

RECV'D: Office of the Town Clerk
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TOWN OF DURHAM

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

MINUTES OF DECEMBER 2, 2009, MEETING

Present

Members: Ralph Chase, Cathy Devaux, Frank DeFelice, George Eames, Richard Eriksen,
Dave Foley, Gene Riotte, Tom Russell
Town Planner: Geoffrey Colegrove
Alternate: Stuart Keating

Absent

Member: Jim Kowolenko
Alternate: Mark Laudano

The meeting was called to order by George Eames, Chairman, at 7:30 p.m. Stuart Keating was seated on the Commission in Jim Kowolenko's place. Mike Geremia was present but unseated (until later in the meeting).

Gene Riotte advised that this was his final meeting, but that he would need to depart as he had a parent-teacher conference at Coginchaug. He was thanked for his years of service to the Commission and the town.

Gene Riotte departed at 7:32 p.m. and Mike Geremia was seated in his place.

1. Steven Byrne, Esq., Discussion of Enforcement Options Related to Greenland Realty, LLC

Attorney Steve Byrne, the Commission's counsel, introduced himself to the members of the Planning and Zoning Commission. He was in attendance to discuss with the Commission options related to enforcement for Greenland Realty, Mountain Road.

Attorney Byrne stated that he had thoroughly reviewed the records as well as visited the site recently with Geoffrey Colegrove and Attorney Joan Molloy (Greenland Realty's counsel). He stated that "a picture is worth a thousand words."

In recapping the history of the site, Attorney Byrne indicated that a special permit for activities within the Design Development District had been granted some time ago. Since that time, there have been a number of ongoing issues and problems as cited in frequent complaints from abutting residents. He stated that under the Zoning Regulations, part of the objective of the Design Development District was to create a zone that harmonized with the existing neighborhood and residential area. On one side of the Design Development District is Ozick Drive (a compatible use). However, the other side features houses in the farm-residential zone.

Attorney Byrne explained the process for pursuing enforcement. A complete description of activities transpiring would need to be provided to the judge, including the violations. Then the regulations would have to be referenced showing where the specific violations are prohibited. The original approval would be referenced, including the application and a reading of exactly what the applicant represented as activities. He explained that in addition to any conditions imposed, what was said in the public hearing is also included; any statements, limitations, or promises made by the applicant during the hearing become implied conditions of approval. Finally, anything contained in the Zoning Regulations that limits use can also be used. The Commission can also look at what was represented and what was approved—and then determine if what the applicant is doing is the same and in accordance with the original provisions or if there has been a deviation from the approved use.

Specifically, the applicant represented that trucks would be leaving in the morning and returning at night; they can "be held" to this (but this is not what is happening at the site, where trucks are coming and going throughout the day/night).

In reviewing the minutes, Attorney Byrne said that the applicant had described a trucking operation. It was stated that there would be no mechanical activities, no repairs or oil changes, and no truck washing. It was represented that trucks would leave the first thing in the morning and then return at the end of the day. It was stated that excess materials would occasionally be stored on the site. Screening was specifically limited to one day per month, between the hours of 8:00 a.m. and 3:00 p.m.

Attorney Byrne stated that the 9,600 square-foot building on the site was approved as a garage for trucks with a small office for business operations and, from the recent site visit, that is what is on the site. He stated that the site was "cleaned up" without any equipment other than a trailer outside. There was no requirement in the original approval for any paving other than the entry apron. There were no light bulbs in the lighting fixtures on the side of the building facing Mountain Road. He stated that there was to be landscaping as a buffer; this shows some evidence of either disease or damage from deer (but the attempt was there).

Attorney Byrne stated that things are not harmonious with the neighbors and "not working out." In particular, trucks are apparently leaving later in the morning but returning later in the evening;

the hours of operation appear to have changed. The use would appear to be the same, including the storage of materials outside. He stated that hours of operation (other than for screening) were not imposed; there is no limitation on hours in either the application/approval or in the regulations. The only thing in the record is that trucks would leave in the morning and return in the evening.

