

TOWN OF DURHAM

Planning and Zoning Commission
P.O. Box 428
Durham, Connecticut 06422-0428

MINUTES OF AUGUST 6, 2008, MEETING

Present

Members: Ralph Chase, Frank DeFelice, Cathy Devaux, George Eames,
Richard Eriksen, Jim Kowolenko, Gene Riotte
Town Planner: Geoffrey Colegrove
Alternate: Mike Geremia

Absent

Members: Dave Foley, Tom Russell
Alternate: Mark Laudano

The meeting was called to order by George Eames, Chairman, at 7:30 p.m. Mike **Geremia was seated on the Commission in Dave Foley's place.**

Motion by Ralph Chase, seconded by Mike Geremia, to approve the agenda of the August 6, 2008, meeting as amended to reflect deletion of item #10 (Durham Auto Center, deferred until meeting in September). Motion carried unanimously.

1. Public Session

Attorney Mike Dowley, representing homeowners in the vicinity of Skeet Club Road, addressed the Commission. He stated that he was not there to speak on the recently closed public hearing of the large animal crematorium. Rather, he was there to address several technical items. He indicated that approximately 25 homeowners had signed an affidavit and seek to file an application using intervener status in this matter; state statute provides for this legally. He briefly described the nature of the affidavit; it speaks to concerns about polluting/destroying natural resources of the state in a case where there are no state or local laws setting standards to govern the proposed use. This is of particular concern because of the lack of public water and sewer in the immediate area of the heavy industrial zone. All of the homes as well as the businesses have wells and septic systems. There is concern because of the use of disinfectants and chemicals and possible drainage/runoff problems.

Attorney Dowley also pointed out that there was no certified copy of the proposed regulation/language text change on file at the office of the town clerk in accordance with state statutes at the appropriate time; the application was date-stamped July 31, 2008. This is also subject of an appeal. Because of this, it was his suggestion that the Commission would be left with no choice but to hear the entire application again (properly noticed); he asserted that significant money could be saved by the Commission enacting to do exactly that without proceeding in that fashion as a result of a legal requirement. He further suggested that the Commission might want to consider this matter before voting on the application itself in September.

Finally, Attorney Dowley stated that a letter from Attorney Thomas Byrne to the Commission advises that any subsequently enacted substantive laws/change will not, in effect, bind the applicant; this was in response to an earlier query by the Commission.

In summary, Attorney Dowley recommended that the Commission be very careful about getting into an area where there is such a real concern about the environment without sufficient standards having been established.

Geoffrey Colegrove indicated that it was highly unusual for Attorney Dowley to be making such assertions; further, he stated that the Commission had not yet received **Attorney Byrne's letter (but would later in the meeting). He added that had he known that Attorney Dowley planned to be addressing the Commission, he would have arranged for the Commission's counsel to be present. Attorney Byrne had advised the Commission** that there was no failure on its part, the legal notice, description of use, and what was proposed; the notice had been faxed by the planning office. The Commission will act according to advice of its legal counsel.

2. Tilcon, Inc., Site Plan Review for Renewal of Earth Excavation and Removal Permit, South Side of Wallingford Road.

Frank Lane, director of real estate for Tilcon, addressed the Commission with regard to the annual quarry operations permit. He reviewed site maps that show all activity that is proposed will be within existing areas. Though the quantity proposed is one million tons (the same as last year), Frank Lane stated that because of the economy, it was unlikely **that this volume would be achieved. He added that the plan is 'unremarkable,'** showing the existing limits of activity, stormwater controls, and structures. Permits have been received to remove all underground storage tanks; going forward, all storage will be above ground.

To Richard Eriksen's query regarding the buffer, Frank Lane stated that the heavy industrial line had been moved to the west. Blasting cannot be any closer than 1,000 feet from the dwellings along Old Mountain Road and Route 68. The 1,000-foot buffer has been preserved (in actuality, 1,200 feet is about the distance to the closest residence). In

terms of the mining activities, the benches are already started and all work is vertical; there is no lateral expansion.

