

**Town of Brookline
Advisory Committee Minutes**

Sean Lynn-Jones, Chair

Date: October 27, 2016

Present: Carla Benka, Clifford M. Brown, Carol Caro, Lea Cohen, John Doggett, Dennis Doughty, Harry Friedman, Janet Gelbart, David-Marc Goldstein, Neil Gordon, Kelly A. Hardebeck, Sytske Humphrey, Angela Hyatt, Janice S. Kahn, Steve Kanes, David Lescohier, Robert Liao, Sean Lynn-Jones, Shaari S. Mittel, Fred Levitan, Mariah Nobrega, Lee L. Selwyn, Stanley L. Spiegel, Charles Swartz, Christine Westphal

Absent: Amy Hummell, Pamela Lodish, Alisa G. Jonas, Bobbie Knable, Michael Sandman

The meeting was called to order at 7:30PM.

Also attending: Ben Franco, Andy Martineau, Petitioner A. Scott Ananian, Petitioner Hugh Mattison, Maria Morelli, Jennifer Gilbert

1. Possible Reconsideration of WA 21: Amend Section 4.07 of the Town's Zoning By-law - Regulation of Non-emergency and non-commercial manned aircraft landing areas. (Planning & Community Development)

The Planning Board and Selectman have numbered this use #51A and have specified that landing on structures is prohibited.

A **MOTION** was made and seconded to reconsider Article 21:

By a **VOTE** of 18 in favor, none opposed and 4 abstentions, the Advisory Committee agreed to reconsider Article 21.

A **MOTION** was made and seconded to recommend favorable action on the zoning amendment, as amended by the Planning Board and Selectmen and offered by the Selectmen under Article 21.

By a **VOTE** of 21 in favor, none opposed and 1 abstention the Advisory Committee recommends favorable action.

2. Possible Reconsideration of WA 16: Resolution regarding Responsibility for Town Electric Vehicle Charging Facilities (Petition of Scott Ananian)

We are reconsidering so we can make take no action because the petitioner is not offering a motion. The purpose is already being achieved. There is no motion under Article 16 - the petitioner is not offering a motion, so we need not vote. Climate Action Committee raised some concerns about WA 17 and 18.

A **MOTION** was made and seconded to reconsider Article 16.

By a **VOTE** of 20 in favor, none opposed and 3 abstentions the Advisory Committee agreed to reconsider Article 16.

No motion was made under WA 16, consequently the Advisory will have no recommendation under this article.

3. Possible Reconsideration of WA 17: Amend Section 6.04 of the Town's Zoning By-Law to require parking spaces for charging Electric Vehicles. (Petition of Scott Ananian)

Issues raised by the Climate Action Committee and the Selectmen did not come out during the Subcommittee hearing. Now that they have been raised, it seems it would make sense to reconsider the article. The Climate Action Committee is in favor of the concept but doesn't feel it is ready for prime time. Wait and rework it to be brought back to Town Meeting in the spring.

A **MOTION** was made and seconded to reconsider Article 17.

By a **VOTE** of 12 in favor, 4 opposed and 6 abstentions, the Advisory Committee agreed to reconsider Article 17.

A **MOTION** was made and seconded to recommend favorable action on the motion offered by the Board of Selectman to refer Article 17 to the Climate Action Committee.

Comments and Questions

Petitioner C. Scott Ananian: This article offers the opportunity for Brookline to lead, it is not premature. Legislation is coming down at the State level

Q: Do you think there will be irreparable harm if we wait to spring Town Meeting?

A: Worry about the quality of the result that will come out of the committee process.

Maria Morelli summarized the feedback from Dan Bennett:

Article 17, if passed, will require at least 2% of parking spaces be equipped for electric vehicle charging. This Article amends the provisions of the Zoning By-Law related to Off-Street Parking Requirements. This applies to Parking Areas (Parking Lots and Parking Garages) and not principal structures. In addition changes to this Article may be approved by the Board of Appeals by special permit.

The By-Law **WOULD** be triggered by the following work:

- Any new parking lot
- Any new parking garage or portion of a building used as a garage
- Any change, alteration or expansion of an existing parking lot or garage
- Any new wiring or parking area lighting when none existed before

The By-Law **WOULD NOT** be triggered by the following work:

- Renovations to the primary structure exclusive of garage area
- Driveway repairs
- Restriping or repaving (same size)
- Ordinary repairs such as patching, excavating
- Repairs to existing parking area lighting

Really don't want to be faced with so many obstacles, would like to focus on how it could be implemented to make electric charging vehicles more of a reality.

Reluctant to put in too many specifics because they can change and we don't want to be out of compliance with the state laws.

