

D-R-A-F-T

HISTORIC DISTRICT COMMISSION MEETING

THURSDAY, OCTOBER 23, 2003

7:00 PM

PUBLIC HEARING ON APPLICATION BY MICHAEL SIEVERT

PROJECT: PAUL BERTON OF FALL LINE PROPERTIES, PORTSMOUTH, NH

MEMBERS PRESENT: Roger Jaques, Chair; Crawford Mills, Andrea Bodo, Joan Graf, Leslie Schwartz, Malcolm Sandberg, Council Representative; Nicholas Isaak, Planning Board Representative

MEMBERS ABSENT: None

OTHERS PRESENT: Victoria Parmele, Minute Taker and members of the public

I. Call to Order

Andrea Bodo called the meeting to order at 7:00 pm, and explained that she would serve as Chair of the meeting because the Board's Chair, Roger Jaques, had recused himself.

She explained that it would be a public hearing on an application for Certificate of Approval , and said the applicant would have the opportunity to describe the proposal in detail, with special emphasis on screening, lighting, signage and general appearance of the proposed project. She also said that members of the public would be able to present their reactions to the proposal and could ask, through the Chair, for clarifications of aspects of the project of relevance to the Historic District Commission.

II. New Business

Public Hearing on an Application for Certificate of Approval submitted by Michael J. Sievert, PE, MJS Engineering of Newmarket, on behalf of Fall Line Properties, Portsmouth, NH for signage, lighting, landscaping features and other issues related to Article VI of the Durham Zoning Ordinance. The property involved is shown on Tax Map 4, Lot 52-0 and 53-0, located off of Dover Road and Main Street, within the Limited Business zoning district.

Malcolm Sandberg MOVED to open the public hearing. The motion was SECONDED by Crawford Mills, and PASSED unanimously.

Attorney Malcolm McNeill, 44 Colony Cove Rd., Durham said he represented the applicant and noted there were other parties who would present the plan in detail. He said he would be speaking to some of the legal issues as they related to the scope of the jurisdiction of the HDC.

He said this was a "Certificate of Appropriateness" hearing and related to the historical design of the structures - the form, but not the substance of the two parcels within the Historic District. He said the new structures shown on the plan were limited because the structures proposed, consistent with the Durham Zoning Ordinance, on this site and subject to HDC jurisdiction is very limited. He described this jurisdiction as stated in Article VI, sect 175-50 of the Zoning Ordinance to regulate construction, alteration, moving or demolition of structures within the historic district.

He said the term "structure" is defined in the zoning ordinance, and noted Durham was one of the few towns that does not have separate regulations for HDC matters, but controls are delineated in the Zoning Ordinance.

Mr. McNeill addressed the following design issues:

Construction and modification of pavement – Mr. McNeill said that because definition of structure speaks to parking lots and decks as structures, he would speak to design, thickness, historical or design features. He said he was not here respond to the movement of the pavement.

Lighting fixtures - Mr. McNeill said he had reviewed the minutes of the non-public hearing and found there were issues regarding to appropriateness of light scanners. He said that he and his client would discuss those issues with the Commission and emphasized that the issue of historical lighting in historical district relates to the form

Installation of fencing – Mr. McNeill said the fencing proposed was not a structure because it was less than 6 ft in height. However, the Planning Board in its Conditions of Approval gave the HDC authority to consider the fencing. He said two fences had been included in the plan, one along the roadway for which clearly there is the greatest sensitivity in terms of ability to view it and desire that it be compatible with other fencing in the area. He noted wrought iron fencing in Town which they had tried to emulate to be consistent with. He said fencing was also required at the rear site in the vicinity of the Jelmberg premises. He said this would not be readily viewable from the street. He said it was not clear whether the Planning Board intended that fencing to be within its scope of review, but in the interest of bringing forward all the structures within the district, he has brought that forward. He said this fencing should be reviewed within the context of the environs and its public perception/visibility, and is intended to be a screen..