The material being mined is igneous basalt (from lava flow originally formed by fire).

Motion by Richard Eriksen, seconded by Ralph Chase, to approve the renewal of Tilcon, Inc., site plan review for one year—earth excavation and removal permit, Wallingford Road. Motion carried unanimously.

3. Payment of Bills

Motion by Ralph Chase, seconded by Jim Kowolenko, to approve payment of the following bills:

- Attorney Thomas Byrne -- \$650.00 (review conservation easement)
- Attorney Thomas Byrne -- \$6,900.00 (Silver Eagle/Price Chopper application)
- Absolute Advantage -- \$641.27 (minutes July 16 meeting and CDs/cases for hearings/transcriber)
- William Wrang (second approval) -- \$50.00 (service of three legal notices)

Motion carried unanimously.

4. Approval of Meeting Minutes

Motion by Gene Riotte, seconded by Cathy Devaux, to approve the minutes of the July 16, 2008, meeting as submitted. Motion carried, 7-1, with all in favor with the exception of Mike Geremia (in abstention).

5. Town Planner's Report

Geoffrey Colegrove stated that because of the effective date of the new regulations for large animal crematoriums listed in the use table, the Commission could not act on the application until the September 17 meeting (within the 65 days that the Commission is allowed for a decision).

He advised that Jim Kowolenko had worked extensively in developing proposed conditions and text for the Commission consideration; language was distributed.

6. Miscellaneous

George Eames advised all Commission members regarding protocol in terms of **contacting the Commission's counsel, Attorney Thomas Byrne. The only two people** authorized to contact Attorney Byrne are the Chair, George Eames, and the Town

Planner, Geoffrey Colegrove. All matters must go through these two individuals and no one on the Commission is to contact Attorney Byrne directly.

Geoffrey Colegrove stated that there will be a Freedom on Information workshop on September 4. One question raised during the last two major public hearings (horse crematorium, Price Chopper application) is how communications are to be received, in particular with the increased frequency of e-mails. In the recent past, e-mails have been sent to members of the Commission, the Commission chair, the Town Planner, the Commission recording secretary, Midstate Regional Planning Agency, the First **Selectman's office, etc. There has not been a protocol formalized to address this and there** was some worry about the Commission being certain it had received and acknowledged all correspondence. For the time being, it was determined that only correspondence posted by the United States Postal Service and addressed to the Chairman of the Planning and Zoning Commission, using the Town Hall address, would be considered official.

Motion by Ralph Chase, seconded **by Jim Kowolenko, to take as 'sabbatical' the** regularly scheduled meetings of August 20 and September 3, which is the typical practice of the Commission. Motion carried unanimously.

Motion by Frank DeFelice, seconded by Gene Riotte, to recess the regular meeting at 8:00 p.m. for the public hearing. Motion carried unanimously.

PUBLIC HEARING

1. **Applicant:** Planning & Zoning Commission
Proposed Zoning
Text Amendment: To Add New Sections 02.15.02 and 04.07 to Prohibit "Outdoor Wood-burning Furnaces" in All Zones

Present

Members: Ralph Chase, Frank DeFelice, Cathy Devaux, George Eames,
Richard Eriksen, Jim Kowolenko, Gene Riotte
Town Planner: Geoffrey Colegrove
Alternate: Mike Geremia

George Eames, Chairman, opened the public hearing and read the legal notices. **Jan Melnik read into the record a letter from Joan Nichols, a Government Relations Specialist with the Connecticut Farm Bureau Association in Wallingford, in which a strong opposition to the proposed ban on outdoor wood furnaces is stated, particularly with regard to the agricultural community.**

Geoffrey Colegrove indicated that the application had been referred to the Southcentral Council of Governments, the Connecticut River Estuary, and Midstate Regional Planning Agency (all regions that abut Durham); 35 days have not yet passed for receipt of their responses. Therefore, the hearing will be continued until the September 17 meeting.

