

**TOWN OF LYNDEBOROUGH  
PLANNING BOARD**

**WORK SESSION MINUTES: July 1, 2010**

**LYNDEBOROUGH MEMBERS PRESENT: Chair Bob Rogers, Vice Chair Tom Chrisenton, Bill Ball, Mike Decubellis, Alternates Larry Larouche and Julie Zebuhr.**

**Guests: Town Counsel, Dwight Sowerby; Board of Selectmen, Steve Brown and Don Sawin and Town Administrator, Jim Bingham**

**Note: The Planning Board did not meet in the month of June due to inactivity. The June 3<sup>rd</sup> meeting with Town counsel was rescheduled until the July 1<sup>st</sup> work session.**

B. Rogers opened the meeting at 7:30 p.m. and said that he would take up any announcements after the discussion with the Board of Selectmen and Town Counsel

**INFORMATION:**

**Joint meeting with the Board of Selectmen and Town Counsel, Dwight Sowerby to discuss Work Force Housing**

Chairman Steve Brown of the Board of Selectmen gave a brief explanation for his decision to bring the subject of Work Force Housing before the Planning Board and have this discussion with town counsel, Dwight Sowerby.

He explained that the subject of workforce housing was brought up, early last year, while he was the BOS representative to the Planning Board, at which time the town's zoning regulations were reviewed to see if they met the criteria in the new legislation for Work Force Housing. The Board made a decision that the zoning regulations, already in place, addressed the State requirements. At the time of those discussions, pros and cons were brought up on whether or not the language in the zoning regulations was sufficient enough; because some "good deed doers" were going to other towns to see how this statute on Work Force Housing was being addressed; in some cases, with unintended results.

S. Brown said that he felt it was time for the BOS and the Planning Board to reaffirm their position by revisiting the topic and reviewing any new legislation.

Town Counsel, Dwight Sowerby began with some background on a case (Britton vs. the Town of Chester) which resulted in legislation adopted for Work Force housing. He said

that it originated with a developer who wanted to build multi family housing in the town of Chester, which was not allowed according to their zoning regulations. The town eventually passed a zoning ordinance that did allow multi family housing but in a restrictive area where it was not practical to build. This resulted in a lawsuit where the superior court found that the town was not fulfilling its responsibility to the general public and that their needs could supersede the needs of the municipality. A builder's remedy was instituted and the town of Chester was directed to allow the multi family development. The court also ruled that every town needed to have its fair share of low or moderate income housing; although this was not clearly defined.

Atty. Sowerby said that there have been, and still are, activists in the State who believe that this was very common among municipalities; that there was a concerted effort to keep out those of lower socio-economic class or families with children because of the impact on schools. He said that, after several attempts, the legislature finally passed a statute that dealt with work force housing but not low income housing.

B. Ball asked the difference between low income housing and work force housing? Atty. Sowerby replied that work force housing deals with a higher income level and residences in and around the \$260,000 range. It is to assist working class people not the working poor.

Atty. Sowerby continued that the statute (RSA 674:59) was passed but the language is not clear. The main problem is the lack of definition. It calls for every community to have its fair share of Work Force Housing in the region. The question is "What region?" and "What's fair share?" He explained that the "fair share" language is what attorney's call an "affirmative defense" and it only comes into play, if a town is sued. Atty. Sowerby said that the statute states that every community must provide realistic and reasonable opportunities for work force housing; taking into account the totality of all of the town's regulations/ordinances. It calls for the majority of the town but does not specifically go by acreage, zoning district, and /or square footage. M. Decubellis commented that the statute excludes unsuitable areas, such as steep slopes. Atty. Sowerby agreed that there would be some environmental or safety reasons for excluding certain areas.

Atty. Sowerby stated that Work Force Housing is an activist legislation and was written for a specific purpose; to try and tear down the walls that communities have built around them and to allow more development for the lower socio-economic group.

He gave the following scenario as an example:

***A developer goes before the Planning Board and presents a proposal to build a five (5) unit apartment in the Village District and states that it will be built under Work Force Housing criteria. Since zoning regulations do not allow this type of structure in the Village District, the Board advises the developer to petition the ZBA for a variance. The developer doesn't go to the ZBA, instead he goes to Superior Court and states that he***

*cannot build his Work Force Housing project because it is not economically viable under the town's zoning ordinances. Because of the statute, the developer gets an expedited hearing and the court approves or disapproves the project, taking it out of the hands of the Planning Board, entirely.*

Referring to the example, S. Brown asked whether it made a difference if the developer was told that it was not allowed in the Village District, but was allowed in other rural zones; would it still have to go through litigation to be solved. He added that the zoning ordinance does not restrict manufactured housing, duplexes and in law apartments in any zone. Atty. Sowerby recalled that under the town's zoning ordinance, a property must have 2 acres in the Village District and 2, 5 or 10 acres in the other rural zones. He asked whether five homes could be built on a 5 acre lot. T. Chrisenton answered that it would not be allowed in any zone. Atty. Sowerby responded that if a developer made such a proposal and called it "Work Force Housing" and it was denied, he would head to court.

