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ROBERT A. BATTLES
(1951-2010)

February 3, 2017

Andrew Corrow, Chairman
Town of Durham Planning Board
8 Newmarket Road
Durham, NH 03824

Re: **Zoning Ordinance Amendments – Elderly and Multi-Unit**

Dear Chairman Corrow and Members of the Planning Board:

This firm represents the interests of several business and property owners in the Town of Durham's (the "Town") Central Business District ("CBD") to include Ken and Cathy Young who own Young's Restaurant and property located at 48 Main Street, Stephen and Rennie Petrovitsis who own Durham House of Pizza and Tacomano Street Food as well as the property located at 38 and 40 Main Street, Roger Hayden who owns Hayden Sports and the Durham Laundercenter as well as the property located at 44 and 46 Main Street, and Joseph Michael, who owns 50 - 54 Main Street (collectively "the property owners") with regard to their opposition of Town Council-initiated proposed Zoning Ordinance amendments. Specifically, the property owners oppose those amendments that would: 1) change Mixed Use with Residential (office/retail down, multi-unit up) ("mixed use/residential") from conditional use to not permitted in the CBD, and 2) add a new definition for Mixed Use with Elderly Housing (office/retail down, elderly housing up) ("mixed use/elderly") and allow same as a conditional use in the CBD (collectively the "amendments" or "proposed amendments"). The property owners also oppose the alternative course of action discussed by the Planning Board at the 11 January 2017 meeting which contemplates an amendment to Table II-1 ("Dwelling Density by Type") that would decrease the maximum number of occupants in unrelated households per 300 square feet of habitable floor area from .5 occupants in apartments, to .3 (the "alternative Planning Board recommendation").

Introduction

By way of brief introduction, together, the properties referenced above have been in consistent family ownership for over 150 years. Ken, Cathy, Steve, Rennie, Roger and Jay, and their respective businesses, are staples of the downtown scene. For decades, they have invested and reinvested in the Town of Durham and supported the community and UNH student body.

DONAHUE, TUCKER & CIANDELLA, PLLC
225 Water Street, P.O. Box 630, Exeter, NH 03833
111 Maplewood Avenue, Suite D, Portsmouth, NH 03801
Towle House, Unit 2, 164 NH Route 25, Meredith, NH 03253

They are invested and ingrained not just in the economic vitality of their respective properties and business interests, but in the very fabric of the Durham community. In fact, over the years many of them, in different contexts, have advocated against their own business interests in an effort to preserve the aesthetic appeal and vibe of the downtown area. Most recently, for example, several of the aforementioned property owners advocated against raising the maximum building height in the CBD and decreasing the minimum square footage per occupant requirement in unrelated household apartments from 300 square feet to 200 square feet. The property owners sincerely believe that a balance can be struck between their individual business interests and the greater needs of the Town of Durham.

Executive Summary

The impetus behind the Town Council's proposed amendments, as well as the Planning Board's alternative recommendation, is singularly focused: the Town desires to prevent more student housing in the CBD. The primary argument in support of the proposed amendments, as articulated by Jim Lawson on behalf of the Town Council during his power point presentation at the Planning Board Hearing on 11 January 2017, is adherence to the vision articulated in the Town's Master Plan.

As proposed, however, the amendments and alternative Planning Board recommendation are not in accord with the Town's Master Plan. Moreover, the feasibility of and demand for senior housing in the CBD has not been thoroughly researched and the Town should do so as an alternative to making drastic zoning changes which will severely impact CBD property owners. Finally, the proposed amendments and alternative Planning Board recommendation, if adopted, would devalue property in the CBD, would constitute an unconstitutional taking under the New Hampshire Constitution and would constitute a violation of the property owners substantive due process and equal protection rights.

The Planning Board should not recommend adoption of either the proposed amendments or the alternative recommendation. If the goal is to encourage senior housing in the CBD, the Planning Board should simply recommend that the Town Council make the mixed use/elderly use a use permitted by right in the CBD in accordance with the Master Plan (*See* Master Plan DH – 38) and leave the rest of the Zoning Ordinance alone.

Analysis

1) The Proposed Amendments and Alternative Planning Board Recommendation are not Consistent with the Master Plan

At the 11 January 2017 hearing, the Planning Board heard evidence from Jim Lawson and another resident in Town that the proposed amendments were essential in order to comply with the Master Plan. While the Town Council purports to be furthering the goals of the Master Plan through its proposed amendments, the Master Plan itself does not support the means by which the Town Council seeks to accomplish said goals. As laid out in greater detail below, the

Master Plan would not support simply removing mixed use/residential as a permitted use in the CBD or making the residential uses in the CBD less dense as the Town Council and Planning Board are currently considering.

