

TOWN OF EAST KINGSTON, NH
PLANNING BOARD MEETING MINUTES
November 15, 2001

FILE

AGENDA

- 7:00 Dick Cook -Tri C Manufacturing- Discussion
7:10 Growth Control Ordinance, Impact Fees, Elderly Housing Ordinance- Discussion
8:30 Julian Dunlop – Carmen’s Restaurant - Discussion
8:30 Jonathan Shafmaster – 2-lot Subdivision of 8 Freeman Street– Public Hearing

Members attending: Richard A. Smith, Sr.– Chairman, Beverly A. Fillio– Vice-chairman, John L. Fillio – Ex-officio, Dr. Robert Marston, David G. Morse and Alternate Member J. Roby Day, Jr.

Others attending: Conservation Commission Chairman Larry Smith, Building Inspector Kent Shepherd, Fire Department Lieutenant Andy Conti, Atty. John Ratigan, Sue Jordan, Conrad Moses, Atty. Jeff Towers, Julian Dunlop, Dick Cook, Joe Cacciatore, Norm & Carol Freeman, Miriam & Ray Chevalier, Bonnie McLaughlin, Shyre Keddy, Kevin Fitzgibbon, Steve & Linda White and other members of the public who did not address their concerns.

Chairman Smith opened this November 15, 2001 planning board meeting at 7:01 p.m. with the role call.

Dick Cook – Tri C Manufacturing -Discussion: Mr. Cook informed the board that two years ago he received approval from the board to attach a temporary modular office building to his business on Haverhill Road. The agreement was for a period of two years, which expires in January 2002, at which time he will appear back before the board for a formal request to continue the agreement. His request for an extension is based on economic reasons – he is not ready to build a new stick-built office at this time.

Members of the board thanked him for this “heads up” and commended him for bringing this issue to light prior to its expiration.

Minutes: The board reviewed Planning Board minutes dated November 8, 2001. Those present and eligible to vote on their acceptance were Chairman Smith, Mr. Fillio, Mr. Morse, and Mr. Day.

MOTION: Mr. Fillio motioned to approve the Planning Board minutes dated November 8, 2001 as presented. Mr. Morse seconded. With no further discussion, the motion carried 4-0.

Incoming Correspondence: Chairman Smith acknowledged the following incoming correspondence:

1. NH Rural Development Council’s workshop on December 5, 2001 at Waterville Valley Conference Center.

Growth Control Ordinance: Chairman Smith opened discussion on the annual review of the Growth Control Ordinance and he noted the sunset clause which states:

*This article expires at Town Meeting 2001, unless the following occurs:
An annual review by the Planning Board to determine if the population and growth data, in conjunction with the CIP, justifies the continued application of the ordinance. If, after making findings, the Board feels that this article is both appropriate and necessary to meet the purposes outlined above, this article would be effective for another year, when another annual review shall occur. After making findings, the Planning Board may change the number of permits allocated annually based on data received during the year to ensure the purposes of this article.*

Ms. Carriel then distributed a memo and tables for review that would support the board’s review of whether or not to continue the ordinance. She explained that she is now using census data and that earlier reviews were conducted using estimates – she still used the same format as outlined before and extended the housing table and the population table by a year. The finding of fact document was updated to include the recent updates to the CIP. The safety complex, library, and fire department equipment projects reflect the town’s need of capital expenditures to accommodate its growth.

She stated that she would like to add information regarding building permits to this document as well as a comparison to other town’s building permit demand.

Mr. Fillio responded that towns without a growth control ordinance would have a “natural” growth pattern and could not be fairly compared to East Kingston who has an “artificial” growth pattern due to its allowance of only 13 to 14 building permits being issued

each year. When it was suggested that the number of building permit request be counted instead, he replied that the general knowledge that East Kingston has a growth control ordinance would have bearing on the number of requests made – you can't compare artificial to natural fluctuation.

