RECV'D: Office of the Town Clerk Sept. 28, 2016 3:45pm

Planning and Zoning Commission Meeting
7:30 p.m., Wednesday, September 21, 2016
Lower Level Meeting Room, Durham Library

Minutes

1. **Call to order**
   Frank DeFelice called the meeting to order at 7:30 p.m.

2. **Roll Call**
   In attendance: Frank DeFelice, Richard Eriksen, Chris Flanagan, Joe Pasquale, and Will Spooner
   Absent: Alana Adams, Campbell Barrett, Lisa Davenport, Dave Foley, Edward Fronc, Dan Melnik, and Jan Melnik
   Others in attendance: Geoff Colegrove, Donald Smith Jr. P.E., Attorney John Corona, Pat Benjamin Project Engineer, Bascom and Benjamin

3. **Seating of Alternates:**
   Will Spooner was seated for Alana Adams

4. **Amendments to Agenda** – None

5. **Approval of Agenda**
   MOTION BY CHRIS FLANAGAN, SECONDED BY JOE PASQUALE TO APPROVE THE AGENDA AS PRESENTED. ALL AYE

6. **Public Session**
   James Fowler, 283 Maiden Lane was present to discuss issues reportedly caused by Camp Farnam. He stated that Camp Farnam was a former YMCA Camp designed to serve inner city kids since 1950. Their operating hours are July 4th to the second week of August, Monday-Friday, 8:30 a.m.-5:00 p.m. He noted that over the years Camp Farnam has been a good neighbor and he has been very supportive of the camp, but when they widened the road into the facility a few years ago the usage has increased. In addition to the camp, they are renting the property for private parties on the weekends, July-September. This has brought with it many issues; traffic, noise, safety issues, trespassing onto private property, and rude and obscene behavior by patrons. J. Fowler then asked if he could present a video that was recently taken during one of these events. J. Pasquale asked if he called the police in reference to the event on the video. J. Fowler responded that he was out of town and his daughter was home, clearly upset, she took the video. He did contact the police the following day.

   Frank DeFelice advised Mr. Fowler that the video was forwarded to members of the commission for review prior to this meeting. It was noted for the record that all commission members present had reviewed the video.

   Geoff Colegrove stated he discussed this with the Vice President of Camp Farnam and is aware of the concerns. He also stated that to the best of his recollection, Camp Farnam has only come before the commission in reference to the Fall Down event application. He suggested inviting Camp Farnam staff to attend a commission meeting to discuss what type of events are currently being held at the facility before issuing a cease and desist.

Chris Flanagan asked Mr. Fowler how much activity there was outside of the day camp. Mr. Fowler stated July-August, every weekend Saturday and Sundays. Typically, fifty to one hundred cars.

Dick Eriksen stated that he understood Camp Farnam to be a charitable organization, the original use a camp for inner city children and over the years has had very little issues to his knowledge. He expressed his concern regarding the liability of serving alcohol or by people bringing alcohol into the facility. He felt the commission has an obligation to review their permit from 1950 to see what is allowed. He questioned what the process would be to establish what needs to be done within a thirty-day timeline, noting he would like to see them come before the commission with an application.

G. Colegrove stated he found very little in the files at town hall and also looked at old photos. He stated that the property is in a farm residential zone and noted this use is a permitted use in the zone with a special permit.

MOTION BY DICK ERIKSEN, SECONDED BY JOE PASQUALE TO ISSUE LETTER TO CAMP FARNAM TO REQUIRE THEM TO COME IN TO THE COMMISSION TO EXPLAIN ACTIVITIES BEING HELD ON THE PROPERTY WITH A RESPONSE WITHIN 30 DAYS. ALL AYE

7. **8-24 Review, Emergency Management Complex, 37, 41, 51 Main Street**

G. Colegrove stated this item was back on the agenda in regards to a question of the individual properties being properly noticed and identified. He noted that this was on a prior agenda and approved but this was an attempt to resolve any questions.

