

PLANNING BOARD
Regular Meeting Minutes of March 29, 2023

Members present: Mark M. Schafron/*Chairman*, Robert J. Swartz/*Vice Chairman*, Paul A. Cormier, Stephen Cormier.--*Members*, and Trevor Beauregard/*Director-City Planner*.

Members absent: Robert J. Bettez, Sr.

Also present: Mayor Michael Nicholson, Rob Oliva-City-Engineer, Christine Fucile-Adm. Assistant, Alan Rousseau, and David Antaya-Gardner Residents.

ANNOUNCEMENT - Any person may make a video or audio recording of an open session of a meeting, or may transmit the meeting through any medium, subject to reasonable requirements of the Chair as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting. Any person intending to make such recording shall notify the Chair forthwith. All Documents referenced or used during the meeting must be submitted in duplicate to the Director of Community Development & Planning pursuant to the Open Meeting and Public Records Law. All documents shall become part of the official record of the meeting.

Mr. Schafron called the meeting to order at 6:30 p.m.

1. OLD BUSINESS:

1.1 City Council Zoning Amendments referred to Planning Board for Recommendation:

10891 – *An Ordinance to Amend the Code of the City of Gardner, Chapter 675 Thereof, entitled “Zoning,” to Change the Classification of Certain Parcels of Land Along Route 140.*

Mr. Schafron opened the meeting and stated the agenda will continue discussions on City Council zoning amendments referred to the Planning Board specifically for item #10891 – An ordinance to amend the code of the City of Gardner, Chapter 675 thereof, entitled “Zoning”, to change the classification of certain parcels of land along Route 140.

Mr. Schafron said regarding last week’s meeting with a presentation from Mayor Nicholson there were some discussions regarding watershed and open space which the Planning Board tabled in search of more information. In the interim, Mayor Nicholson provided a rather detailed memorandum outlining various facts and figures surrounding watershed and open space including attachments and illustrations of the area. Mr. Schafron invited the Mayor to go over this.

Mayor Nicholson stated Director Beauregard, City Engineer Oliva and himself did go through all of the questions and as much detail as they could to make sure the Planning Board did have enough data. The confusion that was had at the end of the last meeting was Director Beauregard and himself realized they were talking about two different things because he was focused on the City-owned parcels of land and Director Beauregard was focused on the full area, so there is some watershed land in the original proposal that was put forward. Further, in working with the City Engineer they worked to figure out where the watershed actually is and basically the Mayor would recommend from the Administration to the City Council on their end to remove all the parcels that have watershed in them from the proposal. There are a couple of things that go with this. First, even if they were to stay by City statute under the city code, there is a provision in the city code which states anything that is watershed land is unable to be sold by the City and must be maintained, so that would already have been taken care of even the zoning went forward but it is just cleaner that way. Therefore, the new map showing the new area is now the proposed

zoning change if the City Council votes to go through with the amendment. The ways this affects zoning, because there was a question as to what would be considered spot zoning and what would not. The Griswold case the Supreme Court took up based on a city in Alaska stated if there is a benefit to the municipality as a whole, it would not be considered spot zoning as the spot zoning is defined as zoning of one single particular parcel that is substantially different from those it surrounded by that benefit a private land owner to the detriment of other private land owners in the area. Where this is public land there some different regulations that go with that. This has been interpreted in the Commonwealth even further in the Lanard and Rando cases which both stated if there is any public benefit, a rezoning cannot be considered spot zoning so as such this would bring increased tax revenue for the City and increased economic opportunity as well as meet some of the City's economic development goals which is how to get around this, but even if it wasn't, it is still more than one parcel contiguous with each other over the Route 140 area so that is how this is able to go forward without any spot zoning concerns.

