

The Planning Board for the Town of Derry held a public hearing on Wednesday, November 19, 2008, at 7:00 p.m. at the Derry Municipal Center (3rd Floor) located at 14 Manning Street in Derry, New Hampshire.

Members present: David Granese, Vice Chair; Randy Chase, Administrative Representative; Brian Chirichiello, Council Representative; Ann Evans

Alternates present: Maureen Heard, Richard Tripp

Absent: Virginia Roach, Phil Picillo, Jan Choiniere, Gary Stenhouse, Mark Cooper, John O'Connor

Also present: George Sioras, Director of Community Development; Elizabeth Robidoux, Planning Clerk

In the absence of Chairman Roach, Vice Chairman David Granese called the meeting to order at 7:00 p.m. The meeting began with a salute to the flag. Mr. Granese introduced the staff and Board members present, and noted the location of emergency exits and extra agendas.

Mr. Tripp was seated for Mrs. Roach and Mrs. Heard was seated for Mr. Picillo. Ms. Evans was appointed acting Secretary in the absence of Mrs. Choiniere.

Escrow

Note: Not in the order taken up by the Board.

#08-47

Tire Warehouse

Tire Warehouse Central, Inc.

17 Tsienneto Road, 08073-003

The request is to approve Renewal #2 for Letter of Credit number 20000595, amendment #2, for the above noted project. The new expiration date is December 22, 2009.

Mr. Tripp asked if the extension is approved? Mr. Sioras advised it is typical for banks to ask for a minimum of a one year extension on the letters of credit.

Motion by Tripp, seconded by Chirichiello to approve as presented. The motion passed with all in favor.

#08-48

Pennichuck Water Works Booster Station

Pennichuck Water Works

1 Cabot Drive, 05038

The request is to approve establishment of cash escrow for the above noted project in the amount of \$34,992.00.

Motion by Chirichiello, seconded by Tripp to approve. The motion passed with all in favor.

#08-49

First Baptist Church

First Baptist Church

2 Crystal Avenue, 30075

The request is to approve Release #1, which is the final release, in the amount of \$27,829.01. The amount to be retained is zero.

Motion by Evans, seconded by Tripp to approve, all voted in favor and the motion passed.

#08-50

Indian Hill Estates

Stone Hill Builders

Goodhue Road, 04003

The request is to authorize the Derry Department of Public Works to draft Letter of Credit #4952, in the amount of \$211,793.75, in the event the Letter of Credit is not renewed by November 29, 2008.

Motion by Heard, seconded by Chirichiello to approve; all voted in favor and the motion passed.

#08-51

Reed Asset Management, LLC

Reed Asset Management, LLC

Gulf Road, 04065

The request is to approve Release #1 in the amount of \$30,912.19. The amount to be retained is \$3,985.20.

Mr. Chirichiello asked what does the amount to be retained cover? Mr. Sioras said it was not unusual to retain a small amount for any roadside work that still needed to be completed.

Motion by Chirichiello, seconded by Heard to approve; the motion passed with all in favor.

Minutes

The Board reviewed the draft minutes of the November 5, 2008 meeting. Mr. Granese noted the following change to page 3, paragraph 3: the road name should be changed from "Gulf" to "Kilrea".

Motion by Heard, seconded by Tripp to approve the minutes as amended. The motion passed with Mr. Chirichiello abstained.

Correspondence

None.

Other Business

Rezoning Request

Mr. Sioras advised the Board has received a request from David Barka of 64 East Derry Road to consider a change in the requirement in the Central Business District that residential buildings with more than 4 dwelling units must contain an office/commercial use on the first floor. He is speaking specifically in the area of South Avenue. Mr. Sioras thought this could be deferred to the Rezoning Subcommittee. Mr. Chirichiello recalled the requirements for this zone have been in effect and enforced for a while. Ms. Evans recalled Mr. Barka being opposed to the change at the time the Board implemented it.

Birch Heights

Mr. Sioras reported he attended a site visit at Birch Heights on Kendall Pond Road today. He recommended that the Board members drive by or visit the facility so that they can see the tremendous job the developer did on the project. The project was built per the plan the Planning Board approved. They are looking for a December opening. Currently, there is a temporary office located on Crystal Avenue where appointments can be made to visit the facility and receive a tour.

Next meeting of the Planning Board

There will be no meeting on December 3, 2008. On December 17, 2008, the Board will take up any administrative business and then Bruce Mayberry will present a regional workshop in conjunction with NH DOT and CTAP on Impact Fees.

Enterprise Bank Decision

The Planning Board had asked to be made aware of the Superior Court decision relating to the appeal of the ZBA decision regarding the variance granted for frontage requirements. Mr. Sioras reported the Planning Office received a copy of the decision last Friday and the Court upheld the decision of the ZBA.

