

**Conway Planning Board**

**Thursday, October 7, 2021, 7:00 – 8:30 p.m.**

**MINUTES**

**Location: Meeting conducted remotely via Zoom**

**Present:** Beth Girshman (chair), Jenn Mullins (vice-chair), Susan Fentin, Bill Moebius, Joe Strzegowski (associate member); Lara De Lucca (administrative assistant)

**Other Attendees:**

Gary Fentin, 901 Roaring Brook Rd  
Thomas Lesser, 195 South Part Rd  
John Moore, 40 Whately Glen Rd  
Dean Scranton, 1211 Roaring Brook Rd

Meeting called to order 7:00 p.m. by Chair Beth Girshman

**1. Review and approve minutes of previous meeting, August 19, 2021**

Motion to approve minutes as submitted by Susan, seconded by Jenn.

Vote:

Fentin - Aye  
Girshman - Aye  
Moebius – Aye  
Mullins - Aye  
Motion passed

**2. Nexamp – outstanding issues, reports**

Beth signed off on latest Tighe and Bond invoice. The contract is for one more report, which will probably be the close-out.

Joe spoke on the phone with the Nexamp engineer, who said system has been successfully running for over a month. According to Joe’s calculations, it should be generating enough power to make the town carbon neutral as far as electricity usage.

Tony the drainage consultant is working directly with DEP and will need at least another week.

**3. Solar bylaw – Attorney General guidance**

Town clerk received approval from the Attorney General for new bylaw. Guidance came along with it, which can be made available on the town website along with the updated bylaw. The practice is that the AG documents are attached to the back of the bylaw document. Nothing can be added to the actual text of the bylaw at this point without a town vote, but a note to “see document below” is possible.

Concern expressed that future PB members will know of the AG guidance when dealing with the bylaw. This suggests a future discussion -- how do current Planning Board members help out future members?

#### **4. Fall and winter meetings – board members scheduled absences**

Beth asks that members inform her if they know in advance that they will miss a meeting so that she can plan for the need to reschedule, etc.

#### **5. Flood plain bylaw revisions – updates, memo and assistance from FRCOG**

Plan is to be on the warrant for the June 2022 Town Meeting. Information session will be part of the regular PB meeting on March 3, 2022. Required Public Hearing will be part of the regular PB meeting on April 21, 2022.

Kimberly McPhee from FRCOG will join the Oct 21<sup>st</sup> PB meeting to discuss the required revisions. Kimberly saw the drafted revision done by Susan. She sent a memo to the PB with three areas to discuss before that meeting.

##### 1. Adopting the 2020 State Model Floodplain Bylaw versus section edits

What Susan did was import the required changes into Conway's existing bylaw. PB will need to talk to Kimberly about what we might or might not want to include and why.

##### 2. Floodplain Administrator designation

Someone has to be designated and Beth made it clear with Veronique that PB member won't do this, and put it in the hands of Veronique and the Selectboard. Joe suggested maybe FRCOG could provide this, but Kimberly asked who Conway would name. PB should ask Kimberly what other towns are planning.

##### 3. Regulating areas beyond the 100-year floodplain

Will it make sense during this process to incorporate additional areas that have been under discussion, like the 500-year flood boundary or the mapped river corridor for the South River? Concern expressed that this would complicate what is brought to Town Meeting, entangle it with property rights, and making it more difficult to get passed. The flood plain bylaw revision is mandatory (for flood insurance), so it is really important that the process be successful. Question of whether this would constitute a slight modification or significant extra work. Possibility of making it two separate votes, or an informational map with the additional areas, so that people could make their own decisions, rather than regulate them.

Beth will be in touch with Kimberly to give her an idea of what was discussed tonight.

#### **6. Master plan update - process**

Beth asked Veronique about funding for this process, and Beth will go before the Selectboard to discuss this. Assuming FRCOG will provide help as well. Joe says during the last process

(2013/14), they hired someone to write it for about \$3,000-\$4,000. Doesn't think it could be done for less than \$5,000 now. They also hired consultants to do coffee hours.

