



Planning Board – Town of Spencer

Minutes

Planning Board Special Meeting

Thursday, November 19, 2020 at 6:00 PM

McCourt Social Hall, 157 Main Street Spencer, MA 01562

Memorial Town Hall- **Remote Meeting**

Planning Board Members Present: Vice Chair Jeff Butensky (in-person/ acting chair), Robert Ceppi (in-person), Jonathon Viner (in-person), and Maria Reed (remote)

Planning Board Members Absent: Shirley Shiver

Staff Present in-person: Ian McElwee, Interim Town Planner

Staff Absent: Monica Santerre-Gervais, ODIS Senior Clerk

1. Mr. Butensky opened the meeting at 6:05 pm and Mr. Butensky read aloud Covid-19 statement. *“This Meeting of the Planning Board is being conducted remotely consistent with Governor Baker’s Executive Order of March 12, 2020, pursuant to the current State of Emergency in the Commonwealth due to the outbreak of the COVID-19 Virus. In order to mitigate the transmission of the COVID-19 Virus, we have suspended public gatherings, and as such, the Governor’s Order suspends the requirement of the Open Meeting Law to have all meetings in a publicly accessible physical location. We are meeting remotely and broadcasting live on Spencer Cable Access to ensure public viewing access.”*

2. Discussion: Solar

Mr. Butensky mentioned the moratorium.

Mr. McElwee mentioned he received an email from Town Council, Jonathan Eichman, on what the Planning Board should do regarding Solar Projects currently on our agendas *“opinion those applications may be returned to the applicants with reference to the moratorium. Per G.L. c.40A, s.5, a zoning bylaw amendment is legally effective as of the date voted by Town Meeting, subject to Attorney General approval. Applications submitted prior to the moratorium are not “grandfathered”, in my opinion, as per G.L. c.40A, s.6, the new bylaw applies to all uses not in existence prior to Oct. 2, 2020, the date of the advertisement for the Planning Board public hearing on the amendment.”* Mr. Butensky asked Mr. McElwee could forward that to the Planning Board to review. Mr. Butensky asked how the Planning Board should function while waiting for the Attorney Generals office to approve and Mr. McElwee said to be on the safe side and act as if the moratorium is in effect. Mr. Butensky asked the board their thoughts about closing or continuing projects for a year and Mr. Viner said they should all be closed and not a fan of continuing for a year but will hear argument for justification on a continuance. Additionally, Mr. Viner felt the plans will get changed with the new bylaw. Mr. McElwee asked about waving the fees and Mr. Viner felt that could happen. The Planning Board members discussed denying the application or having the applicant withdraw, which, would be the easier solution.

Mr. Butensky stated the Planning Board needs to start having discussions about bylaw changes to make recommendations to the Board of Selectmen. Mr. Butensky if the solar changes should be on a separate agenda before each regular meeting or a standalone item on the regular agendas and Mr. Viner said they should have the availability to speak about it on each agenda if time permits.

Mr. Butensky opened the discussion up to the public for comments and questions.

Jamie Boyd, Sunpin Solar, said the moratorium would affect their solar project. Mr. Butensky said when they get to 22 Norcross on the agenda, they will discuss more with Ms. Boyd.

Ralph Hick, 21 Lyford Road, said the lawyer letter is what you need to know. Mr. Hicks said that Gary Woodbury sent another email regarding one of the solar farms on the agenda. Additionally, Mr. Hick stated the lawyers should be listened to and the Planning Board should wait to hear from the Attorney General before they act on any projects.

Ted Heuer, Attorney representing BETA Group, asked for clarification of the language from the Moratorium and mentioned discussion from the October 20th, 2020 meeting where projects that have been submitted wouldn't be affected by the moratorium. Mr. Butensky said the North Brookfield Solar project is unique and it might be expired but looking for an extension and asked to hold off on discussing until their agenda item.

3. Adoption of Minutes: 10/20/2020 Zoning Meeting Minutes

Mr. Butensky asked if the members wanted to vote when Ms. Shiver was present, and Mr. Viner agreed to continue the minutes of 10/20/2020 until all Planning Board members are present.