There was some discussion about whether the site plan modification before the Commission in a few weeks could reopen the matter to enable the Commission to impose hours of operation over the entire site. He stated that he needed to conduct further research, possibly to determine if there is an expiration for all work on the site to be completed by a certain time. If there is an expiration, then this could enable reopening of the entire application and the establishment of hours of operation. As far as the landscaping buffer is concerned, it needs to serve the intended purpose and if it is not, the Commission can require the applicant to make the appropriate repairs (different type of shrub or fence).

Based on everything reviewed and discussed, Attorney Byrne said there is nothing that gives him the authority to go before the court regarding hours of operation.

Neighbors Diana Cruise and Cindy Turcik stated that there are trucks coming into and going out of the site on a non-stop basis. Attorney Byrne responded that this is a change of pattern to what the applicant's initial statements had been. In other words, if truck traffic is more than just out once in the morning and back at the end of the day, it is a changed use (this gives more the appearance of a trucking terminal). One option would be the applicant returning to the Commission for a change of use (stating the need to come and go more frequently), on which the Commission would then vote—and hours of operation could be stipulated at that time.

The Commission discussed the fact that had the actual type of operation been known at the time of the application approval, there would have been more concern about dust control and the likelihood that paving would have been required. In addition, with the type of frequency of truck traffic, hours of operation would have been imposed so as to provide a reasonable situation with the adjacent residential neighbors.

Attorney Byrne stated that the Design Development District affords the Commission the opportunity to impose additional criteria because the zone is adjacent to a residential neighborhood and is a transition zone.

The Commission discussed the monitoring of truck traffic. Attorney Byrne recommended two steps:

- 1) Monitoring equipment be set up for truck traffic for at least a few weeks
- 2) Concurrent with the monitoring of truck traffic, a log be maintained (Attorney Byrne noted that the neighbors could be instrumental in this regard)

Frank DeFelice queried the relevance of comments made during a site walk by either the applicant or the applicant's legal representative. Unless those comments are captured in official meeting minutes that are then approved by the Commission, these remarks would not stand up in

court. There is the issue of acoustics/noise level at an outside site walk—remarks made might not be heard as reliably as in a meeting room. What would be appropriate (for future reference) is restating of remarks made at a site walk as part of the regular meeting and having them incorporated in official minutes that are subsequently approved.

Stu Keating stated that there was a representation that the excess material being stored on the site on an occasional basis would be mulch, decorative stone, and topsoil—the types of materials associated with landscaping and that would not be objectionable on most people’s properties. However, what is being stored on the site is construction debris and rubble; this is not of a landscaping nature and it is not being done on just an occasional basis.

Attorney Byrne indicated that if this is considered significantly different from what was represented and approved, this could be pursued legally, in particular because there is valid reason for complaint where the zone abuts a residential area and should be compatible (a dumping ground for rubble would not be considered compatible). The Commission is tasked with protecting health, safety, and property values.

Geoffrey Colegrove noted that the rubble is not a DEP-regulated material. If a distinction were to be made, it could not be on the basis of the asphalt being a pollutant. However, Stu noted that the three items represented are all materials that would not be objectionable in a residential area, unlike the rubble.

Cathy Devaux queried the validity of statements reflected in the minutes; Attorney Byrne indicated they become valid when the minutes are officially approved. She then pointed out that hours of operation were reflected in the minutes of an April 2001 meeting; however, this was prior to the public hearings and before the approval of the special permit.

Dave Foley reiterated the violations:

- 1) Multiple truck trips per day to/from the site, at hours as early as 3 a.m. and into the evening
- 2) Material being stored on the site other than what was stipulated for the original approval
- 3) More than the “occasional” storage of materials on the site
- 4)

He stated that he believed there was enough of a change in use to warrant enforcement.

Attorney Byrne stated that there would need to be verification that the truck volume is significant and deviates from what was approved. With documentation, enforcement action could be taken. He also noted that nowhere in the record did the word landscape appear; the term trucking business is what was used. The large garage with tall overhead doors indicates that this is an operation that exceeds the typical neighborhood landscaper. The issues involve intensity of use and impact on the neighborhood—and these things being substantively different from what was presented and approved.

