

Karen Edwards

From: Michael Behrendt
Sent: Friday, April 30, 2021 10:43 AM
Subject: ZBA decision on parking definitions | later comments at PB and TC - email and attachments from Robin Mower
Attachments: 2021.04.14 PB minutes verbatim.pdf; Olshansky & Tobias APRIL 19 TC.pdf

To the Planning Board,
Please see the email below and the attachments from Robin Mower.

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From: RobinM [<mailto:malpeque@gmail.com>]
Sent: Thursday, April 29, 2021 9:31 PM
To: Durham Town Council; Michael Behrendt
Cc: Joshua Meyrowitz
Subject: ZBA decision on parking definitions | later comments at PB and TC

Greetings,

At the April 19th Council meeting, resident Beth Olshansky spoke during Public Comments, and then Councilor Sally Tobias spoke during Councilor and Administrator Roundtable, implicitly and explicitly referencing a discussion held at the Planning Board on April 14, the day after a Zoning Board decision on an appeal based on our current zoning ordinance's parking definitions.

It occurs to me that it may be helpful for future discussions to be able to refer to verbatim transcriptions of the section of the Planning Board meeting that focused on whether and when to take up zoning amendments to clarify the definitions that were at the heart of the ZBA appeal and decision AND of the Town Council comments.

Planning Board members will recall that the April 14th discussion was prompted by an email sent by the Chair on the previous evening shortly after the Zoning Board decision.

Please see, attached, my transcription of those approximately 30 minutes at the Planning Board, plus Joshua Meyrowitz's transcription of the April 19th Town Council comments.

(Michael: Please forward this email to the Planning Board. It may also be helpful for Victoria Parmele, or whoever is now preparing minutes. Thank you.)

Regards,

-- Robin

Robin Mower
Durham, NH

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20210414 PB minutes verbatim

April 28, 2018 Durham, NH Planning Board meeting

Robin Mower, transcriber, notes:

- This section of the meeting focused on when and how to clarify or amend the definitions for “surface parking” and “structured parking.”
- Transcription is difficult when several people speak simultaneously, so some comments may have been missed. The use of an ellipsis i.e., ... , indicates a speaker's pause or shift in direction of speaking, not a transcription gap. [Brackets] may indicate a place where transcription wasn't possible due to inaudible or garbled audio.
- See also Joshua Meyrowitz's transcription of the ensuing April 19, 2021 Town Council comments on this topic, first, by Beth Olshansky during Public Comments, and, second, by Councilor Sally Tobias, during Councilor and Administrator Roundtable.
- Zoom hybrid videoconference meeting
- Planning Board member attendees: Rasmussen, Tobias, Parnell, and Grant in Council Chambers; Kelly, Hotchkiss, Germain, Bubar, Phillpot, Dill, McGowan (arrives late) on Zoom.

Agenda Item: XI. Other Business

Discussion starts about DCAT recording mark 1:03

Paul Rasmussen: So this one was a late addition. Last night the ZBA met, as Mr. Behrendt said, and there were a couple of comments made while I was watching it that waived the red flag that any Planning Board member should pay attention to. There's a requirement in zoning that, or an item referred to as “reasonable person test.” And we had two ZBA members say that they were confused by our definitions and that the project that they were looking at met both definitions when in a situation that should be an either/or type decision. So, given that, I believe it's imperative for the Planning Board to review those definitions and to move forward in a very expedited manner to correct them, or else it could... I just feel that if we don't, that it's going to lead to a potential, even more and more confusion, the longer we let it slide.

Sally Tobias: Yeah, it could.

Rasmussen: And to support that, I did provide late this afternoon my, some proposals which act as a starting point on those definitions. What I'd like to do tonight is, I mean it is 8:00, we have time. My goal had been simply for us to lay out a strategy of when we do that. If people want to massage these, sort of get some feedback on what people think about them, and have Mr. Behrendt start putting things together for an actual zoning update to include the new definitions. Comments?
Barbara.

Barbara Dill: I did see your email, but I was really focused on preparing for tonight's meeting, and so I sort of just said, I can't digest this right now, but I think it's a good idea to do it. But what I'm thinking is, I don't know if all of the other members watched last night, or, and/or if they have had a chance to look at the DCAT, which, it is posted now, it didn't go up until sometime later this afternoon. But I think that you can only really appreciate this situation if you actually have seen that meeting and seen the members that you spoke of, sort of, you can go either way on this. So that's

just my thought. I don't know that we should even start it tonight, unless everybody has looked at the meeting and knows what they think, and, blah-blah-blah-blah-blah.

