

**Leicester Planning Board Meeting Minutes**  
**March 5, 2013**

MEMBERS PRESENT: Jason Grimshaw, David Wright, John McNaboe, Debra Friedman, Sharon Nist

ASSOCIATE MEMBERS: Kathleen Wilson

MEMBERS ABSENT:

IN ATTENDANCE: Michelle Buck, Town Planner; Barbara Knox, Board Secretary

MEETING DATE: March 5, 2013

MEETING TIME: 7:00 pm

AGENDA:

- 7:00PM Public Application:  
Auburn Street Solar, Project Changes
- 7:10PM Public Application:  
ANR – Parker Street
- 7:20PM Approval of Minutes  
2/5/2013
- 7:30PM Public Hearings, Zoning Amendments
  - A. Medical Marijuana Treatment Centers
  - B. Childcare Facilities
- 9:00PM Planner Report
  - Miscellaneous Project Updates

---

Mr. Grimshaw called the meeting to order at 700PM

**Public Application**

Auburn Street Solar, Project Changes

Mr. Brad Kites and Mr. David Albrecht made the presentation.

Mr. Kites said Borrego Solar, in conjunction with First Wind, has acquired the Auburn Street Solar Site. They are proposing some modifications to the previously approved Site Plan Approval and requesting the Board to determine whether these modifications are considered substantial.

Mr. David Albrecht, Borrego Solar Systems, said in his letter to the Board there is a brief description on a couple of technical changes they are proposing to the project. Everything being proposed is to do with optimizing the layout of the site, the performance of the site, etc. The components of the solar project consist of solar modules that are constructed on racks that are pounded into the ground. The electrical connectors will be underground and will connect to the electrical pad locations where they will hook into the convertors and then into the National Grid distribution system. This will all remain unchanged. The maintenance shed, septic system, water well and the gravel access aisles will be maintained in the same location as proposed under the approved plans.

Mr. McNaboe asked if the gravel access will be wide enough for a utility truck. Mr. Albrecht said yes, during construction they will use every bit of that access.

Mr. Albrecht continued. As for maintenance, once the project is constructed, there will only be a pickup truck once or twice a year checking the site; cleaning off the modules if needed, mowing the grass, etc. The perimeter fence will remain and they will not be going beyond that fence. They show the approved layout highlighted in gray on the copy of the plan and what they are proposing is highlighted in blue.

Mr. McNaboe asked what was significantly different and why Borrego Solar's engineering layout is better than what was laid out previously.

Mr. Albrecht said there are a couple of significant differences in the layout. One is the tilt angle, as approved, was 30° and they are proposing 25°. Two, the modules were laid out to portrait and they will lay them out to landscape and there will be more of them. The purpose of that is during the day, a portion of the panel would be shaded and the module would be worthless during that period of time and they would be getting only 50% of the productivity at that particular point in time. They will have 5 high and 6 long in landscape so the bottom panel will be one of 5 parts or 20%.

Mr. Albrecht noted that another difference is their array rack setup will not line up exactly the same as shown on the approved plan. The reason is that their setup will be a little bit taller, 5 inches taller in height, the tilt angle is different. They do a 3-D model, which allows them to know exactly where the shade is going to be at every single row. Every single row has a different width and the space between the rows and the modules are all different and that's because the ground is not flat, it goes up and down, it faces south, etc. They will review all the analysis to know exactly how everything will be placed on the site. Actually, there will be 7% fewer modules that will be a lot more efficient.

Mr. Albrecht continued. In the back will be the electrical equipment location as shown on the original approval. There were 10 locations originally approved and referred to as small capacity inverters. They are proposing change to a large capacity inverter, which would result in having fewer by pairing them together. This would result in having 3 locations for the electrical equipment, as opposed to 10. Although theirs would be bigger, there would be a lot fewer of them. The gaps in the rows were originally approved at 12 feet and their range is from 14 to 28 feet.

Mr. Albrecht said that one of the other things, as the Board may recall, there were some interception trenches as part of the drainage analysis. They intend to do as much as they can. Part of their geotechnical investigation will be done next week and they plan on doing some test pits and boring all in the same day, so they can get a better sense of things there.

Mr. Albrecht asked the Board what their impression was with the changes proposed, are they acceptable.

Mr. Grimshaw asked the Board for comment. Mr. Wright felt having fewer modules that will be more productive and the output being the same or greater is always a bonus. Ms. Nist asked about the maintenance shed and the water and septic mentioned earlier.

Mr. Albrecht said they do not store anything on site such as lawnmowers, extra modules, etc. They do not build maintenance sheds for their systems, so they don't see the need for the shed, septic or well. If they need water for any purpose, they would bring in a water truck.

Ms. Friedman felt the changes were very minimal, as far as the impact to the site plan. Mr. McNaboe agreed with what has already been said and had no issues.

Ms. Buck said until she had something in writing from the applicant she didn't comment, because she wanted to have a better sense of what was being proposed before commenting to the Board. She asked the applicant to come to this meeting and describe these changes to the Board. The changes were a bit more than she would typically approve outside of a meeting. She agreed the changes were minor and recommended for the Board to approve these minor changes tonight.

Mr. Grimshaw asked if anyone present had a comment or concern.

Ms. Joann Schold, Conservation Commission asked when they would be meeting before Conservation. Mr. Albrecht said March 13, 2013. Ms. Buck noted that she had advised the applicant on the need to meet before Conservation with these changes.

Mr. Albrecht said the geotechnical investigation starts next week. He wasn't sure what the results of the testing will be and had some concern that some of the grading proposed might be an issue. He asked the Board that if they needed to do some different things grading wise, in regards to stormwater changes, would that have to come back before the Board.

Mr. McNaboe said if it has something to do with drainage, he felt it would be something that would come back before the Board.

Mr. Albrecht asked if it would be something addressed formally. Ms. Buck said that would depend on the results of the geotechnical testing. The results of the testing would be sent to the Town Engineer for review and he would advise as to whether it was a minor construction change or if it would be something more involved.

MOTION: Mr. McNaboe moved to approve the modest changes of Borrego Solar regarding the solar module turn angle and arrangement, the inverters quantity and location, the racking, and the layout of the electrical equipment and row spacing.

SECONDED: Ms. Friedman – Discussion: Mr. Wright asked if the Stormwater concerns should be included. Mr. McNaboe said that would be a separate issue at another time if needed.