Mr. McNeill said that for the purposes of the Site Plan, no modifications are proposed for this building. In the regulations there are standards that apply for existing structures being changed and new structures. This existing structure is not being changed. In terms of the site so far, the lighting, fence, and pavement are the new structures being proposed for the site. He said there had been discussion at the last hearing about signage, of which there are two forms, one being traffic safety signage. This form of signage has been subjected to extensive review by the Planning Board. Mr. McNeill said that the applicant is not asking for HDC review of commercial

signage, because it is not known what it will be. He said the applicant will ask for HDC input on traffic signage, although he had mixed feelings about this since the HDC's scope of review was architectural and form, not substance, and signage really had to be what the traffic safety people had approved. He said this was really a limited issue for the HDC because this form of signage was very limited on the site.

Mr. McNeill provided some history of the area where the hotel is proposed. He said that historically, it had been utilized for commercial purposes as was permitted in the zone, and said he was guessing that the buildings previously at the site, now gone, pre-dated the HDC regulations. He noted that in the past few years, Durham had acquired a stop light at the intersection, which came as a result of a great deal of interaction with the State of NH, because the roadway is primarily controlled by it; he said access permits for the propose site also had to come from the State.

He said that the basic issues of how to get in and out of the site were based on decisions that were made previous to this project. He also said that access issues had been reviewed by all appropriate parties and that the approval granted by the Planning Board was final, had not been appealed, and other than minor conditions of approval such as going to HDC and other permits that will be necessary after the fact, that process is completed. Went to the substance of the project although there were issues discussed regarding form. He noted that approval was granted on August 27, 2003 and that approval included all needed submissions, so access issues, safety, construction and drainage were all resolved by the Planning Board and have become final. In addition, all approvals had been obtained from the State, and were not appealable. He said the Town Council had authority to repeal the Planning Board's decision, which it has not done, and that the time period for doing so is over.

Mr. McNeill said that as part of Planning Board approval, there were findings that related to the conditional use permit. In that permit were some items one might argue were a bit more subjective than nuts and bolts Planning Board approval. He said when the Planning Board considered the matter, and because the Planning Board makes recommendation to the Town Council regarding Conditional Use Permits, Planning Board issues an extended recommendation. Mr. McNeill read through this section of the Findings of Fact and Conditions of Approval that related to appropriateness of design.

Mr. McNeill said that the process of any project was not a simple one with regard to the scope of review, enthusiasm of participants and the extent of dialogue. He said that after 9 months, all of the matters of substance were approved by the Planning Board, so with all due respect, the HDC was not here to alter the approved site plan but to consider the historical design features, which are limited to pavement, light standards, fences, and traffic safety signals. He said the applicant has included landscaping on site although he believes it is beyond the HDC's jurisdiction. The applicant has done this to show the appropriateness of the landscaping and the extent to which the developer has attempted to deal with and not avoid that issue. He noted that the plans before the HDC this evening were basically consistent with the plans approved by the Planning Board, except that fencing and some further detail have been added.

He said the applicant obviously wished to cooperate within HDC's scope of jurisdiction, but that cooperation did not extend to the alteration of safety, zoning, planning and site review issues that had already been resolved, have become final, and have not been appealed. He said the scope of HDC review in Durham was controlled by Section 175-54.B, criteria for conformance for new structures, which also speaks to the authority of the HDC to deal with architectural taste, form and design, but not substance. As such, the applicant believes that the height, length and width issues have all been reasonably considered. Design issues relating to street frontage, setbacks, etc, have all been approved by the Planning Board regarding substantive issues, and because of all the approvals necessary, the HDC has practically no flexibility. He reviewed other aspects of the regulations that discussed design, and how these related or did not relate to the current application. He said he believed the provision regarding landscaping related to landscaping in the context of the structures being built, and noted the structures they were proposing were the street lighting, fences and the pavement.

Mr. McNeill said given the fact that this is essentially the review of a parking lot, the applicant took pictures of properties within the historic district. He discussed fencing in the vicinity of the Courthouse, in the area of Pettee Brook parking lot, around Main St. in the historic district, and the Episcopal Church parking lot pavement and lighting. He distributed these photographs to members of the HDC as a comparison to what was being proposed.

