

DRAFT

DURHAM PLANNING BOARD MINUTES WEDNESDAY, AUGUST 11, 2004 TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL

MEMBERS PRESENT: Stephen Roberts; Amanda Merrill; Richard Kelley; Kevin Webb; Karen Bishop Nick Isaak; Arthur Grant; Richard Ozenich

MEMBERS ABSENT: Annmarie Harris

OTHERS PRESENT Jim Campbell

I. Call to Order

II. Approval of Agenda

Kevin Webb MOVED to approve the agenda as submitted. The motion was SECONDED by Arthur Grant, and PASSED unanimously.

III. Report of Planner

- Mr. Campbell noted a new CD from the NH Office of Energy and Planning on preparing a Master Plan, and a pamphlet on Land Conservation from the Working Group of the Conservation Commission. He briefly reviewed other materials that had been provided to Board members.
- Mr. Campbell briefly described his most recent meeting with Doug Bencks of UNH. He said they had discussed the following issues: developments concerning the parking lot expansion at West Edge and the Mast Road expansion; the proposed moving of the UNH Observatory; the RFQ for the CMAQ Main Street enhancements; and the new building designed for dairy operation personnel, to be located at the west edge of campus, near the dairy operation. He said a bird flyway would also be built in the same area, by the Psychology Department, and also said a new walk way from Garrison Ave to Main Street was planned.
- Mr. Campbell spoke briefly about the site walk the previous day at 33 Madbury Road, and said this had provided a good perspective on the property.
- Mr. Campbell suggested that the Board could schedule their quarterly meeting for Aug 25th since there were no applications planned for the agenda on that evening.

- Mr. Campbell said that Omnipoint had asked for a continuation until the September meeting, although a letter on this had not been received yet. He said they were also asking for an extension from Newmarket, but also noted that they might be looking for another location.

Councilor Grant suggested not having the hearing on the Omnipoint application until the Town of Newmarket had completed their own review of the application brought before them. There was discussion about this.

- Mr. Campbell said he had heard from Zoning Administrator Johnson that the ZBA would be rehearing the Appeal of Administrative Decision concerning 66 Main Street.

Chair Roberts said he had received a call concerning the University's plans for the Northern Connector. There was discussion about this, and Chair Roberts asked Mr. Campbell to have Doug Bencks keep the Board apprised concerning this issue.

IV Acceptance Consideration of an Application for a Boundary Line Adjustment submitted by Terry W. & Linda E. Zych, Durham, New Hampshire, Elizabeth A. Zych, Newmarket, New Hampshire, and Alan Baker, Durham, New Hampshire. The properties are located at 80,76 and 84 Wiswall Road, are shown on Tax Map 14, Lots 27-2, 27-4, and 27-7 and are in the Rural Zoning District.

Chair Roberts noted that this was a continuation of a previous hearing on the application. (Details of the application are available in the July 29, 2004 minutes)

Surveyor Kevin McEneaney spoke before the Board, and explained that the plans for the boundary line adjustment had been revised because of questions raised about the amount of frontage on the larger, back lot, which was one of three lots involved in the application. He explained how the lot lines had now been adjusted so the larger back lot now had 300 ft of frontage, and said the frontage of the two smaller front lots would remain the same.

Mr. McEneaney also said the floodplain information that had been requested had been provided.

Mr. Campbell said the application was complete and was ready for acceptance.

Councilor Grant asked if abutters had been notified of the application, and Mr. Campbell said they had been.

Amanda Merrill MOVED to accept the Application for a Boundary Line Adjustment submitted by Terry W. & Linda E. Zych, Durham, New Hampshire, Elizabeth A. Zych, Newmarket, New Hampshire, and Alan Baker, Durham, New Hampshire. The motion was SECONDED by Richard Kelley, and PASSED unanimously.

Mr. Campbell said there were no additional Findings of Fact for the application, and went through those that had already been developed. He then went through the Conditions of Approval, and noted that #3, concerning referencing the most recent flood maps had been fulfilled, and could be removed from the list.

Kevin Webb MOVED to approve the Application for a Boundary Line Adjustment submitted by Terry W. & Linda E. Zych, Durham, New Hampshire, Elizabeth A. Zych, Newmarket, New Hampshire, and Alan Baker, Durham, New Hampshire, including the Findings of Fact and Conditions of Approval. The motion was SECONDED by Councilor Grant, and PASSED unanimously.

