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Town of Durham

SEP 19 2012

Planning, Assessing,
Zoning & Code Enforcement

Durham Planning Board
ATTN: Karen Edwards
Town of Durham
15 Newmarket Road
Durham, NH 03824-2898

RE: Geoff Sawyer d/b/a Great Bay Kennel Property at 27-35 Newmarket Road
Tax Map 6, Lot 7-11
Conditional Use Permit Application

Ladies and Gentlemen:

This law office represents Geoff and Jaki Sawyer, d/b/a Great Bay Kennel, with respect to matters relating to the Site Plan and Boundary Line Adjustment applications your Planning Board conditionally approved at its January 25, 2012 meeting. We are working together with the Sawyers and their civil engineer, Michael Sievert of MJS Engineering, P.C., and their designer, Robin Wunderlich.

The new structures and their relocation (to the base of the hill, to better control and attenuate noise, for the benefit of neighbors) were approved by your January actions. Attempted abutter appeals have run their course and do not overturn or in any way affect the conditional approvals granted. When presenting this Conditional Use Permit ("CUP") application, Michael Sievert will also demonstrate the applicant's fulfillment of all Conditions of Approval, rendering the Site Plan Approvals previously granted final and complete.

Those approvals obtained, however, aren't sufficient to trigger the issuance of building permits, and support financing necessary for the Sawyers to move on with their kennel improvements and alterations. In conversations with the Town Code Enforcement Officer, as well as with legal counsel for neighbors, it became clear that Durham Zoning Ordinance Section 175-21 requires a Planning Board granted CUP as a necessary precondition to the alteration, enlargement, expansion and relocation of the Sawyers' buildings, even as approved by the approved Site Plan Application.

This application is submitted with the intent to cure that deficiency in the previously granted approval.

All previously submitted site and architectural plans and exhibits relevant to this Planning Board's January, 2012 Site Plan Approval remain equally relevant to this CUP Application. In summertime discussions with Attorney Scott Hogan, who represents a group of the most immediately affected abutters, additional design changes and operational controls were offered, counter offered, suggested, considered, and, as a product of a two-way listening and appreciating exchange, in part agreed to be implemented to further assure that external impacts on abutting properties of the applicant's altered/expanded/relocated use will satisfy CUP approval criteria.

By exhibits the applicant is acquiring and will submit for dissemination to the Board prior to the October 5 "Packet to Board" deadline for the Planning Board's next October 10 meeting, and with further testimony potentially with additional exhibits to be offered at public hearing, the applicant will prove he meets the approval criteria set forth in Durham Zoning Code Section 175-23. A comparison of the current kennel conditions/operations to the to-be-built conditions illuminate applicant's satisfaction of the approval criteria.

Current Conditions

The previously submitted Site Plan Application plans, as approved by this Board, show both current and to-be-built conditions. Michael Sievert has submitted updated plans with this CUP Application. There are only five physical changes to the plans, which can be assured by this Planning Board's establishment of "conditions" in granting the CUP (with reference to the updated plans).

1. Revised drainage design.
2. The wooden noise barrier fence along Route 108 on the Newmarket side of the new structures is now proposed to be 8 feet in height (versus the previously shown 6 feet) to match the 8 foot fence on the driveway side of the new structures.
3. Wooden stockade fencing (as a visual barrier) has been added on the uphill, southerly corner of the fenced in pen area.
4. Internal chain link fencing will be relocated to maximize operational controls, explained further below.
5. The previously proposed three sided barn will continue to be enclosed by two and a half full side walls, but now additionally by half-wall fencing and gates that can be opened on the one and one-half sides adjacent to the fenced-in pen play yard areas. This affords additional operational options to keep dogs wholly inside a building.

The additional wooden stockade fencing (visual barrier) on the uphill southerly corner is added to prevent dogs from seeing any residential activity relating to the Sawyers' existing home. This would include cars driving to the circular driveway, or outdoor gardening, or other outdoor activity.

Currently, if dogs see outdoor human activity, they sometimes bark at it. Not being able to see it, they will not bark.

