

TOWN COUNCIL MINUTES
Ordinance Committee
Town Hall Council Chambers
March 30, 2015, Monday

Present: Kenneth DiFazio, Chairman
Michael Smart, Vice Chairman
Jane Hackett, Councilor
Arthur Mathews, Councilor
Patrick O'Connor, Councilor

Also Present: George Lane, Town Solicitor
Thomas J. Lacey, Councilor
Rebecca Haugh, Councilor
James Clarke, Director, Planning & Development
Dan McCormack, Director, Public Health

Recording Secretary: Mary Barker

Chairman Kenneth DiFazio called the meeting to order at 6:33 PM.

15 006-Ordinance Amendment –Chapter 7

Chairman DiFazio noted that this matter was referred to the Ordinance Committee by the Town Council on January 20, 2015. The proponents of the measure, Councilors Lacey and Haugh were invited to the table to give a presentation. Councilor Haugh provided background of the proposal to the committee.

She and Councilor Lacey collaborated through the Economic Development Committee following discussions as to how to bring the town new revenue and quality commercial development. An elaborate discussion regarding the tax shift took place at the Town Council Meeting on January 20, 2015. At that meeting, President O'Connor stated that a shift will not change the climate, but it requires a culmination of many factors to clean up Weymouth-- keep it clean and draw residential and commercial investment to town. Although on the surface this proposed ordinance may appear anti-business, it is not.

In December they began researching what other towns in Massachusetts have enacted, including Chicopee, Springfield, Worcester, New Bedford, Pittsfield, Attleboro, Everett, Medway, and Marlboro. They then looked further, to cities in Connecticut and as far as California, and realized it is not an eccentric idea. Many areas have adopted general anti-blight ordinances. Mayor Walsh has submitted a similar bill, #1881 (currently in committee) to the Boston City Council.

Councilor Haugh continued that the ordinance was written and incorporated four key town departments: Building- Licensing & Inspections, Health, Police and Fire. Each of these departments do a portion of what the ordinance is intended to, using Zoning and state Sanitary Code and Public Safety guidelines already in place, but nothing that links them cohesively. The intent of the ordinance is to provide a larger umbrella of protection,

and to give the town the power to enforce what is already on the books.

Councilor Lacey noted that this is a third attempt to bring this type of ordinance forward; the administration had issues with the prior versions redundancies and concerns with enforcement. They have met with impacted Department Heads and the Mayor and held healthy dialog regarding redundancies in the current laws, particularly with the State Sanitary Code, in which the Health Department plays a key role. The dialog was to ensure that the proposal had at least fundamental support from the administration to move this forward, and they have received the commitment. The concerns highlighted in that meeting are included in the materials the Councilors provided to the committee to aide in the ultimate document put forward for consideration. It will require deliberation by Council, a public hearing, and sign off by the administration. They want this to be a collaborative effort to build an ordinance that will work and that takes a holistic approach. The additional documentation is a great set of working documents for the committee to review.

Chairman DiFazio asked if the Health Department provided comments. Councilor Haugh noted there are written comments from Matt Brennan. Chairman DiFazio read the purpose of the ordinance is to prevent vacant properties and foreclosing properties from posing a nuisance or dangerous situation to the town; he asked if this is the general objective of the proposal. Councilor Lacey responded yes, but it's also an attempt to hold owners responsible to maintain their properties to a certain aesthetic standard.

Chairman DiFazio asked Solicitor Lane to provide his opinion. Solicitor Lane noted that public safety may be one aspect, but the other is to bring blighted properties up to a standard. He reviewed the case of Easthampton Savings Bank v. the City of Springfield in 2014 that was a seminal ordinance case. It called for an expansion on the question of who is an owner. The ordinance proposed here will attempt to define an owner (to include mortgagees). It provides more power to rectify adverse situations. It also calls for new duties on health and building inspectors, which under the terms of the charter constitutes a change or modification of duties, or organizational change. However, with collaboration of the departments, there are some difficult provisions it appears to be on the right perspective. They also discussed exceptional and/or extraordinary measures, such as receivership. Solicitor Lane reported that he still has some documents to review before he offers his formal opinion.

