

D-R-A-F-T

**DURHAM PLANNING BOARD
WEDNESDAY, NOVEMBER 9, 2005
DURHAM TOWN HALL – COUNCIL CHAMBERS
7:00 PM**

MEMBERS PRESENT: Chair Kelley; Kevin Webb; Arthur Grant; Richard Ozenich; Stephen Roberts; Councilor Jerry Needell; Nick Isaak

ALTERNATES PRESENT: Bill McGowan; Susan Fuller; Lorne Parnell

MEMBERS ABSENT: Councilor Diana Carroll

I. Call to Order

II. Approval of Agenda

Arthur Grant MOVED to approve the Agenda as submitted. The motion was SECONDED by Councilor Needell.

Chair Kelley said that under Other Business, the Board should discuss the status of the Town Council's deliberations on Section B of the proposed changes to the Zoning Ordinance.

The motion to approve the amended Agenda PASSED unanimously 7-0.

III. Approval of Minutes

September 14, 2005

Councilor Needell MOVED to approve the September 14, 2005 Minutes. The motion was SECONDED by Richard Ozenich, and PASSED 6-0-1, with Stephen Roberts abstaining because of his absence from the September 14, 2005 meeting.

September 28, 2005

Page 9, 8th line, remove the word "Bob". Same paragraph, should read "fishway".

Councilor Needell MOVED to approve the September 28, 2005 Minutes. The motion was SECONDED by Nick Isaak and PASSED 6-0-1, with Kevin Webb abstaining because of his absence from the September 28, 2005 meeting.

IV. Report of the Planner

- Mr. Campbell said he had met with University Planner Doug Bencks on Nov 7th, and they discussed the Town's CIP, upcoming University projects, and the proposed amendments to the Zoning Ordinance.

He said the University wanted to renovate DeMerritt Hall, but realized it would have to be torn down, so planned to rebuild it on the same footprint. He noted there was an antenna on the atrium of that building that took readings of the sun, and said it would be moved out to a location near the Dairy Bar.

Mr. Campbell noted that Mr. Bencks was at the site visit at the New England Center concerning the Verizon cell facility application.

- Mr. Campbell said the Town Council was continuing its deliberations on the Zoning Ordinance. He said he would send Board members a list of scheduled dates for the ongoing deliberations as soon as he received it.
- Mr. Campbell said there would be one Planning Board meeting in November, and one meeting in December.
- Mr. Campbell said he had recently met with Appledore Engineering concerning proposed work on the Middle School, and provided details on this. He also said he had met with Jesse Gangwer concerning his property in the RB district. In addition, Mr. Campbell said he had recently spoken with someone possibly looking to purchase the Cumberland Farms property.

V. Acceptance Consideration of an Application for Boundary Line Adjustment submitted by Geoff Sawyer, Durham, New Hampshire, on behalf of Great Bay Animal Hospital, LLC, Newmarket, New Hampshire to change the boundary line between two lots. The properties involved are shown on Tax Map 6, Lots 11-7 and 11-8, are located at 27 & 31 Newmarket Road respectively and are in the Residence C Zoning District.

Chair Kelley said the applicant was requesting that this application be withdrawn.

Mr. Campbell provided details on this. He said the application was intended to make the kennel conforming, but resulted in making the parking lot for the facility nonconforming.

VI. Public Hearing on a Site Plan Application submitted by Celco Partnership d/b/a Verizon Wireless. The application is for a Personal Wireless Service Facility located on the roof of The New England Center on the University of New Hampshire campus. The property is shown on Tax Map 2, located on 15 Strafford Avenue, and is within the Residence A Zoning District.

Mr. Webb MOVED to open the public hearing. Councilor Needell SECONDED the motion, and it PASSED unanimously 7-0.

Mr. Grant said he would recuse himself so that one of the alternates would have the opportunity to participate in deliberations.

Chair Kelley said Lorne Parnell would substitute for Mr. Grant on this matter.

Tom Hildreth, Attorney for Verizon, noted the site visit held that same day with Board members. He said there had been some minor changes made to the site plan based upon the

requests that had been made, and read from a letter he had developed that covered these details.

He said Verizon acknowledged that it expected that a condition of approval of the site plan would be to provide a two-year maintenance bond as well as a removal bond.