F. DeFelice stated that he just received and had forwarded to the commission members a legal opinion from Attorney Byrne, dated September 20, 2016 in response a document submitted by G. Eames submitted during the commissions September 7, 2016 public hearing on the Special Permit Application for a Public Safety Complex located at 37, 41, and 51 Main Street. (Copy of the legal opinion following minutes.) F. DeFelice stated the applicant will withdraw its application and re-file it, with signage properly posted. A public hearing will be noticed and held, however according to Attorney Byrne the commission may accept the record (minutes, recordings and evidence) generated at the first hearings and make them part of the record for the re-filed application.

D. Eriksen asked what the status of the application was. G. Colegrove responded that the application has been with-drawn and have re-applied. Signage will be posted on all three properties.

G. Colegrove explained that an 8-24 review requires the proposed activities be consistent with the Plan of Conservation and Development. F. DeFelice made reference to Section 7.4.6.; Communities Facilities; Public Safety Complex as determined at the prior meeting. G. Colegrove also noted that Inland Wetlands received the last two exhibits received by the commission, for review and revision, and approved.

MOTION BY DICK ERIKSEN, SECONDED BY CHRIS FLANAGAN TO APPROVE 8-24 REVIEW, EMERGENCY MANAGEMENT COMPLEX, 37, 41, 51 MAIN STREET. DEFELICE, ERIKSEN, FLANAGAN, SPOONER; AYE. PASQUALE; OPPOSED. MOTION CARRIED.

8. **Town of Durham, Emergency Management Complex, Special Permit, 37, 41, 51 Main Street**

Donald Smith Jr, Engineer was present to represent the application. He stated that the applicant has formally withdrawn the prior application and has re-applied with a new application. Maps have been

revised to show the relocation of the generator and propane tanks, and placement of a living fence along the south property line. The Plan also shows the location of three (3) public hearing signs, one (1) on each parcel.

MOTION BY JOE PASQUALE, SECONDED BY CHRIS FLANAGAN TO HOLD A PUBLIC HEARING RE: TOWN OF DURHAM, EMERGENCY MANAGEMENT COMPLEX, SPECIAL PERMIT, 37, 41, 51 MAIN STREET ON OCTOBER 19, 2016. ALL AYE

9. **William Lawson, 2 Lot Subdivision, 134R Creamery Road**

Attorney John Corona of Lang and Corona representing William Larson and Pat Benjamin, Project Engineer from Bascom and Benjamin were present. Attorney Corona noted that Mr. Larson owns a piece of property on 134R Creamery Road, a parcel of about 67 acres that lies equally between Route's 79 and 77. Mr. Larson currently lives there with a barn (farm) and garage and a large cell tower. He was present tonight to request a one (1) lot subdivision of the 67 acres.

Pat Benjamin presented a map of survey, the total parcel area in a farm residential zone represents 67 acres. Mr. Lawson would like to cut off an interior lot that represents a 6.43-acre lot. He pointed out the gravel driveway entrance into the property, boundary of the property noting the first split done in the 70's, subdivision along the road, the driveway enters the existing home, pasture, and wooded area. A twenty-five (25) foot strip would run to the 6.43 interior lot, 200 feet wide. Also on the lot is an existing cell tower built in the early 90's; the cell tower company does not own the land it is leased from Mr. Lawson. They soil tested for a four-bedroom house, septic system was approved by town sanitarian Bill Milardo, and indicated where the well would be located. The power comes in through a utility easement that runs to the existing buildings up the existing driveway to the cell towers. He reiterated that it is a subdivision.

C. Flanagan questioned why Mr. Lawson would want to subdivide a parcel near a cell tower and sell the rest of the property. Attorney Corona stated that there was no immediate plan to build a home. It is likely that when the subdivision is approved that the rest of the property will be marketed. He noted the zone allows for residential development and this is just a first step in reference to subdivision. C. Flanagan asked if the owner can subdivide the property without the intension of putting a home on it. Attorney Corona responded that he does not have to put a home on it. C. Flanagan asked how long the cell tower lease was. Attorney Corona stated he understood that it is left up to the cell tower company to determine the term of the lease.

F. DeFelice accepted into the record, approval from Bill Milardo, Health Department.

G. Colegrove asked if there were any wetlands associated with the application. P. Benjamin stated no, not in the review area.

