

July 27, 2022

Planning Board
8 Newmarket Road
Durham, NH 03824

Greetings,

Yesterday I sent a letter to Michael Behrendt and Todd Selig about the change in procedures outlined in Michael's email following up his discussion with Heather Grant and Laura Spector-Morgan. I hoped that Michael and Todd might further discuss that game plan, given concerns that I had raised and imagine the Board might also have.

I understand that Todd forwarded my letter to the Town Council and is comfortable leaving the matter in the hands of those who devised the proposed procedure. Thus, Council representatives to the Board will have seen the letter. I think it appropriate that other Board members should also, so I am sending it along. (See next pages.)

Addition to that letter: "One vote" scenario

What I did not include was a possible scenario in which a Board member faces a dilemma when a "single vote" comes up.

As the zoning ordinance requires, a Conditional Use permit needs at least five approval votes, i.e., a "supermajority." Yet both a site plan permit and a Notice of Decision require only a simple majority approval.

If three members believe the CUP application does not meet the criteria, yet four members vote to approve the site plan and/or the Notice of Decision, then that functionally negates the power of a CUP vote. This process would undercut the authority of the conditional use, which has been included in the zoning ordinance since 1990 and which we are told—over and over—is a "powerful tool."

In closing, I hope that the Board will take the concerns laid out in my letter, below, under advisement tonight.

Regards,

Robin

Robin Mower
Durham, NH 03824

July 26, 2022

Mr. Michael Behrendt, Town Planner
8 Newmarket Road
Durham, NH 03824

Greetings, Michael—

First, thank you for your email from earlier this afternoon which lays out what you, Acting Chair Heather Grant, and Town Attorney Laura Spector-Morgan propose for a procedure for the remainder of the Planning Board's review of the Toomerfs' two 19 Main Street applications. Please note that I am copying Todd on this letter.

However, even your current proposal raises numerous concerns, as I will detail.

My advice

Taking into account the below questions and comments, I urge you to discuss with Todd the procedure laid out in your email. Then, you *must* speak when the board takes up the agenda item at tomorrow's meeting—which, unfortunately, may be late at night (another red flag for procedure): lay out your proposal, explain how you arrived at it, and invite comment and questions from the board.

Questions and comments

1) What is the legal basis for changing the voting procedure at the very tail-end of a nearly-two-year review process—indeed, during final deliberations (for a high-profile, controversial proposal, to boot)?

You note in your email:

- The board will take one vote – at the final meeting about the conditional use, the site plan, and the draft notice.

Of particular concern is the proposed change to “one vote” rather than individual votes on the two applications (CUP and site plan) and the Notice of Decision. (Or do you, in fact, mean one vote on each, to be done in sequence on the same night?)

The procedure anticipated by the community, and no doubt by board members, began with the assumption of separate votes for (a) the CUP—supermajority approval required—and (b) site plan—only majority approval required—applications, as well as an implication in your June 22nd Planner's Review that a vote would be held at least a month earlier than you now propose.

In addition, if only a single vote is taken, then that could result in a violation of best practices, i.e., stating rationale(s) for each of the Conditional Use criteria prior to voting, a practice strongly advised by attorney-authors of articles I've read.

2) How will the board “direct you”—if not by a vote—to draft a Notice of Decision, i.e., if it has not yet voted on either the CUP or site plan application?

As a resident who has followed Planning Board applications for over 20 years pointed out to me, the board has historically voted FIRST on whether the application(s) meet our regulations—which by inference direct the Planner's draft Notice of Decision—and THEN on the Notice of Decision.

3) Heading off Planner bias.

Some residents have read your July 27th Planner's Review with concern that you appear to be presenting bias in your comments about the Conditional Use criteria discussion, whether via the selection of points or their language. It's a sort of a “leading the witness” situation. Without an actual vote to direct you to draft an approval or denial Notice, that risk remains. Yes, the board votes on the Notice, but it's also a kind of “out of sight, out of mind” situation. If you only list certain items, and at such a distance in time from the deliberations, will all relevant points make it into the Notice?

4) Will the board orally review at the meeting each and every single Conditional Use Permit criterion immediately prior to voting?

Deliberations on the Conditional Use Permit began on June 22, just over a month ago. Your timeline now suggests that a vote might not occur until at least August 24—two months later.

The board's own discussion of CUP voting procedure last summer (July 14, 2021, starting about 9:30pm) clearly concluded with a consensus that a delay between deliberations and voting is not a good idea. Indeed, the board clearly preferred to vote during a meeting—even as late as 11:30pm and even on a controversial application.

See this partial DCAT transcript from that July 14, 2021 meeting:

Councilor Sally Tobias: But we may be ready to vote, we might be ready to vote on something at 11:30, I mean, even on a very controversial one that's taken us for, you know, seven years to look at. I mean, you might be ready to vote when you're ready to vote, and it would be a mistake, I think, to postpone it. You, you lose your point of thought, and I think you'd be more open to accusations of

unethical behavior if you were ready to vote and then suddenly you changed your mind.

Lorne Parnell: I think that one thing we'd have to be sure of is that, if we start this discussion on each of these eight items, we would have to finish with a vote.

Were the board to vote on August 10—a procedure running counter to that July 14, 2021 consensus, that would mean SEVEN WEEKS will have intervened since the initial June 22, 2022 deliberation.

It is likely that few will remember the details of the earlier deliberations. (Will you somehow require all voting members to swear under oath that they have watched, or even rewatched, the DCAT recordings—and taken notes on them, which they will bring to the voting meeting?)

5) This town values transparency. We can do better.

Already, at the July 13, 2022 Planning Board meeting, Acting Chair Heather Grant opened the CUP deliberations and stated—with no explanation, and apparently countering prior statements from you: “We will be reviewing the final Conditional Use criteria. We will not be voting on that criteria tonight.”

Going forward, transparency would also be well served if each voting member states clearly the reasons supporting his or her vote—and not just an “I agree with so-and-so”—even at the risk of repetition.

This has indeed been a rough process for all parties. I hope that you will take my above advice for tomorrow night's meeting.

Regards,

Robin

Robin Mower
Durham, NH 03824

cc: Todd Selig, Town Administrator