Public Hearing**Avatar Income Fund I, LLC****Parcel ID 29195, 32 West Broadway****Acceptance/Review, Waiver of strict compliance with LDCR § 170-64.C**

Attorney Douglas Macdonald of Keane and Macdonald presented for the applicant. He confirmed the Board members all had a copy of the application packet. He provided the members with an 11 x 17 copy of the plan dated 11/4/08 prepared by Sublime Civil Consultants. Also present was Keith Coviello, representing Sublime. Mr. Macdonald advised that Avatar acquired 32 West Broadway after the Halls defaulted on their loan. The bank would like to sell the property, but the current litigation has made it difficult, and they have lost potential buyers. The goal is to resolve the matter.

As he stated in the application, they do have pending litigation and are waiting for further resolution to several cases. There is one motion scheduled at Rockingham County, and he expects to see further Motions for Reconsideration. The most important of all of the issues is the pending litigation in Hillsboro County. He has attached a copy of that opinion to the application. In reviewing the application he submitted to the town, there is a letter of explanation attached. An important word is missing from that document and he asked the Board members to please insert the word "not" on page 2, paragraph 2 so that the sentence would now correctly read, "...courts in this matter have found that a 3 foot buffer was *not* approved for the Property.¹" The courts found the town did not approve a three foot buffer and that is what brings the applicant here tonight. The applicant foreclosed on the property, after the property had been involved in litigation for about three and a half years. The Hillsboro County Superior Court found that this Board expressly required a 20 foot buffer at the property. This Board and the town have maintained a 3 foot buffer was approved. The Halls installed a 3 foot buffer. After the Hillsboro Superior Court indicated a 20 foot

buffer should be installed, there was further litigation which states this Board's record was inadequate to support that this Board had approved a 3 foot buffer. A Motion for Contempt was also filed. The applicant did not then have the luxury of asking the Board for the 3 foot buffer. So, the bank installed the 20 foot buffer and is asking for relief for some of the parking that was lost when the 20 foot buffer was installed. They have taken a conservative approach and he feels it is within this Board's authority to approve a 3 foot buffer if that was requested, but they are not asking for that. The 20 foot buffer was installed along the back edge of the property. The buffer contains a retaining wall, gravel, groundcover and trees per the regulation.

On Exhibit 1F, the Board can see how the buffer is configured. After the guardrail there is a drop into the next property; the drop is substantial. At that point the landscaping is made up of railroad ties that form a retaining wall. At that point, the distance is between 6 to 8 feet. They did not do anything in that area for several reasons.

One issue is with regard to the screening. It shields the apartment house from the restaurant. There exists some natural vegetation for the last ten or so feet. The Board can see this on the pictures and in the plan.

In trying to restore some of the parking that was lost, Sublime Civil Consultants (Sublime) prepared a plan which offered a conservative approach. They are requesting the ability to place five parking spaces along the rear part of the buffer, which would reduce the buffer closest to Central Street by about 3 to four feet. He asks for some consideration with regard to the measurements so that if they are off in their estimate by 10 to 12 inches, they will not have to come back to the Board. For example, if they think it is 16.2 feet and it turns out to be 17.2 feet, the Board would not feel that was an issue.

They are asking for a waiver with respect to the strict requirements relative to the landscape buffer, that those requirements be waived as shown, give or take 12 inches. As to the extent that the buffer does not conform with the landscape regulations, that that be allowed as well; for example, the pavement near the retaining wall which is there for drainage.

It may be that the Board will require the trees be moved to less than 7' apart. They would like to keep the screening, trees and adequate distance, which would allow parking that is not nose in, and the buffer would not be so close to the abutting property. This allows them to get out of the hardship with regard to the change in parking, the inability to sell the lot, and potentially halt the lawsuits.

Mr. Granese reported he drove by the lot and has seen the buffer. Is Mr. Macdonald asking for permission to remove the trees? Mr. Macdonald said the trees would remain and allow for sight down Central Street. The tree that may be

affected is the last one in the row closest to Central Street. He is not suggesting they remove it, but it may end up closer than 7 feet at a staggered distance.

Mr. Granese asked the Board if they had any questions.

Ms. Evans asked of the trees that remain, will they extend into the space closest to Central Street? Mr. Macdonald explained Exhibit IB shows that space has been left open for sight distance. They could add another tree now if appropriate or in the spring if that is what the Board requires.

Mr. Chirichiello inquired if any town official, such as the Fire Department, requested line of sight distance? Mr. Macdonald said no. The regulations do not mention line of sight other than with regard to fencing in the landscape requirements, so they kept the sight distance because they felt the trees would block views similar to a fence.

Ms. Evans asked if there would be the same number of parking spaces as originally on the lot? Mr. Macdonald said originally, along the back property line there was a three foot buffer, which began the dispute. There were ten spaces against the buffer, where cars parked nose in. The proposed approach avoids the nose in parking to eliminate that concern, if it exists.

