WICKED LOCAL SHERBORN
NEWS FROM THE DOVER-SHERBORN PRESS

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October 20. 2015 8:43AM

Sherborn presents public hearing on 40B

Barbara St. Andre, town counsel for Sherborn, tackled this very issue on Monday, Oct. 19, in a lively forum meant to inform residents about the Massachusetts Comprehensive Permit Act and how to handle both current and future applications for proposed 40B developments.

With the current application for the Fields at Sherborn 40B development on Washington Street and past projects such as the Pulte Homes projects, which went to the 2014 Annual Town Meeting, the issue of 40B affordable housing appears to be very relevant in Sherborn.

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Outline

As she outlined in a brief supplement, Chapter 40B, Sections 20 to 24 pertain to the authority of a town's Zoning Board of Appeals to issue a comprehensive permit for low- or moderate-income housing, when less than 10 percent of a town's housing stock meets the definition of this housing type.

St. Andre said in the definition of the statute, 40B housing must be subsidized by a state or federal subsidizing agency.

She said, "Even if you may have housing in the town that is selling at what would be considered an affordable rate, unless that housing is subsidized, so that there is a restriction on it that keeps it at a certain affordable level, they don't count. So it has to be a certain type of affordable housing."

Not meeting the 10 percent criteria means a developer can apply for the permit that allows the ZBA to override local rules and regulations, according to St .Andre.

However, she added, it does not allow the applicant to override state laws and regulations. As such, state regulations such as Title 5 and the Wetlands Protection Act cannot be waived.

Similar to the Wetlands Protection Act, she added, "The zoning board cannot issue anything that would violate Title 5, but if you have local regulations for septic systems, which many towns do, the applicant can ask the zoning board to grant them waivers for any of the local regulations the applicant doesn't want to have to comply with."

St. Andre added, "So that's essentially what a comprehensive permit does."

To apply for a permit, the applicant must be a public agency or limited dividend organization, have control of the land and secure a site approval, or project eligibility, letter from a subsidizing agency.

She said in the case of rental units, all count toward the 10 percent goal, but in an ownership situation, only up to the required 25 percent of low income housing is eligible.

There are procedures to follow, St. Andre said, such as the town officials have a 30-day window to offer comments about the application with a site visit invitation.

Once MassHousing issues a site approval letter, which she said occurs "well over 90 percent of the time," the developer applies to the ZBA for the permit. The development must provide a site plan and a list of requested waivers.

St. Andre noted the several requirements, namely that a public hearing must be opened within 30 of the application and that there is 180 days to complete the hearing. After that period, the ZBA must reach a decision within 40 days, sometimes as a result of an agreement between the two parties.

Within the process, she said extensions, preferably in writing, are possible, and consultants can also be hired, i.e. an environmental expert.

Cooperation is key

Board of Health member Darryl Beardsley asked if the town board can only review information submitted by the applicant, to which St. Andre said they can do research beyond what is submitted, but within limits.

Cooperation is key, she added, in the issue of having the applicant pay for a consultant as there is a tight timeframe. In order to effectively ensure the applicant would pay for an expert, St. Andre said it helps to have an application filed before the board in question.

While asking the applicant is an option, she said, "The best way to do it would be through the zoning board."

She said as the comprehensive permit program is “designed to promote and create affordable housing,” often technical objections such as a late submission of the waiver list are not “a silver bullet” to require an extension.

The ZBA decision must be consistent with the town’s needs, St. Andre said. Furthermore, in the case of denying a permit, the burden of proof lies with the town, not on the applicant, which differs from non-40B applications.

She said, “You can’t deny an application simply because it does not comply with local rules and regulations.”

To deny an applicant, there must a local concern in areas such as safety, site and building design or open space, according to St. Andre’s summation.

She added, “The presumption as to the need for affordable housing is considered a very heavy presumption. So you really need an important, substantial reason in order to be upheld at the Housing Appeals Committee.”

The applicant does have the burden of meeting state standards, she said.

Cases for denial

She noted two of her successful cases: O.I.B. Corp. v. Braintree Board of Appeals, in which a denial was upheld because there was only one access road for 118 units, and Dennis Housing Corp. v. Dennis Board of Appeals, in which “it was so dense, there was literally no open space on the site.”

The former case involved a detailed explanation from the Fire Chief about fire safety regulations. In the latter case, it was found that it was so dense someone could not put out a barbecue grill without encroaching on the wetlands.

In Dennis, she added, the developer returned with an adjusted plan that was approved.

Using the examples of stormwater runoff or traffic circulation, she said, “Density itself is not going to win the day, generally speaking. Again, you have to tie it into something.”

Of all the categories of local concern, St. Andre said open space gets “quite a bit of play” in Housing Appeals Committee decisions. She stressed that uniformity in the application of local regulations and an identifiable standard are important in an appeals case.

Reynolds vs. ZBA of Stow

She discussed the recent Reynolds v. ZBA of Stow case, in which they overturned the grant of a comprehensive permit. The abutters appealed in the Massachusetts Superior Court on the grounds of sewerage disposal and elevated nitrate levels.

St. Andre emphasized, “That is the rarest of rarities.”

In that case, the developer did not tell the town what the water sources would be and were “cagey” about the issue, as the case footnotes indicated.

Q-and-A session

St. Andre fielded some questions.

Selectman Mark Brandon asked if the information gathered by a ZBA-hired consultant becomes public, and St. Andre answered affirmatively.

She said, “That is one of the requirements of the Housing Appeals Committee regulations.”

When asked about the peer review process, St. Andre said it can be “extremely valuable” for boards such as the ZBA imposing conditions to protect the town, as well as ensuring accuracy in the applicant’s information.

Addie Mae Weiss, a member of the Sherborn Citizens Action Committee, inquired about what happens when the ZBA does not have enough information from the applicant.

Noting it did come up in the Reynolds case, St. Andre said, “That’s a real issue. … It’s becoming more and more common.”

One thing towns can do, she said, is encourage the Department of Environmental Protection to determine whether a proposal is going to use a public water supply, which carries more requirements for applicants.

Beardsley noted the importance of the meeting was to “simply to understand the 40B process.”

She said the process for the Fields at Sherborn project has been different than 40B developments in the past, such as Whitney Farms.

She added, “We needed to know procedures.”

Weiss said the meeting was important because it helped prepare the town in the 40B process.

She added, “The positive outcome of this meeting was to get everyone on board.”

She noted that St. Andre spoke about the town having the right to request information from an applicant, as well as the significance of having information about a project prior to the ZBA deadline.

Weiss said, “Attorney St. Andre impressed that information provided after is not likely to be considered by the HAC [Housing Appeals Committee].”