From: Michael Goldsmith [mailto:mgoldsmith@rrklaw.net]
Sent: Wednesday, February 07, 2018 6:23 PM
To: 'T E Hopkins'
Subject: Lagoon Ridge Flexible Siting Special Permit

Ewell: You have asked me whether the open space shown on the Lagoon Ridge special permit application (submitted on December 4, 2017) under Section 7.3 of the Zoning By-laws ("ZBL") qualifies as open space for purposes of meeting the forty percent requirement and/or seeking lot bonuses . In particular, you asked whether the represented 8.76 acres of "open space with deed restriction" (OSDR) constitutes open space for purposes of the ZBL. The OSDR, as I understand it, is delineated on eight of the larger lots – four at the westerly end and four at the easterly end of the site – and is "created" by building envelopes on those eight lots. In other words, the applicant will prepare deed restrictions designating the portion of those eight lots outside of the building envelopes to serve as "open space".

I have not located any statutory provision or case expressly establishing that deed-restricted portions of individual lots is not available to meet the open space requirement of a flexible siting zoning by-law. However, the relevant portions of Section 7.3, taken together, grant broad discretion to the Board, when acting as the special permit granting authority, to decide what does, and what does not, constitute open space for the purpose of any particular application.

The following subsections of 7.3 address the open space requirement:

"7.3.1. Purpose: The purposes of this section, Flexible Development, are:

1. to encourage *the preservation of open land for its scenic beauty* and to enhance agricultural, *open space*, forestry and recreational use;
2. to preserve historical and archeological resources; to protect this natural environment, including varied landscapes and water resources. . . .

7.3.2 **Definitions.** The following terms shall have the following definition for the purpose of this section . . . .

4. 'Contiguous open space' shall mean open space **suitable, in the opinion of the Planning Board** for the purposes set forth herein. Such open space may be separated by the road(s) constructed within the Flexible Development. Contiguous open space *shall not include required yards, if any.*

7.3.14. Contiguous Open Space. A minimum of forty (40) percent of the parcel shown on the development plan shall be contiguous open space. Any proposed contiguous open space, unless conveyed to the Town or its Conservation Commission, shall be subject to a recorded restriction pursuant to G.L. c. 184 §§ 31-33 and enforceable by the Town, providing that such land shall be perpetually kept in an open state, that it *shall be preserved for* ***exclusively*** *agricultural, horticultural, educational or recreational purposes* and that it shall be maintained in a manner which will ensure its suitability for its intended purposes. . . .

2. The contiguous open space ***shall be used*** *for conservation, historic preservation and education, outdoor education, recreation, park purposes, agriculture, horticulture, forestry or a combination of these uses, and* ***shall be served by suitable*** *access for such purposes.*

3. The contiguous open space shall remain un-built upon, provided that the Planning Board may permit up to ten (10) percent of such open space to be paved or built upon for structures accessory to the dedicated use or uses of such open space, pedestrian walks and bikepaths. . . .

7.3.14 Ownership of the Contiguous Open Space. The contiguous open space ***shall*** at the Planning Board's election *be conveyed* to:

1. the Town or its Conservation Commission
2. a nonprofit organization, the principal purpose of which is the conservation of open space and any of the purposes for such open space set forth above;
3. a corporation or trust owned jointly or in common by the owners of lots within the Flexible Development. If such corporation or trust is utilized, ownership thereof shall pass with conveyance of the lots in perpetuity. Maintenance of such open space and facilities shall be permanently guaranteed by such corporation or trust which shall provide for mandatory assessments for maintenance expenses to each lot. Each such trust or corporation shall be deemed to have assented to allow the Town to perform maintenance of such open space and facilities, if the trust or corporation fails to provide adequate maintenance, and shall grant the town an easement for this purpose. In such event, the town shall first provide fourteen (14) days written notice to the trust or corporation as to the inadequate maintenance and if the trust or corporation fails to complete such maintenance, the town may perform it. Each individual deed, and the deed or trust or articles of incorporation, shall include provisions designed to effect these provisions. Documents creating such trust or corporation shall be submitted to the Planning Board for approval and shall thereafter be recorded; (or)
4. *In the alternative, a conservation restriction pursuant to G.L .c. 184, §§ 31-33 shall be placed on the land.*

(Emphases added.)

It does not appear that the applicant has the ability to satisfy the requirement under Section 7.3.14(1)-(3) to "convey" the OSDR to one of the listed entities, given that the OSDR is part of a prospective lot owner's land. I assume that the applicant will invoke subsection 4 by creating a conservation restriction complying with the above-cited statutory provisions. The restriction would have to be perpetual. Any proposed restriction should be reviewed by counsel.

I also note that Section 7.3.1(4) excludes from the open space calculus "any required yards". Section 11 of the ZBL defines "Yard" as "[a] space open to the sky, located between a building or a structure and a lot line, unoccupied except by fences, walls, poles, paving, and other customary yard accessories." I interpret this provision to mean that, if the governing zoning district establishes setback areas, then those areas cannot be counted (or rather "double-counted") as "open space" under Section 7.3 because the lot owner is already required to keep the area free from structures. I cannot discern whether the applicant counted excluded yard areas in the OSDR designated lots toward his total number of 8.76 acres of OSDR, so that would be a question to address at the hearing.

I reiterate that the Board has broad discretion to determine whether the offered open space satisfies the purposes of Section 7.3. While the portion of any lot outside of a building envelope burdened by a permanent conservation restriction is certainly "open", the OSDR does not necessarily meet the criteria outlined in this Section, such as the uses listed in 7.3.14(2). In Croteau v. Planning Board of Hopkinton, 40 Mass. App. Ct. 922, 923, review denied, 422 Mass. 1110 (1996), for example, the Appeals Court upheld a planning board's denial of a special permit to build a cluster development under the town's open space by-law, as follows:

> "The board concluded that the open space created by the plaintiff's plan would not provide a public benefit worthy of protection. In those cases where it had issued special permits, the open space either provided a link to other open space, provided scenic views, protected significant natural features, or provided a direct public benefit, such as conveying land to the town for school or other public purposes.

At the hearing before the Land Court judge there was testimony that the open space in the plan did not provide a link to other open spaces, did not provide scenic views, and did not have significant natural features. There was also evidence that construction of individual sewage disposal systems on some of the lots (at least three) would require significant regrading and would change the topography of the land. The board also noted that much of the open space was wetland, which would, in any event, be protected by wetland regulations and was by its nature inaccessible to the public. . . .

The board's determination that the plan did not provide open space beneficial to the public and that the conventional zoning requirements should apply was a sufficient and valid reason to sustain its decision. . . . The determination of public benefit involves a 'considerable area of discretion' and it is 'the board's evaluation . . . not the judge's, which is controlling.'"

Although Section 7.3 is not identical to the Hopkinton By-law in issue in the Croteau case, the Board could reasonably anticipate that a Court would afford it the same discretionary deference in applying the Town's flexible siting by-law. I do not cite this case to show that the Board is legally compelled to deny the application – an approval with conditions or a denial is a decision committed to the discretion of the Board – but only as an example of the scope of review on appeal.

Please call with any other questions.

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