Richard Eriksen noted that the point of moving forward was to have a moratorium in place while the state develops some sensible regulations. He stated that he does support agricultural uses and would probably be supportive of a process that could permit them for agricultural facilities. He thought that there could be a logical, rational way to handle this without creating problems for farmers. However, until the state or Department of Environmental Protection comes up with a plan, the only way to police the activity is with a regulation. Discussion followed regarding what constitutes a farm (a large dairy farm versus someone with five tomato plants).

Geoffrey Colegrove indicated that the DEP currently speaks to a separating distance of 200 feet from a residential structure. This might be a reasonable minimum distance to a property line. Another **difficulty is defining the term “farm,” which is currently rather** broadly defined in the statutes. If there were to be an exemption for farms, parameters would need to be established. Using 200 feet as a setback from all property lines would require a minimum four-acre parcel; 300 feet as a setback would require 8.25 acres to accommodate. Geoffrey Colegrove added that, in his experience, some installations meeting these standards have still caused major problems.

George Eames spoke with the building inspector, Dick McManus, regarding concerns about the high cost of fuel driving residents to purchase and install these furnaces without permits; then, when neighbors complain, people might be forced to remove them (they are not inexpensive).

Most of the major farming pursuits would be able to provide a minimum of eight acres; thus, developing language linked to the size of a parcel and setbacks should be able to accommodate most farmers (and would be a process that could be implemented more easily than simply **trying to define ‘farm’**).

Frank DeFelice referenced a statute (22-174) that discusses control of airborne particulate **matters (not allowing smoke beyond the limit of a property’s boundary)**. **Jim Kowolenko** added that these systems would need to be monitored, carefully installed, maintained, and operated. It would not be easy to control smoke going over a property line.

The state of Connecticut may be attempting to license certain units that are capable of meeting specific requirements and criteria. Ultimately, there is likely to be some kind of permitting process for the unit itself in order to be sold in the state of Connecticut. There are presently many different vendors and a wide range in quality and price.

Mike Geremia queried at what point the same codes and requirements that apply to in-home furnaces would apply if these systems are used for a primary heat source. Geoffrey

Colegrove noted that a permit is required for installation; the building inspector would inspect the system to insure correct installation to standards.

Frank DeFelice pointed out the questions that arise with use of fireplaces (generating smoke, odor, dust, etc.). He added that wood is inefficient to burn in most every scenario, but that he would prefer to see a properly operated outdoor wood-burning furnace within 200 feet of a property line than an improperly smoking system on eight acres.

Richard Eriksen expressed concern with Durham having to become an “experimental town” for all sorts of processes (from horse crematoriums to these wood-burning outdoor furnaces). Frank DeFelice added that the state needs to do something; this should be brought to the attention of Representative Kalinowski and Senator Meyer.

George Eames referenced a brochure put out by the state on the outdoor wood-burning furnaces; these speak to a 200-foot separating distance to residences, stacks being higher than any residence within 500 feet of the furnace (but not more than 55 feet in height), visible smoke not crossing property lines at ground level, and a variety of other constraints.

Mike Geremia expressed support for allowing wood-burning outdoor furnaces on farms that meet acreage minimums.

Ralph Chase stated that a moratorium should be established until such time as adequate criteria is established by which to judge the furnaces. They could then be considered for special permit on a case-by-case basis.

In opening the hearing to the public, Joe Greenbacker, 182 Wallingford Road, addressed the Commission. He owns a dairy farm and stated that he was somewhat encouraged by the discussion indicating possible consideration to accommodate agriculture when thinking about outdoor wood-burning furnaces. He explained that there are several houses on his farm that need to be heated, in addition to the need for plenty of hot water (180 degrees F) for cleaning and sanitizing milking equipment. This is a large expense and many other farmers have saved considerable money through the use of outdoor wood-burning furnaces. He stated that their farm has an ample supply of firewood with **more than enough land to satisfy setback requirements and not be near anyone’s** residence. In terms of farms in Durham, he stated that there are probably more than most people would think. He summarized that outdoor wood-burning furnaces would be of **value to agricultural operations, adding that a ban that would minimize a farmer’s ability** to save on costs would be detrimental to business operations.

