BROOKLINE ADVISORY COMMITTEE

Public Safety Subcommittee
Report to Advisory Committee on Warrant Article 11:
Adoption of Article 8.37 of the Town's By-Laws – Tree Protection By-law

Subcommittee Members: Janice Kahn, Chair, Lea Cohen, David-Marc Goldstein and Alisa Jonas

The Public Safety Subcommittee held a public hearing on Article 11 on Thursday, April 7, 2016, at 6:00 p.m. in Brookline Town Hall, room 308.

In attendance:

All four subcommittee members; Petitioner Richard Murphy; resident Bobby Murphy; Thomas Brady, Town Arborist; Hugh Mattison, TMM-5 and Ernie Frey, TMM-7.

Summary

Warrant Article 11 is a citizen petition that asks TM to adopt a tree protection by-law that would protect and preserve both public shade trees and designated trees on privately owned properties that meet certain criteria. The petitioner seeks to protect the "urban community forest" in Brookline. Although the Town already manages and maintains more than 50,000 trees on public lands, including over 11,500 street trees, the vast majority of trees are on private property. This article would require the Town to also regulate "protected" trees on land that is privately-owned. This proposed by-law would put into place procedures to regulate the removal of trees at least 8" in diameter, and enforcements and penalties for violations. The subcommittee did not take a vote on this warrant article.

Background

The petitioner brought this warrant article after the property next door to his home was clearcut – with all trees removed by a developer. This is not the first time the need for a tree protection by-law has come before Town Meeting. Article 24, which was passed at the Fall 2000 Special Town Meeting urged that a Moderator's Committee be formed to evaluate the feasibility, effectiveness and community benefits of such a bylaw in Brookline. This current draft is nearly identical to a tree protection bylaw proposed by that Moderator's Committee and included as part of their report to the Annual Town Meeting in 2003. The Committee concluded that: "The Town should not implement a tree protection bylaw until there is appropriate staffing in place that can ensure the process is fair, equitable, performed within a realistic time period and adds value to the community." The Moderator's Committee estimated that it would need at least a ¾ FTE to enforce the bylaw, and recommended that a bylaw be adopted as soon as the Town had the financial resources to afford the personnel costs. It also prepared a draft of a tree protection bylaw which it felt would fairly balance the trees' value to the community with other community needs and concerns. It further recommended that various town boards (including the Planning Board, Conservation Commission, Zoning Board of Appeals and Preservation Commission) consider the value of trees during their reviews. Since the Moderator's Committee report was completed, additional language has been added to Section 5.09 of the Town's design review guidelines to consider preservation of trees and landscape in

the review of all projects requiring design review. Public shade trees are protected from removal under M.G.L. Chapter 87.

Discussion

Street trees are protected through State statute, but the vast majority of trees within a municipality rely on local statutes for protection. Trees are acknowledged to be a valuable community resource offering many benefits, both environmental and social. Trees positively affect climate change by absorbing CO2, providing oxygen and absorbing pollutants, improving the quality of our air. They help prevent soil erosion and reduce runoff through our stormwater system which may carry pollutants to the ocean. Shade trees help to keep homes and streets cooler and provide privacy and screening. They also provide a habitat and are a source of food for people and wildlife.

Many municipalities in Massachusetts have tree protection bylaws, including: Lexington, Newton, Wellesley, Canton, Cambridge and Springfield. Tom Brady, the Town's Arborist, reported that he spoke with many of his colleagues in other towns and talked to them about their respective bylaws and the amount of time it takes them to enforce them. Each municipality took a very different approach to tree protection. For example, Cambridge's ordinance only applies to lots of at least 25,000 sq. ft. and so there are perhaps only 2 -3 projects per year to review. In Newton, residences (1,2,3,4s) which are occupied for 18 months before and 90 days after trees are removed are exempted from the tree protection ordinance, and there are up to 200 reviews annually. In Wellesley, the bylaw is triggered when there is a 50% increase in the footprint of a residence or there is a rebuild, and only for trees greater than 10" in diameter. Wellesley's 2011 bylaw is administered through zoning, not a general bylaw, and was specifically designed "to encourage the preservation and protection of sizeable trees on portions of private property during significant demolition and/or development activity." Wellesley's bylaw contains a "look-back" provision, that counts trees cut down in the 12 months prior to the law being triggered. Lexington also uses a zoning bylaw which is triggered when there is a 50% teardown or replacement and for trees greater than 6"; the zone that is looked at is 30' off the front and 15' off the back and side. Each site requires 3 visits and there are about 100 properties per year that are reviewed. Lexington's bylaw also deals with the potentially conflicting overlap of the departments that deal with trees and landscaping (Planning, Conservation, Parks, etc.)

