

The Planning Board for the Town of Derry held a public meeting on Wednesday, December 18, 2019, at 7:00 p.m., at the Derry Municipal Center (Third Floor Meeting Room) located at 14 Manning Street in Derry, New Hampshire.

Members present: John O'Connor, Chairman; Lori Davison, Vice Chair; Randy Chase, Town Administrative Representative; Mark Grabowski (Secretary Pro-Temp), Mark Connors, Members

Absent: Maya Levin, Dave Granese, Brian Chirichiello, David McPherson, Frank Bartkiewicz, Jim MacEachern

Also present: George Sioras, Planning Director; Elizabeth Robidoux, Planning & Economic Development Assistant, Robert Mackey, Code Enforcement Director

Mr. O'Connor called the meeting to order at 7:01 p.m. The meeting began with a salute to the flag. Mr. O'Connor then noted the location of emergency exits and introduced the Board members and staff present.

Mr. Grabowski was appointed Secretary Pro Temp.

Escrow

#19-38

Project: Lot Line Adjustment – Lake Avenue

Developer: Manuel Gendron

Escrow Account: Same

Escrow Type: Cash escrow

Parcel ID/Location: 52007 and 52008, 2A and 2B Lake Avenue

The request is to approve Release #1 in the amount of \$17,515.44 for the above noted project. The amount to retain is zero. This is the final release.

Motion by Connors seconded by Davison as presented. The motion passed with all in favor.
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#19-39

Project: Medical Office Building
Developer: 11 Tsienneto Road, LLC
Escrow Account: Same
Escrow Type: Cash
Parcel ID/Location: 08073, 15 Tsienneto Road

The request is to establish cash escrow in the amount of \$22,777.20 for the above noted project. This escrow is non-interest bearing.

Motion by Connors, seconded by Grabowski to approve as presented. The motion passed with all in favor.

#19-40

Project: Medical Office Building
Developer: 11 Tsienneto Road, LLC
Escrow Account: Same
Escrow Type: Letter of Credit
Parcel ID/Location: 08073, 15 Tsienneto Road

The request is to approve a final release of Letter of Credit #43374-1, drawn on Enterprise Bank in the amount of \$22,777.20. The amount to retain is zero.

Mr. Connors asked why the Board was establishing and releasing the same amount. Mr. Sioras explained the applicant is replacing the Letter of Credit with cash. The town accepts the cash first and then releases the Letter of Credit.

Motion by Connors, seconded by Grabowski to approve as presented. The motion passed with all in favor.

#19-41

Project: 66 Fordway
Developer: John Lanzafame
Escrow Account: Same
Escrow Type: Cash
Parcel ID/Location: 24003, 66 Fordway

The request is to establish cash escrow in the amount of \$10,199.52 for the above noted project. This escrow is non-interest bearing.

Motion by Grabowski, seconded by Davison to approve as presented. The motion passed with all in favor.

#19-42**Project: AEC Office/Garage****Developer: American Excavating****Escrow Account: Seven Hills Development****Escrow Type: Letter of Credit****Parcel ID/Location: 31013, 5 Madden Road and 31011, 15 Madden Road**

The request is to approve a renewal of Letter of Credit #22413 for the above noted project in the amount of \$22,137.51, drawn on Enterprise Bank. The new expiration date will be December 23, 2021.

Motion by Connors, seconded by Grabowski to approve as presented. The motion passed with all in favor.

Minutes

The Board reviewed the minutes of the December 04, 2019, meeting.

Motion by Connors, seconded by Grabowski to approve the minutes of the December 04, 2019, meeting as written. The motion passed with all in favor.

Correspondence

Mr. O'Connor advised the Board has been copied on a letter sent to the owners of the project at 29 Ashleigh Drive, reminding them the Letter of Credit will expire in January.

Other Business

None

Public Hearing

Public hearing to discuss proposed amendments to the Town of Derry Zoning Ordinance, Article II, Word Usage and Definitions, Section 165-5, Definitions, to add definitions relating to sports wagering as well as amendments to Article IV, District Provisions, Sections 165-32, General Commercial, Section 165-32.3, General Commercial IV, and Section 165-42, Industrial IV District to amend the permitted uses.

Mr. Sioras advised the Board has been discussing this amendment for a few months. The State passed a bill that permits Sports Wagering in the state. The Town Council and Town Administrator asked staff to look at the various zones to see where this would fit. The plan is to put sports wagering on the town ballot in March so that the voters can decide if it should be in town or not. Planning and Economic Development staff looked at the various zones and came up with recommendations which were augmented by Council input. The Planning Board came up with three zones where this should be a permitted use. Those include General Commercial (Crystal Ave, Route 111), General Commercial IV (Ryan's Hill and south), and Industrial IV (Police Department and north). The Board utilized the existing State of New Hampshire definitions and did not change those. Legal Counsel has reviewed the proposed changes. Town Council would like to hold their own public hearings on this matter in January so that they can get it on the ballot.