Attorney Hildreth said Verizon had responded to the staff report suggestion that the Board might want to have independent consultants verify the radio frequency and noise reports. He noted Verizon had already explained that it felt this was unnecessary, and he provided technical details on this.

He said the Board had asked some good questions at the site visit, including a question about what kind of material would be used to screen the antennas. He said he didn't yet have the answer to some of the questions, but noted that the Board's concerns in some ways overlapped those of the University. He said there were multiple layers of review for the process, including oversight by UNH's project manager.

Attorney Hildreth suggested that the Board could approve the application with the condition that the details still to be resolved would be brought back to the Board later.

There were no comments from members of the public. Chair Kelley asked Board members if they had any questions.

Chair Kelley said that questions raised by the Board concerning the application were very specific and technical, and it was understood that the answers to these questions weren't readily available at present. He said he agreed there were processes in place for the Board to be assured the antenna tower would not come down in a windstorm, noting that Doug Bencks of UNH and Tom Johnson, the Town's Code Enforcement Officer, would be reviewing this.

Chair Kelley said the structural attachment to the building would be a concern, and said Mr. Johnson would be made aware of this. He also said that especially given the small amount of land area on top of a portion of the roof, he suggested that the applicant investigate whether there were any OSHA requirements regarding the safety of maintenance personnel accessing that roof, specifically, the cooling vents.

Chair Kelley asked if the cable trays Verizon was providing were adequate for future providers to utilize, or whether additional trays would have to be installed.

Attorney Hildreth said the vertical cable trays would carry the cable of all three carriers, and explained that at the bottom it split to go to the shelters of each carrier. He said the cable would be carried separately at the top as well, to go to the antennas for the different carriers. He said he couldn't imagine there would be room in these trays to hold the cable of another carrier, and he provided additional details on this.

Chair Kelley asked if the vertical tray would be large enough to house other providers to the first roof level, and there was discussion about this.

Chair Kelley asked if another provider came in, whether it would need a similar sized shelter for its equipment on the lower roof.

Attorney Hildreth said the structure would probably be smaller because Verizon tended to use larger structures than other carriers. He also said that no other company would utilize the Verizon shelter.

Mr. Webb asked if Verizon's facility would have a generator.

Attorney Hildreth said it would, but not like the one at Foss Farm. He said Verizon would tie into the generator used by UNH. He provided additional details on this.

Mr. Ozenich noted that Verizon would replace the lower roof where the shelter was, and asked if this had to be noted as part of the site plan review process.

Mr. Campbell said UNH and Mr. Johnson would check on this, and that it could be noted in the conditions of approval.

Attorney Hildreth said the lease with the University said that Verizon would do this work.

Mr. Webb said the only aspect of the cell facility that would impact the Town would be its visibility from a distance. He noted that all of the pictures of the facility were taken up close, and asked if any had been taken at a greater distance.

Chair Kelley noted that he had suggested the idea of having the air conditioner face the woods.

There was discussion about the extent to which the antennas would be visible, and it was generally agreed that they would be hard to see.

Richard Ozenich MOVED to close the public hearing. The motion was SECONDED by Kevin Webb, and PASSED unanimously 7-0.

Chair Kelley said there was time to deliberate on the application that evening. The Board then reviewed the draft Findings of Fact and Conditions of Approval for the application.

Chair Kelley said the most recent site plan drawings dated November 8, 2005 should be included in the Findings of Fact. He also said they should reference the letter provided by Mr. Hildreth that addressed outstanding issues.

Chair Kelley said a Finding of Fact should be that there were no members of the public who spoke for or in opposition to the application.

He asked when Verizon hoped to begin construction on the facility, noting that the Conditions of Approval required that these conditions would be met within six months.

Mr. Valez said construction would start well before six months was up.

Mr. Webb received clarification that discussions of the proposed cell facility with UNH were well along. Mr. Hildreth provided details on this.

Mr. Webb noted Verizon's request for a waivers from federal and state approvals. He asked for details on this.

Mr. Hildreth said the FCC required a license to operate generally, and was not a site-specific issue. He said the FAA required that the location of the facility be registered, for radio frequency purposes.

