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PO Box 120, Windham, New Hampshire 03087
(603) 432-3806 / Fax (603) 432-7362
www.WindhamNewHampshire.com

Planning Board Minutes
April 6, 2011

Roll Call:

Ruth-Ellen Post, Chairwoman – Present
Margaret Crisler, Vice-chair – Present
Pam Skinner, Member – Present
Kristi St. Laurent, Member – Present
Jonathan Sycamore, Member – Present

Carolyn Webber, Member – Present
Ross McLeod, Selectman Member - Present
Lee Maloney, Alternate - Present
Sy Wrenn, Alternate – Present Arrived 7:28 p.m.
Kathleen DiFruscia, Selectmen Alternate-Excused

Staff:

Laura Scott, Community Development Director - Present
Mimi Kolodziej, Planning Assistant – Present

Call to Order / Attendance / Pledge of Allegiance:

The meeting was called to order by Chairwoman Post at 7:01 p.m. followed by the Pledge of Allegiance.

Public Hearings:

Case #2010-39 Major Plan Site Application – A Major Site Plan Application has been submitted for Lot12-A-532 on Rt 111, which is located in the Gateway Commercial, Cobbets Pond Watershed Protection, and WWPD Districts. The applicant, Karl Dubay of The Dubay Group, Inc., on behalf of MacThompson Realty, is proposing a one-story bank (2,400 sqft) and two-story mixed use building (8,000 sqft) consisting of a small café, retail shop, and office uses, totaling 10,400 sqft, as well as associated parking, drainage, signage, and landscaping improvements. A WWPD Special Permit has been requested to construct 2,727 sqft of paved areas within the WWPD buffer and 4,863 sqft of stabilized vegetated slope. The applicant is asking to waive the provisions of Section 400-401 of the Site Plan Regulations to combine the Pre-Submission and Final Application processes.

Vice-chair Crisler read the Application into the record.

Ms. Scott outlined the items included in the Planning Board packet and noted that information from the Fire Department was provided to members tonight. As well, the applicant is requesting two waivers, one from the Site Plan Regulations, Section 400-401, and one from the Cobbets Pond Watershed Protection Ordinance, Section 616.8.2. There are outstanding items still to be addressed outlined on the memo in the packet, which can be conditions of approval.

The Applicant is requesting a waiver from the site plan regulations which require a 2-step process; a pre-submission and final application: Staff supports the request to waive Sections 400-401 of the Site Plan Regulations and allow the Applicant to perform this as one final application. There are a few minor outstanding items at this point.

Mr. McLeod made a motion to waive the two-step application process and accept the application as complete. Seconded by Vice-chair Crisler. Motion passed: 7-0.

Mr. Sy Wrenn was seated at 7:28 p.m.

Mr. Karl Dubay of the Dubay Group presented the history and current details of the Bank and Café Project. He addressed the four (4) outstanding items Ms. Scott itemized in her memo. He has worked with the DOT on roadway construction improvements on route 111 and has updated and upgraded the signalization package including the emergency vehicle package. The Pennichuck water main has been extended across the intersection at their expense. Examples of free-standing and wall signage to be submitted for approval are available for the Board's review. A thorough hydro-study has designed a water flow system of fully-treated, re-charged water infiltration connected to the DOT system for overflow guaranteeing no drainage will affect abutters.

Mr. Dubay continued to explain the landscaping design and assured the Board all state permits have been approved.

Mr. Sycamore asked if Mr. Dubay had a plan of the project as it would be seen exiting I-93. Mr. Dubay offered a color rendition of the front of the site, which is slightly askew from Mr. Sycamore's request.

Mr. McLeod asked why Mr. Dubay wanted to wave Section 616.8a of the Zoning Ordinance, which is a request for a reduced buffer. Mr. Dubay explained that his project meets drainage and re-charge criteria, so the Board is allowed to grant a waiver of the buffer.

The Board had various drainage questions to which Mr. Dubay provided a full explanation.

Ms. St. Laurent asked about the snow removal area, which is raised up 3 ft. and is positioned over leaching fields. Mr. Dubay explained that snow over leaching fields does not present a problem and the owner will be very eager to remove snow from the property to open up parking spaces. If necessary the snow will be taken off site.

