

**TOWN OF LINCOLN**  
**MINUTES OF THE PLANNING BOARD**

**JUNE 11, 2019**

**TOWN OFFICES**

**PRESENT:** Margaret Olson (Chair), Lynn DeLisi (Vice-Chair), Richard Rundell, Gary Taylor, Stephen Gladstone

**STAFF:** Paula Vaughn-MacKenzie

**7:00 PM Determination of Minor Change, Section 17 Site Plan Review and 13.6, Solar Energy Systems: Rural Land Foundation, 145 Lincoln Road, Parcel 162-39-0.** Public Hearing for site plan review of a proposed carport/canopy solar installation. Vote expected.

The RLF initially came to the Planning Board for approval of a carport/canopy solar array. The array needed relief from the zoning setbacks which is allowed under the South Lincoln Overlay District as well as the Zoning Bylaw Section 13.6.

In addition, there was an unresolved issue where part of the Carport/Canopy intruded into property owned by the Town of Lincoln. The applicant stated that they would approach the Board of Selectmen to see if a license agreement could be a resolution. The applicant is now proposing a revised project which does not intrude into Town of Lincoln property.

**The Project:**

The Project proposes three canopy/carport arrays that will cover the parking lot between the Real Restaurant and Donelan's.

**Setbacks:** Required setbacks for accessory structures are 20' from a side or rear lot line and 50' from a front lot line. The Board can approve any setbacks because the project was approved under the South Lincoln Overlay and Section 13.6 allows waivers.

**Capacity:** The total capacity of the array has been reduced from 277.2kW DC /234 kW AC to 267.18 kW DC / 200 kW AC.

**Height:** The height of the arrays stays the same at 17'.

Array C: is closest to the REAL Restaurant.

- The setback to the MBTA property line has been decreased from 24' 3.9" to 22'.

- The array has been increased slightly from 152' 6.6" X 40' 2.5" to 154' 11" X 40' 1"; and from 6133.6 square feet to 6205 square feet.
- The proposed transformer is in Array C facing Donelan's.

Array B:

- The closest setback to the MBTA property line has increased from 16' 2.4" to 17'.
- The array dimensions have changed slightly from 149' 2.7" X 40' 2.5" to 148' 6" X 40' 1"; and from 6,000 square feet to 5946 square feet.

Array A:

- The setback from the Town of Lincoln property line is now 2' 2". The setback from the MBTA property line has been increased from 16' 10.6" to 18' 9".
- The array measurements are changed from 135' 11.5" X 40' 2.5" to 135' 7" X 26' 11"; and from 5466 square feet to 3626 square feet.

**Landscape Plan:** The Landscape plan remains unchanged and shows one 15' tree to be removed as well as three trees which are less than 12" in diameter. There is one of these trees in each vegetated island.

**Lighting:** The lighting plan has been revised in response to the Planning Board's request at the initial hearing. The submitted Lighting Plan shows areas of 2.5 foot-candles underneath the arrays and 1 foot-candle isoline on the pavement around the arrays.

The Board also noted that these lights should be shut off with the other lights at the mall at midnight as a condition of approval.

**Drainage:** The applicant submitted a drainage report stamped by a professional engineer.

**Utilities:** The Board was concerned about the transformer being located directly across from the Donelan's entrance and would like it moved to the other end of the array or put in an underground vault.

The Board approved the first proposal with the following conditions:

1. The RLF and the Town of Lincoln sign an agreement allowing the RLF to use the Town of Lincoln land for Array A of the solar project.
2. The RLF shall submit a drainage plan stamped and signed by a professional engineer.
3. The RLF shall submit a revised lighting plan reducing the maximum foot-candles to one foot-candle.
4. The setbacks of the arrays B and C shall be as proposed on the site plan and shall not intrude further into any setback without prior review and approval by the Planning Board.