Mr. Tripp asked if the last proposed parking spot, closest to the street, will impede the line of sight on Central Avenue? Mr. Macdonald did not believe so. Mr. Tripp thought the parking spot appeared close. Keith Coviello of Sublime explained he is not sure what the line of sight is at that location. He assumes Mr. Tripp means the line of sight from the property? The line of sight is taken 10 feet from the edge of travel way. The parking space is behind that. If the trees don't extend to the edge of the parking space, they could potentially add some without interfering with the line of sight. Mr. Macdonald added that Exhibits 1B and IE show the area of the property and the buffer zone that is adjacent to the abutting parking area. This is not a zone where there are no trees between the bank's building and the abutting building.

Mr. Tripp suspected the purpose of the trees is to block visual intrusion of the Firehall operations as a business from the residence. He would be in favor of granting a waiver so long as a few more trees were added to block the cars parked in that area. Mr. Macdonald said the trees as they exist provide a screen between the buildings. If the Board would like to see any added at the end, they would be happy to do that.

The Board had no further questions at this time and Mr. Granese opened the floor to the public.

John Griffith of Griffith & Associates introduced himself. He is representing Property Portfolio Group, the owner of 7 Central Street. He provided handouts to

the Board members which included a letter and pictures. An original was retained for the file. He explained the photos attached to the letter would be presented on screen from his computer.

Mr. Griffith advised he did not agree with many of the representations made by Mr. Macdonald. Mr. Griffith felt this was a request to waive the May 18, 2005 decision, which he tried to appeal and it was found his request was untimely. This is three and one half years later. Time has run out for review of that decision and the Board should vote to not take jurisdiction on that grounds. He questions the authority to consider this request without a site plan before the Board. In order to grant a waiver, the applicant needs to prove unnecessary hardship. This is not an adjudicatory board, so there are no definitions of hardship for this Board. For the ZBA, hardship has a definite meaning that has been defined several times by the courts.

Does this buffer restriction interfere with reasonable use of this property? Avatar says no. In their submission, they state, "The Property would have sufficient access to off-site parking through public parking options, and with 9 spaces on-site, it would be better equipped from a parking perspective than many of the other local restaurants in close proximity that are also located in the TBOD." So, they are stating they want a leg up on the other restaurants and so want the Board to grant the waiver. It is so hard to prove hardship. A slice of buffer does not seem like a big deal. He is sure it seems like his client is a "crank" for complaining. The other issue is adverse impact on the abutter.

Mr. Griffith showed pictures of the side yard before construction of the buffer. Picture one, taken in 2004, shows a gradual slope to 7 Central Street. The second picture shows that rubble was put in to raise up the land to create parking. Fill was added over the rubble and then asphalt. The retaining wall was a fence. This picture was taken in October of 2005. Picture 3 shows the bank once the cars are parked. Picture 4 (2006) shows how busy it was at the time and shows loss of value to the abutting properties. His client was granted a more than 50% abatement for taxes because of the lack of a buffer and because their property is unrentable.

Picture 5 is the most recent picture and shows the current buffer, as well as the screen afforded to the residential property. The Board can see no effort was made to screen the ugly outside of the building (HVAC units, the fan that blows grease onto the neighbors).

Ms. Evans asked how many years has Mr. Griffith's client owned the property? Mr. Griffith advised the property is not a "tenement" and it was purchased in 1992 or 1993. He showed a picture taken during the time the Firehall was performing its renovations. The picture is of Rig-A-Tony's, which covered its HVAC system. (At this point in the presentation, Mr. Griffith's laptop lost the battery charge and the Board and public were unable to view the pictures on the screen.)

Mr. Griffith advised Rig-A-Tony's covered all of their units and put it out of sight of the neighbors. The grease fan is on the roof. None of that was done at the Firehall. As a result, there is no shield feature which the LDCR says should be screened. There was no effort to do it. The dumpster was finally removed after the Health Department got involved. He has provided a picture of the 3 foot buffer taken from the Firehall (this is the 5th picture from the back of the packet). It shows the original buffer. This picture was taken in the fall of 2006.

The reason for the buffer is to protect residential properties from the more intense non-residential use. This is supposedly what this Board approved and this screens the use from the residence. The next picture is Rig-A-Tony's where the Board can see the screening. The next picture is the current view of the buffer as it has been installed. This was taken from the porch of 7 Central Street about 4 feet up from the rear of the Firehall.

The plan given to the Board shows a door on the east corner of the building. That door has been sealed and there is pavement. The next picture shows 1 ½ inch crushed gravel. The LDCR landscape requirement says that any disturbed ground should have groundcover with 4" of friable topsoil.

The outstanding order in court says that all the fill and rubble should be removed. This has not been done. The retaining wall is there for the purpose of retaining all the rubble that was not removed. He is submitting a disc to the Board that contains a short video, showing the water draining from the firehouse property onto the backyard at 7 Central Street. The last picture in the packet shows an area in the backyard where the drainage has happened. It floods as does the brick sidewalk. The video shows the water from a light rainfall and now it runs under the wall onto 7 Central Street.

