

# MINUTES

## NEW DURHAM PLANNING BOARD

### APRIL 1, 2008

Chairperson Bob Craycraft called the meeting to order at 7:02 PM.

**Roll Call:** Bob Craycraft (Chair), Paddy McHale (Vice-Chair), David Bickford (Selectmen's Representative), Ron Gehl (Selectmen's Alternate), Cathy Orłowicz, Paul Raslavicus

**Others Present:** Gigi Giambanco, Mark Foynes, Sarah Foynes, Peter Rhoades, George Gale, Malcolm McNeill, Don Rhodes, Don Voltz, Cindy Balcius, Brian Crossan

**Public Input:** Chair Bob Craycraft asked if there was any public input. There was none.

**Kodiak:** Chair Bob Craycraft introduced the case and invited the applicant to speak. Malcolm McNeill told the Board the applicant was looking for final approval at this meeting. He said that as far as he knows there are no problems from the perspective of the town's third party experts and from Town Counsel. Mr. McNeill gave the board a list of proposed conditions of approval.

He said the applicants know they need a special exception from the Zoning Board of Adjustment in order to set a road across wetlands. He added they had already submitted a revised wetlands application to the New Hampshire Department of Environmental Services. McNeill noted that the Conveyance of Open Space with Conservation Restrictions had been revised in consultation with Town Counsel to add the ability for the Conservation Commission to enforce the restrictions that McNeill said is a common provision in many communities.

McNeill referred to a letter of March 28 for the project timeline, and added that the applicant believes that this timeline should define the vesting criteria as well. McNeill said the applicant had worked out an agreement with the fire chief that a cistern would be installed after the first phase is completed and before the second is started.

Bob Craycraft asked if information collected by the applicant to fulfill state requirements regarding roads and drainage would be made available to the Town. Cindy Balcius answered that the state mandates certain inspections and logs of

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inspections and that those reports will be on the site at all times and available for public inspection. Ms. Balcius said the applicant's current alteration of terrain permit expires 1/8/2010 and that they would submit a request for an extension, which is a standard non-controversial action in larger developments. She said their permit is grandfathered because it has already been granted and current revisions of the Alteration of Terrain guidelines would not affect this project.

Paul Raslavicus and Ron Gehl asked about the landscaping plan and said the most recent draft from the applicant does not meet the intent of the planning board. After discussion, the applicant agreed to lighting guidelines that limit outdoor lighting in any part of the subdivision to downward pointing fixtures that will emit no light horizontally or upward toward the night sky. The applicant also agreed there would be no cutting of trees within 10' of any lot line that is a boundary line between two lots and agreed to replace any trees they plant that die within 24 months of being planted.

The applicant asked if the limitation on cutting vegetation on a lot before a building permit has been issued means they owners cannot clean up vines and shrubs that make the lot less appealing to buyers. Ron Gehl said that was not the intent, the applicant could do cleanup. Other board members agreed.

Paul Raslavicus asked the applicant if he was agreeable to replacing any planted trees that die within 24 months. Mr. Crossan said he thought it was unreasonable. Mr. Raslavicus said if the trees were properly planted and cared for they would likely all live. Mr. Crossan agreed to the requirement; and he had no objection to a requirement not to allow introduction of any invasive species as defined in state law and NHDES regulations

Paddy McHale clarified with the applicant that he was agreeing to leave 30% of the trees uncut on the lots. Mr. Crossan agreed and said he understood that to mean 30% of the total lot area of both Phase I and Phase II. Mr. McHale and other board members agreed.

Mr. McNeill spoke regarding bonding and third party fees. He said the applicant had already agreed to the bonding, and would pay the approximately \$4500 billed from CMA engineers, but they felt the amount was much too high. He said the only work the engineers had done was correct a typographical error. He asked that the Town use a different third party engineer to oversee the completion of the actual work in the subdivision. Board members did not make any commitment on this comment.

Paul Raslavicus told the applicant that the number of requests for delay that he had made frustrated him. He said he had rearranged his own schedule with some difficulty in order to be present, and after doing that the applicant had delayed again. Brian Crossan apologized. He said they had issues to resolve with state, and his

counsel has had conflicting projects that necessitated the juggling regarding scheduling.

Chair Craycraft opened the issue for public comment at 8:10 pm.

Sarah Foynes said she lived immediately across the street from the property. They are very concerned about the entire project. They have had to put out campfires left burning by the owner's son. Their lot has a very small amount of land that is usable for outdoor play by her child. With the additional traffic the subdivision will generate, they no longer feel they can stay outside and feel safe. She asked the board please not to approve the application.

In response to a request from Ron Gehl to give more detail on her safety concerns Ms. Foynes said their house is only 8' from road, the section of Birch Hill Road is the only straightaway on the road and traffic moves very fast. She said there was an accident recently near Cathy Orlowicz' house.