- V. **Public Hearing on Conditional Use Permit** submitted by Michael A. Davis, Sumner Properties, LLC, Durham, New Hampshire. The application is to change the conditional use of the property from fraternity/sorority use to general apartment use, and to change from a five-apartment with one common room building to a six-apartment building. The property is shown on Tax Map 2, Lot 8-13, located at 33 Madbury Road, and is within the Residential A Zoning District.

Michael Davis spoke before the Board, and provided background information on his application. He said he would like to change his building from 6 apartments, consisting of 5 one-bedroom units and one common room, back to 6 one-bedroom units, with no common room. He noted that this configuration was the same as the property had had before 1999.

He said the previous conditional use permit was written so that a lot of people could pile into that sixth room. He said he wanted to eliminate the fraternity status, where the building had to be occupied by a recognized fraternity, and wanted to rent it as an apartment building to individual students. He explained that the reason for this was that at present he had no control over who lived there, and had difficulty with the activity that went on there. He noted that at present he had to rent to fraternity people because if he didn't, after one year, the property reverted back to only 3 people being able to live in the whole building.

Chair Roberts clarified that for the following school year, the building's apartment might or might not be rented to a fraternity, so there would no change to the actual use of the building until the 2005 school year.

Mr. Isaak asked if there was any definition of a fraternity or sorority that required some kind of gathering area. He asked whether, if the building became six apartments and there were still fraternity members living there, with no common room available, there might be some problems. It was clarified that this living area would be adjunct to a fraternity's main living area.

Mr. Davis provided details on what had prompted the current situation at his building.

Mr. Campbell noted that the definition of fraternity didn't say anything about having a separate space, and said the separate space idea came from the conditional use permit that had been granted.

Councilor Grant said the conditions set forth in the 1999 approval for a fraternity house were much more restrictive than those in the present application for conversion to an apartment house. He said common sense dictated that anyone could live in an apartment house, but this did not mean these people could function as a fraternity in that building.

He said he didn't think a mixing of the terms should be used in the official document they were being asked to approve. He said Mr. Davis was welcome to have 12 fraternity members living in his building, but said they could not function as a fraternity there. He said as part of this that they had to be recognized as a fraternity by the University in order to do so, also noting that this was part of conditions of approval granted by the Board. There was additional discussion about this.

Mr. Campbell said he had not put any language in the conditions of approval that said fraternity, and noted that the property was going from one nonconforming use to another.

Councilor Grant said Mr. Davis, as the landlord, needed to make clear to tenants of the building that they would not be functioning as a fraternity in the building, and would not be allowed to have fraternity parties.

Mr. Davis said he understood this, and said that was why he had no loitering policies in place at all his apartments.

Chair Roberts asked Mr. Campbell if all of Code Enforcement Officer Johnson's comments had been incorporated into the Findings of Fact, and Mr. Campbell said they had been. He also received clarification that only five apartments would be rented for the coming school year.

There was detailed discussion of what the sixth assembly room would be used for if it were not to be rented. Mr. Davis said the contract was that the 10 guys living in the 5 apartments could use that sixth room.

Mr. Campbell said that once the papers were signed for the conditional use permit, the fraternity/sorority status of the property would no longer be in effect, and said the extra room could not be used as a common area.

In response to comments from Board members, he said the contract said that no more than three people could be in one room.

Chair Roberts clarified that once the Conditional Use Permit was granted, the sixth apartment could be rented, whether to fraternity members or not, but said the room could no longer be used as a gathering room

Mr. Kelley asked if Mr. Davis had a lease with the fraternity for the coming semester.

Mr. Davis said according to the 1999 conditional use permit, the building presently had to be leased to a fraternity or sorority.

Mr. Kelley said he was concerned as to whether there was a conflict between the Board allowing Mr. Davis to have a contract with a fraternity, while renting the apartments to individuals.

There was discussion about what would happen to the contract, because it would involve an illegal use in 2005, and there would have to be individual contracts for each tenant.

Mr. Webb suggested that if the Board established an effective date for the Conditional Use Permit, the conflict would be resolved.

Mr. Davis said that would work for him.

Mr. Campbell read the escape language in the permit, and said it covered this.

Mr. Kelley said it would be good to spell out this intent in the Conditions, and Mr. Campbell said he would do this.

Kevin Webb MOVED to open the public hearing on the Conditional Use Permit submitted by Michael A. Davis, Sumner Properties, LLC, Durham, New Hampshire. The application is to change the conditional use of the property from fraternity/sorority use to general apartment use, and to change from a five-apartment with one common room building to a six-apartment building. The motion was SECONDED By Councilor Grant, and PASSED unanimously.

