

TOWN OF NEWTON
PLANNING BOARD
MAY 20, 2015
MINUTES

The Town of Newton Planning Board met in a regular session on Wednesday, May 20, 2015, at 7 p.m. at the Town of Newton Municipal Building, 39 Trinity Street, Newton, N.J. The following members were present: Neil Flaherty, Gary Marion, Kent Hardmeyer, Helen Le Frois, Ernest Hemschot, Dan Flynn, Kevin Elvidge, Joseph Ricciardo and Greg Le Frois. Thomas Russo was excused. Also present were: David H. Soloway, Esq., Board Attorney, Jessica Caldwell, Board Planner, David Simmons, Board Engineer and Board Secretary, Katherine Citterbart.

SALUTE TO THE FLAG: was recited.

ADMINISTRATION OF OATHS: None

ROLL CALL: was taken

THE SUNSHINE STATEMENT: was read.

CONSIDERATION OF MINUTES

April 15, 2015

A motion was made by Mr. Marion and seconded by Mrs. Le Frois to approve the minutes from the April 15, 2015 meeting.

AYE: Mr. Marion, Mr. Flaherty, Mr. Hardmeyer, Mr. Hemschot, Mrs. Le Frois, Mr. Le Frois
Mr. Flynn and Mr. Elvidge abstained.

The motion was carried.

HISTORIC RESOLUTIONS:

None

RESOLUTIONS:

Richard Lance (#LUVWSP-01-2015)
128 Sparta Avenue
Block 24.01, Lot 1, T-3 Zone

Resolution granting approval for a use variance to allow a Tax Preparation/Financial Services Office on the First Floor and Residential Use on the Second Floor and two bulk variances for parking and signage.

Mr. Hardmeyer made a motion to approve the resolution. The motion was seconded by Mrs. Le Frois.

AYE: Mr. Flaherty, Mr. Marion, Mr. Hardmeyer, Mr. Hemschot, Mrs. Le Frois, Mr. Le Frois

The motion was carried.

OLD BUSINESS:

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None

NEW BUSINESS:

Ordinance #2015-15 – Permitting Vapor Stores and Tobacconists as principal permitted uses in the T-4, T-5 and SD-3 Zones.

Ms. Caldwell stated: We have three separate ordinances that were referred to the Planning Board. Under the referral that you're used to it's generally a Master Plan Consistency Review. Also you're able to provide whatever comments you might have as a Planning Board back to the Town Council. I believe we have some public here to discuss the vapor ordinance so I will start with that.

As you know in our Form-Based Code we have a very specific list of uses and that's what prompted this specific ordinance. There have been several requests to have vapor stores and some for tobacconist or cigarette and cigar shops. For most municipalities if they have a general retail or commercial zone it's not a question of whether or not they're permitted. They fit right in. With our ordinance because our uses are very specifically listed; if it's not listed then it's considered prohibited. When it comes to one retail versus another it's difficult to justify an exclusion if there isn't a specific reason for doing so. Because of all these requests and the way our ordinance is specifically listed the Town Council and the Town Manager directed me to draft an ordinance that would permit them somewhere in the town. So what you have before you tonight has been introduced before the Town Council is an ordinance that establishes some definitions that apply to vapor stores essentially the next generation that includes e-cigarettes but electronic smoking devices can vary a little bit. Potentially what the ordinance does is it provides for the vapor store or the tobacconist to be permitted in the T-4 which is the neighborhood commercial or the T-5 which is a slightly more intense commercial area directly surrounding the downtown and a few other areas of commercial uses. And then not permitted in the T-6 which would be on Spring Street. We also permit, under this ordinance, both of those uses in the SD-3 district which is the highway commercial district where Home Depot is all the way down Water Street, close to The County Seat. So those are the areas in general; the main commercial areas excluding the Spring Street area.

Mr. Ricciardo asks why Spring Street is excluded?

Ms. Caldwell answered that the idea was that if we get too many of them on Spring Street it would give a flavor of something not desirable.

Mr. Ricciardo asks if you could regulate the number of them for that street?

Ms. Caldwell doesn't think you can limit them.

