

# MINUTES

## JOINT MEETING OF BOARD OF SELECTMEN AND PLANNING BOARD

### AUGUST 17, 2010

Members of both Boards met with Town Counsel at 6:20 PM.

Board of Selectmen Chair Terry Jarvis called the Board of Selectmen meeting to order at 7:03 PM at the New Durham Elementary School. Planning Board Chair Paul Raslavicus called the Planning Board meeting to order at 7:04 PM.

**Roll Call:** Terry Jarvis (Chair, BOS), David Bickford (BOS), Fred March (BOS), Paul Raslavicus (Chair, PB), Bob Craycraft (Vice-Chair, PB), Dot Veisel (PB), Scott Drummey (PB)

**Excused Absence:** Jeff Kratovil (Alternate, PB)

**Others Present:** Many citizens of New Durham and members of the public.

**Red Oak Conservation Effort:** BOS Chair Terry Jarvis opened the meeting. She noted that the purpose of the meeting was for sharing information with the public, and receiving comment and feedback. She emphasized that no decisions would be made at this meeting. She asked PB Chair Paul Raslavicus to summarize the history of the project.

Mr. Raslavicus said the issue first came before the Planning Board in November, 2007. The meeting was designated as a Design Review meeting and the Red Oak applicants showed the Board their proposal for a 216 unit subdivision accessed from the Class 6 portion of Birch Hill Road.

There was a very strong negative reaction from citizens of the town at the November 6 meeting and at subsequent meetings in January, 2008. The applicants told a Planning Board meeting that they had decided it would be in everyone's best interest to pursue a "conservation outcome" that would protect all or most of the land from development. In November, 2008 the Planning Board and Red Oak LLC signed an agreement that would hold the legal status of the plan in its current state for three years while the Town, the Applicant, and the Society for the Protection of New Hampshire Forests worked to raise the funds necessary to purchase a conservation easement from the applicants. The agreement

states it will continue for three years or until “the receipt of written notice by the Town that the developer no longer wishes to pursue a conservation alternative”.

Ms. Jarvis then invited Mike Speltz, Conservation Specialist from the Society for the Protection of New Hampshire Forests (SPNHF) to explain the work that has been done to acquire funding to purchase a conservation easement.

Mr. Speltz began by saying that the process with the applicant in regard to finding a conservation outcome has been all about money: where to get it and what kind of process would be mutually agreeable for partnering to get available funds.

The first opportunity came in the summer of 2009 when applications were being accepted for the federally funded Forestry Legacy program. Mr. Speltz noted that this is a popular program because grants can be quite large, sometimes exceeding \$1,000,000. There are more applicants than funds, so it is standard procedure for acceptable projects to apply for 2-4 years before a grant is awarded.

This and all other grant applications require the landowner to sign the application agreeing they are interested in pursuing a conservation outcome. It does not bind any party to a specific plan and it in no way limits their flexibility to change their plans. Mr. Joshua Gruss, the principal manager of Red Oak, LLC would not sign this agreement, and therefore the grant could not be submitted.

The second grant opportunity came from the New Hampshire LCHIP program. This time Mr. Gruss agreed to sign and the town was granted \$200,000. Two more grant opportunities became available in the spring of 2010 through a grant program for protecting wetlands and water quality. The town was granted \$150,000 and had a second application filed which Mr. Speltz expected to bring in at least another \$200,000 and perhaps as much as \$400,000 more.

Mr. Speltz pointed out that the purchase of land conservation easements by non-profit organizations such as the Forest Society is guided by laws and regulations that require purchases to be made at or below the current market value of a property. This protects taxpayers' money from being used to enrich a private property owner by paying them more than the land is worth.

The current appraisal of the property says it is worth \$2.7 million. The grants raised by the Forest Society together with the \$700,000 pledge by New Durham residents, and the proposed \$1,000,000 bond by the Town brings us close to the money needed to complete the purchase.

The Forest Society wrote a letter to Mr. Gruss saying that it was in a position to negotiate a purchase and sale agreement at the appraised market value of the property and asking Mr. Gruss to authorize such negotiations. Mr. Gruss replied that he would consider no proposal less than the \$4,000,000 that the property had been appraised at before the economy crashed.

Mr. Speltz stated that the grants the Forest Society has raised come with time limitations. The money must be spent within a certain time period. These time limits are not overly restrictive because the grantors recognize that putting together a complex conservation purchase with many participants can take several months to work out. On the other hand, the money does come from taxpayers who want to see it put to use for worthwhile projects, not sitting unused.

