

DRAFT

DURHAM PLANNING BOARD MINUTES WEDNESDAY, OCTOBER 27, 2004 TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL

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

MEMBERS ABSENT: Richard Ozenich; Annmarie Harris

OTHERS PRESENT Town Planner Jim Campbell

I. Call to Order

II. Approval of Agenda

Councilor Grant MOVED to approve the Agenda as submitted. The motion was SECONDED by Amanda Merrill, and PASSED unanimously.

III. Approval of Minutes – July 28, 2004

Councilor Grant MOVED to approve the July 28, 2004 minutes. The motion was SECONDED by Amanda Merrill.

Last page, 3rd paragraph, should read “Ms. Merrill said it was important that, even with disclaimers, the map not be misleading.”

Page 4, 2nd full paragraph, should read “.....three unrelated occupants”.

The motion PASSED 4-0-2, with Nick Isaak and Councilor Grant abstaining because of their absence from the July 28, 2004 meeting.

IV. Report of the Planner

Mr. Campbell said Town staff had met with representatives of the University and SEA Consultants on October 21st for the kickoff meeting of the Main Street Enhancements project. He said the next meeting would be held on November 2, 2004.

Mr. Campbell said the Economic Development Committee had met the previous Friday. He said the Committee had received an update on the Durham Business Park, and also discussed the Town Hall/Library/Town Center locations, including the Town Hall site, and the Gangwer property at 17 Madbury Road, which was listed as a possible site in the Master Plan.

He said the Committee also discussed the tax rate and tax base growth for 2004, and noted that the tax base growth for the year was 1%, while the Budget figure was 2.5%. He said that hopefully the Committee could come up with some ways to increase this in the long run.

Chair Roberts asked if Mr. Campbell had brought the Committee up to speed on the student housing presentation presented to the Planning Board at the previous Board meeting, and Mr. Campbell said he would do this at their next meeting.

Mr. Campbell provided details of his monthly meeting with University Planner Doug Bencks, noting the various upcoming University projects they discussed. He also told Board members that the University's Board of Trustees had approved the Campus Master Plan, and said the Town would be getting a copy of this.

Mr. Webb asked what stage the cogeneration facility construction was at, and Mr. Campbell said that all the permits had been obtained, and construction had started.

Ms. Merrill asked if the Economic Development Committee had developed any recommendations regarding the Town Center concept.

Mr. Campbell said there was mainly discussion on this, but said the general feeling on the Committee was that it would like to see the Town Center moved to the downtown area, in order to draw more people there, and that the Town Hall site should be available for economic development.

Chair Roberts noted that the present Town Hall site was the real town center, historically speaking.

Mr. Campbell said the concern about the Town Hall site was that there was not sufficient space there, unless it included Smittys.

- V. **Acceptance Consideration of an Application for an Amendment to a Conditional Use Permit** submitted by Sandy Brook Corporation, Durham, New Hampshire, to change the age restriction on elderly housing from 62 to 55 (for their property). The property is located at the intersection of Mill Road and Packers Falls Road, is shown on Tax Map 13, Lots 14-14 & 14-15, and is located in the Residence B Zoning District, as a Planned Unit Development.

Steve Schuster, representing Sandy Brook Corporation, provided introductory remarks about the company's request to amend its Conditional Use Permit for the Planned Unit Development/Elderly Housing project. He said a conditional use permit was received from the Planning Board in 2003, and also said that the Master Plan for the entire Planned Unit Development was approved by the Town Council. He provided details on the various elements of the development, as laid out in the original Master Plan.

Mr. Schuster noted that he had reviewed the minutes for the Planning Board meeting where Duane Hyde, the former Chair of the Planning Board, had pointed out that Phase I of the development had the 55+ requirement, and had asked why Phase II had the 62 age requirement. He noted that at the time, developer Jack Farrell said it was his experience that 62 was appropriate. Mr. Schuster explained that the senior market had changed somewhat, so the 55+ requirement was now more appropriate.

He noted that a range of differentiated elderly options were already provided at the development, and said the company had determined that 55+ was the highest and best use for a portion of it. He said the 55+ category was tailored to a growing “Active Adult” segment of the population, and noted the market on this had been well tested.