VOTE: All in Favor

### **Public Application:**

#### **ANR - Parker Street**

Ms. Buck noted that this plan was in the same vicinity and similar to the plan submitted in August 2012. The August 2012 plan had been reviewed by Counsel and it was his opinion and her opinion to recommend that the Board vote to require subdivision approval and to not endorse this ANR plan. A copy of the draft decision was included in the mailing packet for the Board's review. That decision was previously reviewed by the Town's attorney in August 2012 and nothing has changed other than updating the reference to the plan.

Mr. Grimshaw opened discussion to the applicant.

Mr. George Kiritsy, Attorney representing the applicant, said he will be making a short presentation relative to Parker Street and the ANR Plan application. He will be specifically addressing the issues relative to Parker Street as a public way. Whether Parker Street is a public or private way is the critical fact to decide whether or not an ANR plan should be endorsed. If an ANR plan shows lots with the minimum width of frontage as required by the Zoning Bylaw, on a public way, it is entitled to endorsement. If it's on a private way, then the Board can define as to the quality of that private way, with no endorsement required and would require subdivision approval. Their position is that Parker Street is a public way.

Mr. Kiritsy continued. Mr. Schold had gone to him a few months ago. This matter is currently in bankruptcy and he will be reporting to the bankruptcy trustee's office and bankruptcy court on the events tonight. He has with him tonight a short little summary as to why they consider Parker Street a public way.

Mr. McNaboe said was he to assume that now the Town does not think that it's a private way? Mr. Kiritsy said that is what he is trying to explain; he doesn't know what the Town is saying, whether it's a private way or public way. He believed the formal position or at least, the noise he's hearing is that it's a private way.

Ms. Buck said the current formal opinion from Town Counsel is that Parker Street is private. There is some disputing in that regard and she didn't know how that was going to turn out. It is the Town's position, in terms of this ANR plan, that it doesn't make a lot of difference, because even if it was a public way, it has to be used and maintained as a public way and this is not; and, there have been other similar plans. In terms of this ANR plan, the Town's position is that it really doesn't matter whether it's public or private.

Mr. Kiritsy said in terms of the statute, Approval Not Required is of Chapter 41, Section 81P, which says any person who believes their plan does not require approval under the subdivision control law, can present a plan to the Planning Board requesting its endorsement on that land, approval not required. If the plan does not show a subdivision, as defined by the statute, then it is entitled to that endorsement. The Planning Board shall endorse the plan, approval under subdivision control law not required, which is what 81P says.

Mr. Kiritsy continued. Now, we have to give the definition of what a subdivision is. Chapter 41, Section 81L defines what a subdivision is and basically it's a very broad definition. A division of land is a subdivision, so this would be a subdivision. However, there are three circumstances it wouldn't be a subdivision; 1) frontage on a public way or a way which the Town Clerk certifies is maintained as a public way; then it's not a subdivision. So that really breaks it down into two categories, public way certified a way, certified by the Town Clerk as being maintained as a public way. The 2<sup>nd</sup> circumstance stated in the law doesn't apply and says that if it's on a previously endorsed or approved subdivision plan under the subdivision control law, then can grant a subdivision [with an ANR endorsement]. So basically, he can get a subdivision allowed and he can back in and change the lot lines without having to go back through the subdivision process; that's an ANR. The 3<sup>rd</sup> circumstance says that if it's on a private way, which in the

opinion of the Planning Board satisfies the width, grades and vehicular traffic needs, they can decide on a private way, to endorse an ANR.

Mr. Kiritsy continued. So the distinction in this case, is whether or not this is a public way, or whether it's a private way. A private way, in the opinion of the Planning Board, relative to the quality and condition of the road, that's one thing. If a public way, it's entitled to the endorsement. Originally, that was the real issue, whether or not it was a public way. In order to determine whether it's a public way, a lot of research was done and currently, there is a request into the Town Clerk and the Select Board for very ancient minutes and records.

Mr. Kiritsy continued. He reviewed the title on the property, and every deed from 1936 back, refers to that street as a public way, as a Town road:

In 1936 the deed noted the YWCA as owner and called it, the Town road called Parker Street.

In 1931 there is a deed that says "tract 1 located on the Town road near the dam" and there are several courses along the Town road. In that deed, there is reference made to a George Wilson and then go back 50-years earlier to 1875 and 1884, there are numerous deeds from Wilson to St Germain. Looking at some of the references in that time period, there are houses identified on Parker Street and all of those tracts that are contained in the 1875 and 1884 deeds, reference the Town road. The tracts were located on the Town road and they used the word Town road, which is important because the courts has actually said that if it said "road" it may not be a Town road, but it says "Town road" then it's a public way. Those deeds all reference the "Town road".

Each of the three tracts in the 1875 deed is bounded on the Town road. Then in 1884, Wilson had been reserving a very thin strip of land to get to the backland and when he conveyed that thin strip of land, he called it the lane that's also bounded on the Town road.

Going back to 1874, there's a deed from Otis Pond to Wilson and in that deed; he refers to the Highland Converse Estates. There are deeds that go further back and all of them refer to this road as a Town road. The Highland Converse Estate consisted of 5 tracts of land that date back to the 1820's. They didn't bother, in the 1874 deed, to reprint or rewrite the 5 descriptions, so they gave reference to prior deeds. In one of those deeds, there is reference to a mortgage from James Peacock and that mortgage has language reserving the right of the public to use the Town way passing through the Estate.

The deed from Levy Hardy to James Peacock also says, reserving the right of the public to use the Town way passing through the estate. By 1870, there was the expressed reservation of a Town lane that passes through this property. In the middle of that property is the Sibley Converse Farm and that actually shows up on the 1855 Town Map. That actually pre-dates the Stiles Reservoir and you can see where the Sibley swamp is and the Sibley Converse house being located in that area.

Looking at the Sibley Converse Estate, Sibley acquires this very large Estate, on both sides of that road, back in the 1820s to 1830s. All of those deeds have those properties starting on the Town road, back to the Town road, across the Town road, and along the Town road. Then it says the deed specifically reserves the right of the Town way, which passes through the farm.

Back in 1868, when Highland Converse deeded out his father's farm, he talked about the Town road that passes through the farm. Sibley Converse's deed in 1827 states "on the east side of the Town road."

