

**Zoning Board of Appeals
Lakeville, Massachusetts
Minutes of Meeting
December 16, 2010**

Members present:

Donald Foster, Chair; David Curtis, Vice-chair; John Veary, Clerk; Eric Levitt, Member; Joseph Beneski, Member; John Olivieri, Jr., Associate member; and Joseph Urbanski, Associate Member.

Regular Meeting:

Mr. Foster opened the regular meeting at 7:00 p.m.

Roll called. Bills signed.

Mr. Foster announced that Comcast was video recording the meeting and that he and Ms. Murray were making audio recordings. He also announced the evening's agenda and cautioned people to use the side exit after 8 p.m. Mr. Foster also stated that at the end of the regular meeting, the Board would go into executive session to discuss pending litigation.

Mr. Robert Poillucci approached the Board and asked to briefly review his plans for the Six Bridge Realty project. Mr. Foster reminded the Board that the comprehensive permit had been extended at last month's meeting for the calendar year 2011. Mr. Poillucci asked that the Board agree to use Mr. Nick Laney as the consulting engineer. After a brief discussion, it was decided that the most efficient approach would be to use Mr. Laney, the engineer who already knows the property and the project.

He asked that the Board consider his pending ownership of the property and change the name on the existing comprehensive permit from Six Bridge Street Reality Trust to Bridge Street Crossing LLC.

Mr. Goldrosen, Town Counsel, advised the Board to first decide if they considered the request substantial or insubstantial. After a brief discussion, it was agreed that the change was not substantial. Mr. Curtis made a motion to state that the requested change was not substantial, seconded by Mr. Levitt. Mr. Olivieri participated in the vote as Mr. Veary chose to abstain. The **vote was unanimous for.**

Mr. Foster asked for a motion to change the name on the comprehensive permit from Six Bridge Street Realty to Bridge Street Crossing LLC upon closing of ownership. Mr. Beneski made the motion, seconded by Mr. Curtis. The **vote was unanimous for.**

Mr. Poillucci then said that he would deposit \$5,000 with the Town to cover engineering and legal costs.

Servis hearing, 211 Old Main Street, continued:

Mr. Foster reopened the Servis hearing at 7:22. Mr. Servis advised that they had straightened out the concerns with the well and that Variances had been issued. Mr. Foster then read the November 2, 2010, letter from the Board of Health. At that time, they were against the petition. He then read the December 15, 2010, letter from the Board of Health which stated that they had granted Mr. Servis a Variance after the fact and that if the new well became polluted in any way, he would move it and would not hold the Town of Lakeville liable. The Board of Health also had Mr. Servis place a restriction on his deed so that any future owner would be aware of this.

Mr. Beneski questioned if this restriction could be removed by the petitioner once it had been placed on. After consulting all the paperwork, it was determined that was not the case and only the Board of Health could remove the restriction. Mr. Foster then asked if anyone present would like to speak for or against the petition. No one spoke.

Mr. Servis stated that the Board had been concerned with the stairs and the bathroom. Mr. Foster clarified that the concern was that the space that Mr. Servis wanted to put above the garage would end up becoming an apartment that could be rented out. Their bylaws do not address two-family properties unless it is an in-law apartment. That is why the Board looks closely at those types of expansions.

Mr. Servis advised that the outside stairs had been removed from the plan. There is now a pocket door to go to into the attic and one at the bottom of the stairs going into the kitchen. Mr. Servis then explained the new plan to the Board members. Mr. Foster asked what the new space would be used for. Mr. Servis replied it would be a master bedroom with a full bath. A possible restriction was then discussed regarding having a door into or from the garage.

Mr. Olivieri then made the motion, seconded by Mr. Curtis, to approve the petition for a Special Permit to raze the garage and build another garage with a second floor on the same footprint based on the revised plans. The vote was **unanimous for**.

Mr. Foster then explained to Mr. Servis the timing of the filings, the appeal period, etc.

The hearing closed at 7:42.

Davis hearing, 113 Nelson Grove Road, continued:

Mr. Foster reopened the Davis hearing at 7:42. Mr. Mike Barlow the contractor was present. He advised that he had a revised garage plan, plot plan, and letters from the

Conservation Commission and the Board of Health to submit to the Board. Mr. Foster then read the December 13, 2010, email from Mr. Perry, Health Agent. He stated that the property had been inspected and the septic system brought back into compliance. If the garage was approved, they would have to re-route the force main which any licensed installer could take care of. Mr. Foster then read the December 15, 2010, memo from the Conservation Commission. They had no issues concerning the project.