He noted that in a 55+ community, 80% of the residents had to be 55 or older, leaving 20% with no restriction, whereas in the 62+ category, 100% of the community had to meet that restriction. Mr. Schuster said his company was not looking for the 20%, and said the company had confidence that the market would support that 100% of the 50 units in Phase II would be occupied by 55+ residents. He said that would be reflected in condominium documents.

Mr. Kelley asked for clarification as to the owner of record, and Mr. Schuster said the applicant was Sandy Brook Corporation, who purchased the property from the _____ Trust. He provided details of the present ownership of the different portions of the development. Mr. Kelley also asked if under the present covenants, whether school age children were prohibited, and if not, whether that provision would be added to the covenants if the Planned Board permitted the applicant to drop the age to 55+.

Mr. Schuster said his company would be open to including an age restriction, if they could do that legally.

Mr. Campbell noted, as Mr. Schuster had, that the age 62 designation required that both people had to be at least 62, but the 55+ designation required that only one person had to be at least 55. He said he was not sure that the Town could require this, and there was discussion about this.

Councilor Grant asked Mr. Schuster to pursue that legal question, and also asked Mr. Campbell to check on it with the Town Attorney.

Mr. Schuster said it was interesting to note that of the 22 residents now in Phase I now, for 55+ residents, there were no children. He again said he would have no objection to adding the age restriction if it was legal.

Councilor Grant explained to members of the public that the attractiveness of approving senior housing developments of this type was that they did not add children to the schools, which were the most expensive part of Town operations. He said that without that tax benefit, elderly housing was not as attractive to the community.

Mr. Schuster noted that the market differentiation he was making had a higher assessed value, and also noted the entire project was fully taxed.

Councilor Grant asked if the prices for these units would approach \$345,000.

Mr. Schuster said the first two units would be marketed at about \$298,000, as loss leaders to kick start the community, and said the other units would be marketed at around \$329,000-349,000

Chair Roberts noted that the development was located in an isolated portion of Town, and asked Mr. Campbell whether there were any abutters who might be influenced, if children were added to the development.

There was discussion about this, and Mr. Campbell said there were residential areas around it where there were children, and said he did not see a problem for these abutters.

Mr. Webb asked under what portion of the Zoning Ordinance the Board was allowed to amend an existing Conditional Use permit. He said he saw no mention of this in the Ordinance.

Mr. Campbell said the application was being treated as a conditional use permit, but didn't need to go through the site plan, just the Conditional Use aspect, given that no building would take place and it was an approved use.

Mr. Webb asked whether, given that this was a new application for a conditional use permit, the application was complete.

Mr. Campbell said they weren't dealing with any of the physical properties of the development, and were only dealing with the age restriction. He said the Town Attorney said there wasn't a problem with amending the application. He said this question had come up twice, including recent concerns expressed by Eileen Fitzpatrick. He said he had asked Ms. Fitzpatrick to provide her arguments in writing so the Board could have these.

Ms. Merrill asked for clarification about what the concerns were.

Mr. Campbell said this had to do with fact that the authority to amend a Conditional Use permit was not spelled out in the Zoning Ordinance. But he noted that due process was being followed: abutters had all been notified, and there would be a public hearing.

Mr. Webb said he was very concerned about the precedent that could be set by this application for an amended Conditional Use permit. He said this could be the first step of going down a slippery slope with amending conditional use permits, especially with regard to elderly housing. He said he didn't see a problem with this application in particular, but said he was concerned that they would see more of these amendment requests come in, and the age requirement would be reduced, as the market became flooded. He said he was

concerned that in a college town, this development could end up as student housing, and said he therefore wanted to make sure that the process was followed very carefully.

Councilor Grant said that the problem was that the Ordinance didn't make provision for amending a conditional use permit.

Chair Roberts said that to him, the key factor was whether this was an approved use.

Mr. Webb said it was a conditionally approved use, and the Board was being asked to change to a different conditionally approvable use.

Chair Roberts said the applicant had a complete application, and only the age rider had changed.

Mr. Webb said it could change to another use, and also noted that the Town had pushed elderly housing, with the Zoning Ordinance rewrite. He said his concern was that elderly housing was being marketed so heavily, by the Planning Board and developers, that the market would sooner or later be flooded, and other developers would be coming back to the Board asking for amendments like this.

Councilor Grant said this discussion, disregarding the application before them, indicated that the Board needed to think about whether it wanted to limit senior housing in the Zoning Ordinance to 62 or older.

