

Conditional Use Review – Durham Town Attorney Guidance

To: Durham Planning Board / From: Joshua Meyrowitz / Jan 3, 2022

The email exchange below was already shared with the Board. But in order to make the guidance more comprehensible and accessible at this stage of your reviews, I have put the emails in chronological order (other than the Nov 1, 2018 cover note to me and others) and taken out the address footers to reduce length.

I also request that you review Attorney Amy Manzelli's June 2018 letter regarding Conditional Use Review, which is posted on the Mill Plaza CUP site: [Letter from BCM Environmental and Land Law 6-21-18](#).

To summarize a few key points from Attorney Laura Spector-Morgan (LSM) input:

- 1) Each and every of the eight criteria must be met to support granting of approval;
- 2) The ordinance provides a “non-exclusive” list of criteria; any negative external impact, whether listed in the ordinance or not must be considered. As LSM writes: “The board might also consider other things that are not specified in the ordinance or on the checklist but are relevant given a specific application. We know this from the language ‘this includes but is not limited to.’”
- 3) There is to be no “tradeoff” or “balancing” among criteria for an “overall” assessment. As LSM writes: “If the board finds that the traffic impact of the proposed use is greater than existing or permitted uses, it does not matter that the dust impact from the proposed use might be lesser.” That is, the application would have to be denied for failure to meet *any* of the eight criteria.

Moreover, as explicitly stated in the Conditional Use Ordinance: “**Burden on applicant.** The applicant shall bear the burden of persuasion, through the introduction of sufficient evidence, through testimony, or otherwise, that the development, if completed as proposed, will comply with this Article and will satisfy the specific requirements for the use contained in the ordinance.”

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[NOVEMBER 1, 2018 – CONTEXT & PERMISSION TO SHARE – FROM MICHAEL BEHRENDT]

From: Michael Behrendt <mbehrendt@ci.durham.nh.us>

Subject: Conditional use review - Town Attorney guidance

Date: November 1, 2018 at 5:46:02 PM EDT

To: "Joshua Meyrowitz (prof.joshua.meyrowitz@gmail.com)" <prof.joshua.meyrowitz@gmail.com>, "Josh Meyrowitz (joshua.meyrowitz@unh.edu)" <joshua.meyrowitz@unh.edu>, RobinM <malpeque@gmail.com>, "Beth Olshansky (Beth.Olshansky@comcast.net)" <Beth.Olshansky@comcast.net>

Hello Josh, Robin, and Beth,

The Planning Board is continuing its discussion about conditional uses at the workshop this Wednesday. Because there was significant concern on the part of several town residents, including the three of you as I recall, about exactly how the 8 criteria should be reviewed, Todd Selig deemed it appropriate to share Town Attorney Laura Spector's email from September 10 (below) with the public at the Planning Board meeting on September 12. Ordinarily, guidance from the Town Attorney is confidential but in this case Todd made an exception.

We received additional correspondence from the Town Attorney about conditional uses, immediately below. Todd has approved my sharing this with the public. Here is an email chain with my questions and the Town Attorney's responses. **Please feel free to share this information with any parties (but please also include my email here for background).** Best regards.

Michael Behrendt

Durham Town Planner {+full address}

{NOTE: email sequence put in chronological order below for greater comprehensibility}

[SEPT. 7, 2018 (& prior?) – BEHRENDT QUERIES TO SPECTOR-MORGAN]

From: Michael Behrendt [<mailto:mbehrendt@ci.durham.nh.us>]

Sent: Friday, September 07, 2018 2:20 PM

To: Laura Spector (laura@mitchellmunigroup.com)

Cc: Todd Selig; Paul Rasmussen (pnrasm@yahoo.com); Barbara Dill (barbaradill@gmail.com)

Subject: Conditional use checklist CONFIDENTIAL

PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

Hi Laura,

I am following up to my earlier email about the conditional use.

1) The Planning Board has used a checklist for years to determine if the 8 criteria are met. See

attached "conditional use checklist for PB." The board is now looking at changing this checklist. The current checklist includes each criterion but it breaks it down in language that is different from the language in the ordinance. I am very concerned that use of this checklist would cause trouble since it does not follow the ordinance and decisions could easily be made for the criteria that do not align with the actual language.

2) The board recognizes this and is now looking at using the proposed revised checklist – "conditional use - checklist for Planning Board – revised." I think this works well because the language follows the ordinance verbatim.

