

TOWN OF DURHAM

Planning and Zoning Commission

P.O. Box 428

Durham, Connecticut 06422-0428

MINUTES OF JANUARY 20, 2010, MEETING

Present

Members: Ralph Chase, Lisa Davenport, Cathy Devaux, George Eames, Richard Eriksen, Chris Flanagan, Dave Foley, Joe Pasquale

Town Planner: Geoffrey Colegrove

Alternates: Campbell Barrett, Mike Geremia

Absent

Member: Frank DeFelice

Alternate: Mark Laudano

The meeting was called to order by George Eames, Chairman, at 7:00 p.m. Mike Geremia was seated on the Commission in Frank DeFelice's place. Campbell Barrett was seated in Dave Foley's place (who arrived later in the evening).

1. Approval of Agenda

Motion by Ralph Chase, seconded by Richard Eriksen, to approve the agenda of the January 20, 2010, meeting as presented. Motion carried unanimously.

2. Workshop

The Commission's counsel, Attorney Steve Byrne, was present to conduct a zoning workshop for the benefit of the Commission members. He indicated that he was speaking to the Commission on behalf of the Connecticut Federation of Planning and Zoning Agencies. He distributed several booklets and the Federation's newsletter to the Commission members along with a copy of the book by Thomas Byrne, *Planning and Zoning in Connecticut*. He reminded Commission members that the powers of their Commission are through the state statutes, first,

and then the town's Zoning Regulations. If a matter is appealed, a judge will look to see, "where in the Zoning Regulations is such-and-such prohibited/allowed?" as well as "where in the state statutes is this referenced?" Topics to be discussed this evening include:

- Conflict of Interest
- Guidelines for Conduct of Public Meetings
- Public Hearings
- Nonconforming Uses
- Decision-making

Conflict of Interest

Attorney Byrne stated that there are two types of conflict of interest, financial and personal. Financial is where there would be a financial gain involved. Personal conflicts of interest are somewhat trickier to determine (but clear examples would be family member and client). In a small town, it becomes more difficult to assess; it is up to the individual Commission member to determine whether or not there is a conflict of interest. At the onset of a public hearing is the appropriate time for a Commission member to discuss this matter. The important point is that a Commission member must be able to state (if not recusing one's self) that the application can be judged in a clear, open-minded, and unbiased manner and that the application has not been prejudged.

To queries regarding the practice of judges when issues of conflict of interest are brought up in appeals, Attorney Byrne indicated judges can dismiss issues (particularly if a vote was unanimous, discounting one vote would make no difference in outcome), but it is possible that complete votes can be vacated.

There is no issue of conflict of interest when the Commission is its own applicant (i.e., amending its own regulations).

Guidelines for Conduct of Public Meetings

Attorney Byrne used the town of Plainville's text in formulating some of this material. Public business should never be discussed between two or more members of a Commission outside of the meeting forum. The same is true of a telephone call or letter received: It should be brought up at a meeting. E-mails are included when considering mail/letters. All e-mail should be sent through a common site at the Town Hall (and not to personal accounts).

With regard to site visits, they are not considered a meeting *unless there is a quorum*. But two or more members meeting at a site does constitute a meeting in some situations (per FOI). There should not be discussions among members of the Commission among themselves and/or with neighbors, applicants, or attorneys. The discussion and questions should be at the following meeting. The purpose of the site visit is to observe. The minutes should reflect "who was present, when they showed up, and when they left." This can be recorded by any Commission member. Actions at an illegal meeting can be invalidated. Individual notes taken by Commission members are technically not FOI-able. Site walks are public meetings—therefore, the public is free to attend. A property owner can deny a request for a site walk that is open to the public; instead, the

Commission members can visit a site individually. At a site walk (which is a meeting), the public should be advised that comments are to be reserved for the regular meeting.

Attorney Byrne stated that, in some towns, a handout is provided to applicants regarding the conduct of the public hearing. The flow of the meetings should be described to those in attendance at the start of the hearing. There can be time limits imposed on speakers (i.e., three minutes first time; once everyone has spoken, a second chance can be provided). Some towns limit the time of the applicant's initial presentation (i.e., 15 minutes).