One of the purposes of this Board is to see this does not happen. Also, the downtown master plan calls for green space, not stone. This area has stone, not planted groundcover.

Mr. Chirichiello inquired where are the grass and planting requirements referred to by Mr. Griffith? Mr. Griffith said they are in § 64.A.2, in the first sentence. "All areas disturbed by construction shall be covered with a minimum thickness of four inches friable topsoil and be seeded with grass seed, covered with sod or planted with groundcover." Mr. Chirichiello stated when looking at this section, one must also look at number 3, which talks about the Central Business District, in which this lot is located. It says "...may be vegetated with grass, landscape plantings, ground covers and native vegetation." He noted "may" and "shall" are important words. Mr. Griffith maintained the section first said "shall" and does not exclude the CBD. Mr. Chirichiello responded that the Section needed to be looked at as a whole, and all the subparts, 1, 2, and 3 apply. It says "except in the CBD." Mr. Griffith did not feel there had been any effort to enforce the green

space standard because the town felt it did not apply to the CBD. Mr. Griffith felt Mr. Chirichiello was trying to say the whole thing does not apply. In state and town law, the more restrictive standard applies when there is a conflict between standards. If one says *shall* be planted materials, that means mandatory. The other says areas reserved as green space *may* be covered with grass, or native vegetation.

The Master Plan has not eliminated green space from the downtown. That is the main component to creating a pedestrian friendly downtown. He did not feel the buffer that was currently constructed was landscaping. It is made up of rock and looks like a railroad bed.

Mr. Chirichiello inquired what would it take to satisfy Mr. Griffith's client with regard to the buffer? Mr. Griffith stated his client wants what the law requires. The buffer should be put back to what it was. Mr. Chirichiello asked if Mr. Griffith's client would be okay with the previous slope? It will create drainage on the property. Mr. Griffith said it won't if the area is grass or groundcover with mulch, which is what it was. Currently the water runs over the stone. He would like to see the land brought down to what it was, have it planted with a groundcover. Trees that really are a buffer should be planted. For example, the third picture from the last shows the trees. There is a large space between the trees. The alley that is created between them does not hide anything. If the trees are clustered closer together, it would provide a shield so that the back of the restaurant could not be seen from 7 Central Street. The vent fan should be placed on top of the building, rather than pointed at the neighbors, and the HVAC system should be put on the roof. This would increase the capability for more parking and the driveway.

Mr. Chirichiello reminded Mr. Griffith the topic this evening is the buffer, not the parking. Mr. Griffith said the applicant is asking the Board to approve the whole construction which includes the 1 ½ inch crushed gravel, rather than groundcover, the retaining wall, rather than removing the fill, the fact that there was no building permit pulled to construct the retaining wall, and a hardscape rather than a landscape. The board is being asked to waive any idea of drainage and what damage the drainage will cause the neighbors.

Mr. Chirichiello asked how does the drainage affect Mr. Griffith's client's property? Mr. Griffith advised the last picture in his packet shows the fines that have come out from under the wall. The video, which he is not able to show this evening, shows water running from under the wall. The effect on 7 Central Street is that the brick walkway has been undermined. The foundation of the building has been compromised by runoff of the fire station. People are having a problem getting to their units or the laundry room in the winter because of the ice they need to cross.

Ms. Evans asked if there was a problem with the drainage before the buffer went in? There was not. Was there a bulkhead or anything there previously? There was not.

Mr. Tripp noted the area used to be a parking lot for the fire station, was there runoff then? Mr. Griffith said there was runoff but since the retaining wall went in, the water is running harder. Mr. Tripp asked if Mr. Griffith felt this was a pre-existing condition? Mr. Griffith said it was a pre-existing condition that the court has ordered removed because it was wrong and illegal. Site plan review was never done. This Board did not know there would be regrading of this area and drainage was not reviewed. The idea of a Site Plan Determination is for a change in use. This was a whole renovation, inside and out. This area was renovated for parking.

Ms. Evans asked if any construction has been done on 7 Central Street to redirect the water flow from the renters? Mr. Griffith said no; there is no sewer drain. The water would need to be pumped and an easement put in place to put the water back on top. The next catch basin is located down the street. Sublime would redirect the water to Central Street and down to the catch basin. So no, he has not redirected the water on 7 Central Street. Water from one property should not be going onto another. That is a trespass and a taking of property. Mr. Chase noted that the fire station had been in that location for over 100 years and at that time water ran from 32 W. Broadway. It runs over grass just as fast as it would over the pavement.

Mr. Chirichiello suggested that all discussions be restricted to the buffer.

Mr. Griffith stated the Board would be irresponsible to vote on this application tonight without conducting a site walk. This is a serious thing. The Board is being asked to tell the court and the state building code, that they are wrong and that this Board is willing to depreciate the value of one property in favor of another, and that applicants don't need to prove unnecessary hardship in order to obtain a waiver.