Proponents of the amendments point to the Demographics and Housing, Downtown and Commercial Core and Economic Development chapters of the Master Plan to argue that because of the saturation of student housing downtown, Durham residents' commercial needs are not being met and "critical mass" has not been obtained. Further, proponents assert that by prohibiting mixed use/residential in the CBD and/or increasing the minimum square foot per occupant requirement in unrelated household apartments, senior housing will be encouraged and the Town can attract more diverse commercial enterprises which will contribute towards the Master Plan's goal of creating a more vibrant and healthy downtown and commercial core. The means by which the Town Council and proponents of the amendments are seeking to achieve the Master Plan goals, however, are not consistent with the recommendations of the Master Plan.

While it is true that the Master Plan discusses the goals and issues listed above, as well as the importance of senior housing, it suggests a far different course of action for accomplishing the Town's goals. For example, within the context of the Master Plan's goal of creating and maintaining attractive and affordable senior housing, the Master Plan recommends developing a live, play, and stay program focused on senior resident retention that includes more neighborhood-based services geared towards seniors, expanding transportation services and establishing other amenities geared towards senior residents. Master Plan, DH – 38. Further, it states in the context of future senior housing siting that the Town should: 1) find ways to site senior housing in the downtown area in a way that avoids noise and light pollution, 2) provide an opportunity for repurposing underdeveloped sites in the downtown area, and 3) support the development of affordable senior housing in the downtown that provides access to vital services and amenities. *Id.* Finally, within the context of zoning changes to create and maintain attractive and affordable senior housing, the Master Plan recommends that the Town "[c]onsider allowing senior mult-family housing by right in the [CBD]" and "[c]onsider an incentive based zoning ordinance provision that allows increased density for development reserved for seniors." *Id.*

A review of the mechanisms by which the Master Plan recommends achieving its articulated goals in the context of senior housing makes clear that the proposed amendments and alternative Planning Board recommendation are inconsistent therewith. Specifically, effort has not been devoted towards establishing more neighborhood based services, expanding transportation and other services for seniors, or implementing incentive based zoning provisions that allow increased density for development reserved for seniors. Moreover, as proposed, the anticipated senior housing will not be sited in a way to avoid noise and light pollution, and the Town has not developed or implemented incentives to repurpose underdeveloped sites in the downtown area. Most strikingly, the Zoning Ordinance changes by which the Town aims to facilitate more senior housing in the CBD, proposed under the guise of being required by the Master Plan, directly contradict the zoning change recommendations made by the Master Plan. Specifically, the Master Plan does not recommend removing mixed use/residential from the list

of conditional uses, it merely recommends that senior multi-family housing be allowed by right in the CBD. Moreover, the Master Plan does not recommend increasing the maximum square footage per occupant requirement in unrelated households which will only serve to decrease density. On the contrary, it recommends incentivizing developers by allowing increased density for senior housing facilities.

More generally, the Master Plan recommends that land use regulation “encourage housing development targeted at young professionals and seniors who want to take advantage of the vibrant life of a university town.” Master Plan, DCC – 23. Further, the Master Plan recommends that the Town “use zoning to create housing units that are attractive to residents of all socio-economic backgrounds.” Master Plan, ED – 32. As proposed, the amendments and alternative Planning Board recommendation accomplish neither of these goals. On the contrary, they would either outright prevent further housing development targeted at young professionals or make such housing economically impractical for the vast majority of people by virtue of the exorbitant rent that would be necessary to justify developing housing with a minimum 1000 square foot per occupant requirement.

Within the context of economic development, the Master Plan recommends creating and promoting programs like the incentives articulated in RSA 79-E to encourage property improvements and enhancements for property owners as well as seeking support from state, federal, private and non-profit sources to create opportunities for private investment in property improvements. Master Plan, DCC 24, 25. While RSA 79-E was discussed at the 11 January 2017 Planning Board hearing, so too was the fact that it has rarely been used in Durham. In reality, the Town has not fully explored the incentive programs and options articulated above or the potential for other land use mechanisms which could be utilized to encourage and incentivize the type of revitalization and development it seeks in the CBD.