Joseph Pasquale, Parmelee Hill Road, addressed the Commission. He stated that he is considering buying one of these furnaces. He has adequate property to accommodate the setbacks being discussed. He said that he would be opposed to a ban, but might possibly support a moratorium. Nonetheless, he agreed that they should be regulated. He suggested that there be a requirement for EPA manufacturer-approved furnaces and

pointed out that there are eight states throughout the Northeast that have worked to develop regulations for these types of furnaces.

Richard Eriksen stated that there is some need for **action; the Commission won't be** meeting again until September 17, the weather is going to get cooler, and already systems are on backorder for people. He stated that if there were a moratorium, at least residents would know up front.

Frank DeFelice suggested that a recommendation be included in any potential language stipulating that equipment/models of a better quality be required.

Geoffrey Colegrove noted that, today, anyone can obtain a permit and install an outdoor wood-burning furnace using the current legislation: 200 feet from residence and stack above height of residences within 500 feet. He will distribute language to all Commission members for consideration.

John Hall, president of the Middlesex County Farm Bureau, addressed the Commission. He echoed the concerns raised by Joe Greenbacker and Joan Nichols and stated his belief that there needs to be some consideration of an exemption for agriculture. Farm owners are usually the largest landowners and are good land stewards—often the best in any town. They are not seeking to pollute the air. He encouraged the development of language that would allow for agricultural uses of wood-burning outside furnaces with appropriate setbacks. He stated that enforcement is the typical problem; however, he said that he has been the chair of the Zoning Board of Appeals in his own town for 25 years and he knows it can be done.

Karen Weeks of Whiteman Osterman Hanna spoke on behalf of Central Boiler, a premier manufacturer of outdoor furnaces in North America. Due to the unprecedented increases in heating oil, outdoor wood-burning furnaces are an attractive alternative. With typical heating requirements of 1,000 gallons of oil a year and an average price of \$4.50 a gallon, homes will be looking at spending \$4,500 for heat this year. A plentiful, renewable resource, wood is a reasonable alternative. She expressed opposition to regulations that would restrict outdoor wood-burning furnaces, adding that Central Boiler has demonstrated a commitment to the restriction of emissions. Such a ban as proposed would make homeowners more dependent upon foreign energy sources.

In addition, Karen Weeks pointed out that the proposed ban is inequitable, targeting only outdoor sources. Wood furnaces (interior) and fireplaces contribute far more particulate matter and are not included. The current models of the outdoor furnaces generate less in the way of emissions when compared with wood stoves and fireplaces.

Roseanne Berluti addressed the Commission, expressing opposition to the proposed ban. **She indicated that the state has fairly stringent guidelines and these don't even take into account the newest technology; systems are much cleaner today.** The Environmental

Protection Agency has a list of voluntary phase 1 requirements and units; this listing was presented for the record. She added that if a house is built after a system has been installed and it falls within the parameters established, the furnace must be removed or relocated. She suggested that a setback to the property line **isn't reasonable, but to the nearest residence would make sense.**

In terms of system portability, Geoffrey Colegrove stated that the outdoor wood-burning furnaces, while not exactly portable, could be dismantled, repiped, relocated, and reconstructed.

Richard Eriksen reiterated that the Commission should not be trying to craft the language—it should be statewide.

Motion by Frank DeFelice, seconded by Mike Geremia, to continue the public hearing of the proposed zoning text amendments to add new Sections 02.15.02 and 04.07 to prohibit all outdoor wood-burning furnaces in all zones to September 17, 2008, meeting. Motion carried unanimously.

Motion by Mike Geremia, seconded by Ralph Chase, to reconvene the regular meeting at 9:05 p.m. Motion carried unanimously.

7. **CT Horse Cremation, Request for a Special Permit for a Large Animal Crematory, 41A Commerce Circle**

The vote on this application cannot occur until the September 17 meeting. However, the Commission can speak about possible restrictions and conditions. Jan Melnik read into the record a letter from Attorney Thomas Byrne. The salient points include Attorney **Byrne's opinion that if the Commission were to approve the application, it would have** the authority to place the following two conditions on that approval (in addition to other conditions), requiring the applicant to comply with the following in conjunction with use and operation of the animal crematory:

- a) The National Ambient Air Quality Standards enacted by the Environmental Protection Agency pursuant to the Clean Air Act, which was last amended in 1990 and as the same may be further amended.
- b) Section 19-508-24 of the Regulations of State Agencies as the same may be amended.