The bylaw proposed in this article would be triggered by any of the following: (1) a proposed addition that would increase the structure's footprint by 10% or more; (2) the proposed demolition of an existing residential structure and its replacement with a new residential structure; (3) the proposed demolition of a non-residential structure; (4) any proposed new construction (residential or nonresidential); (5) proposed removal and replacement of existing public shade trees; (5) any land-disturbing activities as defined in the Town's Stormwater Management bylaw Article 8.26 Section 8.26.2(3), which deals with erosion and sediment control.

The draft bylaw defines a protected tree as "any tree that is greater than eight inches "Diameter at Breast Height" (DBH) measured at 4.5' off the ground." Any removal of protected trees would be prohibited without the authorization of the Tree Warden or the Tree Planting Committee. And for any protected tree that's removed, the property owner should should plant a replacement tree that is ½ inch caliper for each inch of DBH of trees removed with a minimum caliper of 3". It also sets up a Tree Replacement Fund, to which the property owner will be required to contribute $50 per DBH of protected tree removed if not already mitigated through replanting. The bylaw further sets out policies for enforcement and penalties for removal of protected trees.

The proposed 10% bar set in the warrant article, means that any time construction enters the setback, it could trigger a review. A memo from the Department of Public Works estimates that the bylaw would result in close to 650 Building Department reviews and 50 instances when the Engineering Department would be called in to look at land disturbance activities each year. These reviews would lead to an estimated 2100 additional hours of staff time for the Tree Warden or another 1.0 FTE, with an estimation of 3 hours per site visit.

The central question when looking at this warrant article is: "Will it achieve the desired goal?" One of the concerns is whether the bylaw could actually lead to more trees being cut down. One loophole that would exist in the law as written is that a developer could buy a property, cut down all the trees first and then file a development plan later, avoiding triggering the bylaw. Wellesley tries to close the loophole with the look-back provision mentioned above. It is only for 12 months, however, and a developer could, and probably would, wait it out to avoid penalties, as occurs with the Town's demolition delay determination, which also is 12 months. Also, by paying into a tree fund, he avoids the hassle, and passes the cost along to the buyer.

The petitioner tries to address this by tying the by-law to Section 8.26.2, the Erosion and Sediment Control of the Town's Bylaws, which states that "no person shall excavate, cut, grade, or perform any land-disturbing activities of significance, without an approved Erosion and Sediment Control Plan". However, if the tree is just cut to the stump, and no "land disturbing activity" is performed, the bylaw again is not triggered.

The Planning Board recommendation is for NO Action on WA 11 as submitted, based on its view that the proposed bylaw could not be effectively implemented. A DPW memo submitted to the Subcommittee, while acknowledging the value of protecting trees on both public and private land in Brookline, stresses a concern about the unintended consequences of shifting current resources away from the management of over 50,000 existing public trees or causing delays in development projects. The Tree Planting Committee, while supporting the need for a tree protection bylaw in the Town, deferred a vote on a recommendation on WA11 pending more study and information.

Hugh Mattison, Chair of the Tree Planting Committee, raised the idea of achieving some of the goals through agency regulations rather than a bylaw. Others considered the possibility of a tree protection zoning bylaw, rather than a general bylaw, look-back provisions, and the use of increased contributions to the Tree Replacement Fund to pay for the additional staff needed to administer the bylaw.

The Subcommittee, while sympathetic to the goals of the bylaw, felt that more discussion and research into the possibilities of how to best achieve those goals was needed before making a recommendation to the Advisory Committee. If the article is to be voted on at Town Meeting, it needs significant revisions beforehand. It was unclear whether to simply recommend No Action on WA11 or to recommend either that the Petitioner resubmit the article with modifications made to address the issues discussed above or referral to a study committee to craft such a modified bylaw with fewer unintended consequences or develop a different strategy altogether to protect Brookline's "urban community forest".