The Demographics and Housing chapter of the Master Plan devotes considerable attention to the need for more affordable and workforce housing in Durham and articulates a specific goal of providing an adequate supply of affordable housing. Master Plan, DH – 34. New Hampshire’s workforce housing shortage is well known.¹ As wages remain stagnant and the costs of owning real estate grow more and more prohibitive, the need for affordable housing options for families as well as single people has become more apparent. To address the issue, the Master Plan articulates the goals of providing an adequate supply of affordable housing, increasing diversity by attracting young professionals and families, and integrating smart growth principals.

Specifically, the Master Plan recommends that zoning changes “[e]nsure that zoning measures such as density requirements do not prevent the construction and/or provision of affordable housing” and “[e]ncourage higher density development in the downtown area.” Master Plan, DH – 34. DH - 35. Here, both the proposed amendments and alternative Planning

¹ See New Hampshire Housing and Finance Authority website, Studies, Publications & Presentations: <http://www.nhhfa.org/studies-publications-presentations>

Board recommendation would directly contradict these Master Plan recommendations because removing the mixed use/residential use from the CBD would hinder the potential for developing new affordable or workforce housing for single unrelated people in the CBD. Further, increasing the minimum square footage per occupant requirement would decrease density in the CBD and effectively prevent the construction or provision of affordable housing because the rent necessary to justify such development would be too exorbitant.

The Master Plan also encourages the Town to:

- Consider using density bonuses to incentivize the construction of affordable housing by developers. DH – 34
- Support the formation of a local non-profit housing trust that advocates for and constructs affordable/workforce housing units. *Id.*
- Strengthen partnerships with the New Hampshire Housing Finance Authority (NHHFA) and the Workforce Housing Coalition of the Greater Seacoast. *Id.*
- Create marketing tools through the Town’s Planning/Community Development/Economic Development department that target individuals between the ages of 20 and 40. DH – 35.
- Provide mixed-use developments that create housing for seniors and younger residents in close proximity to shopping and services and encourage multi-generational neighborhoods. DH – 36.

The Town should explore implementing these types of initiatives rather than take the type of drastic action contemplated by the proposed amendments and alternative Planning Board recommendation.

In summary, the Master Plan provides numerous recommendations and initiatives the Town has yet to employ within the context of encouraging a more diverse and vibrant downtown with more senior housing options, and the proposed amendments and alternative Planning Board recommendation stand in stark contrast to same.

2) Feasibility of Senior Housing in Downtown Durham

It is clear that the Town has carefully analyzed the historic trends in the UNH student housing demand. These conclusions have been published in many contexts and within the Town’s Master Plan. It does not appear, however, that the Town has similarly analyzed the demand for senior housing in the CBD. Such an analysis should be undertaken and the Town should not prohibit mixed use/residential within the CBD or increase the maximum square footage per occupant requirement in unrelated households. The perfect barometer to assess the viability of senior housing in downtown Durham would be to simply allow mixed use/elderly by right in the CBD.

As the Master Plan points out, there are already several senior housing options available in Durham to include the Church Hill Apartments, the Bagdad Woods Apartments, and Spruce

Wood/Brookside Common. Additionally, a senior living community has been proposed for Young Drive and is currently seeking permitting and there are several other senior housing projects either under construction or in the planning stage in the greater Seacoast area. Accordingly, as Brian White, MAI, SRA states in his enclosed letter analyzing the impact the proposed amendments and alternative Planning Board recommendation would have on property in the CBD, senior living in downtown Durham would not be attractive. This assertion is supported by the fact that the properties in the CBD are not serviced by elevators, do not have an ample buffer from the nightlife and noise intrinsic to the downtown area while school is in session, do not have close access to medical and other vital services, and are not serviced by nearly enough parking to sufficiently meet the demand.

These realities point to the conclusion that the Town should carefully study the demand signal for senior housing in downtown Durham and comply with the Master Plan as an alternative course of action to the drastic zoning changes that will significantly impact the value of property in the CBD currently being considered by the Planning Board.