The Forest Society reads this response as a clear indication that no agreement for a conservation outcome can be negotiated in the next few months before the time limitations for the grants expire. It is critical for both The Forest Society and the Town of New Durham to maintain credibility with the granting agencies so that when future opportunities arise the grantors will give them positive consideration. Therefore the Forest Society officers believe that if they do not get a positive response from Red Oak within the next couple of weeks, they need to return the grant money to the grantors. From a financial perspective, this effectively brings the town back to the point it started at in late 2008.

John Teague, Town Counsel with Upton and Hatfield, then spoke about the legal issues involved. He noted that this project had unusual features from the very beginning. He said that both sides—the Planning Board and Red Oak—had agreed to stop the clock as it is laid out in New Hampshire Planning and Zoning Law, in order to try to find a conservation agreement. He added that there is explicit reference in the agreement to both parties entering the process in good faith and the willingness to work in good faith was implicit in the entire negotiating process of the contract.

Mr. Teague said that he viewed the current situation as the end of a chapter in the conservation effort, not the end of the process. He believes that the potential for an eventual agreement still exists but it will take a while. It appears that the owner, Red Oak LLC, is not acting in good faith as they agreed to. They are fully aware that any transaction cannot exceed the market value of the property.

He said the Planning Board is aware that the Forest Society is about to send a letter to the Town formally notifying the Town that it is returning the grant funding. As soon as the Planning Board formally receives that letter, it will meet to consider its options under the contract, and will act to protect the Town's opportunities to protect this piece of land.

Mr. Teague said there is a doctrine in the law that a party is not obligated to chase after impossible objectives. The fact that Red Oak is insisting on an impossible price for the property and has made it clear that it is not open to negotiation makes it impossible to come to an agreement. Just as the Forest Society action puts the Town back where it was in late 2008 in a financial sense, the Red Oak actions put the Town back where it was in a legal sense at that same time.

Terry Jarvis, BOS Chair, pointed out that since the Red Oak contract is with the Planning Board, they will have the biggest part to play in the next stages of this drama. The Board of

Selectmen will be involved from time to time when it is appropriate, for example, they applied for the L-CHIP grant and will need to act in regard to that.

Ms. Jarvis opened the floor for public comment.

Mr. Russell Weldon, 318 Merrymeeting Road, asked if returning the grant funds at this point would make us lose any future opportunity to access those grant monies. Mike Speltz replied that we would still be able to reapply in the future.

He said this is the second time that Red Oak has backed out of its responsibilities under the agreement, and he would like to see the Town set a date for a positive response from Red Oak, and if that does not happen, it should aggressively go after Red Oak from a legal perspective. He said he felt the Town had been mostly in a reactive rather than a proactive mode.

Cathy Orlowicz, 303 Birch Hill Road, said she thought the Forest Society should inform the grant making agencies of the current status and ask for additional time to work things out. They could, for example, suggest the grantors make a conditional list of grantees who would receive funds if the town was ultimately required to return them.

Pat Decker, 303 South Shore Road, said he is very sure that more funds can be raised in town if we get to the point of having a tentative agreement that lets us know how much more is needed. He agreed with Mr. Weldon that the town should be proactive in "putting the gauntlet out" to Red Oak.

There was no further public comment.

David Bickford (BOS) said he agreed with the comments from the floor and felt that Town officials were talking about the kinds of actions that had been suggested. He noted that timing is critical and there are only certain times when the Town can act, and that should not be read by citizens as being passive.

Terry Jarvis adjourned the Board of Selectmen's meeting at 7:41.

Paul Raslavicus recessed the Planning Board meeting until 8:00 pm at Town Hall.

Paul Raslavicus reconvened the Planning Board meeting at 8:03 PM at Town Hall. The same board members were in attendance. Cathy Orlowicz and Mary McHale were others present.

**Vello Conditional Use:** Paul Raslavicus noted that the Planning Board had conditionally approved the Vello application for a Stormwater Conditional Use Permit and a Steep Slopes Conditional Use permit at their August 3 meeting. David Allen reported that the applicant had met all the conditions required of them at the 8/3 meeting. He distributed copies of the revised plan that incorporates the Board's requests. He noted that the condition that the approved plan be filed with the Strafford County Registry is a task that the Town takes care of to ensure that it actually happens.