Another tract to Sibley Converse in 1828 has "on the west side of the Town road" and it specifically says: "by the Town road as originally laid out." That's 1828 and it says it was laid out. So they put that in the deed in 1828, suggesting that it was in fact, at some point, laid out.

In the history of Leicester, it is absolutely fascinating how a large tract of land, 8 square miles, is reserved by the original proprietors for future development and that became Spencer. Styles Reservoir was originally the Cedar Swamps and there are properties that cross both Spencer and Leicester. Even on those deeds the grantor's say: "together with access and granted over other land of Muzzy, to get to the Town road in Leicester." This is the only Town road that could get there.

In 1809, Isaac Green to Phineas Jones. Phineas Jones ultimately deeds to Sibley Converse, but in the deed of Phineas Jones it says it's 64-acres and he accepts a Town road through the premises as now trod.

Mr. McNaboe asked if that was a right-of-way. Mr. Kiritsy said no. It says town road and that is the way the deeds referred to this.

Mr. Kiritsy continued describing his deed research:

Going back even further, in 1790 Ebenezer Baldwin to Isaac Green, describes the premises as being by a Town road.

In 1809, David Baldwin to Isaac Green, and this is an interesting one because this is a deed of land that is on a "grass hill so called," he can show the deed not a plan. In 1860, Emily Washburn wrote what is currently regarded as, *The Definitive History of the Town*, with a prior one written in 1826. The version written in 1860 shows a map of the Town of Leicester, based on the original proprietors deeds that date back to 1722. Mr. Kiritsy noted having a copy of that map and it being recorded in Middlesex. That was before the County existed and the Registry of Deeds were accepting documents for recording. What makes this interesting is that on this property, the "grass hill", it states: "beginning on the northerly side of the Town Road on a quarter of Green's land on grass hill so called." That is referring to the Town road.

In 1780, there is a deed from Nathaniel Green to Isaac Green saying: “reserving the Town Way through the premises.” So in 1780, they are regarding this as a Town way.

Mr. Kiritsy continued. There have been other deeds found and are very difficult to read because they are all hand written in quill. He is going as far back as he can trace this as a Town road. He has requested from the Town Clerk, documents from that period relative to the layouts. Emily Washburn, in the History in 1860, has a small chapter on roads. In that chapter, she takes a few roads to give an example as to the method of layout and the layout went from tree-to-tree to tree-to-tree. Based on all the titles, it is pretty clear that there is a Town road. In 1892, the Town, at the time, appointed a committee to name all the streets in Town.

At this point, Mr. Grimshaw interrupted discussion to open the scheduled public hearing, and then ask for a motion to continue the public hearing until after the ANR discussion.

**Public Hearings, Zoning Amendments:**

A. Medical Marijuana Treatment Centers

B. Childcare Facilities

Called to order at 7:40PM

Mr. Grimshaw read the Notice into the record and then asked for a motion to continue until after the Parker Street ANR proposal.

MOTION: Mr. Wright moved to continue the public hearing on Medical Marijuana Treatment Centers and Childcare Facilities until after the ANR Public Application discussion.

SECONDED: Mr. McNaboe – Discussion: None

VOTE: All in Favor

**Public Application continued:**

ANR - Parker Street

Mr. Kiritsy continued. Reviewing the titles, in his opinion, this is a Town road and knowing that it exists, it’s in the records with the Town Clerk Office and they still exist. There is definitely a layout and everything seems to indicate that there was a layout. Mr. Kiritsy continued with his presentation of his research:

In 1882, the Town appoints a committee, at a Town Meeting. They appoint a committee for the purpose of naming the streets. At that time, they identified all of the public ways in Town and that was what was stated in the minutes of the vote at Town Meeting. It identifies what streets they wanted thereafter to be known. Parker Street, at that time, was known as Verry Street and there was a family on that street named Verry at that time. He actually found an anecdote in the law in the Leicester Library that talks about Verry Place and how a woman was visiting Verry Place and at that time, one of the Baldwin funerals passed by the property she was staying at Verry Place and made a comment about the Baldwin’s. This road was originally considered Verry Street.

In 1882, the committee comes back and says “name this portion Parker Street and name this portion Verry Street.” The Town then came back saying to name the entire length Parker Street. So in 1882, the Town voted that the public way shall be known, from now on, as Parker Street.

In 1945, the Town assembled a list of all public ways and voted to accept “all ways” in 1945. Mr. Kiritsy was not suggesting that is the smoking gun and what he was relying on. He felt there was a lot of other information that he could rely on. But in 1945 it identified the public ways, which is the basis of public funds for reimbursement for public ways. The Town does get Chapter 90 funds for that portion of Parker Street.

On three occasions, in the 1960s to the 1990s, there was an act to discontinue the public way. It was on the Town Warrant for the Town to vote to discontinue the public way. The first step was to acknowledge it as a public way and then the Town says they will now discontinue the public way on three occasions and the vote failed. It has not been discontinued by procedure that is required, but the Town recognized that it is a public way.

There are at least 20 ANR plans dating back to the 1950s on this same road, with abutting properties on this same road. Not on the section they we are arguing, but on the other section of the street and there are ANR plans that date back that this has all been determined to be a public way.

Mr. Kiritsy continued. A few years ago Mr. Schold was cutting trees along the street and he was fined \$6,000 by the Town for cutting trees along a public way. He paid the fine because the Town said it was a public way. Now he applies for an ANR and he’s told it’s not a public way. He felt there was sufficient data for the Board to determine that Parker Street is a public way and under the Statue 81L, it’s not a subdivision and is entitled to endorsement as Approval Not Required.

Mr. Kiritsy noted that he did submit a request to the Town Clerk and Select Board. Mr. Reed called him today and said that the deed reference has not shown Parker Street as a Town Road. He told Mr. Reed that he did and he brought with him tonight copies on a series of deeds.

Mr. McNaboe said: “where the YMCA Camp is, how were those buildings built if they weren’t on a public way?” There must have been some kind of boundaries at some point. Mr. Grimshaw felt they may have been exempt. Ms. Buck wasn’t sure, but said that was not what’s before the Board tonight.

Mr. Grimshaw said he would like to hear if the Board had any questions first and then open it up to the audience. Ms. Friedman asked to hear from Ms. Buck first.