The increase in height along the Route 108 fencing maximizes the blocking of sound wave propagation toward neighbors on the other side of Route 108. The applicant's sound expert, **Reuter Associates, LLC**, has submitted (copy attached) an updated September 19, 2012 report including additional exhibits, evidencing additional sound wave propagation mitigation resulting from this fence height modification. The higher fence creates a better barrier blocking noise, having the effect of decreasing any noise heard by neighbors across the street coming from the kennel. Mr. Reuter's revised report further clarifies his conclusions by characterizing the reduction in noise levels by the reduction in decibel levels achieved by this modification (see page 3/Results and Conclusions of revised September report).

As a reminder to the Board, a smaller accessory building (former modular classroom structure) is now located at the top of the hill. Kennel customers dropping off or picking up their dogs for daycare services park at the top of the hill, bring their dogs to either this structure or a gate at the fence near it. Drop off and daycare operations are essentially conducted outside. Dogs in this smaller structure, or in the fenced in pen area, could see dogs coming and going. This activity often catalyzes barking. Tarps have been temporarily draped over fencing in this drop off/pick up area to create visual barriers to decrease barking. As explained below, the complete internalization of these operations within the newly relocated structures at the base of the hill, together with additional operational controls to be offered by the applicant and imposeable by the Planning Board as CUP conditions, will achieve the greatest impact in eliminating drop off and pick up dog barking.

The Town Code Enforcement Officer, Tom Johnson, confirms that the applicant can replace/rebuild this current structure as a matter of right by getting a building permit to replace in kind, so long as the replica building (size/location) is compliant with current building codes. Such a permit had previously been issued, but has lapsed as a matter of time. It can be reissued.

Additionally, the applicant's use of the outdoor fenced-in daycare area has existed for over a decade as a permitted kennel use, and has withstood legal challenge by neighbors in Strafford Superior Court litigation entitled **Paul A. DuBois, Trustee, et al, v. Geoff Sawyer, d/b/a Great Bay Kennel, et al, Strafford Superior Court Docket No. 01-E-0089**. A copy of Judge Tina Nadeau's August 27, 2002 Order, together with the neighbors' then legal counsel, Bernard Pelech's Request for Findings of Fact and Rulings of Law, and the Sawyers' attorney's (the undersigned) Request for Findings of Fact and Rulings of Law and Trial Memorandum of Law, are all submitted for the record to fully and collectively understand the N.H. Superior Court's affirmation of the Sawyers' right to conduct business in their current manner.

Notwithstanding, for the reasons explained below, the proposed structures and their relocation to the base of the hill, will be a win-win situation for both applicant and neighbors. The neighbors can be further protected by the imposition of operational controls (which applicant intends to submit proposed Findings/Conditions before or at hearing).

CUP Considerations

The Planning Board already has a good understanding of intended changes by virtue of its January, 2012 conditional approval of the applicant's Site Plan. In granting a CUP, the Planning Board can clarify the following issues and operational controls to assure a meeting of the CUP approval criteria.

First, this Board can make fact findings and conditions of approval clarifying the caretaker apartment use intended in the new structure shall be built and used in reliance upon a previously granted variance to allow a caretaker apartment in a previously intended but never built addition to the main kennel structure located at the top of the hill. The variance granted is not necessarily building specific as it is the approval of a use for the applicant for the lot. As such, the transfer of this previously granted variance right, which runs with the land, is now used at the base of the hill. So long as the Planning Board's conditions make specific reference to the previously granted variance and these explained findings in conditions to be recorded at the Strafford County Registry of Deeds (again, applicant will offer exemplary text in its proposed findings/conditions prior to or at hearing), the Town will be protected against the current or any future owner trying to expand apartment use at the lot beyond that previously permitted by the Zoning Board of Adjustment.

Secondly, the elimination and attenuation of now periodic barking (primarily at time of dog drop off and pick up), by internalizing drop off/pick up operations and providing an inside daycare room and mostly enclosed barn daycare area, is improved by design modifications and operational controls associated with modified internal fencing of the outside pen area.