With regard to a third possible condition that the Commission had asked Attorney Byrne to evaluate (Any subsequently enacted applicable state or federal laws and/or regulations **concerning health and safety, including emission standards**), **his opinion was that “in the event that state or federal legislation is enacted which changes the standards for the operation of the requested animal crematory, then, at that time, the Commission can make a determination of whether the applicant or its successors or assigns will be required to seek a modification of the special exception and/or any of the conditions attached**

thereto.” To that end, he suggested the Commission insert the following provision into any special exception granted “subject to compliance with the conditions attached thereto:”

“Each and every condition attached to this special exception is an integral part of the special exception and inseparable from it. Should any of the conditions attached hereto be found by a court of competent jurisdiction on appeal to be void then, in that event, the special exception granted hereto is void and of no legal effect.”

Jim Kowolenko distributed proposed conditions for permitting a large animal incinerator (dated 8/1/2008). He undertook a comprehensive review of public hearing minutes and commentary as well as extensive research in developing this language for the **Commission’s consideration. The standards proposed here exceed those in California** (widely accepted as being the most stringent in the country).

The Commission reviewed each of the points in this document on a preliminary basis.

- **Item 1 ... where referencing ‘noninfectious large hooved ...,’ it might be desirable to include a statement saying noninfectious to humans. Perhaps a veterinarian could be asked to provide a statement indicating ‘no known infections’ at the time of death or ‘free of communicable diseases.’**
- **Item 2 ... the stated burn rate shall be no greater than 500 pounds (not 200 pounds) per hour.**
- **Item 9 ... This item relates to stack emissions that ‘comply with the following until the state of Connecticut defines new criteria. At that time the new state criteria shall be put in force.’ Frank DeFelice stated that it is possible that the state could present new regulations that are *less* stringent than what the town has. Therefore, he recommended deleting the portion referencing the state and simply saying ‘stack emissions shall comply with the following,’ then detail the standards.**
- **Item 11 ... Frank DeFelice wanted to ensure that where ‘authorized hazardous waste contractor’ is listed, that this contractor be *licensed*.**
- **Item 11 ... Where animal ashes are listed (to not be released outside the building), this should be amended to read *unclaimed* animal ashes.**
- **Item 16 ... 500 feet from any dwelling; based on what the applicant said, Frank DeFelice recommended that this number be modified to 1,000 feet to the nearest residence. However, Geoffrey Colegrove stated that there is at least one dwelling inside the 1,000 foot line; he suggested retaining the 500 feet but adding ‘to any *existing* dwelling.’ There was still discussion that property line might make more sense (i.e., abutting railroad company property). At the end of the meeting, the Commission seemed to be in agreement that the proper language would be ‘500 feet from the property line of any existing dwellings.’**
- A possible condition might be to require that the animal be only from Connecticut.

- An operation and maintenance plan to cover certain procedures on site is essential. There are two ways to proceed: 1) the minutes can be thoroughly reviewed with all representations made throughout the hearing culled and categorized as part of a maintenance plan or 2) the applicant can be asked to submit a comprehensive plan to address a variety of situations (including **accidental spillage**) ... **providing such document for review by the health department could become a possible condition.**
- Based on input from Attorney Thomas Byrne, it was recommended that Item 7 of **the possible conditions as proposed by Attorney John Corona be deleted (“7. The use shall comply with any subsequently enacted applicable state or Federal laws and regulations concerning health and safety in the operation of animal crematoria, including emission standards.”)**
- **New item ... As proposed by Attorney Thomas Byrne: ‘Each and every condition attached to this special exception is an integral part of the special exception and inseparable from it. Should any of the conditions attached hereto be found by a court of competent jurisdiction on appeal to be void then, in that event, the special exception granted herein is voided and of no legal effect.’**

Geoffrey Colegrove will work on organizing the changes to the proposed conditions/language and have available for the meeting September 17. He asked that all Commission members review the language and provide any comments to him.