Chairman DiFazio requested confirmation that the committee may still review and reform the language while the work is in progress. Councilor Lacey noted that they were cautious in their language to be cognizant of legal and safety terms, but that it is a work in progress. Councilor Haugh provided additional information on the legal case Solicitor Lane referred to (Case #11612 and the ordinance in City of Springfield). Some of the provisions in it would not fit in Weymouth, but Councilor Haugh believes that the basic ordinance was impressive and the ordinance they propose for Weymouth is a workable and enforceable one.

Vice Chairman Smart asked Solicitor Lane for further explanation as to equity being

affected. Solicitor Lane responded that the language may be refined. He noted that not every aspect of a blighted condition can be approached from the Health Department or Building Department but with this it can be rectifiable. It refers to any property in this condition. Councilor Haugh noted the “blighted condition” is handled in the second portion of the proposed ordinance. It is not the intent to target homeowners and it refers to any property, not only delinquent ones. Chairman DiFazio noted that the definition of a blighted condition comes in; it could be considered discretionary. The town will need to be reasonable in dealing with the homeowner who may not have the financial means to remedy a condition.

Councilor Mathews noted in reading through the back up material he questions if their meeting with the Mayor was before or after the memo from Jeff Richards? Councilor Haugh responded it was after, and he was not present at the meeting. Councilor Lacey noted the work being done by the town departments, this is not to call out a lack of work by these departments; but to add accountability and to adopt a holistic approach. They want to eliminate the redundancy. The letter from Jeff Richards was a part of the materials to take back to the Council. They are not at risk from an enforcement standpoint. Vice President Smart noted that it appears that Mr. Richards is defensive of his department. Solicitor Lane responded that the memo is dated 3/6 and it was a response to the proposed ordinance review. This is still a work in progress. Councilor Lacey noted that they were clear in the meeting with the administration that if they can propose an ordinance that is in the best interest of the town, it will be supported by the administration.

Councilor Haugh reminded the committee that a smoking ban was put in place and the intent was the same; not to infringe on anyone’s civil rights, but to preserve and protect the lives of those in the community.

Councilor Hackett thanked the proponents for their proposal; she suggested this type of proposal is what is needed to raise the bar.

During the discussion, at 6:37 PM, Councilor O’Connor arrived.

A motion was made by Vice Chairman Smart to continue 15 006-Ordinance Amendment Chapter 7 in committee while work continues and was seconded by Councilor Mathews. UNANIMOUSLY VOTED.

15 013-Requested Change to Ordinance Section 120-22.8 (note: Zoning Ordinance)

Chairman DiFazio reported that this measure was referred to the Ordinance Committee on March 16, 2015 and a public hearing is scheduled for May 4, 2015. He invited citizen Robert Montgomery Thomas to the table to present his proposal. As a property owner in the HT district, he proposed a substitute motion to address 120-22 with a lot set aside of 24% for landscaping and any other consideration would be required to go before Planning Board, and said that if it meets the Planning Board’s criteria it would not need to go to BZA.

Councilor Mathews noted that the Zoning Board of Appeals is the correct board to review it.

Chairman DiFazio confirmed that if someone were seeking relief, it would be to the Zoning Board of Appeals for special permit and asked Mr. Clarke to confirm, which he did.

Vice Chairman Smart noted that as Mr. Montgomery Thomas was not the proponent of the prior language change, he was not in a position to make a substitute motion. Solicitor Lane noted that Mr. Montgomery Thomas is here because he resides in the zoning district and is making a new independent amendment to the zoning and that's how it should be referred. Chairman DiFazio noted that this is now not a special permit to the Zoning Board but a special permit to the Planning Board. He asked Mr. Clarke to clarify. Mr. Clarke responded that a drive through in an HT zone requires the applicant seek a special permit before BZA. Mr. Montgomery Thomas disagreed. He is trying to illustrate that a drive through restaurant could fit onto a smaller lot. Mr. Clarke quoted Article 1, 120-22- which states that the Board of Zoning Appeals is the granting authority. It was noted that when the form of government changed, a section was added so that the entire zoning book didn't need to be revised and supersedes the section to which Mr. Montgomery Thomas referred.