With regard to expert testimony, Attorney Byrne stated that the Commission is not "obliged" to believe the experts *unless they are the only experts to come forward on an issue*. Experts can't be challenged on their expertise—other than to verify that they are an expert. One expert carries great weight with the court. If a Commission member possesses special knowledge in a certain area, this fact must be made known during the public hearing—and not saved until later in the discussion among the Commission after the hearing is closed.

Evidence after the close of a public hearing: Staff and the Commission's paid advisors/consultants can provide information for the Commission's review and consideration after the close of the public hearing. Ideally, the information should come in during the public hearing process.

A question was raised between discerning the background of an expert on traffic versus the lay knowledge of an interested resident who has personal knowledge of the area. There can be attempts at discrediting experts by residents during the hearing. Many of these decisions are on a case-by-case basis. Sometimes it becomes very clear that an expert's testimony is not 100% accurate. However, if not challenged during a public hearing, then it is taken at face value.

For a special meeting, an agenda must be posted 24 hours in advance. An emergency meeting can be held immediately without an agenda—but this is very difficult to defend.

Public Hearings

The goal is to provide a fair and objective public hearing in which there is due process and adequate opportunity to present evidence. The official date of receipt is at least the day *prior* to the scheduled meeting. The clock begins the day after receipt. The hearing must be scheduled within 65 days. The hearing must close within 35 days of the hearing opening. Then the Commission has 65 days in which to decide an application. There are occasions when a hearing must be closed, then a new hearing starts. An applicant will often want to bring information forward from the first hearing; this is permissible. There is no newspaper notice necessary for a continued public hearing (only two postings prior to the opening of the initial public hearing).

Decisions can be appealed 15 days after the date a decision is published. Publication of a decision is what makes it final.

Nonconforming Uses

Attorney Byrne discussed extensions of nonconforming uses and structures. A lot is dependent on whether the regulations allow for expansions or extensions of nonconforming uses or structures. The abandonment issue is determined by “intent” of a person to abandon—passage of time is not typically sufficient. Discussion ensued regarding expansion of a building, but using the same footprint. Attorney Byrne indicated that the regulations typically provide for these scenarios. Consistency of the Commission’s interpretation of its own regulations does tend to prevail in court.

Attorney Byrne discussed the issue of interveners; if issues are raised during the course of a hearing, even if they are outside the purview of the Planning and Zoning Commission (i.e., a wetlands issue), the Commission needs to reflect consideration of whatever point was introduced. Intervenors receive notification of decisions, continuations, etc.

Decision-making

Attorney Byrne stated that the court prefers to see a “collective statement” as part of a decision. In other words, Commission members should be on record with the rationale for their decisions (i.e., “I concur with so-and-so,” adding other details or reasons as applicable).

Geoffrey Colegrove suggested setting another workshop for review of the Plan of Conservation and Development as well as the Subdivision Regulations. February 17 was proposed as a workshop date at 7 p.m. in advance of the regular meeting.

George Eames suggested that a meeting be held with the new Agricultural Subcommittee relative to land use and proposals for agriculture in town. He asked Geoffrey Colegrove to set up a meeting. Joe Pasquale, who serves on that subcommittee, indicated that a meeting was held the day before. He indicated that the chair of the subcommittee, Warren Herzig, would be contacting George Eames.

Dave Foley was seated at 8:00 p.m. Campbell Barrett was unseated, but able to participate in discussion.

3. Public Session

Alison Gaffney, 308 Tuttle Road, addressed the Commission and also introduced Mary Veranis, 305 Tuttle Road. She had a number of questions about the Alfano home at 322 Tuttle Road that was the site of a major fire recently. She was advised to contact the tax collector (relative to the process the town uses for unpaid taxes) as well as the building official (regarding the property being condemned). Geoffrey Colegrove stated that the town could raze a property; however, there would be a timetable, appeal rights, and due process. Alison Gaffney noted a number of concerns. While public safety and health are the primary issues, this is outside the purview of the Planning and Zoning Commission. She was advised to work with the first selectman, town sanitarian, and building official; Geoffrey Colegrove stated that the building official likely has the greatest power in this case.

Motion by Ralph Chase, seconded by Dave Foley, to adjourn the meeting for the Greenland Realty public hearing. Motion carried unanimously.