Ms. Carriel added that a comparison over a ten-year period is not an accurate account for the past five-year figures, however, those numbers can be used to track trends. They can look at the CIP and identify other additional projects as needed improvements based on growth needs. She then asked if Town Counsel would review this information as well. She said it makes sense to do that, as this is such a sensitive issue.

Mr. Fillio stated that from his review of the information presented, not much has changed. Ms. Carriel agreed and stated that percentage-wise, East Kingston has had higher growth than the surrounding towns.

Mr. Day stated that the nature of the growth control ordinance it to be tied to the CIP, which suggests the board is faced with considering the major investments with facilities in town due to growth. He said he believes they should keep the ordinance in effect.

Mr. Fillio noted that the town personally has not increased the traffic on Routes 108 and 107 – but the surrounding towns have. The growth around East Kingston has also impacted the town. He then gave reference to traffic passing through the town via access to Route 125 and Interstate 95 – there is a hundred times more traffic going through the town than there used to be. He said he thinks the Growth Control Ordinance should stay in effect for another year. If it is opened up now with the elderly housing growth as it is, the town could in no way accommodate its growth.

Chairman Smith then announced that the public hearing for the formal review of the ordinance is scheduled for December 6th at 8:45 p.m. Ms. Carriel will look at other information that might be useful in this review, i.e. building permit data for the past five years, issued certifications of occupancy, permit requests, etc.

Impact Fees: Chairman Smith opened discussion on impact fees. Mr. Day distributed copies of his latest revision, which reflected the comments from Town Counsel discussed at the last meeting. He said the only item he disagrees with Town Counsel is the reference to nine years. He clarified that the nine years is how many years the town will retain records of impact fees, but that impact fees themselves must be committed within a six-year period. He said he rewrote the paragraph for clarification.

He went on to say that he and Ms. Carriel attended the NHMA Law Lecture Series and learned that a recent court case that has resulted in a movement to change impact fees was not about the impact fees itself; it was about off-site improvement costs being levied on a developer. He said the board should also have authority to exact off-site development costs within the subdivision and site plan review process – but it must also be in the ordinance. Some developments imposed tremendous impact on town roads and the town needs to be able to force the developer to pay for such needed improvements. He said there should be a statement or paragraph in the ordinance regulating off-site improvements separate from the impact fee ordinance.

At this time Atty. Ratigan asked to address the board regarding impact fees and growth control devices. He said RSA 647:21 speaks to what Mr. Day is referring to. It says you can put such provisions for off-site improvements in the subdivision and site plan review regulations and then adopt it elsewhere in the zoning ordinance. He read aloud RSA 674:2 V (h):

The adoption of a growth management limitation of moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development.

He stated that this statute seems to suggest that the town needs to make a choice between an impact fee and a growth control ordinance – you can't do both. He then noted a court case with the town of Hudson where the judge said you must make a choice. He said that this might influence the decision to adopt this [impact fee] ordinance as not many towns have both and this doesn't come up that often.

Mr. Day replied that the statutes say you can implement only one at a time, but it does not say you can't have both. Mr. Fillio concurred and said you can have both but you can't impose both on a developer. Mr. Day agreed to draft language for off-site improvements for Town Counsel to review.

Mr. Day then brought up his recommendation to reorganize and renumber the zoning ordinances. He submitted a suggested format which included renaming some of the articles. He broke the reorganization into three categories: Municipal Zoning Parameters, Zoning Regulations, and Governance and Execution, which would result in a total of twenty-three articles versus the current twenty-one. He proposed:

Municipal Zoning Parameters

- I Purpose
- II Definitions
- III Districting
- IV Commercial District
- V Light Industrial/Residential District
- VI Wetlands Conservation District
- VII General Provisions
- VIII Uses Permitted
- IX Lot Area and Yard Requirements

Zoning Regulations

- X Flood plain Development
- XI Single Family Cluster Residential Development
- XII Elderly Housing
- XIII Growth Control
- XIV Septage/Sludge Disposal Facilities
- XV Telecommunications Facilities
- XVI Home Occupations

