

The regular monthly meeting of the City Planning Board was held on April 20, 2005 in the City Council Chambers at the City Hall Annex at 7:00 PM.

Present at the meeting were Members Drypolcher (who as Chair presided), Dolcino, Foss, Gross, McGonagle, Merrill, and Alternate Member Kenison. Messrs. Woodward, Henninger and Pollock, and Ms. Osgood of the City Planning Division were also present, as was Mr. McGinley, the City's Fire Marshal.

At 7:02 PM a quorum was present, the Chair called the meeting to order and welcomed new Members Dolcino, Merrill and Kenison. Mr. Kenison was seated for absent Member Swope.

APPLICATIONS

Site Review Pursuant to RSA 674:54, Government Land Uses

1. The **NH Department of Transportation** for a proposal to construct an approximately 52,195 square foot building with a 3,265 square foot garage at **224 Sheep Davis Road** for an Emergency Operations Center and Traffic Management Center.

Public Hearing

Mr. Henninger reported that the City Planning Division had received site plans for the new NH Emergency Operations Center/Traffic Management Center to be constructed between the existing NH Fire Training Complex and the NH DOT Mechanical Services facility now being constructed adjacent to NH Route 106.

The new 52,195± square foot facility will house the NH Bureau of Emergency Management, and Emergency Operations Center, a 24/7 State Police Dispatch Center, NH DOT's Traffic Management Center and space for an E-911 call center. The site will be supported by a new transmission tower, parking for 150 vehicles and a new sewer pump station to serve both the EOC and the Fire Training facility.

Pursuant to RSA 674:54, the State is required to notify the City Planning Board and City Council of the pending "Governmental Land Use" at least 60 days prior to construction. The City is allowed 30 days for the City Council or Planning Board, or both, to hold a public hearing and to comment on the proposed governmental land use if they choose.

He reported that the project straddles the zoning boundary between the Industrial Park District and the Open Space Residential District. The use would be allowed by right in the Industrial Park District and by Conditional Use Permit in the Open Space Residential District.

He reported that the NH Department of Public Safety is not proposing any disturbance within the 75-foot vegetative buffer along the Soucook River. The State proposes to disturb about 700 square feet of the 75-150 foot woodland buffer along the Soucook River for grading next to the proposed parking lot. The Planning Board can allow for

disturbances up to 50% of the land area in this buffer to support the development by the issuance of a CUP. The area disturbed is less than 2% of the woodland buffer area.

He reported that no disturbances to wetlands are proposed. The Department is proposing to disturb a sizeable wetland buffer area next to an isolated wetland located between the proposed development and the Mechanical Services building. A portion of the disturbance is drainage related. However, the majority of the disturbance is for side slopes associated with the proposed 150-car parking lot.

Mr. Henninger reported that the development of this facility involves the elimination of a sand bluff adjacent to the Soucook River floodplain. The proposed project requires cuts up to 28 feet and fills in one area up to 40 feet. The development, as a private project, would not be permissible under Concord's Zoning Ordinance.

He reported that the proposed building is three stories in height plus a mechanical penthouse, but will be built into the side of the bluff and a portion of the bluff will be leveled to allow for surface parking. Surplus excavation will be used to fill an area between Smokey Bear Boulevard and the NH DOT Traffic Bureau, and any balance will be trucked offsite.

Mr. Henninger reported that the entire complex will be on municipal sewer. Existing septic systems for the Fire Training Complex will be maintained as an emergency disposal system. A flow control valve will need to be added or relocated to the water supply system to prevent pressure and flow problems upstream of the Fire Training facility. The City's General Services Department has been requesting this feature for some time.

He explained that the State and the City are cooperatively working to create a new signalized intersection on Sheep Davis Road (Route 106) with Smokey Bear Drive and Regional Drive. The City is extending Regional Drive to Sheep Davis Road and installing a signal at the new intersection. The State is realigning Smokey Bear Drive to form the fourth leg of the Regional Drive/Route 106 intersection and is repaving Route 106. The extension of Regional Drive is under construction and is expected to be completed by August of this year.

Mr. Henninger reminded the Board that the City does not have regulatory authority over this project but has the opportunity to comment on the design of the site and building.

Matthew Moore, administrator of the Public Works Bureau of NH Department of Transportation, was present to answer questions from the Board. He explained there is a pond at the rear of the site to which water drains from the site. Water for fire training activities comes out of the pond and circulates for training purposes and returns to the pond. Very little municipal water is used for this facility during training exercises.

He indicated that they will be working with the City on the landscape plan.

Ms. Foss had a number of questions relative to the drainage plan and Mr. Moore explained that they are providing sedimentation controls to protect the aquifer.

There were no further questions or comments and the Chair declared the hearing closed at 7:29 PM.