Mr. O'Connor explained the State approved sports wagering in two phases. The first phase has to do with wagering over the internet. The second phase allows 10 brick and mortar locations in the State of New Hampshire. Those locations are chosen by the Lottery Commission. This is the reason the Board is adding the definitions and permitted uses in the above noted areas – so that Derry has potential to be one of the ten chosen locations.

Motion by Connors, seconded by Grabowski to open the public hearing. The motion passed with all in favor and the floor was open to the public.

There was no public comment.

Motion by Connors, seconded by Davison to close the public hearing. The motion passed with all in favor and review of the proposed amendments returned to the Board.

Motion by Connors, seconded by Grabowski to recommend amendments to the Town of Derry Zoning Ordinance, Article II, Word Usage and Definitions, Section 165-5, Definitions, to add definitions relating to sports wagering as well as amendments to Article IV, District Provisions, Sections 165-32, General Commercial, Section 165-32.3, General Commercial IV, and Section 165-42, Industrial IV District to amend the permitted uses, and to forward said amendments to the Town Council for review and recommended approval.

Chase, Grabowski, Davison, Connors and O'Connor voted in favor and the motion passed.

Mr. O'Connor said this will move forward to Town Council for their process and will be placed on the warrant in March for the voters to decide if they want this use in town or not.

Public hearing to discuss proposed amendments to the Land Development Control Regulations, Article XIV, Architectural Design Regulations, Section 170-84.A.1, Various

Sections of the Town to add a new district; Section 170-85.C; and to add a new Section 170-86.1, Design Elements Specific to the West Running Brook District.

Mr. Sioras advised the Board has been discussing the proposed changes for several months. The West Running Brook District is in place now. The area encompasses land just before the Robert Frost Farm north past the old Grandview flea market lot, to Humphrey Road, and then west toward Shute's Corner on Rockingham Road. The intent is to have a more stringent level of architectural regulations to raise the quality of development in this area. The last page of the proposed amendment discusses the design elements. As the Land Development Control Regulations are Planning Board regulations, this proposed amendment does not need Town Council approval. Staff recommends approval of the amendment.

Ms. Davison noted the design elements are specified in the regulation. The developer would still need to bring a rendering before the Board and the Board would verify the design elements are included in the rendering. Mr. Sioras agreed, adding the developers are aware through items in the Zoning Ordinance that they need to come before the Planning Board and staff for a conceptual discussion; at which point the Board can remind the developer of the design requirements.

Motion by Grabowski, seconded by Connors to open the public hearing. The motion passed with all in favor and the floor was open to the public.

There was no public comment.

Motion by MacEachern, seconded by Grabowski to close the public hearing. The motion passed with all in favor and review of the proposed amendment returned to the Board.

Mr. Connors asked if the proposed changes had been reviewed by legal counsel. Mr. Sioras said they had.

Motion by Grabowski, seconded by Davison to approve proposed amendments to the Land Development Control Regulations, Article XIV, Section 170-84.A.1, Various Sections of the Town; to add a new district, Section 170-85.C; and to add a new section 170-86.1, Design Elements Specific to the West Running Brook District and to make the changes effective immediately.

Chase, Grabowski, Davison, Connors and O'Connor voted in favor and the motion passed.

Workshop #1 – Proposed amendments to the Town of Derry Zoning Ordinance relative to Public Nuisance

Bob Mackey, Code Enforcement Director, presented. In the Zoning Ordinance, there is language specific to livestock (Article XX). Over the course of the spring and summer, Code Enforcement has received several complaints. Because of the existing language in the Ordinance, which states a nuisance can't be created, Code Enforcement is placed in the position of trying to determine

what is a private nuisance. The proposed change removes the definition of Nuisance and replaces it with a definition for Public Nuisance. Some of the nuisance complaints are for a public nuisance. Some of the complaints have gone to the Town Council. The Town Council and Town Administrator charged staff with broadening the definition from “nuisance” to “public nuisance” which keeps the town out of subjective situations between neighbors. This change would clarify that a nuisance that affects the whole neighborhood is a public nuisance, not just one neighbor, which is a private nuisance. This proposed change also adds Public Nuisance to the Livestock Ordinance.

Ms. Davison asked what types of complaints might be considered a public nuisance. Mr. Mackey said it could be any situation that affects more than two properties. Fireworks might be a public nuisance. If someone has horses or cows and accumulates manure, that could be a public nuisance if the smell disturbs the neighborhood. Target shooting might meet the definition of public nuisance if there are multiple complaints, but there are other rules that come into play with that.