Mr. McNeill said that the engineer for this project, Michael Sievert, would speak next about the paving being proposed, and said that if there were historical features the HDC felt were consistent with the architectural design of paving in Durham, the applicant would consider these as long as they were consistent with approvals from the Planning Board. He noted the paving did contain some arrows, required as part of the safety design.

Mr. Sievert, MJS Engineering, spoke about access in the parking lot. He also said he had brought engineering drawings to which details discussed the last time had been added. He noted the fencing in the front, the hedging, and the changing of the light styles.

Regarding the parking lot, Mr. Sievert said the pavement would be 3 inches thick, with 2 inches of binder coarse, and 1 inch of wearing coarse on the top.

Regarding fencing in historic district, Mr. Sievert said that a small block retaining wall with a stockade fence on top of it had been added.

Roberta (Robbi) Woodburn, the architect for this project, spoke next concerning the landscape plan for the portion of the project within the historic district. She explained that the plan was relatively simple, and described its key aspects as follows:

- Deciduous trees were chosen for the parking lot to provide shade and to give scale.
- Added fencing the same as is across from the project, along the street side and ends with granite bollards similar to what is downtown now, and has large brick piers at the entrance going into the parking lot.
- Foundation planting at the base of "Nicks Bricks" to soften that building.

- Have now backed up the fencing with privet hedge because it is a strong, versatile plant. The hedge would sit behind the fence and be kept at four feet, so there would be a decorative edge similar to the fence across the street, with a green hedge behind it in the summer and the tracery of the stems in the winter.
- Colonial lantern lights have been included, which is another change from the previously proposed “Darth Vader” lights. There would be brick piers at the main entry that would have colonial lanterns, and these lanterns would also be placed at the secondary entry.
- Regarding the brick paving out front, Ms. Woodburn said they were thinking of repeating the stamped asphalt at the intersection and at crosswalks in other portions of town. She said it is not brick but looks like it. She said this material was very functional and doesn’t get ripped up by snow plows.

Nick Isaak asked if repainting of the brick sidewalk would be done by the Town. Ms. Woodburn said she would assume the Town would do it because it was within the right of way, but did not know for certain.

Chair Bodo asked if there would be real brick as trim. Ms. Woodburn said there would be, and they would basically restore what was there now.

Leslie Schwartz asked for clarification on how far the privet hedge would run, and Ms. Woodburn said it would be placed wherever the fencing was.

Crawford Mills said it was proposed the height of the hedge would be that of the fence. Ms. Woodburn said that was a standard approach.

Mr. Sandberg asked from a practical standpoint if privet could be pruned to a higher height, or did it lose its vitality at that height. Ms. Woodburn said it could grow higher and still be healthy.

Joan Graf asked if there were evergreen privet hedges. Ms. Woodburn said there were but they grew in Texas, and could not handle the climate in New England. She said evergreens would not do well in the area, because of the snow and the salt used to treat the roads. She said that most evergreen shrubs are not salt tolerant. She described a privet as a tenacious plant that comes back after abuse, and said it was important to be realistic about what would be likely to survive.

Mr. Sievert showed what traffic safety signs would look like at the entrance by the existing brick building. He said there would be a right hand turn only, so there will be no left turn facing into the project on the left hand side. Also, a “Do Not Enter” sign will be facing Main Street on the back side of the sign on the right side. He said the smallest size could be 30” square.

Chair Bodo asked about additional signs. Mr. Sievert said these would be four within the site, and they would come back to the HDC for approval on them.

Crawford Mills clarified that these were the commercial signs, and also asked if the applicant proposed signage for the piers. Ms. Woodburn said not at this point.

Chair Bodo asked if any of the signs could be wood if at all possible; the commercial signs at the entrance, exit, anything that could be seen visually as one looked into the site, would like to be wood and Mr. McNeill said that to the extent they could, they would do so.

Mr. McNeill spoke briefly to the conditions imposed by the Planning Board in its Site Plan approval that in his view spoke to some of the jurisdictional issues.