3) The Proposed Amendments and Alternative Planning Board Recommendation would Constitute an Unconstitutional Taking

The New Hampshire Constitution provides that no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. N.H. CONST, pt. I, art. 12. *See also* 14 Loughlin, New Hampshire Practice, Local Government Law §823. The New Hampshire Supreme Court has found that police power regulations can destroy the use and enjoyment of property just as effectively as formal condemnation proceedings or physical invasion of property. *See id.; Burrows v. Keene*, 121 N.H. 590 (1981). Though not every regulation of private property constitutes a taking requiring compensation, "arbitrary and unreasonable restrictions which substantially deprive the owner of the 'economically viable use of his land' in order to benefit the public in some way constitutes a taking within the meaning of the new Hampshire Constitution requiring the payment of just compensation." 14 Loughlin § 823 *citing Burrows*, 121 N.H. at 598. Owners do not have to be deprived of all valuable use of their property for a taking to occur, as long as the denial of the use is substantial and especially onerous, a taking occurs. *Id.* And, while the New Hampshire Supreme Court has specifically held that zoning ordinances which deny single uses of property like excavation of gravel or new mobile home parks may be upheld, the relevant inquiry remains related to the degree of harm to the property owner. *See Flanagan v. Hollis*, 112 N.H. 222 (1972); *Village House, Inc. v. Loudon*, 114 N.H. 76 (1974). To be compensable, "the damage must be substantial and amount to severe interferences which are tantamount to deprivations of use or enjoyment of property." *Id.* at 80. Finally, property loss compensable as a taking only results when the government "intends to invade a protected property interest or the asserted invasion is the direct, natural or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Allianz Global Risks U.S. Ins. Co. v. State of N.H.*, 161 N.H. 121 (2010).

Here, there is no doubt that the government intends to invade the property owner's right to further develop their properties in accordance with their highest and best use. It has been repeated time and again in the public forum that the motivation behind these measures is to prevent more student housing in the CBD. Further, the proposed amendments and alternative Planning Board recommendation are arbitrary and unreasonable because they are inconsistent with the Master Plan, they substantially deprive the property owners of the economically viable use of their land, they significantly interfere with the property owners' use and enjoyment of their property, and they are motivated solely by an unreasonable desire to prevent student housing. The damage these amendments and/or alternative Planning Board recommendation would do to the property owners is substantial because they will devalue the property within the CBD.

Specifically, prohibiting mixed use/residential will prevent expansion or further development of student, young professional and affordable/workforce housing which remains the highest and best use for the residential portions of the properties in the CBD. As Brian White points out in his enclosed analysis, value for commercially zoned property is driven by maximizing the potential permitted uses for a given parcel to enable the highest and best use to be established. Because the property owners and future developers will not be able to further develop property in the CBD in accordance with their highest and best use, the highest net return on the property will go down. When the highest net return on a property goes down, so too does they property's value. This reality is compounded by the fact, as discussed above, that senior housing would not be attractive in the downtown area. Ultimately, if adopted, the proposed amendments would take from the property owners the highest and best use of their property and replace it with the mixed use/elderly use whose merit and feasibility in the CBD has not been researched or thoroughly vetted, and is speculative at best. The same analysis pertains to the Planning Board's alternative recommendation to dramatically increase the minimum square footage per occupant requirement in unrelated households. This initiative will simply disincentivize development and drive down the value of property in the CBD.

The proposed amendments and alternative Planning Board recommendation also violate the property owners' substantive due process and equal protection rights under the New Hampshire Constitution. Substantive due process challenges to an ordinance question the fundamental fairness of an ordinance "both generally and in relationship of the particular ordinance to a particular property under particular conditions existing at the time of the litigation." *Caspersen v. Town of Lyme*, 139 N.H. 637, 642 (1995); *Dow v. Town of Effingham*, 148 N.H. 121 (2005). Equal protection challenges to an ordinance amount to assertions that the government impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner. *See Dow* 148 N.H. 121.

Here, the proposed amendments and alternative Planning Board recommendation are fundamentally unfair on their face and through their application to the properties in the CBD for all of the reasons discussed above. Moreover, the amendments and alternative recommendation impermissibly treat similarly situated individuals, like students and young professionals, in a different manner because they prohibit or inhibit further housing development for these classes

of people in the CBD. And, because the property owners' right to use and enjoy their property is an important substantive right, a court would use its intermediate scrutiny test to review Durham's proposed Zoning Ordinance changes. Under this test, the burden would be on the Town to prove that its ordinance is substantially related to an important governmental objective and may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overly broad generalization. *Community Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007).² As outlined above, there are a variety of initiatives and actions available to the Town to accomplish its ends short of removing the highest and best use from the CBD or significantly increasing the minimum square foot per occupant requirement which will cause significant harm to the property owners. Public officials have a duty to obey the Constitution and certainly should not be in the business of implementing zoning ordinances which severely impacts a small group of loyal business owners in Town.

