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Kendall Corners Subdivision Preliminary Plan, Dated March 14, 2016

PROJECT DESCRIPTION

Kendall Street Realty Trust proposes to develop about 5 acres of land off Kendall Avenue near the Sherborn Town Line (+ 500 feet away). The rear of the property abuts the town of Natick.

A 1925 Plan shows two Private Ways, one of which Kendall seeks to improve. Kendall would like to keep the Private Way as private and it will be maintained by a Homeowners Association.

The land is in the General Residence Zone (G) requiring 8,000 sf/ lot and 65 feet of frontage. A large section of the land to the east is regulated wetlands. The site had a house on what was previously Lot 14 (1925 plan), and an existing house under separate ownership protrudes into the locus. Kendall Avenue is a 40 foot wide County Layout (1915), with a pavement width of up to 26 feet. Sewer, water, and drains exist in Kendall Avenue.

Site topography is generally flat within the area on and adjacent to the Private Way, but slopes down in close proximity to the wetlands area (6 foot drop over 30 feet adjacent to the wetland). The site is mostly wooded in the upland portion with deciduous trees. Soil tests indicate a deep well drained gravel with a water table approximating the surrounding wetlands elevation.

Kendall proposes to develop the property with 8 new lots, for duplex housing, and construct the Private Way as a 28 foot paved way, with a sidewalk on one side. One lot is a 'frontage' lot on Kendall Avenue (lot No. 8), and it contains some of the stormwater management system for the subdivision.

One house, at 94 Kendall Avenue (n/f Gutierrez and Chicas), exists at the corner of Kendall Avenue and the Private Way. The Gutierrez/Chicas deed recognizes both the "proposed street" and the 1925 plan.

Infrastructure would be underground. On-site stormwater management is proposed, and sewer would be gravity to Kendall Avenue.

The preliminary design seeks to improve the road within the 40 foot Right of Way, incorporating the Very Low Volume Local Road standards of MassDOT. Framingham has recently adopted this standard in various zoning districts, and approved projects under this standard. Improving the Private Way as a Low Volume Road would

not interfere with the existing use of others. Those others would include, at least the existing house and the land in Natick.

Kendall wishes the Planning Board act favorably on the construction of the existing Right of Way with a 28 foot pavement within the 40 feet, preferably as a Private Way to be maintained by the homeowners, under a Homeowners Association, (excepting the existing abutter) and it would be designated a Fire Lane under the statute and posted as such.

Waiver regarding "PERMIT APPLICATION PROCEDURES"

Kendall will need to request a waiver of the Framingham Planning Board Rules and Regulation requiring signatures of the owners.

"Applicant: The owner(s) of land and such duly authorized agent(s), representative(s), assign(s) or attorney(s). In each instance where an applicant is in addition to the owner(s), such representative shall file with the Planning Board sufficient written evidence of authority to act by or on behalf of the owner(s), such as a certificate of corporate vote, power of attorney, a list of officers, and/or such other evidence as the Planning Board may reasonably require. **All owners of land within a subdivision must be co-applicants.** (emphasis added)"

Based upon Kendall's representation, the abutter is not in favor of the plan to improve the "private way" and indeed the property. Kendall claims he would not be able to obtain his signature. Conflict between the Planning Boards Rules and Regulations now appears with Easement Law. Kendall has the right to improve the Private Way yet the Planning Boards requirement places an unreasonable burden. The statute, M.G.L. c41 s81L, the Subdivision Control Law, Definition: "*Applicant*" shall include an owner or his agent or representative, or his assigns." Here Kendall is "an owner" seeking subdivision approval. Kendall is only subdividing their own land, and as such Kendall is the sole owner of the "subdivision", but also a co-tenant of the private way.

The local Planning Board regulation requiring signatures of all owners is not statutory, but a local requirement found in the definition of Applicant ("All owners of land within a subdivision must be co-applicants.") The "subdivision" is Kendall's property only. Thus Kendall will be the only signature to the application as they are the Subdividers.

Case law is not clear on this issue. It does recognize the regulatory authority's interest, but notes "...zoning authorities are not the arbiters of private property disputes between landowners." *Hahn v. Planning Bd. of Stoughton*, 24 Mass. App. Ct. 553, 555 (1987).

"Even though it is not the role of permit-granting authorities to decide property disputes, they nonetheless may find it necessary to address questions of ownership in the course of their work. This is well illustrated by cases arising in the subdivision approval context, where it has been held that a planning board may enforce a provision in its rules and regulations requiring the applicant be the owner of record or his agent and that a subdivision plan identify the owners of the site. *Kalinska v. Planning Bd. of Wakefield*, 357 Mass 123, 129, (1970).

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These cases recognize that a planning board has a legitimate interest in ascertaining whether an applicant has (or prospectively will have) sufficient ownership rights in the property to go forward with the project. Where encumbrances on title do not impair the applicant's rights to prosecute the proposed development, denial on that basis is not warranted. Hahn supra. (that easement did not conflict with subdivision was no impediment to planning board approval).

Here we have a private road with full rights for the developer to improve and an abutter who will likely object, but with no basis under easement law. It would be appropriate to have the Planning Board waive the ownership (signature) requirement. The Planning Board may waive its rules and regulations:

M.G.L. 41, Section 81R. A planning board may in any particular case, where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, waive strict compliance with its rules and regulations, and with the frontage or access requirements specified in said law, and may, where the ways are not otherwise deemed adequate, approve a plan on conditions limiting the lots upon which buildings may be erected and the number of buildings that may be erected on particular lots and the length of time for which particular buildings may be maintained without further consent by the planning board to the access provided. The planning board shall endorse such conditions on the plan to which reference is made on such plan and which shall for the purpose of the subdivision control law be deemed to be a part of the plan."

Waiving the owner's requirement would not detract from the "public interest and not [be] inconsistent with the intent and purpose of the subdivision control law", where the purpose of the Subdivision Control Law, is "...regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways..."

M.G.L. c41 Section 81M. The subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas. The powers of a planning board and of a board of appeal under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for

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insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions. Such powers may also be exercised with due regard for the policy of the commonwealth to encourage the use of solar energy and protect the access to direct sunlight of solar energy systems. It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land; provided, however, that such board may, when appropriate, waive, as provided for in section eighty-one R, such portions of the rules and regulations as is deemed advisable.

Accordingly Kendall requests the Planning Board find the Statutory language "*Applicant*" shall include an owner or his agent or representative, or his assigns." is complied with versus that of the Planning Board Rules and Regulations.

Very truly,


Kendall Street Realty Trust
By their attorney
George Connors

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