5. The RLF shall make reasonable efforts to have Eversource agree to move the transformer from its current location to the other end of the array or reposition the transformer so that the narrow end faces Donelan's and screen it with vegetation.

The Board noted that the revised application makes condition 1 not applicable and complies with conditions 2 and 3. The Board asked that conditions 4 and 5 be included in the new approval.

GT made a motion to determine the changes minor changes to the approved plan. SG Seconded. Passed 5-0.

SG made a motion to approve the project as proposed subject to conditions 4 and 5 stated above. GT Seconded. Passed 5-0.

RR noted that applicants will routinely ask for setback relief for solar installations in order to fit more panels and the Board should be aware of this. MO agreed, but in this case, the MBTA is the only abutter and the Board should review each case independently. All the members of the Board agreed.

**7:15 PM Recommendation to the Zoning Board of Appeals, Section 6.2 Uses requiring a Special Permit from the Board of Appeals with the written advice of the Planning Board: Stephen/Doggy Dates, 28 Winter Street, Parcel 150-36-0.** Request for a recommendation to the ZBA from the Planning Board to operate an outdoor dog daycare. Vote expected.

Jackie Stephen, the owner of 28 Winter Street, the owners of Doggy Dates, and their attorney, David Himmelberger appeared before the Board.

The applicant initially came before the Board on January 22, 2019 when the location of the enclosure was within the 100-foot wetlands buffer. The Board heard from the building inspector and abutters but did not make a formal recommendation. Due to the wetland issues, the applicant withdrew their application without prejudice on February 3, 2019.

**The Project:** The applicant is proposing to operate an outdoor dog daycare on her property Monday through Friday from 8:30 am to 4:00pm. They anticipate three groups per day. Each group consists of up to 2 vehicles which can carry ten dogs each. Doggy dates will have up to 20 dogs, three times per day for a total of up to 60 dogs per day. The owner of the property will not be on site during the operation of the daycare, Monday through Thursday.

**Zoning:**

Section 6.2 of the Zoning Bylaw allows certain uses in residential zones with a special permit from the Board of Appeals and written advice of the Planning Board.

Section 6.2 (g) specifies the following: "the boarding, training, raising, or breeding of dogs other than farm dogs or any dogs for the residents' own use as pets, or the offering for hire of riding horses other than for residents' own use".

The Planning Board considered the following issues:

1. Does a dog daycare qualify as the boarding, training, raising, or breeding of dogs?

The building inspector weighed in with an advisory letter to the Planning Board. He noted that unless a use is specifically listed as allowed, it is prohibited. He notes that dog daycare or pet sitting is not specifically listed in 6.2(g) and therefore is not allowed. He notes that the State statute is explicit:

MGL Chapter 193 section 136A defines “Commercial boarding or training kennel”, as an establishment used for boarding, holding, daycare, overnight stays or training of animals that are not the property of the owner of the establishment at which such services are rendered in exchange for consideration and in the absence of the owner of any such animal....”

He also noted case law 1997 Livoli v. Southborough Zoning Board of Appeals supports the most important canon restated by the Court is that “inclusion unius et exclusion alterius,” that is, inclusion of one Use is exclusion of another or Uses not listed are prohibited.

His conclusion is that since commercial boarding or dog day care is not listed as a permissible use in an R-1 district, it is prohibited. Words not included in the clear definitions like Commercial or dog day care cannot be added without legislative enactment.

2. Wetlands:

The initial location proposed for the dog enclosure was within the 100-foot buffer zone of the wetlands. The current location is outside the buffer zone and the applicant has submitted a memorandum from Tom Gumbart, Conservation Director stating that because the location is wholly outside the buffer zone, no wetlands permitting is required.

3. Chapter 61A designation for 5 acres of the property:

The property consists of 9.51 acres of which 5 acres are designated chapter 61A. Since a dog daycare does not qualify as an agricultural use, the area for the enclosure must be outside the 61A area. The applicant submitted an inaccurate hand drawn plan showing the location of the agricultural uses and the location of the proposed dog enclosure. The plan did not designate the acreage dedicated to the agricultural use and the acreage dedicated to the house and dog pen which is .4 acres.

