

## PLANNING BOARD MINUTES

June 25, 2012

The meeting was attended called to order at 7:03 pm with members J. Mullen, H. Morse, C. Parton and P. Hardyman in attendance. Brain Domina (Berkshire Regional Planning Commission) was present.

The minutes from the Board's meeting on July 11th were approved as amended. As there was no quorum for the Board's meeting on May 20<sup>th</sup>, the notes from the meeting did not require formal approval by the Board. However, the notes were reviewed for accuracy. P. Hardyman will submit the approved documents to the Town Clerk for posting on the web page.

Review of the Planning Board page of Town's web site revealed that the minutes from Board's meeting on May 2<sup>nd</sup> (2012) had been posted. However, the minutes form the April 4<sup>th</sup> meeting need to be posted.

The Board's mail included a notice from the Town of Monterey as to a hearing before its Board of Appeals (BOA) scheduled for Thursday, August 16<sup>th</sup> at 3 pm. The BOA will hear the grievance(s) regarding a variance to a permitted use within the Town's Agricultural-Residential Zoning District that allowed for the development of a fitness center at 109 Pixley Road.

J. Mullen noted that Mr. Domina had distributed a PowerPoint presentation regarding MGL Chapter 40A, Section 6 concerning non-conforming structures. (See Attachment A.) He indicated that he did not want to spend much time on this topic at this meeting as the law is rather arcane and The Board had several other topics that need to be addressed. Mr. Domina indicated his comments would be brief and that he would simply highlight key sections of the law. He directed The Board's attention to slide 17 pertaining to extending or altering a structure on a non-conforming parcel and pointed out that the local permit granting authority (ZBA within New Marlborough) needed to find that the "change, extension or alteration shall not be substantially more detrimental than the existing nonconforming (structure or) use to the neighborhood." Current New Marlborough Bylaws (§3.5.1/3.5.2) provide that pre-existing non-conforming structures, if damaged, can be rebuilt within two years. By-right 3.5.3 pre-existing non-conforming structures can be altered by special permit approved by the BOS, provided the BOS finds that the change is not more detrimental that the existing non-conforming structure. The Bylaw allows pre-existing use non-conforming to be changed to another non-conforming use on approval of the BOS.

It was clarified that the current draft of the revised By-laws includes the flexibility for converting a multi-to single-family home and a single family to be converted back to a multi-family house within a VCD (Village Center District). Within the RRS (Rural Residential District), a two-family home can be converted to a single family, and then back to a two-family, but it cannot be converted to a multi-family structure.

Mr. Domina noted the changes to the draft by-law agreed upon by The Board at its last meeting had been incorporated into the draft dated 5/29/12:

1. Page 6 e.3 - the clause "not explicating stated herein" was added to the miscellaneous uses.
2. Pages 10, 11, 13, 14 and subsequent pages - text highlighted in green identifies unanswered questions about minimum lot sizes within the village center districts.
3. Header for Section 5.3 – reference to § 3.2 (E)(1) was added.

He added that language that allows for reduction of VCD lot sizes if technology allows for adequate separation of sewage and water remains to be added to §4.4 (page 11).

Briefly discussed was the development of an “Adaptive Reuse Overlay District” as a means of allowing for reuse of specific structures/parcels. Mr. Domina recommended that the Board not incorporate this type of district within this revision of the bylaws as it may generate greater resistance to the bylaw changes and increase the complexity of the bylaws without addressing all non-conforming lots/structures. The Board reiterated its’ intent to make as many as possible of the non-conforming structures/parcels lots conform to the revised Table of Permitted Uses and Intensity Table.