Ms. Buck said the short version, which is just repeating what she said earlier, and she knows that the applicant disagrees with the Town’s position on this, but it’s Town Counsel’s opinion, based on case law, that even if it’s a public way, it still has to exist on the ground in such a way that it allows ordinary vehicular traffic and that’s not the case here. This is similar to the Hammond Street case, which when the Board saw an ANR plan on that road, the Town believed at that time



it was a public way. It is very similar to this one; that it's basically just a cart path and that ANR plan was not endorsed and they [the property owners] ultimately came in with a subdivision plan.

Mr. Grimshaw said this is a rhetorical question and wasn't expecting an answer, but was curious if those referenced Hammond Street in the way Parker Street currently referenced in these deeds.

Mr. McNaboe said the Town also doesn't get Chapter 90 money for cart paths. Ms. Buck said that [Chapter 90] is a separate issue from this. Mr. McNaboe said Chapter 90 money is supposed to be used to upkeep public ways, right? That's why we get it from the State. Ms. Buck agreed, but noted that's a separate issue from the Planning Board's endorsement of an ANR plan. She can only say that's been the Town's position for a very long time. We've had similar ANR plans of those with similar circumstances and Town Counsel's recommendation is not to endorse the plan and it's not really getting into whether it's public or private.

Mr. Kiritsy said he would like to address the public vs. private issue. Once a road is determined a public way, you incidentally determine whether or not endorsement for public use. The Statute, originally back in the 60s, when the cases started coming under this, the court said the Planning Board's function was ministerial. If you present it on a public way, with frontage, you have to endorse the plan. That's been the case since back in the 1960s and it was in black and white.

Then in the 1970s, developers were starting to get greedy and horrible plans were being presented through the Planning Boards. For example, if somebody presents to the Planning Board a big chunk of land that fronts right up to Route 95, a limited access highway, there has to be a ramp to get onto the property. There's a lot of frontage on this road, but it's not real frontage, because they have to get to it around a thin strip of a driveway to place 15 lots. Whether it's on Route 95 or not, it's a public way and he showed frontage, so you have to sign the ANR Plan.

Mr. Kiritsy continued. The courts said at that time that frontage on a way must provide access to the lot and it can't be illusory. They won't be getting access to those lots from Route 95, so they shot down that. That was the first time the courts decided you needed a road from that group from the 60s that said, it's ministerial. There were cases that went forward and now Planning Boards, now armed with this information, go after other plans. Bad cases make difficult decisions. For example; there are these developers who have these big tracts of land on a public way and they divide it for maximum density and they have these thin little strips that are 2,000 feet long to get to the lot that is going to be developed. The judge says, in this case, to build a 2,000 foot long bridge over wetlands to get there; it's not real access. It's not just inadequate access, it's illusory and they used the term that it was illusory access; it wasn't access in fact.

Another case where a guy comes in and says the Town laid out a public way by public vote and they declare it to be a public way, so we have it automatically [ANR endorsement], but the road was never, ever built. There are trees growing down the middle of the road and that guy didn't care. Let the Town fix it, he just wanted ANR plan. The court said it was illusory, it doesn't exist. Then the Town said, if that's illusory, what about a situation where there's a road that comes down and there's rocks and wetlands they would have to cross over. So it's denied because of this illusory access. The courts said, no, not in that circumstance, because they have

access with frontage on the road. The court said in the original decisions, where they have these long bottleneck subdivisions, were so impressed by the poor quality of the design, they printed the plans. There are these subdivisions where the lots have 5 to 6 bends in them, the driveways are 1,000 to 1,200 feet long to get to the buildable area and those are the cases where the courts have said, in exceptional cases and this is an exceptional case, allowed the Board to consider access.

Mr. Kiritsy continued. Then the Sturdy Case comes down and the Board said, there are deficiencies in this way and the court said no, that is where they draw the line. If it's a way in fact, if it's a public way and it exists in the ground, then deficiencies are not sufficient to deny the ANR approval. That's not the reason you do it; you deny the ANR approval once it's illusory. So the courts have created and literally say two categories: "it could be better" and "illusory in fact."

That's the distinction here, this road [Parker Street] exists on the ground, people travel it, it's there, there are no trees growing in it. This is not a case where we have these crazy lots that in order to maximize the property; you show 30 lots up on a hill with these long driveway accesses to easements. Their [the Scholds'] lots are all legitimate lots and are very uniform in size and shape. Their access is directly on the road; there are no wetlands and there are no issues on that property. It's an ANR plan on a public way and wanted to suggest to the Board that Parker Street exists, in fact, on the ground and the access to the lots is genuine from Parker Street. This is not a situation where they will have to gain access from the back, they have legitimate access. This is a plan that warrants ANR endorsement.

Mr. McNaboe asked Mr. Kiritsy if he intended for a vote from the Board tonight or if this was a warm up session for attorneys to talk.

Mr. Kiritsy said he would be happy to talk to anyone on this. However, there is some pressure. The banker for his client is sitting in back and he has significant interest in this and the bankruptcy court has significant interest in this. Mr. Schold is currently in bankruptcy under Chapter 11. This will probably be a court proceeding of court in issue from the bankruptcy court. Successful resolution of that bankruptcy ultimately depends upon the Parker Street property. The Board can deal with this the way they want, but he wanted to make a presentation. He has invested at least 60 hours on title work and he will invest another 50 in the basement of the Town Hall. He knows what he is looking for and he will be able to give the names of the people who originally laid out the land and that is probably between 1740 and 1768. That's only if the issue is on whether it's public or private and that's what he was told Town Counsel had opined about.

Ms. Buck thought Town Counsel opined recently about the public versus private issue on a separate matter related to Conservation issues, erosion and Stormwater issues.

Mr. Buck continued. We seem to be going back and forth on this and she is not an attorney, but there are more recent court cases that are somewhere between "could be better" and illusory, where a Planning Board denial of ANR plans have been upheld on public ways, where they don't have real access. Attorney Joe Cove is well aware of the conditions on the ground in this case

and when he visited this road with Ms. Buck in 2003, there was ANR plan on this road and his opinion was the same at that time. The plan, at that time, ultimately came back labeled, Not a Building Lot. It's been the Town Attorney's opinion the same over the last 10 years and he has looked at this multiple times. Until roughly year ago, the position was that it was a public way.

Mr. Kiritsy said until a year ago when DEP was suing the Town. At that point they said it's a private way.

Mr. Paul Schold said DEP did nothing. The Town developed 4 different positions between, we don't know why the water is coming, we only own 200 feet, Hammond Street decision, and we are not sure if it's ancient way status. This is only because of money it's not a public way.