Deliberations and Action

Mr. Gross moved to forward the following comments to the State with the additional request that the State give due consideration to resolving these comments:

1. A drainage study has not been provided. The development should ensure that post-development flow and runoff does not exceed pre-development conditions.
2. This project is located on the highly productive Concord Heights aquifer and upstream of the Town of Pembroke's municipal well field. Best management practices need to be observed with the construction and management of the proposed underground storage facilities, including leak detection and spill containment. The City's water supply consultant has noted that a spill prevention and containment plan is needed for this facility. In addition, it is recommended that the fuel supply lines from the tank to the building also be double-walled along with the tanks, given the close proximity to the Town of Pembroke's well field downstream.
3. No provisions have been shown on the site plan for the disposal of solid waste.
4. No landscaping plan has been provided, and the erosion control plan is incomplete. Given the high potential for erosion of the sandy soil along the steep banks being created around the parking lot and building, special attention needs to be paid to stabilize the soils.
5. Parking demand information has not been made available for this facility.
6. Seismic design and soil stabilization for both building and parking area are critical to this facility inasmuch as it must function in any type of natural or man made disaster.

Mr. Merrill seconded. Motion carried.

The Chair asked the Clerk to review the Board's new procedures relative to determination of completeness. Mr. Woodward reminded the Board that amendments to the Board's Subdivision and Site Plan Review Regulations had recently been adopted and were now in effect. Under those amendments, the Planning Board now needed to take formal action on each application individually to determine its completeness and ability to hold a public hearing. In the event that a minor subdivision is determined to be complete, that public hearing can take place immediately. However, in the case of a major subdivision or site plan, the Board will then schedule a hearing for a later date.

Major Subdivisions

2. Application by **Abbott Hill LLC, Leslie J. Mills 2002 Revocable Trust and Timothy R. & Jayne A. Golde** for approval of a subdivision of property at **Currier Road and Timberline Drive**.

Determination of Completeness

(Mr. Merrill recused himself and left the table.)

Mr. Woodward explained this application for 13 new residential lots on an extension of both Reserve Place and Timberline Drive linking together both Phase 1 and Phase 2 of this development. He explained a Conditional Use Permit has been requested for disturbances to a wetland buffer for the construction of Reserve Place and for the construction of two houses. He reported all elements for review of this application had been submitted and the application could be considered complete.

Mr. Gross moved that the Planning Board determine this application to be complete. Ms. Foss seconded. Motion carried with Mr. Merrill abstaining from discussion and vote.

Mr. Gross moved and Mr. McGonagle seconded that this application be set for public hearing on May 18, 2005. Motion carried with Mr. Merrill abstaining from discussion and vote.

3. Application by **The David J. & Edwina Morrill Irrevocable Trust and June R. Brown** for approval of a cluster subdivision of property at **12 Sanborn Road**.

Determination of Completeness

Mr. Woodward explained this application for an 18 unit "no lot" cluster subdivision on a 63.19 acre parcel in the Open Space Residential District. He reported a Conditional Use Permit has been requested for minimal disturbance to a wetland buffer for construction of the private entrance road and for the storm drainage outfall to Snow Pond Brook. He reported all elements for review of this application had been submitted and the application could be considered complete.

Mr. Gross moved that the Planning Board determine this application to be complete and set it for public hearing on May 18, 2005. Mr. Kenison seconded. Motion carried.

Site Plans

4. Application by **Concord Hospital** for approval of a site plan of property at **250 Pleasant Street**.

Determination of Completeness

(Mr. Drypolcher recused himself and Mr. Gross presided.)

Mr. Woodward explained this application for a 117,300 square foot addition to Concord Hospital to expand the emergency room and intensive care unit, add operating suites, and 24 patient beds. The top floor of 20,480 square feet will initially be left unfinished to address near term expansion needs. He reported all elements for review of this application had been submitted and the application could be considered complete.

Mr. McGonagle moved that the Planning Board determine this application to be complete and set it for public hearing on May 18, 2005. Mr. Merrill seconded. Motion carried with Mr. Drypolcher abstaining from discussion and vote.

Mr. Drypolcher again presided.

5. Application by **Peter D. Holden** for approval of revisions to a previously approved site plan of property at **19 Triangle Park Drive**.

Determination of Completeness

Mr. Woodward explained this application for the conversion of an existing 9,938-square foot office building to a retail store, together with modifications to the landscaping, lighting, and signage. He reported all elements for review of this application had been submitted and the application could be considered complete.

Mr. McGonagle moved that the Planning Board determine this application to be complete and set it for public hearing on May 18, 2005. Mr. Gross seconded. Motion carried.

Conditional Use Permit

6. Application by **Gerald Q. Nash, on behalf of US Cellular**, for approval of a Conditional Use Permit pursuant to Section 28-5-23, Wireless Telecommunications Equipment, of the Zoning Ordinance for property at **49 Donovan Street**.

Determination of Completeness

Mr. Pollock explained this application for the construction of a 130-foot monopine-type wireless telecommunication facility to be placed within a leasehold area. He reported that, if the new tower is installed at a height of 130 feet, it will be 45 feet higher than the tallest nearby tree and 60 to 65 feet above the trees located between the proposed tower and I-93. The proposed tower will be 121.1 feet from the right-of-way of I-93 between Exit 12 and the interchange with I-89. He reported all elements for review of this application had been submitted and the application could be considered complete.

