

These minutes were approved at the February 14, 2024 meeting.

**TOWN OF DURHAM
DURHAM PLANNING BOARD**

Wednesday, January 24, 2023

Town Council Chambers, Durham Town Hall

7:00 pm

MEMBERS PRESENT: Paul Rasmussen (Chair), Heather Grant (Vice Chair), Sally Tobias, William McGowan, Peyton McManus, Emily Friedrichs (Council Rep), Tom DeCapo (Alternate), Chuck Hotchkiss (Alternate Council Rep), Erika Naumann Gaillat (Alternate); Richard Kelley (on Zoom)

MEMBERS ABSENT: Chris McClain (Alternate)

ALSO PRESENT: Town Planner Michael Behrendt

I. Call to Order

Chair Paul Rasmussen called the meeting to order at 7:00 pm.

II. Roll Call and Seating of Alternates

No alternates were seated; Richard Kelley on Zoom due to health issues.

Mr. McGowan MOVED to approve the Agenda for January 24, 2024 as presented; SECONDED by Mr. DeCapo; Roll Call Vote: Sally Tobias-aye, Bill McGowan-aye, Emily Friedrichs-aye, Peyton McManus-aye, Heather Grant-aye, Paul Rasmussen-aye, Richard Kelly-aye; APPROVED 7-0, Motion carries.

IV. Town Planner's Report

Mr. Behrendt said the Historical District Heritage Commission held first roundtable meeting to discuss Oyster River Massacre marker; next meetings February 15 and March 21, to wrestle with controversy of the marker, whether to reinstall, what language, and help the community discuss this difficult issue.

V. Reports from Board Members who serve on Other Committees

Reporting from Energy Committee: Councilor Friedrichs said the Committee continued to work on goals established: Community Power: negotiating energy rates to lower prices and building more sustainable options; evaluate Lee Energy Grid for Town purchase for future savings and other energy-saving projects; Transportation: EV chargers; Built Environment: find funding to help residents organize and plan home projects to increase efficiency and de-carbonize.

Reporting from Town Council: Councilor Hotchkiss said there was only one meeting in January before the last Planning Board meeting; nothing to report.

Reporting from IWMAC: Vice Chair Grant said she missed the last meeting, but they worked on the campaign for reuse and repair in terms of awareness in the community and different repair capabilities; working on new pamphlets.

Reporting from the Housing Task Force: Chair Rasmussen said the Housing Needs Assessment has been received and HTF is going to start work on a first Zoning Amendment: Board was approached by a team who would like to do Work Force Housing in Durham and the location available does not currently allow WF Housing; will try to put together an amendment to make this work.

Reporting from Conservation Commission: Mr. Kelley said the Commission met Monday, with presentation by Land Stewardship Coordinator Sara Callaghan about easement monitoring; Trail Stewards program initiated in November with 20 volunteers. Commission acted on and supported Title Docket for 18 Meadow Road, and directed Mr. Behrendt to prepare and direct comments to NHDES; acted on 561 Bay Road; Duane Hyde of SELT informed commission of Langley & Kennard Forest Conservation Easement: funding made available with \$2.4 Million investment to conserve 44.5 acres on Durham Point and along Durham Point Road.

VI. Public Comments

VII. Review of Minutes (old):

VIII. 561 Bay Road – Conditional Use. Conditional use for retaining walls and landscaping within the Wetland Conservation Overlay District. The existing house will be demolished, and a new house constructed. David and Karen Della Penta, property owners. Ron Beal and Eric Weinrieb, Altus Engineering. Robbi Woodburn, Landscape Architect. Ben Auger and Christian Cote, Auger Building Company. Map 239, Lot 9. Residence Coastal District.
Recommended action: Set public hearing and schedule site walk.

Chair Rasmussen asked Mr. Behrendt to explain an item discussed this afternoon. Mr. Behrendt said this is a non-conforming lot in Residence Coastal Zone; minimum lot size is 150,000 sq ft (3.5 acres) and this lot is 1.5 acres; non-conforming with a house to be demolished and rebuilt. Use is permitted even though the lot is undersized; must meet all requirements and setbacks.