Mr. Kiritsy said there was a case in 2009, it came out of Northbridge, in which the court talks about denial of an ANR. The Appeals Court reviewed a denial of an ANR endorsement regarding lot along an unpaved way. The Town argued that only the paved portion of the way should be considered adequate access; the appeals court disagreed. The Appeals Court said, despite the defendant's suggestion otherwise, the quality of access may not be considered by a Planning Board deciding on an ANR endorsement. Though the Planning Board may prefer that the way be paved along the entire length of frontage, it does not change the fact that access to the lot was not illusory.

Mr. Kiritsy continued. In 2007, there was another case, which came out of Framingham, Ablemal (sp) Realty Corp vs. Framingham. In that case the Planning Board determined that the access was deficient and the court ruled that the adequacy of the way was not an issue. The court confirmed its prior issue stating "The Planning Board cannot withhold an ANR endorsement, when access is deficient, but not illusory." The issue there is, is it illusory? They're talking of deficiency, with no real access or is it something that could be better. If it's deficient that's not enough. That confirms the Sturdy case and that confirms all the ways back to the 60s, the courts have made it very clear, "we stress that this is an exceptional case." This is an exceptional case and they reprint the plans when these developers have proposed these most crazy ANR plans with 2,000 foot driveways, with bridges to get to the lot. The courts, at that point, said no, that's illusory and that's really not what's taking place here. On the plan before the Board, that's not what is being presented.

Mr. Grimshaw asked for any questions or comments from the Board. Ms. Friedman asked if the Planning Board did endorse this, can they automatically get building permits or is the Building Inspector have to say, yes it's adequate. Ms. Buck said she hadn't thought of that and was not sure if they would meet the requirements.

Mr. Kiritsy said the Town's Zoning Bylaw, where it talks about the definition of street. That street definition is virtually the same as the 81L definition. It talks about; 1) a public way; 2) a way certified by the Town Clerk; 3) a subdivision plan with a private way for adequate access. They almost carry word for word, except they actually do make it specific when it has got to be both a public way and a way maintained. That's not what the Zoning Bylaw says. This is a public way, and a way certified by the Town Clerk as maintained as a public way.

Mr. Paul Schold said he has no doubt that they can prove this a public way, between the ancient history and just what is going on. They have been coming here regarding Parker Street for 10 years. They've applied for building permits and they have a history of meetings and no one has ever brought up or questioned Parker Street as a public way. It is only because of the stormwater issue that essentially cost the Town some money that they took this position. On a public way, such as Parker Street, which is 2.18 miles from Charlton Street to Pine Street, the entire length, the Town is obligated to keep that public way free of defects. The only way they can get out of that and there are only two ways a public way can become a non-public way and that is by discontinuance and by an abandonment process.

Mr. Schold continued. Ten years ago the Town was under the impression that Parker Street was public, and at each end of the graveled sections, are two signs that say: "unimproved road, travel at your own risk." The 10-step abandonment process has to be done in order to post that and that was never done. In 2003, when he put the first plan before the Board, he should have been approved then and they should be living there now. It's a Town Road and it has to be maintained and if they don't want to maintain it, they need to do those two steps.

Mr. Schold continued. In 2003, he bought the property in October. With Town Planner Michelle Buck, they took a ride out there and in that ride, she mentioned a few times two-wheel drive and emergency vehicles and he didn't know why, but now he knows why. If it could have gone through there, there was a chance it might have been endorsed. A month later, at a November meeting, Parker Street was on the warrant to be discontinued, just that section of road. This is basically a dream piece of land he grew up on, he and his wife had met on the lake, and his kids grew up there. They were told they were denied and had to build this magnificent road in the middle of it. There is an 18 foot road on one end and 18 foot road on the other and the Town demands that he put in a 22 foot road, with a sidewalk, underground utilities, streetlights, a fire cistern, to leave a space for another sidewalk and a few other bells and whistles. If they did that, the Town would let us build on it.

Mr. Schold continued. The Town Planner probably thought that he would go over there and build 50 houses with 100 kids and build a new school. All of a sudden the street is on the warrant and at least it did get passed over. It was probably passed over because if the Town did discontinue it, then the owner of the property would be entitled to damages, which would be quite extensive. The abandonment process was never done and he submitted a Freedom of Information Act request to Bob Reed, and got some jibber jabber back. But he needs to produce those documents and with the vote for 2.18 miles of Parker Street is a public way, none of it discontinued, none of it abandoned, and it's the Town's obligation to maintain it free of defect.

Mr. Schold stated that he can show the Cease and Desists they got and in 1965 the Town tried to discontinue it. It had the metes and bounds and showed the layout. There is a memorandum from Kopelman and Paige, a top municipal law firm in State and he encouraged the Board to read that because it tells that there are only two ways a road can be discontinued. It tells the process of abandonment and that there are a lot of minefields if that is not done, which has not been done here.

Mr. Schold said he also has a letter from Michelle Buck stating that Parker Street is a public way, although this section is unimproved. He has a denial for a building permit, but nothing about it not being a public way. The public way thing is just something that they threw up against the wall to see if it would stick.

Ms. Buck said until recently, this Board certainly thought it was public, as well as she. She has not been involved in the recent determination by the Town's attorney to say that it was private. She does know the discontinuance being taken off the warrant in 2003 and there were two or three other streets at the same time taken off the warrant.

Mr. Schold said he came before the Planning Board and a month later it was on the warrant to discontinue a public way.

Ms. Buck said the Planning Board recommended passing over because they wanted to do a more comprehensive look at it, rather than singling out [a small group of streets].

Mr. Schold indicated that he felt that the reason it was taken off the warrant was related to damages owed to property owners along the road.

Ms. Buck didn't remember that coming up and was nothing specific. In terms of this Planning Board, the discussion and when they recommended passing over, it had more to do with wanting to look at it more carefully.

Ms. Buck continued. She stated that she seems to keep repeating herself, but Town Counsel is aware of what this road is like and the status. So, she cannot recommend to the Board going against Town Counsel's recommendation. The only thing she can say is that the Board may want Town Counsel to take another look at it. We can take the information Mr. Kiritsy submitted. We are on a tight schedule, we have only 21 days on an ANR plan, which means a decision today, unless the applicant allows more time. Without more time, she has to go with what Town Counsel has recommended.