Mr. Soloway agreed. I don't see how you can limit the number of stores. It's either permitted in the zone or it isn't. You can't put a cap on the number like you can with a liquor store based on the available number of liquor licenses.

Mr. Ricciardo asks where does it start and where does it end? Does it start at the Square and end at the Newton Theater?

Ms. Caldwell agreed.

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Mr. Le Frois asks if the definitions are those that are generally accepted in the public or have they been developed by you through research?

Ms. Caldwell answered: a combination. We utilized a model ordinance from California and we utilized the Moskowitz Book and tried to go back and forth to develop something that was standardized and accepted versus just something we came up with. Primarily from the model ordinance.

Mr. Soloway brought up from an enforcement perspective how do you make the determination of the tobacconist based on the percentage of gross sales receipts. It's one of the ways you can tell what it is. Floor area I guess you can do. Not sure how you do the gross sales receipts. It's an issue for the Board or somebody at the Council.

Ms. Caldwell says we wouldn't know if they were accurate. The State law is slightly different but there are some State regulations that also define tobacco and vapor stores as well. The other wrinkle is that you can have a convenience store that sells cigarettes, and vapor products so that was another issue. The products can be sold but we're prohibiting just being sold in one place. That was another issue as to why it is brought forward.

Mr. Ricciardo asks does it limit what he has to sell to what's listed here as a tobacconist or can he put other things in that store?

Ms. Caldwell - he certainly can put other things in the store. It's 25% or more of the floor area and 75% or more of gross sales. So the rest of the store can be a newsstand with a quarter of it is tobacco products. We used to have one on Spring St.

Mr. Le Frois states that if only 10 or 15% of their sales is tobacco they're not considered and would not fall under this.

Ms. Caldwell states yes, so you would be considered more of a convenience store. This is to capture the types of uses that are as their primary business.

Mr. Le Frois asks so if a business on Spring St sells under 25% and they want to sell vapor products they could.

Ms. Caldwell states yes. A lot of liquor stores sell them as an ancillary product. It's a minor thing that people sell as an accessory to their main sales which is liquor.

Mr. Flaherty asks why are we forbidding it on Spring St if it was already allowed there at a number of other stores? We had a tobacconist on Spring St.

Mr. Ricciardo stated it was considered a luncheonette and breakfast place more than anything else. That was the largest floor area he had was the counter in the back and he had magazines and newspapers. He had a very small tobacco area.

Discussion ensued

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Mrs. Le Frois states - Regarding sales enforcement – this Board nor the Zoning Officer or anyone else will be looking at the receipts of the store. So why is that in there? I can understand the floor space because that's a visual inspection, but not the 75% or more of gross sales receipts.

Ms. Caldwell says that's a fair statement and a good comment that could be sent back to the Council.

Flynn asked – wouldn't the income have to be disclosed and itemized to the Tax Assessor?

Discussion ensued.

Mr. Le Frois says the major comment that should go back to the Council to perhaps rethink the alternate to the floor area in terms of the definitions. Perhaps, gross sales receipts is not a way to determine if that is their primary business. There may be some other accessible way that our enforcement officer could use if the floor area is not an appropriate method.

Ms. Caldwell says T-6 includes the Square, around the Courthouse and includes Church Street.

Mrs. Le Frois listed some of the prohibited business types. Drive thrus not conducive to Spring St. Auto body not permitted. Prohibitions were made based on space requirements and pedestrian vs. auto traffic sales. Someone might ask what the exclusion of this in the T-6 is?

Ms. Caldwell – we see it as potentially drawing an element that we don't want in the area. We've had several requests for hooka shops and drug paraphernalia in the area and we've kept out of the town.

Mr. Soloway states he doesn't know if we are going to have a problem if we are saying we will allow it in one zone but not another. It gets trickier when you say you will not allow it anywhere. The Council can make legislative judgements about the specific types of uses deemed appropriate for specific areas and how they group together and interrelate. It's always a bit dangerous when you start talking about that you don't want to attract that kind of person because that can take you to a lot of strange places. I think it's probably defensible because I think your objective with T-6 is to have a shopping district that would attract tourists as well as local people. Not so much hang around establishments. More true retail. Family oriented. Rated G.