Mr. Barlow submitted the new plans and plot plan. He also submitted the original Special Permit that had been issued in 2003. Mr. Foster felt that everything that they had asked for had been completed. He had no problem with this petition. Mr. Foster asked if anyone present would like to speak for or against the petition. No one spoke.

Mr. Levitt then made the motion, seconded by Mr. Olivieri, to approve the petition. The vote was **unanimous for**.

Mr. Foster then explained to Mr. Barlow the timing of the filings, the appeal period, etc.

The hearing closed at 7:49.

LeBaron Residential LLC hearing:

Mr. Foster reopened the continued LeBaron Residential LLC hearing at 7:50. He advised that they had left the last meeting with a request that Mr. Heaton look at the financials of the project and Mr. Varga look at the engineering aspects of the impact of waiving the age restriction on the remaining portion of the project.

Atty. Freeman was present. He advised that they submitted a full set of information and a review had taken place, and that they had met the burden of showing that the project is uneconomical. He wanted to note that the age restriction in the Master Deed does state that it is subject to changes and future phases may or may not be age restricted. Atty. Freeman also submitted a proposed agreement that they had with the condo owners as a gesture of good faith. They met this goal by working with the neighbors and would like to submit this as part of the record.

Mr. Foster said that it was his understanding that they must now base their decision on the economic viability of the project and the results of the analysis. They have agreed to consider thinking about the present residents, but from a legal standpoint that cannot be part of their decision. Atty. Goldrosen advised that the appropriate scope of the review for the ZBA would be the economic analysis and the health and safety of the environment, or the water and sewer.

Atty. Libertine said that he would like to go on record as acknowledging that an agreement is being contemplated, however, they are still working on that. In regards to the traffic study, they are a little further apart. It is not being taking in consideration that they have approximately 100 age restricted units at the entrance and at the end of the road that is going to support all the traffic if that is the sole means of egress to the property,

and the impact of approximately 200 non-age restricted units on traffic and the road. He also wanted to call attention to the original decision of 2004. That decision does not specify when the secondary road will be built only that it must be paved and gated. In 2006, that was amended to include that the road would be required to be completed in stages along with the pavement. As they now see this as a project that might never reach the number that would terminate it and require this road to be built, they are asking the Board to take this under consideration when they render their decision. All his clients are asking for is an additional means of access which they had been promised at the outset and which will take some of that traffic away from the age restricted units. In regards to the waste water, they are concerned about its management. It is controlled by the developer right now, but they are trying to come up with a scheme to fairly apportion the use of it and a management scheme that will allow all the participants of the facility to have oversight of it. In regards to the economy, they are not challenging the report.

Atty. Freeman responded that the question of whether they could compromise on the secondary access is that they just can't do it piecemeal. They don't know what they will be building or how it will be sited and the road would have to be laid out according to how the project progresses. Mr. Foster said that he thought that the back entrance was limited card access for security and emergency vehicles. Atty. Libertine said it was to be gated for the use of emergency vehicles and there would be card access for the residents. Atty. Libertine reiterated that their concern is that the project could go to 304 or 324 units and not ever be considered complete by the developer and the entrance may never be built. Discussion continued about traffic concerns and the types of vehicles that might be anticipated with non-age restricted units.

Mr. Foster suggested that they begin with the engineering review. Mr. Varga said that he would like to summarize some of the key points. The original design called for a total of 386 units which would generate a total of 1,688 vehicles per day. The current proposal of the 118 age restricted units with 268 non age restricted units would generate 1,927 per day. They also looked at the 118 age restricted units with only 220 non-age restricted units which would generate 1,688 vehicles which is the same amount of the original design of the project. If the project went above those numbers then a new traffic study should be completed.

In regards to the wastewater treatment facility, Mr. Varga stated that age restricted housing is rated at 150 gallons per day per unit. General residential housing is rated at 110 gallons per bedroom or 220 for a two-bedroom unit. The two age restricted phases have a total flow of 17,700 gallons per day. The 40,300 gallons available permitted flow is fully achieved by 183 two-bedroom units. BSC feels that without a change in the design and current Groundwater Discharge permit requirements that 183 is the maximum number of two-bedroom units of non age restricted units that can currently be approved.

Mr. Varga continued with the water analysis. The site has a water agreement with the City of Taunton and the Town of Lakeville for 70,000 gallons per day. The first portion of water usage is predicated on Title V flow figures. In terms of other water usage or outside water activities, such as lawn irrigation or garden watering, this can range from as

little as 3.5% or as much as 50% of the total water usage during summer periods of major irrigation. BSC uses a value of 20% to account for this variable function of water demand. For the original proposal this would generate 180 gallons per day per unit or a total of 58,000 gallons per day. Non-age restricted units would generate 264 gallons per day per unit. The current water supply agreement would limit non-age restricted units to 185. He noted that the Groundwater Discharge Permit at 183 two-bedroom non age restricted units is the current maximum limit of that type of unit.