Other groups in town are working on areas that could be incorporated into the new Master Plan:

- Open Space and Recreation Plan
- Economic Development group
- Housing Needs Assessment
- Municipal Vulnerabilities/Climate Resiliency

According to the webinar Susan attended, getting by-in through coffee hours/focus groups early on is really important. It's an important process and big job, probably won't be written again for some time, and it makes sense to push the town to pay for a consultant. Do it right so it stands the test of time. Must have a new one every 10 years, if you don't have one you're not eligible for grant funding.

Susan has list of potential consultants from webinar. Beth will go to Selectboard with the list and maybe how much they would cost. They wouldn't have to start from scratch because there are resources the town is already working on. Beth will also ask FRCOG if they have any info about this, and will check with several area towns to see what they have done.

## **7. Revised request – Gary Fentin**

Susan Fentin recuses herself and leaves the meeting.

Gary Fentin submitted a letter to the Planning Board via email, which is attached at the end of these minutes.

Gary's concerns:

- Requests that he be allowed to comment during Roaring Glen Farms-related discussions in PB meetings, rather than waiting until the Public Comments section of the meetings.
- Requests that abutters to Roaring Glen Farms be notified when RGF is on the PB agenda, and that they receive copies of related documents via email.

PB response:

- There is law and protocol to follow. By law, PB agendas are posted 48 hours in advance, both on the bulletin board outside the Town Office, and on the town website. When appropriate, abutters impacted by particular agenda items are also individually notified. Going forward, if RGF is on the agenda, Beth will email the agenda to Gary.
- Documents submitted to the PB are public documents, but they are not shared with individual members of the public before they are discussed at a PB meeting.
- The purpose of the Public Comments section is that it gives members of the public the opportunity to respond to the meeting, which is why that comes at the end of the meeting. Members of the public can request to speak during a specific agenda item (rather than

wait for the Public Comments section), but they must be recognized by the Chair in order to speak.

- PB can add a specific time to a scheduled agenda item on future agendas, in order to allow participants to come to only the relevant part of the meeting.
- When members of the public are concerned about an item going before the PB, they also have the option to send an email to [planningboard@townofconway.com](mailto:planningboard@townofconway.com).

### **8. Roaring Glen Farms, LLC – submittal of letter requesting PB actions**

Attorney Thomas Lesser sent a letter to the Planning Board on behalf of Roaring Glen Farms, LLC. The letter is attached to the end of these minutes, and it covers much of what Attorney Lesser spoke about during the meeting.

- Requests waiver of compliance with 11.R section of bylaw, governing change in ownership. If RGF transfers more than 10% of ownership their Special Permit will lapse. This would require RGF to start again at the beginning of a long process. It isn't practicable to require this as it is an expensive business to start and needs investors.
- It is onerous to ask potential owners to get approval from PB along with the already long negotiations they go through.
- Conway's law covers the same ground as state law, state law preempts local law.

Planning Board response:

- Beth appointed Joe as Associate Member to the Planning Board for anything to do with this matter. He will be a voting member if it comes to the point of an amendment of the Special Permit.
- Any waivers occur during Special Permit process. Waivers shouldn't happen after the fact, outside of the SP process.
- RGF can apply for an amendment to the Special Permit in order to change ownership, so it would not trigger the lapsing of SP. There is a process in place for that, PB can address this situation within their existing system.
- This bylaw has gone through a Public Hearing and Town Meeting twice, and through the Attorney General's office twice. They didn't say anything about it being impracticable or onerous or in conflict with the state law. Conway decided to duplicate state regulations as a back-up so that if state isn't enforcing its laws, the town would have the power to do so.
- The process of amending the Special Permit, along with the required public hearing and public comment will add one more layer of public review making it more solid for both applicant and PB. In the application RGF can explain the new structure of the organization and why the change is needed.

Jenn moves that the PB request that Roaring Glen Farms, LLC apply for an amendment to their existing Special Permit. Bill seconds.

Vote:

Girshman - Aye

Moebius – Aye

Mullins - Aye  
Simple majority only needed to pass. Motion passed

Per Attorney Lesser, RGF will request the amendment.

Jenn moves that PB waive the town fee of \$150 for the Roaring Glen Farms, LLC application to amend existing Special Permit. Bill seconds.

