



MEMORANDUM

To: Planning Board
From: Juliet T.H. Walker, Planning Director *JTW*
Subject: Staff Recommendations for November 16, 2017 Planning Board Meeting
Date: November 9, 2017

II. DETERMINATIONS OF COMPLETENESS

A. SITE REVIEW

1. The application of **Pamela Thatcher, Owner**, and **Charlie Seefried, Applicant**, for property located at **180 Middle Street**, requesting Site Plan Approval.

Planning Department Recommendation

Vote to determine that the application is complete according to the Site Plan Review Regulations and to accept the application for consideration.

III. PUBLIC HEARINGS – OLD BUSINESS

- A. The application of **Goodman Family Real Estate Trust, Owner, and Aroma Joe's Coffee, Applicant**, for property located at **1850 Woodbury Avenue**, requesting Conditional Use Permit approval under Section 10.1017 of the Zoning Ordinance for work within the inland wetland buffer to construct a 785 ± s.f. restaurant/take-out building and 195 ± s.f. attached patio, with drive thru service and a walk –up window, with 6,870 ± s.f. of impact to the wetland buffer. Said property is shown on Assessor Map 239 as Lot 9 and lies within the General Business (BD) District. *(This application was postponed at the August 17, 2017, September 21, 2017 and October 19, 2017 Planning Board Meeting).*

Description

The applicant has requested to postpone to the December 21st Planning Board meeting.

Planning Department Recommendation

Vote to postpone this application to the December 21, 2017 Planning Board meeting

III. PUBLIC HEARINGS – OLD BUSINESS (cont.)

- B. The application of **James A. Mulvey Revocable Living Trust, Robert J. Bossie Revocable Trust and Peter Brown Living Trust, Owners**, for property located at **150 Spaulding Turnpike**, requesting Conditional Use Permit approval under Section 10.1017 of the Zoning Ordinance for work within the inland wetland buffer to remove two buildings, remove pavement and replace with pervious and impervious pavement, for a truck sales outlet with vehicle storage, with 2,570 ± s.f. of permanent impact to the wetland buffer. Said properties are shown on Assessor Map 236 as Lots 34, 35 & 36 and lie within the General Business (GB) District. *(This application was postponed at the September 21, 2017 and October 19, 2017 Planning Board Meetings).*

Description

The applicant has requested to postpone to the December 21st Planning Board meeting.

Planning Department Recommendation

Vote to postpone this application to the December 21, 2017 Planning Board meeting.

III. PUBLIC HEARINGS – OLD BUSINESS (cont.)

- C. The application of **Borthwick Forest, LLC, and KS Borthwick, LLC, Owners**, and **Borthwick Forest, LLC, Applicant**, for property located on **proposed subdivision road to be created off Borthwick Avenue**, requesting Amended Site Plan Approval to increase the height of the proposed office building (footprint of 16,700 ± s.f.) from 3 stories to 4 stories (gross floor area of 66,800 ± s.f.), with related paving, lighting, utilities, landscaping, drainage, multi-use path and associated site improvements. (Original Site Review approval was granted by the Planning Board on May 18, 2017). Said properties are shown on Assessor Map 241 as Lots 25 & 26 and Assessor Map 233 as Lots 112, 113, & 114 and lie within the Office Research (OR) and the Single Residence B (SRB) Districts. *(This application was postponed at the September 21, 2017 and October 19, 2017 Planning Board Meetings).*

Description

The applicant has requested to postpone to the December 21st Planning Board meeting.

Planning Department Recommendation

Vote to postpone this application to the December 21, 2017 Planning Board meeting.

III. PUBLIC HEARINGS – OLD BUSINESS (cont.)

- D. The application of **Deer Street Associates, Owner**, for property located at **181 Hill Street, (“Lot 6”)**, requesting Site Plan Approval for the construction of a 4-story mixed use building with a penthouse (including interior parking garages on two levels, retail space on the ground floor, office space on the first floor and 43 residential units on the second, third, fourth and penthouse floors) with a footprint of 12,574 ± s.f. and gross floor area of 81,498 ± s.f., with related paving, lighting, utilities, landscaping, drainage and associated site improvements. Said property is shown on Assessor Map 138 as Lot 62 and lies within the CD5 District. (*This application was postponed at the October 19, 2017 Planning Board Meeting*).

Description

On November 8, 2017, the applicant submitted revised plans and a response that addresses comments from the Planning Board at the October 19, 2017 meeting. Revised plan sheets address minor plan changes that would typically have been recommended conditions of approval. The narrative response addresses the following comments discussed at that meeting:

1. TAC-recommended Peer review.

The applicant has removed the previously proposed sump pump below the lowest level garage in favor of waterproofing the garage slab bottom and perimeter foundation walls. The applicant requests that the peer review of the stormwater management system be retracted as they feel the issue was this design feature and not the Stormwater Management Plan.