Chair Roberts asked if any members of the public wished to speak for or against the application, and there was no response.

Councilor Grant stated that this property, under previous ownership, had a very bad reputation. He noted that it was located in a prominent place in the community, near the elementary school, and families, and in the neighborhood had been known as the “crack house”. He said Code Enforcement Officer Johnson had told him that Mr. Davis had a good reputation in terms of controlling tenant behavior. Councilor Grant said he was counting on Mr. Davis to do this in, on behalf of others in the neighborhood, in this intensely student occupied area.

Other Board members reinforced Councilor Grant’s comments.

Chair Roberts said the site visit had revealed a considerable upgrade of the property, and said the Board appreciated what Mr. Davis was trying to do with it.

Mr. Kelley noted that the 1998 Conditions of Approval indicated that the Police Chief had said he endorsed the conditional use of the property as a fraternity, noting that apartments rented to individuals caused significant problems for the police, while fraternities provided more structure and the ability to speak to someone in charge.

He said the present memo from the Police Chief said that as long as the management of the apartment was an active participant with the department, issues related to these kinds of properties could be minimal to nonexistent. Mr. Kelley said this fit with what Mr. Grant was saying, - that as long as Mr. Davis's company was active, the Town would be well served by the property.

Councilor Grant MOVED to close the public hearing. The motion was SECONDED by Richard Ozenich, and PASSED unanimously.

Councilor Grant recommended that the two key points made by the Police Chief should be included in the Conditions of Approval: 1) ensure that each apartment is clearly and systematically numbered; and 2) a statement to the effect that management would be an active participant with the police department.

Mr. Webb said he appreciated Mr. Davis' efforts, but said he was concerned that if his financial situation changed, he could easily sell the property to someone else with a different attitude. He suggested tightening up the Conditions of Approval in case this happened, noting that this was not meant to be a punishment to Mr. Davis.

Mr. Webb also said he had noted that there seemed to have been numerous violations of the previous Conditions of Approval for the property, yet there was no evidence of the occurrence, or even the threat of revocation of the Conditional Use permit. He noted that it was clearly stated in condition #13 that violation or lack of compliance with the previous conditions would be grounds for revocation of the permit.

Mr. Webb said that in the present situation, that since it also was a conditional use, if things didn't work out, the threat of the rug being pulled should be there. He stressed that he was not trying to punish, or threaten Mr. Davis, but was thinking of how future owners could be bound to the level of behavior that Mr. Davis was attesting to.

Mr. Isaak suggested that it should be written into the Conditions of Approval that future owners would get copies of them. There was discussion about this.

Ms. Bishop said it wasn't just a matter of what the conditions were, but whether they would be enforced.

Mr. Campbell said he believed Mr. Johnson was willing to enforce this.

Councilor Grant said Durham had not previously had the kind of Code Enforcement Officer that Mr. Johnson was. He said he appreciated the difficult job before Mr.

Johnson, and said in his own view he was doing a very good job. He said he was very conscientious, and understood well the concerns of the community.

He said he agreed with Mr. Webb that the conditions should run with the property, to ensure that future Planning Boards had the authority to uphold those conditions in a firmer way than perhaps the Police Department could. He said the ability to withdraw approval for the operation of the facility was a very powerful means of enforcement, and said the conditions should be very clear on this.

Ms. Merrill noted that several conditions referred to the applicant/owner. There was discussion among Board members as to what this meant. She said especially those that related to ongoing inspections, etc. needed to be clear on who this applied to.

Chair Roberts said the key question was how to ensure that this information got in to the hands of the new owner. There was discussion about this between Board members and Mr. Campbell.

Chair Roberts asked how Mr. Davis had learned about the previous Conditions of Approval for the property, and Mr. Davis said the conditional use permit had appeared when the Attorney did the title search, and also noted he had seen the conditional permit in the Town file.

Mr. Campbell said it could be put in the Conditions of Approval that the new owner should get a copy of them, but said it could not be guaranteed that the person would see this. There was additional discussion about this.

Chair Roberts asked Mr. Campbell what additions had been made to the Conditional Use permit document in their hands.

Mr. Campbell described three additional conditions:

6) The Condition Use Permit for 6 apartments with 12 residents will go into effect on June 1st, 2005. As of June 1st, 2005, the use will no longer be a fraternity.