He said concerning fencing conditions, the fence the Planning Board considered was just a fence, but the applicant was aware of HDC concerns, and said as long as the height of the shrubbery did not exceed the fence, because of safety concerns. Not in a position, in his view, to go back to Planning Board, and shouldn't be compelled to, to put a fence that would adversely affect traffic safety. He also pointed out the lighting plan conditions, which considered technical issues, an noted Planning Board had more skill in the area to make those kinds of assessments.

Mr. McNeill closed by saying he believed the plan was responsive to what the ordinance required, and recognized that in the scheme of approvals the Board conducts, this was unusual, and was unusual for him.

Malcolm Sandberg noted there were multiple parcels in the overall project, and asked if the parcels within district had been officially merged, or if they were still separate parcels. Mr. McNeill said they had not been merged, but said the merger of lots did not change the zoning requirements.

Jim Jelmborg, Park Court, said he had questions regarding the visual impact of the proposal. He asked Mr. Sievert what could be done to reduce the glare from the lighting that was proposed.

Mr. McNeill said they would be glad to talk about lighting design, but not to the function of the lighting.

Mr. Jelmborg said the design of the top of the light related to glare, so this did speak to the design of the lighting.

Mr. Sievert said it was originally proposed that the parking lot would be better lighted by "Darth Vader" lights, but the HDC had suggested that lantern lights be used. He said these lights were not as bright and directs the light down.

Ms. Woodburn explained that a refractor inside the colonial lanterns directed some of the light down, but she noted that the "Darth Vader" helmets provided more control than the lanterns.

Mr. Jelmborg asked if any evergreen trees were planned as part of the landscape design and was told they were not. He asked if the trees on the west side of the hotel could be evergreen, so they would provide more of a visual screen. Ms. Woodburn said the reason she didn't include

evergreens was that they would be growing on the edge of the parking island, and because of their shape would block visibility.

Mr. Jelmborg recommended that the retaining wall on the west side be leveled all the way across, instead of being at staggered height, because this would otherwise be visible at the stop light, especially when the leaves are gone.

Mr. Sievert said it would be leveled all the way across.

Mr. Sandberg asked Mr. Jelmborg if he thought 6 ft. fence would be adequate to shield the view. Mr. Jelmborg said the combination of a 4 ft. retaining wall, plus 6 ft for the fence on top would be adequate, especially if it was level all the way across.

Nancy Sandberg, 15 Langley Road, noted that the scope of the HDC was limited, but its work was still incredibly important to the town, and covered things the Planning Board and Public Works Department can't do. She said that the ordinance they administered passed with a 2/3 vote, and represented a significant commitment from the people of the Town to preserve the historic character of the Town. Mrs. Sandberg said she served on the Master Plan 2000 committee, and they heard over and over about the Town's historic resources and their importance. She said the work of the HDC, although limited, was no less important than the decision making the Planning Board had done. She said it was very particular, but could have huge impacts on this important area of Town.

Mrs. Sandberg said she had listened to Mr. McNeill say the HDC couldn't visit various issues, but she said she believed the parking lot, although made of asphalt and having various engineering components, had width, breadth, shape, and would definitely impact the intersection, which is located at an extremely important historic crossroads for Durham. It was the conjunction of all the delivery of goods by sea to the Town, and the new overland route that served all the early towns in New Hampshire. It all happened right there. She said that although the present intersection may contain smart lights, it was carefully designed, recognizes the important historic structures around it, and was designed with a great deal of historic input. She spoke in detail about these historic structures.

She said this intersection, with all of these structures, now will have a new parking lot that will have 71 vehicles, and it will very visible, so it is very important how it is screened.

She said she was happy to hear that a privet hedge was planned for behind the black fencing, and liked the idea of the brick piers, although she said she would leave the lanterns off.

Mrs. Sandberg said she would like to talk about the design of the parking lot. She said she felt that this did come under the jurisdiction of the HDC, noting the developer chose not to come to the HDC first concerning the design of the parking lot, but this did not make their decision any less important than that of the Planning Board. She said the design of the parking lot greatly impacted the historic significance of the lot and its impact on the intersection, and citizens' enjoyment of the historic setting they traveled through every day.