By a **VOTE** of 19 in favor, 2 opposed, with 1 abstention, the Advisory Committee recommended favorable action on the motion offered by the Selectman under Article 17.

4. Possible Reconsideration of WA 18: Resolution urging the Selectmen to petition for a change in the State Electrical Code, as applied to Brookline, to require outlets suitable for Electric Vehicle Charging in newly constructed garages. (Petition of Scott Ananian)

A **MOTION** was made and seconded to reconsider WA 18.

By a **VOTE** of 15 in favor, 2 opposed with 6 abstentions the Advisory Committee agreed to reconsider WA 18

A **MOTION** was made and seconded to refer Article 18 to the Climate Action Committee.

Again Maria Morelli from the Planning Department summarized some concerns they had with Article 18. On local level, dwelling unit is defined as being attached, detached or multifamily dwelling. There are some inconsistencies with Article 17. Focus our energies where this makes sense.

Don't see how these concerns warrant it being sent to Climate Action.

We want to look at this holistically, thinking for a policy for the entire town and looking at zoning districts. The language is not precise at all. We want to further the concepts presented here in a way that it considers the entire district. Maybe premature to act on this now until we hear more from the state or even petition the state.

Would it make sense to have Town Meeting encourage the State Board to look at the "Stretch" building codes and make the necessary changes to provide capacity for recharging electric vehicles. This change has already been adopted for the National (Uniform) Building Code

Cleared with Town Counsel and by the Department of Fire Protection Resources letter saying this was appropriate to do. Changes in terminology do need to be fixed. This is consistent with what is going on elsewhere. This is a resolution to the state.

Q. If Town Meeting supports this would it make the State work faster?

A. I see no harm in passing this

By a **VOTE** of 16 in favor, 7 opposed with no abstentions, the Advisory Committee recommends referral of Article 18 to the Climate Change Committee.

5. Review WA 7: Amendment to the Zoning By-Law – Zoning Map -- adds a new Emerald Island Special District. (River Road Study Committee)

Planning and Regulations Subcommittee: Article 7 was drafted and submitted by the RRSC concerning the rezoning between Washington and Brookline Avenue and River Road. We had an interim report because the Planning Board report had not been completed. Meet a second time and reviewed PB on

WA 7 (favorable action) and WA 8 (no action). MOA is 95 years. Spot zoning vs contract zoning. This is neither. Three potential development spaces – is there some way to build in additional triggers. The subcommittee voted favorable action on WA 7.

6. Review WA 8: Amendment to the Zoning By-Law – Zoning Map – Alternative Zoning proposed for the Emerald Island Special District. (Petition of Hugh Mattison, TMM5)

Article 8 is the same as Article 7 with the exception of the width of the sidewalk on 25 Washington Street. Article 7 talks about sidewalk widths not setbacks. RRSC determined that the minimum sidewalk width should be 10 feet. But with a bike lane it impinges on the property line of 25 Washington. WA 8 calls for narrower portion of sidewalk for walking but wider planting strip. Article 7 is silent on planting strips. The subcommittee followed the Planning Board recommendation and voted no action on Article 8, although all of them liked the idea of wider sidewalks and trees, we understood that the site is so constrained that a foot here or there does make a big difference. The language of Article 8 wasn't providing for wider sidewalk than what the proposed development in Article 7 outlines.

7. Review WA 9: Accept a Restrictive Covenant and authorize the Selectmen to enter into a PILOT Agreement for 25 Washington Street. (Selectmen)

Public hearing and public meetings were held. Brookline has been aggressive in entering tax certainty agreements with property owners. Way to protect our tax revenue. Estimates payments at \$1M a year but will most likely increase, will be equal to whatever taxes are levied on the property. Length of the agreement is 95 years thus protecting tax certainty on this piece of land for a very long time. Agreements are recorded on the property deed, not carried anywhere else. The Town has to do a few things to maintain this, notice of extension after 35 years and every 20 thereafter. During October meeting Lee brought up some concerns about spot and contract zoning. Explained why these would not be considered either. Agreement is conditional on the zoning change. Tax certainty agreement will evaporate. It applies to a set of parcels that are unique and provides contiguous zoning with some of the other areas so not considered spot zoning. Subcommittee recommended favorable action on WA 9.

8. Review WA 10: Authorize the Selectmen to enter into agreements and amend existing agreements related to the development of 25 Washington Street. (Selectmen)

Article 10 concerns the MOU authorizing the Board of Selectman to enter into and amend any agreements that are necessary to carry out the terms of the Restrictive Covenant and MOA between the Town and Claremont Brookline Avenue, LLC. The subcommittee voted favorable action on Article 10.

