

# Draft Minutes

## New Durham Planning Board

### September 6, 2011

*(Please note: These are draft minutes prepared by staff from notes taken at the meeting. They have not been reviewed by the Board for accuracy, and should not be relied upon for accuracy. Reviewed, corrected, and approved minutes will be available at Town Hall and on the Town's website following the next scheduled Board meeting.)*

Chairperson Bob Craycraft called the meeting to order at 7:01 PM.

**Roll Call:** Bob Craycraft (Chair), Dot Veisel, David Bickford (Selectman's Representative), Scott Drummey (Vice-Chair), Paul Raslavicus, Craig Groom (Alternate)

**Others Present:** Amy Manzelli, Charles Healey, Doris Healey, David Nelson, Mike Clarke, Arthur Capello, Alison Rendaro, abutters and members of the public.

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

**Olson Subdivision:** Chair Craycraft asked Mr. Christian Smith, representing the applicant, to present any updates to their plan.

Mr. Smith reported that, as requested by the Planning Board at its last meeting, he had held further discussions with the Fire Department regarding their Fire Safety Regulations. Chief Peter Varney had confirmed to him that the regulations require the installation of a cistern in any subdivision of five lots or more, including the parent lot in the count.

On the basis of this information Mr. & Mrs. Olson had decided to limit their subdivision to four new lots, thereby avoiding the cost of a cistern which would be about \$70,000. This change means the elimination of one lot line, reduction of the number of driveway culverts from 4 to 3, and the elimination of any wetlands impact. The lot being eliminated from the plan is the one with the driveway with the greatest length of steep slopes which means that the most challenging steep slope engineering has been eliminated from the plan.

Mr. Smith added that he had sent the revised plans to Mark West, the Town's natural resource third party consultant. Mr. West confirmed that the design and engineering of the storm water BMP's was proper. Mr. Smith asked that the Board waive the engineering review for the balance of the driveway work because it is very minimal.

The Planning Board agreed by consensus to waive further engineering review. Scott Drummey asked if the applicants would accept a condition of no further subdivision and Mr. Smith said yes.

Scott Drummey moved to approve a steep slopes conditional use permit for the construction of houses and driveways on steep slopes on Tax Map 261-037 as it exists on September 6, 2011, and as shown on the plan submitted by Mr. Christian Smith to the Planning Board on that date. Paul Raslavicus seconded. Approved unanimously.

Paul Raslavicus moved to approve the application of Dennis and Bobbi Olson, for a 5-lot subdivision of their land at 257 Valley Road, Tax Map 261-037, with the following conditions:

Conditions Precedent:

1. Payment of all outstanding fees and charges;
2. Submission to the Planning Board of revised recording plans of the 5-lot subdivision as presented to the Board on September 6, 2011, and including all stormwater management items requested by the Road Agent;
3. Inclusion of the following wording on the plan: "Further subdivision of any of the 5 lots conditionally approved by the New Durham Planning Board on 9/6/2011 will require the installation of all fire safety requirements of any relevant fire safety codes. Requirements based on the number of lots in the subdivision will count all lots created from Tax Map 261-037 after September 6, 2011, including the remainder of the parent lot."
4. Inclusion of the following wording on the plan: "Driveways, houses, and septic systems will be located as shown on the plans presented to the New Durham Planning Board on September 6, 2011 with the application for a conditional use permit. The owner of any lot may apply for a revised conditional use permit."
5. Conditions 1-4 shall be met by December 6, 2011. If they are not, the Planning Board may consider the subdivision abandoned and revoke approval.

Conditions Subsequent:

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1. All Road Agent requirements for any lot shall be completed and approved by the Road agent before any building permit is issued;
2. All storm water management BMPs and driveway engineering shall be completed and approved by the Town Engineer or Town Natural Resource Consultant before any building permit is issued;
3. Driveways, houses, and septic systems will be located as shown on the plans presented to the New Durham Planning Board on September 6, 2011 with the application for a conditional use permit. The owner of any lot may apply for a revised conditional use permit.