Mr. Chirichiello asked what will it take with regard to the buffer, to satisfy Mr. Griffith's client? Mr. Griffith said the rubble should be removed, grass/groundcover planted in its place, and trees planted in loam, close enough so that the back of the building cannot be seen. Mr. Chirichiello asked if lights are in issue? Mr. Griffith stated that previously, Mr. Cournoyer on Storer Court, had complaints regarding noise from the bands that used to play. That noise would be blocked in part by a solid, evergreen buffer. So, 10 to 15 more trees would help. The rubble should be taken out, and the retaining wall. It is not a big deal to remove it. The retaining wall should have had a building permit. Ms. Woodward held a brief discussion with Mr. Griffith. His client wants to see what the court ordered done, and the landscaping installed per the LDCR.

Ms. Evans asked how Mr. Griffith would classify the look of the current buffer? Mr. Griffith said the landscape by Ms. Evans' feed store is attractive. This buffer looks like a railroad track and he feels it is unattractive.

Mr. Granese asked for confirmation that Mr. Griffith is asking for the railroad ties to be removed, the stone wall taken out, and grass/trees planted. Mr. Griffith said he would be happy with pachysandra or some similar groundcover. Mr. Granese inquired if Mr. Griffith had any issue with the requested parking spaces? Mr. Griffith did not feel the applicant needed them, and does the applicant need a variance of 20 feet in order to obtain them? Mr. Granese noted Mr. Griffith has not answered his question. Mr. Griffith said there are 8 foot wide spaces coming in, and 9 foot spaces below. Why are the spaces not 8 feet there as well? He has no issue with the parking spaces.

Mr. Granese asked again for confirmation that Mr. Griffith would like to see the rubble removed, and loam placed. He asked if Mr. Griffith understood that any trees planted would need to be planted to allow room for growth and there needs to be some distance between them. They also need time to grow. Mr. Griffith said when there was a 3 foot buffer, the trees were planted right along the fence. He knows trees need room to grow. Across the street, the trees have grown in and now provide a hedge. Mr. Chirichiello noted there is spacing requirement in the LDCR (p. 65), so there is not a lot of control over that. Mr. Griffith noted that is a minimum distance requirement; the Board can require the trees be closer.

Ms. Evans asked if Mr. Griffith was agreeable to the 5 parking spaces? Mr. Griffith said he was not agreeable to the waiver and does not believe this Board has the authority to grant one. There are ways to do this without taking space from the buffer. There are no measurements noted, so how much of the buffer is being taken? Ms. Evans asked if he would want to clarify that? Mr. Griffith said it was not up to him to clarify it. The Board should want to know how much space is being asked for. Ms. Evans asked if Mr. Griffith was opposed to 5 parking spaces? Mr. Griffith said was opposed to anything that impinges on this buffer. Site plan review would allow some give and take.

Mr. Granese asked if there was anyone else from the public who wished to speak on this matter?

Steve Trefethan, introduced himself as the manager of Dom Vincent, LLC., located at 40 West Broadway. 3 years prior site plan review was waived. Dom Vincent filed an appeal in a timely manner. The town manager, the town attorney and the Halls made an agreement with Don Vincent to put in the buffer, one along the property line near Rig-A-Tony's, and some other items. During the site plan determination process, they submitted a petition signed by many residents opposed to the project. The town waived site plan review. There should have been a buffer along the Rig-A-Tony's property line. There should have be a site plan to look at so the public could review it.

This Board decided to count parking spaces at the Firehall and Halcyon while there was a viable lease between the Halcyon Club and Dom Vincent, so a lawsuit was filed. The town manager and attorney took a look at the issues and realized there were many issues and many improper actions, including approving the waiver of site plan review. That is still hanging out there. He feels there are valid items for future appeals. He is against any waiver of the buffer as there are still issues to be taken care of and the neighbors need to be satisfied. He does not know why only the Firehall was allowed to valet park at Abbot Court, and that option was not given to any other restaurant in town. The town pushed the project through and everyone got hurt. He is against any waiver. He wants the bank to do the right thing.

Mr. Macdonald advised Sublime would address the size of the parking spaces and the drainage. Mr. Coviello said reference has been made to a plan that Sublime prepared. They were hired *after* the Firehall went to the Board and the suits began. Sublime looked at the drainage; at that time there was a 3 foot buffer and there had been an increase in runoff. Sublime's recommendation was to add a cape cod berm to run the water to the street drainage. That corrected the problem. Today, the curb has been removed as well as the increase in the amount of pavement. The parking currently is less than it was when the property was the fire station. Sublime's current proposal is to request 3 feet 3 inches of relief on the 20 foot buffer, which would reduce the buffer to 16.7 feet at the widest point. If approved, and pavement is added, there will still be less paved parking area than the fire station had. There would be more landscaped area than there was when the fire station was there. The current landscaping is stone and could be called a landscape bed. There has been argument this evening with regard to grass. Grass generally speaks to slopes. With islands, more often than not, one would see bark mulch, which is a maintenance item. A stone bed allows water to perc and provides a hard area that does not need to be mowed and does not interfere with the ability of the trees to obtain sufficient water to grow. The water is not being used by grass. He believes stone to be acceptable in a landscape bed. The drainage has been decreased.