PUBLIC HEARING

1. Applicant/Owner: Greenland Realty, LLC.
Property Location: 10R Mountain Road, Assessor's Map #54, Parcel #1.9, Lot #3
Proposed Activity: Request for a modification to an existing site plan to include outside storage of construction equipment and vehicles and on-site fuel tanks

Present

Members: Ralph Chase, Lisa Davenport, Cathy Devaux, George Eames, Richard Eriksen, Chris Flanagan, Dave Foley, Joe Pasquale
Town Planner: Geoffrey Colegrove
Alternates: Campbell Barrett, Mike Geremia

George Eames, Chairman, opened the continued public hearing and read the legal notice. Campbell Barrett was seated on the Commission in Frank DeFelice's place. Mike Geremia was present, but unseated (he had not had an opportunity to listen to the tapes of the previous hearing; Campbell Barrett was present at that hearing).

Attorney Joan Molloy, with Laughlin & Fitzgerald of Wallingford, addressed the Commission on behalf of the applicant. She stated for the record that there is just one tank proposed (not two or more, as the application incorrectly reads tanks). She referenced the area on the plans where the outside storage is proposed. In speaking of the site walk in December, Attorney Molloy noted that the arborvitae on site has been decimated by deer. She described the pattern of trucks entering the site for fueling on the west side of the building so that lights are shining in the opposite direction of the residences. An apron/concrete pad will be installed under the fuel tank at the direction of the fire marshal.

Attorney Molloy also brought duplicate copies of handouts provided at the site walk for anyone in need of such material. In reviewing questions raised at the site walk, Attorney Molloy provided responses:

- 1) there will be just the one fuel tank
- 2) there will be an electric pump for the fuel tank
- 3) equipment is to be stored outside: trucks, backhoes, construction shovels, trailers, processing equipment
- 4) maximum number of vehicles or pieces of equipment to be stored outside (not audible)
- 5) excavating contract was referenced on a document, raising a question about activities; the use of the tank is for fueling of construction vehicles and over-the-road vehicles

(diesel only). Dave Foley pointed out that one tank can't do both as taxes must be paid on over-the-road diesel fuel sales. Attorney Molloy clarified that the fuel will be used for diesel vehicles not passenger pickup trucks. This fuel—for which taxes have been paid—*can* be used in construction vehicles, but the owner will be paying a surcharge unnecessarily for taxes.

- 6) additional copies of bills were provided showing maintenance/repair costs paid by the property owner for off-site work
- 7) it is the intent of the applicant that fueling of trucks will occur at the end of the day, then vehicles will be garaged; there is a possibility that if someone is doing a long-haul, that vehicle might be refueled during the day
- 8) only Elite Transport trucks will be fueled at the site
- 9) millings will be added to the driveway to help reduce the dust problem; a wetlands permit is likely not necessary as the driveway is well beyond the 100-foot separating distance
- 10) there will be no curbing, just sheet flow
- 11) a letter of agreement between the applicant and the neighbors (the Cruises) is available, but because Mrs. Cruise has not (yet) provided permission for this to be read, this was tabled

Attorney Molloy indicated that the appropriate approvals have been secured from the fire marshal and the state (relative to the fuel tank). This parcel is similar to other properties in the Design Development District (that also have outside fuel tanks and outside storage of equipment).

Ralph Chase indicated that this site does abut (or is very close) to the day care center property. Attorney Molloy stated that Murphy Pool has a fuel tank immediately adjacent to the day care center. There is no new construction planned; the pouring of concrete for the pad will be in the spring if this is approved. No new landscaping is proposed; however, the applicant has committed to replacing the arborvitae with white pines. This was communicated in December of 2009.

Joe Pasquale asked where the equipment is being stored presently. Attorney Molloy indicated that some equipment has been stored at sites where snow is being removed. He then queried the dimensions of the tank and the size of the pad. Attorney Molloy indicated that the size of the pad will be determined in the field by the fire marshal. Either bollards or mafia blocks will be placed around the pad, as per code, the fire marshal, and the insurance company. Attorney Molloy will provide the final dimensions to Geoffrey Colegrove.

To Ralph Chase's query for clarification of the concrete pad, Attorney Molloy indicated that it is specifically to be under the tank as well as the area of the truck being refilled.