Mr. Gross moved that the Planning Board determine this application to be complete and ready to be set for public hearing. Ms. Foss seconded. Motion carried

There was a discussion as to whether to hold a public hearing at this time. Mr. Woodward reminded the Board that the determination of completeness and hearing procedures were adopted for subdivision and site plan applications but not for Conditional Use Permits. Generally, the site plan application process is followed for stand-alone Conditional Use Permit applications. However, last month the Board held a hearing on another CUP for a cell tower on the same evening it was determined complete. Board members noted that there were usually many people in the audience wishing to speak about a telecommunications installation and it did not appear as though that was the case this evening. The Chair asked the audience if anyone was present other than the applicant to speak regarding this application. There was one person interested in this application. The question then became whether the notice was clear as to the possibility for a public hearing at this time.

Mr. McGonagle noted that there had never been an application for a telecommunications facility before the Board that had been treated as a minor application as this was proposed to be now that it was determined complete.

Mr. McGonagle moved to hold a public hearing on this application on May 18, 2005, and to provide a clear notice to abutters that this will be a public hearing. Mr. Merrill seconded.

The Clerk asked for clarification of the motion and the Board expressed interest in having applications for telecommunications facilities treated as a major site plan.

Members suggested that the notice for those items scheduled for a determination of completeness should be made more clear as to the probability of a public hearing taking place immediately following the determination of completeness action.

Motion to set this application for hearing on May 18th carried.

Architectural Design Review

7. Applications by the following for approval of a sign at the following location under the provisions of Section 28-9-4(f), Architectural Design Review, of the Code of Ordinances.

- **Gamil's Cafe** at 25 Hall Street

Public Hearing

Mr. Henninger reported that the Design Review Committee had reviewed the proposed sign, found it to be appropriate for the location and use, and recommended approval as submitted.

There was no one present on behalf of the applicant, and no questions or comments, and the Chair declared the hearing closed at 7:59 PM.

Deliberations and Action on Application

Mr. McGonagle moved approval as submitted and Ms. Foss seconded. Motion carried.

8. Application by **General Growth Properties** for approval of revisions to the site and building plans at **270 Loudon Road**.

Public Hearing

Mr. Henninger explained this proposal for a new retail entrance to the existing Steeplegate Mall. He reported there would be no access to this store from the interior corridor of the mall. The only access will be from the outside. He reported the Design Review Committee had found the renovations, including signage, to be appropriate for the location and use, and recommended approval as submitted. He reported a new sign design had been submitted since the Design Review Committee reviewed the plans. The difference in design was that the lettering is now proposed to be 24 inches tall instead of the 18 inches seen by the Committee.

Joe Eaton, general manager at the Steeplegate Mall, was present to answer questions from the Board.

There were no questions or comments and the Chair declared the hearing closed at 8:06 PM.

Deliberations and Action on Application

Mr. Gross moved approval as revised and Mr. Merrill seconded. Motion carried.

Amendments to Planning Board Regulations

9. Public hearing relative to proposed **amendments to Site Plan Review Regulations** relative to application fees.
10. Public hearing relative to proposed **amendments to Subdivision Regulations** relative to application fees.

Public Hearing

Mr. Woodward explained that the Board's application fee schedules were amended in February of 2003 for the first time since 1995. The fees were increased approximately 10%, which was consistent with a guideline recommended by the City Administration. The fee schedules were again amended in February of 2004, at which time the fees were raised to the point that Concord had the highest fees when compared to those charged by five other New Hampshire cities as well as its largest town.

He reported that City Administration asked that all fee schedules be reviewed with consideration to increases of 5% over the current rates. He indicated that a modest

increase in base fees for subdivision and site plan applications is proposed, as are increases for plats and documents to be recorded. Also, new fees are proposed for sketch plan for major subdivision applications as well as pre-application meetings on site plan applications.

Mr. McGonagle asked where Concord fell as far as comparison of fees with other communities. Mr. Woodward responded that surveys were conducted prior to the last two fee changes. The survey was repeated again in December of 2004 and it revealed that in the past year only Portsmouth had increased its fees for subdivision and site plan applications and those fees remained below those already charged by Concord. Dover remains as the city with fees at the closest levels to those charged by Concord. He explained the fees are analyzed through the use of four subdivision application scenarios and four site plan application scenarios.

There were no further questions or comments and the Chair declared the hearing closed at 8:17 PM.

Deliberations and Action

Mr. McGonagle moved and Mr. Merrill seconded adoption of amendments to the Board's Site Plan Review Regulations relative to application fees. Motion carried.

Mr. McGonagle moved and Mr. Merrill seconded adoption of amendments to the Board's Subdivision Regulations relative to application fees.

Ms. Foss expressed concern about the fee proposed for sketch plan, noting that it might discourage such an application. Mr. Woodward explained that at present an applicant had to pay the fee for a full application if they chose to submit a sketch plan, and that the proposal to enact a separate sketch plan fee was intended to provide an incentive for the sketch plan.

After a discussion relative to the reasons for sketch plan and pre-application consultations and the related costs and proposed fees, Mr. McGonagle amended his motion to move adoption of amendments to the Board's Subdivision Regulations relative to application fees with the exception of the fee related to sketch plan, and to ask that the staff provide some analysis and recommendation relative to deducting the sketch plan fee from the application fee at the time of formal application. Mr. Merrill, as the person who seconded the motion, agreed to the amendment.

The motion as amended carried.

Mr. Gross moved to reconsider the Board's action relative to amendments to the Site Plan Review Regulations to allow for discussion of the pre-application consultation fee, and Mr. McGonagle seconded. Motion carried.

