

The Planning Board for the Town of Derry held a public meeting on Wednesday, December 05, 2012, at 7:00 p.m., at the Derry Municipal Center (3<sup>rd</sup> Floor Meeting Room) located at 14 Manning Street in Derry, New Hampshire.

Members present: David Granese, Chairman; John O'Connor, Vice Chairman; Frank Bartkiewicz, Secretary; David Milz, Town Council Representative; John P. Anderson, Town Administrator; Darrell Park, Member; Lori Davison, Alternate.

Absent: Jan Choiniere, Randy Chase, Ann Alongi, and Jim MacEachern

Also present: George Sioras, Planning Director; Elizabeth Robidoux, Planning Clerk; Robert Mackey, Code Enforcement Officer.

Mr. Granese called the meeting to order at 7:02 p.m. The meeting began with a salute to the flag. He introduced the staff and Board members present, and noted the location of the exits, and meeting materials.

*Ms. Davison was seated for Mrs. Choiniere.*

## **Escrow**

### **#12-30**

**Project Name: Bunker Estates**

**Developer: JEMCO Builders & Development, Inc.**

**Escrow Account: JEMCO**

**Escrow Type: Letter of Credit**

**Parcel ID/Location: PID 02020-001, 65 Fordway**

The request is to authorize the Treasurer for the Town of Derry and/or his designee to draft Letter of Credit #20001082, amendment #9, drawn on TD Bank, in the amount of \$62,122.86 on December 11, 2012, if a replacement Letter of Credit is not received by December 10, 2012.

It was noted the Letter of Credit has an automatic call provision but it was recommended the Board approve the draft as a precautionary measure.

Motion by O'Connor, seconded by Bartkiewicz to approve the request as presented. The motion passed with all in favor.

## **Minutes**

The Board reviewed the minutes of the November 19, 2012, meeting.

Motion by Anderson, seconded by Bartkiewicz to accept the minutes of the November 19, 2012, meeting as written. The motion passed in the affirmative with Park abstained.

### **Correspondence**

Mr. Bartkiewicz advised the Board is in receipt of a letter from Attorney Morgan Hollis of Gottesman & Hollis regarding the mixed use overlay district proposal and the proposed changes to the General Commercial zone. The Board will hold discussion of the letter until the workshop later this evening. The Board is also in receipt of the latest edition of *Town and City*.

### **Other Business**

#### Southern New Hampshire Planning Commission Appointment

Motion by Anderson, seconded by Bartkiewicz to nominate John O'Connor as a Commissioner to the Southern New Hampshire Planning Commission.

Park, Anderson, O'Connor, Milz, Davison, Bartkiewicz and Granese all voted in favor and the motion passed with all in favor.

#### Request to extend approval – Ernest Lewis Keith Revocable Trust

The Board has received a request to extend conditional approval of the Ernest Lewis Keith, two lot subdivision approval so that the applicant can establish escrow. This is the first request.

Motion by Anderson, seconded by Milz to approve a six month extension of the Ernest Lewis Keith Revocable Trust, 15 Hillside Avenue, PID 29029, 2 lot subdivision approved on June 20, 2012. The conditions will then expire on June 20, 2013.

Park, Anderson, O'Connor, Milz, Davison, Bartkiewicz and Granese voted in favor and the motion passed.

#### Next Meeting of the Planning Board

Mr. Sioras advised there will be no second meeting in December. The next meeting of the Planning Board will be January 16, 2013.

## Public Hearing

### Proposed changes to the sign regulations

A public hearing to discuss proposed amendments to the Town of Derry Zoning Ordinance, specifically:

To amend Article II, Word Usage and Definitions, Section 165-5, Definitions, to amend the definitions for Flashing Signs, Projecting Signs and Window Signs and to add definitions to define the following: Advertising Device, Billboard, Sign Permit, Abandoned Sign, Directional Sign, Digital Sign, Electronic Sign, Government Sign, Ground Sign, Interactive Digital Sign, Non-conforming Sign, Off Premise Sign, Residential Neighborhood Identification Sign, Sandwich Board Sign, Special Event Sign, Unsafe Sign, Wall Sign and Warning Sign.

