

The Planning Board for the Town of Derry held a workshop on Wednesday, August 24, 2022, at 7:00 p.m. The meeting was broadcast from the Derry Municipal Center, 14 Manning Street, Third Floor meeting room. There was not a quorum.

Members present: Jim MacEachern Chair Pro-Temp; David Nelson, Secretary; Chris Feinauer, Richard Malaby, Alternates

Absent: John O'Connor, Randy Chase, Brian Chirichiello, Dave Granese, Joseph Tremper, Mark Connors, John Morrison, Andy Myers

*Denotes virtual attendance.

Also present: George Sioras, Planning Director; Elizabeth Robidoux, Planning & Economic Development Assistant; Lynn Perkins, Chairman, Derry Zoning Board of Adjustment

Mr. MacEachern opened the meeting at 7:00 p.m. The meeting began with a salute to the flag. He provided appropriate links for members of the public to join the meeting electronically via a MAC, PC or by phone. He then introduced the Board members.

Mr. MacEachern claimed the Chair's prerogative and elected to move forward with the discussion this evening, without a quorum, as the intent was for discussion only and no decisions were to be made this evening. Lynn Perkins, Chairman, Town of Derry Zoning Board of Adjustment, was asked to join the Board members for the discussion.

Mr. MacEachern advised the purpose of the discussion this evening is to review recent legislative changes relating to Planning Board training, publication fees, incentives, written findings, timelines, deadlines, and requirements for religious uses as set forth in HB 1661 and HB 1021. Mr. Nelson had attended the workshop offered by NH Municipal Association and the Department of Business and Economic Affairs that outlined the changes and the actions municipal Board's should be taking to ensure compliance with the statutory changes.

Mr. Nelson advised there were two bills signed into law. The changes take effect on various dates: primarily July 01, 2022, August 23, 2022, and January 01, 2023. There are many changes to how the Planning Board operates and the Board's regulations should be in compliance. In the member packets, Mrs. Robidoux has provided a copy of the "Changes to Planning & Zoning Laws in 2022: A Guide for Municipalities" compiled by NHMA and BEA, as well as a summary of the changes, by section, prepared by the NHMA. Mrs. Robidoux prepared a similar spreadsheet outlining the section, statute, effective date, statute change, and the Planning Board compliance status for each change. Mr. Nelson reviewed the changes in the statutes, beginning with HB 16610.

Section 70 deals with training. The Board's Policy & Procedures already requires Board members to attend at least one training session per year. No changes are required to comply with this statutory change. What changed in the law is that a Certificate can be provided at the end of some training sessions. In particular, the Board member can study the Planning Board

Handbook or Zoning Board Handbook, take a test, and receive a certificate upon passing the test. This is not mandatory. Mr. Perkins noted the ZBA members also are required to attend training and they are encouraged to attend several.

Section 71 deals with the publication of land use fees in a public place. Mrs. Robidoux has posted the Planning Board fees to the town website as required and the fees are also noted on the application and in the regulations. Mr. Sioras confirmed the ZBA will need to post their fees as well.

Section 72 states incentives for elderly housing must also be applied to workforce housing. This change gives municipalities that offer increased density, reduced lot size, expedited approval, or other dimensional or procedural incentives to housing for older persons a one-year period (Until July 01, 2023) to make any adjustments to those incentives before they automatically apply to workforce housing developments. Mr. Nelson stated he spoke with Mrs. Robidoux who had a concern that some of the language in the Independent Adult Community Overlay District might not be in compliance with the Fair Housing Act. This section will require review by the Board. If the Board does nothing with the Independent Adult Community Overlay District, the provisions will be applied to any workforce housing development, which would be housing that is defined as workforce. Mr. MacEachern stated the Board will need to schedule a separate workshop to discuss this one topic.

Mr. Nelson explained Section 73 discusses written findings of fact. The Board did review the findings of fact proactively for the Keystone development, but the Board needs to determine if it will use that same format for all applications moving forward. The intent of the statutory changes is to ensure a clear record on appeal of an approval or denial of an application. The Certified Record does not include a video recording of the hearings. This change is intended to supplement the official record of the proceedings. The written findings of fact tell why the application was approved or denied and for the specific reasons. It is not enough to state the Board finds the applications meets all the regulations and if not, has been granted a waiver. That is not detailed enough. During the workshop, it was suggested municipalities involve legal counsel in the drafting of the motion to include findings of fact.

