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March 22, 2013

Michael Behrendt, AICP
Director of Planning and Community Development
Town of Durham
15 Newmarket Road
Durham, NH 03824-2898

RE: Geoff Sawyer d/b/a Great Bay Kennel Property at 27-35 Newmarket Road
Tax Map 6, Lot 7-11
Amended Site Review and Conditional Use Permit Applications

Dear Michael:

Thank you for sharing your draft findings/conditions which you're preparing for the Planning Board's review and anticipated editing at next Wednesday's, March 27, 2013, Planning Board hearing. Per our Wednesday, March 20 meeting, I'm writing with the intent of your sharing my letter with the Planning Board to assist members working their way through these findings/conditions.

I would also appreciate your sharing with the Board and making a part of this case's official record, my February 22, 2013 letter to mediator, Esther Tardy-Wolfe, together with the 4-page Exhibit A and 3-page Exhibit C reference in my letter. I have not included Exhibit B, as it was a copy of Dr. Ballestero's February 15, 2013 report, copies of which the Planning Board already has.

My February 22 letter specifically responds to neighbor recommendations and concerns. By your March 20, 2013 e-mail, you shared with Planning Board members, me and others Steven Burns' proposed conditions for the Planning Board to consider. Mr. Burns' proposed conditions are not supported by the weight of all the evidence submitted in the many public hearings the Planning Board has held on this case, and my February 22 letter and enclosures helps illuminate that point. Portions of my letter, frankly, could be culled as additional findings and/or conditions of approval.

As to your draft, we met to briefly discuss these earlier this week, and you asked that I respond to certain of your draft conditions:

1. Boundary Line Adjustment/Driveway Easement

We do need to complete the deed exchange/boundary line adjustment with Dr. McKiernan (to accommodate setback compliance for new structures at the base of hill – previously approved/currently extensions granted to effectuate). Dr. McKiernan is agreeable to these. We'll proceed with this legal work to your office's/legal counsel's approval post Planning Board approval.

I believe reciprocal access easements for the Sawyers (d/b/a Great Bay Kennel) and Dr. McKiernan to use the driveway still need to be accomplished. Typically, such legal work is completed following approvals, and would need to meet with your office's or your legal counsel's satisfaction. I will be drafting these. Depending upon the final location of the new well, an additional easement from Dr. McKiernan may be necessary to assure no development within the State required well protection radius. Dr. McKiernan has already told the Sawyers he is willing to grant such an easement if necessary.

2. Surety.

Your draft conditions raise this with respect to three issues: payment of Dr. Ballestero's consulting, future testing of water from the bio-retention system outlet, and to assure completion of landscaping/replanting. The Sawyers are unable to pay Dr. Ballestero at present, but certainly acknowledge their responsibility to pay him. Upon arranging construction financing following approvals, the Sawyers can include that anticipated disbursement, as well as such surety (cash surety, letter of credit, or other) as will be needed for water testing over the next two to three years, to be a construction loan disbursement/holdback.

With respect to the landscaping/replanting, you acknowledge that the Town's typical "equivalent to 100% of installed costs of all landscaping" may be unnecessary. I don't yet know if a realistic budget estimate for this work has been projected. It will need to be for the Sawyers' construction loan financing, and when it is, it certainly would be a reasonable proposal for the Sawyers to consult with your office in setting this disbursement amount to assure the work's completion in the first instance. To assure repair or replanting of any plants within a two year window that may fail, it is excessive to insist upon surety to redo everything. I recommend the Planning Board conditioning approval on surety

"in a form and amount satisfactory to the Planning Director, anticipating repair or replacement planting over a two year period to assure compliance with the intent of vegetative buffer requirements."

3. Stormwater Runoff Testing/Twice a year for the next three years.

This was Dr. Ballestero's fifth recommendation (page 7 of his report). Your draft conditions elaborate (at page 8) levels for which the testing should be done. Mike Sievert was unavailable (this week) to help me confirm the accuracy of these standards; I presume they were provided by Dr. Ballestero. I'll follow up on this before the March 27 hearing.

As we discussed, your condition does not address what to do if testing shows levels exceeding thresholds. We both agree that the evidence does not warrant the Conditional Use Permit being jeopardized, *per se*. I reminded you that at the February 27 Planning Board hearing, Dr. Ballestero specifically asked about this, and the minutes should reflect (or certainly he can be consulted in the future) appropriate next steps to enhance the system's operation and achieve testing within appropriate limits.