Mrs. Le Frois – my two comments to go back to the Council would be about the T-6 and my second comment is about the 75% of sales.

Mr. Soloway continues – you need to determine if it is inconsistent with the Master Plan. Beyond that you're allowed to make any comments or suggestions you might like. The only thing you're required to do is address Master Plan consistency.

Mr. Soloway continues – if the majority of the Board feels that way it is a legitimate comment or question to send back to the Council. It's directly relevant to what the Planning Board is supposed to think about. If you have a majority that is asking the Council to take a closer look at how you determine a tobacconist or vapor store is based upon, sales in particular. People have some questions about it.

Ms. Caldwell states – regarding the Master Plan it's kind of a generalized document so it doesn't get into the real specifics of different types of uses. In general we're not inconsistent but I think an important point is what we talked about with the T-6 being pedestrian friendly, being a certain type of shopping

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district, being family-oriented, the types of uses you would like to see. This is an interpretation you can make from the Board perspective and you can say we think this is an ok use and it fits into our vision of the downtown, or we can say that we think it does. This would be your relationship to the Master Plan and consistency in saying whether or not it should be permitted in a T-6.

PUBLIC PORTION

Mr. Soloway stated to the public that this is the Planning Board. The action takes place when this goes back to the Council. The Board's action tonight is a step in the procedure before it goes back to the Council and that is the better place for your presentation.

1st Public

Annamarie Shafer for the Center for Prevention and Counseling in Newton, NJ. We are concerned with the actual ordinance does not coincide with the NJ Smoke Free Air Act. The fact that you write in here "tobacconists may permit product sampling within their establishment in compliance with applicable State and Federal regulations" so that implies that product sampling which would be vaporizing, is really in the Smoke Free Air Act, illegal. In 2010 in the State of NJ the Smoke Free Air Act that prohibited smoking in all public places was amended to include any kind of vaporizing. As prevention specialists we work very hard to educate. It's been a real battle in fact to educate the community where restaurant and bar owners have people vaping at a certain time of night thinking that it's ok. I was actually in Walmart a year ago and the woman bent down for something and I noticed a puff of smoke come from behind her. This is in the photo department. If I stick to my information and the PowerPoint that you are looking at is that we really are stressing what your idea of a high class humidor beautiful cigar establishment and the reality of what these places may and can end up looking like are two totally different things. I would really suggest that everybody does their education and update. Most recently, Becky has information on a place in Ledgewood. The 6th slide in on PowerPoint. We've worked very hard and tobacco use is at an all-time low. The exposure to e-cigarette advertising between 2011 and 2013, youth exposure to e-cigarette advertising, jumped over 250%. They are not regulated by anyone. The ingredients aren't regulated by anyone. FDA wants to hear from people. Most importantly, e-cigarettes look almost like a big fluorescent pen. You open them up and put e juices in. Some are just flavored with oil and strawberry. Some other things these products are used for are marijuana oils. Oils have 100% thc. Vaporizers, e-cigarettes are now considered drug paraphernalia under many of the local schools.

2nd Public

Becky Carlson works for The Center for Prevention and Counseling. We work with schools in Newton and Sussex County. Most confiscated are vaporizers and e-cigarettes with 6, 7 and 8th graders. It is something that has been worked very hard to reduce the use of cigarettes amongst kids and young adults and that's worked. But in the last year there has been a huge increase in vapor and e-cigarettes amongst 6, 7, and 8th graders. In Andover, there is a big store and they are throughout the community now. I encourage you to go take a look at them. They are not fine tobacco stores. They are not going to attract older adults. They are going to attract kids. We did education at the hospital about drug trends. In doing so a person there was from Ledgewood and she knew of a vapor store that had opened there. They were concerned about it. People didn't understand. They did a month long surveillance of it. They arrested people in and outside the store for marijuana. The vapor stores are not what people think they are. They are something to be very concerned about for our kids. You can sell bong, rolling paper, all kinds of

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things associated with any kind of tobacco products that can be used for marijuana and other things. Thank you for your time. We want you to consider this and encourage you to go out in our communities and look at a vape store.

Mr. Ricciardo asks what is the age you can buy them?