3) Several residents have expressed concern about using this revised checklist because it does not break down each criterion into separate lines or bullets. They are concerned that board members would just give a simple okay to each criterion without thinking carefully about each component. Robin Mower has suggested using a hybrid of sorts. See the attached "Mower CUP checklist." This would include the ordinance language verbatim on top and then break it down into the components. I think it unavoidable that there are different (if nuanced) ways to breaking out the components and that they are not equal to the verbatim language. However, this approach could break out the components for board members to think through recognizing that what counts is the actual language of the ordinance.

What do you think of these three approaches? Also, regarding my prior email about whether to review the individual components separately or collectively, I assume that we should not include guidance on that question on this checklist; please advise if you think otherwise.

If you could respond by this Tuesday or Wednesday that would be helpful as the board is discussing this item on Wednesday. Thank you.

Michael Behrendt

Durham Town Planner {+full address}

ATTORNEY-CLIENT PRIVILEGED INFORMATION

Hello Laura,

Regarding conditional uses, there are 8 criteria included in Article VII – Conditional Use Permits in the Zoning Ordinance. Most of the 8 criteria involve several components within

them (e.g. criterion 2 External Impacts speaks to traffic, noise, odors, etc.). The question arises whether the applicant must meet each of the individual components within a given criterion or whether the Planning Board can look at all of the components within a criterion in total, considering the overall net impact. It is clear that an applicant must meet all 8 criteria but not clear how to evaluate each individual criterion.

I include the pertinent section from the ordinance at the bottom. Each criterion is worded differently so it may be possible that the answer to this question varies based on the specific criterion. For example, see criterion 2 External Impacts. Must the board determine that the external impacts are no greater for traffic, then form a similar conclusion for noise, then for odors? Or can it consider that overall the impact is no greater: there might be a little more noise but that is more than offset by the reduced traffic.

My understanding is that the board has always reviewed the criteria requiring each separate component within each criteria must be met. If you interpret that the board can or should review the components in total, is there a problem with changing the approach now?

Thank you.

Michael Behrendt

Durham Town Planner {+full address}

[SEPTEMBER 10, 2018 – SPECTOR-MORGAN INITIAL RESPONSE]

From: Laura Spector-Morgan [<mailto:laura@mitchellmunigroup.com>]

Sent: Monday, September 10, 2018 4:24 PM

To: Michael Behrendt

Cc: Todd Selig; 'Paul Rasmussen'; 'Barbara Dill'

Subject: RE: Conditional use checklist CONFIDENTIAL

Michael:

I do not think the board needs to or should be making individual findings on each of the items listed in the conditional use permit criteria as set forth on the current checklist or on Robin's proposed checklist. I think they should make a global conclusion on each of the eight criteria, taking into account the specific items to the extent they are relevant.

My reasoning is based on the following: the criteria is set forth in the first sentence of each criteria. What follows are really examples of things the board can consider if relevant. The board might also consider other things that are not specified in the ordinance or on the checklist but are relevant given a specific application. We know this from the language “this includes but is not limited to”. So I think the existing checklist is both too detailed and too narrow; it would lead an average board member to think about specific items rather than the actual criteria.

I would use your revised checklist to guide the planning board. And you are correct, this guidance need not be included on the checklist.

Please let me know if I can be of additional assistance.

Laura
Laura Spector-Morgan, Esquire
Mitchell Municipal Group, P.A. {+full address}

[SEPTEMBER 20, 2018 – BEHRENDT FOLLOW-UP QUESTIONS]

From: Michael Behrendt [<mailto:mbehrendt@ci.durham.nh.us>]
Sent: Thursday, September 20, 2018 10:35 AM
To: Laura Spector (laura@mitchellmunigroup.com)
Cc: Todd Selig; Paul Rasmussen (pnrasm@yahoo.com); Barbara Dill (barbaradill@gmail.com)
Subject: Conditional use review - CONFIDENTIAL

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

Hello Laura,

We have some follow up questions. Could you send us a response in writing? Please mail it to Paul, Barbara, Todd, and me. Feel free to respond simply to the questions or with a general narrative as you see fit. I attach Article VII – Conditional Use Permits. The Planning Board changed the form (former “checklist”) to use the ordinance language verbatim (attached just fyi, no need to review).

I am leaving on vacation for two weeks and will be out starting tomorrow and returning on Tuesday, October 9.