Vote:  
Girshman - Aye  
Moebius – Aye  
Mullins - Aye  
Simple majority only needed to pass. Motion passed

PB will waive town fee of \$150. RGF will need to pay for the required ads and the mailing of abutter notifications.

**9. November/December meetings – in person, Zoom, or hybrid?**

Susan Fentin returned to the meeting at this point.

PB will continue holding virtual meetings via Zoom in November. Will revisit the question for the December meetings.

In person meetings are preferable, and PB will eventually return to them, but hopes to provide a hybrid model so that interested parties can still attend virtually as well. Beth will find out the rules for hybrid meetings and whether a quorum needs to be present in the room.

**10. Mail/email**

Planning Board received two letters via email, from Gary Fentin and from Thomas Lesser. Both letters are attached to the end of these minutes.

**11. New Planning Board member**

Several people have recently expressed interest in serving on PB. If a new member were appointed now, they would serve until the next election, and then run to fill the rest of Mary's term.

**12. New business/public comments (not anticipated 48 hours in advance)**

None

**Motion to adjourn by Susan, seconded by Bill.**

Vote:  
Fentin - Aye  
Girshman - Aye  
Moebius – Aye

Mullins - Aye

**Motion passed. Meeting adjourned at 8:39.**

**Next regular meeting: October 21, 7:00 p.m. via Zoom**

Gary S. Fentin  
901 Roaring Brook Road  
Conway, MA 01341

September 29, 2021

To: Conway Planning Board, via email

The Planning Board has been considering interpretations of the Town Bylaws that affect the development of the Roaring Glen Marijuana Project (the "RG Project") which may set a precedent for interpreting the Bylaw for locations other than the RG Project. I also expect that the Planning Board may receive from the RG Project additional requests for interpretation of the Town Bylaws and may receive an application to amend the RG Project Special Permit.

As you may know the Ethics Commission has determined that my ownership of 30 acres abutting the Osterman property creates a presumption that the development of that Project will affect my financial interests.

In order to ensure that neighbors and other residents of Conway are aware of these proceedings and given the opportunity to protect their interests and their property, I request that I and other property owners near the RG Project:

1. Receive, via email,
  - a. Notice of when the RG Project is on the Planning Board Agenda.
  - b. Copies of documents submitted by the RG Project with regard to that Project, and in that regard I request Attorney Lesser to email to me courtesy copies of any documents prior to submission to the Planning Board.
  - c. Copies of any Opinions of Town Counsel rendered with regard to the RG Project.
2. Be allowed to address the Planning Board from time to time with respect to the RG Project as part of any discussion of the RG Project, and not included at the end of the meeting as part of the Public Comment section.

Please include my presentation of this letter on the Planning Board Agenda for Thursday, October 7<sup>th</sup> as a separate Agenda item, and not part of Public Comment.

Sincerely,

Gary S. Fentin

cc. Attorney Thomas Lesser, Via email

# LESSER NEWMAN ALEO & NASSER, LLP

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*Attorneys at Law*  
Thomas Lesser  
William C. Newman  
Merry L. Nasser  
Michael E. Aleo

October 5, 2021

Town of Conway Planning Board  
Town Office Building  
32 Main Street  
Conway, MA 01341

Email: bgirshman@gmail.com

Re: Roaring Glen Farms, LLC

Dear Board:

I am writing on behalf of Roaring Glen Farms, LLC, ("Roaring Glen") to request that the Planning Board grant Roaring Glen a waiver, under Section 11.2 of the Conway Zoning by-laws, from compliance with Section 11.5(R) of the By-laws, a section that governs "Change in Ownership" and more specifically states, "A Special Permit issued under this Article shall lapse upon any transfer of ownership or legal interest of more than 10%. The Special Permit may be renewed thereafter only in accordance with this Article 11 and Section 63 (Special Permit) and Section 64 (Site Plan Review) of these By-laws."