Mr. Grimshaw asked what Attorney Cove arguments were. Ms. Buck said essentially, it's the things outlined in the draft decision to the Board. That the Planning Board has previously looked at this issue; it's not fully constructed on the ground and it doesn't provide safe passage and it's unimproved. Mr. Grimshaw asked if Attorney Cove referenced any specific cases in the decision. Ms. Buck said no.

Ms. Friedman said getting back to her question about automatically getting a building permit. Ms. Buck said the way the definition of access is, she was not sure but no she did not believe they could get a building permit, because that is what they tried a few years ago and the same issues came up. Ms. Friedman said in other words, the Board would be just pushing it down the road.

Mr. McNaboe said the standard is that it's passable but could be improved. He was there today and could it be a lot better, absolutely. It could be a lot better, but it's passable.

Mr. Kiritsy said then the last issue was whether or not it's illusory or it exists and could be better. There is no doubt there are certain public ways that are in great shape and don't fall under the category that it could be better. The courts have made the decision and carved out, in their language, exceptional cases. Since the Sturdy decision in 2000, which came down and said no, if it's a public way, the deficiencies are not grounds for ANR disapproval. Since that, there are very few cases afterward. There are a lot of cases in Superior Court or Land Court, from recorded decisions are very sparse.

Mr. Kiritsy continued. Two cases he gave are the most recent cases he found, in 2007 and 2009. In 2009, the courts basically punched it out. There are two paramount cases the court had in the 80s and 90s, they tried to reconcile them and you can almost see the frustration with the land court judge. Those two ways were the ones coming down with the exception cases and the other one sends down was purely ministerial. When you tie them together [the two cases], they tie together nicely with the Sturdy case.

In the Corcoran Case the appeals court affirms ANR disapproval. The land court flips the Planning Board and the appeals court flips the land court and affirms the ANR disapproval. The SJC flips the appeals court and they say, no, this is a case where there are deficiencies in the public way and a Board cannot rely on those for disapproval of an ANR plan.

Mr. Kiritsy continued. Could the Town Counsel come up with case law? Yes, because there is a whole body of case law in between the 80s and 90s. Recent case law, you will see it state, deficiency in a public way is not sufficient for ANR denial, unless it is illusory in fact. That is what he is presenting, that it's there [the road] and you can pass by it.

Ms. Buck said we need to reach a decision and if the Board feels they need more time and the applicant isn't willing to grant it... Mr. Kiritsy interjected that he didn't say they weren't, but he needs to talk to the banker first.

Ms. Buck said if the applicants are not willing to continue, the Board's only option to have more time is to move forward and vote as recommended and then they [the applicants] can just resubmit. She needs to protect the Town's interests but she is open to hearing new case law. She can't recommend the Board vote against Town Counsel's recommendation. If the Board does nothing, it's automatic approval.

Mr. Grimshaw said he was comfortable with his opinion at this point.

MOTION: Mr. McNaboe moved to approve the ANR for Parker Street.

SECONDED: Mr. Wright – Discussion: Ms. Buck said this is against the advice of Town Counsel.

Ms. Friedman said she would agree that it's against the advice of the Town's Attorney, per his letter that he doesn't have anything to back that up.

Ms. Buck said he does have backup, he just didn't put it in [the decision].

Mr. Grimshaw said with all due respect, he should have.

Ms. Friedman said this does not guarantee that they get building permits.

Mr. Wright said the section of road at each end that says no maintenance past this point.

If they want to get a building permit, they will have to improve the road.

Mr. McNaboe said the highway department also said that part of it that points down towards Camp Wind in the Pines, the road was in pretty good shape and that was the part he was on.

Mr. Grimshaw said also, if it is to be developed, obviously they will need to improve the road.

Ms. Buck said no.

Mr. Grimshaw said if they are going to sell a premium lot, the road would need to be to some degree presentable.

Mr. Wright said as Ms. Nist and Ms. Buck were saying, the difference in a Town road is it's the Town's responsibility.

Mr. McNaboe said they are getting Chapter 90 money to do it.

Ms. Buck said it is not the Town's responsibility to construct a road for a private party.

Mr. McNaboe said it's not constructing a road, it's maintaining a road that's there.

Mr. Wright said based on documentation provided by the applicant that states over the years, it's a town road.

Mr. Grimshaw asked for any further discussion; hearing none, asked for a vote.

VOTE: All in Favor

### **Approval of Minutes:**

2/5/2013

MOTION: Mr. McNaboe moved to approve the Minutes of February 5, 2013

SECONDED: Ms. Friedman – Discussion: None

VOTE: All in Favor

### **Public Hearing, Zoning Amendments cont:**

#### **A. Medical Marijuana**

MOTION: Mr. Wright moved to reconvene the Public Hearing

SECONDED: Mr. McNaboe – Discussion: None

VOTE: All in Favor

Mr. Grimshaw call the Hearing to order at 8:25PM

Ms. Buck said the initiative petition for the Humanitarian Medical Use of Marijuana went into effect on January 1, 2013. There is no punishment under State Law for medical marijuana use in accordance with the law, although no protection from Federal law. It requires a prescription for various medical conditions spelled out in the law. The State Department of Public Health is currently working on regulations to administer the law and those are still being worked on by the State. The State Law only allows 35 medical marijuana treatment facilities in the entire state and only 5 per county. There would be 5 dispensaries in Worcester County, so the likelihood of Leicester being inundated with these is low.

The term medical marijuana treatment center, as defined under state law is: “a not-for-profit entity, as defined by Massachusetts Law only, registered under this law that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils or ointments), transfers, transports, sells distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their personal caregivers.”

Communities in Massachusetts have a different range of options that they can take in response to this State Law. One option is to do nothing. This was the initial approach that the Town of Spencer was taking and the Spencer Planning Board voted to do nothing and just allow it under an existing category. The Selectmen disagreed with that and are sponsoring their own article.

In Leicester, it would be a little more difficult to do nothing because this use doesn't neatly fit into one of the Town's existing categories. Even if the Town wanted to allow it everywhere, it should still be added to the Use Table.

Mr. Grimshaw asked what use existed in Spencer that this fit under. Ms. Buck said medical treatment facility.

Ms. Buck continued. Another option is to do a temporary moratorium to allow the Town time to look into the issue. The next option is prohibition, and at least three communities have done that, which is not recommended. It might withstand legal challenge, but would have to do more comprehensive planning and study related to showing full justification.