Mr. McGonagle moved adoption of amendments to the Board's Site Plan Review Regulations relative to application fees with the exception of the fee related to pre-application consultation, and to ask that staff provide some analysis and

recommendation relative to deducting the pre-application consultation fee from the application fee at the time of formal application. Ms. Dolcino seconded. Motion carried.

REGULAR MEETING

Minutes

Mr. McGonagle moved approval of the minutes of Planning Board meetings of March 2, 2005 and March 16, 2005 as submitted. Mr. Gross seconded. Motion carried.

The Board considered applications for approval of developments on which public hearings had previously been held.

- 2.a Application by **Ben D. Benson** for approval of a subdivision of property at **115 Appleton Street**, together with an application for Conditional Use Permit pursuant to Section 28-4-3(d), Conditional Use Permit Required for Certain Disturbance of Wetland Buffers, of the Zoning Ordinance.

Mr. Woodward explained this proposal to subdivide a 5.081-acre lot with the existing house, and leave the balance as a 99.419-acre lot. The applicant has filed an application for a Conditional Use Permit pursuant to Section 28-4-3(d), Disturbance of Wetland Buffers, of the Concord Zoning Ordinance, to construct a driveway through a wetland buffer. He explained the property is located at the easterly end of Appleton Street at the cul-de-sac terminus.

He reminded the Board that, at the Board's meeting of March 16, 2005, after the public hearing where an abutter questioned the property lines as shown on the plat, the Board voted to table action on this application until such time as the property line dispute can be resolved. The Clerk indicated that he would seek the advice of the City Solicitor as to how the Board should proceed in this matter. The City Solicitor has advised that it would be appropriate for the Board to take action on this application with the addition of a condition covering potential outcomes of either an agreement between the parties or a court judgment. This will allow the parties to resolve matters between themselves, and the Board need only be involved again if there are material changes with regard to the plat under consideration.

He reported that the Board had received communications from the applicant's surveyor as well as the abutter and his attorney for consideration by the Board.

Mr. Gross moved approval of a Conditional Use Permit pursuant to Section 28-4-3(d), Disturbance of Wetland Buffers, of the Concord Zoning Ordinance, to construct a driveway through a wetland buffer. Mr. McGonagle seconded. Motion carried.

Mr. Gross moved approval of the subdivision subject to the conditions as recommended by the Planning Division, with additional language added to condition #5, as follows:

1. The applicant shall revise the plat drawings to address the minor corrections and omissions noted by City staff.

2. The wetland buffers shall be clearly and permanently marked before, during, and after construction of the sites. Building permits will not be issued until the buffers are marked.
3. The applicant shall provide a right-of-way easement for the expanded cul-de-sac at the end of Appleton Street in a form acceptable to the City Solicitor and suitable for recording in the Merrimack County Registry of Deeds.
4. The location of the existing septic system on Lot #2 shall be shown on the plan.
5. The Board takes no position regarding the boundary line issues raised by the abutter, Kenneth Vallery, and the Board's action on this application is without prejudice to such issues. However, should the applicant and abutter come to an agreement, or a court of competent jurisdiction render a judgment, relative to the disputed boundary line such that the applicant's proposed lot will be reduced to less than five acres, then the applicant shall obtain an approval for the subdivision from the NH Department of Environmental Services. Should such agreement or judgment create any violations of the Zoning Ordinance, then the applicant shall seek appropriate relief from the Zoning Board of Adjustment or otherwise amend the plat to eliminate the violations, and file a revised subdivision application for action by the Planning Board. The plat shall be duly annotated to include the wording of this condition.

Mr. McGonagle seconded. Motion carried.

- 2.b Request by **Kevin Guay** for approval of a waiver of Section 9.03(3)(b)(v) of the Board's Subdivision Regulations relative to maximum grades of a private driveway on property on **Villanova Drive**.

Mr. Woodward explained that the property in question is a 29-acre lot located on the west side of Carter Hill Road with access from a common private drive known as Villanova Drive. The parcel is currently vacant and a subdivision plat approved in 1999 included a driveway of approximately 90 feet in length directly off the section of Villanova Drive that runs westerly from Carter Hill Road. However, the driveway as approved as part of the subdivision plat would be at a grade of 30+% without extreme cuts. Inasmuch as the land in this lot rises steeply from Villanova Drive and the majority of the usable land is on a ridge at the top of the hill, the applicant is proposing to construct a 2300-foot driveway using an old woods road with slopes in some places that are up to 15%. Section 9.03(3)(v) of the Subdivision Regulations sets a maximum grade for a private driveway at 10%, and the applicant is seeking a waiver to establish the proposed driveway, recognizing that the previously approved driveway was apparently not reviewed at the time the Board approved the subdivision and would be at a more non-conforming grade. The driveway is proposed to be 24 feet in width. The site excavation to accommodate this driveway is extensive, and the NHDES Site Specific permit previously issued for this site will need to be amended.

He reported that the Fire Department does not favor driveways at such a steep grade but, if a waiver is to be approved, recommends that the house to be accessed by this driveway be required to have a residential sprinkler system.