Recommendations

If the Town desires to encourage senior housing in the CBD, it should comply with the recommendations and initiatives designed to facilitate and encourage such growth as outlined in the Master Plan. The simple and obvious solution to this debate is to simply recommend that the Town Council permit the mixed use/elderly use by right in the CBD in accordance with the Master Plan ((See Master Plan DH – 38) and leave the rest of the Zoning Ordinance alone. Once a permitted use, the Town could determine to what extent the market supports senior housing in the CBD and it could focus its efforts on adhering to the Master Plan to implement the types of incentives necessary to attract such development. In adopting this approach, the Town could simultaneously encourage senior housing in the CBD and preserve the property owners' rights and property values.

Conclusion

A recommendation to not adopt the Town Council's proposed amendments or to simply make mixed use/elderly a permitted use in the CBD is not a vote in favor of unrestrained, unmitigated expansion of student housing in Durham. On the contrary, such a vote would be consistent with the Master Plan and would constitute an acknowledgement of the property owners themselves, whose years of loyalty to Durham should not be repaid with zoning initiatives that will significantly compromise their fundamental property rights. The property owners appreciate the work that went into the Town Council's proposed amendments as well as

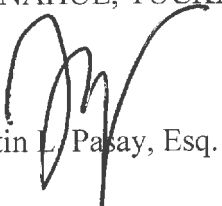
² See Enclosed minutes from the Town of Durham Planning Board meeting with Town Attorney Laura Spector on 27 May 2015 during which a member of the public asked Attorney Spector "what about cumulative impact concerns such as too much student housing." Attorney Spector replies "[t]here is case law in zoning requirements related to variances, but it is more difficult to apply those to Planning Board projects. *A Town has to let the market decided at what point the Town is saturated.*" (Emphasis added). See also the following question from the public: "How can Durham maintain a balance between the interaction of students and the community?" Attorney Spector replied "[t]he Planning Board does not manage that. Every community has to bear a certain amount of different types of housing. *The board should seek legal advice before enacting any zoning change that potentially discriminates (i.e., against students, or the elderly, etc.)* Zoning and planning does not address the balance of discrimination." (Emphasis added).

Andrew Corrow, Chairman
Town of Durham Planning Board
February 3, 2017
Page 9

the extensive time and effort the Planning Board has devoted to reviewing and analyzing the same. However, fundamental property ownership rights are being threatened by the proposed amendments and alternative Planning Board recommendation and the property owners are prepared to take whatever action is necessary to preserve their rights moving forward.

Please do not hesitate to contact me at our Portsmouth Office to the extent you have any comments or questions.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC



Justin L. Pasay, Esq.

Enclosures (2)

cc:
Ken and Cathy Young
Steve and Rennie Petrovitsis
Roger Hayden
Joseph Michael

WHITE APPRAISAL



REAL ESTATE APPRAISING & CONSULTING

Brian W. White, MAI, SRA

February 3, 2017

C/o Justin L. Pasay, Esquire
Durham Planning Board
Town of Durham
8 Newmarket Road
Durham, NH 03824

RE: Proposed Zoning Ordinance Amendments

To Whom It May Concern:

A group of business owners with property within the Town of Durham's Central Business District ("CBD") have asked me to offer an opinion regarding the impact a few proposed Zoning Ordinance amendments would have on their respective properties. I am referencing those proposed amendments which are currently before the Planning Board which would: 1) create a new permitted use in the CBD titled "elderly housing up," designed to encourage and facilitate 55 year old and up residential uses in the CBD; and 2) make the current "multi-unit residential up" use not permitted in the CBD. Additionally, this letter will discuss the impact of increasing the minimum square foot requirement per student in the CBD.

To summarize, I believe that passing the proposed Zoning Ordinance amendments will likely unnecessarily devalue the properties in the CBD. Further, based on my experience and my understanding of the circumstances regarding 55 and up/elderly housing developments in the greater Durham and seacoast area, I do not believe that such a use is feasible or suitable for downtown Durham.

My name is Brian White and I am a commercial real estate appraiser. I have been valuing commercial properties in the greater Seacoast area of New Hampshire for the past thirty-three years and have appraised most of the Durham developments that contain a student housing component. I am very familiar with the commercial properties located in the CBD on Main Street, the current Zoning Ordinance as well as the proposed Zoning Ordinance amendments.