Rasmussen: Mr. Kelley?

Richard Kelley: Like Barbara, I haven't seen the meeting. I did go to DCAT earlier today and it wasn't there, but I certainly see now, it is there. For those members who did attend the meeting, those Planning Board members who were able to attend the meeting, if I could understand: There were ZBA members who struggled with the current definition of structured parking, and more to the point, and struggled with the definition of surface parking, specifically, the term "at grade." Would that be correct?

Rasmussen and Dill together: That is correct / Yes.

Kelley: And the reading of "at grade" would be that it had to be "existing grade."

Rasmussen: That's where members disagreed on the Zoning Board. Some felt that "at grade" meant finished grade. Others felt that it did not necessarily mean finished grade, that it means starting grade.

Kelley: It implied "existing grade," an existing grade out there, or in close proximity to.

DCAT recording mark about 1:08

James Bubar: I think the other thing you may want to consider, if you look at our existing structured parking definition, anybody with a garage has actually got structured parking.... Which means garages aren't allowed in Church Hill district...

Rasmussen: Based on the logic used by Joan Lawson last night, yes, anybody with a garage has structured parking.

Bubar: I mean, that does fit neatly into our definition.

Rasmussen: Yes. Chuck?

Bubar: It isn't the intent [?], but they are dealing with the language, and I don't know that anyone knows the intent behind these definitions when they were created.

Rasmussen: Alright, go ahead, Chuck.

Chuck Hotchkiss: I did watch the entire debate last night and actually found it very interesting, the differing interpretations and the need for clarity. While I support Paul's contention that this is something that needs to be addressed, I would warn against trying to rush to a new set of definitions, because I think that it would be better to give this more consideration and be careful. Whether we start that tonight or not, you know, I think we need to take our time and get it right, so that we don't prompt another discussion like the one that occurred yesterday evening.

Rasmussen: I agree, I agree.

Tobias: Yes.

Bubar: I really agree with Chuck. What I was struck with last night was Mr. Sievert essentially saying, "Well, OK, get rid of the wall. I will just use fill. It will be longer and narrower, but I can still build it." You know, I walked away from that, and that's why I raised the issue of the berm, Paul, that, if I put 20 feet of fill on top of the grade at the time of the application, is, that's effectively a wall. It's doing, it's serving the purpose that that wall served. And I would, quite frankly, if I was on the ZBA, I would probably go down the same path that says, Nah, I don't like 20 feet of fill. To put a wall in would be actually be less damaging than the 20 feet of fill, because it would be much closer to the wetland, much closer to Chesley Drive, in that case.

Lorne Parnell: I don't think we should get into a discussion on the merits of that decision or the project itself.

Tobias: Yeah.

Bubar: That's fine, but the issue I'm trying to raise is, I think there's more than just a wall at stake. I think you need to deal with the issue of fill, and how is that going to happen going forward? And what is, how do I get from the current grade at the time of the application to the finished grade? Now, is that a 20-foot difference? Is that OK, or is only a 4-foot difference?

Tobias: That would be something other than, that goes off into something other than the definitions that we're looking for.

Bubar: Hmmm, it's part of "structure." I maintain that fill, to that extent, if you're bringing in rocks so that you can build a platform, that's a structure.

Tobias: And depending upon the site, it may or may not be needed.

Bubar: No, if it's not needed, then, if it doesn't exist, then it's not a structure, but if you have to put in 20 feet of rocks, you're putting in a structure.

DCAT recording mark about 1:12

Tobias: Still, I come back to the definition of what structured parking... In my head, when I think of structured parking, I think of a parking garage, or....

Rasmussen. Bill?

Bill McGowan: I mean, given the discussion that's going on right now, we need more time to take a look at the video from last night and get more information from Michael, otherwise we're going to be spending a lot of time going round and round and not make much progress, so I, my consensus is that we need to wait for another meeting until we get more information.

Rasmussen: Alright. Like I said originally, my definite original intent was simply for us to lay out a strategy on how we want to move forward.