She said that to make the proposal more in keeping with the goals of the Master Plan, she recommended eliminating the one way exit in front of "Nicks Bricks", thereby reducing the number of curb cuts, and increasing the landscape buffer zone which would make a much better transition from Gasoline Alley into the historic district going up to Church Hill and down to the bridge over the Oyster River. She said it was within the Board's authority to look at these combined lots, and is totally rational to say that a beautifully designed, federal gateway, as Ms. Woodburn had designed, should be the main entrance to the site. She said this gateway was very much in keeping with the area, but what was not in keeping was the view when one was sitting at the traffic lights looking north into the site, and one saw two wide lanes going into the site, unimpeded all the way to the "Nicks Bricks" building. She said she didn't think that was a good design for the site historically speaking because it was modern and car oriented, and was not softened by landscaping or a turn in the road, and would provide protection from the onslaught of cars. She said she believed it was very possible to redesign it so that after one turned into the entrance way, the road curved around into the site. She said that at the very least, there should be a much larger bump-out made in front of "Nicks Bricks", with trees and shrubbery. She said it was up to the developer to configure the design it to be more sensitive, and to soften the entry way.

Mrs. Sandberg provided suggestions concerning lighting. She said the Hancock light with the matching pole was a fine fixture if it had the right element. She said the present elements in Durham are not right, the intensity is too great, the color is still not right, and needs work. She suggested the HDC should have a consultant advise it, because the lighting intensity very much should be their purview because it helped create the atmosphere of the historic district. She recognized there were safety concerns that belonged to others, and that the HDC's focus was more narrow and should consider the intensity of the lighting in historic terms, whether it overwhelmed surrounding residences, or was too glaring. She explained that it was important not to be glaring or overwhelming.

Concerning the landscape plan, Mrs. Sandberg said she would like to see a few evergreens, because a mix of deciduous and evergreen trees was more historically accurate. She also said she would also like to see another tall tree on the corner by "Nicks Bricks" so that corner was softened a bit more.

Beth Olshansky, Packers Falls Road, noted one of the selling points for the proposal was that it was the Gateway to Durham, and how much this was being improved by taking down the gas stations and putting up the hotel, which she said she appreciated had been designed with historic considerations. But she said the parking lot proposed flew in the face of the Master Plan, which said there should, which she noted said there should not be parking in the front in this area of Durham. She said the location of the parking lot came as a result of the soil contamination issues at the site. There was not a lot of flexibility. However, she believed the Planning Board compromised some goals of the Master Plan because of the contamination issue.

Ms. Olshansky said she did not think this glaring eyesore should be accepted as the new gateway. She said she appreciated the inclusion of privet hedging, and hoped it was substantial, but said she was concerned that 4 ft. was not high enough. She said she hoped it could be requested that the hedging be considerably taller. She said she heard 4 ft. was used because of

the need to maintain visibility entering and exiting. She acknowledged that safety needed to come first, but suggested that if this was truly a safety concern, perhaps the hedging could be moved back so it could still be taller, but would not cause safety problems. She said if this was not possible because there wasn't enough space to put in all the vehicles necessary, she suggested perhaps one of the duplexes could be removed, creating less need for parking, and allowing it to be moved back.

Ms. Olshansky concluded by saying that because of the Master Plan's recommendations, and because the site being considered was in the sensitive historic district and was a gateway property, she felt very strongly that the Town should not be compromising on eliminating the view of the parking lot.

Mr. Sandberg said that one of the drawings showing the entrance showed the left lane as being substantially narrower than the right lane. It was clarified that the total width of the road there was 24 ft. plus 11 ft. at the turn in point. Mr. Sandberg also asked where the setback began. He said 175-65:D which said that no driveway in the front yard setback shall be wider than 22 ft., so was trying to figure out where Mr. Sievert measured to get the limited 22 ft. Mr. Sievert said he never really did, because 22 ft. at the main entrance, out into the state right of way, would not allow emergency vehicles come in and out, but he said further back, that 22 ft. could be measured.