Mr. Webb said Verizon should include a reference to required permits. He asked if the FAA permit had been obtained.

Mr. Valez explained the FAA's requirements concerning this, and the process Verizon had to go through with the agency. He said Verizon would be notified through the FAA web site if everything were in order.

Mr. Webb said the Town should get a copy of the FAA notification, and Mr. Valez said it would be available within six months.

There was additional discussion about permits that were needed. Chair Kelley received clarification that Mr. Johnson would need to issue a building permit.

In answer to a question from Chair Kelley, Attorney Hildreth provided details on provisions in the lease concerning future removal of the structure, including the removal bond.

Chair Kelley asked if Attorney Hildreth and Mr. Valez had read the Findings of Fact and Conditions of Approval and were satisfied with them.

Attorney Hildreth said they had, and noted that condition #5 had already been satisfied.

Kevin Webb MOVED to approve the Findings of Fact and Conditions of Approval, as amended, for the Site Plan Application submitted by Cellco Partnership d/b/a Verizon Wireless for a Personal Wireless Service Facility located on the roof of The New England Center on the University of New Hampshire campus. The motion was SECONDED by Councilor Needell, and PASSED unanimously 7-0.

VII. Review By-laws/Rules of Procedure/Site Visits – Visit sites of some recently approved subdivisions

The Board began a systematic review of the Planning Board Bylaws/Rules of Procedure.

Mr. Roberts spoke about II. C. concerning the duties of the Secretary of the Planning Board, and said the Board might want to add the following language "...and shall see that minutes of site inspections shall be taken, and provided to the Board."

He said he had especially liked the minutes Amanda Merrill had taken for the Irving application and found them very useful, noting they were detailed and covered material information not necessarily covered at presentations at Board meetings.

There was discussion as to whether site inspection and site walk were the same thing.

Councilor Needell said perhaps this should be put on page 6, under V. Records, since a site walk was a public meeting. There was discussion about the proper section of the Bylaws to address this

Mr. Grant questioned the use of the month of April in Section II. A, B and C, and Mr. Campbell said it should say May.

There was discussion on the use of the word "Chairperson" throughout the Bylaws. The Board decided that this word should remain.

Mr. Campbell said he thought the Board needed to change II. E concerning the role of alternate Planning Board members. He said that according to the Town Attorney, alternates could join in the discussion until the public hearing closed, and should no longer speak during deliberations, so were just like members of the audience at that point. He noted that in the past, the Board had allowed alternates to join in deliberations.

Mr. Parnell said this point had been reinforced at the recent State Planning Conference.

Chair Kelley explained that the key issue was the possibility that if an alternate Board member made a persuasive argument, this could influence the vote. But he said that to him, what the Town Attorney was telling the Planning Board seemed counterintuitive.

Councilor Needell said this clearly was a change in policy. He said alternates on the Planning Board had participated in deliberations, and also noted that the ZBA allowed this. He said it had been a consistent policy in Town to do this, so the Board would be changing this if it changed the Bylaw. He said he understood the argument for doing this, and it made sense. But he said he wished there was a better justification for making the change.

Board members said they would like to see court cases where this had been an issue.

Mr. Webb noted that when he was an alternate on the Planning Board, he sometimes voiced his opinion and may, because of his outspokenness, have influenced the decision of another Board member. But he noted that most of the votes where he had done this had been unanimous.

Ms. Fuller said she could see that if an alternate raised a new point of view, this might be problematic to a party who was aggrieved, and could put the Town in a somewhat weaker position.

Mr. Webb said he didn't see any real loss by not allowing alternates to be part of deliberations, noting they were able to participate earlier, and helped get everything out on the table.

Chair Kelley said his concern was that he didn't want the Board to do anything that put the Town in legal jeopardy.

Councilor Needell asked if there was anecdotal information from other towns concerning this issue.

Mr. Campbell said most towns allowed alternates to participate in discussions before deliberations began, and some allowed alternates to actually participate in deliberations.

Councilor Needell said there was also the issue that if a Board member, whether a regular member or an alternate, hadn't been at the meetings and showed up when there was deliberation on an application, he/she couldn't participate. He said part of the warning here was that the Board had to be very careful. But he said he felt a well-informed alternate was a bonus, not a detriment.