Regarding parking spaces, the LDCR has no standard space requirement for parallel parking spaces. For the pull in, generally they are 18 x 9 feet wide. They kept the 9 foot width and added 2 feet so that there was room to maneuver for the parallel spaces. Some towns reduce the width to 8 feet, but make the space longer. Regarding the Rig-A-Tony's buffer, no landscape buffer is required on that lot line as Rig-A-Tony's is a commercial use. There is a 5 foot parking setback but that pavement has always been in that location since the time of the fire house. That is not the issue before the Board tonight, but he wanted to point out that has not changed.

Mr. Granese noted it has been stated the parking spaces were acceptable to Mr. Griffith. Regarding the runoff, with the parking spaces as presented, and 3 feet 3

inches taken off the buffer, would that allow enough room to install the curbing to direct the water to the street drainage, without affecting spaces along the back of the property? Would it take the water away from West Broadway and direct it to Central Street? Mr. Coviello said it would and that was their recommendation. They could encroach an extra foot into the buffer to install the curb, as the curb needs one foot of depth, or they could decrease the parking space dimension from 9 feet to 8 feet to obtain the distance.

Ms. Heard inquired what is under the buffer? Is the rubble still there? Mr. Coviello did not know. Mr. Macdonald stated that what has been heard through deposition of the people who installed the buffer was that the pavement was removed up to the retaining wall. At the top of the wall, pavement was removed again to the 20 foot line. He can't give particulars as he was not there during construction, but has heard that enough was removed to create the buffer and accommodate groundcover. Ms. Heard asked if the gravel still sat on the rubble? Was all the debris removed and the buffer created from a fresh box? Mr. Macdonald said speaking to hardship, the bank loaned the company money and has had to reduce the asking price hundreds of thousands of dollars, and has spent \$20,000.00 on the buffer installation and tens of thousands in legal fees. To hear the buffer is unacceptable is a stretch. He has never seen an affidavit or anything else from a witness who saw the buffer installed, stating that the rubble was covered up. When the 3 foot area was removed for the retaining wall, they did not say during deposition, they came across anything under it. The vines were removed from the fence at the request of the owners of 7 Central Street.

Mr. Macdonald said he is not here to discuss Rig-A-Tony's or what happened three years ago or what may be appealed in the future. He is here to discuss the buffer. This is a reasonable approach to a difficult circumstance and he feels there is clear hardship. If this is a side yard buffer, then the buffer should be 10 feet and this is a moot issue.

This Board has the authority in the regulations to grant a waiver. It is included in the application. One was granted to the Halcyon Club. Regarding the provisions that grass is the requirement, one needs to read the applicable section in its entirety. There is no requirement for green space on this lot; this is not a lawn. There is no court order regarding lawn, but there is a court order regarding a buffer. With regard to the trees, they are planted in compliance with the regulations with regard to height, spacing, and all other regards.

The abutter has had a lot of litigation. They have withdrawn all claims with the exception of the buffer, so we are not discussing the HVAC system. If we install a buffer according to the regulations, then it diminishes the effect of the use. His client does not have to construct anything to hide the units on the back of the building. They pursued settlement options with the abutter and were unsuccessful, so they installed the buffer, but would like some relief from some of the requirements of the buffer.

They would like to have parking in the buffer. They are requesting relief of inches from the end closest to Rig-A-Tony's to approximately 5 feet near Central Street. They are not here for site plan review. The Board has a waiver request application. He is happy to comply with any conditions the Board sets with regard to a berm or the addition of more trees.

Approval is appropriate under the waiver requirements because there is a hardship, although that is a 'may' requirement so a waiver can be granted. They loaned money to a property that had 10 spaces. The lot now has 5 parking spaces. It has had an adverse impact and will continue to do so. He feels the argument regarding the tax abatement is irrelevant to this discussion. He feels the Board has sufficient information in front of it and requests approval of the waiver of strict compliance with regard to the parking spaces, the amount of space requested and the other issues relative to 164,C.

Mr. Tripp asked Mr. Coviello if Sublime designed the parking lot when it was first expanded. Mr. Coviello advised Sublime was retained after the site plan determination. They were first hired after the parking lot was installed and were asked to look at the drainage to correct it. They were involved in the addition of the berm to redirect the stormwater.

Ms. Evans asked Mr. Sioras if the Board could take jurisdiction of this matter, or does the Board need to wait for a site plan? Mr. Sioras explained that based on previous advice of counsel, this is not a site plan. This is a waiver request and part of a court decision. Based on that, the Board can accept the waiver request and vote on it. The Board can't take jurisdiction as there is no site plan.