Mr. Gehl said he hoped Ms. Foynes understands that the applicant has an inherent right to develop his property. He pointed out that the Planning Board has the responsibility to alleviate any negative impacts, but that does include simply denying the application. Gehl said he was not sure what else the Board could do.

Sarah Foynes said there is only one small flat area on their lot that is directly across from the subdivision entrance, and then the land on her lot goes down steeply to the old Coburn Mill Pond.

Amanda Turner asked to speak. She said she is not an abutter but had a suggestion. Can some of the big boulders unearthed in doing the Kodiak project be moved to the edge of her property near the road for protection? Ms. Foynes said they would not want that. Mr. Raslavicus asked about adding fill to the back yard to make it more level. Ms Foynes said that would be too close to the brook for safe child's play.

Mark Foynes spoke and challenged the Board. He said the Board could not go forward with approval because such action would be predicated on an illegal action the board took in September 2007 when they approved a waiver to extend the length of the cul de sac. He referred to a New Hampshire Supreme Court Case, Auger v. Town of Strafford that held that a town could only waive its own regulations in case of undue hardship. He also said the second paragraph of RSA 674:36 says that a waiver cannot be given if it undermines the intent of the Town's ordinance. He said it is his understanding that the intent of the Open Space Conservation Subdivision ordinance is to preserve open space. He referred to the minutes of the September meeting that indicate that the reason given by the Planning Board for giving the waiver was so the applicant could make productive use of highlands beyond the 1000-foot maximum cul de sac length. Mr. Foynes said that reason did not amount to hardship. He asked the Board to rescind the waiver based on its own ordinance

and regulations.

Ron Gehl replied. He said the applicant had offered alternative road designs and the Board had made its decision based on a comparison of the available options. He pointed out that the Auger v. Strafford decision had not yet been published and was unavailable to the Board at the time. Mr. Gehl and Mr. Foynes made additional comments regarding the applicability of the Auger decision to the case before the Board. David Allen reminded the Board that he had discussed the relevance of the Auger decision with John Teague, Town Counsel on a couple of occasions. Mr. Teague had consistently said that the Board also had an obligation to work with applicants in good faith, and reversing its decision on the waiver after the applicant had done several months of work under the assumption it had a waiver could easily put the Town in a bad legal position.

Chair Craycraft asked Road Agent Mark Fuller for his comments on the plan. Mr. Fuller said he had worked out all concerns with the applicant and the fixes were reflected in the plans. He had no further concerns.

George Gale spoke about the Auger case. He referred to a note posted by attorney Ben Frost on the Plan Link listserv. Mr. Frost felt the Auger decision was a clear directive to Planning Boards that they cannot grant a waiver solely on the basis that an alternative plan is in some way "better" than the plan that meets the regulations. There must be a hardship beyond the question of how many lots or how much financial benefit can be found in the subdivision.

Malcolm McNeill said the applicant's team has worked in good faith with the Board. He noted that prior to tonight there was no indication this issue was still in play. He said they have negotiated in good faith with the board on this and many other issues. He does not feel the situation is analogous. He pointed out that his team member Don Rhodes has been on the Strafford Planning Board for 20 years, and sees no comparison between the two cases. He charged that it would be "Grossly inequitable" to return to an issue we have relied upon as being resolved. We think we met criteria. We will not agree to referral of issue back to the Town's lawyer. The rights of the applicant are equal to or greater than those of the abutter.

Mr. Foynes said his attorney Mike Donovan told him that Auger is a precedent setting case, that going forward it is the law, and that the Planning Board and applicant cannot change that.

Peter Rhoades told those present that he has not sat on this issue because Mr. Gehl has continued to be the Select Board's representative on it. He said that speaking from a selectmen's perspective George Gale was an alternate member of the Planning Board when this application was being considered and yet he did not attend board meetings for the last several months. Rhoades said that Mr. Gale had his chance if he

really thought it was such an important issue.

Mr. Gale spoke about the importance of sidewalks and asked the Board if the plan includes them. Bob Craycraft clarified that the ordinance requires pedestrian and bicycle paths, and does not speak of sidewalks. The plan includes a bicycle pedestrian pathway, but no sidewalks.

David Bickford asked the applicant if they had approval from the Manchester postal service for the siting of the mailboxes. Brian Crossan said he understood they did. Mr. Bickford said he did not want to see this applicant have the same problems regarding mailboxes that another subdivision is having.

Paul Raslavicus asked the applicant if his company would be doing the building of all the houses, noting that a single builder ensures more uniformity of design and feel. Mr. Crossan said they had not made a decision one way or the other.

There was no additional public comment. Chair Craycraft closed the public hearing at 8:50 pm.