4. Continued Public Hearing-Major Site Plan Review/Special Permit Applicant: Sunpin Solar Development, LLC; Owner: Peter and Carol Gaucher, Location: 22 Norcross Road; Spencer Assessor's Map R40-07. The applicant is requesting a Major Site Plan Review under Section 7.4 and Special Permit under Section 7.2 of the Spencer Zoning Bylaw Zoning to install a Solar Farm. The property is located within the Rural Residential zoning district (looking to continue for 6 months)

Mr. Butensky mentioned the applicant is looking to continue for six months due to the developer trying to work out issues between Utilities and National Grid.

Jamie Boyd, Sunpin Solar, did submit request to continue for six months because an area study was done by National Grid and it came back this project would be 19-million-dollar upgrade, hired council, and trying to make this work. Ms. Boyd said that they have spent a substantial amount of money on this project and she does not want to withdraw.

Mr. Butensky opened the hearing up to the public for comments and questions.

Gary Woodbury, 219 Charlton Road, stated he had documents from Town Council and all the solar hearing need to get closed and then reopened after the moratorium. Mr. Butensky agreed with Mr. Woodbury but mentioned the Planning Board could extend for one year or close the hearings and felt if they go either way it could have repercussions. Mr. Woodbury said the Planning Board should wait and proper procedure is a better understanding from Town Council and Mr. Butensky agreed.

Mr. Butensky asked if instead of a 6-month extension they do a month extension. Mr. McElwee said the Planning Board can deny the extension request and continue to a different amount of time. Mr. McElwee will get more guidance from Town Council. Mr. Viner stated that he would be surprised if the Attorney Generals office get back to the Town of Spencer by December. However, Mr. Viner said a six-month extension is ridiculous and the first application for this project was in 2018 and it has now been 2.5 years and it would be a waste of time and ask the applicant to withdraw their petition. Mr. Butensky asked if the applicant would be willing to withdraw their petition for a year and resubmit in a year without fees and Ms. Boyd answered no and because a Planning Board threatened termination of the project she will need to reach out to her attorneys. Mr. Butensky asked if they need to make a motion regarding the 6-month extension and Mr. Viner stated he was ignoring it and making his own motion.

MOTION: Mr. Viner motioned to continue the public hearing until 12/15/2020

SECOND: Mr. Ceppi

DISCUSSION: None

ROLL CALL VOTE: Butensky-yes, Reed-yes, Ceppi-yes, Viner-yes, (Vote 4-0 motion carried)

5. Continued Public Hearing: Major Site Plan Review/ Stormwater Permit Renewal – Applicant: Chris Nolan, BETA Group, Inc.; Owner: DG Northeast 2020 Holdings, LLC Location: North Brookfield Road; Spencer Assessor’s Map R39/14. The applicant is requesting an extension to a Major Site Plan Review under Section 7.4 of the Spencer Zoning Bylaw to install a solar array. The property is located within the Rural Residential zoning district.

Mr. Butensky explained the applicant is looking to extend their site plan, there has been discussion regarding an expired special permit, and the Building Inspector, Duane Amos, has sent a letter to the applicant regarding his opinion of substantial use.

Ted Heuer mentioned there are 3-4 things that needs to be clarified. First, special permit, regarding Mr. Amos’ letter from November 9th, 2020, and the lapse of site plan approval. Discussion regarding substantial use to commence and the site plan review and a completion deadline of the certificate of decision should be disregarded due to Covid-19. The decommissioning bond was discussed last meeting and can be increased after the site plan and special permit are approved. Also, Mr. Heuer mentioned the moratorium and if it affects this project.

Mr. Viner wanted to hear a response from the letter sent by the Building Inspector and Mr. Heuer said the letter was for the special permit and the examples in attachment A of a letter he provided

it did not constitute as substantial use for construction and Mr. Amos only considered it as preparation. In the letter from Mr. Amos, he asked for additional examples of specific use since May 02, 2018. Mr. Heuer said its not a factual question and there is not a clear definition in the Spencer Zoning Bylaw that define substantial use and there is no apparent case; there is case law for substantial use for a building permit under Massachusetts General Law 40 A section 9. Mr. Heuer said a special use permit is different because you don't need construction and he gave some examples. Additionally, Mr. Heuer discussed the Evergreen Case and requested a good cause extension.