2. Proposed additional requirement to reduce runoff volume.

The applicant states that the proposed retention system significantly reduces the volume of stormwater flow into the City stormwater system at peak periods and that the total runoff rate from the site is reduced by a third from pre-existing conditions. The applicant outlines physical and regulatory considerations for the site that they feel the Board should consider within the narrative response.

3. Alteration of Terrain Permit

The applicant states that discussions with NHDES are ongoing and they request that issuance of the AOT permit (if it is deemed to be a requirement) is determined to be a condition of the approval.

<h4><u>Planning Department Recommendation</u></h4>
<p><i>Vote to postpone Site Plan Approval until such a time as the applicant can either confirm that an AOT permit is not required for this project or secure an AOT permit.</i></p>

IV. PUBLIC HEARINGS – NEW BUSINESS

- A. The application of **Gregory C. and Sandra M. Desisto, Owners**, for property located at **36 Shaw Road**, requesting Amended Conditional Use Permit approval under Section 10.1017 of the Zoning Ordinance for work within the inland and tidal wetland buffers to eliminate gutters and one catch basin, relocate a manhole and eliminate the pervious paver parking area, with a 396 ± s.f. reduction of permanent impact and 35 ± s.f. of temporary impact to the wetland buffer. Said property is shown on Assessor Map 223 as Lot 22 and lies within the Single Residence B (SRB) District. (Conditional Use Permit approval was granted on September 17, 2015 and Amended Conditional Use Permit approval was granted on January 19, 2017 by the Planning Board.)

Description

The applicant is proposing to construct a new home, barn, driveway, septic system rain garden and associated grading almost completely within the 100 foot wetland buffer.

Conservation Commission Review

The Commission reviewed this application at the November 8, 2017 meeting and voted postpone it to a future meeting so that a site walk can be scheduled and the applicant can consider other locations for siting the proposed development.

Planning Department Recommendation

Vote to postpone this application to the December 21, 2017 Planning Board meeting.

IV. PUBLIC HEARINGS – NEW BUSINESS (Cont.)

- B. The application of **Carolyn McCombe, Trustee; Elizabeth Barker Berdge, Trustee; and Tim Barker, Owners**, for property located on **Martine Cottage Road**, requesting Conditional Use Permit approval under Section 10.1017 of the Zoning Ordinance for work within the inland wetland buffer to construct a 1,936 ± s.f. single family home and a 1,200 ± s.f. detached barn, with a 22' x 52' paved parking area and a 25' x 5' rain garden, with 23,125 ± s.f. of impact to the wetland buffer. Said property is shown on Assessor Map 202 as Lot 149 and lies within the Rural (R) District.

Description

This is a request for an amendment to an application that was originally approved on September 17, 2015 and amended January 19, 2016. This amendment is requesting elimination of gutters, a catchbasin, relocation of a manhole and elimination of a parking area.

Conservation Commission Review

The Commission reviewed this application at the November 8, 2017 meeting and voted to postpone it to the next meeting pending revised drawings that clearly show the proposed changes.

Planning Department Recommendation

Vote to postpone this application to the December 21, 2017 Planning Board meeting.

IV. PUBLIC HEARINGS – NEW BUSINESS (cont.)

- C. The application of **Pamela Thatcher, Owner, and Charlie Seefried, Applicant**, for property located at **180 Middle Street**, requesting Site Plan Approval for a proposed 3-story four unit residential building with a footprint of 2,606 ± s.f. and gross floor area of 9,348 ± s.f., and a proposed 2-story one unit residential carriage house with a footprint of 959 ± s.f. and gross floor area of 1,918 ± s.f., with related paving, lighting, utilities, landscaping, drainage and associated site improvements. Said property is shown on Assessor Map 127 as Lot 8 and lies within the Mixed Residential Office (MRO) District and the Historic District.

Description

The applicant proposes to convert a single-family dwelling and carriage house to five (5) residential dwelling units, along with related site improvements. The HDC granted approval for the proposed site plan on October 4, 2017 with the following stipulations:

- 1) The HDC supports the retention of the front steps and chain railings as is, given the historical significance of the building.
- 2) The lighting shall be removed from the application and submitted for an Administrative Approval.
- 3) The retaining wall design shall be removed from the application and submitted for an Administrative Approval.