Mr. Sioras commented Mr. Mackey, the Code Enforcement Officer, had asked questions with regard to findings of fact for the ZBA, because the ZBA crafts motions on the fly the night of the hearing. The ZBA does not generally have suggested motions drafted ahead of time. Mr. Nelson noted both Boards are quasi-judicial and can make findings of facts. The ZBA must also make findings of facts as part of its written decision process.

Mr. MacEachern felt the findings of fact should be extended to the granting of waivers. Currently, the Board uses generic wording such as “meets the spirit and intent of the regulations”. Given this change, he feels the Board needs to say why they are voting to grant a waiver outside of meeting the spirit and intent. What is unique about this particular request that allows it to be granted? Mr. Nelson added when the applicant provides a written waiver request, the applicant states why they feel they should be granted the waiver. That wording can be the basis for the findings of fact. If a Board member disagrees with the logic, the Board member can vote no on the waiver request and state the reason why. Mr. Sioras commented it is important

for Board members to state the reasons why they vote no on a particular motion. There are times when the votes are very close.

Mr. Nelson said there are arguments on both sides to use a short form for the findings of fact and to use a longer format. There should always be a good record because an approval can be appealed. Mr. MacEachern ~~thought the Board might be able to utilize both formats.~~said he would favor a single, uniform format. The number of findings would vary per application.

Mr. Nelson explained Section 74 which concerns ZBA timelines to act on an application. The ZBA has 90 days to begin consideration and approve or disapprove of an application, unless the applicant agrees to an extension. If the ZBA determines it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the ZBA may deny the application without prejudice, allowing the applicant to reapply for the same relief. This change is effective August 23, 2022. The important change here is that the consent to extend must be mutual and the applicant has to agree to it.

Section 75 is very similar, but applies to Planning Board timelines, which is 65 days. The Planning Board can no longer apply to the Town Council for an extension. The applicant must agree to an extension. Similar to the ZBA, the Planning Board can deny the application without prejudice and explain what was lacking for information. Mr. MacEachern noted the 65-day time frame does not include the additional 30 days that is allowed if an application is deemed to be of regional impact. If the application is not decided upon within 65 days, the Town Council is required to approve the application as presented. If Town Council does not do that, Superior Court has 30 days to approve the application in its stead. If that happens, the court can order the town to pay the applicant costs, and attorney's fees if the court found the governing body's failure to act was unjustified. Mr. Nelson noted the Planning Board has a strict time clock. The deadline is 65 days or 95 days if there is regional impact. The 90-day provision which used to allow a Planning Board the ability to request an extension from Town Council to deliberate on an application has been eliminated.

Section 77 deals with court cases and the shifting of fees and bonds. The Board does not need to do anything with this, but it should be aware of attorney fees and cost. The applicant may be required to establish a bond to cover those costs upon appeal of an application. If the town is required to supply the bond, that could affect budgets.

Section 78 deals with acquiring property for workforce housing. This expands the definition of "public use" under the Tax Increment Finance (TIF) statute, RSA 162-K, to allow any party including a municipality to acquire real property – except by eminent domain – for the purpose of constructing housing units which ~~meet~~meet the statutory definition of workforce housing. Said construction must occur either through private development or private commercial enterprise. This change is effective on August 23, 2022.

Mr. Nelson explained HB 1021 concerns property used for religious purposes. There is a lot of text in the change, but not a lot of clarity. Many of the terms uses are not clearly defined. If the use of the property is primarily religious, then the Planning Board is only allowed to regulate height, yard size, lot area, setbacks, and building coverage requirements, providing those

requirements apply equally to non-religious uses in the zone and the restrictions do not substantially burden the religious exercise. The Board can't impose regulations concerning lighting, signs, noise, on and off-site drainage, erosion and sediment control, layout of streets and sidewalks, utility design and installation, open space, pervious and impervious area, landscaping, and parking/access management requirements. However, the religious use would need to comply with state and federal codes relating to state building and fire codes, local driveway regulations, septic and sewer regulations, shoreland protection requirements and wetland setbacks. He noted most churches are used a few days a week for services, and then there are the ancillary uses. It is hard to determine "primary use". For example, if a pastor offers religious classes at home, then extends to services on the weekend for a small congregation, at what point does the primary use of the property change from residential to religious? There is no case law on this issue.