Atty. Freeman replied that they disagree with those numbers. Regarding the increase of 20%, their engineer feels that this doesn't have to be done. They have the pond and their own private well for domestic irrigation. Also, typically you would say 70 gallons per resident, not per bedroom, per unit, even if you have three residents that would only be 210 gallons per unit. They were also told that Taunton uses a lower figure and it is on an annualized basis. They do not agree that the totals are as limiting as Mr. Varga says but they could have a condition if they are reaching capacity they have to show they have permission from the Water Authority. Mr. Foster felt that discussion on the water was moot and the limiting factor was the Waste Water Treatment. He felt that for today's purposes from a practical standpoint the consideration is the most restrictive or the most limiting issue which is waste water treatment unless they were going to expand the Treatment Plant and leaching field.

Mr. Heaton then began his financial review. He stated that this was a unique project and not one that you typically see. At about \$100 million, it was large and with both rental and condo units it was complex. In his opinion, the information provided by the developer was very conservative. He has determined and stated in his report that at this point the project was uneconomic and removing the age restriction will make it less uneconomic. Mr. Heaton then discussed the Pro Forma he had prepared. It had been broken down into three stages. Stage 1 was from 2005 to 2010 and showed a loss of approximately \$5.7 million on 44 units. Stage II was from 2011 to 2013, this showed a loss of \$633,049. Stage III was from 2013 to 2014, anticipated sales were of 66 units for a profit of approximately \$2.6 million. The total of the project was still a loss at approximately \$3.7 million. He did feel that if the age restriction was removed they had a reasonable chance to sell the 66 units sooner than what is projected and begin to generate a profit. He noted that partly what they are doing is paying off the costs incurred from the infrastructure.

Mr. Foster said that he did agree that in Stage 1, they had the infrastructure costs for the project and the project does include 56 rental units which are returning profit to the developer and they have no idea what that profit is. Mr. Heaton advised that the proforma does indicate that the developer is receiving a rental development fee of \$739,000. Mr. Foster asked if they used Mr. Varga's calculations and the project could only go up to 301 units, would it be economical? Mr. Heaton responded that his projection for 386 units is a 12% return. 301 units might come in at 4-5%.

After further discussion, Mr. Heaton advised that in closing he would like to focus on three things. The first was the size of the project and how that drives the finances. Mr.

Foster reviewed that in the worst case with the lowest number of 301 units based on the waste water treatment limitations the estimate would be that the project would generate anywhere between 3-5%. Mr. Heaton said that was correct. He advised that the second issue would be the number of affordable units. Mr. Foster replied that the developer does need to maintain 25%. Atty. Freeman agreed that was the number in the Comprehensive Permit. Mr. Varga noted that all of the 56 rental units were considered affordable. His calculations indicate that they could have up to 170 units before they would have to start providing affordable units again. Atty. Freeman advised that when they did build the rental units, this issue was addressed on the modification.

Residents brought up some issues that concerned them. One was the impact on the school system and how the schools could accommodate a large number of additional children. Another was why the focus was on the financial situation of a for profit organization. Why are they not instead protecting the covenants of the project? Mr. Foster replied that the law states that they cannot restrict or impose conditions on a 40B project that makes the project economically unfeasible. The developer is arguing that the age restriction that was agreed to in the beginning now makes this project unfeasible, which is why they are asking to lift that age restriction. Although this has been done with other projects, this is the first time that there have already been residents in the project. However, they should be reasonably grateful that the developer is willing to consider some of their requests. They have no legal obligation to consider the residents that live there although he did feel that the Board had an ethical obligation to do so, which they are trying to do. Mr. Heaton said the final point was what will happen to this project over the next ten years.

Mr. Foster then stated he would like to discuss the paper that had been distributed earlier which concerned a possible agreement between the developer and the residents. Atty. Freeman responded that although these items should not be imposed by the Board, they wanted the record to reflect that they are trying to work out these issues with the neighbors. Mr. Foster clarified that this then takes this away from the Board and it's an agreement that the developer arranges with the residents through their representative. Atty. Libertine advised that he would agree with that with the exception that they will need to craft an agreement to decide which entity will manage the waste water treatment facility. He stated that the residents could propose how they would like to see the system distributed but they don't have control over that. His clients are not yet trustees of their own association yet, so they can't put that into place without the cooperation they have been receiving from Atty. Mather's office.