My notes reflect that higher test results might simply suggest clogging of the outlet (keeping water within the rain garden longer than necessary). His comments to this prompted his forwarding to you recommended maintenance procedures, which the Sawyers agree you appropriately attach as recommended conditions of approval (for the CUP). My notes also reflect Dr. Ballestero saying there are other steps that can be taken to enhance the effectiveness of the bio-retention system, including the use of disinfectants (additives to water collection area) or the installation of a UV light at the end of the system.

Dr. Ballestero's testimony certainly made clear that the present design (drainage swale, building of bio-retention system, etc.) embraces state of the art technology and will result in a significant improvement to this private property's stormwater management. Dr. Ballestero testified (an appropriate finding of fact) that the stormwater runoff from Route 108 would be expected to produce runoff more damaging to abutting wetlands, water resources and neighbors than what could run off from the Sawyers' site after its being improved by the system.

To embellish your proposed condition, I would suggest this language following the requirement to test twice a year for three years:

If test results exceed the above standards, applicant shall inform the Planning Director/Planning Office of steps to be taken (consistent with Dr. Ballestero's February 27, 2013 Planning Board meeting testimony recommending next steps if outlet water testing exceeds limits (noted above)), including, but not limited to, enhanced maintenance procedures, use of disinfecting additives to system, or installation of UV light. Applicant shall consult with Dr. Ballestero, or an equally qualified consultant if Dr. Ballestero is unavailable, for advice for system enhancement as necessary.

4. Buffer.

At page 3, your reference to vegetative buffer cuttings should include "thinning to best preserve vegetation and/or prevent bodily injury and/or property damage." The "in perpetuity" condition should be changed to "for so long as dog daycare operations continue."

5. Operation Procedures.

As a draft (starting point), let me suggest this language:

- 1) Approval of the Amended Site Plan and granting of the Conditional Use Permit will provide Great Bay Kennel with many new indoor/outdoor operation options to enhance the current existing use, as it may possibly expand, in daycare population. Applicant's ability to modify future operating procedures to maximize its control of dogs and attenuation of noise, traffic, etc., should not be limited by specific Planning Board conditions set before the new facilities are put into operation. Notwithstanding, the Board conditions its approval on the following:
 - a) Applicant shall continue to use customer/dog intake forms in substantially the form of the three pages attached as Exhibit "X"
 - b) In addition to use of such forms, applicant shall pre-screen and evaluate the temperament of new dogs to be taken in at daycare, and evaluate the dogs' ability to interact with other dogs and humans in a positive manner. This shall include but not be limited to, the placing of new dogs in the penned area closest to the driveway with a minimal number of dogs for limited times, to assess interaction, barking, etc. Dogs unable to associate with other groups of dogs without excessive barking will be discouraged from being taken for daycare services or, if taken, confined to inside (house) and barn play areas (until able to go into outdoor penned area without excessive barking) so as to attenuate barking noise.
 - c) Applicant shall continue to maintain documentation of dogs' medical history and vaccination status.
 - d) Applicant shall determine through documentation or intake assessment that dogs taken for daycare are at least eight weeks of age.
 - e) Applicant shall determine through documentation or intake assessment or obvious visual inspection that dogs taken for daycare are spayed or neutered if dogs are over six months of age.
- 2) All findings and conditions imposed by the Strafford Superior Court in the case, **Paul A. Dubois, Trustee, et al v. Geoff Sawyer, d/b/a Great Bay Kennel, et al**, Strafford Superior Court Docket No. 01-E-0089, are adopted and made a part of these conditions of Planning Board approval.