Mr. Viner noted that the examples given were appropriate but has issues with the special permitted use is a large mount photovoltaic facility that needs to be constructed to be used and not interpreted as a building use special permit. Mr. Heuer answered that the Evergreen Case was about a subdivision and the court did not consider that as a construction special permit and the findings the Zoning Board of Appeals Certificate of Decision findings to grant is the use impact of the project. Additionally, the two documents approved for the Zoning Board of Appeals special permit had conceptual documents with the understanding that the developer would need to go before the Planning Board for Site Plan Review and apply for a building permit. Mr. Viner said they need clear guidance from legal counsel to make any decisions. Mr. Heuer asked what they can provide to the Planning Board and Mr. Viner said there hasn't been specific answers to the questions they have asked to the previous Town Planner, Town Officials, and Town Counsel. Mr. Butensky asked the next steps and Mr. Viner said he doesn't know the exact procedure and what we have done in the past has not worked. Mr. Viner suggested the developers Town Counsel, the Town's Counsel, and the Building Inspector should get together to have a solution to move forward.

Mr. Butensky opened the hearing up to the public for comments and questions.

Matt Defosse, 7 Paul's Drive, asked about the discussion of site plan review and why Mr. Heuer only discussed the special permit and he objects this project and the validity of this project. Mr. Defosse asked to present his package to the town, a packet was given to the Planning Board at an earlier date. Mr. Viner said the board received the packet and it was reviewed and he appreciates his frustration. Mr. Defosse wants to submit material to the Planning Board and would be helpful with the decision.

Mr. Heuer asked about the site plan extension and make sure the full range of issues. Also, Mr. Heuer stated the 3-year completion extension would not need to be extended because of the Covid-19 crisis but the first deadline must be discussed with the Building Inspector and Town Counsel. Mr. Viner clarified the deadline for the two-year window in order to initiate the project to site plan approval that expired February 20, 2020 and Mr. Heuer said yes.

MOTION: Mr. Viner motioned to continue the public hearing until 12/15/2020

SECOND: Mr. Ceppi

DISCUSSION: None

ROLL CALL VOTE: Butensky-yes, Reed-yes, Ceppi-yes, Viner-yes, (Vote 4-0 motion carried)

6. Review of Asbuilts- 17 GH Wilson and 17 So. Spencer Road

- **17 GH Wilson Road-** Mr. Butensky reviewed that there have been some issues with this site including the battery pad and other items and a letter from October from Graves Engineering for the peer review of the asbuilt. Mr. Viner expressed that the plans used for the building permit were not the approved site plans. Mr. Butensky asked what the Planning Boards role with the asbuilt and Mr. Ceppi said it is to confirm that the project was built to the approved plans. Mr. Butensky asked if the Planning Board has any right to challenge an asbuilt because it was not built to the approved site plans. Mr. Viner felt it was embarrassing that they haven't received guidance on it. Mr. Butensky explained the Planning Board had expressed in numerous meetings that they were not allowing battery storage and this applicant is storing power with battery storage on the site. Mr. Viner stated there is nothing the Planning Board can decide on at this time and it will be appropriate motion to not endorse the asbuilts because the project was not built to the approved Planning Board site plans. There was much discussion about the procedure to approving asbuilts. Mr. Viner believes the matter is now a legal issue and wants to be able to approve the asbuilt.

Pete Forte, ZPT Development, commented that the asbuilts were submitted in August and there has been plenty of time the Town of Spencer has had to ask the question needed and conclude with Town Counsel. Mr. Viner did agree with that statement but voiced he still can't vote to approve the asbuilts.