Atty. Sowerby questioned how a town would be able to prove to a court that it had its fair share. Under this statute, fair share is undefined and the region is unknown; therefore there isn't anyone who can make that determination. It has been suggested that the regional planning commission should decide whether a town has its fair share. Atty. Sowerby said that this would not be binding because it's not written in the statute. The only person to determine whether a town has its fair share is the judge. For a town to prove that it had its fair share would be very expensive because an expert analysis and build-out study by engineers, statisticians and assessors would be required. This did not include legal fees; and still, the town could lose in court.

Don Sawin asked if such issues as location, types of soil and or septic would affect a proposed project. He said that the septic design must follow State regulations.

Atty. Sowerby replied that there was a provision in the statute to address this issue and he read the following from RSA 674:59; IV: **"Paragraph I shall not be construed to require municipalities to allow workforce housing that does not meet reasonable standards or conditions of approval related to environmental protection, water supply, sanitary disposal, traffic safety, and fire and life safety protection."** He said that the town's soil based zoning requirements are more restrictive than NHDES and the town would lose that requirement, in court, for that project.

T. Chrisenton said that this would be contrary to a Superior Court ruling (Freedom vs. Gillespie) that towns could have more restrictive requirements than the State. Atty. Sowerby said that since that particular court ruling, the work force housing statute has been passed and there is a builder's remedy whereby the totality of all a towns regulations can be looked at to determine its reasonable and realistic opportunities for work force housing. If soil based zoning and density requirements prohibit an economically viable project, the regulation will get "tossed."

Atty. Sowerby said that there were other technical problems with this statute, such as empowering the Planning Board to issue variances for work force housing projects, instead of deferring it to the Zoning Board of Adjustment for a decision.

At this point, Atty. Sowerby said there wasn't anything a town could do to guarantee it won't get sued and have some part of their zoning regulations overturned. The question is "what can be done to lessen the chance of losing a suit and to place more of the burden on the developer." He gave the Board the following advice:

- #1 The Board should review all of the zoning ordinances and ask if there are any realistic opportunities for work force housing; including multi unit housing.**
  
- #2 The Board should ask the following questions:**
  - Are there any buildable two acre lots?**
  - What is the cost of a five acre lot and a 10 acre lot?**
  - Can a developer construct work force housing on a five acre lot economically?**
  - Can a developer build a duplex on a five acre lot and sell it for under \$250,000?**
  
- #3 The Board should consider inclusionary zoning.....areas where work force housing can be built and have realistic regulations for development**

T. Chrisenton commented that the Board, last year, had developed a draft proposal for town meeting but after reviewing the NRPC data, it was decided that a work force housing ordinance was not needed. He asked whether the Board should review that proposal again. Atty. Sowerby replied that the Board should look at it again The NRPC data only demonstrated the current housing situation. If the demographics remained the same and the census grew, the data showed the number of housing units that a town would need. The data did not acknowledge that the town would meet any work force housing requirements or its fair share.

M. Decubellis voiced his concern that the law was unclear and towns had to depend on the best data concerning "fair share" that was available at the time. Atty. Sowerby replied that it would not hold up in court.

- #4 The Board should include in the zoning regulations (for work force housing only), the power for the Planning Board to waive a requirement or part of a requirement, if the developer could prove his case that the project was not economically viable by producing an engineering study and analysis at the developer's expense.**

B. Ball asked if there were any work force housing ordinances that addressed this issue better than most. Atty. Sowerby mentioned that the town of Amherst already had a work force housing section in their ordinance but it didn't meet the new law. He passed out a sample copy of language for a Planning Board waiver and requirements for a developer's proof.

Atty. Sowerby strongly recommended that the Planning Board take a realistic and honest look at this issue and develop an ordinance that would work; and remember that work force housing must be allowed in the majority of the town.

M. Decubellis said that the statute did not say that multi unit housing had to be allowed in the majority of the community, just work force housing. Every lot in Lyndeborough allows manufactured housing and in law apartments. He voiced concerns that allowing work force housing in areas that are too far away from emergency services and transportation would create other problems. He also brought up the argument that work force housing should be developed closer to towns that have work opportunities, not in small towns that do not have any industry. Atty. Sowerby replied that a town such as Milford should have a higher percentage of fair share of regional need because it has apartments, mobile home parks, etc. and has such services as town water & sewage, transportation and jobs. The question that is asked is "what region is the town of Milford in?" The answer is still unclear. The town of Chester, as mentioned earlier, is very similar to the town of Lyndeborough.....there are no job opportunities.