He reported that the plans reference the adjacent lot at 30 Villanova Drive and appear to indicate a future connection to this lot. This waiver is strictly for a driveway for access to one single-family home at 12 Villanova Drive.

He reported that the plans show another woods road running along the northerly property line for which a note indicates "maintain existing 14' travel surface as alternative surface". The applicant created this driveway and his grading of this driveway encroached on the neighboring Sunnycrest Farm on which the City holds a conservation easement. If this driveway is to remain, it will need to be shifted away from the property line. Remediation of the prior encroachment needs to occur under any circumstance.

Mr. Woodward noted that, with regard to the waiver standards of Section 11.06:

- a. The waiver will not be injurious to other property or to the public;
- b. The conditions on which the waiver is based are unique inasmuch as the Board previously approved the lot based on incorrect assumptions relative to the driveway shown for the lot, and the lot has extensive steep slopes;
- c. A site with buildable area is reachable only by means of an upgraded woods road that exceeds the maximum grade standards.
- d. The waiver does not vary provisions of the Zoning Ordinance or the Master Plan.

Mr. Woodward reported that the Board had received a communication late this afternoon from the abutting property owner to the south with attached photographs taken at the southern boundary of Mr. Guay's property showing an accumulation of old lawn mowers, cable and other trash which has been left there for some time. The abutter noted that some trash has migrated onto his property and he expressed concern about the continuing encroachment of material of this nature onto his property. The abutter expressed concern about these activities and the consequences of permitting a driveway of this length with this grade, particularly in the Penacook Lake Watershed Protection District. He felt the applicant had shown a general inability to comply with the Board's regulations and the State wetland regulations, resulting in significant damage to wetlands in this sensitive area. He felt that a driveway of this length and grade would create a high likelihood of runoff and erosion.

Mr. McGonagle had questions relative to erosion onto abutting parcels.

Mr. Kenison asked the purpose of the other woods road on the parcel and Mr. Woodward responded that it had no formal purpose. It was being used for access to other portions of the site.

Mr. Drypolcher questioned the siting of the house on this lot at the end of such a long driveway and asked whether there were alternative house sites. Mr. Woodward

responded that the proposed house site was on a plateau and there appeared to be one other small flat spot on that lot where a house could be placed.

Mr. McGonagle noted that the abutter indicated in his letter that the applicant has had difficulties complying with Planning Board requirements. He asked for a history of the problems and Mr. Woodward responded that there has been a history of problems, including actions by the NH Attorney General and fines by NH DES.

Mr. Kenison discussed the encroachment on the abutting conservation easement area and asked if there could be a condition that not only will this encroachment be remediated, but also that in the event of any further encroachment the owner will indemnify against further damage.

Mr. Drypolcher explained that he was hesitant, given the history of problems with this property, to grant a waiver. He would like to see more information about any other possibility for locating a house on the lot in question.

Mr. McGonagle asked if the grade requirements for driveways were in place in 1999 when this lot was created and he was told that those requirements were in place at that time.

Mr. Merrill also expressed concern about granting the requested waiver. Aside from the obvious life safety issues, he was concerned about erosion problems, especially since this is in the watershed area.

Mr. Gross mentioned that this applicant did not have a very good record of compliance. Some of the proposed conditions required some good faith in the compliance. The Board's obligation is to not impose its regulations unreasonably, but the Board has not been shown that there is no other place for a house site on this lot.

Mr. Gross moved that the waiver be denied since evidence has not been presented to convince the Board that a house could not be sited on the lot such that a driveway could be constructed within the maximum grade limitations, and further that the design of the driveway as submitted would have significant potential for erosion which is of concern as the lot is in the Penacook Lake Watershed Protection District. Mr. Merrill seconded. Motion carried.

Kevin Guay addressed the Board from the audience without recognition from the Chair and expressed his dissatisfaction with the Board's action on the waiver request.

NEW BUSINESS

Item #4. The Board considered a communication from the Fire Marshal relative to **residential sprinklers**.

Mr. Woodward explained that the Board had received a communication from the City's Fire Marshal relative to amending the Board's regulations to include a requirement for residential sprinkler systems for lots and units that the Board approves and which are

outside the Urban Growth Boundary and will otherwise not be served by a municipal water supply. The topic of residential sprinklers was raised in November of 2001 when a former Fire Marshal discussed the need for a Citywide ordinance during a debate over the use of cisterns in rural areas. No ordinance has been forthcoming and rural development has continued in Concord. Recently, the Planning Board in Boscawen adopted amendments to their regulations to require residential sprinklers outside of their water precinct. The City Planning Board's Subdivision and Site Plan Regulations can be similarly amended to add such a requirement for Concord.

Tim McGinley, Fire Marshal, was present and explained he had written this memorandum as a result of comments and understandings exchanged during the Board's meeting on February 16, 2005, relating to the length of cul-de-sacs and its impact on fire department operations. During that meeting he witnessed several participants express their understanding of the 1000-foot maximum limit to cul-de-sacs. He reported that, while it is true that the longer streets present an additional burden to fire department operations in the rural setting, there is also a complex challenge in firefighting operations at dead-ends or any street outside the municipal water district. Fire suppression operations which require establishing and maintaining static water supply is equipment-, personnel- and time-intensive. He explained that the fire department's initial objective when responding to a fire is the life safety of the building's occupants. Secondary to that is the preservation of the personal property. The supply hose is carried in ten 100-foot lengths and it is primarily for this reason the belief has evolved that cul-de-sacs must be no more than 1000 feet in length. However, that does not take into account the length of a private driveway, which can be a tortuous, narrow path with no limit in length.