Chairman DiFazio asked if this now goes to BZA, if there is still something he would like changed? Mr. Montgomery Thomas reviewed his proposal to change the existing 120-22.8(e). Chairman DiFazio asked if the changes to Table 1, etc., would be changes the Zoning board would take into consideration anyway. The intent is not to circumvent the authority of the BZA. Mr. Montgomery Thomas feels he should not be discriminated against if his property is less than the size requirements, if it meets all other requirements. He reviewed his plan and Chairman DiFazio asked if the plan is a hypothetical one. Mr. Montgomery Thomas responded that if someone were to make him an offer on his property, or his and the adjoining one; this is a conceptual plan that indicates that he can build a restaurant and meet all of the requirements on less than the one acre required. Chairman DiFazio asked Mr. Montgomery Thomas to summarize the changes he is proposing. Is the intent to eliminate the square footage requirement from the ordinance the Council just passed? He responded that he shows it doesn't need to be a 1-acre lot; he can do it in a third of the size.

Vice Chairman Smart responded that the restriction was included in the language to minimize the impact. The Administration and Ordinance Committee reviewed close to 200 parcels to narrow down those that could support it; every lot is not shaped similarly. Mr. Montgomery Thomas responded that he is using the 15,000 square feet as a benchmark. The concept he shows proves a drive through can go in a smaller lot and he would like to have the option. Mr. Clarke noted that if there were some part of the application that did not meet the current zoning, he would need to request a variance before BZA.

Councilor Mathews noted that the original proposal language was dead without adding

the minimum lot size requirement; he does not want to see queuing up and down Route 53; he noted his support of the original proposal.

Mr. Montgomery Thomas responded that the zoning ordinance that was just changed is discriminatory because it can be done in a lot size smaller than the restriction.

Chairman DiFazio noted that the public hearing is scheduled for May 4, 2015, and he recommended Mr. Montgomery Thomas speak with the Council Office regarding the publication requirements.

A motion was made by Vice Chairman Smart to continue measure 15 013-Requested Change to Ordinance Section 120-22.8 and was seconded by Councilor Mathews.
UNANIMOUSLY VOTED.

Issue – Board of Health Regulation #33 (Bodyworks Regulations)

Chairman DiFazio reported that this matter was referred to the committee for review from the Town Council and in a proposal from Citizen Robert Montgomery Thomas. Mr. Thomas provided a reworked copy of the proposed ordinance for the committee to review. Solicitor Lane noted that a Board of Health regulation may not be superintended by an Ordinance. The law is clear. He read from a case. Boards of Health have plenary power to promulgate regulations. There is no power to enact an ordinance.

Mr. Montgomery Thomas disagreed with the state regulation. He has a problem with the public being put aside, and Weymouth Home Rule charter states all power rests with Town Council not with the Mayor. He asked, who is in charge? He has a problem with a third party official who is appointed and does not reside in the town telling the town what to do. If a Board of Health can make a reasonable regulation, the authority should be paramount. He noted that this regulation was not properly advertised to the public and no summary was listed. Permission to do anything in town should come before the Town Council. The charter specifically states that all licensing and inspections goes before that board, but he disagrees with their authority.

Councilor Mathews noted that the Council is not the supreme authority. Organization and reorganization has been the topic of discussion many times with the Town Solicitor. When the Town Solicitor rules, the Council must abide. Mr. Montgomery Thomas disagreed and read from the Charter-noting that only the Council may enact an ordinance. Solicitor Lane noted that the interpretation of the plenary powers of the Board of Health is clear in Ch. 111 Section 31, except as otherwise provided by law; it is provided by law. The Council has no right to promulgate an ordinance that stands in dereliction of a Board of Health regulation.