Mr. Sandberg clarified that in terms of the portion of the project that the HDC is covering, that the width of the road back at the setback line was around 24 ft. He asked Mr. Sievert if this was discussed with the Planning Board, and was told it was. Mr. Sandberg noted that 175-54:B, 1, unless waived by the commission, read "that a structure must conform, within a variation of 10% to an average of the dimensions of the nearest neighbors." He asked Mr. Sievert to explain how he calculated this, explaining it had to be determined if that structure met those requirements. Mr. Sievert said he did not use this in the parking lot design, because the parking lot would not be any higher than any other parking lot. He said he was not sure how this would be applied height, width, setback from street, frontage. He described dimensions of individual parking spaces, and said this was the same as other parking lots.

Mr. Sandberg said he was thinking of the parking lot as a structure, and wanted to know the dimensions of this structure. He asked what the length of the structure was, and was told it was approximately 180 ft.

He said his point was that if they were required to find the dimensions of nearest neighbors, and one of these is street frontage, and include Cumberland Farms, Court House, "Nicks Bricks", etc., an get an average, will have a frontage number, and we are required, unless we chose to waive the requirement, to know those numbers, because the structure must conform to those numbers within a variation of 10%.

Mr. Sievert said the nearest neighbors would not include "Nicks Bricks" because that was owned by the applicant, and said they would use the Library, Smitty's, Town Hall, but the numbers had not been specifically calculated.

Mr. McNeill asked to have the opportunity to speak with his client, and said he would like to be able to respond to the issues that had been raised.

Joan Graf noted the previous discussion concerning locating the parking lot out front because of the soil contamination issue toward the back, and asked for a prediction about the future success of the landscaping because of the contamination issue

Robbi Woodburn said if they found the soil to be contaminated, they would either have to amend it or remove it, but were not at that point yet, and would not recommend planting in areas where they thought the plants would not thrive. Mr. Sievert noted the cleanup was underway, so that the upper layer soil contamination had been removed, and the contamination within the lower soils was not planned for removal at this time. Ms. Woodburn also noted said most of the roots were near the surface, so if the topsoil was alright the plants and trees should be fine.

Chair Bodo called for a RECESS at this time.

It was noted that the eight of the photographs shown were not of areas within the historic district, and many of the sites shown existed before the district was created.

Mr. Sandberg asked Mr. Sievert for clarification on the location of the proposed entry bollards at the main entrance, as described by Ms Woodburn, because he was interested in what the site line would be for someone approaching the stop. Mr. Sievert said the site line for vehicles approaching the stop would see a bit of an opening there as compared to what it would be if the fence cam all the way up. He noted this might be important for the pedestrians.

Mr. Sandberg asked an additional question relating to 175 30:B - dimensional controls for front yard and side yard setbacks . He said the front yard setbacks referred to structures.

Mr. Jelmborg referred to Mr. Sandberg's previous question as to whether the lots were merged, noting that two of the lots were merged.

Mr. Sandberg said the reason he asked about the setbacks was because the side setback was required to be 10 ft., and if the lot line went through the parking lot, where were the two 10 ft. setbacks. Mr. Sievert said they wouldn't exist there because the parking lot already exists there, and once the project is fully approved, because we are crossing all the property lines, all of those property lines would disappear. Mr. Sandberg noted they hadn't disappeared yet. Mr. Sievert said it didn't make sense to take out the lot lines while in the design phase.

Mr. Sandberg said a condition of the HDC's approval could be pending approval of the merger of the lots.

Mr. McNeill – responded to various issues that had been raised at the hearing:

- Concerning the request for utilization of evergreen trees to the rear of the site, he said they were willing to consider that in order to enhance the area. He said he did not think the trees in that location would adversely affect safety and the planting would not be not of a scale that

would require a return to the Planning Board because tree height would continue to serve the purpose intended by that Board.