F. DeFelice asked if this was subject to open space. Attorney Corona stated that it could be but noted the property will likely be developed in the future, or a person may develop a large home on the property and hoped the commission would save this opportunity to do something constructive when the overall development of the property takes place. F. DeFelice read 4.02.03 in the regulations where it stated the commission has the right to delay the provision.
G. Colegrove suggested putting a note on the map which states the commission reserves the right, in the future, a calculation required for open space or 10%. Attorney Corona was in agreement and noted

to his knowledge this property does not connect to any other open space where the town may build upon.

J. Pasquale questioned the Helco easement asking if there is a need for an extension of the easement. Attorney Corona stated no, the service line is already in place, underground, to serve the subdivision. P. Benjamin explained it currently goes to the home on the property, cell tower, and any other location in the subdivision. Attorney Corona stated that the easement was only done to accommodate the cell tower.

J. Pasquale asked if the cell tower was initially approved by the commission. G. Colegrove stated the Connecticut Siting Council approved the tower. J. Pasquale asked how tall the tower was and if the house location would be more than 100 feet away. P. Benjamin stated the tower is 100 feet and the house location approximately 130 feet. He noted the tower is in a fenced in area with barbed wire on top.

J. Pasquale made reference to the east property line right of way. P. Benjamin stated that the Assessor map didn't show it so they indicated it with a dotted line to show it. J. Pasquale asked if it could be used in the future for a driveway. P. Benjamin did not think so. It was very steep. He stated there currently is a completely graded driveway with power.

J. Pasquale stated he felt the driveway grading and utility easement should be a condition of approval.

MOTION BY DICK ERIKSEN, SECONDED BY CHRIS FLANAGAN TO APPROVE TWO (2) LOT SUBDIVISION AT 134R CREAMERY ROAD WITH THE FOLLOWING CONDITIONS: 1.) TO REQUIRE UP TO 10% OPEN SPACE BASED ON THE PRE-SUBDIVISION AREA (66.9 ACRES) OF THE PROPERTY, 2.) AT THE TIME THE LOT IS CONVEYED THE PROPERTY OWNER WILL ESTABLISH THE DRIVEWAY EASEMENT FOR LOT #2 AS SHOWN ON SITE PLAN. ALL AYE

10. <u>Payment of Bills</u> - None

11. <u>Minutes of Previous Meetings</u>

MOTION BY CHRIS FLANAGAN, SECONDED BY JOE PASQUALE TO TABLE UNTIL THE NEXT MEETING. ALL AYE

12. <u>Zoning Enforcement Officers Report</u>

Route 68 Industrial Park: G. Colegrove stated he met with the owner of the facility, Pat DiNatale who is in the process of revising the site plan and applying for an amended special permit. He talked about the number of vehicles on the property; five vehicles are owned by the tenant, seven employees, vehicles in rotation for repair, and a number of vehicles are in storage pending payment from customers. Currently there is an issue with compliance of the fire code and has a couple of options to bring the site into compliance. The tenant received an order from Building Inspector Dick McManus to get the work done within 30 days. He intends to stay on the site. An application is coming forward either for the second meeting of the commission in October or the first meeting in November regarding the site plan and special permit. They were advised that there will be a public hearing and a sign needs to be posted on the property. G. Colegrove felt it to be a productive discussion. He noted that keeping the fire lane between all buildings at 24 feet and parking were major issues and fire rating between the buildings.

C. Flanagan questioned if there was a process to seize cars that are on the property for non-payment. G. Colegrove stated there is a process through the CT DMV but is very difficult.

MOTION BY JOE PASQUALE TO ISSUE A CEASE AND DESIST. Discussion: G. Colegrove stated he needed to come before the commission with an application and did understand what this would do. J. Pasquale stated that it has been confirmed that he is violating his special permit and did not think the commission should accommodate his violations of his permit. He felt this to be a slap in the face to the commission and he understood that he would be in violation and knew what the process was and became non-compliant again. He is not compliant to regulations or his permit and is sending a bad message to others.