Bob Craycraft asked the applicant about the Board's request for funds to help pay for monitoring the conservation easement. Mr. Crossan said he had agreed to pay \$5,000 to the Town at the completion of Phase 1. David Allen said the money would go into a special permanent fund dedicated to conservation easement monitoring.

Mr. McNeill said the applicant had provided a letter dated April 1 with a more detailed timeline for completion of public improvements as requested by the Board. He said the applicant wanted an understanding that meeting the proposed timeline will serve as making "active and substantial progress" under the terms of RSA 674:39. Thus if the applicant completes the items promised for the first stage of Phase 2 within 4 years they will at that point be vested and protected against further changes in ordinance and regulation.

**Paddy McHale moved to approve the 23 lot Kodiak Woods Open Space Conservation Subdivision on property located on Birch Hill Road, (Tax Map 16, Lot 22 ) in New Durham, New Hampshire subject to the following conditions:**

1. Receipt by the Town of all approved state and/or federal permits necessary for the development of the subdivision.
2. Receipt by the Town of full payment of \$4502.01 currently outstanding for third party engineering services; and full payment of any additional third party expenses incurred prior to the signature date of this decision;
3. Approval of a special exception by the New Durham Zoning Board of

- Adjustment pursuant to Article IX, Section E, allowing all impacts within the Wetlands Conservation Overlay District that are necessary to complete the roads and infrastructure.
4. Receipt by the Town of a fully executed performance bond in a form approved by Town Counsel for \$697,000 to ensure completion of all infrastructure improvements and landscaping described in the accepted plan and related documents; consistent with the estimates submitted by CMA Engineers on January 7, 2008.
  5. Building permits for any house, addition to a house, or any structure attached to a house in this subdivision shall be issued only when accompanied by designs for a home sprinkler system that is in compliance with NFPA 13D and the design samples included by the applicant as part of the application;
  6. Certificates of occupancy for any house, addition to a house, or any structure attached to a house in this subdivision shall be issued only after the home sprinkler system has been approved as complete, properly installed, fully functioning, and in full compliance with NFPA 13D by the New Durham Fire Chief.
  7. A certificate of occupancy for the fifth house completed in this subdivision shall be issued only after a 30,000 gallon cistern, meeting the specifications agreed to by the applicant and the New Durham Fire Department, and submitted as a part of this application, has been installed at a location approved by the Fire Department as close as reasonably possible to the entrance of the subdivision, and approved as complete, properly installed, filled with water, and fully functioning by the New Durham Fire Chief; provided that the size and specifications for the cistern may be modified with the written approval of the New Durham Fire Chief .
  8. Receipt by the Town of 3 copies with original signatures of the Declaration of Protective Well Radius Easements, Conveyance of Open Space with Conservation Restrictions, By-Laws Of Kodiak Woods Open Space Conservation Subdivision Homeowners' Association, and Declaration of Home Owners' Association as those documents were approved by Town Counsel John Teague, Esq.
  9. Streets and public improvements shall be started and completed consistent with the timeline set out in the applicant's letter to David Allen dated March 28, 2008.
  10. Individual key controlled locking mailboxes shall be installed consistent with

the applicant's letter to David Allen dated March 28, 2008.

11. Landscaping of the subdivision shall be consistent at all times with the plan submitted by the applicant to David Allen dated April 1, 2008 with the following additional conditions:
- a. No trees have been cut within 10' of any side or rear property line
  - b. No more than 70% of the square footage of all 23 lots has been disturbed by moving or removal of soil, or removal or cutting of plants, land cover, shrubs, trees or other vegetation;
  - c. No land cover, shrubs, or trees on any lot have been cut before a building permit has been issued for that lot with the exception of minor clearing of shrubs, vines, debris, and dead trees needed to improve lot appearance for sale, or disturbance necessary for the installation of roads, drainage, or utilities;
  - d. All existing trees that are more than 35' from the center line of the road and exceed 2.5" caliper at 4.5' above ground level that are cut for installation of the road and utilities have been replaced by native New England oak, maple, and evergreen.
  - e. All trees, shrubs, ground cover, or other vegetation shall be installed according to accepted horticultural standards as defined by the American Standards of Nursery Stock. All plants shall be nursery-grown under climactic conditions similar to those in the locality of the project. Plants shall conform to the botanical names and standards of size, culture, and quality for the highest grades and standards as adopted by the American Association of Nurserymen, Inc. in the American Standard of Nursery Stock, American Standards Institute, Inc. 230 Southern Building, Washington, D.C. 20005.
  - f. Plants that are dead or dying within 24 months of planting shall be replaced by the applicant, during the current or next growing season, by a plant meeting the same specifications.
  - g. Invasive species as defined by New Hampshire law and New Hampshire Department of Environmental Services shall not be used in landscaping by the applicant or any successor to applicant.
  - h. All areas disturbed for the above purposes shall have erosion control measures staked in place between the work and Water bodies,

Wetlands, and/or drainage ways before construction, and maintained during and after disturbance until revegetation has been completed and new vegetation has reached a stage of growth adequate to prevent any erosion of soil.