The Board then turned to its questions regarding the revisions to the Bylaws submitted to the BRCP staff:

1. Is “§5.5 Village Center District Mixed Use” adequate to ensure the desired flexibility for development within the VCD?
  - On review of §5.5, the Board agreed it was adequate.
2. Review the concept of “flexible frontage” to determine if this provision should be included in the proposed Protective ByLaws. (It was included in the previous proposed bylaws for village districts within New Marlborough.)
  - Flexible frontage has been addressed by reducing VCD lot sizes, allowing for reducing lot size for water, sewage, and technology, and adjusting the minimal frontage and set-back requirements within the Intensity Table (page 10).
3. Review the principles for drawing the village center district boundaries which included:
  - Natural boundaries, i.e., rivers, open meadows, roads, and the like;
  - Density of the homes;
  - Size of the lots; and
  - Historic building and commerce patterns.
    - The Board’s principles for drawing the village center district boundaries were identified in the handout prepared for the Annual Town Meeting.
4. Review the decision of the Board to be “flexible” as to owners’ preference as to whether their lots were within the village center districts.
  - The need for flexibility was initially addressed through J. Mullen’s conversations with landowners;
  - The formula for splitting large lots within the villages (i.e., setting boundary according to a specific distance from nature boundaries/road) addressed the need for flexibility in the setting of the village boundaries.
5. Review The Board’s decision to defer, where possible, to the owners’ preference as to whether the district boundaries would split their lots between the village center and rural residential districts.
  - See response to question 4.
6. Should The Board be adding provisions to the proposed Protective Bylaws for reviewing and modifying the village center district boundaries in future?
  - Provisions for adjusting the village boundaries are included with MGL.
7. Discuss setbacks for farms in New Marlborough. Should The Board consider making farm development, along a historic pattern seen in New Marlborough (split across roadways with virtually no setbacks) possible in the revised bylaw?

- A farmer need only to apply for an agricultural exemption from local zoning for any the farm structures (including the homestead) that he/she wishes to build.

Mr. Domina indicated that the “final” draft of the revised bylaws will be available for the August 18<sup>th</sup> meeting of The Board. This will enable The Board to prepare for community outreach at the Burrirt Day celebration.

The Board noted that large maps of the village center districts and handout(s) are needed for Burrirt day. BRCP will generate the maps and bullets, however the Board will assume responsibility for getting the maps laminated. (Options include Staples or Kwik Print.)

A tentative plan for out-reach, public hearings, etc. was outlined:

- Burrirt Day – August 18<sup>th</sup> – PB will have “booth” to show the maps, distribute handouts, address any questions, etc. C. Parton will try to locate a tent. P. Hardyman will reach out to Maureen Hosford to get permission from the Cultural Counsel for the Board to have a booth/table at the Burrirt Day.
- Public Information Education Meeting – Sept 8<sup>th</sup> (M. Greer will participate.)
- Public Hearing – Sept 22<sup>nd</sup> (B. Domina will be available to provide technical expertise.)
- Special Town Meeting - tentative October 1<sup>st</sup>. J. Mullen will request space on the BOS’s agenda to discuss scheduling of special town meeting.

Meeting was adjourned at 9:26 pm.

P. Hardyman  
Acting as Secretary



A Presentation by the  
Citizen Planner Training Collaborative



# Part I

## Vested Rights

# **The Seven Protections of M.G.L., Chapter 40A, Section 6**

## **I. Preexisting Structure or Use**

MGL chapter 40A, section 6 protects a structure or use, lawfully in existence or lawfully begun, prior to the first advertisement for the zoning change that will make the structure or use nonconforming.

## II. Building or Special Permit “In Hand”

- Protection from new zoning change.
- Must have building or special permit *hand* prior to the first advertisement for the zoning change that will make the structure or use nonconforming.

## III. Single Lot: 50/5,000

- Protects a *vacant lot* in existence when the new zoning regulations become effective from increases in area, frontage, width, yard or depth requirements.
- Lot *must have at least* 50 feet of frontage and 5,000 square feet of land area.

## **IV. Common Lot: 75/7,500**

- Protects up to three adjoining and commonly held lots.
- Protection for 5 years from the date the lots became nonconforming.
- Lots must have at least 75 feet of frontage and 7,500 square feet of area.

## **The “Merger Theory”**

Substandard building lots must be combined to form one lot that will meet or more closely approximate the minimum lot area and frontage requirements of a local zoning bylaw.

## **V. Preliminary Plan**

A preliminary plan will freeze zoning if:

- Filing occurs prior to the effective date of the zoning change.
- Preliminary plan is followed within 7 months by a definitive plan.

## **VI. Definitive Plan**

Statute protects the land shown on the plan for eight years from the date of endorsement by the Planning Board.