G. Colegrove clarified that Mr. Forlini was the applicant for the special permit and Mr. DiNatale signed the application. The owner was the one who came in for the regulation change for the use in the zone. If he issues a cease and desist it would need to go to the property owner not to the applicant.

SECONDED BY CHRIS FLANAGAN FOR DISCUSSION: F. DeFelice asked when they would come to the commission with the application. G. Colegrove reiterated his understanding was either the second meeting in October or the first meeting in November. He stated when he normally issues a cease and desist order it goes with a time frame to become compliant and in the past if someone files and application the commission has suspended enforcement. He noted the process (and consequence) of issuing a notice of violation followed by a cease and desist order, then Attorney correspondence, and the filing of court papers. C. Flanagan noted his appreciation of J. Pasquale's concern and questioned the town citation process. G. Colegrove noted it was a question of enforcement. J. Pasquale noted that just because an application is coming before the commission doesn't mean that it will be approved because there was a lot of concern with the first application. F. DeFelice asked if a notice of violation had been issued. G. Colegrove stated no. F. DeFelice stated he felt the standard procedure should be followed. W. Spooner stated he was in full agreement and felt that the applicant would not be able to remedy the situation within thirty days and questioned if this would precipitate another problem by moving cars to another location in Durham.

FORMER MOTION RETRACTED. MOTION BY JOE PASQUALE, SECONDED BY CHRIS FLANAGAN TO ISSUE A NOTICE OF VIOLATION TO PROPERTY OWNER AND APPLICANT OF #589 WALLINGFORD ROAD. ALL AYE

13. <u>Town Planners Report</u>

G. Colegrove stated that documentation was provided at the last meeting regarding an historic property (Lyman property) that the commission has sixty days to comment. He recommended that the Chairman put this on the next agenda.

14. <u>Miscellaneous</u>

W. Spooner asked if there was an update on the Goduti issue. G. Colegrove stated no.

15. <u>Adjournment</u>

Meeting adjourned at 9:30 p.m.

Respectfully submitted,
Beth Moncata

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September 20, 2016

Frank DeFelice, Chairman
Durham Planning & Zoning Commission
Town Office Building
P.O. Box 428
Durham CT 06422-0428

Re: Special Permit Application for Municipal Public Safety Complex
Property located at 37, 41 & 51 Main Street

RESPONSE TO DOCUMENT ENTITLED "NON-COMPLIANT ZONING REGULATIONS RELATING TO PUBLIC SAFETY COMPLEX"

Dear Mr. DeFelice:

You have asked for my opinion regarding certain issues regarding the above mentioned application. I was sent a copy of a document that was submitted during the Commission's September 7, 2016 public hearing on this application. In this document, 10 statements are made alleging that the application does not comply with the zoning regulations, including lot coverage and notice requirements. I will address each issue as it appears in this document.

Non-Compliant[1] Issue #1 – Sec. 13.05.05.01. Notice Sign Installed on Property

This section of the zoning regulations provides in relevant part that "All applications for special exception for which a public hearing has been scheduled shall be required to post a minimum of one sign ... on the property in question". The published notice of the application as well as the agenda/legal notice for the public hearing were done in accordance with the law. Thus, the only notice problem concerns the posted signs.

[1] The document uses the term 'nonconforming' but the intent appears to be to use the term non-compliant, which is what I will use in this response.

Apparently, a sign was only posted on the middle parcel – 41 Main Street – which is currently the location of the existing public safety building. The issue is whether the posting of one sign for this application satisfies this requirement of the zoning regulations.

The State Appellate Court found that where a special exception application involved several parcels of property, each parcel was a property affected by the pending application. Thus, notice requirements applied to each parcel and were not satisfied by notices identifying only one of the parcels involved.[2] For example, where an application for a special exception involved converting a rooming house to apartments on one parcel and also utilizing another parcel to meet parking requirements, notice requirements that abutters be notified by certified mail applied to abutters of both parcels and not just to those abutting the parcel with the rooming house.[3]

In this case, the public safety building application involves three separate lots. The language in Section 13.05.05.01 requires a sign on the property in question, which in this case is 3 separate properties. Thus, in accord with the court decisions cited above, a sign should have been posted on each parcel.