Dot Veisel seconded. Approved unanimously.

**Hertel Home Occupation:** Fred Hertel presented his request for a Home Occupation permit to allow Northern Exposure Real Estate to relocate from its current location at 16 Depot Road, to his residence at 37 Main Street. The company's public office for meeting with customers will be located on the first floor which is handicapped accessible. Mr. Hertel's personal office will be located on the second floor. No customers will utilize this area. There is a half bath on the first floor for use by customers. The building is a duplex owned by Mr. Hertel. All space calculations for meeting Town requirements have counted only that part of the Duplex occupied by Mr. Hertel. The occupant of the other section of the duplex has been notified of these plans and has no objection.

**The Board agreed by consensus that it had no objections to the plan, subject to on-site review by the Building Inspector.** Mr. Raslavicus asked the Building Inspector to confirm the number of parking spaces.

**Appeal of a Driveway Permit by Mr. & Mrs. Charles and Doris Healey:** Chair Bob Craycraft described the appeal. He asked if any of the parties involved, any members of the public, or any Board members had concerns that any sitting Board member might have a conflict of interest in this case. No concerns were expressed.

Paul Raslavicus said he was aware that the Board of Selectmen had discussed the hiring of Town Counsel to assist on this case, and asked Selectmen's Representative David Bickford any of those discussions had involved the substantive issues in this case. Mr. Bickford assured the Board they had not. Bob Craycraft serves as an alternate on the Conservation Commission. He noted that Mr. David Allen, staff, had informed the Conservation Commission that this issue might come to the town as an appeal, and

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affirmed that there had been no discussion of substantive issues at the Conservation Commission.

Chair Craycraft pointed out that this was the first time the Planning Board had handled an appeal on the Driveway Regulations and asked all parties involved to bear with them if they ran into any problems along the way. He outlined the procedure the Board would follow, allowing time for each party to present its perspective and arguments on the appeal, and time for each party to respond or ask questions and then summarize their case. He asked for a couple of volunteers from the Board to serve as timekeepers: Scott Drummey and Paul Raslavicus volunteered.

Amy Manzelli, Esq. and attorney with Callen & Baldwin, PLLC represented the Healeys who filed the appeal. She began by emphasizing that the Healeys as direct abutters and as a property owner of lakeshore property that would be affected by increased storm water runoff were clearly a party with standing to file an appeal.

She described the layout of the Nelsons' property, emphasizing the paved driveway and parking area located between the house and the road, the garage facing toward the paved section, and the graveled section of the yard running between the Nelsons' house and the joint property line from the road toward the lake. She entered several photographs into the record for the purpose of helping the Planning Board visualize the site and understand the lot layout.

Ms. Manzelli also said it was important for the Planning Board to understand that the disagreement between the Healeys and the Nelsons about what constituted a safe, appropriate, and legal build out of the Nelson lot did not begin with this driveway proposal. The Healeys had gone to court in 1993 to stop the Nelsons from paving this same gravel driveway with PPPP pavers and both the Strafford County Superior Court and the New Hampshire Supreme Court had upheld their position and ordered the PPP pavers removed because they created more impermeable surface on the lot than the 20% allowed by the newly adopted Town Shore Front Protection Ordinance.

Ms. Manzelli said she would explain five specific objections to the Nelsons' as ground for the Planning Board to reverse the decision of the Code Enforcement Officer and the Road Agent to grant the driveway permit. She would argue first that there is no lawful driveway to "modify/resurface" as the Nelsons had stipulated in their driveway application; and second that there were four technical deficiencies in the Nelson proposal that made out of compliance with the driveway regulations.

Ms. Manzelli explained three reasons why there was no legal driveway. First, the courts had ordered the removal of the PPPP pavers as stated above. Secondly, there had never

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been a permit requested or granted for the gravel area between the house and the property line to be a driveway. And third, the court had specifically prohibited any future installation of Turfstone pavers or “similar material”.