Mr. Sioras noted churches are allowed in every district but the Industrial IV district. With regard to parking requirements, there is a fine line between the religious use and then the additional uses such as rental of the space for other uses (bingo, dances). He recalled a lot of discussion during the approval process for the St. Thomas Aquinas Center. Mr. Nelson commented on the difficulty of defining "primary" and "accessory" uses for religious purposes. With the change in the statute, the Board will not be able to exclude churches as a permitted use in the Industrial IV zone, as the statute overrides any municipal regulations.

Mr. Perkins noted the ZBA will have a few challenges with regard to the findings of fact. Their decisions on cases are often made the same evening as the hearing. Having a decision and the minutes due within days of the hearing could be challenging in crafting the findings of fact. This can also cause issues with the Housing Appeals Board as the three votes need to be on the same factor. Mr. Nelson stated the Planning Board voted on the complete list of findings of fact (for Keystone). There were a few "no" votes, but the members explained which finding they did not agree with and why. The vote should be based on a majority vote of the Board. It would be too cumbersome to have each member vote on each finding of fact. Mr. Sioras added for the last application, the Planning Board had 22 findings of fact. The question was raised during the hearing if they should be voted upon individually. Mr. Nelson thought it would be interesting to inquire of legal counsel. When the Courts write an opinion, based on a multi-justice panel, the opinion is the consensus of the panel. He does not feel it would be a good precedent to vote on each finding individually.

Mr. MacEachern thought the best way to move forward is to work with staff on necessary changes. Staff and the Chair can create the findings of fact for each application, which can be read into the record. If a Board member does not agree with one of the findings, the Board member can make a friendly amendment to add something to the finding, or to amend it. While there may be some differing opinions, there should be a consensus on the findings of fact. If a member feels strongly against a particular statement, the Board member can vote no and state the reasons why.

Mr. Sioras commented this change is going to add to the staff workload, but it is a necessary change. Mr. MacEachern felt the majority of the applications before the Board will have fewer findings of the fact. Not all projects will require an extensive list.

Mr. Nelson noted there are additional materials attached in the Board packet this evening. Mrs. Robidoux provided a copy of the Planning Board fee schedule. She has requested the Board remove the Certified Return Receipt requirement and just send the public notices certified mail. Additionally, the 5% administrative recording fee should be removed. The applicable sections of the Land Development Control Regulations are found at LDCR Section 170-17.A.4 and 170-56. He agreed there would be extensive discussion with regard to any potential changes to the Adult Independent Community Overlay District, which is found on page 213 at Article XIX, and begins at Section 165-145 in the Zoning Ordinance. Currently, occupancy by any person 18 years or younger is prohibited for more than 90 days in any calendar year. This is likely unlawful under Federal Fair Housing. The Board should also define what does an adult development mean? If there is no age limit and the purpose is to only grant specific concessions, and if in fact the developments are allowed to have families, then this may be an aspirational ~~principal-principle~~ which would be difficult to enforce. If the Board can't enforce what made this district unique and it does not increase value to the town, then why have the district? If this is not an adult community anymore and this is just a loophole for cluster development and increased density, that is not what the town likely wants.

Mr. MacEachern stated the Board will need to look at changes that occurred on the local and federal level. Some of the changes could be minor or major, depending on the statute. If the definition of adult community has changed then the Board should look at eliminating the overlay district. Mr. Nelson noted the Board has almost one year to make changes to this particular section. Mr. MacEachern felt it would be important for the Board to develop a calendar to prioritize the changes that need to be made so that the changes can be spread out appropriately. Mr. Sioras suggested interested Board members could come in and work with staff during the day on proposed changes. Mr. MacEachern agreed this might be a good way to work on the changes. Proposed changes can be drafted and reviewed by legal counsel.

Mr. MacEachern noted the Growth Management Ordinance is still referenced in other sections of the Zoning Ordinance. The GMO had a positive impact on the town. He would like to look at that again to see if it made sense to bring that back. The GMO created a point system for new development, and it provided a good road map for capital improvement planning. There is a lot going on in Derry right now. A new fire station is being planned and there is the potential to close a school and build a new one. Mr. Sioras stated staff would create a schedule and prioritize the changes that need to be made. Much of the work can be done over the winter months. The Board has a good template it can use for findings of fact.

Mr. MacEachern requested for the next public hearing, the motion for any waiver requests include reasons why the Board would approve it. The standard wording can be at the end of the motion.

There was no discussion.

The discussion adjourned at 7:51 p.m.

Approved by: _____
Chairman/Vice Chairman

Secretary

Approval date: _____