Chair Kelley suggested that the Planning Board should go through the Bylaws/Rules of Procedure, and try to get to the point where it could vote on the entire document. He said if this was not possible, the Board could go back and vote up or down on proposed individual changes.

Mr. Webb said perhaps the ZBA needed to be aware of this issue, noting it allowed alternates to speak right up to the time when the vote was taken. He also said he wondered if this was something that perhaps the Town Council should look at.

There was additional discussion as to whether court cases on this issue could be cited.

Mr. Roberts said he thought there were two problems with Section II E. of the Bylaws concerning alternates. He suggested that the second sentence of the section should read "Alternates should attend and participate in discussions at all Board meetings, but shall not be permitted to introduce a motion, second a motion, participate in deliberations, or to vote unless appointed by the Chairperson to fill the vacancy...."

There was discussion as to whether a Board member should be allowed to vote if he/she had not been at previous meetings on an application.

Mr. Campbell noted that recent case law said that if a Board member missed a meeting on an application, but reviewed the tape of the meeting, he/she still shouldn't participate in deliberations on the application.

Chair Kelley said he felt that during the public hearing process, there was a lot of latitude for Board members, including alternates, to ask questions, make statements, and put an argument out there.

There was detailed discussion on III. C. Disqualification. Mr. Campbell read RSA 673 concerning this.

Mr. Webb said it sounded like this was only advisory, and someone asked to recuse himself could refuse to do so, unless the Board adopted something else.

Concerning Section III. Meetings, Chair Kelley said that other people in addition to himself could ask to call a meeting, as far as he was concerned.

Mr. Ozenich said he didn't see anything in the Bylaws concerning the quorum of five votes required for conditional use applications.

Councilor Needell said he thought it was in the Zoning Ordinance. There was discussion about this, and it was agreed this didn't need to be addressed in the Bylaws.

There was additional detailed discussion about the issue of disqualification, and what RSA 673 really said concerning this issue. It was clarified that the local regulations could expand upon the RSA. The Board agreed that no changes would be made to the Bylaws concerning disqualification.

Concerning III. D Order of Business, the Board agreed that the sentence "Although this is the usual order of business, the Board may wish to hold public hearings first in order to accommodate the public" should be removed.

Concerning III. E. Attendance, there was discussion on what "unexcused absence" included. Mr. Campbell said it referred to a situation where a Board member decided not to show up and didn't call.

There was discussion about what the policy was if several times, a Board member called and said he/she was not coming to the meeting. It was noted this hadn't been a problem for the Board recently. There was discussion as to whether to take out the word "unexcused", but it was decided to leave it in the Bylaws.

There was discussion about the wording of III G. Communications. Mr. McGowan asked if the language in the second sentence of this section should be stronger than simply saying "Discussions outside of these meetings by Planning Board members (including Alternates) should be discouraged as much as possible."

Mr. Webb suggested the following wording for the first sentence of this section:
"Discussions on applications should only be held at public meetings/public hearings."

Mr. Campbell noted that this wording limited the ability of two Board members to discuss an issue.

Councilor Needell noted that the State was grappling with the whole issue of communications, in terms of documents, emails, etc.

Concerning IV. 3 regarding site walks, it was agreed the Bylaws should say "Site walks should be performed prior to the public hearing", instead of "Site walks should be performed before the start of the public hearing."

It was noted that this same section should mention that minutes of site walks must be maintained.

The Board discussed the proper role of the public at site walks, and the rules concerning this.

Mr. Roberts noted that at times when members of the public attended a site walk, it became difficult to get information on an application from the professionals that were there. He said members of the public were then asked to stop talking temporarily so the business of the site walk could continue.

Mr. Grant said he thought this wording should be left as it was, and handle this according to the particular situation.

Chair Kelley said since the site walk was a meeting of the Planning Board, the Chairperson could say there had been enough public comment, and the meeting had to continue.

It was agreed there would be no changes to this section of the Bylaws.

Mr. Grant said he thought the Bylaws should say that reconsideration of a decision would be undertaken at the next meeting of the Board. There was discussion about this.