Here are some questions:

- 1) Generally, how should the board decide if a specific criterion is met? What could constitute failure to meet a criterion?
- 2) There is some debate whether the applicant must meet each of the “subcriteria” within a criterion (regarding traffic, noise, etc.) individually or whether it is only a “global” (or “net” or “aggregate”) review. Is failure to meet one of the subcriteria automatically sufficient to deem noncompliance of the criterion?
- 3) Can the subcriteria be weighed or considered together, i.e. if the traffic impact is increased but the noise is decreased, can the board look at the net effect? Can one subcriterion balance another? Does the applicant get “credit” for improving other subcriteria?
- 4) Is it a reasonable assumption that some relatively *minor impact* of one subcriterion is acceptable if the overall effect seems reasonable, whereas a *significant or substantial impact* of one subcriterion, should be deemed a failure to comply by itself, even if there are other positive effects for other subcriteria?
- 5) The various criteria are worded differently. Criterion 1. actually is broken down into separate bullets/letters. Criteria 2, 3, 4, and 5, state, “shall include, but not be limited to” whereas criterion 1 says, “This includes”. Is this relevant? Should different criteria be evaluated differently?
- 6) Does the board as a whole need to have a clear method here or is it acceptable for individual members to interpret the ordinance as they see fit. In the board’s discussion recently, it was noted that different members will invariably have their own way to interpret the ordinance, even if it is unspoken. Five members will need to vote favorably so we just see how people decide in their collective wisdom.
- 7) To what extent should individual board members be prepared to justify or explain their decision?
- 8) If the board has historically interpreted the criteria in a very strict manner where failure to meet one subcriteria is deemed a failure to comply but we change the approach now, are

there any ramification to such a change?

Thank you.

Michael Behrendt

Durham Town Planner {+full address}

[NOVEMBER 1, 2018 – SPECTOR-MORGAN CONCLUSIVE RESPONSE]

From: Laura Spector-Morgan [<mailto:laura@mitchellmunigroup.com>]

Sent: Thursday, November 01, 2018 1:28 PM

To: Michael Behrendt; Todd Selig

Subject: FW: Conditional use review - CONFIDENTIAL

Hi Michael.

In order to grant a conditional use permit, the board must find that each of the conditional use permit criteria are met. In order to make such a finding, the board members must consider look at each of the criteria, and determine whether this application satisfies them based on the facts of the particular application.

As you rightly note, many of the criteria (#2-5) provide examples of the types of impacts the board members need to consider. These are not “subcriteria.” They are examples of the types of things the board should consider when weighing the criteria. Take, for example, the “external impacts” criteria.

External impacts: The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation and exterior lighting and glare. In addition, the location, nature, design and height of the structures and its appurtenances, its scale with reference to its surroundings and the nature and intensity of the use, shall not have an adverse effect on the surrounding environment nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood.

This is a criteria: The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone. The board needs to make a specific finding that this is met.

This is a list of non-exclusive things the board can consider when determining whether the criteria is met: traffic, noise, odors, vibrations, dust, fumes, hours of operation and exterior lighting and glare. The board does not need to make specific findings on each of these examples; however, this is not a balancing consideration. If the board finds that the traffic impact of the proposed use is greater than existing or permitted uses, it does not matter that the dust impact from the proposed use

might be lesser.

This is also a criteria: the location, nature, design and height of the structures and its appurtenances, its scale with reference to its surroundings and the nature and intensity of the use, shall not have an adverse effect on the surrounding environment nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood. The board needs to make a specific finding that this is met.

Criteria 3, 4, and 5 would be analyzed similarly. As for whether the impact must be significant, for #2 and #5, no, it is an absolute. For #3 and #4, a minor impact might not make the use “incompatible;” that is something the board members will need to decide.

For criteria #1 (site suitability), each of the a-d items must be met, to the extent that they are applicable.

Each board member will inevitably make different judgments on the criteria. However, if they follow the general rule that they have to weigh the evidence against each of the criteria, they will be fine. They don't have to “justify” their decisions; however, since appeals are heard on the record, it would be extraordinarily helpful if, as the board discussed each criteria, each board member expressed why s/he feels the criteria are met or not met, even if that is just to say that they agree with the sentiment another board member expressed.

As for past interpretations of the ordinance, there is a theory in the law called “administrative gloss” and it says that where a term in a zoning ordinance is ambiguous, and where the board has consistently interpreted that term in a certain way, that the board cannot later change its interpretation without changing the ordinance. So the first question is whether your ordinance is ambiguous. I don't think it is, but if the board is concerned about its past interpretations, it can certainly propose amendments to the zoning ordinance to address the issue.

I believe this addresses your questions, but should the board have additional questions, or if a meeting would be helpful in assisting them with this issue, I am always happy to meet with them.

Thank you.

Laura

Laura Spector-Morgan, Esquire

Mitchell Municipal Group, P.A.

25 Beacon Street East

Laconia, NH 03246

(603) 524-3885 / fax (603) 524-0745

www.mitchellmunicipalgroup.com