Mr. McGinley also noted the additional hazards in extensive dead-end streets. Any time there is one means of emergency vehicle access, there is a greater vulnerability to a delay when help is needed. Items such as downed power lines and trees, extreme weather conditions, vehicular accidents, brush and forest fires can limit access. And, without a secondary escape route, residents might become trapped and unable to escape via automobile.

Mr. McGinley reported that as rural growth continues, development of homes is occurring in areas where they cannot offer adequate response times. The time has come to look closely at the residential sprinkler system to provide a level of property protection and life safety that exceeds the initial installation cost.

He reported that there are now about 40 homes with sprinkler systems in the city because of the Board's efforts.

Mr. McGonagle moved that the Board ask staff to draft a reasonable amendment to the Subdivision Regulations requiring sprinkler systems outside the Urban Growth Boundary in order for the Board to begin a discussion leading to public hearing for possible adoption of an amendment to the Regulations. He also asked that staff research what has been done in other communities. Mr. Gross seconded. Motion carried.

Item #5. The Board considered a Comprehensive Development Plan for a development for which the Board has received an application for subdivision:

- a. Application by **Berkshire Concord LLC** for approval of a subdivision of property at **295 Loudon Road** under the provisions of Section 28-9-4(e), Comprehensive Development Plan, of the City's Zoning Ordinance.

Mr. Henninger explained this proposal to create two lots of 8.58 acres and 0.60 acres within the Gateway Performance Zoning District for a shopping center proposed on the north side of Loudon Road opposite Toys R Us. The Comprehensive Development Plan will allow for the creation of a lot of less than 300 feet of frontage in the GWP District. He reported that this is the first application for a Comprehensive Development Plan (CDP) since the adoption of the current Zoning Ordinance on November 29, 2001. An application for approval of a CDP is made and reviewed in accordance with the procedures for a sketch plat application, as specified in the Subdivision Regulations.

He reported that the application is supported by site plan drawings, drainage study, traffic study, project narrative and construction details for the entire development. Architectural plans have been provided for two of the three buildings proposed on the site but all access, circulation, drainage, utility provisions and required site landscaping and residential district buffers have been provided for on the site plan and will be constructed in the first phase of the development.

Both lots will share pedestrian and vehicular access, parking, internal parking lot and perimeter landscaping, drainage, and the free standing project sign. A reciprocal easement agreement has been prepared for both lots governing the use and maintenance of the common facilities as well as rights of passage. In addition, utility service connections to the smaller of the two lots across the main lot are also addressed in the reciprocal easement agreement.

This application is in support of an approved plan with three retail buildings containing a total of 80,700 square feet. The largest building will be constructed for a sporting goods retailer containing 52,800 square feet. A second building will contain a 5,700 square foot jewelry store and a third undesignated retail building of 22,500 square feet (possibly multi-tenant) completes the development.

He reported that a joint access agreement between Berkshire Development and the Milano property to the east has been submitted and is under review. This agreement is a condition of prior site plan approval.

Mr. Gross moved approval subject to the following conditions:

1. Prior to the final plat being signed by the Planning Board Chair and Clerk for the companion subdivision plan creating the two (2) proposed lots, the applicant shall revise the plat drawings to address the minor corrections and omissions noted by City staff.

2. Prior to the final plat being signed by the Planning Board Chair and Clerk for the companion subdivision plan creating the two (2) proposed lots, the following easement documents, in a form acceptable to the City Solicitor and suitable for recording in the Merrimack County Registry of Deeds, will be provided to the Planning Division:
 - a) Reciprocal Easement Agreement between Berkshire-Concord, LLC and McFarland Development, LLC.
 - b) A sewer easement across the site from Loudon Road to Old Loudon Road.
 - c) A cross access agreement between this property and the property to the east, the Milano Condominium property.

Mr. McGonagle seconded. Motion carried.

2.d Application by **Juniper Fells LLC** for preliminary approval of a subdivision of property at **Snow Pond Road, Graham Road and Shaker Road.**

Mr. Woodward explained that, at the Board's regular meeting of March 16, 2005, Board members were provided with copies of a Motion for Reconsideration by Attorney Eugene Sullivan on behalf of Juniper Fells LLC relative to the denial of a waiver of the Subdivision Regulations with regard to the length of a cul-de-sac. The Board tabled action on the motion pending a report from the Planning Division and advice from the City Solicitor.

He reported that the Motion for Reconsideration asks that the Board reconsider and reverse its decision to deny the waiver for the length of the cul-de-sac. There are no statutory or regulatory provisions relative to such a request, and there is no known precedent in the records of the Planning Board. However, the City Solicitor advises that it is appropriate to give serious consideration to the request and the matters raised in the motion. Any decision of the Board on a subdivision application may be appealed to the Superior Court by an aggrieved party pursuant to RSA 677:15. Therefore, it is in the Board's best interest to give full and careful consideration to the Motion for Reconsideration and the grounds for the reconsideration. If possible, the consideration of this Motion should be made by those members of the Board who were present on February 16, 2005, and voted on the waiver request; however, the Solicitor also indicated that the Courts recognize that Board membership changes and the Board that is sitting at any time is empowered to rule on any matter before it. If the Board does find there are grounds for reconsideration, then the reconsideration should be conducted after a duly noticed public hearing on the reconsideration.