Landscape Architect Robbi Woodburn said she is representing Della Pentas for a new residence: removing and rebuilding existing home. The current house is non-compliant and sits over the front and side yard setbacks; new home will fit within all setbacks, replacing septic with new advanced treatment system; 1 shed on site. The existing house sits on a high point of site and rolls down a slope to flatter area towards bay; existing gravel loop driveway with small retaining wall holds up house in front. At bottom of slope is a 2 ft high retaining wall and existing steps with footprint at edge of wetland; south portion of property is a wetland bordered by a larger conservation easement.

Proposed Plan: New house, new driveway, low stone walls on property line in front, new septic to right of building with regraded slope, front and side walkways with retaining wall in back, new stairs down from patio to field below. Replacing the back retaining wall with 2 shorter retaining walls, to better hold the slope and provide safer access with new steps, both within 100-ft conservation wetland buffer. From patio to bottom of steps roughly 10-10.5 ft; finished floor to bottom of steps 11 ft (existing grade); rebuild stone wall at bottom at same height but longer.

Landscape Concept: Plant massing shown without specific plan; plant list at top with everything in the buffer native species, aiming for 75%/25% native/non-native; ornamental plantings in front (non-native). Removing at least 1 tree in buffer, maybe 2, and replacing with 2 more trees. Fit of house on site: shallow positive pitch at driveway from edge of road to garage with steps up to finished floor, set as close to ground as possible.; black dotted line shows existing grade mimicked by steps; new bottom retaining wall back one foot further back from wetland; slope will be better from erosion standpoint.

Questions: Mr. McManus asked if the retaining wall covers the whole back expanse of the house or extends a little beyond. Ms. Woodburn said it goes beyond the house with a lower-level walkout and walls turn back into the house with door to basement at left with walls that hold up the rest of the grade. The existing wall is 2 ft high with 3:1 slope; replacing with two 2-ft retaining walls. Mr. Kelley said the Conservation Commission voted in favor with 2 stipulations and said the impact in wetland setback is 25 ft of the permanent impact within the 100-ft setback line.

Eric Weinrieb of Altus Engineering said the closest point to the wetland is 74.2 ft, with about 25-26 ft of the permanent impact. Mr. Kelley said the impact is modest compared to existing, but there is concern about whether the sedimentation barrier as shown is the limit of the impact and whether there is enough room to construct the walls and perform the grading. Mr. Weinrieb said corners closest to sedimentation barrier are about 5 ft off the wall which is more than adequate; for fill section of the wall only digging down a few feet to create a foundation.

Councilor Friedrichs said shoreland setback extends another 25 ft and said there cannot be any new landscaped area or lawn established in the buffer; Board said it is not shoreland. Mr. Weinrieb said the area is currently lawn and will be less after we are done. Ms. Woodburn said the edge of the buffer is along the base of the house, and there is an existing access path at end of the steps to right at the end of the second wall and a strip of lawn between the 2 retaining walls. Councilor Friedrichs said if area is dug up to grade, Ordinance states you cannot re-establish lawn in that area.

Ms. Woodburn said she did not read it that way and agreed to a stipulation from the Conservation Commission that the area only be mowed twice yearly; but the path going down to bay is our conservation easement and would be mowed. Councilor Friedrichs said his concern is that the Board is not privileged to trade off in the language of the Ordinance, but mowing is allowed for removing invasive species and said the area was probably being illegally mowed by prior owners.

Ms. Woodburn said it is being mowed to remove invasives. Chair Rasmussen asked about a site walk; Mr. McManus said he is cross-comparing Durham GIS with Google Maps and has enough information.

Councilor Friedrichs asked about the tree removals; Ms. Woodburn said there is an oak at end of existing stone wall and one just above the buffer with an ash tree in the unsurveyed area to right of house. Mr. Kelley said our zoning ordinance does allow the repair or replacement of existing retaining walls, and the existing wall is being replaced upgradient of the buffer; grading is permitted where necessary to accommodate a structure located outside the WCOD, and proposed structure will be within setbacks; those 3 items do not require CU and only require Permitted Use B.