Mr. McLeod requested a review of traffic flow circulation and queuing. Mr. Dubay explained the one-way design and the trucking access/exit pattern with deliveries being made during low-impact hours. The proposed curbing and heavy landscaping is not inviting to tractor trailers to come onto the site and will be an unlikely occurrence.

Ms. St. Laurent inquired about ADA accessibility. Mr. Dubay explained that the project meets ADA guidelines with entrances, sidewalks, crosswalks and signage.

Ms. Webber asked if the Dubay Group would consider restoration of the Tower in the rear of the property. Mr. Dubay explained that he used the tower as a reference point on his drawings, but it actually belongs to the Weaver family and is not located on the property to be developed. Mr. Dubay suggested that this discussion could happen between the two landowners but this was not part of the proposed project.

Mr. McLeod asked about the lighting on the site. Discussion continued about downward lighting, recessed accent lights, changing the design of the pole lights to be more aesthetically pleasing, re-directing lighting away from abutting property and motorists eyes, and adding a splash of lighting to highlight an adjoining stone wall. Mr. Dubay will present the final architectural design for the pole lights for Board review, will splash the wall with light, and heavy landscaping should protect abutters from most of the light.

Ms. Maloney asked if it was possible to turn the tower into a rainwater collection tower. Ms. Mary Weaver, the tower property owner, spoke and explained that the tower structure is greatly compromised, the family has no plans to restore it, but they do all they can to keep frequent vandals from hurting themselves or the tower.

Ms. St. Laurent asked Mr. Dubay to walk through the parking / seating requirements. Mr. Dubay elaborated on the number of parking spaces in relation to the seating capacity. He shared that the Ordinance requirements in the Gateway District for the 32 seat café is one parking space for 1.5 seats. There is a 10% overlap of shared usage.

Chairwoman Post opened the Hearing to the Public.

Mr. Patrick Nysten of 4 Edgewood Road complimented The Dubay Group on doing an excellent job and supported the lighting of the historic wall submitting a lantern style architectural design of pole lights. Mr. Dubay said this type of lighting would be agreeable in the front of the buildings where shedding light would not be a problem.

Ms. Weaver is concerned about traffic impact on her abutting residential property. The driveway cannot be seen from the curve. She asked about the café hours of operation. Mr. Dubay reminded her that this is in the Gateway District and that her property is currently surrounded by ambient noise. Mr. Dubay suggested that the café may want to have a 24 hour of operation. Ms. Weaver explained said she had no expectation of hours; she just wanted to know what to expect.

Chairwoman Post closed the Public Hearing.

Ms. Crisler inquired about a previous traffic study in which the DOT said the intersection was in failure. Ms. Scott explained that a traffic study has been submitted which was reviewed and approved by NHDOT and the Town's Consulting Engineer (KNA). The applicant did amend their site plan and both NHDOT and KNA have approved the application. Ms. Scott noted that with the I-93 changes and addition of traffic lights the intersection has been improved.

Chairwoman Post asked about provisions for outside seating. Mr. Dubay said there were none, and the ambient noise would not be inviting to outside seating.

Chairwoman Post asked about signs. The signs are awaiting approval, but there is a standing sign perpendicular to the road out front with significant landscaping. As tenants come in, sign requests will be processed by the Community Development Department. .

Mr. McLeod made a motion to grant a waiver of Section 616.8.2 of the Zoning Ordinance due to the fact that the existing Searles wall physically contains and protects abutting properties, the

land areas within the buffer zone have been previously disturbed, and the proposed work will include revegetation. The small amount of pavement within the zone is graded to flow away from the buffer zone and be treated prior to recharge. The soils and grades on the site will provide additional filtration. These unique property characteristics and design features combine to provide at least the same degree of water quality protection in meeting the buffer zone performance criteria. Seconded by Ms. Skinner. Motion approved: 7-0.

Vice-chair Crisler made a motion to grant the WWPD Special Permit for the construction of 2,727 sq. ft. of paved area and 4,853 sq. ft. of stabilized vegetative slope within WWPD buffer due to the fact that the drainage patterns will not be added to or changed. Seconded by Mr. McLeod. Motion approved: 7-0.

Vice-chair Crisler made a motion to approve the Site Plan application with the following conditions:

- Written Pennichuck Water Service sign-off;
- Provided detailed site signage for Planning Board review and approval, to include the locations and dimensions of all wall and freestanding signs to ensure they are coordinated in color and style; and
- Provide detailed site lighting for Planning Board review and approval, to include the location and style of all landscaping, sign, and architectural lighting to ensure it is “dark sky” friendly.