4. Impacts to the neighborhood:

Section 20.2 (c) requires that Before granting a special permit, the Board of Appeals shall determine that the use for which such permit is requested is in harmony with the general purposes and intent of the Bylaw and that the proposed use is not detrimental or injurious to persons or property.

Safety: Doggy Dates states the following:

- a. Aggression: The Doggy Dates application states that if a dog shows any signs of aggression, there is a series of steps taken to intervene and work with the owner to determine how best

to address the issue. If the issue is minor, a plan of action will be discussed with the team and put into place. Consultation may be conducted with local dog trainer Elaine Stern of the Grateful Dog.

The applicant also states that there is a zero-tolerance policy for aggression that results in injury to any animal or human, for a dog that shows signs that they may pose a danger within the group. Such dogs are banned from Doggy Dates.

- b. Security: The fenced area will be completely secured to keep animals contained including parking areas.
- c. Health: All dogs are required to be up to date on their vaccinations. Fresh water is provided. All equipment is sanitized regularly.

Noise: Doggy Dates states the following:

They employ bark control practices:

Ultrasonic Bark Boxes are employed at the fields. These devices emit a high frequency noise that is inaudible to humans while serving to deter barking. The boxes have a range of up to 50 feet and will not be heard by dogs that are not on the property.

Citronella Collars are used in some cases with the owner's consent. They are used when a dog's barking is deemed excessive by the staff.

Setbacks to neighboring houses were shown on the site plan.

### **Public Comment:**

Doggy Dates operated the dog daycare last summer without obtaining the necessary permits. The Planning Office and the Zoning Board of Appeals received several letters from the abutters regarding this time period.

The abutter at 18 Winter Street stated that

1. No attempt at contact with the neighbors was made by the applicant.
2. If a special permit is granted, who can neighbors contact for a complaint. The owner is not going to be on the premises Monday through Thursday and is not operating the business.

The abutter at 33 Winter Street stated that

1. During the period the Applicant/Doggy Dates was operating without approval, the barking was loud and generally constant. The couple works from home and at times would have to close the windows to conduct their business. They also stated that spending time in the yard was ruined because of the barking.

2. Overlap between groups has been prevalent at the Natick location where overlap can be 15-20 minutes. They say that the abutters in Natick found Doggy Dates to be so disruptive that they have filed a suit with the state land court.
3. Doggy Dates elected to conduct business without the proper permits claiming they did not know that they needed them. This was their third location in a residential area and needed to go through the same process in each of the other Towns. This disregard for the laws of the Town of Lincoln should be noted.
4. This is a business owned by a non-resident. We do not believe that the intention of the Lincoln Zoning was to allow leasing of property to an outside business owner.

The abutter at 25 Winter Street stated that

1. Concern is allowing a business in a residential area. Doggy Dates is an outdoor dog day care that charges a fee to dog owners whose dogs are transported there. Does not believe that the Lincoln Bylaw intended to allow a business run by a non-resident in a residential neighborhood.
2. All the 7 neighbors who attended the initial Zoning Board meeting reported that during the period Doggie Dates was operating without approval, the barking noise was loud and bothersome. None of us were made aware in advance of the plans to operate Doggie Dates in the neighborhood.
3. The property owners will not be home during the operation of the business except on Fridays. At least 6 of the abutting properties have owners who are either retired or working from home during these hours.

The abutter at 27 Winter Street stated that

1. This is a residential not commercial zoned neighborhood.
2. Concerned about increased traffic
3. Concerned about noise of barking.
4. No informal communication with neighbors.