Parnell: Could I just ask Michael, I agree with the comments made about not rushing into this, and I just wonder, are there other definitions that you're aware of that are, where there are potentially issues, similar problems, that have come up in the past?

Michael Behrendt: I mean, conventional...I've looked at a couple of ordinances and other templates. Conventionally, there's two kinds of parking...

Parnell: No, I'm not speaking about parking. I'm speaking about definitions in general, the definitions section we have. I mean, if we're going to be rewording some of these things, maybe we should spend a bit of time and solve all the problems, or try to solve the problems.

Behrendt: All the problems related to parking? Structured [xxx] or all of the [xxx]

Parnell: Definitions.

Dill: Yep. Definitions

Behrendt: Well, That's one of the things, as soon as we have an opening, I'm going to bring to you early on is a whole revised definitions section, but that's months away.

Parnell: I'm reluctant to just... twenty-four hours after this, we're talking about changing the wording on this thing, and I'm, I think we should take a bit more time and think about it a bit, including other things, other changes, that might have to be required.

Behrendt: You mean related to this?

Parnell: Or similar problems, that you've experienced, when people have done something, and then there's been an issue of this or that.

Behrendt: Well, I do have a list of numerous zoning changes. I've made my list, waiting to bring it forward. I mean, I could work with Paul on this. We could come up with revised parking definitions, and that the same time, there are dozen or more simple things we could tack on and just clean up.

Parnell: I think that would be a good idea.

Bubar: Michael, do you have a list of all the items that we have essentially adopted an administrative gloss for?

Behrendt: Pretty much so.

Bubar: I think that should be included.

Behrendt: I mean, we could do that. Probably, take advantage, if we're going to go through the process for parking definitions, and we've got a couple of dozen other things that are pretty straightforward, we might as well put it . We may as well put it all together, which is easy to do, recognizing that in the coming year and two and three, when we have time, I'm going to be bringing a lot of articles one at a time to redo. But that's off.

Rasmussen: My big concern about delaying too long is, I totally get that we don't want to tackle it tonight, but the fact that, and I encourage you all to go watch Joan Lawson work through her logic on how she voted last night, but, basically anybody, I think it's, we've opened ourselves up at this point, or the ZBA has, anyway, that anybody who's working on a garage or even their driveway...

Dill: No!

Rasmussen:...could potentially be open to a similar type of administrative appeal that what they're doing is structured parking. Yes, Richard.

Richard Kelley: There are numerous definitions available on LawInsider and other websites out there that we can consider, but one consideration that we could just simply do immediately, if the concern arises so much, is to revise our current definition to say that this does not include residential garages or carports. I don't think there's people out there worried, "Oh, my goodness, I'm not in conformance with the zoning." But if it rises to such a degree that we share that concern, we could just simply say, under our definition of "structured parking," revise it tonight by saying that "structured parking does not include parking or carports."

Bubar: Residential.

Tobias: Or driveways.

Rasmussen: Barbara?

DCAT recording mark about 1:17:39

Dill: I just want to say that this particular situation that we're talking about is a principal use, and driveways in residential areas, and garages that you park your car in: Those are all accessory. So I think that this particular instance should not be of great concern to people in residential areas. It shouldn't be of any concern whatsoever.

Rasmussen: Let me clarify. Last night's decision had what to do with what the definition of structured parking meant. Structured parking as an accessory use is not permitted in a residential zone.

Dill: Fine, so, that's fine.

Rasmussen: It...no, it isn't.

Tobias: It entails...a wall...it requires a retaining wall.

Rasmussen: No, it isn't because, it...

Behrendt: Well, we need, we need to change or clean up the definitions. This is not hugely pressing. Audrey is not gonna cease giving someone in a single-family a permit to build a garage for their car. We're not gonna be issuing violations to people with three-foot retaining walls. But the definitions are problematic and we need to correct them.

Rasmussen: Alright. So, what I do need is to get a feel for from the board is, we've had several different suggestions of how we should be moving forward. Alright. Lorne would like to have a larger package of definition changes move forward. There's also been a proposal for just the targeted ones that were causing the problems last night to be dealt with. Which way do we want to go? How do we want to move forward with this?