Subcommittee member Lee Selwyn shared his thoughts, to address a couple of issues that might be relevant to the agreement. The structure of this deal as it stands, under article 9 the developer will sign an agreement before town meeting convenes – tax certainty becomes operative if we vote for zoning change.

This affects the entire Emerald Island district that consists of a number of parcels that need to be consolidated into blocks of 13,600 feet. Only one satisfies that qualification: 25 Washington. All others are smaller and do not benefit from the change. If and when those parcels are taken by other developers and they meet the qualification they are not subject to the tax certainty agreement. Lee asked why couldn't the other properties be linked to the tax certainty agreement and was told it would

be contract zoning. What then is the difference between what is being proposed here and what Lee has proposed?

He did an analysis of the economic value to the town and cost to the developer of the tax certainty agreement. The substance of his memo is below.

“From: Lee Selwyn
To: Advisory Committee
Re: WAs 7-11
Date: October 27, 2016

The operative effect of Warrant Article 7 is to create a unique zoning treatment for a total of three (3) existing or potential parcels of land located within the so-called “Emerald Island.” However, only the roughly 18,500 square foot parcel being denominated as “25 Washington Street” is currently being proposed and available for development. The proposed “EISD” zoning would apply only to parcels of at least 13,600 square feet; none of the remaining Emerald Island parcels currently meet this threshold, and thus will require ownership changes and consolidations before the proposed zoning changes can apply. Hence, the practical effect of WA7 is to create special zoning treatment that will apply to only one parcel – 25 Washington Street – at this time.

When considered together with Articles 9 and 10, the proposed zoning treatment is linked to a specific set of *quid pro quos* to be provided by the owner of the 25 Washington Street parcel, Claremont Brookline Development LLC, to the benefit of the Town. One of these consists of a so-called “Tax Certainty Agreement” under which any tax-exempt entity that might subsequently acquire this parcel for tax-exempt use in the future would be subject to a “Payment in Lieu of Taxes” (“PILOT”) agreement equivalent to 100% of the Real Estate Tax to which the property would otherwise be subject. Because the Tax Certainty Agreement is expressly and uniquely linked to the 25 Washington Street parcel, it will not apply to the other potentially developable properties within the proposed EISD.

While similar Tax Certainty Agreements have been negotiated by the Town in three recent instances of similar parcel-specific up-zoning (2 Brookline Place, the Red Cab site, and the Brookline portion of the Cleveland Circle Cinema site), none of these earlier properties have been sold to a tax-exempt entity for tax-exempt use. Hence, the Town has no experience as to the efficacy or actual enforceability of these Agreements. Associate Town Counsel Jonathan Simpson attempted to assure the Planning and Regulation Subcommittee that the Tax Certainty Agreement with Claremont is valid and enforceable over its full 95-year term. However, he rejected a suggestion that an independent legal opinion to that effect be obtained, and counsel for Claremont, when asked if Claremont would agree to indemnify the Town with respect to any legal challenge to the Agreement that might be initiated by a future owner, advised the Subcommittee that Claremont would not agree to any such indemnification. Mr. Simpson also advised that there was no case law that he could cite relating to the enforceability of such Agreements.

If enforceable over its full term, the Tax Certainty Agreement is extremely valuable to the Town. The potential value can be calculated using a Net Present Value (NPV) analysis. I have used this method to conservatively estimate the value to the Town of the Tax Certainty Agreement with Claremont.

Starting with the Petitioners' estimated annual Real Estate Tax obligation of \$1-million, the analysis assumes an annual tax escalation of 2.5%. Using an assumed 4% long term municipal bond interest rate, I then calculated the present value of each annual payment based upon a 4% "cost of money" compounded annually. I also assumed that, absent this Tax Certainty Agreement, the Town would otherwise be able to negotiate a 25% PILOT agreement, which would produce \$250,000 (with annual escalations) in annual PILOT revenues. Hence, the net benefit to the Town would be the full \$1-million minus the assumed \$250,000 PILOT, or \$750,000 (plus annual escalations) each year. The NPV of this cash flow, at a 4% interest rate, is approximately \$38.3-million. That value assumes an immediate sale by Claremont to a tax-exempt purchaser; the value is decreased, but not by very much, the longer than Claremont (or another taxable owner) retains the property.