1. A smaller fenced-in "courtyard" of sorts in front of the barn structure will be maintained to allow the operator to keep dogs in the area where structure and fence noise barriers will maximize the elimination of noise traveling off-site. It will also maximize operational changes to keep dogs either completely inside or in the barn, or, for some, in this smaller courtyard fenced-in area in the hour or two associated with morning drop off and afternoon/evening pick up.
2. By establishing an internal fence essentially parallel with the fence now parallel to the lot's driveway, dogs will physically be kept further away from the fencing and vegetative buffer now screening the dogs from any cars and humans related to other kennel (and veterinary practice) activity. What the dogs don't see or notice, they will not bark at.

Approval Criteria

The applicant meets the approval set forth in Durham's Zoning Ordinance Section 175-23 (C):

1. Site Suitability. The Planning Board's January, 2012 Conditional Approval of the applicant's Site Plan satisfies these criteria. Michael Sievert will demonstrate the applicant's satisfaction of all Conditions of Approval.

2. External Impacts. Great Bay Kennel was first established as a matter of zoning right. The Zoning Ordinance now allows kennels in the zone conditioned on the granting of Conditional Use Permits. As noted above, the applicant's proposed changes to the site and operations require a CUP.

Any external impacts characterized as offensive by abutting neighbors are in large part eliminated, and certainly diminished, by the proposed plans and proposed operation changes. Noise (barking) has been the focus issue. The internalization of daycare drop off and pick up will eliminate most barking. Review of designer Wunderlich's floor plans demonstrates how dogs dropped off and picked up are separated by walls in multiple rooms from general daycare population. This eliminates completely the barking now catalyzed by drop off and pick up. One-way windows will allow humans to view dogs in the internal daycare room and external pens, but dogs will not be able to see them. A dropped off and picked up dog must go through a two door vestibule separating daycare population from human customers.

In addition to this internalization of drop off and pick up, the applicant will have the option of keeping all or some (barking) dogs wholly inside the new structure, or some there and some in the barn, or some in those two structures and some in the small courtyard play area adjacent to the barn. Only when dogs are settled and separated among their daycare peers with whom they get along will they be released into the larger pen area (always under employee supervision) during the mid-morning to mid-afternoon hours.

Dogs typically don't just bark. They bark in response to outside stimuli, which is largely eliminated by the new structures and design changes and operational controls. Dogs that do bark immediately are quieted by command (regulars to the daycare who know their caretakers), or sprayed in the face by a spray water bottle or hose by the employee if they (dogs) do not respond immediately to command. Unlike the current situation, dogs who don't learn to immediately be quiet on command, can be segregated to either inside the barn or completely inside the indoor play area within the building (behind first floor offices and below the second floor apartment) to eliminate any barking heard by the outside world.

3. Character of the Site Development. Robin Wunderlich's beautifully designed structures speak for themselves. Vegetative screening will be maintained as buffers with only minimal trees removed to accommodate the new structures which, frankly, become more effective sound barriers. The new structure and layout are an improvement to the neighborhood.

4. Character of Buildings and Structures. Again, the architectural plans support this approval criteria.

5. Preservation of Natural, Cultural, Historic and Scenic Resources. Michael Sievert will explain drainage modification and the Site Plan Approval condition's compliance as satisfying these criteria. As to cultural aspect, Great Bay Kennel has now become a multi-decade institution for the Town of Durham, and the applicant expects testimonial support at hearing to explain this business' benefit to the community and how its services will be enhanced by the proposed changes for both the operator, its customers, their dogs, and neighbors.

6. Impact on Property Values. The zoning standard is to not cause or contribute to "a significant decline in property values of adjacent properties." The applicant submits there will be no decline in property values. If anything, the improved architectural features and elimination/lessening of external impacts will likely have a positive impact on neighborhood property values.

7. Availability of Public Services and Facilities. This was all demonstrated for Site Plan Approval.

8. Fiscal Impacts. There will be no negative fiscal impact on the Town. The new structures will actually increase the assessed value of applicant's property, resulting in an increase of property tax payment, with no increase to municipal costs to the community.

It is applicant's intent to supplement this letter with additional exhibits and proposed findings/conditions prior to the October 5 "Packet to Board" deadline, and at hearing.

Sincerely,



Christopher A. Wyskiel

CAW/nl
Enclosures

cc: Geoff and Jaki Sawyer
Robin Wunderlich
Michael Sievert