018
Joanna M Brown
Robin W Reed
Douglas Wilson

The Berkshire Eagle

October 15, 2018

https://www.berkshireeagle.com/stories/a-legal-snag-for-short-term-rental-regs,553203

In Lenox, a legal snag for short-term rental regs?

Lenox's town counsel flags bylaw part that might not pass muster with AG

Posted Monday, October 15, 2018 10:57 am

By Clarence Fanto, Eagle correspondent

LENOX — The town's attorney has warned the Planning Board that a section of a proposed general town bylaw on short-term rental rules might fail to win the required approval from state Attorney General Maura Healey.

The advice from Town Counsel Joel Bard of KP Law in Boston centered on a provision in the general bylaw prepared by the board requiring that operators of short-term rental homes must provide to the town clerk an affidavit proving their primary legal residency in Lenox.

The Planning Board has also prepared zoning bylaws on the Airbnb phenomenon for consideration by registered voters at an upcoming town meeting. Those are expected to pass muster with the attorney general, according to Bard, if approved by the necessary two-thirds majority at the Nov. 1 town meeting.

In a phone call with Land Use Director/Town Planner Gwen Miller and Planning Board Chairwoman Pam Kueber, Bard recommended striking the proof of residency requirement from the proposed general bylaw. The reason, he said, is that the Attorney General's Office might view the residency requirement as an end run around "grandfathering" protection in zoning laws for current operators of short-term rentals of less than 30 consecutive days.

"It's best to keep zoning requirements in zoning [laws] because this is where we regulate use," Bard said

At the board's meeting last Tuesday, the attorney's guidance did not sit well with several members who had completed crafting a set of Airbnb short-term rental bylaws for a decision by special town meeting voters.

"I have multiple problems with that," said Kameron Spaulding.

He pointed out that the town counsel had already approved the board's general bylaw requiring full-time residency and inspection rules for hosts of short-term rentals while "grandfathering" current operators.

"He already reviewed that bylaw and was OK with it," Spaulding said. "Now another lawyer questions it, and he has a problem."

The other lawyer cited by Spaulding is Michael Martin of Martin & Oliveira, who told the board last month that the proposed general town bylaw "is wholly contradictory to the zoning bylaw as written" in connection with its primary residency requirement for short-term rental hosts.

Martin argued that a nonresident running a permitted short-term rental operation before Nov. 1 would be "grandfathered" as "a pre-existing, non-conforming use" under the zoning bylaw, but would run afoul of the general bylaw requirement stating that rental hosts must produce an affidavit stating that the property is their primary legal, full-time residence.

Bard, a veteran and well-respected municipal law and land use specialist, is a partner at KP Law, formerly Kopelman & Paige, which represents over one-third of the 351 towns and cities in Massachusetts. "It's unfair to suggest that someone is arbitrarily changing their opinion," Kueber said. "Most definitely, there are situations where any of us might look at something once and say it looks good" but then come up with a second opinion upon further study.

She also said that a case can be made that the purpose of the licensing and residency requirements in the general bylaw is to prevent grandfathering of existing short-term rental properties by nonresidents.

During a spirited discussion, Spaulding pointed out that primary residency requirements are standard procedure in multiple Lenox general bylaws. "We do have an entire bylaw that lays out the process of annual license renewals," he said.

The proposed general bylaw for short-term rentals does include a requirement for annual licenses of the premises offered by a host to guests. "You may be zoned to open up a short-term rental, but you still have to go through the licensing process every year," Spaulding said. "I don't care about someone who's already doing it and is grandfathered. I want to know, going forward, that they're continuing to live there.

"Otherwise, all I need to do is move my residency, get my special permit, start running my Airbnb, and then change my residency the next day and it never matters again."

"I think you've made a great argument," said board member Kate McNulty-Vaughan. "It definitely puts the policy right at the tip of the spear."

"We're not lawyers," Kueber cautioned. "Lawyers will figure this out."

"This means the policy intent of the board is to only have full-time permanent residents licensed to do short-term rentals in Lenox," she added, with no opportunity for grandfathering claims by nonresidents.

In response, Miller, the town planner, emphasized that the residency requirement still exists in the proposed zoning bylaw. "We're not taking that requirement out, we're just taking it out of the general bylaw," she said. "Our professional town counsel feels that if we submit that bylaw as currently written to the attorney general's office, it may not be approved."

"Someone could file an appeal, a complaint about our bylaw to the attorney general," Miller added, "and that's what our town counsel suggested might happen."

Nevertheless, the board decided to keep the residency requirement in the proposed general bylaw with the understanding that the attorney general could strike that provision and approve the rest of the bylaw. Members also agreed to continue discussions with the town counsel, since revisions in bylaw proposals can be made right up to the Nov. 1 date of the special town meeting at 7 p.m.