Mr. Griffith stated with the Halcyon Club, the Board has decided they will be granting waivers from now on. He assumes any citizen can now come to the Planning Board rather than the ZBA if they have a question about anything. There was a 30 day appeal period since the May 18, 2005 decision to approve the site plan determination. That time period has run. The Board is now being asked to change that decision. He does not think the Board has jurisdiction because that time period has run.

Mr. Granese asked Mr. Griffith if he was making accusations against this Board with regard to the Halcyon Club? Mr. Griffith stated the only accusation he is making is he has been told by several people that they have been promised they can get a 3 foot buffer back on this property from this Board in the future. Mr. Granese asked who are those "people". Mr. Griffith responded a prospective buyer spoke with Mr. Sioras and the town manager and was assured he could get a 3 foot buffer. When he asked what would happen when Mr. Griffith was not away for that meeting, they laughed and said that would not be a problem.

Mr. Sioras stated this discussion is inappropriate. Accusations and comments are being made. This discussion should be based on the waiver. He is personally being sued by Property Portfolio and has been cautioned not to participate in this type of a discussion. This is a serious slander accusation. That discussion did not take place regarding the Halcyon Club. Mr. Griffith was not present for that meeting and it did not take place the way Mr. Griffith has implied and Mr. Griffith is calling him a liar. This is inappropriate. The discussion needs to go back to the waiver and it is not appropriate to continue this type of discussion. There are many other issues going on here.

Mr. Granese noted the Board has not yet made a decision. Mr. Griffith said it is a huge mistake for this Board to grant a waiver without a site plan before it. Section 3 of the LDCR only applies to the section regarding site plans and site plan determinations. The Planning Board should do what is right for all and should not adjudicate; that is not the function of the Planning Board. The ZBA adjudicates. The Halcyon Club is the first time he is aware that the Planning Board has granted a waiver without a site plan before it. A waiver is required to be noted on the recorded plat. When the Board approves this waiver, the Board approves the entire plat without a site plan review. He feels Rockingham County Registry of Deeds would have a plat of record and anyone looking at the plat would be of the impression the entire plat was approved, not a three foot triangle.

Mr. Macdonald stated that with regard to the town counsel advice to this Board that is for the Board's consideration. With respect to the procedure, the May 18, 2005 decision was appealed by the abutter too late. It went to Rockingham County Supreme Court and that court said the appeal was too late. A second suit was filed in Hillsboro County. Hillsboro said they did not want to hear this, citing *res judicata* and collateral estoppel, and it was appealed to the Hillsboro Supreme Court. That court said Hillsboro Superior court could hear the case with regard to those items not approved by the Planning Board. The court has maintained the 3 foot buffer was not approved by the Planning Board. So for Mr. Griffith to tell this Board that Mr. Macdonald is trying to get a three year decision overturned is ludicrous. This whole thing is about the buffer and whether it complies. The buffer they put in complies, but it is a hardship and they want relief from it. It is disingenuous to say they are here to get a three year old decision overturned.

Mr. Trefethan stated this [May 18, 2005 decision] was appealed by abutters [Don Vincent]. That appeal was accepted by the court. An agreement was made with the town manager, the town counsel and the Halls. No site plan was done and that is still an issue today. He feels any appeal would still be timely. There is not one thing on the agreement that was made, that was done. He feels a site plan should be done when a buyer is located for this property because nothing is done. Site plan was waived and they never got a chance to speak.

Ms. Evans stated this went to the Planning Board. She believes the Planning Board has authority to waive it and is not tied to the ZBA definition of hardship. She feels there is a hardship for this property. This lot originally had 10 parking spaces and that number was reduced. The benefit to the town outweighs any deterrent. She does not see an adverse impact to add 5 parking spaces. Regarding the drainage, there is no proof that the drainage is other than what it always has been and she does not feel more room needs to be added to accommodate the drainage. She also finds that the buffer is in the side yard of the business. The HVAC discussion is not relevant to this waiver. The buffer is attractive and she does not feel it needs to be bark mulched. She feels this buffer is low maintenance, which is preferable for a business located in the CBD.

Mr. Tripp said he has heard a lot tonight. Many items are not relevant to the topic. Avatar has put a commendable effort into installing a 20 foot buffer that appears to satisfy the court judgment. He agrees granting a waiver to allow up to 3 feet of buffer for parking is acceptable. It does not appear the buffer as installed is acceptable to the abutter, but the Board needs to act in the town's best interest.

Motion by Heard to approve the request for a waiver of strict compliance from Section 170-64.C of the Land Development Control Regulations, seconded by Evans. Mr. Granese advised this is to allow the 3.3 foot encroachment into the buffer.