Dan McCormack, Public Health Department Director, reviewed the other regulations promulgated since the change in government; tobacco regulations, well regulations; others were rescinded. The process used is legal and he reviewed the notification process and noted it is fully transparent.

At the recommendation of the Chair, the matter was taken under advisement for further discussion. Mr. Montgomery Thomas disagreed with Solicitor Lane in that the plenary powers of 111 31- which refers to subsurface sewage disposal. The parameters of reasonable regulations are not clearly defined in the language.

ADJOURNMENT

At 8:05 PM, there being no further business, a motion was made by Vice Chairman Smart to adjourn and was seconded by Councilor Hackett. UNANIMOUSLY VOTED.

Respectfully submitted by Mary Barker as Recording Secretary

Approved by Chairman Kenneth DiFazio

Voted unanimously on 21 April 2015

**Proposal from Mr. Montgomery Thomas:
Testimony to ORDCOM regarding Regulation 33**

“Thank you Mr. Chairman, Councilors and others:

As you are aware, I presented my amended version of BOH Regulation 33 to be enacted as an Ordinance in § 6-1400 of the Weymouth Code to follow § 6-1300 regarding Sex Offender Registration, which follows the 23 pages of § 6-1200 regarding Body Art, which is also a health-related Ordinance. So Section 6 looks like the place this Ordinance should be.

Let me start by saying that I appreciate the work done by the BOH and the Health Director because what they did was a good starting point. But there are several authority and wording issues I have with their version.

In contradiction to the memorandum to you from the Mayor, she stated that she doesn't feel that an additional ordinance is necessary. Mr. McCormack echoed that sentiment in his memo to the Mayor as did Chairwoman Delprete. Ms. Delprete stated in her memo that the BOH has regulatory authority in § 3-12 of the Ordinances, which simply states that the Director of Health, may recommend regulations to the BOH; with authority allegedly coming from MGL c. 111 § 31, which, on the face of it, deals with subsurface sewage issues.

From the Guidebook for Massachusetts Boards of Health at Section F, Septage and Garbage, local boards of health are charged with:

- 1. Enforcing Title V of the State Environmental Code; and Minimum Requirements for the subsurface disposal of Sewage, 310.CMR 15.00 (which mirrors MGL c. 111 § 31).*
- 2. Making rules and regulations for the removal, transportation and disposal of garbage, offal and other offensive substances; citing MGL c.111, § 31B. Please notice that § 31B is an extension of § 31.*
- 3. Issuing permits for the removal or transportation of garbage, offal or offensive substances when such refuse has been collected in the city or town. Keep registry of all transporters of refuse through the city or town, and enforce local rules and regulations regarding such transport; citing MGL c.111, §31A. Please notice that § 31A is an extension of § 31.*

Ms. Delprete also stated, "We have spent countless hours working with Dan McCormack and Matt Brennan to compose what I feel is a complete and legal regulation. The draft regulation underwent legal review and was published in the Weymouth News and was unanimously voted by all five Board Members during our Public Hearing on November 5th." Unquote...

Unfortunately, the notice was published on October 29, 2014 for a meeting to be held in less than 10 days to "discuss" the "regulation" on November 5, 2014 and the notice did not contain the summary required by the alleged authority of MGL c. 111 § 31. Not being able to find the summary or regulation online at the Health Department webpage because Mr. McCormack does not post there, I had to ask him to email me a copy, which is unsigned by the way.

Section 3-313 of the Ordinances states that the Director of Health shall have powers except the power to promulgate health regulations. So that is one of my many major concerns. It begs the question as to what power he has and whence he derives that power: certainly not from our Home Rule Charter.

In contradiction to what was stated by the Mayor, Mr. McCormack and Ms. Delprete, my proposal is not additional, it is to replace what was enacted by the BOH and to properly codify the regulation in our ordinances where it belongs, and properly place it in the hands of the Board of Licensing Commissioners according to § 5-7 of our Charter. Upon my review of the Quincy Bodyworks Ordinance, I found that they had placed their licensing function with their license commissioners. Intrigued by that, I searched our Charter again and found that § 5-7 addresses which department and which board governs; so I revised my version, which is before you now, to properly work within the framework of our Charter.