Mr. Connors asked if there is now a need to add a definition for “private nuisance”. Mr. O’Connor said there is recent case law that provides definitions for private and public nuisance. He would request an additional workshop so that Board members can review the case law and perhaps incorporate Private Nuisance into this amendment. A public nuisance is when all the neighbors agree and lodge a complaint. In 2009 when the Board was creating the Livestock Ordinance, he recalled the Board discussing issues with roosters during the public hearings. Mr. Mackey recalled the Board at that time discussed adding language specific to roosters. Complaints can be subjective. When Code Enforcement has subjective complaints, they are not always defensible in court. The Town legal counsel feels the town should not be involved in private nuisances.

Mr. O’Connor said he was aware there are some towns that add time elements to the Ordinance; for example, no noise between 10 PM and 7 AM. Mr. Connors asked how a rooster complaint would be different from a barking dog complaint where if the dog barks for less than an hour, it is not a nuisance. Why not say there can be no animal noise? Why is this not an issue for Animal Control [to enforce]? Mr. Mackey explained there are specific RSAs that deal with dogs; there is nothing in State law that deals with nuisance complaints of this type. Each town decides how it wants to handle it. Mr. O’Connor added if “animal noise” is not defined in state law, the Board can’t say there should be no animal noise. He recalls spending almost a year creating the livestock ordinance. A nuisance can also be a smell; it is not limited to noise.

Mr. Mackey asked the Board to keep in mind that staff is being counseled to not be involved in neighbor to neighbor complaints. Piled manure might rise to a public nuisance or health complaint if a group of people are disrupted – that is when Code could become involved. Mr. Connors asked if changing the ordinance as proposed would limit a resident’s right to sue a neighbor who is disrupting their quality of life. Mr. Mackey said there is a private nuisance provision in the state law. Staff did meet with the town attorney and the attorney did review the proposed changes.

Mr. Connors confirmed a private citizen has the right to file a civil complaint with the proper authorities. He did not feel the burden should be placed on one neighbor who wants to live peacefully on their lot; there should be a means of redress for them.

Mr. O'Connor commented that when people purchase chicks at the feed store, there is no way to determine the sex of the chick until it matures. Ms. Davison asked if there is a limit on the number of chickens someone can have on their lot. Mr. Mackey said currently, there is not. One acre is required for larger livestock, but there is no limit to the number of livestock on the one acre. There is no restriction on fowl.

Mr. Grabowski wanted to clarify the enforcement procedures for complaints. Mr. Mackey replied if the proposed amendments move forward, and Code Enforcement receives a public nuisance complaint from multiple people in one neighborhood for the same situation, Code Enforcement would go out to investigate. The current process is to contact the owner and try to resolve the issue informally through discussion. They would follow up with a letter that would outline a time frame for the owner to comply. If there is no compliance within the allotted time, they send a second letter. After that, the issue is referred to the town attorney and the issue could then go to court. This procedure is not only for rooster complaints; it applies to any complaint, including a business that is operating improperly. Once an issue goes to court, the Town awaits a judgment. It is up to the judge as to what the Town is awarded.

Mr. Grabowski asked if the enforcement activity would change if this amendment goes forward. How much enforcement activity is ongoing? How many court cases does the Town have? Mr. Mackey advised half of his job is Code Enforcement and is spent dealing with these types of issues. 90-95% of the complaints are resolved by discussing the issue with the owner. The complaints vary; occasionally the Health Department assists with the complaint. 5% of the complaints go to court. There are six to eight court cases ongoing at any given time. The Ordinance does have a penalty clause.

Mr. O'Connor said he would like to continue the workshop to give the Board members time to review the recent court decision that defines public and private nuisance. Mr. Sioras said that could be scheduled for the first meeting in January, which will be January 15, 2020. Once the Board finalizes the language in workshop, the changes will be brought forward under Administrative Business to schedule a public hearing.

Ms. Davison asked when residents call Code Enforcement with complaints, do they also call the Police Department with the same complaint. Mr. Mackey said sometimes the residents call both departments. They also call the Town Councilors. That is part of the reason staff was mandated by the Council and Town Administrator to look at amending the Ordinance. Down the road, it may be that the Livestock Ordinance is revisited and revised. Mr. Connors asked if from a zoning perspective, the town could restrict fowl to a specific zone. Mr. Mackey said different towns have different rules; the Town cannot prohibit fowl.

The second workshop will be scheduled for January 2020.

Mr. O'Connor took a moment to thank Jonny Bottino from the Cable Department for his work and for making the Board look its best. He wished those watching a Happy Holiday, and a safe and happy New Year.

There was no further business before the Board.

Motion by Connors, seconded by Davison to adjourn. The motion passed with all in favor and the meeting stood adjourned at 7:47 p.m.

Approved by: _____
Chairman/Vice Chairman

Secretary

Approval date: _____