We don't have similar estimates of the tax revenues for the other two potentially developable EISD parcels. They are smaller than the 25 Washington Street property, so to be conservative I have assumed that they would each produce \$750,000 per year, or \$1.5-million total. Were these two additional parcels subject to similar Tax Certainty Agreements, the potential value to the Town, in NPV terms, would be in the range of \$57-million. **Thus, by not linking the rezoning of these parcels to similar Tax Certainty Agreements, the Town could be leaving as much as \$57-million in value "on the table."**

While the Tax Certainty Agreement with Claremont provides value to the Town, if fully enforceable it also creates a substantial encumbrance on the Claremont property whose effect would be to impair its potential resale value. Confronted with an obligation to pay \$1-million (plus escalations) to the Town of Brookline, a potential tax-exempt purchaser would demand a substantial discount from the seller, whether the seller is Claremont or any subsequent taxable owner. Assuming that any potential purchaser of the property would not be eligible to borrow at municipal bond interest rates, the applicable discount rate would be somewhat higher than that confronting the Town. Using a 5% long term interest rate (note that the current 30-year US Treasury Bond rate is 2.34%), I have calculated the NPV of the potential impairment in value to the owner of the property at roughly \$27.6-million. To put this amount in its proper context, the estimated \$1-million in annual property tax at the FY16 Brookline Commercial Real Estate Tax rate of 1.699% suggests an assessed value of about \$58.8-million. Thus, the potential impairment in value to the owner attributable to the Tax Certainty Agreement is nearly half of the estimated value of the fully-developed parcel. That suggests several potential concerns:

- (1) Confronted with an economic impairment of that magnitude, Claremont or any subsequent owner may initiate legal action to invalidate the Tax Certainty Agreement at some point in the future;
- (2) Alternatively, confronted with the economic effect, Claremont or any subsequent owner may seek a substantial abatement of Brookline Real Estate Tax based upon the impairment in value attributable to the Tax Certainty Agreement.

Under either of these scenarios, the potential economic benefit to the Town could be considerably less than the amount suggested by the Petitioners.

For all of these reasons, I believe it is premature for Town Meeting to approve the proposed EISD zoning at this time. I will move for REFERRAL, with the following specific objectives:

- (1) Consider limiting the proposed up-zoning of the "Emerald Island" to only the 25 Washington Street property at this time. When/as/if the other parcels are proposed for development, similar up-zoning can

be implemented and made subject to the same type of Tax Certainty Agreement as contemplated in WA9 and as implemented in the several prior up-zoning situations referenced above.

(2) Undertake further legal analysis as to the efficacy and enforceability of the Tax Certainty Agreement, including obtaining an independent legal opinion thereon.

(3) Determine the potential Real Estate Tax Abatement implications of the Tax Certainty Agreement assuming its enforceability.

Since there may be some time sensitivity to approval of this zoning amendment, it may be possible to resolve these concerns prior to Town Meeting and then amend one or more of the Warrant Articles as required. At worst, the referral can be time-limited, perhaps being completed in time for a Special Town Meeting for this purpose only that could be scheduled for January 2017. A two-month delay in resolving this issue would be a small price to pay to assure an outcome that can provide maximum value to the Town.”

He suggests deferring action until some of these issues can be explored and resolved. Refer to further study and have clear answers before Town Meeting or have this amended to be limited to Claremont property. Have an expedited review process and have emergency Town Meeting in January.

Comments and Questions

Question about 2 Brookline and flipped use.

The building has to be used for tax exempt purposes for tax certainty agreement to be operative.

Q: Are you most concerned about non-Claremont properties get purchased by a not for profit or are you concerned with the TCA that Claremont has entered into?

A: I am suggesting many possible scenarios. TCA is enforceable we are leaving \$57M on the table because we are not applying it to the other parcels. If not enforceable, we are overstating the benefit to the town.

Q: Not getting anything we wouldn't be getting under any situation, until he sells it and it is no longer used as a hotel. Question whether tax revenue assumptions on other parcels are accurate.

A: Only property tax not hotel tax and assumed lower valuations for other parcels.

Conceivably a nonprofit might buy the other parcels, not willing to hold up the whole thing. We cannot protect against everything. We are not leaving money on the table because it is speculative. Like saying I didn't buy the lottery ticket but I am leaving the \$58 million winnings on the table.

Q: Why can't you negotiate the same agreement with any other subsequent potential property owners?

A: Providing zoning benefits to three parcels. Only one is subsequent to an agreement.

We don't have anyone to negotiate with now. You do potentially run into an issue with contract zoning when you let it be known that you enter into an agreement with the Town and then get your zoning change. It is very unlikely that some developer will come along, bring the other parcels together to meet the requirement then come to the Town with a similar proposal.

Appreciate Lee's efforts and the exercise. The worry is not something that will happen. Agreement travels with the property. Scenario may or may not happen.