Seconded by Mr. McLeod.

Ms. St. Laurent asked for clarification of the intent of the sign approval so that each new tenant does not have to come to the Planning Board for approval. Ms. Crisler said that the intent is to have the color and size of each sign coordinate with the building façade. Ms. Webber thinks that each business owner should be free to select their own color. Ms. Post is fine with continuing sign oversight on this project as it is the first business seen as one exits I-93.

Motion approved: 7-0

The Board adjourned for a 5 minute break and reconvened at 9:07 p.m.

Case 2010-44 Major Open Space/Workforce Housing Subdivision/Site Plan Application & WWPD Special Permit. A Major Open Space/Workforce Housing Subdivision/Site Plan Application & WWPD Special Permit has been submitted by Karl Dubay, of The Dubay Group, Inc., on behalf of AWAC Realty Trust, for Lot 11-A-1418 (76 Meetinghouse Road), which is located in the Rural, Aquifer, and WWPD Districts. The Application is for a 13-lot open space subdivision (12 residential lots and 1 open space lot) with a new Town-maintained road, as well as associated drainage improvements. Of the 12 residential lots, 3 lots are proposed to be Workforce Housing lots, as defined in NH RSA 674:58. The WWPD Special Permit is for drainage improvements along Meetinghouse Road.

Vice-Chair Crisler read the Application into the record.

Chairwoman Post asked Ms. Scott if the application was complete and did it have the recommendation of Staff to accept the application.. Ms. Scott drew the Board's attention to two memos, one from her in the Planning Board packet and the other from Town's council referencing her March 31 memo in which she stated that the application did not meet two (2) sections of the Zoning Ordinance. The first section not met was the Open-space requirement; the second section was the request to waive impact fees. In her March 31 memo, she outlined these two non-compliant Zoning Issues and reminded the Board that historically, if there are outstanding Zoning Ordinance compliance issues, the Board has not taken acceptance of the Application.

Chairwoman Post explained that the question in front of the Board tonight was whether the Board should accept an application that does not comply with Town Zoning Ordinances, which they are sworn to uphold, or should the Board refer the Applicant to the Zoning Board.

Vice-chair Crisler asked Attorney Kalman to explain the rationale expressed in his letter of April 4th.

The Applicant's Attorney, Sumner Kalman, passed out copies of Statute RSA 674:4 to the Board and proceeded to read portions of it while explaining that the Board has thirty (30) days or until the next Public Hearing to decide whether an application is complete. A completed Application means sufficient information is included or submitted to allow the Board to proceed with consideration to make an informed decision. It is his opinion that this is the only question before the Board tonight. Mr. Kalman continued to explain that in the last legislative session there was an amendment to this statute: "An Application shall not be considered incomplete solely because it is dependent upon the issuance of permits or approvals from other governmental bodies." Therefore, it is his argument that the two (2) outstanding Ordinance requirements do not provide the basis for the Board to refuse to accept jurisdiction over the Application tonight.

Chairwoman Post noted that it is common practice for the Board to regularly deal with the permits and approvals addressed in the amendment to NH Statute 674:4. However, no where in the Statute's language is there reference to Variances, which is what is in question tonight with this Application and the issue that Town's Council addressed in his memo, which Attorney Kalman received.

Attorney Kalman admitted not having read Attorney Campbell's letter, nor did he care what it said. He maintained that if the Variances required in this case are not under Work Force Housing, then that will be the subject for another night. He underscored that the Board of Adjustment is a quasi-judicial, independent governmental body within the definition of what this Statute is addressing. He noted that Planning Boards have traditionally looked at an Application, decided it was do-able, and then watched while the Application was torpedoed by a member who decided to post a change to the Zoning Ordinances resulting in denial of the Application. Attorney Kalman believes that this statute change was put in place to assist Planning Boards in defining a completed Application as an application that is not an application, but really a Plan ready to sign. The Application would not be accepted by the Board for jurisdiction unless all State and Local approvals were complete and in order. This process left a wide open space for posted Zoning Ordinance changes to torpedo a plan. He feels this language was added last year to address sub-division regulations that added conditions that defined a completed Application that were onerous and full of delay so that someone could not protect their Application by bringing it in and insisting the Planning Board make a decision within thirty (30) days. The Variance issue is new territory; the Work Force Housing Statute is not clear as it might be. Attorney Kalman reiterated and emphasized that the question before the Board tonight is whether or not to accept jurisdiction of this

Application with outstanding Zoning Ordinance issues. He argued that the language in the new amendment to Statute 674:4 covers this situation and requires the Board to accept jurisdiction of the Application.