J. Zebuhr referred to a recent NRPC workshop where they discussed the issue of rural character in a town's Master Plan and its affect on a judge's decision concerning work force housing. She asked why work force housing would not have an affect on the rural character of the town. Atty. Sowerby replied that there isn't anything written in the statute that addresses this issue and it is one of the items in the totality of the town's ordinances that keep work force housing out.

T. Chrisenton summarized this discussion why stating that the Board should review the previous draft proposal, work on it and present a reasonable ordinance for a vote in March at town meeting. Atty. Sowerby said that the alternative is to do nothing and wait for a lawsuit.

S. Brown commented that this statute is now being tested. It was one of his reasons to revisit this issue and determine whether or not the town has done everything to maximize the conditions that we believe are appropriate for the growth of the town. He just wanted the Planning Board to take another look at this issue.

Atty. Sowerby responded that there are work force housing projects that the town may not object to but there are others that might affect the rural character of the town. If the town makes an honest attempt to regulate work force housing by adopting an ordinance, the town has more of a chance to win in the case of a lawsuit.

Don Sawin asked what procedure follows when a Planning Board denies a developer's work force housing application and before it going to litigation.

Atty. Sowerby said that there is an appeals process and read the following language from **RSA 674:61 Appeals:**

**I. Any person who has filed a written notice required by RSA 674:60 and whose application to develop workforce housing is denied or is approved with conditions or restrictions which have a substantial adverse effect on the viability of the proposed workforce housing development may appeal the municipal action to the superior court under RSA 677:4 or RSA 677:15 seeking permission to develop the proposed workforce housing. The petition to the court shall set forth housing requirements of RSA 674:59 or how conditions or restrictions of approval otherwise violate such requirements.**

**II. A hearing on the merits of the appeal shall be held within 6 months of the date on which the action was filed..... (Atty. Sowerby said that this would be an expedited review)..... If the court determines that it will be unable to meet this requirement, at the request of either party it shall promptly appoint a referee to hear the appeal within 6 months. Referees shall be impartial, and shall be chosen on the basis of qualifications and experience in planning and zoning law.**

**III. In the event the decision of the court or referee grants the petitioner a judgment that allows construction of the proposed development or otherwise orders that the proposed development may proceed despite its nonconformance with local regulations, conditions, or restrictions, the court or referee shall direct the parties to negotiate in good faith over assurances that the project will be maintained for the long term as workforce housing. The court or referee shall retain jurisdiction and upon motion of either party affirming that negotiations are deadlocked, the court or referee shall hold a further hearing on the appropriate term and form of use restrictions to be applied to the project.**

Atty. Sowerby said that the Planning Board must be careful when drafting the ordinance that the project stays as work force housing because it will be part of the town's fair share. M. Decubellis questioned how this type of housing could be maintained over a long period of time and who would be responsible for keeping track of leases, rents, tax returns and etc. He added that the Planning Board will need proof that this project is work force housing and must remain as such. Atty. Sowerby agreed that monitoring will be a problem. He said that the ordinance could require a home owner's association, deed restrictions, phasing but it must not become too restrictive. When drafting the ordinance, the Board must look at its total zoning and subdivision regulations as well as the growth management ordinance.

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He cautioned that, under the statute, a work force housing ordinance will not guarantee that the town will not get sued, at some time, but it will strengthen its case for keeping out the types of projects the town really doesn't want.

After listening to other concerns, Atty. Sowerby distributed other information on this subject for the Board's review and ended the discussion.

The Board thanked Atty. Sowerby and B. Rogers continued with the remainder of the meeting.

### **Public Service of NHS**

B. Rogers said that he had a letter from of PSNH requesting a public hearing to discuss tree trimming on several of the town's Scenic roads. The Board agreed to schedule a hearing for August 5<sup>th</sup> and Clerk P. Ball would send a confirmation of that date to David Crane, arborist for PSNH.

### **MINUTES:**

#### **Review of minutes for May 20, 2010**

T. Chrisenton made a **motion to accept the minutes of May 20, 2010, as written.**

B. Ball seconded the motion and the vote in favor of acceptance was unanimous.

### **ADJOURNMENT:**

T. Chrisenton made a **motion to adjourn the meeting at 9:10 p.m.** B. Ball seconded the motion and the vote in favor of adjournment was unanimous.

**The next regular meeting will be held on Thursday, July 15th at 7:30 p.m. The next work session will be held on Thursday, August 5<sup>th</sup> at 7:30 p.m.**

**Pauline Ball  
Clerk**

**Approved by the Planning Board on July 15, 2010**