"[I]n the absence of proper public notice, the commission was without jurisdiction to consider the merits of the ... application."[4] While it could be argued that the public had adequate notice because all of the parcels were adjoining and the sign was posted on the middle parcel, the express language of the regulations required a notice on each parcel. Local notice requirements must be followed and a failure to comply with them requires a new public hearing.[5]

The best course of action to address this notice issue would be to have the applicant withdraw its application and re-file it, with proper signs posted. A public hearing should then be noticed and held, with the Commission accepting the record [minutes, recordings and evidence] generated at the first set of hearings and make them part of the record for the re-filed application.

Non-Compliant Issue #2 – Sec. 13.05.05.01(1) – Notice Sign Location Shown on Plan

This section of the regulations requires, in relevant part, that the location of the notification sign be shown on the site development plan. The notification sign in question was 'placed inside the [existing] firehouse sign' and that the location of the firehouse sign is shown on the site development plan.

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[2] Cassidy v. Zoning Commission, 116 Conn. App. 542 (2009).
[3] Kellogg v. City of Norwalk, 62 Conn. L. Rptr. 502 (2016).
[4] Id at 504.
[5] Qualey v. Planning & Zoning Commission, 41 Conn. L. Rptr. 12 (2006).

It is clear that this section of the zoning regulations has been satisfied. Minutes of the August 3, 2016 Commission public hearing on this application reveal this issue was discussed and was resolved – that the location of the notice sign was shown with the only issue being whether notice signs should be posted on all involved parcels, and not just 41 Main Street.

Non-Compliant Issue #3 – Sec. 13.05.05.01 – Remedy for Failure to Post Required Notification Sign

I addressed this issue in my response to Issue #1. The best course of action to address this notice issue would be to have the applicant withdraw its application and re-file it, with proper signs posted.

Non-Compliant Issues #4, 5 & 6 – Sec. 13.05.04 – General Standards for Special Exceptions.

I will address these issues in a limited fashion as they do not pose legal questions so much as they direct the Commission to consider certain alleged facts and how these facts can be interpreted by the Commission in applying this section of the regulations.

First, it should be noted that the document I reviewed states several times that this application should be denied as it permits additional commercial uses in this neighborhood. The application is clearly a municipal use which is a separate and distinct use identified in Section 5's table of uses (number 32) and is therefore not a commercial use.

Second, the Commission should be remember that in deciding an application for a special exception, the Commission, "When considering an application for a special exception, a zoning authority acts in an administrative capacity, and its function is to determine whether the proposed use is expressly permitted under the regulations, and whether the standards set forth in the regulations and statutes are satisfied."[6]

Non-Compliant Issue #7, 8 & 9 – Sec. 05.02.01 – Setbacks and Lot Coverage

This section of the zoning regulations provides in part that "In addition to stipulations in section 4, **each dwelling** erected shall have:". It is alleged that the application does not comply with the set back and lot coverage requirements of this section.

From its clear language, this section applies to dwellings. As the application is for a municipal building – specifically public safety buildings – the setback and lot coverage requirements in this section do not apply.

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[6] Bethlehem Christian Fellowship, Inc. v. Planning and Zoning Commission, 73 Conn. App. 442 (2002).

"A local ordinance is a municipal legislative enactment and the same canons of construction which we use in interpreting statutes are applicable to ordinances.... **A court must interpret a statute as written** ... and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation.... A zoning ordinance is a local legislative enactment, and in its interpretation the question is the intention of the legislative body as found from the words employed in the ordinance.... The words employed are to be interpreted in their natural and usual meaning".[7]

As written, the regulations is clear that the setback and coverage requirements apply only to 'dwellings', a term which is defined in the zoning regulations and is listed as a separate and distinct use in the zoning district. As such, it is inapplicable to this application.

This concludes my review of this document. If the Commission should have any additional questions on this matter, please feel free to contact me.

Very truly yours,

Steven E. Byrne

[7] Fedus v. Zoning & Planning Commission, 112 Conn. App. 844 (2009).