## **VII. Approval Not Required**

ANR plans provide protection against changes to *use* only, and for a period limited to three years from the date of endorsement of the plan.

## **Part II**

### **Nonconforming Uses and Structures**

## **Nonconforming Uses and Structures Defined**

“Except as hereinafter provided, a zoning ordinance or bylaw shall not apply to structures or uses lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or bylaw required by section five...”

## **6-Year Statute of Limitations**

- Protects against enforcement of a building permit that was issued in error.
- Protects the structure and the use authorized by the building permit.
- 6-Year period commences from the date of violation.

## **10-Year Statute of Limitations**

- accordance with the terms of a building permit, or built without a permit.
- Provides protection from enforcement of *structural* violations if enforcement is not commenced within 10 years from the date of the violation.
- No protection from use violations.

## **Alterations To Nonconforming Structures**

A zoning ordinance or bylaw shall apply to any alteration of a structure begun after the first notice of the public hearing to provide for its use for a substantially different purpose or the same purpose in a substantially different manner.

## The Section 6 Finding

“  
uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or bylaw that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming (**structure or**) use to the neighborhood.”

## The Section 6 Finding

- Local government can prohibit the expansion or change of preexisting nonconforming uses and structures.
- Section 6 requires that any expansion or change must comply with current zoning.
- If bylaw allows for expansion or change, the expansion or change must not be more detrimental to the neighborhood.

## **Single and Two Family Exemptions**

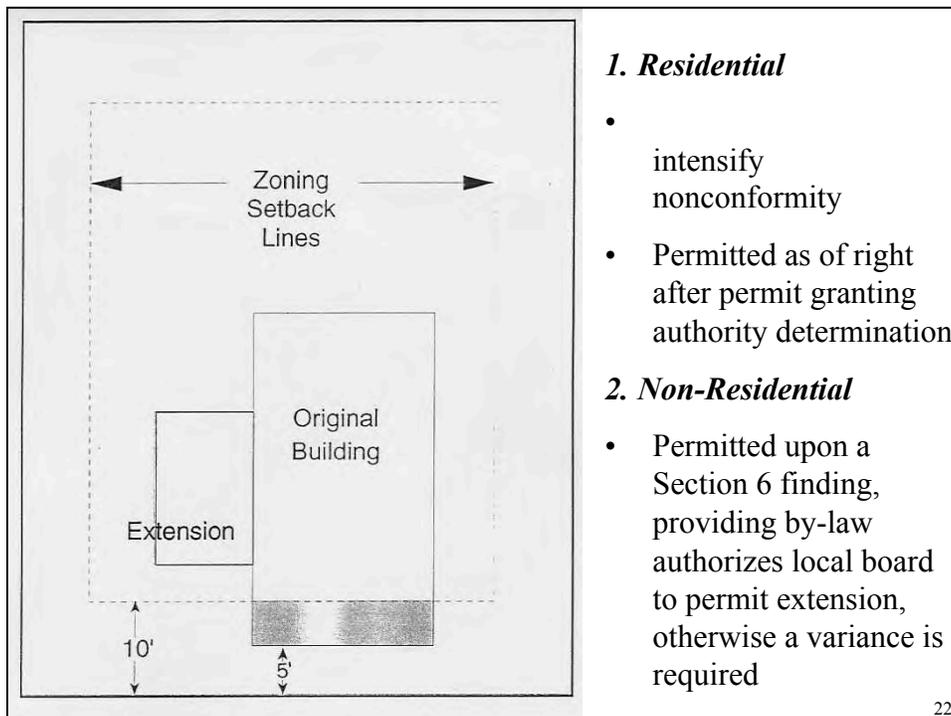
“...a zoning ordinance or bylaw shall not apply ... to any ... alteration, reconstruction, extension or structural change to a single or two family residential structure (which) does not increase the nonconforming nature of said structure.”

## **Goldhirsh v. McNear**

1. Property owner makes application to the ZBA (or Special Permit Granting Authority designated by zoning ordinance or bylaw).
2. Board identifies the nonconformity
3. Board determines whether the proposed change intensifies the nonconformities or result in new ones.

## Goldhirsh v. McNear

4. If no intensification, applicant is entitled to Special permit (perhaps the Court meant building permit).
5. If otherwise, applicant must obtain a Section 6 Finding by showing that the change will not be “substantially more detrimental to the neighborhood”.