There was detailed discussion about the ability to request a reconsideration of a decision made on an application, and when this might occur. It was noted that this was quite a rare occurrence. It was decided the Bylaws concerning this should probably not be changed.

Concerning IV. C. Public Hearings, Chair Kelley noted that he didn't always call for a motion to open the public hearing, although he was supposed to do this.

There was discussion about possible ways to get the public to focus their words more at the public hearing, although the Board didn't want to be too strict about this. There was discussion as to whether doing this was even appropriate.

Chair Kelley said it was important that the Board was comfortable with being looser than what was specified in the Bylaws concerning this for public hearings.

Mr. Webb noted that members of the public sometimes spoke numerous times at public hearings, and said if the Board followed the Bylaws strictly, it wouldn't allow this. He said the only time he had seen the rules followed strictly was for the Craig Meadows application.

Mr. Grant noted it was strongly protested when it was used. He said it would be clear when the Board needed to follow these rules more closely, and Chair Kelley agreed with this.

Mr. Webb said if the Board was in the habit of not following the rules, and then a hotly contested application came before the Board and it decided to follow the rules closely, there could be problems.

There was detailed discussion about this issue.

Councilor Needell said that Item #5 under Public Hearings covered this, in saying that "The Chairperson, with the approval of the Board, may place reasonable time limits on all speakers." He said the idea of bending the rules was consistent with this.

Board members agreed the Board should be more careful about this, and that the rule was there for a purpose.

Councilor Needell noted that the Board tended to start off with questions, during the public hearing, rather than waiting until public comments were completed. He said perhaps this should change, noting among other things that it took a lot of time.

Mr. Isaak said this made sense since it was a public hearing. There was discussion about this.

Chair Kelley said he was fine with sticking more closely to this procedure of having the public speak first at the public hearing.

There was detailed discussion on Items #7 d. and e, and whether they perhaps should be removed from the Bylaws. Mr. Campbell noted that #7 f. provided additional opportunity for a party to speak a second time at the public hearing.

Chair Kelley said he was comfortable with following the existing rules closely for a public hearing from here. But he said the Board gained so much from a give and take discussion, noting the recent meeting where it received valuable input from the University and a student in a less formal discussion. He asked Board members if they were comfortable with the Board loosely following this rule when it could.

Mr. Campbell noted again that IV. C. 7 f. provided the discretion to allow this flexibility.

There was discussion as to what "party to the application" meant in IV. C. 7. g. Mr. Campbell said this referred to professionals related to the applicant. It was noted that the wording here was not clear.

Councilor Needell questioned whether asking questions was different than making comments. He also suggested the following wording: "Questions may be asked, at the discretion of the Chairperson, by any member of the Board, or by anyone listed on the application, including abutters, applicant's agents, and anyone who speaks at the public hearing."

Mr. Roberts said he disagreed, and said this rule was in the Bylaws to prevent someone from speaking as a member of the public when he was really an agent of the applicant.

Mr. Grant suggested that the wording in IV. C. g. after "...by any member of the Board" should be removed from the Bylaws because it was confusing.

Mr. Campbell said this left it to the discretion of the Chair to use IV. C. 7. f.

There was additional discussion on whether allowing 5 minutes for the applicant's rebuttal was appropriate. It was agreed that the Bylaws should allow 15 minutes for this.

There was discussion concerning the phrase in IV. C. 7. h. "...and no further public testimony may be heard.", and what this meant. Mr. Campbell noted that written statements were considered testimony.

Mr. Webb said there was a comment period and a deadline for this. He said the Board could consider comments received after this, but didn't have to.

Chair Kelley said this could lead to confusion for Board members deliberating on applications. There was detailed discussion about this.

Chair Kelley noted that the Board had received public testimony on the Zoning Ordinance after the public hearings closed.

Councilor Needell said the problem with limiting public testimony was that Board meetings were public meetings, and Board members were public officials. He noted that one way members of the public could respond was by writing letters.

There was additional detailed discussion about this issue. Mr. McGowan said the Bylaws should say something about how long written comments would be accepted. He noted that it worked well when a public hearing was extended, and the Board read letters that came in between Board meetings.

There was additional discussion about this issue. Mr. Campbell suggested that he could flag with colored papers the written comments that came in after a public hearing closed. Board members thought this was a good idea.