Governance and Execution

- XVII Building Inspector and Permits
- XVIII Impact Fees for Public Capital Facilities (Placement if adopted at Town Meeting)
- XIX Board of Adjustment
- XX Unnamed – Structure or Land Use Conformance
- XXI Unnamed – Ordinance Violation Penalty
- XXII Unnamed – Ordinance Validity
- XXIII Unnamed – Ordinance Application Authority

He then directed members to look at the very last page in the zoning ordinance titled: *Zoning Schedule of Bulk and Coverage Controls*. He suggested it be renamed and moved to Article 6 (to be renumber Article 5) *Lot Area and Yard Requirements* as a summation of the article.

Chairman Smith stated that over the years the board has just continued to add amendments. He agreed that it would be a good idea to overhaul the organization of the book to make it look more reasonable.

Mr. Day also recommended that when new articles are adopted, they be placed where they belong within the ordinances instead of just adding them to the back of the book.

All members were agreeable to Mr. Day's suggestions. It was noted that any changes to the Zoning Ordinance require public hearing and the vote of townspeople via the Zoning Ballot.

MOTION Mrs. Fillio motioned to hold a public hearing on December 6, 2001 at 7:15 pm for the renaming and reorganization of the articles within the Zoning Ordinance as presented (except for Impact Fees) by Mr. Day for the purposes of placing on the March 2002 Zoning Ballot. Mr. Fillio seconded. With no further discussion, the motion carried 5-0.

Discussion then refocused on the impact fee draft ordinance. Dr. Marston stated that he thinks agricultural buildings should be exempt from impact fees as they (the board) should be encouraging farming. Mr. Morse agreed.

Mr. Day responded that no other town does it this way. Mrs. Fillio inquired as to when a barn becomes a commercial business. She then noted the Waldron horse boarding facility on Route 108. Much discussion transpired on the state's definition of farm as well as how the town is to police such a distinction.

Atty. Ratigan suggested the board include provisions for waivers from impact fees. He noted RSA 674:21 V(g):
The ordinance may also provide for a waiver process, including the criteria for the granting of such a waiver.

He said the board would need to set up the criteria – criteria to determine what would not create an impact. Members discussed the possibility of drafting definitive criteria exempting agricultural buildings. Mr. Fillio stated that he does not agree with exempting farm buildings– waivers might be okay, but outright exemptions are not.

Building Inspector Kent Shepherd stated that some towns do not have building permit fees. They impose a \$10 per thousand impact fee on all buildings – no matter what it is. Mr. Day replied that he does not think that plan is defensible in court. He stated that when Bruce Mayberry did his seminar work, he did not address waiver provisions, however, impact fee methodology would provide the means for differentiating commercial, agricultural, light industrial, and residential. Fees for each would be different.

MOTION: Mr. Morse motioned to exempt agricultural buildings from the provisions of the impact fee ordinance. Dr. Marston seconded.

DISCUSSION: Mr. Fillio stated that he had a problem exempting agricultural buildings. Mr. Morse stated he was mostly referring to barns. Mr. Fillio stated that they first need to determine what is a business and what is a farm— sometimes barns become commercial ventures. Mr. Morse then offered to amend his motion.

MOTION: Mr. Morse motioned to amend the motion by adding the term nonresidential to the type of buildings exempt (nonresidential, agricultural buildings). Dr. Marston seconded. With no further discussion, the motion to amend carried 3-2 (Mr. Fillio and Mrs. Fillio opposed).

On the original motion, now amended Chairman Smith called the vote. Mrs. Fillio asked that the board be polled.

Chairman Smith – in favor
Mr. Fillio – against
Mrs. Fillio – against
Dr. Marston – in favor
Mr. Morse – in favor.

The motion to exempt nonresidential, agricultural buildings from the provisions of the impact fee ordinance carried 3-2.

Mr. Day will draft the language exempting nonresidential, agricultural buildings from the impact fee ordinance and will place it in section F.4.