If any of the amendments referenced above are passed, there are a couple of valuation impact issues that will likely take place for the Main Street CBD properties. First off, I anticipate that the value of these properties could be diminished. Value for commercially zoned property is driven by maximizing the potential permitted uses for a given parcel to enable a highest and best use to be established. For a site to be used at its highest and best use that use must have the highest net return to the land and the proposed development must be financially feasible. Limiting the uses allowed within the CBD will have the effect of limiting the highest net return for those properties. As a result, further student housing development in accordance with the current Zoning Ordinance will be stymied. Further, because a 55 year old and up/elderly housing use would not be attractive in

downtown Durham, as I address below, development of the property within the CBD towards that end would likely not be financially feasible.

To highlight the effect restrictive zoning amendments have on the value of property, I provide you the following example. The Durham Planning Board recently passed two zoning amendments that likely have already reduced the potential value of a Main Street CBD property. On 1/28/13, the maximum building height for these properties was reduced to 35' and on 12/1/2014; the maximum number of occupants in an unrelated household was reduced from 1 per 300 square feet of habitable floor area for an apartment to .5 per 300 square feet of habitable floor area for an apartment. Both of these zoning changes have likely resulted in a diminution of value to the Main Street CBD properties because they reduce the size and income potential of the property. This in turn, provides a disincentive for development. Further, the Main Street CBD properties have to conform to these recent zoning changes unlike that of several recently developed nearby mixed-use developments that contain upper level student apartments. As a result, they are at an additional disadvantage. In most cases, a reduction of the income potential directly results in a diminution of the value of the property. The proposed amendments would constitute another zoning restriction on the Main Street CBD properties that would likely negatively impact the value of these properties.

The second issue that impacts these properties is effectively replacing the "multi-unit residential up" use with "elderly housing up" as a conditional use. In my opinion, 55 and up/elderly housing within the CBD will not be marketable because there are currently at least two large elderly housing developments either under construction or in the planning stage in Durham with several others either under construction or planned in the greater Seacoast area. In my opinion, the elderly resident has many more desirable housing options than to locate on the upper levels of a mixed-use building in the heart of the downtown area of a college town that is dominated by college student residents. It would be very unlikely that there would be sufficient demand to make it feasible to construct elderly housing units on the upper levels of these Main Street properties. Because the demand isn't there and because the use is not financially feasible, adding the elderly housing as a replacement use for the student apartment use likely does nothing more than devalue the properties within the CBD.

It should be noted that the only definitive way to estimate the diminution of value is to complete a detailed property specific analysis. I have not completed this analysis but one could be done. This opinion letter is based on my knowledge of the local real estate market and my conclusions represent what I believe is likely given the acceptance of the proposed zoning amendments.

Respectively submitted,



Brian W. White, MAI
NHCG-#52

***RECENT ZONING AMENDMENTS THAT HAVE PREVIOUSLY
NEGATIVELY IMPACTED THE MAIN STREET CBD PROPERTIES***

2013

13-02 Amending Chapter 175 “Zoning,” Article II,
 “Definitions,” Article XII, “Zone Requirements,”
 Section 175-41(A) & (F)(7) and Section 175-54, to
 limit the height and number of stories in a section of
 Main Street in the Central Business District.....1/28/13

14-14 Amending Chapter 175 “Zoning,” Article II, “Definitions,”
 Table II-1, “Dwelling Density By Type,” to change the
 Maximum Number of Occupants in an Unrelated Household
 from 1 to .5 per 300 Square Feet of Habitable Floor Area for
 “Apartment” (Excluding Accessory Apartments) except in the
 ORLI and MUDOR Zoning Districts.....12/1/14

Table II-1. DWELLING DENSITY BY TYPE

| Dwelling type | Maximum number of occupants in unrelated household per 300 square feet of habitable floor area |
|--|---|
| Single-family dwelling | 1 |
| Duplex or townhouse | 1 |
| Apartment (excluding accessory apartments), except in the ORLI and MUDOR districts | .5 |
| Apartment (excluding accessory apartments) in the ORLI and MUDOR districts | 1.5 |
| Accessory Apartment | 1.5 |
| Rooming/boarding, including accessory rooming/boarding | 2 |
| Dormitory | 3 |
| Fraternity or sorority | 2 |
| Nursing home | 2 |
| Elderly housing | 1.5 |

Notes: No more than three (3) unrelated occupants may occupy a dwelling unit in an R, RA, RB, RC, PO, CH, C, or CC Zoning District. See Section 175-109(E).