To amend Article VI, District Provisions, to repeal the following sections of the Article and to renumber them accordingly: Section 165-32.2.E, General Commercial III; Section 165-34L, Office Business District; Section 165-37G.3, Neighborhood Commercial District; Section 165-45D.2.f, Medium High Density Residential Special Exceptions; Section 165-45.1.C.2.f, Medium High Density Residential II Special Exceptions; Section 165-46B.2.f, Medium Density Residential Special Exceptions; Section 165-46E.5, Medium Density Residential Campgrounds; and Section 165-49H, Traditional Business Overlay District Signs.

To repeal Article XII, Signs and Billboards in its entirety and replace it with the following: Article XII, Signs, Section 165-100, Purpose; Section 165-101, General Provisions; Section 165-101.1, Signs in Residential Districts; Section 165-101.2, Signs in Neighborhood Commercial Districts; Section 165-101.3, Signs in Business, Commercial and Industrial Districts; Section 165-101.4, Signs in the General Commercial III District; Section 165-101.5, Signs in the Traditional Business Overlay District; Section 165-101.6, Campground Signs; Section 165-101.7, Political Signs; Section 165-101.8, Off Premise Signs; Section 165-101.9, Nuisance Signs; Section 165-101.10, Interactive Digital Signs; Section 165-101.11, Electronic Signs, Section 165-102, Non-Conforming Use Signs, and Section 165-103, (Reserved for Future Use).

Mr. Granese said he would like to open the floor to the public prior to the Board discussion.

Motion by O'Connor, seconded by Anderson to open the public hearing.

Park, Anderson, O'Connor, Milz, Davison, Bartkiewicz, and Granese voted in favor and the floor was open to the public.

Kenneth Peskin of the International Sign Association, Alexandria, VA, handed out a letter to the Board as well as an excerpt from the Municipal Law Lecture Series (Fall, 2002). He said he had five main points he wanted to address with the Board. In general, his organization supports the

changes to the ordinance. The proposed changes make the ordinance more clear, and consolidates and updates the language. He has five items to bring to the attention of the Board, four of which may have been errors in language, or unintended consequences of the proposed change.

Mr. Peskin stated most well written ordinances have a substitution clause where a sign is permitted to substitute its commercial or business message with one that is non-commercial in nature, such as a political statement. Regarding the Neighborhood Commercial District, he felt the language was unnecessarily limiting as advertising or product information could not be displayed and that the wording could be challenged in court. He noted a conflict between the General Provisions section which states there shall be a 10 foot setback for signs and the Traditional Business Overlay District which has no setback. The conflict arises in the Conflicting Provisions section which states that the more stringent rule applies; thus, the setback in the TBOD would default to 10 feet.

Mr. Peskin also recommended revisions to the definitions of “flashing signs”, “projecting signs” and “window signs”. Under “Non-Conforming Signs”, he felt there would be problems if a business shut down for renovations. His interpretation of the regulations as written indicate if a nonconforming business shut down for two months for renovations, they would need to replace the existing sign with a conforming sign. This can affect the value of property. He cited case law that would allow the non-conforming use and sign to continue. Mr. O’Connor asked if Mr. Peskin had any recent case law that spoke to these issues? The information provided to the Board involved case law from 1995. Mr. O’Connor noted that some of the state statutes have changed since that time and the Courts have overruled some of the prior decisions. He did not feel this information was relevant to today’s regulations. Mr. Peskin stated when he researched there were many cases that were out of state. There have been many things written after the *Carlson Chrysler v. Concord* case but he did not feel they were relevant. Mr. O’Connor asked if Mr. Peskin had reviewed the state statutes to see if they were more stringent than the Federal regulations? Mr. Peskin has not.