George Kiritsy, Attorney representing ZPT Development, West Boylston, MA. Mr. Kiritsy stated the Planning Board has had the asbuilts since August and he sent a follow up letter in September. Site plan approval is approval for a Building Permit, the Building permits were issued, signed off, and approved. Also, including in the conditions mention a certificate of completion would be issued once the asbuilts were received and permitting authorities have signed off and that has been completed. Mr. Kiritsy stated this is the last step, its generating, and approved by the Building Inspector, and, respectfully suggest the Planning Board close this matter. Mr. Ceppi felt the applicant took advantage of the Town of Spencer by switching the plans and how the applicant can get away with it. Mr. Butensky stated that battery storage was not a minor field change and the Planning Board members are still in shock the previous Town Planner signed off on the building permit. Mr. Butensky stated his issue with approving this asbuilt is opening issues where other developers add things and the Planning Board needs to set a precedent. Furthermore, Mr. Butensky expressed he could approve the asbuilt if the battery storage is to be removed. Mr. Forte mentioned in 2018 the Planning Board said the battery storage was a building and electrical issue and Mr. Kiritsy said batteries are part of a solar farm. Additionally, Mr. Kiritsy can appreciate the Town of Spencer and the Planning Boards concerns for battery storage but can now update their bylaws to address those issues.

Brendan Gove, Zero Point Development, referenced the meeting minutes and former Town Planner, Paul Dell'Aquila, mentioned to put a condition regarding battery storage into the special permit/ site plan approval but he did not insert the condition. Mr. Gove

felt they submitted their electrical and building permits and were all set and did not know it was an issue, however, he finds it offensive that they are being accused of a “bait and switch” of plans. Mr. McElwee asked what meeting minutes Mr. Gove was referring to and Mr. Gove said 8/21/2018. Mr. Viner said there were two separate site plan hearings because the original site plan was denied and then appealed to court and remanded back to the Planning Board and then approved. Mr. Viner said the condition that Mr. Gove is referencing was not put in the second final decision that was approved. Mr. Gove argued the condition was to get the building and electrical approvals and they did so even if the condition wasn’t inserted in the decision, they have met the requirements. Mr. Viner felt the Planning Board was not kept up to date on the process and Mr. Gove said they spent over \$80,000 for the Town of Spencer’s engineers to review the project as it was to be constructed and Mr. Viner said the applicant was correct but the site reports were not submitted to the Planning Board. Mr. Gove argued that Mr. Dell’Aquila was copied on the emails. Mr. Viner did not argue that Mr. Dell’Aquila received the reports, but he did not provide the Planning Board copies and Mr. Gove said that they should not be blamed for the former Town Planners errors.

Point of order was called and Mr. Butensky said the discrepancy was brought on by Mr. Dell’Aquila and did a lot of actions without notifying the Planning Board. However, Mr. Butensky stated that the developers were at the meetings where the Planning Board showed their disagreement with battery storage and the Planning Board’s number one solar issue. Mr. Gove disagreed and asked Mr. Viner what will change by next meeting. Mr. Butensky said he would like to see the batteries be removed and Mr. Gove said that was not going to happen. Mr. Butensky stated the Town of Spencer and the Planning Board are against battery storage and felt they have been clear about their standpoint. Mr. Gove asked Mr. Viner to explain to Mr. Butensky why he is wrong. Mr. Viner said the town officials knew what was being done. Mr. Gove stated he believed some members of the Planning Board knew about the battery storage. Mr. Gove expressed how upset he is and would like to see his project approved. Mr. Kiritsy stated he was not at the meetings that Mr. Butensky accused him of being present to and understands everyone’s frustrations but needs to move on. Mr. Viner said in all fairness the Planning Board knew that a concrete pad was being installed for future battery use, however, the functional issue is the process from concrete pad to “future use” to “batteries stored onsite” that process were different expectations. Mr. Viner said he is not faulting the applicant and the issue is that Mr. Viner felt the process happened in a manner that the Planning Board would have been handled differently. Mr. Butensky was under the understanding from the beginning that the battery storage would happen at a separate meeting for approval.

Mr. Butensky recommended no action. Mr. Kiritsy said the project needs a certificate of completion for the project. Mr. Viner asked what a certificate of completion adds to the applicant and Mr. Forte answered that every condition needs to be completed to close off the special permit.

Matt Defosse, 7 Paul’s Drive, said he was on the Solar Bylaw Advisory Committee and recommended continuing this meeting because the Spencer Cable Access channel went

back to the 17th meeting. Furthermore, Mr. Defosse recommended putting a hold on anything Mr. Dell'Aquila approved and should be investigated. Mr. Defosse said deciding on this matter would be unfair to the residents that could not participate, and Mr. Butensky noted this was not a hearing. Mr. Gove ended with stating his position that the Planning Board approved the project with the batteries and the signatures are on the Certificate of Decision.