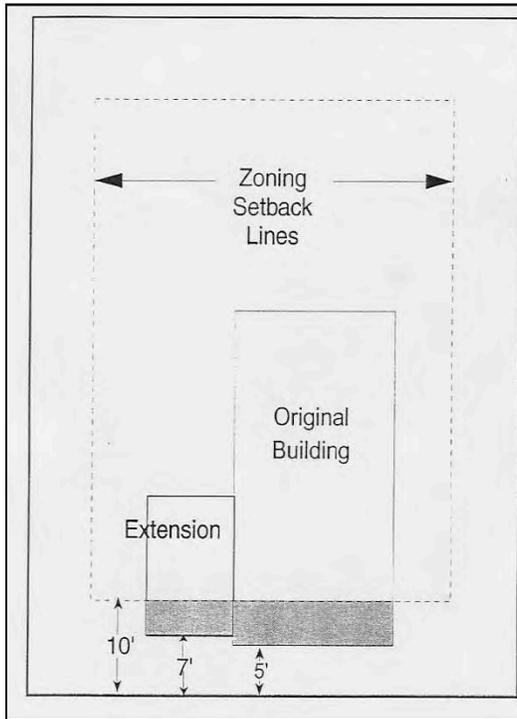


### ***1. Residential***

- intensify nonconformity
- Permitted as of right after permit granting authority determination

### ***2. Non-Residential***

- Permitted upon a Section 6 finding, providing by-law authorizes local board to permit extension, otherwise a variance is required

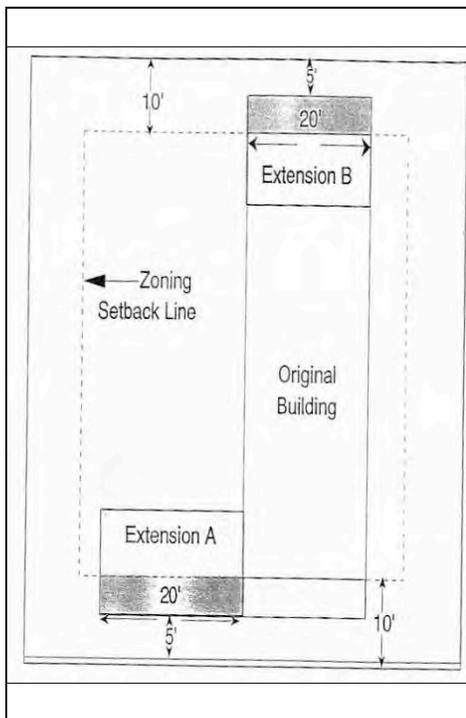


*1. Residential*

- Intensifies nonconformity
- Permitted upon a Section 6 finding

*2. Non-Residential*

- Variance required
- Section 6 finding required



**1. Residential**

***Extension A***

- 
- 

***Extension B***

- 
- 
- Section 6 finding

**2. Non-Residential**

***Extension A***

- Intensifies nonconformity
- Variance and Section 6 finding

***Extension B***

- Creates new nonconformity
- Variance and Section 6 finding

**1. Residential**

- Creates new nonconformity
- Variance probably required
- Section 6 Finding required

**2. Non-Residential**

- Variance and Section 6 finding required

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**1. Residential**

- Appears to intensify nonconformity
- Permitted upon a Section 6 finding
- “Footprint test” not determinative

**2. Non-Residential**

- Variance and Section 6 finding required

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## **Changes to Nonconforming Uses**

“...a zoning ordinance or bylaw shall not apply to ... uses lawfully in existence or lawfully begun... but shall apply to any change or substantial extension of such use...”

## **Three Part Test “Powers Test”**

Part 1:

Does the use reflect the nature and purpose of the nonconforming use prevailing when the zoning took effect?

## **Three Part Test “Powers Test”**

Part 2:

Is there a difference in the quality or character  
and/or degree of the resulting use?

## **Three Part Test “Powers Test”**

Part 3:

Is the current use different in kind in its effect  
upon the neighborhood?

## Non-Use and Abandonment

“A zoning ordinance or bylaw may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.”