Mr. Anderson asked if there was a specific entity that requested the International Sign Association attend this meeting? Mr. Peskin said no. They serve member communities in the area and attend public hearings. Mr. Anderson asked if they were paid lobbyists? Mr. Peskin said essentially yes, but he has not been paid by a client to attend this hearing. They have members in the state of New Hampshire. He found out about the hearing through a newspaper article in *The Union Leader* a few weeks ago. Mr. Anderson asked if Mr. Peskin had clients in Derry? Mr. Peskin said not necessarily in Derry, but in the area. They have eight or nine clients in the State of New Hampshire. Mr. O’Connor asked for confirmation that the comments contained in Mr. Peskin’s letter were not related State RSAs that Mr. Peskin is aware of? Mr. Peskin said he was not familiar, so could not comment on the relevance. Mr. O’Connor asked if the ISA legal department reviewed his letter to the town? Mr. Peskin said his trade organization did not have an in house legal department.

There was no further comment from the public.

Motion by Milz to close the public hearing, seconded by Bartkiewicz.

Park, Anderson, O'Connor, Milz, Davison, Bartkiewicz and Granese all voted in favor and the discussion came back to the Board.

Bob Mackey, Code Enforcement Officer, said Mr. Peskin raised some points that he would like time to digest to see if there was anything relevant brought to light. He did not feel the issue raised about the non-conforming uses would be a problem. It would not be the intent of the town if a business closed for renovations to consider them abandoned. He would like time to review the letter submitted this evening. Mr. O'Connor asked if someone closed for renovations, does the town give them a timeline for completion? Mr. Mackey said we do not. The owner would need to have pulled building permits and there would be associated inspections, so the town would be aware the business was closed for renovation. Mr. Milz noted the original intent tonight was to hold a vote on the amendments.

Motion by Milz to table this public hearing to the January 16, 2013, meeting so that Mr. Mackey can review the letter submitted by the International Sign Association, seconded by O'Connor. Discussion followed.

Mr. Granese asked if that would allow Mr. Mackey enough time to review the letter and ensure there were no conflicts within the proposed amendments? Mr. Mackey said it would give him plenty of time.

Park, Anderson, O'Connor, Milz, Davison, Bartkiewicz and Granese all voted in favor and the motion passed.

## **Workshop**

### Continued discussion of proposed revisions to the Town of Derry Zoning Ordinance, specifically relating to the General Commercial Zone.

Mr. Granese stated at the last meeting, the Board discussed the distances between auto repair, vehicle sales and filling stations. The Board is looking at distances of 1000, 1500 and 2000 feet. Mr. Granese asked Mr. Park how he felt about the distance limitation.

Mr. Park said that personally, he did not like the buffer. The market should dictate the distances between the uses. If the Board feels there has to be a buffer, he would say at most, it should be 1000 feet, but he is not in favor of it at all. Mr. Anderson was in favor of a 2000 foot buffer. Mr. O'Connor said based on his research, a 1000 foot buffer would be preferable and would be consistent with the buffer requirement for the General Commercial II zone. Mr. Milz agreed with Mr. O'Connor on the 1000 foot distance for continuity. Ms. Davison agreed with the 1000 foot distance, as did Mr. Bartkiewicz. Mr. Granese said Mrs. Choiniere was not present this evening, but he spoke with her via telephone prior to the meeting and she would prefer a distance

of 2000 feet. He preferred 2000 feet because that is what was requested by one of the property owners. The Board will move the draft forward with a distance of 1000 feet.

Mr. Granese said the next item for discussion is the issue of allowing single family detached residential in the General Commercial zone. If a Board member feels the use should be allowed, he would like to hear on what size lot it should be allowed.

Mr. Park said the town should be encouraging business growth in this area, so he is not in favor of allowing single family residential as a permitted use. Mr. Anderson said it should be allowed on one and a half acres. Mr. O'Connor did not want to include it as a permitted use. Prior to the 2010 Master Plan update, two hundred or so citizens in the Town answered a profile and said they would like Derry to invest in water and sewer in this area to improve the property values and add commercial uses. Mr. Milz said he did not want it included as a use for the same reasons, as did Ms. Davison and Mr. Bartkiewicz. Mr. Granese said no and advised Mrs. Choiniere had indicated to him that she did not feel this should be an allowed use. The Board will move forward without single family residential as a permitted use. Mr. O'Connor said if a property owner had the land area to add a single family residence, they would still have the avenue available to approach the ZBA for a variance.