Then she explained the technical deficiencies:

1. The Driveway regulations require a driveway be set back at least 5’ from the property line;
2. The driveway regulations require a driveway to have a minimum width of 14’. The Nelsons’ permit requests is for a 13’ driveway;
3. The regulations require a paved “apron” that connects to the road and extends 6’ from the road onto the owner’s property; and
4. The regulations require that the slope of the driveway not exceed 15%, and the applicant provided no evidence that this was the case; and
5. The regulations prohibit two driveways on a lot, and the paved area between the house and the road is an already existing driveway. The Nelsons’ plan will create a second driveway not allowed by the regulations.

Ms. Manzelli said the Nelsons may argue that their driveway is grandfathered but the Court decisions in the 1990’s said the driveway was not vested because no permit had been issued for the Turfstone pavers, and they were not installed until after the Town had adopted its Shore Front Protection Ordinance in 1990 which limited impermeable surface to 20%.

In regard to the technical violations, she argued that the Driveway Regulations allow the Town to waive its requirements only within the Town right of way, and then only if the Town official explains the reason for the waiver in writing at the time of issuing the permit. This was not done.

Ms. Manzelli introduced John Seevee, an Environmental Engineer. Mr. Sevee referred the Board to the letter he wrote in xxx which challenges the permeability of the Belgard Subterra pavers. He also said that immediately before the evening meeting he had used an inclinometer to measure the slope of the gravel space and found it to be 20%. The inclinometer has a range of error of +/- 2% so the actual slope could be 18%, still greater than the 15% allowed in the driveway regulations.

Chair Craycraft asked David Nelson to speak on behalf of his father, Gullmar Nelson.

Mr. Nelson said the gravel area between his house and the property line is a legal driveway. He said the gravel was placed on the area in 1989 and it has been used for parking, delivering groceries and other goods to the house, and bringing boats to the waterfront, among other activities. He noted that when the Healeys filed suit against him in 1993 they did not challenge the existence of the gravel driveway, only of the Turfstone Pavers. At no time since then have the Healeys ever complained that the gravel driveway is not legal.

Mr. Nelson said none of the court orders of the 1990's stated that the driveway was illegal, nor did they order it to be removed. The removal order referred only to the pavers.

He challenged Ms. Manzelli's interpretation of the court order related to grandfathering. Mr. Nelson argued that the only thing the court said was not grandfathered was the paving, and the court specifically noted that if it had been paved prior to the implementation of the Town's Shore Front Protection ordinance the paving would have been grandfathered. The court ordered the removal of the pavement, not of the driveway.

Mr. Nelson also said that the court action of the 1990s has no relevance to the current situation. All actions ordered by the court or the New Durham ZBA were completed by the Nelsons. The Town Building Inspector did a site visit and said all terms of the court order had been met. Copies of this information were sent to Mr. Healey's attorney and neither Mr. Healey nor his attorney ever challenged the Building Inspectors report that all terms had been met.

Mr. Nelson noted that at the time the Turfstone pavers were installed, and at the time of all court action, gravel was considered by the New Hampshire Department of Environmental Services and most experts to be a permeable surface. However, the scientific perspective began to change in the 2000s and in 2008 the New Hampshire Wetlands Bureau ruled that henceforth gravel would be considered an impermeable surface and included in measurements of impermeable surface used for conformance to the Comprehensive Shoreland Protection Act. For this reason when the Nelsons applied in 2010 for a permit to install the permeable Belgard Subterra pavers, the DES issued a permit because they would reduce the amount of impermeable surface on the lot.

Chair Craycraft called on members of the Town staff who had been involved with the issuance of the permit to speak.