7) Each apartment must be clearly numbered and have a systematic approach to the numbering

8) Management must be an active participant with the Town's Department?

Councilor Grant asked if it was necessary to act on the application that evening, given the issues that had come up at the meeting, and the need to be clear on them. He said he would like Mr. Campbell more time to work on them.

Mr. Davis said that as long as things were finalized by Nov 1st, that was fine with him. He noted that this would be when he would be making arrangements to rent the apartments for the following year.

Mr. Campbell said the Board had until October 1st to act, and said they could deliberate on the application on September 8th.

Chair Roberts noted the additional conditions did not further restrict Mr. Davis, and asked if he was clear on them.

Mr. Campbell suggested the Board should go through them at the present meeting, to avoid having to do additional work on them after the next meeting.

Mr. Webb suggested also going through the previous Conditional Use Permit, and transferring things over things that were applicable, for ex, condition #13, on possible revocation of the permit. There was discussion about how much detail on codes to put in these conditions.

Councilor Grant said condition #5, under Conditions to be met Subsequent to the Signature of Approval on the final Floor Plan, should read ““shall be grounds for revocation” as opposed to “may be grounds for revocation...”

There was discussion about this, and Mr. Campbell noted that the word “shall” gave Code Enforcement Officer Johnson more flexibility to work with the applicant to resolve a problem.

Councilor Grant said within condition #5, the wording “after June 1st, 2005” should be included. It was agreed this language should also be added to #6.

Mr. Webb said the more specific the conditions were, the better, since they were dealing with unknown future landowners. He noted that the specific ordinance provisions that could potentially be violated were not included within the conditions.

Ms. Merrill noted that the Board didn’t actually say the last Item under the Findings of Fact, that the change of use was “less deleterious to the neighborhood, considering all factors.”

Mr. Campbell said the Board would have to go through all of these conditions before the application was approved.

Mr. Kelley said that statement was why he had considered in more detail the conflicting statements from the police chiefs concerning fraternity use versus apartment use.

Ms. Merrill noted Mr. Davis had said it was sometimes hard to get a hold of fraternity contact persons.

Mr. Kelley said it all seemed to come down to whether the fraternity president was responsible or not.

Chair Roberts said the Board would deliberate on the application based on the upgraded Finding of Fact and conditions of approval at the September 8th, 2004 meeting.

Mr. Campbell urged Board members to review 175:23 (c) concerning the Conditional Use Permit, to make sure they felt the applicant was meeting all of those standards, and also to make sure they believed the planned use was less deleterious than the previous use.

Chair Roberts wondered whether this property could be considered part of the Town's inventory of affordable units. He asked Mr. Davis if someone who was not a student could live in one of his apartment units, and Mr. Davis said yes.

VI. Other Business

A. Old Business: Town Council Feedback on Zoning Ordinance

Councilor Grant asked to defer discussion on this until the Zoning Rewrite meeting the following week. It was agreed that this made sense.

B. New Business: Request for review before the Technical Review Committee for changes to the business locates at 13 Jenkins Court

Mr. Campbell said the applicants were the new owners of the building that housed Benjamin's Restaurant. He explained that they would like to use the basement as a tanning salon. He said he had met with Mr. Johnson and the Fire Department and were working out details concerning sprinklers, etc.

Councilor Grant said he had no objection to the Technical Review Committee hearing the application, but asked that the findings of the Committee be reported to Board members.

Chair Roberts said nothing about the application bothered him but said he felt there was a need for joint Planning Board/Technical Review Committee review of a use that was in the Business area. There was discussion about this.

Questions were asked by Board members about egress and parking spaces. Concerning parking, Mr. Campbell said that if the establishment didn't have enough parking, the current regulations said they could pay \$750/space for the parking.

Ms Merrill asked if there were written guidelines for the Technical Review Committee. She noted the language in the Ordinance said the Planning Board was empowered to delegate their authority to the Committee, but didn't give more specifics on this.

Mr. Campbell explained how the Technical Review Committee operated, and noted that the Planning Board, or members of the audience could request a full Planning Board hearing on an application if desired.

There was additional discussion about delegation of review of applications to the Technical Review Committee.

Mr. Webb asked the applicants if the customers of their establishment would be mostly students, and Ms. Dinner said there would be mostly students, but also possibly other clientele. She said it would be a very high-end tanning salon.