Tripp, Chirichiello, Heard, Chase, Evans, and Granese all voted in favor. Mr. Granese added he feels there is hardship and the applicant has done a good job with regard to the 20 foot buffer. This is a big change from before and he feels that granting an encroachment of 3 feet is appropriate.

Mr. Macdonald called for point of order. Is the granting of the waiver allowing parking to be situated within that 3 feet? Mr. Granese confirmed it does.

Mr. Granese advised the Board would take a 5 minute break and then move into the Master Plan workshop. That portion of the meeting was not televised.

The workshop began at 9:02 p.m.

MASTER PLAN WORKSHOP

Jillian Harris of Southern New Hampshire Planning Commission presented the draft of the first two chapters, Demographics and Housing, of the Master Plan to the Board. (See attachments)

Growth projections have been provided for the years 2007 through 2030. Derry is estimated to grow from 34,200 in 2007 to 40,430 in 2030. These are based on

NH OEP and SNHPC projections. The projections are based on the 2000 census and local projections are based on a community's historical share of its respective county's growth. There is a difference between the OEP and SNHPC projections. SNHPC's methodology includes more localized data and assumptions about the town and its surrounding area than the OEP projections. The Commission makes its projections based on natural growth and net migration.

She reviewed an age distribution comparison between Derry, Londonderry, Manchester, the county and the state. This distribution table is important because it shows the out migration of the 20 – 34 year olds, which will affect future housing needs. She noted in the first chapter, "With increasing numbers in the older population and decreasing numbers in the younger population, the prospects for economic growth and development diminish greatly, so this analysis is something that needs to be seriously considered in the future land use and development decisions."

With regard to housing, the town needs to consider its share of affordable and workforce housing. SB 342, is an act establishing a mechanism for expediting relief from municipal actions which deny, impede or delay qualified proposals for workforce housing, and codifies *Britton v. Town of Chester*. Ms. Harris advised she analyzed the housing stock in Derry to see how Derry fulfills its requirement towards workforce and affordable housing. She reviewed rental and homeowner stock

To determine if such opportunities exist, the collective impact of all local land use regulations must be considered, and workforce housing of some type must be allowed in a majority of land area where residential uses are permitted (but not necessarily multi-family in a majority of such areas). Recognizing that some municipalities have already done what is necessary under this law, the existing housing stock of a community is to be accounted for to determine if a municipality is providing its "fair share" of current and reasonably foreseeable regional need for workforce housing. Importantly, reasonable restrictions may still be imposed for environmental protection, water supply, sanitary disposal, traffic safety, and fire and life safety protection. This new law defines affordable housing as housing, where no more than 30% of income is spent on housing (rent + utilities; or mortgage principal and interest, taxes, and insurance). It defines workforce housing as housing that is "affordable" for a renter family of 3 making 60% of the area median income, and an owner family of 4 making 100% of the area median income. This does not include age-restricted housing or developments with greater than 50% of the units having less than 2 bedrooms. Also, multi-family housing is defined as 5 or more dwelling units.

She provided information on the specific analysis for Derry.

The maximum housing purchase price for an owner family of 4 making 100% of the area median income would be approximately \$227,6283 (Table 2.3), based on the area median income of \$80,574, assuming 10% cash on hand for a down payment, a 6.25% interest rate, a 0.50% insurance rate, required PMI and Derry's 2007 property tax rate of \$22.10 per thousand.⁴ With 20% cash on hand for a down payment the maximum price increases to approximately \$247,567 and with only 5% cash on hand for a down payment and closing costs the price decreases to \$218,805.

This analysis shows that a majority of the housing units in Derry are affordable for all of these categories, based on the above assumptions and the definition of affordable according to the new law. Even with the lowest amount of cash on hand (5%), there are still 53% of the assessed housing units in Derry that are at or below the affordability threshold.

Even though it is important to realize that there are a number of assumptions in these calculations and that these are not hard and fast numbers for determining affordability, it still gives a good basis to begin analyzing if there are reasonable and realistic workforce housing opportunities within the town. According to this analysis of Derry those opportunities do exist within a majority of the town. It will also be important to determine if those opportunities will continue to exist within the reasonably foreseeable future as well.

Ms. Harris advised the next chapters will be Community Facilities, Public Utilities and Economic Development.

Mr. Chirichiello had a question with regard to SB342. He understood this to mean that the towns that don't carry their fair share of housing would have their local regulations superseded by this act. For example, Auburn may need to allow condominium developments. Because Derry meets its fair share of housing, there is nothing to do, because Derry can prove it meets its fair share. Ms. Harris said there is a term called 'builders remedy' that would apply for towns such as Auburn. Auburn would have to comply.

The Board noted this was a great presentation and thanked Ms. Harris.

Mr. Sioras reminded the Board the next meeting will be on December 17th. The Board will not meet on December 3rd.

Motion by Heard, seconded by Tripp to adjourn. All voted in favor and the meeting stood adjourned at 9:19 p.m.

Minutes prepared by Elizabeth Robidoux, Planning Clerk