- 3) Because Court rulings apply to the daycare operations existing primarily as an outdoor only operation, the Planning Board acknowledges that the new structures to be built can accommodate a dog daycare dog population in excess of 30 dogs, so long as no more than 30 dogs are ever kept outside at any time. The Planning Board finds that dogs kept under roof cover of the new partially enclosed barn structure are not “outside” for purposes of such limitation.
- 4) Daycare dog population (dogs kept inside (house) and barn, as well as in outside pen areas) shall not exceed 60.
- 5) In addition to said Court limitations, the Planning Board finds that noise attenuation will be enhanced by keeping dogs inside (meaning also under cover within the barn structure) and within the first enclosed fenced area outside of the barn as shown on said plans during the drop off and pick up hours of 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m.
- 6) The Planning Board finds it reasonable for some dogs to be kept beyond the 6:00 p.m. end of weekday operations time to accommodate customers who occasionally need to pick up their dogs late because of work or personal circumstances, provided that said dogs be kept completely inside after 6:00 p.m., and are picked up no later than 7:00 p.m.
- 7) Applicant shall use best efforts to staff daycare operations to have no less than two employees during drop off and pick up hours (7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m. or 7:00 p.m. on occasion, per above), when dogs are contained within limited areas stated above. When dogs are allowed out into the open pen areas controlled by Court-ordered limitations, applicant shall staff the daycare operation with a goal of generally maintaining a staff to dog ratio of 1 to 15. The Planning Board acknowledges that, occasionally, this ratio will not be met if an employee is dispatched from daycare operations to the kennel or to other emergency or job-related responsibilities, or for other unforeseen circumstances.
- 8) Staff will routinely pick up dog waste inside and in the yard throughout the day, disposing of same in plastic bags and containers (such as Dumpsters) for eventual landfill disposal.
- 9) Existing, partially composted, dog waste piles shall be removed to landfill disposal.

- 10) Internal play areas shall be daily hosed down and washed, as shall be the rubber mat flooring in the barn building.
- 11) Food supplies shall be stored in containers to discourage vermin infestation.
- 12) Applicant shall continue to control vermin infestation by professional applications (currently Orkin).

[NOTE: Upon discussing the above with the Planning Board, the applicant reserves the right to modify or edit the above.]

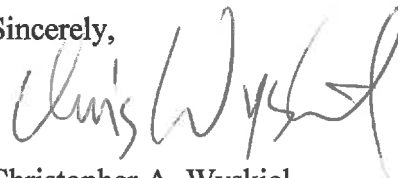
6. Additional Proposed Findings.

- 1) Geoff Sawyer's 1995 letter to the Town (referred to many times by abutter testimony) was written with reference to overnight kennel operations only. His "no barking" comments were then made with reference to kennel runs that were enclosed in the mid-1990's. It was never intended to apply to outdoor daycare operations which were the subject matter of previous of Superior Court litigation.
- 2) The proposed plan, with new internal play area options, new sound barrier fencing and alternative controlled play area fencing, coupled with enhanced operation procedures, will improve noise attenuation.
- 3) Further soundproofing of buildings (beyond which plans propose) or fences will achieve no greater sound attenuation. See E. Reuter reports and testimony.
- 4) Modification of the Great Bay Kennel's presently legally existing accessory kennel use as proposed by the Amended Site Plan and Conditional Use Permit Applications will enhance the specific properties' condition, and generally enhance the condition of the neighborhood.
- 5) The Historic District Commission approved structures, new site plan improvements and, particularly, stormwater management improvements, all support the finding that conditions exist to grant a Conditional Use Permit under Chapter 175-23(C) of Durham's Zoning Ordinance.
- 6) With respect to all Chapter 175-23(C) factors, it is appropriate for the Planning Board to compare the pending applications to the existing accessory kennel use.

- 7) Specifically with respect to the Chapter 175-23(C) (6) impact on property values standard, the evidence demonstrates that the proposed applications will not cause or contribute a significant decline in property values of adjacent properties.
- 8) Richard Gsottschneider's January 23, 2003 e-mail to Michael Behrendt, Rick Renner and Tom Johnson (shared with Planning Board) does not prove a causal link between the daycare's existing condition and the lack of maintenance of abutting properties. The cause of abutting properties not being maintained is that property owner's failure to maintain their own property. It is speculation to suggest why an abutting property owner would not maintain their property.
- 9) The enhancement and value added to the applicant's site by building the new structures and modifications proposed by the applications will enhance the property value of applicant's property and, more likely than not, have a positive impact on abutting property values.

As we discussed, Michael, I may try to submit additional "findings of fact" for the Planning Board's consideration, prior to Wednesday's hearing, or any continued hearing to April.

Sincerely,



Christopher A. Wyskiel

CAW/nl
Enclosure

cc: Geoff and Jaki Sawyer
Michael Sievert
Robin Wunderlich