Mayor Nicholson noted the definition of watershed is actually found within the city ordinances itself under Chapter 673 that lists specific bodies of water which are considered part of the City's watershed. It is all of City's drinking water supplies and MamJohn pond which came up at the last meeting. The Engineer and the Mayor had only heard of MamJohn pond as Cowee pond because at some point in time the name changed and do not know why, but depending on what map being looked at where the City Engineer shows Cowee and the DPW shows MamJohn, it is the same location. Mayor Nicholson displayed a map showing the watershed based on the definition both in the city ordinances and per the code of Massachusetts regulations. Mayor Nicholson pointed out the watershed shaded areas known as Zone A, Zone B, and Zone C, and noted it is dependent on how far out from the body of water source you go and pointed out the two proposed parcels that are completely out of the watershed. There was a question about the Surface Water Protection Overlay District which exists in the City's zoning code and is a zoning code that regulates what can and cannot be done within that specific overlay. It does not create watershed land. Watershed land is a very scientifically based definition and is based on topography, based on distance from a water source, and based on the amount of time it takes for something to run into a body of water within that time frame there. Zoning again just regulates what can and cannot be done. Surface Water Overlay Protection District says there are certain things that can be done within the district there based upon receiving a special permit from the Planning Board, so it is not an outright prohibition as seen in certain areas of the watershed as well. Mayor Nicholson pointed out the Surface Water Protection District and commented it **does** come through a portion of the proposal as well, however again this would all be regulated through the special permit processes from the Planning Board. Mayor Nicholson noted underground storage tanks, and different types of car repair things which are allowed in that district already but hope to see something better in this section. Mayor Nicholson stated he is showing the difference between a zoning overlay versus scientifically defined watershed lands.

Mayor Nicholson continued on to Open Space questions that were raised. The City's Open Space Recreation Plan defined the protection levels as being obtained by several methods. The Mayor explained the ones that exist for public land are land acquired for watershed and aquifer protection which are usually permanently protected open space. This has been interpreted in different locations through the Commonwealth and the Commonwealth's Cabinet departments through votes when the parcels are acquired. The deeds for both of these properties are one given to the Gardner School Department in case there was need for an additional school out back when there were neighborhood schools in 1888 and one in 1931 Harriet Heywood (*pointed out on map displayed*). Further, there is no deed restriction on either of these listed in either of those deeds. These deeds were obtained directly at the Registry of Deeds. In addition, these deeds had no mention of any conservation purposes there nor was there a vote of the City

Council that placed a conservation restriction on any of these. The next one is provided they have been dedicated as conservation or open space in the deed. Municipal properties may be protected via a City Council vote to acquire them as protected properties. Mayor Nicholson stated there are no votes for either of these properties on record with the City at all, and in fact back in the 2010 era, there was a proposal by the Patrick Murray Administration to the City to put these parcels into protected open space conservation. The Commonwealth was going to compensate the City about \$500.00 per acre to put into conservation and was not done under the previous administration. No votes were ever put forward before the City Council, no money changed hands and the City did not receive the close to two million dollars the Commonwealth offered for the several hundred acres of conservation land. The City chose not to place into conservation through that process. Finally, through protections under Article 97 of the "Articles of Amendment to the State Constitution". Article 97 of the constitution of the land protection act states if a parcel is acquired as open space such as playground or conservation land then it is protected and has to go through a vote of the State legislature in order for it to be disposed of which governs the disposal of the land, not the zoning or anything like that. Further, both parcels are not currently protected under Article 97. There is an exemption under Article 97 the Supreme Judicial Court has put forward, the Smith case, however that does not apply here. It was the City of Westfield that obtained a Federal Grant from the Department of the Interior to build a playground on land purchased through the school department. The Grant Contract from the Department of the Interior had a clause in the contract saying if a municipality accepts this funding the land must be permanently used for playground purposes so as such the court rules that under contract law they put a restriction on the land by accepting the funding which they did from the Federal Government for that land purpose. In addition, there have been no grants used for that here, and no restrictions placed on the property. Mayor Nicholson provided a list of all the properties City Owned that have actual conservation restrictions on them. There is a total of 13 and neither of these parcels are listed in that list because they were never voted on, never recorded and no restrictions have ever been put forward for these properties.