MOTION: Mrs. Fillio motioned to hold a public hearing on December 6, 2001 at 7:15 pm to place the Impact Fee Ordinance on the March 2002 Zoning Ballot. Mr. Fillio seconded. With no further discussion, the motion carried 5-0.

Elderly Housing Ordinance: Chairman Smith opened discussion on the elderly housing ordinance. This discussion was for the board to decide whether or not to amend the ordinances' cap on number of units allowed annually. Ms. Carriel stated that there needs to be a consensus as to whether or not she should proceed with either developing supporting data or drafting an amendment.

Mr. Fillio stated that he thinks such an amendment is premature. Ms. Carriel said that if the board has concern that the intent of the ordinance was not as it reads, the board could revisit it. Mr. Day stated that elderly housing may not have any impact on the schools, but it does have an impact on other town services. Mr. Fillio asked what basis there was to order the ceasing of elderly housing construction – there is no burden to the school system.

Atty. Ratigan stated that his client, Jeff Caley would be affected by such an ordinance. He thinks elderly housing should remain exempt from growth control. He said these development may indeed impact the fire, police and ambulatory services, however, those impacts still do not add up to the amount of taxes each one of these elderly homes will pay out with a single burden to the school system. These homes will not be exempt from paying full property taxes – that more than counteracts what police and fire could impose. The statutes say that towns can implement growth control if there's an impact. He suggested the board call the towns of Exeter and Portsmouth and ask what impact their elderly housing communities are having on their town and services. He said he doesn't think there is a basis to show that elderly housing has an impact to the town.

Noting the time, Chairman Smith directed that this issue be brought up again at the next meeting.

Ewald Mylar: It was noted that the Ewald minor lot line adjustment proposal has met all conditions set forth in the board's approval that was given on November 8, 2001. Mr. Shepherd confirmed that he inspected the bounds and found them acceptable. He indicated that he applied his approval stamp and signature to one of the plans and to the Certification of Monumentation form. Chairman Smith reviewed the plan and for the purposes of recording into the minutes, he applied his signature to the mylar and to four sets of plans. He then directed the recording secretary to record the mylar at the Registry of Deeds.

Jonathan Shafmaster – 2-Lot Subdivision Proposal at 8 Freeman Street – Public Hearing: At this time, Mr. & Mrs. Fillio left the board's table and took a seat in the audience, as they are abutters to the proposal. Chairman Smith opened the public hearing at 9:50 pm and designated Alternate Day to vote in this matter. Representing Jonathan Shafmaster was Atty. Jeff Towers, general counsel for the applicant. Atty. Towers indicated that he has been before the board on various occasions on behalf of Mr. Shafmaster. He then displayed a large version of the proposal. He stated his reason for the hearing was to request the board's approval for a two-lot subdivision of a 160-acre parcel located at 8 Freeman Street and identified as MBL# 9-8-6. He stated that the division would be for a 100-acre and a 60-acre parcel, respectively. He stated that the version of the plan he was displaying was prepared before the final version plan as wetlands were still being delineated.

He then pointed out Route 108/107, the parcel's frontage on it, the old post office building, Freeman Street, and existing barns and paddocks. He stated that developer, Steve Hallet was before the board last month to discuss his plans to for the 100-acre piece and that he (Hallet) was trying to work out a suitable access to the back parcel. The 60-acre parcel would be accessed off of Freeman Street as it currently is and the 100-acre parcel would be accessed off of Route 108/107 should the soils be suitable. He noted frontage measurements.

Mr. Morse asked about the frontage on the 60-acre parcel that is accessed off of Freeman Street. Atty. Towers responded that Ms. Carriel also mentioned concerns about that and that the idea was to create a backlot using the Town's backlot provisions, which require 240 feet of road frontage – that would be with the primary lot containing 200 feet of road frontage and the backlot with 40 feet of road frontage.