The Board agreed that the use is not allowed under Section 6.2(g) of the zoning bylaw. MO thought that the use was contrary to both the letter and the spirit of the bylaw. She explained that the intent of the bylaw was to allow an owner who was a hobby breeder to operate or an owner who privately trains dogs. It was not the intent of the bylaw to allow a large-scale commercial use to operate in a residential zone. LD noted that the business should not be allowed to operate as the barking is a nuisance to the neighbors.

GT noted that the neighbors have had experience with the operation as Doggy Dates had operated last summer without seeking permits. In addition, Doggy Dates has had problems operating in two other towns. The owner of Doggy Dates is quoted in the local paper as saying that the use is

inappropriate for a residential neighborhood. In addition, the residential owner will not be onsite for four of the five operating days. He concluded by saying this is not a use that the Planning Board should recommend.

The Board summarized their findings:

1. The proposed use of a dog daycare is not allowed under the zoning bylaw as it is not explicitly permitted.
2. Doggy Dates operated without permits last summer and proved to be a nuisance to the neighbors.
3. The owner of Doggy Dates stated that the use is inappropriate for a residential neighborhood.
4. The proposed commercial use is contrary to the spirit of the bylaw which would allow an owner to have a small breeding or training operation with a special permit.

David Himmelberger, the attorney for Doggy Dates thought that it was inappropriate to use the newspaper quote as his client meant that it was inappropriate for a denser neighborhood with smaller lots and the proposed property is much larger than typical lots in Natick. In addition, he thought that a commercial business was implicitly allowed under the bylaw. He suggested that Doggy Dates could be considered “training” of dogs as the dogs were being socialized. He also suggested that the zoning bylaw does not require the operator or owner of the business to be the owner of the property. Lastly, he stated that he could not find any registered complaints.

He suggested that the Planning Board recommend a trial period of three months to be reviewed at the end of the period.

GT noted that a special permit was granted in Natick and they could not revoke it. The use had so many complaints that the Town of Natick passed a zoning bylaw prohibiting such uses. The special permit for Doggy Dates, however, was grandfathered and there is now a lawsuit. He asked Mr. Himmelberger if he was suggesting that a special permit could be revoked. Mr. Himmelberger responded that it was not uncommon to have a trial period for such uses.

LD noted that Doggy Dates already had their trial period when they operated without permits last summer. GT agreed and noted that given their experience in Natick and Acton, why did they not apply for permits in Lincoln prior to starting their operation?

SG stated that he was surprised that the applicant was putting forward a use that has proven to be detrimental to the neighborhood. The neighborhood is uniformly against the use and they have experienced the use.

The Board asked if there was any public comment.

Jackie Stephen stated that she was not allowing Doggy Dates to operate on her property for the money. Rather, she has a puppy that she wants socialized because both she and her husband work full time. She also noted that other neighbors were supportive of Doggy Dates operating on her property.

The Board noted that no neighbors in support of the use sent letters or appeared at the hearing.

Mrs. Fenton at 25 Winter Street stated that all the neighbors suffered from the noise.

Robin Wilkerson stated that all the neighbors think this is a bad idea.

Lee Harrison of 18 Winter Street stated that during the summer that Doggy Dates operated without permits, she just gritted her teeth because she thought that Jackie had friends over that brought their dogs and she was trying to be a good neighbor. She noted that all the neighbors are against the operation and does not understand why Ms. Stephen is pursuing it.

Mr. Taylor from 33 Winter Street stated that all the neighbors are either retired or work from home and could hear the incessant barking during the day. He is usually not one to complain but he was bothered by it.

Mr. Rappaport of 45 Winter Street agreed.

LD noted that there had been no outreach to the neighbors by Doggy Dates.

GT made a motion to recommend that the ZBA not issue a special permit for Doggy Dates to operate at 28 Winter Street. SG Seconded. Passed 5-0.

**8:00 PM** RR made a motion to adjourn. GT Seconded. Passed 5-0.

Approved as amended June 25, 2019