The waiver is requested for several reasons:

1. First, I would call your attention to Town Counsel's July 22, 2021 opinion:

What has concerned me from the beginning, however, is the question of **why** the Planning Board should be concerned about these transfers in the first place. The Cannabis Control Commission (CCC) already has detailed regulations in place to deal with changes in the ownership or control of a Marijuana Establishment. See 935 CMR 500.104 (1). I believe that the CCC has the resources and is better equipped to vet any proposed new owner or stakeholder of a Marijuana Establishment than the Planning Board is. The regulations also use the 10% figure as the threshold figure for further inquiry. Why does the Town care about the internal



financial structure of a Marijuana Establishment (aside from knowing the identity and address of all owners) when the State already undertakes a vital role in vetting any new owners of the business?

There is a concept in law known as "preemption." Essentially, if the State has extensively regulated an area, a local municipality is "preempted" from passing ordinances or bylaws regulating the same subjects or area. G. L. c. 94G, section 3(a), entitled "Local Control" provides:

" (a) A city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter"

While one may argue that the Conway Bylaw provision does not "conflict" with the State regulation, it certainly covers the same issues and concerns and might be construed as overstepping the Town's authority. And I don't have sufficient information to determine whether or not Section 11.5(R) is "unreasonably impracticable" in this particular case. Perhaps Attorney Lesser will expand upon this point at tonight's hearing.

I cannot say definitely that Section 11.5(R) violates G.L. c. 94G, section 3(a); that decision would ultimately have to be decided by the Courts. I do, however, urge the Planning Board to consider these issues in their deliberations tonight. The Board should ask itself what is the purpose of this bylaw? If it determines that the bylaw serves a valuable purpose and should be followed, then my opinion, as stated in my last email, is that the transfer of ten 4% ownership shares would trigger the provisions of Section 11.5(R). If, on the other hand, the Board should decide that the bylaw is redundant of the State regulations and further inquiry into the internal financial structure of a Marijuana Establishment is not necessary, then I suggest that actions be undertaken to amend the Conway Bylaw to eliminate this section as soon as practicable. In that

event, if the Board does determine that Section 11.5(R) is redundant of State regulations and/or is "unreasonably impracticable" in this case, then it is my opinion that the Board could choose not to enforce that section of the bylaw in this case.

Attorney Fitz-Gibbon's questioning of why the Planning Board should be concerned about the ownership of Roaring Glen is correct.

11.1, the "Purpose and Intent" section of the By-Law certainly appears to support Attorney Fitz-Gibbon's conclusion. It stated that:

It is the purpose of this article to promote public health, safety and general welfare, and to support the availability of recreational and medical marijuana in accordance with State law and regulations (935 CMR 500.000 et. seq.) and (935 CMR 501.000 et. seq.). To mitigate potential impacts to adjacent areas and the environment this bylaw will regulate the locations and site development to promote safe attractive business areas, prevent crime, maintain property values, protect and preserve the quality of residential neighborhoods and to protect the safety of children and young people in the vicinity of schools, public parks and other areas where children regularly congregate.

But Section 11.5(R) does not regulate either the location or site development of marijuana establishments.

To the contrary, who has an ownership stake in a marijuana establishment, whether it be Elon Musk, Jeff Bezos or a third party, is totally unrelated to regulating "locations and site development to promote safe attractive business areas, prevent crime, maintain property values, protect and preserve the quality of residential neighborhoods and to protect the safety of children and young people in the vicinity of schools, public parks and other areas where children regularly congregate."

The concern of the Planning Board should be that Roaring Glen is operated in accordance with the conditions set

forth in the Special Permit, not with who owns it.<sup>1</sup>

2. The second reason that the Planning board should grant a waiver is that Section 11.5(R) conflicts with G.L. c. 94G, § 3. That section of the General Laws allows a municipality to adopt ordinances and by-laws that impose reasonable safeguards on the operating of marijuana establishments, but only "provided, they are not unreasonably impracticable and are not in conflict with this chapter or with regulations pursuant to this chapter, and that (1) govern the time place and manner of marijuana establishments/ operations..." A copy of G.L. c94G § 3 is attached.

In other words, a local ordinance or by-law is valid only if it meets three prerequisites:

- (1) it governs "the time, place and manner of marijuana establishment operations":
- (2) it is not "unreasonably impracticable", and
- (3) it does not conflict with Cannabis Control Commission regulations (a concern addressed by Attorney Fitz-Gibbon above).