- Mr. McNeill said he saw nothing in the regulations that spoke to the issue of lighting. He said this jurisdiction was with the Planning Board, and once the HDC decided on the fixtures, the technical issues of these could be looked at by the Planning Board. He said it was the desire of everyone at the intersection not to over-light the area, and to do what was necessary for safety.
- Mr. McNeill said he believed it was appropriate to keep the hedge at the height consistent with safety and the fence height.
- Mr. McNeill said that with the greatest apology, he would have to ask Mr. Sandberg to recuse himself. He said the standard of review for someone sitting on a regulatory board was controlled by the standard of review for a juror in a trial (RSA 500-A:12). He said Mr. Sandberg's wife had now testified against this plan, and its provisions, and against the approval of the plan in its present form. Mr. McNeill said he was raising the issue reluctantly because if he did not do so now, he would be barred forever from raising it. He said the first question was whether he would voluntarily step down. He said he was sorry to raise the issue, but if he did not do so, his client's interests and rights would not be protected. He said he and his client had made a considered judgment on this, and noted the process they were all involved with worked best when there was no indication that someone could be affected in a unique way by testimony given at a hearing, which is why the standard was so high. He requested that an alternative be chosen under the circumstances.

Mr. McNeill said the plan had undergone extensive review by qualified experts, and said the people who had spoken, with the exception of Mrs. Sandberg, had spoken before about the prominence of this piece of ground. He said would suggest is not the role of the HDC to be site engineers and planners, and its role was to review the architectural design of the site, and the architectural design of the site related to the form and substance of the plan. Issues with regard to the approval of the plan by the Planning Board were no longer appealable. He said if there was any request that the applicant measure the frontage of surrounding properties for any reason other than an attempt to defeat the plan, rather than look at the substance and merit of the plan itself, they would do that.

Mr. McNeill asked what lot in the historic district contained such a degree of landscaping, and had been subjected to this degree of safety review. He said that after nine months, the applicant would not change the entrance to the site, because every expert who dealt with safety said alternative access-ways into the site were necessary and appropriate.

Mr. McNeill suggested that this had now become a way to defeat plan, when some had been unable to accomplish when the plan was before the planning board. He said nothing compelled them to come to any board first, but thought it was appropriate to take it to the Planning Board first because of their expertise concerning the issues they felt were critical - site design and safety, but never doubted the HDC would be a stop along the way. He said if there was a request

that the whole site be re-designed, this was beyond the purview of the HDC. He said they would be glad to do further tinkering what has been offered, they would be happy to do that.

He said there had been a less than discrete attempt to try and exalt form in a way that would destroy the reasonable substance of the plan. He said the HDC's form considerations could be reasonably addressed, and the site would be a credit to the Town.

Beth Olshansky said she did not interpret Mrs. Sandberg as opposing the plan, and distinctly heard her compliment the landscaping design, the attractiveness of the entrance way, and saw the comments as supporting aspects of the design she appreciates, and making helpful suggestions as to how the design could be tweaked, which is the purpose of a public hearing. She said Mr. McNeill appeared to be over-reacting. She said she didn't think anyone was trying to defeat the project, and speaking for herself, she came because she was concerned about aesthetics in the historic district, and was hoping to have some input into the possible softening of the gateway to the community, so the project would be something community feels good about.

Mrs. Sandberg spoke again, saying she was not against the project. She said she had simply wanted to make it the best it could be within the constraints of the HDC's regulations, and tried to speak to that. She said that even though her husband sat on the HDC, she had lived in the Town for over 30 years, and felt she had the right to come and talk about historical considerations as they related to this project. She said she believed she was speaking positively, and not against project. She noted she testified at the Planning Board against the plan on other issues – traffic, etc., but she was respectful of the Planning Board's decision.

Mr. Jelmsberg said he had heard Mrs. Sandberg's speak capably since the Onassis oil refinery project in the 1970's, and had no doubt the Sandberg's reached their conclusions independently.