Chair Roberts said he totally agreed with that, and said the issue was what the definition in the ordinance was; what the Table of Uses said about the use; and whether what was proposed was legal under the Ordinance.

Councilor Grant said it was legal under the Ordinance, if there was a procedure for amending an original approval.

Mr. Webb said the key issue to him was whether this was an acceptable application, and if there was a process for amending the application.

Mr. Campbell asked if there was anything Mr. Webb felt was not in the application, given the request. He again said there were no proposed physical changes to the site, but said if Mr. Webb felt that something was missing from the application, he should request that information and have the applicant come back to the next meeting.

Chair Roberts said the Board needed some specific indication of what was missing from the application.

Councilor Grant said his concern was where in the Zoning Ordinance it said the Board could consider revisions to a CUP, after it had been approved.

Mr. Campbell noted the Board had previously amended site plan review applications and subdivision applications, and said there was nothing spelled out in the Ordinance concerning this either.

Chair Roberts said he agreed with Mr. Campbell that if there was missing information, the Board should request it.

Mr. Schuster said concerning the slippery slope, the test he would use was, where he could it go from there, other than 55+ or 62+ age categories. He said there was no other place for him to go. There was additional discussion about this.

Mr. Campbell said if the applicant came back and said he could not market to elderly people, he would have to come back with a new application, because the elderly housing use would no longer be valid. But he said at present, they were still under the elderly housing use category.

There was discussion that the present definition of elderly housing in the Zoning Ordinance covered both 55+ and 62+ age groups. Mr. Campbell said the Board might want to take a look at this, and treat them as separate uses.

Mr. Webb said his concern was the precedent the Board might be setting for any conditional use permit, in using an amendment to make the process easier. There was additional discussion about this.

Mr. Campbell suggested that Board members go through the provisions concerning conditional use, and look at these concerning this change in certain aspects of the use.

Ms. Merrill noted that if the Board decided to accept this application, the next step was the public hearing, where abutters and others could come forward if they had problems with the change, and the Board would then consider these.

Mr. Kelley said as matter of practice, he agreed with Mr. Webb, and said he would hope the Board would require the applicant go through criteria in 175: 23 C, the criteria required for consideration of a conditional use permit.

Mr. Webb said he simply didn't want to see this referred to as an amendment, and accepted as an amendment, because there was no such thing in the Ordinance. He also said that if possible, he would like to change the Agenda wording by striking the word "Amendment".

Councilor Grant said that before accepting the application, the Board needed to answer two questions, based on clear guidance from the Town Attorney: a) did the Ordinance specifically authorize an amendment to be granted to a previously issued permit; and b) could a restriction be made on the age of occupancy. He said the only thing that worried him was that elderly housing could become a burden on the Town in the future, if it turned out children were allowed in the developments.

Mr. Campbell said although the Town could not require the age restriction, the applicant could say it was willing to do this. But he noted that down the road, there might be problems with this if the property was sold.

Chair Roberts noted that Fitts Farm had language in its charter which defined what ages could and could not live at the development. He also said that as he read the definition for elderly housing, the prior conditional use permit wording concerning age 62 had no validity, because this was not defined as elderly housing; - the definition was defined as 55 years of age and older.

Mr. Campbell said Mr. Kelley had made a good point, and said the applicant could be asked to go through the criteria under 175: 23 C, the provisions concerning conditional use permit.

Mr. Webb agreed that would be the thing to do, and said he would like to see a complete application.

Mr. Campbell noted that this would not include a new site plan, since nothing was being built, but agreed it was reasonable that the applicant be asked to answer the other questions.

Councilor Grant noted that the 1999 Zoning Ordinance specified 55+ as elderly housing, so it appeared that the applicant's request was grandfathered, in terms of the Board being able to approve it.

Mr. Webb said that in other words, the original CUP set conditions that were more restrictive than what was in the Ordinance.

Mr. Isaak asked what the Board's rationale originally was for requesting the 62+ age limit.

The applicant read the minutes that explained the rationale for this. He said the people coming in at the time were older, and reflected the market, and said the applicant was now asking for a use that reflected the current market.

There was discussion about what the applicant would be asked to provide.

Mr. Webb said he could accept the application with the understanding that the applicant would provide the Board with additional information. He also said he wanted the word amendment stricken from the application.

Councilor Grant said this should happen unless the Town Attorney provided them with legal guidance that the conditional use permit could be amended. He said he was comfortable with this.