Joe Pasquale referenced June 2003 minutes from an Inland Wetlands meeting. Temporary storage of materials outside the building is referenced. The concrete pad referenced there is not related to the concrete pad now proposed for the fueling. Back in 2003, fueling was not anticipated.

Joe Pasquale stated his concern with hours for the operation and fueling, in particular. Attorney Molloy indicated that there is a pole with a light fixture for the tank. While fueling is anticipated to be between the hours of noon and 6 p.m., by 5 p.m. in the winter, it is dark and light will be needed. Attorney Molloy is not willing to put limits on the applicant's operations, but is representing how the site will be used.

Chris Flanagan expressed concern with catastrophic damage to the tank and ability of the site to contain such an incident. He also noted concern with a delivery truck having containment. Attorney Molloy stated that there are emergency shutoffs. Chris Flanagan noted that the fire marshal's requirements may not necessarily reflect the concerns of the EPA with respect to delivery trucks. Attorney Molloy stated that it is local requirements that stipulate what is necessary in terms of a concrete pad, not the EPA. No one else in Durham has been required to do any of these things being discussed and yet all have been sanctioned by the fire marshal.

Cathy Devaux asked questions about the construction equipment and noise levels, especially heavy construction equipment being "started up" early in the morning. Attorney Molloy indicated that this would be true—when in use, the vehicles are started. What is being requested is the ability to store equipment outside the building when not in use. Other businesses in the Design Development District are allowed to store equipment outdoors. To Cathy Devaux's statement that there is "no give and take," Attorney Molloy noted that the applicant, of his own free will, is volunteering to replace the arborvitae with white pines. Trucks do make noises, but this is a commercially zoned area. Cathy Devaux believes the proposed activities will exacerbate the problems.

Campbell Barrett asked if the Commission can determine whether or not to modify the site plan based on credible evidence presented by the neighbors that might establish the fact that the applicant has already violated the approved site plan. Attorney Molloy indicated her belief that this application cannot be judged on the basis of what a Commissioner might think is not in compliance with a previous site plan.

Lisa Davenport asked if there was another location in Wallingford owned by the applicant where equipment has been stored and that is being closed; Attorney Molloy was not certain. She asked if there would eventually be fewer vehicles stored on the site if the economy rebounds; this is likely, but can't be quantified.

Bill Corvo, representing William and Diana Cruise, addressed the Commission, noting he had spoken with the Commission before. The Cruises are away. A number of years ago, the Cruises had complaints about the initial activities at the site. He researched some of the previously approved site plan details and has been out on Mountain Road. When examining the last set of approved documents, it is evident the contours do not match those on the approved site plan. When the Design Development District was originally created, there was a specific plan in mind by the Commission, where certain types of activities were to be promoted. He characterized this as a "boutique development" adjacent to a residential neighborhood.

Bill Corvo also noted that some of the development in the District has been attractively and appropriately created. Mountain Road was a gravel road bordered by a nice forested area. Further, the town instructed the Cruises to maintain Mountain Road as it was not a town road. This was done for years. He questioned whether the application before the Commission is simply for a fuel tank—or expansion of the original application. He indicated that a truck depot or a heavy equipment depot is not referenced on the first application. It said storage/warehouse and an office—and he characterized the impression given to the Commission originally that it was to be a “friendly landscape operation.” He added that there was a 4,000-gallon tank installed on the site some years ago without permission and subsequently removed from the site.

Bill Corvo asked about limitations on the operations in terms of fueling trucks; only Elite Transportation trucks will be fueled. He believes that this application gives the Commission a chance to structure the operation appropriately. He characterized the current application as being for a truck yard/truck warehouse and a fueling operation for the truck yard. He believes the application is for an expanded use. He recommended that the contours be corrected to conform to the originally approved site plan. Grading, landscaping, seeding, and planting need to be completed to comply. This would eliminate the “unsightly dirt pile.” He noted that the Design Development District is to be “sympathetic” to the adjacent residential neighborhood. He further suggested that the landscaping buffer be mandated on the surrounding boundaries. Finally, he suggested that the Commission limit hours of use of the facility that would conform with the applicant’s statement of use (an all-night truck depot? 18-wheelers at 4 a.m.?). The Commission can then determine if this is appropriate in the Design Development District.