Mr. Morse replied that that ordinance requires 240 *contiguous* feet of road frontage. Atty. Towers noted that the total frontage was not contiguous and that he thought that the 200+ feet of frontage along Route 108/107 for the 100-acre parcel would be sufficient in meeting the frontage requirement. He said with respect to the contiguous issue, he might request a waiver. Ms. Carriel replied that the road frontage requirement was a zoning ordinance provision, thus he would need to apply for a variance. Atty. Towers asked what the reasoning was behind the 240 feet having to be contiguous.

Mr. Day replied that the backlot formula was intended to provide a means for a landowner to build a single residence behind his home, a total of two homes, thus this provision does not help Mr. Shafmaster as the backlot here is proposing an estimated 68 units.

Atty. Towers offered another scenario where a cul-de-sac could be designed at the end of Freeman Street. Mr. Day reminded him of the town's 1,000 foot maximum cul-de-sac limit.

Conservation Commission Chairman Larry Smith stated that Atty. Towers mentioned that the wetland mapping was not completed. He said that until that is done there's nothing to talk about. If that area is wet like the county map indicates, a road cannot be located there. Atty. Towers agreed. Mr. Day added that it appears they are dead in the water at this point.

Members then questioned the layout of the boundary lines. Atty. Towers stated that those line were drawn that way to accommodate Mr. Hallet and that there is not reason why they can't be moved to another location as any subdivision they would propose would involve keeping the existing horse farm as it is shown now. If this project doesn't succeed they will consider other options for the land.

Mrs. Fillio asked if the farm was commercial or agricultural, and if anyone lived there. Atty. Towers replied that there is no residence there.

ABUTTER'S COMMENTS

Miriam Chevalier stated that since they are bringing in animals and training them, it appears the property is used commercially. Dr. Marston commented that if they are not raising any foal than it's a livery stable.

Atty. Towers stated that whatever it is used for now it will be the same. Shyre Keddy asked Atty. Towers if Mr. Shafmaster would consider selling the property to someone else as she said she knows for a fact there is someone who wants to buy the entire parcel without the subdivision. Atty. Towers replied that Mr. Shafmaster is open to all offers. Mrs. Fillio asked if it was Mr. Shafmaster's intention to sell the property. Atty. Towers answered that the property may be sold.

Atty. Towers went on to say that he would consider different alternatives to accessing the 100-acre piece versus seeking a variance. Ms. Carriel advised the board that they have two choices of action: 1) deny the application as presented, or 2) continue the hearing to another date and time allowing the applicant to submit new plans.

There was some discussion over whether or not the applicant was required to re-apply if the plans were substantially different than what was submitted this evening.

MOTION: Mr. Day motion to reject the application by reason of its incompleteness and its violation of Article VI – Lot Area and Yard Requirement. Dr. Marston seconded.

DISCUSSION

Atty. Towers requested the board continue this hearing until January 2002 to give him time to prepare another plan. Ms. Carriel noted that one of the Maplevale subdivision plans were altered and revised and in that instance the board continued the public hearing so they didn't have to reapply.

Mr. Day withdrew his motion and Dr. Marston withdrew his second.

MOTION: Mr. Day motion to continue the public hearing for Jonathan Shafmaster's 2-lot subdivision for MBL# 9-8-6 to January 17, 2002 at 7:15 pm. Dr. Marston seconded. With no further discussion, the motion carried 4-0.

Chairman Smith closed the public hearing for Jonathan Shafmaster and Mr. and Mrs. Fillio returned to the board table and resumed their voting status.

Julian Dunlop – Carmen's Restaurant – Discussion: Chairman Smith opened discussion with Julian Dunlop at 9:24 pm. Mr. Dunlop was before the board to discuss another option for his use of the Carmen's Restaurant property. He began his presentation by noting that even though he was advised by the board to consult with an attorney regarding the grandfathered status of the property, he has not done so as of yet. He then produced a set of conceptual plans for a single-story, full foundation restaurant contained within the original footprint of the existing building. He presented conceptual drawings of the front and side elevations of the proposed building and an approximate layout of the interior. He stated that he is back to square one where he is proposing a restaurant only at this time and later he will build a new house after removing the existing house.