- i. Any outdoor lighting installed by the applicant or any successor that exceeds 1800 lumens shall not emit any direct light above a horizontal plane from the lowest light emitting point of the fixture.
12. No building permit shall be issued for any lot in the Phase 2 section of the subdivision (beyond the second wetlands area) until the Town has received payment of \$5000 to be placed in a Town of New Durham Permanent Conservation Enforcement Trust for future use by the Town as needed to enforce the terms of the Conveyance of Open Space with Conservation Restrictions.

**Paul Raslavicus seconded the motion. It passed unanimously with no abstentions.**

Chair Craycraft called for a 5-minute recess at 9:20 PM. He reconvened the meeting at 9:27 PM.

**Turner:** David Allen summarized the materials included in the application. The Board took time to look at the materials.

Board members discussed the application. Paddy McHale asked if the driveway changes that were made a few years ago had been fully permitted by the state DOT. David Allen said he believes there is documentation in the file for that. Amanda Turner said it was permitted and she can provide the documentation.

Bob Craycraft said it might be that a more cohesive application is needed. The Board needs to see what was waived before. Cathy Orlowicz added that the Board needs in writing that there are no snowmobile or ATV trails on the property.

**Cathy Orlowicz moved to continue the acceptance and public hearing on the application submitted by Amanda Turner for a doggie day care business at 261 Route 11, Map 7, Lot 8 to the May 6 Planning Board business meeting. Paddy McHale seconded. The vote was unanimous with no abstentions.**

Chair Craycraft invited Ms Turner to have a conceptual discussion with the Board regarding a doggie day care business.

Amanda Turner says she wants to use one of two greenhouses at the Merrymeeting Garden Center for doggie day care during the winter when the Garden Center has no business. She said she has let her own dogs use the greenhouse and it has worked



well. She has also had employees and customers who have asked her to do it. She said she had looked at similar businesses around southeast New Hampshire and gotten many ideas and information. The doggie day care will not conflict with the garden center because they will be in different seasons. The green house will be surrounded by snow fence. Dogs will be on the leash until they get into the fence. If the dogs need to come early in the morning they will come to the house. She had three or four dogs lined up for the day care until she had to close down. Owners would pick up their dogs on the way home from work. She plans for the day care to be a fun play camp so that the dog goes home tired. She has researched what is needed for doing this kind of thing. She has information about getting a dog bite waiver, dog health, risks of having dogs, what to do if animal is abandoned. Her current garden center insurance company needs the information. She would probably have maximum of 4-5 other dogs and her own two big dogs.

Bob Craycraft said it would be very valuable if she gives the board a written narrative of what she just explained. Cathy Orlowicz asked that she include documentation of whether the state needs to give a revised state driveway permit. Ms. Turner said she would probably put the planning on hold right now because the garden center is about to get very busy.

David Allen asked the board what kind of information it would need regarding dog waste. Paul Raslavicus asked if there might be any concerns about waste because of the closeness of the facility to wetlands. Ms. Turner said the parking lot had been designed for the garden center so that it drains to the center of the lot and water is then filtered before being discharged. She also referred to the impact statement that was prepared for the Swett doggie day care, which said the amount of waste is so miniscule as to be no threat.

Cathy Orlowicz said Ms. Turner should be sure to review the site plan checklist. For example, will additional lighting be needed? What about bathroom facilities? In addition, be sure to provide a written request for any waivers that might be needed.

David Bickford asked if there are any state regulations about how many dogs you can do. Ms. Turner replied that there are for kennels, but not for day care. Mr. Bickford asked that she provide documentation of this fact.

Bob Craycraft said that even though this is not a public hearing if there were any abutters or concerned citizens he wanted them to have an opportunity to speak.

David Jones identified himself as a neighbor and abutter who owns a dog. He did not before the meeting the details of what she wanted to do. Many of his questions have been answered. Some other questions he would like to see answers to is the greenhouse suitable for kenneling dogs. Is it strong enough? What does periodic removal of waste mean? Is the snow fence suitable in strength and and design

material?

There was no other public comment. Chair Craycraft closed discussion on the proposal. Since the time was 10:20 PM, no new business could begin.

Paddy McHale moved to adjourn. Paul Raslavicus seconded. Unanimous with no abstentions.

Respectfully submitted,

David Allen  
Land Use Administrative Assistant

Minutes Approved May 20, 2008