DCAT recording mark about 1:20:28

Tobias: I wouldn't know which ones are going to be problematic if they haven't become a problem yet. If Michael is aware of problematic definitions, bring that to the table and this. I don't want to start going through every definitions and decide it's problematic, because we're going to get lost in the weeds there. And I do think that, you know, Michael says this isn't pressing, but it certainly does have an impact, a tremendous impact, on an application that's here, and it could impact

future applications. So I think we do need to clarify it. I think we need to look at the definitions ourselves, and it would be good for everybody to watch the ZBA meeting, because it would give us an example of how someone's logic, you know, worked this out, and then have a discussion about it. But I don't necessarily think that we can tackle every issue. And whereas I get what Lorne is saying—we're going to do one, we might as well do them all, but I think that's a lot, that could be a lot of time, and I think that we should start with this one, and any others that you have seen have definitely become an issue.

Rasmussen: So how much time would you need to put together...

Behrendt: Oh, I could have something for the next meeting. I can talk with you. I can include a bunch of things that are pretty straightforward. We may as well, if we're going to process it, we may as well have a bunch of stuff at the same time.

Rasmussen: OK. So, is that agreeable to everybody? Michael will put together the, his backlog of changes that he has for us, we'll include this with it, and we'll, he'll present it to us for our next... What's on our agenda for the next meeting?

Rasmussen: [groans]

Behrendt: We have Gerrish Drive and Mill Plaza. So I could do it then or do it on the 12th.

Grant: Or we could do it during the workshop on the 27th of May.

Rasmussen: Gerrish Drive and Mill Plaza. That's a full night. So let's take a look at...and we have one, two...

[Dill: Unintelligible]

Behrendt: We'll be busy on April, on May 12th, too.

Rasmussen: I have, just so you guys know, I have Chuck and Richard lined up. Once I get my head out of the current loop, I'll be getting to you. Yeah, let me think about that one. Chuck, you were waving your hand first.

1:22:55

Hotchkiss: Yeah, thank you. In my experience, wordsmithing with a larger crowd is probably not the most efficient way to get this done, and I'm wondering if maybe Michael could come up with his Top 10 or Top Dirty of definitions and maybe work with some subcommittee of the Planning Board to come up with some proposed new wordings before presenting that to the full Planning Board?

Dill: Yay!

DCAT recording mark about 1:23:30

Rasmussen: I think that's sort of what we had been discussing. Yes, he already has something. It's not a list of things that need to be fixed but a list of fixes that he's ready to give to us, and he'll run it by me before the next, before we bring it to the board. I think that is the plan we're following, Chuck, which I think melds nicely with your suggestion. Richard?

Hotchkiss: Alright. Thank you.

Kelley: Well, I think the Councilor has an excellent idea, and that's what I was going to put on the table as well, was that, you know, a smaller committee of individuals could work, basically via email, to get something together to put in front of the planning board and the public.

Rasmussen: Yeah. OK. Is there anyone else who'd like to be involved in this besides just me and Mr. Behrendt? Barbara, you have your hand up?

Dill: Because I'd like to be involved.

Rasmussen: OK.

Tobias: Barbara's a good wordsmith.

Rasmussen: We could do one more, if anybody's really interested. Chuck?

Dill: Chuck.

Rasmussen. Alright. Sounds great.

Hotchkiss: I'll do it.

Rasmussen: Great. We get any more people involved, then we become a public meeting, and I have to limit it there.

Tobias: More power to the [unintelligible].

Bubar: [unintelligible] subcommittees.

Rasmussen: Excuse me, James?

Bubar: I said, dueling subcommittees.

Rasmussen: I don't have the time to be doing subcommittees.

Behrendt: So, if we have, if I'm working with a few of you, we should make it May 12th, then. The 28th wouldn't give us enough time.

Rasmussen: Yeah, yeah, definitely, well, May 12, and we'll look at the agenda. If we have to push it, we'll push it.

Tobias: May 12th might be a an appropriate thing to do.

Rasmussen: It may fit better on May 19th, after Mill Plaza

Tobias: Maybe pencil May 12th and a "To be determined"?

Rasmussen: Yeah. That sounds like the best idea. Alright. We're good? Any last comments on that? Alright, review of minutes?

