

MEMORANDUM

To: Our Lancaster First (Team, Group)
From: Theresa K. Capobianco, Esq.
Capobianco & Gentili, P.C.
Date: January 11, 2007
RE: Lancaster Zoning Amendment Articles, Requests for Zoning Interpretations, Wal-Mart
Site Plan Review Status

Greetings to all:

Zoning Articles

On Monday, January 8, 2007, the Lancaster Planning Board conducted its continued public hearings on the two Articles proposing Zoning Amendments to the definition of shopping center and imposition of a 6-month moratorium on large retail developments.

At those hearings, many people spoke in favor of the Articles. There was no verbal opposition presented at that meeting. Vic Koivumaki (Chair) indicated that the Board received emails regarding the Articles, 6 in favor and 10 against. The proponents for these articles wish to see the moratorium in place so the Master Plan can be continued and hopefully completed. The Master Plan will allow the Town to determine what type of developments will be located in Lancaster's various zoning districts. The Master Plan also specifies what type of development in general, the Town would like to see and accept. Right now, without a solid Master Plan in place, big box retailers and other mega retail developments can walk in to Lancaster with the understanding there are very few restraints on such developments. We're looking at the possibility of one right now.

The redefinition of the term Shopping Center will clarify the inherent confusion in the current definition. The current definition utilizes the term "units" in two separate places within the same sentence, but it is illogical that they would carry the same meaning. The term must be redefined to not only use words that make sense, but also, to bring the definition up-to-date to reflect current retail development trends. The term "Shopping Center" was originally inserted into the Zoning Bylaws at the time of the proposed Pyramid Mall development. The definition more closely reflects a traditional "mall" style development. As we all know, today the mega retail box stores can contain the equivalent of an entire mall under a single name – they can even call themselves a "Shopping Center" but still need not comply with Shopping Center zoning regulations, according to Lancaster Town officials. Redefining the term will prevent any future confusion on the issue.

The public hearings were closed on January 8, 2007. As those of you who attended the November 27, 2006 public hearings may recall, at the time the Board suspended the hearings, I expressed concern that the Board would not have their report on the Articles completed before the January 22, 2007 meeting. Under Chapter 40A, Section 5 of the General Laws, the Planning Board has 21 days to issue its report. The 21-day clock starts to tick only after the public hearings are closed. There can be no vote on the Articles until either (1) the report is completed,

or (2) 21 days elapse without a report from the Board. The concern is that the Board will not complete the reports in time for the January 22, 2007 hearing, and the citizens will be unable to vote on these Articles at the continued Special Town Meeting.

On November 27, 2007, again as those of you who were present at the hearings may recall, when I expressed these concerns to Vic Koivumaki and the Board, I was chastised for so doing, and my profession was disparaged by the Chair. I was accused of being hired to create problems. Eugene Christoph (a member of the Board) also expressed his dismay with my concerns, stating he has the utmost faith in the Board and the Chair, and suggested that the integrity of the Board would prevail in this situation. The Chair promised the citizens that a report would be completed in time.

As predicted, the concerns were legitimized on January 8, 2007 when, at the close of the public hearings, Vic Koivumaki announced that "the Board has 21 days to write its report." When challenged in light of his prior promises, Vic stated that it has come to his attention (through a source he chose to not disclose), that if these matters proceeded to a vote on January 22, 2007, there would be a fair amount of the citizens who would be unable to vote who might otherwise want the ability to vote. Vic's belief was that if citizens didn't attend and participate at the October 16, 2006 Special Town Meeting, they could not vote at the January 22, 2007 continued Special Town Meeting. Vic stated his goal was to ensure people could vote, and if it meant not issuing a report in time for the Special Town Meeting, he would withhold the report to preserve "democracy" for those who would otherwise be excluded from the vote.

On Tuesday, January 9, 2007, articles appeared in various newspapers (Clinton Item, Telegram & Gazette) in which Town Administrator, Orlando Pacheco, is quoted as stating that he was working with the Secretary of State's office, had a legal ruling from the Secretary of State's legal counsel, and that anyone who was not present and did not participate in the October 16, 2006 Special Town Meeting would not be allowed to vote at the January 22, 2007 Special Town Meeting.

On Tuesday, January 9, 2007, I called the Secretary of State, Elections Division offices and spoke with two representatives. I informed the representatives of the statements made by Vic Koivumaki and the statements made to the press in published articles by Orlando Pacheco. I provided the Telegram & Gazette article to the office. I was informed that in fact, Orlando and Vic were wrong. If a citizen was eligible to vote (meaning, a properly registered voter) on October 16, 2006, the he/she can attend and vote on January 22, 2007, irrespective of whether they also attended on October 16, 2006. I was also informed that no one from the Town of Lancaster was working with the Secretary of State's office on this matter, and that no such ruling existed. The representatives informed me that they were contacting Orlando directly, and would require a retraction and clarification to be published.

Apparently a retraction/clarification was published on Page 3 of the paper, in a manner I find insufficient to clarify the issue for voters. I will be providing a copy of the clarification today to the Elections Division and ask that they require a more noticeable, hopefully front-page retraction and clarification.

As it stands, the January 22, 2007 Special Town Meeting is open to everyone to attend. Those who were properly registered voters as of October 16, 2006 can vote at that meeting. If you moved to town or registered to vote after that date, you will be unable to vote at the meeting but you will be permitted to participate.