Amanda Merrill moved that the application be referred to the Technical Review Committee. The motion was SECONDED by Richard Kelley and PASSED unanimously.

VII. Approval of Minutes

Councilor Grant MOVED to approve the July 14, 2004 Minutes.

Page 1, under II. should read "...will be heard at the end of the agenda."

Mr. Webb asked, concerning page 2-3 of the minutes, if the Town Attorney's response, concerning whether the Town could apply its regulations to activities proposed in the adjoining town, had been forwarded to Board members.

Mr. Campbell said he would check on this. There was also discussion as to whether a formal request for comments on the Omnipoint application had been sent to the Conservation Commission. Mr. Campbell said he believed it had been, but asked Mr. Webb to check on this at the upcoming Commission meeting.

The motion was SECONDED by Amanda Merrill. The motion PASSED, with Richard Kelley abstaining because he was not at that meeting.

Ms. Merrill suggested bolding changes made to the minutes between the time they were sent out to Board members for review and the time they were reviewed again at the meeting, so the changes could be tracked.

Mr. Campbell said he would arrange for this to be done.

Chair Roberts said he had been contacted by Judith Spang about getting a volunteer for the Lamprey River Citizens Advisory Board, and noted that Mr. Webb had expressed interest in volunteering. There was discussion about this.

Chair Roberts also noted that the Historic District Commission had attended the recent Zoning Rewrite committee meeting, asking for input on their overlay district proposal.

There was discussion about this. Chair Roberts said it was important to determine if there were any legal contradictions in the ordinance proposal. He discussed the proposal in some detail, and also asked Mr. Isaak if he had any guidance for the Board concerning it.

Mr. Isaak said the overlay district proposal was written before he came on the Planning Board, but said the only real issue with it was that it extended the historic district boundaries significantly.

Chair Roberts said a key question was whether there was anything about this significant extension of the Historic District in the Master Plan, and said he wanted to be sure the proposal was based on how the Plan presently read. He noted that the Historic District Committee may have already looked into this.

Councilor Grant said it was important to look at the Master Plan again to see what it did say about this.

Chair Roberts said the Board could propose to revise the Master Plan to envision what was presented concerning the historic overlay district. There was additional discussion about the Master Plan as it related to the overlay proposal.

Mr. Isaak suggested that this issue could be an agenda item for the quarterly meeting, noting it was truly a planning issue, so was appropriate to discuss at that time. He said he would provide Board members with a better idea of the Historic District Committee's viewpoint concerning the extension of the district boundaries at that meeting.

Chair Roberts said feedback from the Town Attorney and perhaps the Town Council would also be useful.

Mr. Campbell noted the letter from Chair Roger Jacques concerning the Historic District Committee's perspective.

Chair Roberts spoke with Board members about the proposed build-out analysis to be done by the Strafford Regional Planning Commission. He said this was a full proposal, and in no way represented a compromised buildout analysis. He said the GIS analyst would be glad to talk to Board members concerning it at the next Zoning rewrite meeting.

Chair Roberts noted again that he felt very vulnerable that this analysis had not been done when the Master Plan was done, and then the Zoning changes were proposed. He noted there were various perspectives concerning whether the revised Conservation Subdivision approach resulted in fewer lots, or more lots, and said it was important to provide some degree of clarity on this.

Mr. Kelley said he agreed with this, and now had a better understanding of the scope of work. But he said he still wanted to know exactly what soils information would be used for the analysis.

Chair Roberts said the issue was that if they used anything other than the soils information used for the Master Plan, there would be no clue as to what the effect of using the Conservation Subdivision approach was. There was discussion about how the analysis would be done.

Chair Roberts said the GIS analyst had done this kind of analysis for other local communities, and had also done many of the recent GIS maps for Durham.

Mr. Kelley said he did not question that this would be a quality product, but said he would like to know before hand whether the soils information that would be used would be the older SCS County Soil Survey information, or the more recent, yet to be published SCS County soil survey information.

Chair Roberts said this and other questions from Board members would be answered completely by the regional planning commission.

Mr. Campbell noted a recent application that had first used SCS County soils mapping information, and had since used HISS mapping. He said the applicant had picked up a good amount of square footage as a result of the HISS mapping, because the actual soil depth was greater than had been expected from the County soils information.

Councilor Grant MOVED to adjourn the meeting. The motion was SECONDED by Amanda Merrill, and PASSED unanimously.

Meeting adjourned at 9:15
CHECK WITH JIM ON THIS

Victoria Parmele, minute taker