Mr. McNaboe said there's a State Law saying that they can locate. Ms. Buck said that's not really why. The State can allow all kinds of uses and Towns have wide discretion under Home Rule to allow or disallow. What could get tricky here is if every community does the same thing and doesn't provide justification for why they are banning it. Just because the State says that some use is now allowed, it doesn't mean it's allowed locally unless there's this specific exemption in State Law, like the exemption for churches, schools, and agricultural uses. Medical marijuana treatment facilities are not on that list of exempt from zoning. Towns do have quite a bit of discretion, but there would have to be good legal reasoning behind an outright ban and she would not recommend it.

Ms. Buck said that what is being done here is close to what the Town did with Adult Entertainment, which specifies distances from childcare centers, parks, playgrounds, churches etc.

Ms. Buck had marked out the Town's Zoning Map to represent, visually, where a facility could actually be placed in Town. The Zoning Map won't actually be amended; the amendment is only going to be described in a narrative form. She marked out on the Map, the locations of all the schools, parks, childcare facilities, and religious institutions and then measured 1,000 feet from every residential district. What was left were only three areas: one along Route 9 west, a small area along Route 56 south, and the largest area is in the Business/Residential-1 Zone along Stafford Street east. What were not shown on the map were the family childcare homes.

Mr. Wright said which the big question on the BR1 District is [family childcare]. Ms. Buck said she just looked at daycare centers in general. She didn't feel it was really reasonable to include the family childcare homes because people go in and out of business frequently.



Mr. Grimshaw asked that if in the future, construction of a facility, such as a school for example, happens in an area that currently would allow the medical marijuana facility, what would happen? Would it be grandfathered?

Ms. Friedman said the area allowed would shrink. Ms. Buck agreed.

Ms. Buck said just by mapping the childcare facilities and distances from residential districts, it completely eliminated the B, CB and NB. The current draft, as it's written, lists it in the Use Table as Y (allowed) in B, CB and I, but it is impossible to locate one there. She asked if the Board wanted to leave it that way, just in case a church or a daycare happens to close in the future.

Ms. Friedman said it may be impossible to locate now, but you don't know that in 10 years that it will have the same profile. We also don't know that in the future, somebody could come in and say they really want to have the facility there, and buy the daycare facility, close it and now put one in there. It's just stating another option.

Mr. Grimshaw asked if there was a way to explain, in a brief way in this bylaw, why it would be this contradictory, that the table implies it could, but the conditions of the abutting properties says it can't.

Mr. Wright said if it's in a location where it's within 1,000 feet of a residential zoning district, church, schools, etc.

Mr. Grimshaw felt it was still contradictory to some degree to someone who might just look at it and not really read it. Ms. Buck said her attempt in doing that in the Use Table is where it states "with limitations." She can strengthen that in some way, if that what the Board wants? She did make that note, because she didn't want someone to just see the "Y" and figure it's allowed. Mr. Grimshaw said that was his concern and he just wanted to make sure that it was made clear and understood.

Mr. McNaboe felt it would be important, on Town Hall Floor, to have the Zoning Map here tonight, displayed at Town Meeting, showing the areas allowed and not allowed. Years ago when the Adult Entertainment Bylaw was proposed, during the first 15 minutes, some residents thought this proposal was recruiting people to come into to Town to do that. They didn't understand that the Bylaw amendment was actually restricting it. He felt there will be people on Town Hall Floor voicing concern about a dispensary locating in Town. This needs to be presented in such a way that will explain that this is the way to make sure a dispensary can't be put just anywhere.

Ms. Buck felt this amendment proposal was a very reasonable solution. Ms. Friedman agreed.

Ms. Buck said this will show that it's not a pretend district or a gimmick and that there was still a reasonable amount of land area in which a facility can go. Mr. Grimshaw also agreed that this was a reasonable solution.

Hearing no further discussion, Mr. Grimshaw asked for a motion.

MOTION: Ms. Friedman moved to vote to endorse and support the proposed Zoning Bylaw Amendment regulating medical marijuana treatment centers on Town Hall Floor.

SECONDED: Mr. Wright – Discussion: Mr. McNaboe felt this was a good thing to have especially where the City of Worcester is thinking about a moratorium and Leicester is right on the bus line, which would be the next easiest area to come.

Ms. Buck noted a couple of minor typos. One, at the bottom of the 5.15, it should be a period and not a semi-colon at the end of paragraph 1. She also noticed upon reviewing the minutes something she forgot to add to the list and wanted to ask the Board if they still wanted to include that item, which were package stores. There was some mention to including in the list of things the dispensary had to be away from was package stores. Did the Board still want to include that? After a brief discussion, the Board agreed to not include package stores in the list.

VOTE: All in Favor

#### **B. Childcare Facilities**

The way Leicester defines and regulates family childcare and childcare center is inconsistent with state law. So this amendment is to bring the Town's Zoning in line with state law, allowing family childcare homes in all districts and childcare facilities in all districts by-right and inserting definitions on both that are consistent with State Law.

Mr. McNaboe said this will just match the State's definitions, correct? Ms. Buck agreed.

MOTION: Mr. McNaboe moved to approve and support the proposed Zoning Bylaw amendment defining childcare facilities that will be consistent with state law, on Town Hall Floor.

SECONDED: Ms. Nist – Discussion: None

VOTE: All in Favor

#### **Town Planner Report**

##### **Miscellaneous project updates**

Ms. Buck noted that there were some minor changes to her vacation time request. Instead of using her vacation time in February, it will be used in March instead.

##### **Economic Development Committee**

Mr. Grimshaw updated the Board. The EDC have been meeting on a regular basis and at the last meeting, the Committee voted to support the Worcester Airports efforts on bringing in Jet Blue.

There were some concerns noted at the last Planning Board meeting regarding the area along Mulberry Street and Paxton Street and he did find out that it's not runway expansion. The Airport is doing things to improve the airport, but not in the sense of expanding.

##### **Parker Street ANR plan**

Ms. Buck asked to discuss her concerns with the ANR approval. Mr. Grimshaw agreed. Her biggest concern was that she wished the Board could have at least allowed it to go back to Town Counsel, because if Attorney Kiritsy legitimately has a more recent court case that she is unaware of from 2009 it should be reviewed. When she first looked at this in 2003, 2009 [court

case] obviously wasn't there; and because it's not just about this street, it has such broad precedent in the Town and Boutilier Road comes to mind. The Board just made a guy go through the full subdivision process and build a 2 mile road under the same principle. That developer will be coming in here with an ANR plan and say "I'm not building a road give me my 25 houses."