Geoffrey Colegrove noted that all representations made by the applicants and their legal **representative enter into the Commission’s decision; if the Commission were to vote favorably**, it would be basing its decision partly on the specific application and partly on the representations made during the public hearing. Instead of simply relying on the points throughout the minutes, these can all be consolidated and made as conditions of approval/performance standards that would be required of the applicant.

Ralph Chase stated that this application is not the same as outdoor wood-burning furnaces; however, he did say that perhaps it could be treated in the same way from the standpoint of awaiting state standards.

Frank DeFelice pointed out that the Commission did vote previously that large animal crematoriums are an allowed use; now it is up to the Commission to establish criteria. He **commended the job Jim Kowolenko did in developing language for the Commission’s review**. He stated that when compared to the EPA and the state of Connecticut, the ideas proposed are excellent. If all the standards of this language are followed, it will be a very clean-running unit. It was recommended that the language be consistent to reflect large animal crematorium (incinerator).

Ralph Chase asked, somewhat rhetorically, if the town of Durham wished to be a leader in establishing criteria against which large animal crematoriums would be judged – or if, instead, we wanted to await a state statute.

Geoffrey Colegrove made the comment that there might appear to be a desire to go back and revote on the original vote; however, he stated that the vote had been taken and now the Commission must determine and go forward with establishing conditions.

Discussion followed about inspection of the unit itself—with thoughts ranging from once a year to once a quarter.

To a query from Richard Eriksen regarding who will oversee the operation, Geoffrey Colegrove indicated that the health department would be responsible for reviewing the testing information, but the Commission would be required to handle enforcement (i.e., issuing a cease-and-desist order if not in compliance).

In terms of the remarks made earlier in the evening by Attorney Mike Dowley, Geoffrey Colegrove stated that if things move forward, it takes about a year until a matter goes to trial. He has talked with Attorney Thomas Byrne and will be provided him with information about technical issues. Unless there was a mistake made technically, it is his belief that the Commission has a defensible position for its decision. The Commission can move forward, for instance, and approve the pending application—the applicant could then build—**all knowing that if the court were to reverse the Commission's decision, then they are 'out of business.'**

Geoffrey Colegrove stated that if it is determined that the hearings/procedural issues were found to be defective and the Commission needed to reprocess the entire application, this would be handled accordingly. However, if Attorney Byrne does not find this to be the situation, then the record would be prepared and the case would go forward through the court process. Allegations have been made; however, this does not mean that these allegations are, in fact, correct. This will be immediately examined so that time is not wasted. The Commission will know before the September 17 meeting.

8. Miscellaneous *(continued from earlier in meeting)*

A letter was received from the firm of Brown & Welsh regarding the matter of James and Ellen Piotrowski vs. Margo and Bryant Esparo; the hearing dates back to September of 2007. Geoffrey Colegrove will investigate.

Brian Curtis, town engineer, provided a recommendation for the road maintenance bond for Elihu Drive (3% of the cost of public improvements—at \$118,431, this would result in \$3,553 for the bond).

Geoffrey Colegrove stated that some eight to nine years ago, there was a matter of a property transfer/Cornaglia on Meetinghouse Hill Road (opposite Creamery Road) that

the only way to resolve was to obtain a variance. There were a variety of violations and there is now a legal suit and outstanding tax matter. This has been sent to Attorney Byrne for investigation. There is no statute of limitations on this sort of problem.

Gene Riotte stated that John Jackson is still not living at his Main Street property; he had originally said he would be living there by the end of June. Geoffrey Colegrove will send a notice indicating that he must demonstrate compliance or return to the Commission for a show-cause hearing.

Motion by Ralph Chase, seconded by Richard Eriksen, to adjourn the meeting at 10:18 p.m. Motion carried unanimously.

Respectfully submitted,

Jan Melnik
8/14/2008