Mayor Nicholson further explained the ways it would go forward from here. If the zoning passes, it would go to the City Council for a vote to declare the land "surplus" for purposes of disposition, then through a public RFP (*Request For Proposal*) process to evaluate at which time Mayor Nicholson would have to appoint a committee of three to five individuals who will review all of the proposals on a technical basis first, and by State law, has to be a separately sealed envelope with a technical proposal as well as a price proposal and are not allowed to touch the price proposals until the three to five member committee reviews what wants to be done with the land and what the intended uses are and if they have the financial backing to be able to do that with it. Once those are completed, the Mayor will then have to review those recommendations from the committee as well as the technical proposals but only at that point are the price proposals opened up and whoever receives the highest technical use of the best use of the land in the best interest of the City as well as has the highest price after that ranking is done will be whoever is awarded, or can reject all of them if none of them seem not to be in the best interest of the City. The next step would be a written document from Mayor Nicholson before the Joint Public Hearing on Monday going to this Board and the City Council outlining that process, the traffic safety concerns, and everything discussed last week as well as tonight, so it is all in one cohesive document with all the exhibitions together.

Mayor Nicholson displayed two maps received from the City Engineer. One map from 1954 maps the watershed in the City and noted these parcels were not considered as part of the watershed. The other map is from 1958 showing Water Department land off of the watershed and City land off of the watershed. Mayor Nicholson also included another map from 1942 that shows City land not watershed.

Questions/Comments/Concerns:

R. Swartz commented on oil storage tanks on properties that people live on currently or possibly abandoned oil storage tanks. The Mayor replied he hopes not to see any more oil storage tanks in the City and right now what is listed in the ordinance is if a property itself needs an oil storage tank they could have something there, and he believes it is because the Overlay allows car facilities and does not think it is a good to have them there even if it is not watershed land but because it is close to watershed land. This would be something that can be judged from the RFP (*Requests For Proposals*). Mayor Nicholson stated he does not think this would be freestanding and would have to be controlled through Site Plan Approval and Special Permit authorization by the Planning Board.

R. Swartz questioned the property on the west side of Route 140, the property that is in the Town of Winchendon and asked Mayor Nicholson if there were some entities that were interested and if this were to happen would this be a City of Gardner issue or Town of Winchendon. Mayor Nicholson said it would depend on what side of the line they are on and believes it is the Town of Winchendon, however there is no public road access to it from Winchendon. If it crossed the line, it would be both the City of Gardner and Town of Winchendon. Mayor Nicholson noted the City of Gardner pays a couple grand in taxes to Winchendon every year due to that land and some other land the City owns within the Town of Winchendon. Therefore, it depends on what side of the line to go on, so if it is only in Winchendon it would have control, if it is only in Gardner, the City could have control, and if it crosses the line, both will have control. Mayor Nicholson noted if the zoning were to go through it would stop at the City line. If Winchendon wanted to make a zoning change it is on them, but the City can only control out to the line and cannot control that section of the parcel.

Mr. Schafron directed to Mayor Nicholson regarding Open Space and Recreation Plan as well as these parcels and remarked despite their historical use as open space recreation land they are not “protection lands” because a deed restriction cannot be found, a conservation easement or documented City Council protection vote. Further, the Open Space Recreation Plan that includes those parcels was approved by vote of the City Council and asked how this is reconciled. Mayor Nicholson replied the way this has been reconciled is through the City’s own opinion as well as through different legal lenses and different case law that has been approved, different things of that nature that in the preamble of the Open Space Recreation Plan, this plan is set to guide the City in its path going forward in terms of what to use as protected open space, and what to protect. Therefore, the document, while endorsed by the City Council which is actually listed in the resolution the City Council passed, that it accepts the document as a guide for suggestion moving forward therefore it is not considered a binding vote to endorse the document even though the documents say protected open space for one of these parcels. It is not known why the document stated protected open space for one of these parcels because there is no basis for that to be made. In talking with Director Beauregard, we think someone just thought it was protected and put it in that way but in terms of the vote action by the City Council and because of the way the resolutions crafted by the Commonwealth are written, they are not considered binding but considered guides and suggestions. Mr. Schafron commented that in turn would indicate the Open Space and Recreation Plan really has “no teeth to it” and is not protected. Mayor Nicholson replied within the Open Space land that is correct and the only way to fully protect a property is through an actual conservation restriction voted on by the City Council for publicly owned land. Further, it has to be a vote by the City Council to either accept as a conservation restriction either when acquired or later installed or through a contract provision like was in the Smith case. Also similar to the Urban Renewal plan that guides certain Economic Development for goals, and a Master Plan says what they would like to see happen in the City for the next ten years, and similar to a housing production plan that says this is how

many housing units they “would like to see” done. The Open Space and Recreation Plan is more of what we would like to see happen in the City of Gardner, but it is not an actual binding document, just considered a guide. Mr. Schafron directed to the Mayor and said that guide is not binding or even desirable. Mayor Nicholson said correct, but for desirable he would say he could see some work there. Mayor Nicholson said he feels there is 2,800 acres right now of protected open space in the City, but the City is land poor in terms of development, however he understands the need to protect certain open spaces.