Beth Olshansky and Sally Tobias
Town Council Meeting: April 19, 2021

VIDEO: <https://durham.vod.castus.tv/vod/?video=6d12cb2a-d90e-42c7-b3b8-d27b943c9043>

7:11:45-7:14:34

PUBLIC COMMENT, BETH OLSHANSKY:

"I have been engaged in Durham Town government for the last 20 years, and whether or not I have always agreed with decisions made by various boards and committees, I've always taken some comfort in knowing that the process was fair and that it was followed with integrity. I guess last week, I was a bit shaken. My faith and my trust in Town government was a bit shaken by a series of events that happened *very quickly* last week. And I just want to thank Todd for sending out that letter and intervening in, you know, a series of events, that just the optics weren't good. And I just appreciate Todd encouraging everyone to take a deep breath and step back and look at our zoning from a more holistic perspective rather than drilling in on one particular issue where some folks didn't like the outcome of a particular decision at the ZBA. So I appreciate that, Todd, and your encouragement to continue viewing our zoning from a holistic perspective, not to rush the process. I think that's very important. And, also, the other piece of that was to wait until this particular issue was no longer at the Planning Board. I guess one concern I have is that the applicant could choose to withdraw their application immediately and then they would no longer be at the Planning Board. And so that is a remaining concern. And I hope that you will just continue to oversee and guide this process so that citizens will feel that there is some integrity to the process of reviewing existing language and making changes. But again, I do want to thank you, Todd, because otherwise, I know myself and many people in Town have been very concerned about those events last week. So I again, appreciate that and, of course, the Integrity that this Council brings to the Town. So thank you to everybody.

7:25:12-7:29:30 [Section of Councilor & Town Administrator Roundtable]

COUNCILOR (AND PLANNING BOARD COUNCIL REP) SALLY TOBIAS:

Well first thing, I'd like to thank Chuck for giving such a thorough report [of the April 14, 2021, Planning Board Meeting]. As Chuck explained about the 74 Main Street and Yates electric, and the postponement of the application for 19-21 Main Street.

I would like to just make a comment about some of the concerns in the community relative to the Planning Board putting together a small working group of Paul Rasmussen, Barbara Dill,

and Chuck Hotchkiss to revise some definitions. And just to assure people that this was not done out of a desire to fix something or because of a dislike for a decision by the ZBA. The ZBA did the job that they are assigned to do. And at the same time, I think it is the responsibility of the Planning Board to do its job. And Chair Rasmussen watched the ZBA meeting, and he was struck by the fact that there was such a diverse interpretation of one of our vocabulary words, which told him that it would not be clear to the average person, and that would say that there was an issue in the way we had worded the definition, and that it was perhaps be interpreted in a way that we ourselves and our own planner had advised us as to what we meant by a certain vocabulary word or definition.

So that was the reason why we or he suggested that and why the Board agreed, that we should look at not only that but others, and that it shouldn't just be that one, and we definitely were not choosing to rush into something or to rush, you know, quickly change a definition to allow an application to go forward. That was *never* the intent. And that there were other vocabulary words that, you know, we asked Michael Behrendt to bring other aspects, of the code (?) that had been problematic and that he was working on. And that group would be able to sit down and start looking at some of these, as a small group, and then bring, of course, their recommendations to the Planning Board where it would be all, any and all, of their recommendations would be fully vetted at the Planning Board and, of course, would be brought to Council to be fully vetted here.

It makes me sad to hear here members of the community somehow believe that the Planning Board would be doing anything underhanded. Maybe that's not your intent, but that's how I'm hearing it. We have some long-standing members on the Planning Board. And we have some, I think they are all excellent people, they know what they are doing, and they sacrifice a great deal of their time and energy performing in performing their duties for the Town of Durham. And nothing was done on Wednesday night at all that was motivated by any personal choice. I think the members take, do their best to do their duty as they're supposed to. And that I would really like to assure the community, if they will, you know, believe me that that was never the intent. What the intent was to do indeed what the Planning Board should be doing and that is addressing a situation that had been challenged that actually turned our own view of what our definition was upside down. So that would require a serious look at the way we define something and to make that decision. And nothing is a shortcut or an underhanded manner. That was never the intent.

Please send any corrections to Prof. Joshua.Meyrowitz@gmail.com

jim / home/mp plan/ docs / Olshansky & Tobias TC April 19 2021