Geoffrey Colegrove will arrange for the installation of traffic counters by the beginning of the week of December 7th. He noted that the monitors need to be calibrated, but that they are usually accurate to between 85 and 95%. The counters will be kept in place 2-3 weeks.

Diana Cruise noted that it was curious that everything that had been stored on the exterior of the site had been moved into the garage immediately before the site inspection. She advised that a truck had been running outside her living room window for an hour on a recent day. With regard to the buffer of trees, she indicated that the incorrect trees had been planted initially and that she has complained to the Commission numerous times over the years about this deficiency.

Attorney Byrne advised that the property owner had indicated that the shrubbery would be taken care of (during the site walk this statement was made). A fence could also be installed.

Attorney Joan Molloy stated that the property owner was asked to install arborvitae initially, that there was not "a mass conspiracy."

2. Greenland Realty, LLC, Request for modification to an existing site plan to include outside storage of construction equipment/vehicles and onsite fuel tanks, 10 Mountain Road, Public Hearing Scheduled for December 16th Meeting
3. DiNatale Rental, LLC, Request for Special Permit for an Automobile and Equipment Service Business in the Heavy Industrial Zone, 593 Wallingford Road, Public Hearing Scheduled for December 16th Meeting
4. Town Planner's Report

A copy of Attorney Thomas Byrne's landmark book regarding planning and zoning regulations in Connecticut will be provided to every Commissioner (some were distributed at the meeting). In addition, Attorney Steve Byrne makes presentations (about 90 minutes in length) before land-use boards. Geoffrey Colegrove suggested selecting several dates for such workshops in January once the new members come onto the Commission.

Geoffrey Colegrove reported that the official record for the Regional School District #13 lawsuits was completed with the exception of affidavits from the *Middletown Press* for the hearing notices.

George Eames stated that preparation of the legal transcript of all public hearings was put out to bid and that Jan Melnik, the successful low bidder, completed the project in "record time."

5. 2010 Meeting Dates

Motion by Dave Foley, seconded by Frank DeFelice, to approve the following meeting dates for 2010:

- January 6, 20
- February 3, 17

- March 3, 17
- April 7, 21
- May 19*
- June 2, 16
- July 7, 21
- August 4, 18
- September 1, 15
- October 6, 20
- November 3, 17
- December 1, 15

* to be held at Town Hall, third floor

Motion carried unanimously.

6. Payment of Bills

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

- Absolute Advantage – \$240.31 (minutes 11/18/09)
- Absolute Advantage – \$792.00 (Reg. Dist. #13 transcript 8/19/09)
- Absolute Advantage – \$780.00 (Reg. Dist. #13 transcript 9/2/09)
- Absolute Advantage – \$876.00 (Reg. Dist. #13 transcript 9/16/09)
- Absolute Advantage – \$492.00 (Reg. Dist. #13 transcript 10/21/09)

Motion carried unanimously.

7. Approval of Meeting Minutes

Motion by Dave Foley, seconded by Ralph Chase, to approve the minutes of the November 18, 2009, meeting as amended to reflect the fact that Ralph Chase was not in attendance (mention on page 2). Motion carried, 6-3, with all in favor with the exception of Cathy Devaux, Tom Russell, and Mike Geremia (in abstention).

8. Zoning Enforcement Officer's Report

Geoffrey Colegrove stated that there is a problem with goats being raised on Old Blue Hills Road that is being pursued, along with several other matters (Park Place, Route, 77, etc.).

9. Miscellaneous

Frank DeFelice stated that the town now owns an audiometer in addition to a laser speed gun and a radar speed gun. Complaints should be brought to the attention of either the resident state trooper or the first selectman's office.

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George Eames noted that this was the last meeting for the following Commissioners: Stu Keating, Jim Kowolenko, Gene Riotte, and Tom Russell. He thanked them for their service, noting appreciation for their time and effort over the years. They have been an asset to the Commission.

Motion by Ralph Chase, seconded by Dave Foley, to adjourn the meeting at 8:25 p.m. Motion carried unanimously.

Respectfully submitted,

Jan Melnik

12/7/2009