In order to refresh the Board's memory, and to clarify and correct representations and assertions made in the Motion for Reconsideration, Mr. Woodward presented a brief summary from his report to the Board. He addressed the regulatory setting, including a discussion of both the Subdivision Regulations and the Zoning Ordinance and their respective amendments.

Mr. Woodward then discussed "administrative gloss" and explained that, for this

doctrine to apply, there are three elements or conditions which must exist:

1. The provision in question is ambiguous.
2. The agency responsible for its administration has interpreted it over a period of years in a consistent manner.
3. The legislature has not interfered with this interpretation.

The provision on the length of a cul-de-sac caused some members of the Board to comment that they could see how it might be interpreted in two different ways, and further, that it should be clarified with an amendment to the current wording. However, other members indicated that the wording had only one implication to them. Certainly, if the other two criteria for administrative gloss are found to be met, then this criterion should be further scrutinized.

The applicant's attorney alleges that the criterion relative to consistent interpretation has been met and that the interpretation has been to measure the length of a cul-de-sac to the base of the circle so that the circle lies beyond the 1,000-foot mark. Mr. Woodward explained that the methodology of measuring the length of a cul-de-sac to the top or back of the circle can be documented back to the application of Eighty Acres, Inc., for a major subdivision known as Equestrian Heights, which became the focus of litigation in Merrimack County Superior Court after the Planning Board's denial of waivers of the Subdivision Regulations related to the lengths of blocks and cul-de-sacs. The Board was upheld in this case on the basis that the Board's denial of the waivers was reasonable and lawful, and the applicant did not appeal the decision of the Superior Court to the NH Supreme Court. While the methodology of measurement was documented by that case, since that time there have been a few waivers granted to the maximum length, and there have been a few lapses in process where waivers should have been required and were not, but there has been a generally consistent adherence to a 1,000-foot maximum length of a cul-de-sac, as measured to the top of the circle, particularly since November of 2001.

Mr. Woodward explained that, while the applicant's attorney alleges that the criterion relative to legislative interference has been met, in reality the Board, as the legislative body, did take an action on March 19, 2003, after a public hearing was held on an amendment to the Subdivision Regulations relative to common private drives. The provision relative to the combined length of a cul-de-sac plus a common private drive was requested by the Board in response to a subdivision which included a cul-de-sac of 970 feet to the top of the circle, beyond which was a common private drive served several additional lots. The critical piece of this amendment that goes to the issue of interpretation of the length of a cul-de-sac is that Section 9.04(3)(p) includes the circumstance of a common private drive at the end of a cul-de-sac, wherein the total length of the distance along the cul-de-sac plus the common private drive cannot exceed 1,000 feet from the edge of the right-of-way of the street providing access to the cul-de-sac. The applicant's alleged interpretation of a cul-de-sac being measured to the base of the circle cannot comply with this regulation as a common drive off the end of the circle would be starting at a point of 1,160 feet from the edge of the right-of-way of the adjacent street.

The Motion alleges representations concerning the interpretation of the length of a cul-de-sac that were made to Juniper Fells LLC about the time of the Hannah Crossing subdivision application in 2000; however, no evidence or substantiation is provided of such representations. There are no minutes or letters that indicate such representations, nor is there any corroboration among the City staff that were there at that time. While the motion alleges that there has been no change in staffing since 2000, changes have occurred in the staffs of the Planning, Engineering, Fire, and General Services Departments since 2000.

He reported that the record on file for the Juniper Fells applications indicates that the length of the cul-de-sac in Phase 3 was flagged from the very beginning as a problem. The first application of Juniper Fells for Phase 1 in March of 2003 displayed a conceptual layout of other phases, and while these phases were not the subject of a sketch plan review, comments were made about the phases by the City staff in written memoranda provided to the applicant's consultants who were, and still are, preparing the subdivision plans as part of this application. VHB, engineering consultants to the City for development review at that time, noted that the cul-de-sac in the future Phase 3 exceeded the City's standards, and this was echoed in a report of the Planning Division. Both of these documents were provided to the applicant's surveyor.

The Motion alleges that the applicant was not given a full review and consideration of the request for the waiver at the hearing on February 16, 2005. Section 11.06(3) of the Subdivision Regulations requires that a petition for a waiver be submitted in writing by the applicant, and that the petition fully state the grounds for the application and all the facts relied upon by the petitioner. The applicant's request for the waiver does not address itself to the requirements of Section 11.06, nor does it provide a basis for the Board to make the findings in order to grant a waiver. The testimony offered by the applicant and his attorney at the hearing focused on their arguments relative to the doctrine of administrative gloss, and to unsubstantiated allegations of representations purportedly made to the applicant in 2000. However, testimony was received at the hearing on February 16, 2005, from Attorney Jason Rich, who represented the Hylands, abutters to Juniper Fells. He cited Section 11.06 and noted specifically that the applicant had failed to state the grounds for the waiver or the basis under which the waiver should be granted. He addressed the requisite findings the Board is expected to make in the granting of a waiver, and expressed the view that the waiver "would be injurious to the Hyland property because it would increase the number of lots and the likelihood of the pond being contaminated....that there is nothing unique about the conditions requiring the waiver....there would be no particular hardship to the developer in this development." This testimony of Attorney Rich was not directly rebutted by the applicant or his attorney.