Technical Advisory Committee Review

The TAC reviewed this application on October 31, 2017 and voted to recommend approval to the Planning Board, with the following stipulations:

- 1) The sidewalk along Middle Street shall be no narrower than it is today.
- 2) Add the water service on the property.
- 3) Fix the typo for the line marked OGU on the Grading, Drainage & Utility Plan.
- 4) Add a note to the plans or details indicating that when planting trees, the metal cage shall be removed entirely and the top 2/3 of the burlap shall be removed.
- 5) The Landscape Architect of record shall witness and approve the planting method and depth.
- 6) Change the base for the cobblestone pavers to be gravel instead of stone.
- 7) Add required notes to Landscaping Plan per Section 2.13.4 of the Site Plan Review Regulations.
- 8) The fence along the northeasterly property line shall be lowered to no more than 3' in height for a distance of 6' back from the front property line.

On November 7, 2017, the applicant submitted revised plans addressing the items above to the satisfaction of the Planning Department. The recommended revision to the existing fence may require that the applicant receives a revised approval from the Historic District Commission.

Planning Department Recommendation

Vote to grant Site Plan Approval with the following stipulations:

Conditions Precedent (to be completed prior to the issuance of a building permit):

1. *The site plan shall be recorded at the Registry of Deeds by the City or as deemed appropriate by the Planning Department.*
2. *The plan sheet(s) submitted for recording shall include the following notes:*
 - “1. *This Site Plan shall be recorded in the Rockingham County Registry of Deeds.*
 2. *All improvements shown on this Site Plan shall be constructed and maintained in accordance with the Plan by the property owner and all future property owners. No changes shall be made to this Site Plan without the express approval of the Portsmouth Planning Director.”*

IV. PUBLIC HEARINGS – NEW BUSINESS (cont.)

- D. Request of the **Sheila L. Raeburn Living Revocable Trust, Owner, Sheila Lynn Raeburn, Trustee**, for the restoration of involuntarily merged lots for property located at **737 Woodbury Avenue** (City Council Referral).

Description

The owner has provided evidence that the existing lot was previously two lots as described in deeds recorded in the Rockingham County Registry of Deeds and a surveyed plan showing the dimensions of those lots. According to her letter to the City Council, no owner in the chain of title ever voluntarily merged the two lots, and therefore the lots were involuntarily merged by the City. The owner now requests that the Council restore the merged lots to their premerger status, as authorized by RSA 674:39-aa.

Statutory Requirements

RSA 674:39-aa requires the City Council to vote to restore “to their premerger status” any lots or parcels that were “involuntarily merged” by municipal action for zoning, assessing, or taxation purposes without the consent of the owner. Unlike all other lot divisions, there is no statutory role for the Planning Board in this process, but the City Council is referring such requests to the Board for its review and report back.

The statute defines “voluntary merger” and “voluntarily merged” to include “any overt action or conduct that indicates an owner regarded said lots as merged such as, but not limited to, abandoning a lot line” (RSA 674:39-aa, I). It is therefore the City Council’s responsibility to determine whether a merger was voluntary (i.e., requested by a lot owner) or involuntary (implemented by the City without the owner’s consent). If the merger was involuntary, the Council must vote to restore the lots to their premerger status. Following such a vote, the City GIS and Assessing staff will update zoning and tax maps accordingly. It will then be up to the owner to take any further action to confirm the restoration to premerger status, such as recording a plan at the Registry of Deeds.

It is important to note that the granting of a request to restore lots to their premerger status does not mean that the resulting lots will be buildable or, if already developed, will conform to zoning. The statute states that “*The restoration of the lots to their premerger status shall not be deemed to cure any non-conformity with existing land use ordinances*” (RSA 674:39-aa, V). For example, the restored lots may not comply with current zoning requirements for lot area, frontage and depth, and the re-establishment of a lot line between any two premerger lots may introduce a new nonconformity with respect to maximum allowed building coverage or a minimum required side yard where a building already exists on one of the premerger lots. In such cases, the owner(s) of the applicable lot(s) would have to apply to the Zoning Board of Adjustment for the necessary variances to restore zoning compliance or to allow future development.

Analysis

The existing lot is located in the Single Residence B district, which requires a minimum lot area of 15,000 sq. ft. and continuous street frontage of 100’. If City Council grants

the request to separate the existing lot into the two original lots, both of the lots will be nonconforming for lot area and the vacant lot will also be nonconforming for street frontage. The lot with the existing residence will be 14,954 sq. ft. with 120' of street frontage and the vacant lot will be 7,472 sq. ft. with 60' of street frontage. Therefore, the vacant lot will require variances for lot area and frontage in order to construct a dwelling. The lot with the existing residence will now become nonconforming as to lot area and variances should be required to create a new substandard lot area for the existing dwelling. Such variances would normally be required by the Planning Board if the lots were divided through the subdivision process; however, since the request is to divide lots in accordance with RSA 674:39-11, there is no regulatory authority for staff to ensure that all these zoning details are addressed prior to the un-merger.