Mr. Behrendt said wall and grading are Permitted Use B according to just 3 criteria, but those criteria are also subsumed into the CU. The 3 Permitted Use B criteria are: erosion control, restoration of disturbed areas, and minimum lasting impact on wetlands. Chair Rasmussen said an existing retaining wall is being replaced with something more suitable for structure and going in same location. The Board did not object to Permitted Use B, and final action could be taken at this meeting.

Councilor Friedrichs recommended the applicants to allow biannual mowing, with ½ in one year and the other half the next year, to allow insects to survive and native plants to repopulate, maintaining conserved land to best standards possible. Ms. Woodburn said she spoke with a person who mows conservation easements and he stressed the importance of mowing at least once/year to control invasives; she said she wants the mowing to be on the same schedule as conservation easement.

Chair Rasmussen said Permitted Use B does not require a public hearing, is recommended by the Conservation Commission with final action by Planning Board, and there are no fees or notices; fees will be returned to applicants. Mr. Kelley asked Mr. Behrendt to review the provisions supported by the Conservation Commission: Mr. Behrendt said they recommend (1) a note on the plan and condition in ordinance that no pesticides or fertilizers be used within the buffer; (2) existing grass area in WCOD be mowed no more than twice per year.

Councilor Friedrichs asked if the Board would still be able to add Conditions of Approval, and Mr. Behrendt said they could. Mr. Kelley said he would then like to see the sedimentation fence be laid out by a surveyor so it is not encroaching further into the overlay district, and asked if further sedimentation measures should be taken. Councilor Friedrichs read Section 175-65 Performance Standards in WCOD: existing lawns may be allowed to remain provided there is a 25-ft wide strip which is not mowed and is allowed to reestablish naturally occurring vegetation; applicant would need to extend 25 ft between wetlands and lawn area only mowing to control invasives.

Ms. Woodburn said there is an existing pathway that leads off the property onto conservation lands. Councilor Friedrichs said that would be allowed to be mowed with width of 6 feet. Councilor Friedrichs said it would need to be revegetated and reestablished. Ms. Woodburn said they are not making any changes to WCOD except up near the house, and asked Mr. Behrendt why this is coming into play now. Mr. Weinrieb said the property was recently purchased and no maintenance changes were made; current owners did not know there was a wetland until the property was mapped.

Mr. Behrendt said the Ordinance refers to SPOD in terms of buffers and is quite confusing with contradictions. Vice-Chair Grant said if a strip is left unmowed it might be a problem for the conservation land abutting that area. Chair Rasmussen said the Board is up against an “administrative gloss” wall, and until the new ordinance is written does not have a place to stand regarding enforcement. Administrative gloss has a legal meaning as courts have ruled towns cannot pick and choose *where* rules and regulations are enforced; Mr. Behrendt agreed it was not enforceable. The Board discussed the issue in depth and agreed to consider application as Permitted Use B.

Mr. Behrendt recommended the Board go through the 3 criteria for grading the site, including the Conservation Commission conditions, and any other conditions you wish to include. Mr. Kelley asked that the sedimentation barrier as shown on the plan be laid out by a surveyor; Councilor Friedrichs asked that a note about the administrative gloss issue be added; total of 4 conditions including those of Conservation Commission.

The board further discussed mowing of wetlands; Councilor Friedrichs amended language to: “mowing of wetlands must be consistent with the greater conservation easement”. Mr. Behrendt said the site now has 5 items: (1) mowing of wetlands, (2) no pesticides /fertilizers, (3) Permitted Use B: well, grading, retaining wall and steps; (4) Note of administrative gloss; (5) have a surveyor lay out locations of sedimentation barrier as shown on plan within WCOD.