Mr. Woodward reported that there were also assertions made in the Motion that the offer of the conservation land would not have been made if the problems with the cul-de-sac in the third phase were known, and that there would have been a way to access the ridge from the land dedicated for conservation purposes.

He reported that the plans initially submitted for Phase 1 did not include a conservation parcel but had an additional house lot fronting on Graham Road. Also, communications

were forwarded to the applicant's consultants during the consideration of Phase 1 noting that the cul-de-sac shown in Phase 3 exceeded the standards for the length of a cul-de-sac. The record demonstrates that the applicant admitted there was doubt as to the development capability of Phase 3, and that he eliminated a lot in deference to neighborhood opposition to his application, donated the land to the Conservation Commission, and presumably took advantage of the federal income tax credits for the donation (applicant's letter of July 15, 2003 to the Chairman of the Planning Board refers to "IRS issues" relating to the conservation easement).

Mr. Woodward noted that a redesign of the cul-de-sac to meet the Board's standard interpretation will not cause the loss of the two view lots on the ridge as alleged. Based on the plans as submitted, with reduction on overall frontage on a shorter road, one or two lots will be lost on the side of the street as it ascends to the ridge, but the two view lots will still be accessible from driveways off the cul-de-sac. However, one of the currently proposed lots does not comply with the Zoning Ordinance standard for maintaining lot width to the full depth of the front yard, and a second lot, as noted by the Board at the hearing, does not have access to the buildable land area, meaning that any house built on it must be constructed on steep slopes. This differs from all of the other lots in the first two phases of Juniper Fells as well as the others in Phase 3, in that all other lots offer a choice to access and build on buildable land or on steep slopes.

It should also be noted that, while the applicant specifically did not want to pursue a cluster development for this property, the option to do a cluster is still available and would likely provide the same number of lots as was originally proposed due to the reduction in the frontage requirements.

As a dissenting vote on the question of the waiver, Mr. McGonagle explained that there was some question in his mind at the time of the earlier vote about whether the conservation easement granted to the City in an earlier phase had actually limited the number of lots that the applicant could now create. He felt making a cluster subdivision would make that question moot and he would be very happy to see that come to pass.

Mr. Gross felt that it was the responsibility of the applicant to convince the Planning Board that not granting the waiver would be a hardship to the developer. They had provided no adequate proof of the applicant being misled by the City staff. The applicant did not make a good case that the waiver should be granted. He felt the Board has been very consistent since the fire department presentation in 2001 regarding the 1000 foot road length. He has not seen anything in the Motion for Reconsideration that would move his mind in a different direction. He does not see any inconsistency in the Board's actions since 2001.

Mr. Gross moved to deny the requested reconsideration for the following reasons:

- a. The vote to deny the waiver of the maximum length of a cul-de-sac was a reasonable action taken pursuant to the Subdivision Regulations.

- b. The Board and its staff have applied a consistent standard of measurement of the length of a cul-de-sac which is to the end or top of the circle, and not the base or bottom of the circle.
- c. There is no basis for the application of the doctrine of administrative gloss to the circumstances of this case.
- d. The applicant failed to provide a reasonable basis for the Board to grant a waiver pursuant to Section 11.06 of the Subdivision Regulations.
- e. There is no evidence to substantiate the allegations concerning representations made to the applicant relative to the methodology for measurement of cul-de-sacs.
- f. The applicant had previously expressed doubt as to the development capability of Phase 3, a road connection from Graham Road to the ridge is of questionable feasibility, and the applicant volunteered to donate the conservation land in Phase 1 and it was not demanded or in any way coerced from him.

Ms. Foss seconded.

Mr. McGonagle indicated that he had voted against the denial of the waiver as he had preferred to table the matter to provide an opportunity for the applicant to revise this plat, and therefore he will vote against this motion.

Mr. Merrill indicated, not having been a party to earlier discussions, that it does appear that if the waiver is not granted the applicant does have the remedy of the cluster subdivision.

Motion to deny reconsideration carried unanimously. Mr. McGonagle noted that he had decided to vote in favor of the motion because of the option of the cluster development.

6. Discussion of the **Board's schedule and procedures** with new Board members.

The Chair explained that he had suggested scheduling a workshop to discuss procedures and schedules with new Board members.

After a brief discussion, it was determined that this should be scheduled for Wednesday, May 4, 2005 in the Second Floor Conference Room at City Hall.

There was a brief discussion relative to scheduling of Planning Board meetings and whether there should be two meetings a month. Staff was asked to be prepared to provide information for this discussion at the meeting on May 4th.

It was noted that there should also be an update on the Master Plan process for the benefit of new members as well as the veteran members.

There was no further business to come before the Board and the meeting adjourned at 11:20 PM.

A TRUE RECORD ATTEST:

Douglas G. Woodward
Clerk

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