Councilor Needell said concerning the proposed change to IV.C. 7. g, that perhaps something important was eliminated in removing the second sentence. He provided details on this, and there was discussion.

There was discussion about the fact that questions concerning an application shouldn't go back and forth between the parties involved, and that instead, everything should go through the Chairperson.

Chair Kelley said Mr. Campbell would compile the Board's comments/decisions so far on the Bylaws, and would then email them to Board members. He said the Board would have ample opportunity to review this, and could discuss if further at the December meeting.

Kevin Webb MOVED to continue the review of the Bylaws/Rules of Procedure. The motion was SECONDED by Arthur Grant, and PASSED unanimously 7-0.

Arthur Grant MOVED to continue the Site Visit discussion to the December 14th Planning Board meeting. The motion was SECONDED By Kevin Webb, and PASSED unanimously 7-0.

VIII. Other Business

Old Business:

Chair Kelley said that during the Town Council's deliberations on Section B of the Zoning Amendments, there was a lot of discussion regarding multi-unit housing. He noted that it had not been a unanimous vote by the Planning Board concerning the use of multiunit

housing in the ORLI District, and said he wanted to get a sense of how the Board felt about this.

He noted that at present, multi-unit residential housing was not allowed in the ORLI District, and was only allowing in the MUDOR District, where limited land was available for this.

Councilor Needell noted that multi-unit housing elderly housing and single family elderly housing was allowed in the ORLI District and the OR-108 District.

There was discussion about the size of the ORLI District as compared to the MUDOR District.

Mr. Isaak asked if the affordable housing issue had come up as part of this.

Chair Kelly said this was raised, and said the issue of the lack of student housing in Town had been raised.

Ms. Fuller said she thought that if elderly multi-family housing was going to be allowed in a district, multi-unit residential housing should be allowed as well. She also said she thought the Town was going down the wrong road in allowing such a broad scope of elderly housing in Durham, and provided details on this.

Mr. Isaak said multi-unit residential housing should be a permitted use in the ORLI.

Mr. Ozenich said multi-unit residential housing should be allowed as a conditional use in the ORLI District, and should get the same density allowances as those provided for elderly housing.

Mr. Grant said that multi-unit residential housing had been allowed as a conditional use in the Office Research District for 20 years, and no one had used it. He said he would support allowing it in the ORLI District as a conditional use. He also noted that the Master Plan spoke about elderly housing as a potential commercial benefit to the Town.

Mr. Webb said he agreed this use should be allowed as a conditional use in the ORLI District. He also said he thought that MUDOR was a joke, and should be merged into a MUDORLI District.

Chair Kelley said he had argued for allowing multi-unit residential housing in the ORLI District, and said he was confused as to why this didn't pass previously when voted on by the Board. There was discussion about this.

Mr. Roberts said this should be allowed as a conditional use. He noted he had lived in multi-unit housing in Durham as an undergraduate, and said he was aghast at the large number of people who now had to live north of Durham because there was no housing close by.

Councilor Needell said he was convinced this use should be allowed as a conditional use. But he said he would be very surprised if anyone other than students lived in this kind of housing. He said providing workforce multi-family housing would be very difficult.

Chair Kelley said he agreed, but said he would still support allowing multi-unit residential housing in the ORLI district.

Mr. McGowan agreed this use should be allowed in the ORLI District as a conditional use.

Mr. Parnell said he assumed that they were not speaking about allowing boarding houses. He also said that if multi-unit elderly housing was allowed in the ORLI District, multi-unit residential housing should also be allowed.

Chair Kelley noted the consensus of the Board was to allow multi-unit residential housing in the ORLI District. He noted again that this was surprising, given that the vote had been against this previously.

Mr. Grant noted that he had previously argued against this, on the basis that the Town didn't have much land for industrial development, and that if this kind of housing came in, it would take away most of this land. He said he didn't believe this was what the Town really needed.

Ms. Fuller said that perhaps the Master Plan was a little dated concerning this issue.

IX. Adjournment

Arthur Grant MOVED to adjourn the meeting. The motion was SECONDED by Kevin Webb, and PASSED unanimously 7-0.

Adjournment at 10:00 pm

W. Arthur Grant, Secretary