Section 11.5(R) of the zoning by-laws fails to meet any of these three requisites, let alone all three.

First, it does not govern the time, place and manner of marijuana establishment operations.

- (a) Time means the hours of operation of a marijuana facility;
- (b) Place means the location of the marijuana facility (that is addressed in Section 11.4 of the by-law); and
- (c) "Manner of Marijuana establishment operations" means how a facility is operated or functions. The Conway

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<sup>1</sup> The character of the applicant was not an issue on the original application per Town Counsel's advice, nor should the character of additional investors be an issue (provided they pass Cannabis Control Commission vetting).

by-laws address the operation of a marijuana establishment in Sections 11.5 E, F, G, H, I, J, K, L, L, M, and O of the Bylaws.

Instead, Section 11.5(R) is directed to who owns or controls a marijuana establishment, not how it operates.

Accordingly, a court would find that the by-law exceeded the authority of the Town of Conway under G.L. c. 94G, § 3(1).

In addition, requiring any person who holds more than 10% of the ownership of Roaring Glen to get local approval is "unreasonably impracticable". A 10% ownership in a marijuana establishment would only be transferred after extensive negotiations between the parties' lawyers. These are expensive and time consuming negotiations, which few, if any, prospective owners would undertake, knowing they still had to get local approval under a by-law, which has no standard(s) for approval or denial. If requested, I will obtain affidavits from lawyers, who do extensive legal work in the field, to that effect.

I would also note that the second purpose of the marijuana by-law, set forth in Section 11.1, is "to support the availability of recreational and medical marijuana in accordance with State law and regulations (935 CMR 500.000 et. seq.) and (935 CMR 501.000 et. seq.)."

Requiring every person who has an ownership interest of more than 10% to receive local approval, in addition to Cannabis Control Commission approval, works against, rather than supporting that availability. The reality is that due to the costs associated with complying with the state regulations, there are virtually no marijuana establishments that do not have investors/partial owners. In fact, 25% of the agenda of every Cannabis Control Commission meeting is now devoted to ownership transfers

For the above reasons, Roaring Glen would request that a waiver be granted from the provisions set forth in Section 11.5(R).

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas Lesser".

Thomas Lesser

TL/sma

## Research References

## Treatises and Practice Aids

18A Massachusetts Practice Series § 19.5,  
Controlled Substances; Marijuana Regula-  
tion.

**§ 3. Local control**

## Local control

(a) A city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter and that:

(1) govern the time, place and manner of marijuana establishment operations and of any business dealing in marijuana accessories, except that zoning ordinances or by-laws shall not operate to: (i) prevent the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 engaged in the cultivation, manufacture or sale of marijuana or marijuana products to a marijuana establishment engaged in the same type of activity under this chapter; or (ii) limit the number of marijuana establishments below the limits established pursuant to clause (2);

(2) limit the number of marijuana establishments in the city or town; provided, however, that in the case of a city or town in which the majority of voters voted in the affirmative for question 4 on the 2016 state election ballot, entitled "Legalization, Regulation, and Taxation of Marijuana", and after December 31, 2019 in the case of any other city or town, the city or town shall submit any by-law or ordinance for approval to the voters pursuant to the procedure in subsection (e) before adopting the by-law or ordinance if it would:

(i) prohibit the operation of 1 or more types of marijuana establishments within the city or town;

(ii) limit the number of marijuana retailers to fewer than 20 per cent of the number of licenses issued within the city or town for the retail sale of alcoholic beverages not to be drunk on the premises where sold under section 15 of chapter 138; or

(iii) limit the number of any type of marijuana establishment to fewer than the number of medical marijuana treatment centers registered to engage in the same type of activity in the city or town;

(3) restrict the licensed cultivation, processing and manufacturing of marijuana that is a public nuisance;

(4) establish reasonable restrictions on public signs related to marijuana establishments; provided, however, that if a city or town enacts an ordinance or by-law above the commission's standard, that local ordinance or by-law shall not impose a standard for signage more restrictive than those applicable to retail establishments that sell alcoholic beverages within that city or town; and