Ann Marie replied in NJ it's 19. Certain communities have raised the tobacco age to 21, i.e. Englewood.

Becky Carlson says she's talking about the e juice for the vaporizers. The liquids that they sell come from China and all over and aren't regulated. There are harsh chemicals like formaldehyde. Small children are attracted to them. They smell like candy.

With no more public stepping forward, this portion of the meeting was closed.

Mr. Le Frois summarizes the comments – send back our concerns regarding enforcement relative to the definitions that are presented here, certainly relying on sales receipts. Perhaps come up with some other alternative in addition to floor space. It does make sense to take a quick review of other regulations that may exist regarding tobaccoist Smoke Free Air Act.

Mr. Soloway states that we would have a problem with allowing sampling on the premises. If you have sampling on the premises then maybe you do have people hanging around; youth in particular. As opposed to just going in and buying the product.

Becky Carlson says it would be a local law enforcement issue whether they are sampling or not.

Mr. Marion states - so the police have to keep watching a vapor store to see what's going on.

Mr. Ricciardo states maybe we should recommend to the governing body that they should reconsider introducing this ordinance in its entirety because we don't think it's in the general welfare of the Master Plan and the general public.

Mr. Le Frois says we can state that 7 out of 10 are not in favor of the ordinance in general. But our job is to find consistency or inconsistency with the MP within the planning function. Whether or not the State and Federal allow is kind of a moot point. Those are separate regulations. The ordinance defers to that.

Mr. Soloway states you could make a recommendation at least to the vapor store that the ordinance have its own specific prohibition of sampling on premises so that even if there's some change in standard Federal regulations you would arguably have an ordinance to fall back on that doesn't allow it on any event. The way it's written now is if there are some change on the higher levels the ordinance automatically follows it and I don't know that if the sampling wasn't prohibited by State and Federal regulations it doesn't mean that the municipality couldn't prohibit it. I suspect they could without further researching it. If I could suggest a motion.

Mr. Flaherty made a motion to make a finding that the Board was unable to identify any specific inconsistencies with the Master Plan in the proposed ordinance. Recommend nevertheless to the Council that it take a closer look at the definitions of tobaccoist and vapor store in particular defining them based upon the percentage of sales receipts derived from those products because of

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possible enforcement difficulties. Also to make a recommendation to the Council that the Council would consider an outright prohibition on product sampling at a vapor store irrespective of what State and Federal regulations allow. We are authorizing the Board secretary to transmit this recommendation to the Council. The motion was seconded by Mrs. Le Frois.

AYE: Mr. Flaherty, Mr. Marion, Mr. Hardmeyer, Mrs. Le Frois, Mr. Le Frois
NAY: Mr. Flynn, Mr. Hemschot (alt), Mr. Ricciardo
Mr. Elvidge abstained.

The motion was carried.

Ordinance #2015 – 14 – Amending the Town of Newton Code to increase the minimum lighting standards for parking areas and sidewalks.

Ms. Caldwell states the concern is safety and public welfare. There have been studies done to determine a safe level of light. We've determined that ½ a foot candle is a good minimum level. Currently in the ordinance its .2 which we've established is too low. Basically what this does is establish that ½ a foot candle in our site plan and zoning ordinance as the minimum acceptable for parking areas, sidewalks, streets and public areas that people would travel at night.

Mr. Le Frois asks so that's more than double what it currently is. Is there additional protections put in for adjacent property owners relative to light shedding onto their property if they happen to be adjacent to a parking facility or something like that?

Ms. Caldwell says other parts of our lighting requires shielding and we strive to be at almost 0 at the property line for any development unless they are adjacent to commercial property. If you're adjacent to commercial property it might be .2 at the property line, but we strive for 0.

Mrs. Le Frois – has the town engineer reviewed the ordinance?

Ms. Caldwell – yes, he has reviewed and he is onboard with it.

Mrs. Le Frois – are existing parking lots going to be required to make changes to their lighting?

Ms. Caldwell – we don't have a mechanism to go back and have them change it but if they do come before the Board we can check and make sure they are at the ½ foot candle.

PUBLIC PORTION

This portion was opened to the public. With no public stepping forward, this portion was closed.