Mr. Schafron directed to the Planning Board for discussion and commented he finds it very disturbing to discover the Open Space and Recreation Plan really has “no bite” to it at all and the lands that are marked in the appendixes that are considered protected are not but only a guide. Mr. Schafron further commented he was not aware of this and is quite shocked by this. Mr. Schafron pointed out to the Planning Board they are looking at Commercial development on those two parcels up in the corner as shown on map provided that are M47-22-4 and M47-24-1 which will call them **22** and **24** for short. Mr. Schafron said first of all the City Council would have to approve for Commercial Development and would then be under Special Permit with the usual list of conditions that can be attached if it were to be developed, and there is the other question does the Planning Board think this is really appropriate for that area considering all the watershed land next door and the protected areas that are there.

R. Swartz commented seeing it is only two properties now instead of 10 or 13 of what is was originally and changing the zoning would limit its use as opposed to being residential which limits the number of entities as well as the willingness of the City to sell the property if there is enough interest to benefit the City, he is not excited about it but thinks by virtue of the fact that it in a way restricts use, he might be in favor of it.

S. Cormier asked if it does go into the Commercial end of it, would the City have to provide sewer and water. Mayor Nicholson said the MRPC study said certain commercial developments could operate off of well and septic or it would be up to the Developer themselves to run the water and sewer out to the site which would be up to the City to charge the Developer for all of that.

Mr. Schafron asked that the bike trail be shown on the map. Mayor Nicholson pointed it out. Mr. Schafron asked about M47-22-4 parcel and thought it was a little wet out there. Mayor Nicholson stated a survey is being conducted for that area right now to get an accurate record. Mayor Nicholson pointed out on the map the place that is wet as well as the location of where Wilder Brook crosses. R. Oliva noted Wilder Brook is outside of the watershed and does cross through a portion of that property and there are some wetlands. Bailey Brook is further west. R. Oliva said Wilder Book goes into Parkers Pond. T. Beauregard said Bailey Brook runs into the western portion or northern portion of Parkers Pond. Mr. Rousseau, resident, clarified Bailey Brook goes through Hilchey Pond into the Otter River.

Mr. Schafron asked for a motion and said the options are to recommend or not recommend the City Council approve the zoning change for those two parcels.

Mr. Swartz moved to recommend the City Council approve the zoning change. No one seconded the motion therefore motion failed.

P. Cormier commented he appreciates the work the Mayor has done and knows the land for commercial development is scarce but when he came on the Planning Board five years ago his main objective was to make sure Open Space Recreation stayed therefore he is going to make a motion the Planning Board recommend **not** to change the zoning.

S. Cormier said he can remember going out there 40 years ago snowmobiling and up to five years ago walking up through the woods which is just a beautiful piece of property and always considered it as part of the water district and cannot see it change into commercial, so he seconded the motion not to recommend changing the zoning.

VOTE:

#10891 – Certain Parcels of Land on Route 140

Motion to recommend NOT approving the zoning amendment to change certain parcels of land on Route 140 from Rural Residential 2 to Commercial 2.

P. Cormier/S. Cormier.

Vote: 4 – 0

Roll Call: R. Swartz, yes; P. Cormier, yes; S. Cormier, yes; M. Schafron, yes.

Mr. Schafron stated the next step would be the Joint Public Hearing with the City Council at 6:30 p.m. on Monday, April 3, 2023.

Adjournment

Motion to adjourn.

S. Cormier/R. Swartz.

Vote: 4 - 0

The meeting adjourned at 7:04 p.m.

All documents referenced or used during the meeting are part of the official record and are available in the Department of Community Development and Planning pursuant to the Open Meeting and Public Records Law.