Qualifications of the Appraiser

Brian W. White, MAI, SRA

Professional Designations:

Member, Appraisal Institute (*MAI*) – Awarded by the Appraisal Institute. MAI #9104
Senior Residential Appraiser (*SRA*)

Employment:

1989 to Present White Appraisal – Dover, NH
President – Senior Appraiser
Owner of White Appraisal, a commercial and residential
real estate appraisal firm. Complete appraisals on all
types of commercial and residential properties.
Consulting.

1988 Finlay Appraisal Services – Portsmouth, NH
Senior Vice President/Chief Operations Officer
Oversaw the operation of four appraisal offices. Completed commercial
and residential appraisals on all types of properties.

1985 Finlay Appraisal Services – Portsmouth, NH
and Appraisal Services Manager – South Portland, ME. Completed
commercial and residential appraisals on all types of properties.

Education:

Mitchell College
Associate of Arts, Liberal Studies, 1979

University of Southern Maine
Bachelors of Science, Business Admin., 1984
Bus 022 Real Estate Law
Bus 023 Real Estate Practice
Bus 025 Real Estate Valuation

American Institute of Real Estate Appraisers
1A-1 Real Estate Appraisal Principles, 1985
1A-2 Basic Valuation Procedures, 1985
1B-A Cap. Theory and Technique (A), 1985
1B-B Cap. Theory and Technique (B), 1985
2-3 Standards of Pro. Practice, 1985
Exam #7 Industrial Valuation, 1986

Society of Real Estate Appraisers
101 Intro. To Appraising Real Property, 1986
102 Applied Residential Property Val., 1987
201 Prin. Of Income Property Appraising, 1985
202 Applied Income Property Valuation, 1985

Education (Continued):

Recent Appraisal Institute Classes:

Introduction to Appraising Green Buildings – 2011
USPAP Update - 2013
USPAP Update - 2015
Introduction to Land Valuation - 2016

Recent Seminars:

Appraising Special Properties - 2013
Real Data – How to Use Their Tools in the Analysis of Real Estate – 2014
Residential Appraisal: Beyond the Secondary Market – 2014
Real Estate Valuation from the Developer/Investor Perspective – 2014
Reaching Escape Velocity: Breaking Free of the Great Recession - 2014
NH Department of Revenue’s Role in the Assessment Process - 2014
AI Past-Presidents on Appraisal Industry & Valuation Techniques - 2015
Liability Issues for Appraisers Performing Litigation and other Non-Lending Work - 2015
Commercial Real Estate Lending & Real Estate Valuation Process - 2015
Drone Technology and Its Impact on the Appraisal Industry - 2015
Business Practices and Ethics - 2016

Appointments:

Board of Directors – New Hampshire Chapter of the Appraisal Institute - 1991 to 1993; 2000 to 2010 and 2015-2017
Vice President - New Hampshire Chapter of the Appraisal Institute – 2011-2012
President – New Hampshire Chapter of the Appraisal Institute – 2013-2014

Experience:

Review Chairperson – New Hampshire Chapter of the Appraisal Institute – 1994 to 2010

Licenses:

N.H. Certified General Appraiser #NHCG -52, Expires 4/30/2017

Partial List of Clients:

Banks:

Bank of New Hampshire
Granite Bank
Federal Savings Bank
Sovereign Bank
Eastern Bank
Century Bank
TD Bank
Kennebunk Savings Bank
Northeast Federal Credit Union
Profile Bank
Peoples United Bank
Key Bank
Optima Bank and Trust
Provident Bank

Attorneys:

John Colliander
Karyn Forbes
Michael Donahue
Richard Krans
Simone Massy
Samuel Reid
Daniel Schwartz
Robert Shaines
William Shaheen
Steve Soloman
Gerald Giles
Ralph Woodman
Gayle Braley
Fred Forman

Others:

City of Dover
Town of Durham
University of New Hampshire
Wentworth-Douglass Hospital
The Homemakers
Strafford Health Alliance
Goss International
Chad Kageleiry
Gary Levy
Stan Robbins
Daniel Philbrick
Keith Frizzell
Chuck Cressy
John Proulx

See started *

OVERVIEW OF PUBLIC DISCUSSION BETWEEN TOWN ATTORNEY AND PLANNING BOARD ON VARIOUS ITEMS OF INTEREST FOR RESIDENTS FROM MAY 27, 2015

On Wednesday evening, May 27, 2015, the Durham Planning Board met with Town Attorney Laura Spector to discuss a number of planning issues and members of the public were allowed to ask questions as well.