One resident noted that two years ago, when Phase 2 was being considered it was asked what costs would accrue to the condo owners when the new building went up and Mr. Fish had said it would be absolutely nothing and that included the waste water treatment plant. Last year, their condo fees went up \$100 per month for the maintenance of the plant. Atty. Freeman replied that he did not recall the exact statement but he did not think the comment applied to the ongoing operating costs. It has always been the case and it is what is stated under the condominium documents so far that there is an allocation and a sharing of all the operating costs by all the units. Mr. Foster wanted a

clarification of exactly why those fees had gone up, and he sensed a lot of frustration on both sides of the table. He would also check with Atty. Freeman and Atty. Goldrosen but he did not think the dispute of the condo fees was part of the Board's business or decision. He did not want to spend time on the issue if it was not relevant to the decision. Atty. Goldrosen said that although this project had a Town Permit, how the costs are broken down is essentially done through the condominium documents. Atty. Libertine responded that according to Mass General Laws 183A does dictate how apportionment of costs for metered utilities will be distributed and it is the general consensus of Towns that they use the water meters to estimate the sewerage usage. They have a scenario where his clients are not being proportionally billed and that does fly in the face of 183A. Therefore, he believes that a resolution to that conflict should be made. Mr. Foster agreed but felt that it was nothing to do with the Board. Atty. Libertine said that until that is resolved and an entity is created to run that facility and do that billing, they are in the position of not knowing how that system will be maintained. Atty. Freeman said that it is done through the condominium documents.

Mr. Foster advised that he was hoping to at least close the hearing tonight. He then noted that although, they over the last few month, had discussed several issues regarding this project; their main issue was to deliberate on the economic feasibility of the project. A decision based on anything other than that would have a good chance of being appealed in Housing Court. This would take the burden off them but they would then lose all the compromises that the developer has agreed on.

Atty. Freeman stated he was also hoping for the hearing to be closed because all the information has been submitted. They were hoping for a vote on the removal of the age restriction or at least a straw vote subject to a decision that would have to be drafted. Mr. Foster asked if there was anything further. Atty. Libertine advised that he did have a few points to make. First, when analyzing the profitability of the non-profit corporation that is running the Fairways, that corporation does have to expend money on management and they should know who the entity is and if it is related to the developer. There are ways that non-profits can show profit for private companies. He also wanted to state that the developer, through Counsel, has stated that they do want to see this project built out and you are then looking at his clients who sit at the beginning of the traffic pattern and under that scenario they are looking at a car going by every 20 seconds during that peak afternoon hour. He felt it was interesting that no proforma had been done for an age restricted scenario when it was indicated by the experts that they don't see this project closing until 2020 or beyond. Then why can't they take that number beyond because if they are not looking for this project to close for 10 years then maybe there is some economic figure that can be realized in an age restricted community. Finally, on behalf of his clients, with no disrespect intended, maybe one of the reasons people are not buying over 55 housing is because it is not being properly supported by the developer once it is purchased.

Mr. Foster then recommended that they close the evidence portion of the hearing. There was then another discussion regarding the management of the waste water treatment facility. Mr. Foster asked if they could now defer this topic of management to another

time. Atty. Freeman replied that he thought what they were suggesting was in a new decision a new condition would state that at such time as when they work it out with the neighbors they can then unilaterally come back to them and change how it works now to a separate entity that owns and operates and charges a fee, etc.

Mr. Foster stated that he would like to close this hearing so that they could move forward but because of the late hour, he would like to save deliberations for another time.

Mr. Curtis then made the motion, seconded by Mr. Levitt, to close the LeBaron Residential LLC hearing. The **vote** was **unanimous for**.

Mr. Foster said that he would like to give Atty. Freeman a sense of where the Board was. They did have 40 days to make a decision so their next meeting would be within the time frame. After a discussion among Board members, Mr. Foster said his sense was to grant the waiver. He felt the risks of not doing that were high. Mr. Olivieri and Mr. Levitt agreed.

Mr. Curtis then made the motion, seconded by Mr. Olivieri, to continue the LeBaron Residential LLC hearing until January 20, 2011. The time would be at 7:15. The **vote** was **unanimous for**.

The hearing closed at 10:25.

Mr. Foster advised that they needed to enter into Executive Session in order to discuss an issue related to litigation. They would adjourn from that session and not return to open session.

Mr. Curtis made a motion, seconded by Mr. Beneski, to enter Executive Session in order to discuss an issue related to litigation and to not return to open session.

Roll call vote: Mr. Curtis – Aye, Mr. Veary – Aye, Mr. Levitt – Aye, Mr. Beneski – Aye, Mr. Olivieri – Aye, Mr. Urbanski – Aye, Mr. Foster – Aye