Planning Department Recommendation

Vote to recommend to the City Council whether the parcel at 737 Woodbury Ave should be restored to its premerger status as two lots, and municipal zoning and tax maps be updated to identify the premerger status of the lots as described in deeds recorded at the Rockingham County Registry of Deeds and shown on the Standard Property Survey prepared by Easterly Survey dated 10/4/17.

V. CITY COUNCIL REFERRALS/REQUESTS

- A. Request of Attorney Kevin Baum, representing owner of **200 Spaulding Turnpike**, to Comment to Proposed **Gateway Mixed-Use Zoning Amendments** and Request to Extend Proposed District to Farm Lane.

At the October 16, 2017 City Council meeting, the Council discussed a letter from Attorney Kevin Baum representing the owner of 200 Spaulding Turnpike which requested that the City Council consider an amendment to the proposed Gateway Mixed-Use Zoning to extend the proposed district to Farm Lane. The Council voted to refer to the Planning Board and Councilor Dwyer requested that the Planning Board also consider other potential properties to recommend for inclusion in the Gateway Mixed-Use Zoning Districts at a future time.

At this time, this item is on the Planning Board's agenda for discussion purposes only as it has not been advertised as a public hearing and abutters have not be notified.

The Planning Department would like to receive input from the Planning Board members on other properties (if any) to consider including in the proposed Gateway Mixed Use Zoning District and what additional information the Planning Board would like to review prior to scheduling a public hearing on this re-zoning request.

VI. OTHER BUSINESS

A. Request for Acceptance of Drainage and Flowage Easement at **1275 Maplewood Avenue.**

Heritage Hill Condominium Association has agreed to convey to the City a drainage and flowage easement across its property located at 1275 Maplewood Avenue. Please see the memo dated October 26, 2017 from Suzanne M. Woodland, Deputy City Attorney, for further details.

Planning Department Recommendation

Vote to recommend to the City Council the acceptance of a drainage and flowage easement from Heritage Hill Condominium Association for property located at 1275 Maplewood Avenue.

VI. OTHER BUSINESS (cont.)

- B. Request for Reconsideration/Rehearing of September 20, 2017 Detached Accessory Dwelling Unit Denial, for property located at **36 Artwill Avenue**.

Description

This is a request for rehearing (or appeal) of the Planning Board's decision not to grant approval for a conditional use permit for a detached accessory dwelling unit in September. Typically, per state law (RSA 677:15 I), appeals of Planning Board decisions "concerning a plat or subdivision" go directly to the superior court. However, RSA 676:15 III provides for an initial layer of review at the local level for Planning Board decisions involving interpretation or application of a zoning ordinance. In that case, the process would be to go first to the Planning Board to request a rehearing and then to the Zoning Board of Adjustment should that request be denied before, ultimately, proceeding to the superior court. Because the Planning Board, as the conditional use permit granting authority for ADU conditional use permits in the Zoning Ordinance for ADU, this is technically an interpretation or application of the zoning ordinance (not site plan review or subdivision).

There is some ambiguity as to how RSA 676:5 III applies to the ADU ordinance in this case. The language of RSA 676:5 III is as follows:

If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.

The first ambiguity relates to the first highlighted section above. It would appear that this process for local review only applies when the planning board is making a decision on a subdivision or site plan review application. That is not the case for the ADU application. In the next highlighted section, the statute indicates that, if the zoning decision is based on zoning adopted according to the provisions of "innovative land use controls" as defined in RSA 674:21, the local appeal procedure is not applicable. The ADU ordinance, which grants the Planning Board permitting approval to grant conditional use permits, is one of the items listed under innovative land use controls under RSA 674:21.

Therefore, it is unclear whether an application that is submitted to the Planning Board for a zoning provision that was adopted under the innovative land use controls (but is not an application for a subdivision or site plan review) is subject to the local appeals process or

not. The attorney for the applicant apparently agrees with the ambiguity in the interpretation of these statutes as he has also submitted an appeal to the superior court on his client's behalf.

If the application is in fact appealable at the local level, then the applicant has filed the request for rehearing within 30 days of the Board's decision and the Board must consider the request at the next scheduled meeting. The Board must vote to grant or deny the request or suspend the decision pending further consideration. If the Board votes to grant the request, the rehearing will be scheduled for the next month's Board meeting or at another time to be determined by the Board.

The decision to grant or deny a rehearing request must occur at a public meeting, but this is not a public hearing. The Board should evaluate the information provided in the request and make its decision based upon that document. The Board should grant the rehearing request if a majority of the Board is convinced that some error of procedure or law was committed during the original consideration of the case.

Planning Department Recommendation

Vote to deny the request for a rehearing.