

Planning Commission
Martin Memorial Hall
5259 Route 5, Ascutney VT
DRAFT Planning Commission Meeting Minutes
Monday July 27, 2020 7:00 PM

Planning Commission Members Present:

Paul Tillman

Fred Kowalik

Howard Beach

Chris Whidden, Zoning Administrator

Planning Commission Members Absent:

Tyler Harwell

Online attendees: Nikita Lenahan

1.) Call to Order by Chair, Paul Tillman at 7:00 pm

2.) Agenda Review – July 27, 2020

No changes

3.) Comments from the Chair and Land Use Administrator

Chris Whidden wanted to make the Planning Commission aware that a petition has been started regarding the noise ordinance. There have been multiple complaints around Town.

4.) Comments from Citizens regarding items not on this agenda:

Michael Todd spoke as a citizen regarding the issues with internet across Town.

5.) Approval of Meeting Minutes –

Minutes from 7-13-20

Michael Todd made a motion to approve the minutes from 7-13-20

Howard Beach – 2nd

No Discussion

Vote – unanimous

6.) Discussion of noise ordinance standards and enforcement:

Paul Tillman noted that the noise ordinance is not on the Town website. He had to Google “Weathersfield, VT noise ordinance” to get a copy. The most recent revision is 12-18-08.

Chris Whidden included his recommendation of changes for the Zoning Bylaw to the Planning Commission and submitted to the Selectboard for review.

“The questions presented are: 1.) What is required for enforcement of a Notice of Violation related to a violation of the performance standards governing noise; and 3)

what can the Town of Weathersfield do to remedy the issue of numerous noise complaints?

1. What is Required for the enforcement of a Notice of Violation?

Notices of Violation are a civil enforcement measure, not criminal. Thus, only a preponderance of the evidence that a violation has occurred is required for enforcement. The bylaw needs to be sufficient to put the public on notice of the proscribed behavior or performance standard. The maximum fine for a noise violation is \$200 per violation under 24 VSA 4451. The Town of Woodstock has also added a bylaw that each time a police officer is called to the scene of a noise complaint it is a separate violation.

Zoning Administrators are qualified to conduct decibel readings for Notices of Violation. See *In Re Laberge NOV*, Docket #2016 VT 99 (VT 2016). In *Laberge*, the Hinesburg ZA took a noise measurement with a complaining property owner using the property owner's personal decibel reader. Using the reading from the device as supporting evidence, the ZA issued a NOV to Laberge. The noise was created by a motocross track that Laberge was operating on his property. At trial, the court enforced the NOV. LaBerge appealed to the Vermont Supreme Court, who affirmed the lower court's enforcement of the NOV. The Court explained that in such cases, the Court's practice was to allow a property owner who had purchased and used a sound meter to explain how well they know how to operate it, how they operated it during a time of concern, and what results the meter showed. The court noted that it would afford the readings the appropriate weight based upon the credibility of the testimony.

Commercial decibel readers are sufficient to provide evidence of a noise violation. See, i.e. Docket # 45-3-12 - *In Re Big Rock Gravel Quarry Act 250 Permit*. (VT Superior Court, Environmental Division 2012). In *Big Rock*, the applicant for a quarry permit provided evidence from a commercially purchased decibel reader, which the court accepted to show that the operation of the quarry was in conformance with the performance standard. However, the court commented on the applicant's lack of training in the use of the reader, citing his inability to distinguish between db and dbA readings.

To bolster the likelihood of meeting that burden, devices can be purchased that have audio recording of the sound that is being measured. Opponents of recordings in court would argue that it is hearsay. However, the argument fails because an audio recording is not hearsay because hearsay requires declarant to be a human. The recordings would be from a machine, and most likely be recording mechanical noises rather than human voices. Because the recording would be taken from a position on the abutter's property line, the ZA need only show that he had permission from the abutter to take the reading on his property, which can be shown by affidavit or testimony.

Therefore, to enforce a notice of violation, the ZA must provide a noise reading paired with testimony showing familiarity with the surrounding circumstances and the procedure of sound measurement, that the measurement was taken from a location where the ZA presence was authorized by the complainant, and the reading on the device. This would

likely result in a court finding that a violation has occurred by a preponderance of the evidence, and thus make the NOV enforceable.