As for Vic's decision to hold the Articles hostage to preserve democracy, it is my understanding that he has unofficially stated that the Board will have reports completed in time for the Special Town Meeting so a vote can occur. I have requested via letter on January 9, 2007 that he reaffirm his original promise in writing, but have not received any response as of yet.

In the event the Board fails to issue its report in time for the Meeting on January 22, 2007, we do have an alternate plan in the works. Please stay tuned for more on this...

Zoning Interpretations

On November 13, 2006 we asked the Building Inspector and ZBA to interpret various provisions of the Zoning Bylaws. The former received a request to interpret the term "Shopping Center" and apply it to the Wal-Mart project, and the latter requested interpretation of the Bylaws pertaining to the Concept Plan requirements, and apply them to the Wal-Mart project. On November 21, 2006, we withdrew the request originally sent to the ZBA, and sent it to the Building Inspector for interpretation. The Inspector sent me a communication stating that he was referring everything to legal counsel for perusal and a response would be timely.

On December 11, 2006, Vic Koivumaki (Chair of the Planning Board) stated that he had some answers to one of those letters and proceeded to verbally dictate the Board's position on the request for zoning interpretations relative to the Concept Plan. This was an informal, procedurally incorrect response. On December 12, 2006, I sent a letter to Town Counsel with my responses and reactions to Vic's statements. I received a phone call from Orlando Pacheco a couple days later indicating that he was forbidding Town Counsel from considering my communications to her. Orlando also stated that he would instruct the Building Inspector to ignore any communications from me. Basically, Orlando's position was that no one in Town Hall will be allowed – by Orlando's instruction – to consider any communications from me. I confirmed this conversation in a letter to Orlando. He has not rebutted that letter. Despite Orlando's statements, I did forward the December 12, 2006 letter to the Building Inspector for his consideration.

On December 26, 2006 I requested that the Building Inspector provide his responses to those requests on or before January 5, 2007. I sent that letter via facsimile. Less than 3 minutes after the letter was faxed, Orlando was again calling me. He stated I should not expect a letter from the Building Inspector because he wasn't going to authorize Mr. Pauley to respond. I told Orlando that responding to such a request for zoning interpretation and application was the Building Inspector's job. After much back and forth on whether Mr. Pauley's job included the responsibilities outlined in the Zoning Bylaws, Orlando finally stated that I and OLF were "obstructionists" and that we must think he is a "fool" because he's known the Wal-Mart matter would go to litigation before the site plan review was even filed. After a few more moments of ranting by Orlando, I asked him why he was being so openly hostile toward me for doing my job.

I asked him to tone it down or I couldn't speak with him. I told Orlando that the Bylaws impose upon Mr. Pauley the obligations to interpret and enforce zoning bylaws. If he didn't respond to our letters for some, I'd be forced to ask a judge to do so. And if Mr. Pauley wasn't going to do his job because Orlando instructed him not to, it would appear that he, Orlando, was the obstructionist. At that, Orlando said he would speak with Mr. Pauley and determine whether he wanted to respond.

As expected, Mr. Pauley failed and/or refused to respond to those letters by January 5, 2007. So, on January 8, 2007, I filed a Complaint in the Worcester Superior Court seeking an order of Mandamus. Mandamus is a direct command to a public official (the building inspector) to perform a duty or obligation of the official's office. In this case I am asking the Court to order Mr. Pauley to respond to the 2 letters by providing a written zoning interpretation and enforcement of the bylaws. There is a hearing at the Court on Friday, January 12, 2007 on the matter, at which time I am asking for an immediate order to issue. Plaintiffs need not attend. As always, the Court and session are open to the public.

Wal-Mart Site Plan Review

The Site Plan Review goes hand-in-hand with the Zoning Interpretations. If in fact a Concept Plan is required, then the owners of the Old Union Turnpike land must get a Concept Plan approved by 2/3 of the voters at a Town Meeting before Wal-Mart's site plan can be approved. If it is determined that Wal-Mart is a Shopping Center as that term is defined in the bylaws, then the building cannot be built on the Old Union Turnpike land because it is zoned Light Industry. Shopping Centers are not permitted in Light Industry zones. We have also requested a determination as to whether Wal-Mart must obtain special permits for the project, as they propose an outdoor garden center and auto/tire facility on site with this project. Those two uses mandate a special permit as part of the approval process. To date, there has been no application for special permit filed for those uses.

Upcoming Events

1. January 12, 2007 at 2:00 p.m., Worcester Superior Court: Hearing on Plaintiffs' Application for Preliminary Injunction against Richard Pauley, Building Inspector.
2. January 22, 2007 at 7:00 p.m., Machlan Auditorium, Atlantic Union College, Main Street, Lancaster: Special Town Meeting. A "MUST ATTEND" EVENT!!!
3. January 29, 2007 at 7:00 p.m., Town Hall: Continued Site Plan Review meeting on Wal-Mart Project.

What Can/Should You Do

Do not assume that others will attend these meetings and will take care of you. Only your attendance at meetings can ensure your concerns are being represented! While this is not an "every man for himself" situation, it is also not a "one man for everyone else" situation. Attend

as many meetings and events as possible – the numbers in attendance at these meetings speak volumes, even if you don't say a word.

Attend all meetings of the group, public hearings, the Special Town Meeting!

Write letters to the editor, emails to your town officials, and participate in events!

BE SURE TO CHECK THE OLF WEBSITE FOR GROUP MEETINGS, DOCUMENT POSTINGS, ETC.

As always, your participation makes success a possibility. Thank you.