What follows are highlights of that public discussion:

Site plan review and regulations are what needs to be followed. The application either meets the criteria, or must obtain a waiver.

An application must meet all criteria, and if it does, then the Planning Board must approve it.

Reasons NOT allowable for the Planning Board to deny a project:

- Because a room full of residents are against it;
- Because an individual board member personally does not agree or 'like' the project;
- Because of language in the Master Plan. The Master Plan is simply an advisory document; it is not a legal standard upon which a Planning Board decision can rely.

If an individual Board member votes against a project, s/he should state why.

Question: What is most effective way for a member of the public to appear before the board?

Answer: Resident questions, concerns, comments should be sent to the board prior to the meeting so board members are prepared to respond. If members of the public or the applicant come to a meeting with information that has not yet been seen or considered by the board, the board should feel free to delay further action on the application until such time as the board members have had a chance to review the new material.

Question: What types of conversations can board members have outside of a meeting regarding matters before the board?

Answer: None, either with a member of the public or an applicant. If a board member gets an email from someone, it should be sent to the Planning Dept. for distribution to all

board members and should not be replied to other than to indicate that it has been shared with staff to provide to the full board at the next regular meeting.

Question: What about issues of health, safety, and welfare within an application?

Answer: It has to be an issue that would cause a hazard to the general public. (Examples given were water & sewer issues.)

* Question: What about cumulative impact concerns such as too much student housing?

Answer: There is case law in zoning requirements related to variances, but it is more difficult to apply those to Planning Board projects. A Town has to let the market decide at what point the Town is saturated.

Negotiating with an Applicant. A Planning Board can request an applicant to negotiate details of a plan, but the applicant is not always required to negotiate such matters with the board.

Master plan. A Master Plan is a forward looking planning document that is used to guide the development of future zoning regulations, and to help with the planning of other elements of the Town. The Master Plan is not an ordinance and has no regulatory authority.

Master Plan: The Master Plan has no legal standing. Not every zoning change has to be tied to the Master Plan. In fact, a zoning change can be contrary to the Master Plan. It is the zoning ordinance that moves the vision contained in the Master Plan into an enforceable document that regulates development. There can also be chapters within the Master Plan that do not align.

Question: Can a Planning Board use the reputation of a developer as criteria to deny a project?

Answer: No.

Question: Can the experience of other communities or the "track record" of a developer be used in making a decision to approve or deny a project?

Answer: No.

A Planning Board should be sure that everything that is represented or promised by a developer becomes a formal written condition of approval.

* Question: How can Durham maintain a balance between the interaction of students and the community?

Answer: The Planning Board does not manage that. Every community has to bear a certain amount of different types of housing. The Board should seek legal advice before enacting any zoning change that potentially discriminates (i.e., against students, or the elderly, etc.). Zoning and planning does not address the balance of discrimination.

Question: What leverage does the Planning Board have to make changes to a project?

Answer: If the project complies with all conditions, the Planning Board cannot require the developer to make any changes. But there can be negotiation if the developer is willing. The Planning Board can negotiate, but cannot force a change unless the application does not meet the requirements of our local regulations, in which case it should be denied.

Question: What is the best way to oversee the process of what to do if Master Plan chapters conflict?

Answer: By statute, it is the Planning Board that adopts a Master Plan as a planning document. The Planning Board ultimately decides which points of view best reflect the goals of Durham through the overall vision of the Board.

Information on the appeal of Planning Board decisions to Superior Court: When an appeal of a Planning Board decision is made to Superior Court, the Town's lawyer gathers information from the Planning Dept. and submits all materials to the court. The hearing itself is usually 30 minutes long, with each side allowed 15 minutes to argue whether the Planning Board decision was right or wrong. The arguments must be based only on the materials of record that were presented to the court. There are not juries, witnesses, testimony, etc.

Conditional Use Permit: If an applicant meets all of the conditions of a Conditional Use Permit request as outlined by our local zoning, then the permit must be granted by the Planning Board.