Mr. Granese asked if the Board wanted to discuss or change any part of the draft that was before it? Mr. Mackey confirmed the distance would be 1000 between auto sales and repair, and filling stations. Mr. Anderson noted that on page 3 of the draft, the single family residential use should be removed from the list of permitted uses and the section renumbered. On page 5, the minimum acreage size should also be removed. Mr. Milz added that under the list of permitted uses, items a, b, c, and k, should be amended to limit the distance to 1000 feet. Mr. Granese explained the Board was working on a seven page draft. Were there any other comments or concerns from the Board? There were none at this time.

Mr. Granese said continuing in its tradition of transparency, the Board would allow the public to speak during the workshop but ask that any comments not reiterate what has been said at previous workshops and that the speakers will be limited this evening to 3 minutes each. This is not a public hearing but a workshop, so the Board reserves the right not to answer questions.

Attorney Morgan Hollis of Gottesman & Hollis advised he was representing the owners of two properties: 45 and 49 South Main Street. He will limit his comments to the seven page handout, and not discuss the mixed use overlay. His letter, forwarded to the Board earlier today, discussed the removal of single family residential as a permitted use in the zone and the mixed use overlay. Mr. Granese acknowledged the Board would not be addressing the mixed use overlay concept this evening. Attorney Hollis said he understands the comments with regard to the Derry Master Plan but at the time the residents completed the profile, single family residential was allowed as a permitted use in the General Commercial zone. This makes it difficult to say that the residents did not intend for the use to continue. Commercial and residential uses have co-existed in this zone. His client advises there are roughly ten residences in this area [zoned General Commercial]. The use was allowed then. Once the use is removed as a permitted use, the impact to the property owners is that it becomes a non-conforming use. Any changes the landowners make to the existing buildings require that they make a trip to the ZBA

and they will need to prove hardship along with the other four conditions. This change imposes on current uses that co-exist with the general commercial uses. He asked the Board to think about what is right and what is wrong. Because of the concern for new residential development, the Board will have a severe impact on at least 10 homes in the area. He asked the Board to consider this. He also noted that in the General Commercial zone, the minimum lot size for single family residential was suggested at one acre where currently they are allowed on less than an acre. The Board should consider putting the lot size back if it adds the use back in because the lot size should be the same. His client strongly feels the Board is subtracting uses and creating a loss of value for his lots. They are asking the Board to consider these points.

Mr. O'Connor commented Attorney Hollis mentioned there would be about 10 existing single family lots in this area affected by the proposed change; does he represent the other owners? Attorney Hollis said this was information gained from his client. As a matter of law, he felt that the other property owners would be in the same situation. If the use is lawful today and not lawful tomorrow, any change on the lot requires a trip to the ZBA. He does not represent the other property owners and can't comment on their feelings.

Rick Metts, 8 Dustin Avenue and 94 Rockingham Road, spoke of the distance buffer map which is not real clear. The map shows the oval buffers but does not indicate where those buffers start. Do they start at the property line, or in the middle of the lot, or from the corner of the lot? Mr. Anderson asked if the Board should mirror the language already contained in General Commercial II? Mr. Mackey said the active distance would be the linear distance from the corner of one property to the next.