Suggestion to amend Article 7 to be exclusive to 25 Washington should be discouraged because it is a good product from a good and thorough process.

Q: Would we be able to get anything near to what we are getting now with Claremont with other developers?

A: It would not be the degree of leverage. Any developer that wants to aggregate will have to be talking with the Town so there would be opportunities for negotiation.

Ben Franco noted that this is a unique situation. The property is oddly shaped, small size. This is an area of town that has been looked at and studied for 20 years. There have been repeated complaints. By advancing article 7 all of the complaints are being address, will become more welcoming and walkable gateway, contribute to the area and economy, and more.

Q: What happens if Article 7 doesn't pass, and Article 8 passes?

A: If Article 7 doesn't pass there will be no hotel. If article 8 does pass, there will be no hotel. Inset of the building any further and you can't build the ramp, you can't have parking and it cannot work.

Hugh Mattison noted that he isn't entirely sure the turning radius required could not be changed somehow so as to prohibit the ramp and parking.

Ben objected to the suggestion that the hotel has been driving this process. He noted that Claremont changed many things in response to the Town and what the River Road Study Committee articulated. Parking levels went from three to two. Other modifications were made to encourage more active uses at the ground level. Sidewalks were enlarged. They have been pushed to share parking ramp access. Forced to grant access to that parking level to whoever takes the land next door.

Many people in the neighborhood are happy to see the Red Cab site gone and a beautiful hotel in its place.

Cycle track is an entirely different project. The cycle track could not be moved a foot in any direction. This doesn't affect the sidewalk.

Advocate for support for both Article 7 and 11 so that discussion of sidewalks can continue. We shouldn't think that the design of the hotel is final yet and there may be some flexibility there.

Petitioner Mattison noted that the cycle track is at sidewalk level. The proposal was for trees to separate them. Crowd people in an 8 foot space against a building with bicycles going by you will have a problem.

This is part of the State process whereby you submit different level of design so they can begin funding. There will be an opportunity to alter and get input on that design.

9. Review WA 11: Resolution regarding the width of the sidewalk at 25 Washington Street. (Petition of Hugh Mattison, TMM5)

This is a resolution in the event the Articles 7 and 8 don't pass, asking the Selectman to use their best judgement to realize the goals of Article 7 and 8 (planting strips and sidewalks). The Planning Board did not take up Article 11. The reason the subcommittee did not vote favorable action – 11 only comes into effect if 7 or 8 don't pass. Article 7 and 11 could live together.

The subcommittee felt that passing the resolution with 7 seemed to muddy the waters.

Voting procedure will involve roll call.

MOTIONS AND VOTES

A **MOTION** was made and seconded to recommend favorable action on Article 7.

By a unanimous **VOTE** of 23 in favor, none opposed and no abstentions the Advisory Committee recommends favorable action on Article 7.

A **MOTON** was made and seconded to offer no action on Article 8.

By a unanimous **VOTE** of 23 in favor, none opposed and no abstentions the Advisory Committee recommends no action on Article 8.

A **MOTION** was made and seconded to recommend favorable action on Article 9 with the correction "Claremont Brookline Avenue LLC" in the warrant.

By a unanimous **VOTE** of 23 in favor, none opposed and no abstentions the Advisory Committee recommends favorable action on Article 9.

A **MOTION** was made and seconded to recommend favorable action on Article 10.

By a unanimous **VOTE** of 23 in favor, none opposed and no abstentions the Advisory Committee recommends favorable action on Article 10.

A **MOTION** was made and seconded to recommend favorable action on the Petitioner's amended motion under Article 11.

By a **VOTE** of 11 in favor, 12 opposed and no abstentions, the motion fails.

A **MOTION** was made to and seconded to recommend favorable action on article 11 (subcommittee version with Planning Board)

By a **VOTE** of 10 in favor, 12 opposed with 1 abstention, the motion fails.

A **MOTION** was made and seconded to recommend no action.

By a **VOTE** of 13 in favor, 9 opposed with 1 abstention, the Advisory Committee recommends no action.

Upon a **MOTION** made and seconded to adjourn, and voted unanimously, the meeting was adjourned at 10:10pm.

Documents Presented:

FOR WA 21

- BoS and Planning Board Amendment to WA 21

FOR WA 16 17 18

- Motions to be offered by the BoS
- Draft Climate Action Committee Report
- Morelli Email

FOR WA 7-11

- Planning and Regulation Subcommittee Reports on WA 7-11
- Planning Board Report and Recommendation Article 7, Article 8
- Article 11 Amended
- Economic Development Advisory Board Recommendations for Articles 7-11
- Lee Selwyn Memo Re: Articles 7-11
- Public Comment (emails)