Chairwoman Post commented that she did not see “permits and approvals” as rising to the level of variances.

Vice-chair Crisler, who was in legislature when this bill passed, recalls that the variance issue was discussed and immediately dismissed citing that Planning Boards cannot issue Variances. She respectfully disagrees with Mr. Kalman’s reading of this Statute.

Mr. McLeod agrees with Vice-chair Crisler and noted that permits and approvals are distinctly different from variances drawing the Boards attention to NH RSA 636.4.1(b).

Mr. Sycamore asked Mr. Kalman if there was a case law where a Planning Board has issued a variance. Mr. Kalman does not think this is a question of a Planning Board being authorized to issue a variance. Planning Boards cannot issue variances. A variance is within the authority of the ZBA.

When the state created a Workforce Housing statute on 1/1/2010, it anticipated that towns would adopt an Ordinance and create some parameters for applicants to follow. Windham has not created an Ordinance. Mr. Kalman argued that if an applicant brings in a reasonably viable plan, which may need some adjustments to the zoning ordinance, they should be accepted for review by the Planning Board so they may take whatever steps are necessary to move forward. Mr. Kalman cited a decision that says if your town does not provide an opportunity to offer WFH, then the applicant can go to Superior Court for a builders remedy to seek relief.

Mr. Sycamore suggested accepting the recommendation of Town Council and Windham Staff. Mr. McLeod asked Ms. Scott to restate her thoughts on this issue. Ms. Scott outlined that she does not believe that the submitted application meets zoning regarding the waiver of impact fees and the Open-space requirements. Historically, the Board has never accepted an application that did not meet the Zoning Ordinance.

Mr. McLeod made a motion to deny the application and to not accept it based on its non-compliance with Section 611.6.7.1 of the Zoning Ordinance. Seconded by Mr. Sycamore.

Ms. Webber asked to have the issue of noncompliance with the impact fee Ordinance and outstanding legal review issues to be added to the motion. Mr. McLeod did not support adding these items to his motion. He noted that the impact fee and legal items can be discussed and not impact the layout of the project but the amount and configuration of the open space is unchangeable.

Vice-chair Crisler asked about documentation for keeping the workforce housing units affordable. Ms. Scott explained that it is part of the legal documents submitted by the applicant. The Towns legal counsel had concerns with the information provided, which was outlined in his memo.

Motion to deny approved 7-0.

Mr. Tom Case from Lamplighter Village requested a minute to congratulate the newly elected Board members and commend them on doing their homework by asking so many questions.

The meeting adjourned for a 5 minute recess and reconvened at 9:45 p.m.

2011 Proactive Work List / 2012 Town Meeting Work List:

Ms. Scott presented a work chart for each Board member to volunteer to assist with various projects throughout the year. This list will be presented at the April 20 Board Meeting.

The Board removed WWPD Zoning Rewrite from the work list and added the Sign Ordinance (electronic signs specifically) to the list.

The Board would not appoint a sub-committee to work on the Design Review Guidelines but would spearhead this themselves. There was discussion about adding Village Center District to the zoning districts to be worked. Ms. Scott reminded the Board that the contract had already been signed for this project and it did not include the Village Center District. In addition, work was being done through the Wall Street/Rt 111 project and there was the possibility of using CTAP \$ for the Village Center as well.

Miscellaneous:

- The Director's and Community Planner's Reports were briefly discussed.
- The OEP Spring Conference was discussed and members were encouraged to sign up quickly.
- Updated pages 84 and 85 of the Zoning Ordinance were handed out to replace the one in the Member Binder.

Ms. Webber made a motion to adjourn. Seconded by Ms. St. Laurent. Motion accepted: 7-0.

Meeting adjourned at 10:58 p.m.

These minutes are respectfully submitted for approval by Mimi Kolodziej.