Bill Corvo noted that neighbors (in addition to the Cruises) have pointed out problems in this regard over the years. He also described what had transpired when the road ultimately became a town road and an attractive stone wall was removed.

Ultimately, Bill Corvo recommended denying this application and restructuring what represents the actual application with appropriate approvals in place that meet the Commission’s goals for a Design Development District. He also suggested that the Design Development District language be tightened to reflect precisely what the Commission envisions.

Fred Serle, Wallingford Road, addressed the Commission. He stated his opposition to any expansion of use for Greenland Realty and was specifically against approval of a fuel tank and exterior storage. He stated that for the past six years, the applicant has misrepresented his business, conducted activities without permission (washing vehicles as recently as a week ago “under cover of darkness”), installing doors without permission, etc. Site inspections are meaningless as the applicant cleans up the property immediately before a site walk. He also noted that the business doesn’t generate much in the way of revenues (if vehicles aren’t on the site at least six months, they don’t have to pay taxes in Durham on those vehicles).

Dave Dingwell, Mountain Road, stated his opposition to the proposal. The fuel tank will be located very near his site. He also queried the meaning of “storage” on the site—worried that vehicles will be fueled and moved around the site at unacceptable hours.

Cindy Turcik, Mountain Road, stated her concern with a large blue dump truck (“Coastal”) being on the site over the years, bringing equipment on and off the site. George Eames indicated that Elite Transportation is the only company allowed to have trucks on the site. Cindy Turcik also expressed concern with proximity of the proposed fuel tank. Trucks are coming onto the site at 10 or 10:30 p.m. and then sometimes leaving at 2 or 2:30 a.m. This would be unacceptable.

Dave Foley asked how many cease-and-desist orders have been issued on the site. Attorney Molloy stated recollection of the issue with rolloffs and installation of the fuel tank on the site. This situation was remedied.

Geoffrey Colegrove stated there was also one issued when there was occupancy of the building without an official c.o.

Chris Flanagan stated that information had been presented by Bill Corvo on behalf of the Cruises. He asked specifically about the issue raised regarding site contours as well as the topsoil pile about 30 feet high near Route 68. He noted that Attorney Molloy informed him that the applicant wasn’t being allowed by the Commission to remove the pile. The Commission denied removal of the pile, the matter was appealed by the applicant, and the court upheld the Commission’s decision. The topsoil pile was the result of activities on the site. The applicant has attempted to remove the pile (which is on the lot immediately adjacent to the lot subject of the present application).

Bill Corvo suggested that the material be spread evenly across the site, as opposed to removed from the site, and this would enable conformity with the approved grading in the site plan. Inland Wetlands does not want the material spread on the site; therefore, Attorney Molloy stated that the pile simply remains and has stabilized with vegetative growth.

In responding to issues raised during the public comment portion of the hearing, Attorney Molloy stated that what was originally approved was a trucking operation *not a landscaping business*. If the Design Development District regulations are examined, there must be 50 feet of undisturbed area between the site and an adjacent neighbor (it is about 75 feet). There is only one area where buffering is required. The plan is compliant with the original landscaping requirements of the Design Development District. Nothing is proposed that changes that. The proposal is in an area that was proposed to be gravel.

Geoffrey Colegrove stated that the area to the south is zoned Design Development District as well. The buffer that exists is actually in addition to what is required (the buffer between the site and the Dingwell residence, which is in the Industrial zone is technically not required).

Attorney Molloy stated that conditions cannot be imposed on something that is already permitted. Conditions can be imposed on new activities (i.e., the fuel tank). However, she asked that her client be treated comparably with similarly approved activities in other Design Development District sites.

Joe Pasquale stated that, in his opinion, a trucking company has trucks—not heavy industrial equipment. Attorney Molloy stated that the applicant has equipment that is used to remove material from sites and trucks are used to haul that material. The proposed activity is a trucking company with trucks and equipment stored outside.

Joe Pasquale stated that Attorney Steve Byrne has advised that the Commission has the right to review the entire application (including what was approved earlier) if the Commission believes what is proposed is significant enough (including hours of operation). Attorney Molloy disagreed with Attorney Byrne's remarks. She stated her belief that the Commission does not have the ability to change a previously granted right "after the fact." Now, as the applicant wishes to add something, the Commission does have the right to impose reasonable conditions on the fuel tank if it so desires. The same would be true relative to outside storage at the site.