He continued to say that the restaurant would be located in the same location it is now as moving it would create the involvement of the state in which he would have to abide by new rules – he wishes to keep the project on a local level. Handicap accommodations would be made. He then pointed out the building, the handicap parking, handicap ramp, foot traffic that would be generated at the back of the building, a covered entrance, parking, and delivery loading area.

Members agreed the project would be treated as a site plan review. Mrs. Fillio stated that she thought the plans were great as did Mr. Morse. Mr. Dunlop indicated the restaurant would serve three meals a day.

Article XVIII was then noted: *...A nonconforming use or structure shall not be...in the event of damage, destruction or demolition of any building not conforming to this ordinance, said building may be rebuilt to its former nonconforming use in the same manner and extent, provided construction is started within one year of its damage, destruction or demolition and is completed within two years.*

Mr. Fillio stated that "the same manner and extent" is at the discretion of the board as they are nebulous terms. Mr. Day stated that case law encourages conformance. Members then held discussion on what constituted the terms the "same manner and extent" and whether or not the building could be moved back away from the road but still kept within the same footprint size. Members agreed that the new building should conform to today's setbacks – the building can conform, but the use won't as it is grandfathered.

Mr. Fillio stated that it doesn't make sense to build a new building without meeting the setbacks when all the other codes are being met. Members then advised Mr. Dunlop to submit a site plan review application for formal consideration. Instructions were given about the process and the submission deadlines.

Building Permits : Discussion was then held regarding a letter from Town Counsel concerning the transferability of building permits. It was their (Town Counsel) suggestion that the board amend that article by deleting the reference to non-transferability. It was their opinion that the board has the authority to regulate the property but not the ownership of the property. The majority of members disagreed and further stated that if an applicant was issued a building permit and the proposed plan changed or was revised, the applicant would lose his permit altogether and have to go to the back of the line and reapply. Further discussion resulted in the board agreeing not to amend the article at this time.

Cul-de-sacs: Ms. Carriel noted that concern was raised at previous meetings regarding cul-de-sac lengths and the exact points in which they and loop roads are measured. She has checked with some other towns and noted that each measures from different spots. In her opinion, they should measure from the street to another road or intersection. Some towns don't even allow cul-de-sacs or dead ends because they want to develop a transportation system.

Mr. Fillio stated that he does not understand what the basis is for determining road length limits. Mr. Day responded they are limited by reason of fire and police protection as well as congestion. If there is a 1,000-foot road with a 1,000-foot loop road off the end of it, and a disaster should occur, there would be only one access in and out. Mr. Fillio responded that that is the same case in roads that are 200, 500, 1,000 or 2,000 feet long – what motivates the town to pick 1,000 feet over 500 feet?

Ms. Carriel stated that the ordinance allows for only twenty homes to be serviced by any single road before a second access must be designed. Brandywine Drive was noted as a poor example of a town road. It is the consensus of many planners that the longer the road, the less efficient it is for trash pick-up, snowplowing, school bus routing, deliveries, and for travel in general.

At this time Mr. Morse presented a question regarding the board's opinion on whether or not he would need a building permit to move his house from its existing lot to another lot. Members replied that a building permit would be required, however, they did not believe it would be considered a new dwelling building permit, thus he would not have to wait in line as outlined in the Growth Control Ordinance. He would not be proposing any new growth. It was noted that this is the opinion of the planning board only.

With no further business,

MOTION: Dr. Marston motioned to adjourn. Mrs. Fillio seconded. With no further discussion, the motion carried 5-0 and this November 15, 2001 Planning Board meeting ended at 10:17 p.m.

Respectfully submitted,

Catherine Belcher, Secretary

Minutes completed and on file November 16, 2001.

Approved: Dec 16, 2001