Sheldon Wolff, 242 Rockingham Road, presented additional signatures on his petition. He thanked the Board for notifying the property owners of the workshop and Mr. Park for keeping an open mind. He is confused by the workshop process. The Board has at least 50 different signatures on two different petitions that ask the Board not to change the zoning. How can the Board arbitrarily do this? He is not sure how this works because the proposed changes would limit and remove rights from the property owners. He would like Mr. Milz to recuse himself from any decisions regarding buffer zones, automobile sales and repair or petroleum uses because of his statement that he did not want to see an "Auto Mile". He feels that statement indicates Mr. Milz has a predetermined decision. There is no evidence that an automobile or petroleum industry has been detrimental to Derry. The map is not correct. If auto uses are to be buffered then all uses in Derry should be buffered such as restaurants, florists, banks, and real estate offices. The town is over-restauranted. There should be no discrimination. The Tri Town News reports that Pinkerton is increasing budget by 3%. The Board's choice for a buffer distance did not include a choice of zero feet and it should have. Businesses do not put kids into the school system. The Board is limiting businesses and saying "no" to business. Two meetings ago, the Board said its job was to say yes to businesses. As a business person, that is a powerful statement to hear from a Board. But right now, the Board is saying, "We don't want you." The Board wants to do what it feels is best for Derry. But the Board can't make arbitrary decisions on gas stations and repair places and not map out the restaurants as well. The Board needs to be fair to all the businesses and give each equal value. If the Board makes a decision, it should be an informed, intelligent decision. He asked the Board to look at all the businesses and then make a decision.

Mr. Granese explained the Board did not consider a zero distance as that was not discussed as an option during the workshops. One of the property owners had asked the Board to consider a distance restriction and so it did. Mr. Wolff believed the Board considered a distance of 2000 feet because someone said don't put those uses on top of each other. The auto dealers in this district are well established with good repeat business. They support the community. The Board should not be afraid of the ones that come and go. By limiting a distance, they are taking value away and he did not feel it was right to do that for one use and not all uses.

Mr. Milz said if he was a property owner affiliated with any of these industries, he would recuse himself. All of the Board members are entitled to their personal opinions. He said he did not like the look of an Auto Mile and did not suggest this area would become that. The buffer would be in place to protect the current business owners and the public had requested it.

Mr. Wolff said at the last meeting people said please don't do this and don't change it. Other residents have told him that they agree and do not want the Board to change this. They want more business in town. They don't use the services and they support the community. These land owners are good corporate citizens.

Dale Smith, representing 169 Rockingham Road, stated his mother owns three properties along Route 28 that would be affected by this change. Good points have been brought up with respect to the residential uses by Attorney Hollis. His feeling about the process to restrict General Commercial is there might be unintended consequences from these proposed changes. Mr. O'Connor has said owners can apply to the ZBA if they want to add a home to their property. It may be that they want to do that with their land. Mr. Smith wanted to point out that if their 48 acre parcel was sold to a large business with a large complex, there would likely be an outcry. His parcel is bounded by conservation land on two sides, the Robert Frost Farm on another and Route 28. Too much regulation can create more problems. His point is that he would like the Zoning Ordinance to stay the way it is and let the market place dictate development. Regarding the type of businesses that are there now – the expense of leasing or purchasing land will drive those businesses out and good business will move in. He thinks it best to leave it as it is.

Phil Abirached, 158 Rockingham Road, advised he owns Metro Plaza. There is a filling station and a used car sales business on this lot. To answer the question, why are there 1000 restaurants in town? It is because the Board did not hold these workshops. He is in favor of the buffer. It will bring business to the area and provide taxes to the town to develop the infrastructure. If the land is left alone it will continue to be crowded with used car lots and the town won't get the business that will improve the area and bring revenue to that strip. The buffer will spread the use through the area and attract better business. He is in favor of the buffer and he does not mind having a distance between the uses. With respect to the petition that was circulated, he did not sign it. When it was presented to him he was told that the changes proposed by the Board were to change the zoning rather than the town was in favor of organizing the zoning.

Dr. Tim Butterfield, 2 Humphrey Road, agreed with Mr. Park and the comment he made that there should be no buffer. He feels the market will work its way and weed out those uses that the town does not want. He feels commercial uses will demand the sites. He thanked Mr. and Mrs.