Chair Rasmussen MOVED that the Planning Board accept the application for 561 Bay Road as a Permitted Use B with 4 conditions and one note as detailed by Mr. Behrendt for Map 239, Lot 9, in Residence Coastal District; SECONDED by Mr. McManus; Roll Call Vote: Sally Tobias-aye, Bill McGowan-aye, Emily Friedrichs-aye, Peyton McManus-aye, Heather Grant-aye, Paul Rasmussen-aye, Richard Kelly-aye; APPROVED 7-0, Motion carries.

Mr. McGowan left the Planning Board meeting at 8:34 pm.

IX. Reschedule April 10 meeting.

Chair Rasmussen said the date must be changed to either April 3 or 17, with back-to-back meetings; Board agreed to April 17 and April 24, 2023.

- X. Review of Definitions in Zoning Ordinance.** Review of the Zoning Ordinance as part of the zoning rewrite. The board completed a first pass through the Definitions. The board is conducting its second review. Once the board is satisfied with the changes an amendment will be presented for a public hearing. Recommended action: Ongoing review.

Page 48: Subdivision – Chair Rasmussen said a lot line adjustment is not necessarily a subdivision; Mr. Behrendt said it is treated as one by subdividing one lot and taking part of it away.

Support Center – Definition deleted.

Surface Parking – Vice-Chair Grant suggested: single-level parking. Councilor Friedrichs brought up the issue of significant fill being considered a structure and said amount of fill should be set as X-feet difference from existing to finished grade. Chair Rasmussen said that does not belong under surface parking and is better with “steep slopes”. Councilor Friedrichs said the Table of Uses in the Zoning Ordinance differentiates surface from structured, and it is important to consider some reference to ultimate grade-level change in one of these definitions.

The Board had a very lengthy discussion of this issue. Mr. Behrendt said the question of whether a retaining wall is a structure is a Site Plan issue, not a definition. Councilor Friedrichs said in structured parking there is no reference to what the structure is made of and could be earth. Chair Rasmussen said surface parking has nothing to do with whether you have a structure associated with it and recommended getting rid of *structured parking* and call it “parking garage” and call *surface parking* “parking lot”. Mr. Behrendt said concerns should be dealt with in Site Plan Regulations.

Councilor Friedrichs said there are currently three parking uses: off-street parking on lot to serve allowed use; structured parking; surface parking. Mr. Behrendt said they will only look at the Table of uses as it is impacted by what you are doing with definitions. The board changed Surface Parking to *Parking Lot*.

Theater – Combined with Cinema.

Completed Page 49.

Variance – Councilor Friedrichs suggested: “the specified purpose for which a parcel or portion thereof”. Mr. Behrendt said a lot is a parcel; the Board decided to leave definition as is. Councilor Friedrichs said: “a deviation from the terms of this chapter is allowed when the ZBA determines that the criteria are met.”

Vernal Pool – Moved to WCOD.

Self-Storage Facility – Board changed to: “any self-service storage unit composed of individual units or lockers rented to the public.”

Wetland, Wetland, Non-Tidal, Wetland, Tidal, and Wetland, Prime all moved to WCOD.

Workforce Housing; Workforce Housing, Subdivision– Textbook definitions.

Councilor Friedrichs proposed the Board add Wildlife Corridor to definitions and reference WCOD. Board agreed.

Mr. Behrendt said the HTF will look at changes on Monday, then the whole new section on Workforce Housing will be called Option A, and part in Conservation Subdivision called Option B.

XI. Other Business

XII. Review of Minutes (new):

XIII. Adjournment

Ms. Tobias MOVED to adjourn the Planning Board Meeting; SECONDED by Vice-Chair Grant; Roll Call Vote: Sally Tobias-aye, Emily Friedrichs-aye, Peyton McManus-aye, Heather Grant-aye, Paul Rasmussen-aye, Richard Kelly-aye; APPROVED 6-0, Motion carries.

Chair Rasmussen adjourned the meeting at 9:11 pm

Respectfully submitted,

Patricia Denmark, Minute Taker
Durham Planning Board