Mr. Isaak said the Board wanted to be sure it was not setting the wrong precedent, so perhaps the Town Attorney could provide guidance to the Board as to the proper way to do this.

Mr. Campbell said he had asked the Town Attorney this. But he said he would ask him specifically, absent amendment language, what the process should be, and not just for conditional use permits, but also for site plan and subdivision review.

Chair Roberts said it strained the imagination how the Board would have the authority to resist enablement from its own Ordinance.

Councilor Grant said he would like to see information on whether the proposed use would have negative fiscal impacts on the Town. He said he would like to see the information the applicant had referred to concerning assessed values, and how that compared with the average assessed valuation in the Town. He said the Master Plan in 1999 required \$465,000, with no restrictions, in order to make it tax neutral.

Mr. Schuster said he didn't think there was data on this, and noted that elderly housing didn't relate directly to that average figure because there were no children involved. Councilor Grant asked if the applicant could provide information on other elderly housing developments in the region – for example, how many children were usually found in 55+ communities.

Mr. Campbell said if the applicant could get an idea of how many 55+ in the region had kids in the region, the average number of kids, and the average price of a similar development, the Board would be able to help determine whether there was a negative or positive for the town.

Mr. Schuster said he would also try to show there was a greater value to the Town from the 55+ category than from the 62+ group, based on what amenities they could put in, and what the market was.

Councilor Grant noted that when the fiscal analysis was done, community water and sewer would be deducted, and said he had a feeling that the income to the Town would well outweigh the probability that there were school age children living in the development. But he said he would like to have information on this.

There was discussion as to how to proceed concerning the application. Mr. Webb said he would prefer to accept the application in order to assure the applicant that the additional time he would have to spend providing responses would move the application ahead.

Kevin Webb MOVED to accept the application for the Conditional Use Permit submitted by Sandy Brook Corporation, Durham, New Hampshire, to change the age restriction on elderly housing from 62 to 55 (for their property), and ask the Town Planner to submit to Mr. Schuster letter requesting additional information: 1) answer the criteria in 175 23C 1-8, especially fiscal impact; 2) propose language for the condominium declaration. The motion was SECONDED by Richard Kelley.

Mr. Campbell said he would also contact the Town Attorney to get clear guidance on whether the ordinance authorized the amendment to the conditional use permit, and to look

at whether the Town could restrict occupants under 55 years of age from living at the development, specifically, anyone under 18 years of age.

Mr. Campbell asked if the Board wanted to have the public hearing on this in November. There was discussion about this, and it was agreed that the hearing should be held at the December 15th meeting.

The motion PASSED unanimously 5-1, with Richard Kelley voting against it.

Mr. Webb moved to amend the Agenda to read “Acceptance Consideration for an Application for a Condition Use Permit.” The motion was SECONDED by Mr. Kelley

Mr. Webb noted again that there was no mention of an amendment process for a conditional use permit in the Zoning Ordinance.

Chair Roberts pointed out that in the deliberation on the application by the Board, they had discussed the amendment issue, so there was no need to change the Agenda itself.

Mr. Kelley said although he could not support this motion, he would want the Agenda to read correctly the next time it came before the Board, because there was no guidance for dealing with an amendment to a conditional use permit.

Mr. Isaak noted that the minutes would reflect that the fact that the Board had deliberated on its concerns about the word amendment.

The motion FAILED 2-4, with Nick Isaak and Kevin Webb voting for the motion.

VI. Other Business

A. Old Business

B. New Business

Request for Technical Review of kitchen expansion for property at 1 Stagecoach Road, Hickory Pond Inn

Chair Roberts said his prior experience on the Board was that it was extremely healthy for the Board to have some review on site applications that might have general relevance to the community. He said they were losing a major opportunity for Board members to understand what a site inspection was. He also said they had also shut off their interface with members of Town staff who gave opinions on these applications. He noted he favored the present application.

Councilor Grant said that the ideal thing when the Board sent an application out to technical review was to have the Committee's recommendations come back to the Board, and then the Board would decide whether to approve the application. But he said that in fairness to the applicants, they had already been before the ZBA a few times, and said he would therefore hope the Board would not delay action on this.

He said if the Board could get the technical review back and could take action on their report at the November 10th meeting, he would feel comfortable with that process. But he said it would not be fair for the applicant to have to wait until December.