Leslie Schwartz said she was confused, noting that the hotel project had been approved by the Planning Board, and was not subject to revoke in form. She asked Mr. McNeill how the testimony of a spouse of an HDC member could Mrs. Sandberg's testimony make any difference. Mr. McNeill said it made a difference because she wished to redesign the plan. The whole intent of her comments was to redesign the entryway to the site and other aspects of the project that would require changing the site plan of the site. He said she appeared to be asking the HDC not to approve the plan before them, unless he was reading her incorrectly. He said if she had opposition to the plan, how could it be fair when one of the people deciding the fate of the plan was her husband?

Joan Graf MOVED that the Public Hearing should be closed. Leslie Schwartz SECONDED the motion, and it PASSED unanimously.

Mr. Sandberg said he was not a lawyer but understood Mr. McNeill was required to speak now on this issue or not at all. He said his understanding of the law was that if he were in a position to gain materially from the final decision of the project, it would be appropriate that he recuse himself, and he would. But he said neither he or his wife had any material interest in the project, and his commitment was to insure that the interest of the citizens of Durham was protected. Mr. Sandberg explained that when he had asked questions concerning requirements under the HDC

jurisdiction, this did not indicate he was opposed to the project, but only that he was doing his duty as a sworn member of the Commission. He said he felt no compunction to recuse himself because he had nothing to gain, and said he had actually been planning to vote to approve the project. He said this did not mean he would move to approve the project without any amendments, but that was what he was there for.

Mr. Sandberg also said he realized that if he did not recuse himself, and down the road in court, a judge said he should have recused himself, the project would end up being approved as submitted. He suggested the Board might want to consult with the Town attorney, and also said that if the Commission thought it would be better for him to recuse himself, he would do so.

Chair Bodo asked the other board members for their opinions.

Joan Graf said she was not a lawyer, but said she was not sure what aspects of their goals could be pursued that evening without jeopardizing their positions, the position of the applicant, and the cohesion of the Board. She said she personally would not want to see Mr. Sandberg recuse himself. She suggested that the Board close the hearing and consult with their attorney to determine if they were allowed to continue to have Mr. Sandberg on the Board.

Chair Bodo acknowledged she was not a legal person either but the fact that Mr. Sandberg's wife had one view did not necessarily mean he had the same view. She said she believed, after working with him on the Board, that he had the best interest of the Town in mind. She said they had agreed to go along with this project with the hope of softening it, and she thought the applicant and team had been very thoughtful about responding to their requests, and she did not get any sense that the Board was setting out to defeat project.

Ms. Graf said she felt their position was now compromised because if there was anything on the plan the Board would like to see changed, that could be challenged by the fact that a member had been asked to recuse himself and we have said we don't want him to do so. She said they needed to speak with their Attorney, and perhaps have him present at the next meeting.

Ms. Graf said she read Nancy Sandberg's notes and was not under the impression she was trying to defeat the project, but noted that was somewhat immaterial to the discussion.

Chair Bodo said there appeared to be two options; the Board could proceed, although crippled, or it could ask for the applicant to grant an extension, so the Board could consult with the Town's attorney.

Mr. Sandberg reminded Chair. Bodo that the 45-day limit would end on October 31, 2003.

Chair Bodo said that in all fairness, the Board had been going toward an acceptance of the application that night, except for some minor tinkering. But she said they would now ask for an extension, in writing.

Nick Isaak asked if striking Ms. Sandberg's comments from the record would make the point moot.

Mr. McNeill said if Mrs. Sandberg would come up and say she approved the plan, they could go forward.

Chair Bodo called for a short break at this time while Mr. McNeill spoke to the Applicant, and Chair Bodo spoke with Mr. Harwood.

Mr. McNeill said the applicant would agree to extend the deadline to the November 6, 2003 meeting. He explained that he was duty bound to raise the issue to and believed that in interest of resolving the issue, an applicant can voluntarily agree to extend a time period so a Board can have benefit of speaking with its legal counsel.

Nick Isaak MOVED to postpone further discussion on this issue until November 6, 2003 at 7:00 PM pending receipt of a written extension by the applicant. The motion was SECONDED by Joan Graf and PASSED unanimously.

The meeting ADJOURNED at 9:30 PM.

Victoria Parmele, Minute Taker