David Allen reported that Mr. Sean O'Toole, contractor for the Nelsons, had approached him to see if any permits would be needed from the Planning Board. Mr. Allen said he

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consulted the steep slope map of the town that had been created by Strafford County Planning Council as a guide to implementation of the Town's Steep Slope Ordinance. The map showed the entire area of the Nelson lot was less than 15% slope. He told Mr. O'Toole that no Planning Board permits were necessary but he would need a driveway permit and should talk to the Building Inspector and Road Agent for that purpose.

Mr. Arthur Capello told the Planning Board that when Mr. Nelson submitted the driveway permit application to him he did a site visit. He also read all decisions from the court cases of the 1990s. Based on his reading of the decisions he determined that the cases from that time had no bearing on the current application except they prohibited the use of Turfstone pavers.

Mr. Capello said he did a great deal of research on the Belgard Subterra product, including extensive information and product specifications from the manufacturer. On the basis of this research and information he concluded that the Nelson application met the terms of the Driveway regulations on the part of the lot outside the right of way which is his area of responsibility. He passed the application on to Mike Clarke, Road Agent, who is responsible for that section of the driveway within the Town's right of way.

Mike Clarke said he had worked for the town highway department for over 20 years. The gravel driveway had been there all that time so he considered it an existing driveway and the request to "modify/resurface" the driveway to be entirely appropriate. With Mr. Capello's review and recommendation and based on his own expertise he issued the permit.

Mr. Craycraft invited members of the Planning Board to comment or ask questions.

Paul Raslavicus said *(need to review tape of meeting)*

Mr. Nelson insisted the Board needed to understand that the only issue regarding the driveway that was raised in court was the pavement.

Ms. Manzelli noted that the ZBA had given a variance to the Nelsons so they could build a house and a garage. The right to construct a house and a garage did not create a right for other improvements.

Mr. Nelson noted again that the gravel driveway already existed and its existence was never challenged.

David Bickford noted that Ms. Manzelli had challenged the fact the driveway after paving with the Belgard Subterra pavers would be less than 5' from the property line.

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He asked Mr. Nelson if the planned location of the paved driveway is the same as the location of the existing gravel driveway. Mr. Nelson said yes, there would be no change in location.

Scott Drummey noted that the 1994 Court order on page 7 refers to a letter from Mr. Nelson to the ZBA. He asked if anyone had a copy of that letter. No one offered.

Chair Craycraft said that the company materials describing the Belgard Subterra pavers said their use needed to be designed by a professional engineer. He asked Mr. Nelson if that had been done.

Mr. Nelson said that statement in the company materials was there simply to protect the maker from liability. The company will only guarantee the product if it is designed by engineer, but it still works fine.

Mr. Craycraft said he had considerable knowledge about permeable materials and he knew that if the installation is not done correctly and if the material is not properly maintained it will lose its permeability.

John Sevee said he started using permeable pavers a couple of decades ago and then found that after 6 months to 2 years they began to clog with silt. He seldom uses them now.

Dot Veisel asked if the maker of the Belgard Subterra makes any recommendations about maintenance. *(Need to check meeting tape for response)*

Arthur Capello stated that he looked carefully at the information about the Belgard Subterra product to determine if it was, in the court's words, "a similar product." He added that when the gravel driveway was installed twenty years ago it was considered a permeable surface. It is now considered an impermeable surface and so the Belgard product would decrease the amount of impermeable surface on the lot.

Ms. Amy Manzelli made closing comments. She reiterated that the Healeys have standing to appeal. She said that the question of the legality of the driveway is only one of six issues raised by the Healeys and they are not all linked together. Even if it is determined to be a legal driveway it must meet all the technical requirements of the driveway regulations which it does not. She briefly restated her earlier description of the technical requirements that the proposed driveway does not meet.

The Planning Board needs to remember what the court said. They told the Healeys they needed to remove the asphalt and never install anything like Turfstone. Gravel is like Turfstone and the Belgard Subterra is like Turfstone.

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The fact that the gravel driveway may have been installed in 1989 does not make it legal. While the Nelson lot layout plan does show the driveway and is dated 1988, there is in fact no certification of the date it was received by the Town and discussion at the ZBA raised questions about when the plan was actually prepared.