Joe Pasquale asked the results of the counter installed on the site a month or two ago. Geoffrey Colegrove stated that it was used for a full week prior to the cables being destroyed by snowplows. Anecdotally, the counters accurately show direction (north/southbound). One day showed a significant amount of material being brought onto the site. Generally, there are between 35 and 55 total trips per day. The classification of axles is not exact (there are three categories: motorcycles, cars, and pickup trucks, which are quite accurate; then, everything else). On one Saturday there was a lot of activity, especially between 4 and 6 a.m. Return traffic was primarily concentrated between 3 and 4 p.m. Geoffrey Colegrove will prepare a summary for the Commission's review.

Attorney Molloy explained that there was one day when the pickup trucks had their plows installed. However, Dave Foley stated that Attorney Molloy had represented that there was not a plowing operation being run from this site. She stated her concern that every other company in the Design Development District can use their property to do a variety of activities; her client is held to a different standard.

Cindy Turcik noted that the activities on Ozick Drive are in an area not adjacent to residences. There is supposed to be a buffer zone between the Design Development District and the adjacent residential neighborhood. Attorney Molloy contended that her client should be entitled to do virtually everything that all businesses in the Design Development District are allowed to do.

Dave Foley and Richard Eriksen asked about outstanding information. Geoffrey Colegrove indicated that it could be submitted under staff comment (i.e., fire marshal's requirement for specific concrete pad size and Geoffrey Colegrove's summary of the counter study).

Motion by Dave Foley, seconded by Cathy Devaux, to close the public hearing of Greenland Realty, request for a modification to an existing site plan to include outside storage of construction equipment and vehicles and on-site fuel tanks. Motion carried, 8-1, with all in favor with the exception of Chris Flanagan (in opposition).

Motion by Ralph Chase, seconded by Dave Foley, to reopen the regular meeting. Motion carried unanimously.

4. Greenland Realty, Request for Modification to Existing Site Plan to Include Outside Storage of Construction Equipment and Vehicles and On-site Fuel Tanks

Geoffrey Colegrove stated he would provide the counter report to the Commission. In addition, there was information disseminated this evening that Commission members might wish to study before their deliberations and decision.

5. Payment of Bills

Motion by Ralph Chase, seconded by Dave Foley, to approve payment of the following bills:

- Midstate Regional Planning Agency - \$3,257.24
- Midstate Regional Planning Agency - \$732.02 (to compensate Assistant ZEO)
- *Middletown Press* - \$242.99 (new charges)

Motion carried unanimously.

6. Approval of Minutes

Motion by Dave Foley, seconded by Ralph Chase, to approve the minutes of the January 6, 2010, meeting as presented. Motion carried unanimously.

7. Town Planner's Report

Geoffrey Colegrove and George Eames advised that they had spoken with Jan Melnik, who is recovering from rotator cuff surgery. Although she had anticipated being here at this meeting, she had a slight setback with physical therapy this week.

George Eames indicated a letter was received from the State Traffic Commission dated January 13, 2010, regarding a permit for the overall Pickett Lane/Allyn Brook Park/Coginchaug/Strong/Korn area. No threshold is exceeded that would necessitate additional permits in conjunction with the Regional District #13 application. Unless there is an appeal, a permit will be issued relative to the athletic fields and the additions of reading rooms to the high school and Korn School.

With regard to enforcement, the Jackson matter on Main Street is being pursued legally.

George Eames discussed the situation with contractors' vehicles traveling up and down Canfield Lane at early hours. An electrical business is being operated from a site at the fairgrounds, with up to six trucks coming in and out of the site every day. He has spoken with Renee Edwards about this (she manages rentals for the Fair Association), who indicated she would speak with Gene Chiapetta, the Fair Association's president, about this. This is a residential zone.

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Geoffrey Colegrove noted that there were discussions with District #13 about possible bus storage on the fairgrounds; he did not know the status of that inquiry. The school district is looking at alternatives to the current leased site in Commerce Circle.

Motion by Frank DeFelice, seconded by Dave Foley, to adjourn the meeting at 10:07 p.m.

Motion carried unanimously.

Respectfully submitted,

Jan Melnik

1/28/2010