Mr. Viner would like to see legal counsels' opinion and provides guidance. Mr. Butensky wants to what degree the Town Planner can change the approved site plan and Mr. Gove argued that the previous Town Planner did not change anything. Mr. Woodbury requested a point of order and to move on.

- **17 So. Spencer Road-**

Jeff Butensky mentioned this is a solar farm asbuilt for the Town of Spencer landfill and asbuilt peer review was provided. Mr. Butensky asked what the Planning Board's role with the asbuilt process and Mr. Ceppi said it is a condition in the decisions. Mr. Viner stated it is proper procedure for the Planning Board to review and approve asbuilts. Mr. Viner said there was an amended asbuilt submitted. Mr. Butensky asked Mr. McElwee to review the asbuilt and to let the Planning Board know and he said yes. Mr. Viner said he has no confidence that the asbuilt will match the approved site plan. There was much discussion about the plans that were submitted for a building permit plan versus the site plan approved plan.

Emily Byrne, Citizens Energy, project was closed out on August 31, 2020 and they received the certificate of completion. Mr. Butensky stated they are just reviewing asbuilts to give thoughts on it and there will be no implication to their project. Ms. Byrne said it is confusing and doesn't know why it is on. Mr. Butensky stated there are no issues and apologized to the applicant. Mr. McElwee asked if the applicant did receive the certificate of completion and Ms. Byrne said yes.

MOTION: Mr. Butensky that the PB endorse the asbuilt for 17 So. Spencer Road

SECOND: Ms. Reed

DISCUSSION: Mr. Ceppi asked why motioning this applicant and Mr. Viner is not comfortable what may or may not have happened and not vote on anything tonight. Mr. McElwee stated the applicant has the certificate of completion and does not need to be voted on. Mr. Ceppi said there are concerns that the board was not aware of the applicant receiving their certificate of completion.

ROLL CALL VOTE: Butensky-yes, Reed-yes, Ceppi-Nay, Viner-Nay, (Vote 2-2 motion not carried and project is not affected by this vote)

7. Town Planner Report- CMRPC delegate, Ian McElwee, Interim Town Planner.

- **Update on the Town Planner position**
- **December meeting Mr. McElwee will be remote**

8. General Board Discussion/ Board Liaison Reports-

- Mr. Ceppi asked if there is an investigation happening regarding all the approvals done by Mr. Dell'Aquila. Mr. Butensky stated there needs to be more involvement from the Town Administrator, Tom Gregory, and other Town Officials.
- Mr. Butensky brought up the Open Space and Mr. McElwee said George Russell has been working on that with a different CMRPC delegate.
- Mr. Ceppi asked for the minutes for 17 GH Wilson Road
- Mr. Viner discussed an email he sent to the Planning Board regarding the subdivision regulations

9. New Business/ Adjournment-

- Mr. Defosse suggested that the Planning Board have an attorney represent the town at meetings.
- Tatyana McCauley, 28 McCormick Road, dissatisfied with the decision to allot thirty minutes of each meeting for solar and wants more organization or topic points.
- December meeting will start at 6:00 pm

MOTION: Mr. Mr. Viner motioned to adjourn the meeting at 8:39 pm

SECOND: Ms. Reed

DISCUSSION: None

ROLL CALL VOTE: Butensky-yes, Reed-yes, Ceppi-yes, Viner-yes (Vote 4-0)

Submitted by Monica Santerre-Gervais ODIS Clerk

Approved by the Planning Board on: 2/16/2021

List of Documents used on November 19, 2020

Items sent to Planning Board prior to Meeting by email:

- Agenda
- 10/20/2020 Zoning Meeting Minutes
- 22 Norcross Road Continuance request
- 17 GH Wilson- Completion letter, construction noise report dated 6/17/2020, change of ownership, and asbuilt stamped 8/14/2020, asbuilt peer review,
- Landfill solar- asbuilt and certificate of completion

Items submitted at the Meeting:

None