Ms. Manzelli said that in the absence of any expert opinion showing that the slope is less than 15%, which the Nelsons did not provide, the Board cannot ignore the fact that it is too steep. Additionally, any court would say that the existing paved area is a driveway and a second driveway is prohibited by the regulations.

In regard to the permeability of Belgard Subterra she said that the intent of the court order was that nothing should be placed on the driveway that increases impermeability to any extent. There should be no impermeability and the Nelsons' plan would amount to a huge increase in impermeable surface.

In closing she asked that the Planning Board reverse the award of the driveway permit. The gravel area is not grandfathered as a driveway. The proposal does not meet the specifications of the Driveway regulation in terms of all the technical issues she has spelled out before.

Mr. David Nelson made his closing comments. He said there is no question of the right of the driveway to be there. The Healeys never challenged the existence of the gravel driveway and the court never denied the right to have a gravel driveway. The denial of grandfathered status by the court related only to the Turfstone pavers and not to the driveway itself. Furthermore, the Healeys have given no demonstration of how they would be harmed by the proposed Belgard Subterra pavers. Without a showing that the driveway permit would harm them, they have no standing to challenge the permit.

Staff made brief closing comments. Mr. Allen reiterated the fact that the Town's steep slope map shows the slopes on the lot to be less than 15%. Mr. Capello emphasized that the gravel driveway was pre-existing and therefore could appropriately be "modified" or "resurfaced". He referenced the extensive research he had done on the product which convinced him that it was a different product than Turfstone and met the Town's criteria for permeability.

Mike Clarke thanked all those who had participated in the meeting and the discussion. He reminded the Board that the gravel driveway had been there for many years and never been questioned. He read a couple of sentences from a letter written by Town Counsel Bart Mayer which suggested that the Healeys' appeal might not have a strong enough basis to be sustained.

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Chair Craycraft asked Mr. Clarke not to read any more from privileged attorney-client communications. Amy Manzelli said that since the information had been shared, the letter was no longer privileged and asked that she be given a copy of it.

Chair Craycraft asked if there were any more questions or comments from the Board. Scott Drummey said that clearly an important issue was how much the court spoke to paving and how much to the driveway. He added that was unclear to him at this point.

Paul Raslavicus said that if the driveway is grandfathered it is legal. And if it is legal, the technical points raised by Ms. Manzelli are irrelevant because they are part of the pre-existing driveway and not new. He added that whether the driveway is legal or not legal there is a question of whether the Nelsons' are planning a new use for it.

Dot Veisel says it looks from her site visit and the photographs that the Nelsons could drive down the gravel area and unload groceries into the kitchen.

Chair Craycraft asked Board members if they were ready to make a decision or if they wanted to look again at the site and discuss the legal issues involved with Town Counsel. The Board agreed on the latter approach by consensus. Mr. Craycraft asked Mr. Nelson for permission to hold the site walk on the Nelson property. He gave permission. The Board agreed on Friday, September 16 at 6 pm or sometime on Sunday, September 18 as times to check with Bart Mayer, Town Counsel, for his availability. Ms. Manzelli asked for notification of the time of the site walk.

Scott Drummey moved to continue the public hearing on an appeal by Mr. Charles & Mrs. Doris Healey of the decision by the Town of New Durham's Road Agent and Code Enforcement Officer to grant a driveway permit to Mr. Gullmar Nelson, 34 South Shore Road (Map 120—014) to 7 pm October 4 at the Public Library. Paul Raslavicus seconded. Approved unanimously.

David Allen told the Board he would send them background information related to the 2012 budget, performance review, and hiring procedures for Land Use staff, and asked Board members to review the materials and come to the September 20 meeting ready to discuss them.

Scott Drummey moved to adjourn at 10:18 pm. David Bickford seconded. Approved unanimously.

Respectfully submitted,

David Allen  
Land Use Administrative Assistant

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