As to the BOH and the Health Director, they cite MGL c. 111 § 31 as their authority. Section 31 is not only vague about what the term "reasonable" in it means in regards to regulations but it goes on to talk about subsurface sewage systems. There is also that § 31 is actually about number 150 of about 600 sections in Chapter 111; so that begs the question as to whether this alleged "regulating" authority should not have been § 1 in c. 111 and would talk about what boards of health may or may not do without being so vague.

Another issue I have is that the citizens of Weymouth adopted a Home Rule Charter in 1999 that states who has authority and who does not, and nowhere in the Charter does it state that the BOH or the Health Director has any authority whatsoever. The Health Director is mentioned only once in the Charter regarding his inclusion on the Licensing Board. Anyway, I believe our Home Rule Charter supersedes c. 111 and vests all powers of the town in the Town Council, as stated in the Charter at § 2-5.

Under § 2-5, General Powers of the Council stated in the Charter, "Except as otherwise provided by general law or by this charter, all powers of the town shall be vested in the Town Council which shall provide for their exercise and for the performance of all duties and obligations imposed upon the town by law." So, it is my contention that only the Council is permitted to enact or adopt ordinances or regulations that control businesses related to human behavior, or other businesses like medical marijuana dispensaries, adult bookstores, body art, and a host of other activities carried on in the town.

In Ordinance § 4-208, which establishes a Department of Health, at sub-section (b) Scope of Department Activities - The Department of Health shall be responsible for the following duties at clauses 1 and 2:

1. In coordination with the Department of Municipal Licenses and Inspections — that's very important here — the Health Department shall be responsible for the issuance of Health Permits or Licenses required under state and local laws;
2. Preparation of draft Health Regulations for submission to the Board of Health and Mayor for promulgation as Rules and Regulations.

The Mayor does not issue or promulgate orders; he or she follows them according to our Charter.

In Ordinance § 4-208, subsection (c), paragraph 2 it states:

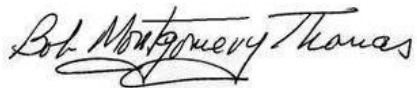
The Director of Public Health shall from time to time, subject to the consent of the Mayor, propose such rules and regulations regarding the public health deemed to be needed or desired to protect the public health. That is ludicrous folks, the consent of the Mayor?

While the Director of Health has some authority vested by the Ordinances at § 4-208(b)2, "Preparation to draft Health Regulations for submission to the Board of Health and Mayor for promulgation as Rules and Regulations", and at § 4-208(c) paragraph two, "The Director of Public Health shall from time to time, subject to the consent of the Mayor, propose such rules and regulations regarding the public health deemed to be needed or desired to protect the public health", I believe that that authority violates the Charter, contradicting the intent of Section 2-5, and Section 1-3, Division of Powers, where, "The administration of the fiscal, prudential and municipal affairs of Weymouth, with the government thereof, shall be vested in an executive/administrative branch headed by a Mayor and a legislative branch to consist of a Town Council. The legislative branch shall never exercise any executive / administrative power and the executive / administrative branch shall never exercise any legislative power."

I don't want this to be a manifesto; I want the Council to do its job properly and without interference. Other than the Town Council, no other person, director, department head, field hand, laborer or Mayor has the authority to promulgate rules, regulations or Ordinances and the Council's power is derived from our Home Rule Charter and from Amendment Article 89 of the MA Constitution and MGL c. 43B.

If you want to mark up my version or make changes, I will be happy to change the master document and give it to Diane so that we get this right. Once again, thanks to Misters McCormack and Brennan and Ms. Delprete for a good head start.

And thank you for your time."

A handwritten signature in cursive script that reads "Bob Montgomery Thomas". The signature is written in dark ink and is positioned below the text "And thank you for your time.".