Ms. Buck continued. She felt the Building Inspector could have a hard time denying a permit, because the last time the Scholds' applied for a building permit, they didn't have a road and they didn't have a signed ANR plan on their side.

Mr. McNaboe said Joe Cove gave the Board absolutely nothing to work with. Ms. Buck said which is why, at a minimum, she would have preferred the Board to refer it to Town Counsel.

Mr. Grimshaw said the applicants came in with an attorney they paid for that provided more than adequate information to prove that it was a public way. He does understand the precedent and he gets that, but he has trouble denying it based on the evidence heard here tonight.

Ms. Buck said she felt that the Board should have heard from Town Counsel as well.

Mr. McNaboe said maybe Town Counsel should have been here, if he knew Attorney Kiritsy was going to be here.

Ms. Buck said maybe this was an error on her part, but because Town Counsel had already looked at this repeatedly, over a 10 year period, and the Board has had a consistent line of argument, not just with this street, but with multiple other streets, a decision was made not to send the new plan back to Town Counsel when he reviewed an identical plan in August 2012.

Ms. Friedman felt the biggest part of the issue was that Town Counsel provided nothing other than "this is my opinion." Ms. Buck said she would have preferred that the Board had postponed the vote and get Town Counsel to weigh in, because this is going to have big repercussions.

Ms. Nist noted that she felt that after Attorney Kiritsy and the banker came back to the meeting after their talk, they were ready to go for the extension.

Mr. Grimshaw said they probably did what they thought they had to. Ms. Friedman agreed. Mr. Grimshaw said that he was comfortable with his vote. Mr. McNaboe said he was comfortable with his vote and he didn't feel Boutilier Road will be an issue because the developer will probably have to close that project down anyway.

Ms. Buck noted a concern with Hammond Street. Mr. Grimshaw said he didn't know that if an attorney would be able to find the evidence, black and white on the deed, to say that Hammond Street is referred to as a Town Road. Ms. Buck said that was definitively private after the court case, but it's another story with Boutilier.

Mr. McNaboe said Boutilier is illusionary.

Mr. Grimshaw agreed; Boutilier Road is less of a road than Parker Street. When he drives by Boutilier on Stafford Street, he looks for the road entrance and has never been able to see it. So, for him, he knows where Parker Street is and he knows where it comes out onto Pine Street and onto Baldwin Street and he wasn't thinking that [about Boutilier] when he made his decision. Now, he feels even better about the Boutilier comparison, because he cannot find Boutilier Road when he drives down Stafford Street. And using Attorney Kiritsy's own words, Boutilier is illusory.

Mr. Wright asked who clears Boutilier Road. Ms. Buck said the Town. Mr. Wright asked why the Town would plow a private road. Mr. McNaboe said it's claimed to be private up to a certain point.

Ms. Buck said the issue of whether it's public or private is moot. There was a recent decision from Town Counsel to say that it was private and she wouldn't be surprised upon the submittal of additional evidence from the applicant, the Town could change their position on that. The main issue is access, not if it's a public way.

Mr. McNaboe said he walked Parker Street; he purposely parked his car because he didn't know whether he would be able to drive it. He walked well past the structures there, probably around a mile and the only reason he turned around was because it was starting to get dark. He felt he could have driven his Subaru, not easily, but for most of it. There were a couple of spots that were pretty good. The road is there and there are no trees growing in the middle of it and there is nothing that actually stops you, other than it's in poor condition.

Ms. Friedman said she believed that there is some definition of what adequate access is [in the Zoning Bylaw]. Ms. Buck said there is, but it is undermined by the signing of an ANR, because when you sign an ANR, you are saying it has access.

Ms. Friedman asked that there is some type of regulation in the state level, stating a road has to be so many feet wide. Ms. Buck said in the Town's subdivision regulations it says a private road has to be 18 feet. Ms. Friedman said that even in the state for a public way, it's not public versus private, its adequate access.

Mr. Grimshaw asked if it was true that the Town fined the Scholds' for cutting trees down. Ms. Buck said yes. Mr. Wright said he believes it was \$6,500.

Ms. Buck said she meant what she said that if Attorney Kiritsy had some more recent court cases that went against what the previous cases were, she's okay with that. She felt it should have, at the very least, gone back to Town Counsel.

Ms. Nist asked what this all means now. Ms. Buck said she didn't know which is why this should have gone back to Town Counsel.

Mr. Grimshaw said it seems like Attorney Cove underestimated what this was going to entail and was "boiler plating" it, saying this is why it should. This has been an ongoing issue for 10 years

and why would we change our minds now, but personally for him, it's because there was an attorney in front of him that gave a pretty solid argument as to why.

MOTION: Mr. McNaboe moved to adjourn meeting

SECONDED: Mr. Wright – Discussion: None

VOTE: All in Favor

Meeting adjourn at 9PM

Respectfully submitted:

*Barbara Knox*

Barbara Knox

**Documents included in the mailing packet:**

1. Agenda
2. Copy of a letter from Thomas Wood to Michelle Buck dated September 18, 2012 regarding Parker Street
3. Memo to the Board from Michelle Buck dated February 27, 2012 regarding March 5<sup>th</sup> meeting
4. Draft Notice of Determination that subdivision approval is required (Parker Street)
5. Copy of a letter from Kevin Quinn to Michelle Buck dated September 5, 2012 regarding Parker Street
6. Draft copy of proposed Zoning Bylaw Amendment to regulate Medical Marijuana Treatment Centers and proposed Zoning Bylaw Amendment related to Child Care Uses.
7. Copy of the MMA Annual Meeting correspondence regarding Medical Marijuana Land Use Concerns.
8. Copy of FAQ regarding Medical Marijuana in Massachusetts
9. Planning Board Minutes of February 5, 2013

**Documents submitted at meeting:**

1. Copy of a letter from David Albrecht of Borrego Solar Systems to Michelle Buck regarding proposed modifications to previously approved Site Plan on Auburn Street
2. Copies of informational correspondence material regarding Parker Street
3. Copies of various deeds dating back to 1768 regarding Parker Street

Approved 4/17/2013 Planning Board meeting