**David Bickford moved to give final approval for a Stormwater Conditional Use Permit and a Steep Slopes Conditional Use permit to William and Donna Vello, 54 South Shore Road (Map 120, Lot 025) as shown on the plan submitted by the applicants and before the Board on August 17, 2010. Scott Drummey seconded. Approved unanimously with no abstentions.**

**Excavation Regulations:** Board members signed and certified the revised Excavation Regulations. Mr. Allen will deliver the signed copies to the Town Clerk.

**Minutes of July 11:** Board members made the following corrections:

Paragraph 4: Strike the entire second sentence.

**Scott Drummey moved to approve the minutes of the July 11 Vello site walk as amended. Paul Raslavicus seconded. Dot Veisel and Bob Craycraft abstained as they were not present. Approved unanimously with no abstentions.**

**Minutes of July 20: Bob Craycraft moved to approve the minutes of July 20 as written. Scott Drummey seconded. Approved unanimously with no abstentions.**

**Minutes of August 3:** Board members made the following corrections:

Page 1, 3<sup>rd</sup> paragraph, should read "62' from Mr. Northridge's leach field."

Page 2, 3<sup>rd</sup> paragraph, motion regarding Vello Conditional Use permits: add the following phrase at the end of the motion: "and the permanent BMP document is recorded at the Strafford County Registry". The motion was seconded by Dot Veisel, not Bob Craycraft.

Page 2, 7<sup>th</sup> paragraph: Motion regarding waivers was moved by Scott Drummey, not Bob Craycraft.

Page 3, 5<sup>th</sup> paragraph: Laurion motion was seconded by Dot Veisel, not Bob Craycraft.

Page 3, 6<sup>th</sup> paragraph, re Van Hertel: Insert the following sentence as the 4<sup>th</sup> paragraph of this section: "Paul Raslavicus suggested to the applicant that this be designated as a Design Review session. The applicant agreed. The Board agreed by consensus.

Page 4, 1<sup>st</sup> sentence: strike "continue the" and replace it with "end the Design Review and schedule an".

Page 4, end of 1<sup>st</sup> sentence, add the phrase: "and to notify the applicant of the end of the Design Review period within 10 days of that date."

Page 4, 2<sup>nd</sup> paragraph: Correct Maynard Map & Lot to "244-028".

Page 4, paragraph re: Non-Public Session: Motion was seconded by Scott Drummey.

**Scott Drummey moved to accept the minutes of August 3 as amended. Bob Craycraft seconded. Approved unanimously with no abstentions.**

**Scott Drummey moved to revised the ending date of the Design Review to August 17, 2010. Dot Veisel seconded. Approved unanimously with no abstentions.**

**Minutes of 8/14 Van Hertel Site Walk:** Board members made the following corrections:

Add the map and lot of the site: (243-008). Add first names for all participants.

**Scott Drummey moved to accept the minutes of August 14, 2010 as amended. Paul Raslavicus seconded. Bob Craycraft abstained as he was not present. Approved 4-0.**

**Van Hertel:** Paul Raslavicus asked if the applicant's representative, Chris Berry, was preparing a full application with applications for Conditional Use permits. David Allen said he had heard Mr. Berry say he intended to do that. Bob Craycraft said he wanted the lots laid out with approvable driveways, building envelopes, and septic locations. He said if a future owner wanted to change those plans he could return to the Planning Board for approval.

**Subdivision Regulations:** Paul Raslavicus distributed copies of the Subdivision Regulations with his proposed amendments. He said he had taken some of the material for the proposed coordinated regulations.

Board members questioned if the Board has the power to require a conceptual consultation, and if they have the authority to designate the start of the design review process. David Allen will check with the Local Government Center attorneys. Cathy Orlowicz cautioned the board that the statutes establish much of the timeline requirements.

**Impact Fees for Infrastructure:** The Board agreed by consensus that it wanted to explore moving forward on these plans and asked Mr. Allen to invite Bruce Mayberry to the next available meeting, probably September 21.

**Non-public session: Bob Craycraft moved that the Planning Board go into non-public session at 9:40 PM under the terms of RSA 91-A:3 II d for discussion of a potential land acquisition. Roll Call Vote: Craycraft, yes; Bickford, yes; Veisel, yes; Drummey, yes; Raslavicus, yes.**

The Board returned from non-public session at 9:55 PM. **Bob Craycraft moved to adjourn. Scott Drummey seconded. Approved unanimously with no abstentions**

Respectfully submitted,

David Allen  
Land Use Administrative Assistant

Minutes Approved by Planning Board on 10/5/2010

Town of New Durham