Siragusa for retaining Attorney Hollis. There have been times when he was confused by the material and how to prioritize it because the Board is talking about many things at once. This letter is stellar. Attorney Hollis puts his finger objectively on what the Board wants to do and where there might be shortcomings. He hopes the Board will look at this letter. There is room here to get everyone's needs met. He is not sure which way the Board is going. He supports leaving the General Commercial zone as it is, and hopes the Board will take a good look at the letter. He would like everyone to have a chance to read it.

Wilbur Palmer, 91 Warner Hill Road, stated he has been following these workshops proceedings. His family has owned the family farm on Rockingham Road since the time of the King's Grant. He realizes municipal water and sewer will not make it to his property in his lifetime, but hopes his two children will see it happen. He opposes the zoning changes. He asked to repeat an analogy his father shared with him back in the 1960s. "Son, I want to tell you what a problem we have in Derry. All these fellas are moving up here and buying a postage stamp and they are trying to tell us envelopes what to do with our land." Mr. Palmer stated fifty plus years later, this continues to be true. He is backing the people who are against the zoning change.

Beth Siragusa, 45 and 49 South Main Street, appealed to the Board. They are the land owners and the people of Derry that the Board is there to serve. They have put their blood and sweat into their property all these years and now the Board is trying to restrict them. They brought up good families in this town. The town is built on its people. They are the people – their businesses, their families and the properties they live on. She asked the Board to leave the zoning the way it is and to please listen to them.

Russell Wolf, 242 Rockingham Road, recalled Mr. Anderson said water and sewer will not get to the Windham town line for years. In that case, there will not be a lot of the business the town would like to see in that area, so there is no reason to change the zoning now. There can't be restaurants because of the lack of sewer. He asked the Board to hold off on the changes and the buffer restriction until the infrastructure can be built out. Rents in this area are high and will continue to be that way until the water and sewer get there. Many of the businesses come and go because they can't afford the rent. The availability of water and sewer will affect the types of businesses that go on those lots.

Mr. Anderson said he can't say what will happen in ten to fifteen years. But he can say that the water and sewer will go north to Humphrey and south to Berry Road for now. It will extend from Rockingham Road past the Hess station to these areas so as to create a loop in the system. To go further than that, the town will need to construct a water storage tank that can pressurize the system beyond what is available today. Russell Wolff said a large revenue producing business can't go on one of these lots without water or sewer. The pharmacies did not have a buffer. Originally, the Board wanted to change the name of the zone. The general thought is that adding these restrictions will limit what can come to the area and will restrict resale of the land. Some businesses like competition.

Rick Metts, 94 Rockingham Road, agreed with Mr. Park that there should not be a buffer. If the Board looks at the 7-11 at Hillside Plaza in relation to his lot, he would not be able to have a gas station added to his property with this buffer. He has a one acre commercial lot in this area. The

buffer will limit his development of his property by about 50% of the development options. He hopes the Board will reconsider how it measures buffers based on what it has heard tonight.

There was no other public comment.

The Board discussed dates to which it could continue this workshop. The Board decided on January 16, 2013. Mr. Granese asked that the draft be updated for the next workshop. Mr. Milz asked staff to look at the buffer distance and where it would be measured from. Mr. Metts makes a good point. Some people have a lot of frontage and the intent is not to legislate the buffer so that no one can add anything. Someone might have a gas station on one end of the property and the furthest property line might be 500 feet from the pumps. He asked staff to look at where the distance would be measured such as the lot line, centerline of the lot, or the building center. Mr. Mackey noted that in the General Commercial II, the measurement is from the lot line. Mr. Milz commented that if one lot contained the Post Office to Overlook, and there was a gas station adjacent to Fireye, the Irving would not be there today. Mr. Anderson suggested looking at options on how to measure the distance and the staff can bring that to the Board at the next workshop.

Mr. Granese wished everyone a Happy Everything this holiday season.

Motion by Anderson, seconded by Bartkiewicz to adjourn. The motion passed with all in favor and the meeting stood adjourned at 8:17 p.m.

Approved by: \_\_\_\_\_  
Chairman/Vice Chairman

\_\_\_\_\_  
Secretary

Approval date: \_\_\_\_\_