2. What can the Town of Weathersfield do to remedy the issue of multiple noise complaints?

Here, the Zoning Administrator has a duty under the 2017 Weathersfield Bylaws to enforce the regulations found therein. When a complaint is received, the ZA is required to investigate. Since taking office on April 7, 2020, the ZA has responded to multiple noise complaints and has been unable to enforce the bylaws. The ZA's first contact with the citizens of Weathersfield was a noise complaint. Further, the ZA has received messages from citizens expressing their disappointment in the Town's inability to ensure enjoyment of their property because of the lack of enforcement. These bylaws contain a noise performance standard that limits the number of decibels that can be emitted from a parcel based on the zoning of the parcels involved. The Court has held that a plainly audible standard is not unconstitutionally vague. Further, this noise ordinance is sufficient to put the public on notice of the performance standards applicable to their parcels and the proscribed behavior because it gives a numeric standard (decibels) rather than a vague or subjective standard. Because the Bylaws provide a numeric standard, the only way to enforce the bylaw and to establish proof of a violation by a preponderance of the evidence is by the use of a decibel reader paired with the testimony of the user. Thus, without a decibel reader, the ZA is unable to establish evidence to support or enforce a NOV, and the bylaw fails because it is completely unenforceable.

Further, the Bylaws require a "trained and certified professional" to measure noise levels. This standard is found in the criminal context, where proof beyond a reasonable doubt is required, rather than a preponderance of the evidence standard required in civil matters. The facts in *LaBerge* clearly show that the standard is that the individual operating the device need only explain how well they know how to operate it, how they operated it during a time of concern, and what results the meter showed. The court would then afford the readings the appropriate weight based upon the credibility of the testimony.

3. Conclusion

Therefore, I request the Planning Commission recommend a change to the bylaw in which "trained and certified professional" is replaced with "the Town Manager, Zoning Administrator, Town Health officer, or the Weathersfield Police Officer or Constable" to the Selectboard. I further request that the Planning Commission recommend the purchase of a decibel reader that has audio recording technology at a price not to exceed \$800 to the same, and that the Planning Commission begin the conversation as to the definition of noise producing activities that are exempted from the noise performance standards and include them in the Bylaw updates."

Respectfully Submitted,
Chris Whidden, Esq.
Weathersfield Zoning Administrator

Paul Tillman requested that Chris Whidden make a draft to give to the Planning Commission.

7.) Discussion on approved definitions section:

Chris Whidden to review if we need a hearing for the definitions. Will review with Town Manager. Chris will also draft up changes he would like to make to the sound ordinance bylaw.

8.) Zoning Bylaws:

a.) Conservation of Natural Resources – Riparian Buffer

i. Consider a vote to accept Riparian Buffer bylaw

Howard Beach made a motion to send the Riparian Buffer bylaw to the Selectboard with the minor change “designated of only named streams.”

Michael Todd 2nd

Discussion – Howard Beach amended his motion “to send the Riparian Buffer bylaw to the Selectboard for a a hearing with the minor change “designated of only named streams.”

Vote – Unanimous

Paul Tillman requested that Howard Beach supply a clean copy of the Riparian Buffer bylaw. hearing was set for Monday, August 24. 2020 at 7:15 pm for the review of the Riparian Buffer bylaw.

ii. Consider a vote to accept the Aquafer protection bylaw

Howard Beach made a motion to adopt the map labeled Vermont Geological Survey Open File Report VG 017-5, by Stephen Wright dated 2017 as the official protection overlay map for the Town of Weathersfield.

Michael Todd 2nd

Vote – Unanimous

Howard Beach made a motion to adopt the Town of Weathersfield, VT aquafer protection ordinance as presented 7-27-20.

Michael Todd 2nd

Vote – Unanimous

Paul Tillman set the hearing date for Monday, August 24. 2020 at 7:30 pm for the review of the Aquafer Protection bylaw.

161 9.) Changes to the zoning map

- 162
- 163 a. Review the proposed different Village designations
 - 164 b. Look at RR1 and RR35 designations
- 165

166 Paul Tillman brought up a map with overlays to review the various designations for review.

167

168 10.) Status Spreadsheet Review

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- 170 a. Review by laws that have been completed and status of non-completed bylaws

171 Chris Whidden reviewed and all items marked in “red” are done and have gone to the

172 Selectboard. Items marked “green” need to go to the Selectboard.

173 11.) Discussion of items for Future Agendas

174

- 175 a. Chris Whidden to follow up on the following:
- 176 i. Create a draft of the noise ordinance with changes for the Planning Commission
 - 177 to review.
 - 178 ii. Review if the Planning Commission needs a hearing for the definition section. To
 - 179 be discussed with Brandon Gulnick, Town Manager.
- 180 b. Howard Beach to provide a clean copy of the Riparian Buffer bylaw for the Planning
- 181 Commission.
- 182

183 12.) Any other business that can legally be discussed –

184 Not everyone on the Planning Commission is receiving their packets in time for the meeting.

185 Chris Whidden will send packets out via email and mailed USPS by Tuesday for anyone that

186 would like a paper copy.

187 13.)Adjourn

188

189 Michael Todd made a motion to adjourn the meeting.

190 Howard Beach 2nd

191 Meeting adjourned at 9:00 PM

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193 Next Planning Commission Meeting is scheduled for Monday August 10, 2020 at 7:00 pm at

194 Martin Memorial Hall.

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196

197 Respectfully,

198 Chauncie Tillman

199 Recording Secretary