Mr. Ricciardo made Motion to find it not inconsistent with Master Plan and authorize the Board secretary to transmit it to the Council and no additional comments beyond that. The motion was seconded by Mr. Marion.

AYE: Mr. Flaherty, Mr. Marion, Mr. Flynn, Mr. Elvidge, Mr. Hardmeyer, Mr. Ricciardo, Mr. Hemschot, Mrs. Le Frois, Mr. Le Frois

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The motion was carried.

Ordinance #2015 – 10 – Amending Chapter 240-7, Adding Chapter 241 Tree Bank and Amending Chapter 100 Fees and Costs of the Code of the Town of Newton.

Ms. Caldwell says there is some discussion about adding requirements. As you are familiar there is a requirement that people flag the number of trees that they cut and replace them on the site. We are amending that section to – all existing trees over 8” in dbh is when they have to start replacing them. We have an exemption for invasive species and we’ve had requests from developers if it’s identified by the NJDEP as an invasive species those don’t need to be counted toward tree replacement. They get a discount of 50% and it’s a replacement of one tree per eight inch dbh that’s cut.

Mr. Soloway states the other thing this ordinance does is when you adopted the new ordinance and you dealt with tree removal you had a reference to developers making contributions to a tree bank. The tree bank never existed. So this creates the tree bank.

Ms. Caldwell says the second half of this ordinance is to create the tree bank which has been a problem for us that we didn’t have it because it didn’t allow those who couldn’t replace on the site to contribute to the tree bank. This would allow them to contribute to the tree bank. It will be overseen by the Town manager and he will get input from the Shade Tree Commission every year as to where the trees can be planted. They are supposed to plant at least once a year. There is also a fee added which is \$200 per tree. Any tree that can’t be replaced they will donate the fee to the tree bank and the Town will be able to utilize it for say the Arbor Day Planting.

Mr. Hardmeyer says as a member of the Shade Tree Commission we’ve worked with Jessica on this and we are very happy to see its final adoption.

Mr. Hemschot asked about replacing trees and money. If ten trees are taken down and he can only replace five does he have to pay for five or ten?

Ms. Caldwell – five. It’s been very controversial and difficult to establish the fees and it is lower than the cost of the trees.

PUBLIC PORTION

This portion was opened to the public. With no public stepping forward, this portion was closed.

Motion was made to find this ordinance consistent with the Master Plan and authorize Mrs. Citterbart to forward our finding to Council with no additional comments. Mr. Hardmeyer made a motion to approve. Mr. Flynn seconded.

AYE: Mr. Flaherty, Mr. Marion, Mr. Flynn, Mr. Elvidge, Mr. Hardmeyer, Mr. Ricciardo, Mr. Hemschot, Mrs. Le Frois, Mr. Le Frois.

The motion was carried.

CORRESPONDENCE

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None

EXECUTIVE SESSION

None

PUBLIC PORTION

None

Mr. Hardmeyer brought up that in the NJ Planner it talks about the transitional process from coah to the Courts. The Courts divided the 560 municipalities in the state into three categories. Does anyone know where we ended up?

Ms. Caldwell states we ended up in the second category. We did submit to coah we had a pending application. It wasn't approved. The way the Court order sounds is if you didn't get substantive certification you were slacking but this wasn't the case. We had objectors and we had to go into mediation and that drags everything down. Then everything went to Court on the coah side and it's been in limbo since then. We are planning on submitting to the Court July 8th for certification through the Court. Following that submission it is likely and understood that we will have to revise the housing element and fair share plan and that's where the planning Board comes in. The municipalities will get five months to adjust the housing element. We are in really good shape. Fair Share Housing Center, which is the affordable housing advocate that brought the case to the Supreme Court, came up with numbers through their own consultants, The NJ Builders, are pushing it and the numbers for Newton are lower than it was before.

ADJOURNMENT

Mr. Hardmeyer made a motion to adjourn the meeting. Mr. Marion seconded the motion. The meeting was adjourned at 9:00 p.m. with a unanimous "aye" vote. The next regularly scheduled meeting will be held on June 17, 2015 at 7 p.m. in the council Chamber of the Municipal Building

Respectfully submitted,



Katherine Citterbart
Planning Board Secretary