Mr. Campbell said taking action on November 10th wouldn't be possible, given the time needed to advertise the public hearing.

Councilor Grant said he didn't have a problem with the technical review process, but said he would like to change the last part of the process. He noted that there were some applications that the Committee could approve, but there were others like this present application. He said he was in support of the applicant's request, but said that some controversial matters were involved, and the Planning Board was supposed to resolve those issues. He noted the Technical Review Committee was supposed to look at the technical aspects of the application.

Councilor Grant suggested that when the date was set for the technical review of the application, Planning Board members should be invited to attend as observers. Chair Roberts said that serious planning issues tended to get glossed over if the Board didn't have input on this, and said the Board used to know a great deal more than it did now.

Mr. Campbell said if the Board didn't want to grant this authority to the Committee to review application, it didn't have to. He said the Board was allowed to do this if they wanted to. But he noted that there were times when it was a great idea to be able to delegate to the Committee.

Mr. Isaak said in this case because it wasn't altering the site, did it make sense.

Chair Roberts said he heard the discussion at the ZBA meeting, concerning what the scope of uses was for the site. He said his position was that the Board was getting no exposure to information on a site plan review in order to be able to discuss these kinds of issues concerning an application. He noted that much of the zoning rewrite involved issues that were administered in site plan review.

Mr. Campbell said there was an existing kitchen, and the applicant wanted to build another kitchen at a different location on the property. He asked what the issues were that the Board would want the Technical Review Committee to address.

Mr. Kelley said the only concern he had was the possible effects of the proposed kitchen on the existing septic system.

The applicant said they had the proper septic system approvals from the State and the Town.

Mr. Campbell noted that the kitchen would have its own separate septic system.

Ms. Merrill asked if the Technical Review Committee made site visits, and also asked if the Board could visit the Inn. There was discussion about this.

Councilor Grant noted that the reason he suggested that the Planning Board should have a role in reviewing this application was that the ZBA had, in its ruling concerning a variance request for the Inn, pointed out that restaurants were not a permitted use in the zone the Inn was located in. He said this would not be a commercial restaurant, and there was discussion about the existing conditional use permit requirements.

The applicant asked what the Technical Review Committee's purpose was, and Chair Roberts described this. He said that because the Board's had gotten bogged down, the authority had been delegated to the Technical Review Committee at the Board's request. But he said that having sat on the Board, with and without a Technical Review Committee, he knew a lot more when there was no such Committee.

Mr. Kelley said it was his understanding that the Inn had an existing kitchen, and breakfasts were prepared, but the applicant wanted to create a larger kitchen so lunch and dinner could be served to guests, on the same footprint. He was told that was correct. There was discussion about whether meals could be served for functions.

Kevin Webb MOVED to forward the application for a kitchen expansion for the Hickory Pond Inn, located at 1 Stagecoach Road, to the Technical Review Committee, and have the Committee report back to the Planning Board. The motion was SECONDED by Councilor Grant.

Mr. Campbell asked if Board members wanted to be invited to the Technical Review Committee meeting.

Councilor Grant said yes, and also said he would like to see a different procedure in the future.

Chair Roberts said he concurred, and both he and Councilor Grant noted they had no issues personally with Mr. Campbell concerning this process.

Councilor Grant noted that the Planning board met in the evenings, while the Technical Review Committee met at mid-day, when it was harder for Board members to attend.

Mr. Isaak said that Mr. Campbell was the Board's representative to the Technical Review Committee, so the Board did have input on the Committee.

Chair Roberts said he believed it was an abrogation of the Board's responsibilities in deferring applications to the Technical Review Committee. He said that when the Board did it the other way, Board members knew a lot more than they did now.

The motion PASSED 5-1, with Chair Roberts voting against it.

2. Zoning Ordinances Re-write Update and Concentrating Efforts

Board members agreed they would go over the Zoning rewrite the following Wednesday, November 3rd. Mr. Campbell said he was in the process of going over the punch list with Mark Eyerman. He said the shoreland and wetlands overlays were done, and said he was waiting on the aquifer overlay. He said the historic district overlay was done, and noted that the Historic District Commission had decided to pull back concerning expanding the boundaries of the district, for the time being. He also said the Table of Uses had been updated.

VII. Approval of Minutes- No new minutes

VIII. Adjournment

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

Adjournment at 9:00 pm

Victoria Parmele, minutes taker