

**PLANNING BOARD  
TOWN OF PETERBOROUGH, New Hampshire**

**Minutes of August 29, 2012**

**Members Present:** Chairman Rick Monahon, Rich Clark, Joel Harrington, Alan Zeller, Alternate Jerry Galus, Alternate Audrey Cass, Tom Weeks, Ivy Vann and Barbara Miller, *ex officio*.

**Staff Present:** Carol Ogilvie, Director Office of Community Development; Laura Norton, OCD Administrative Assistant

The meeting was called to order at 7:00 p.m. Chair Monahon introduced the members and staff. He noted there would be a presentation for the Magic Flute Child followed by comments from the public. He noted written communications by both the Magic Flute Child owner and abutter Jim Stewart. He concluded by noting “there will no new information distributed tonight, it is my hope to receive clarifying information on what we have” adding “there is no enormous value in repeating the things that have been stated over and over.”

Chair Monahon recommended the members listen to and use the presentation as an opportunity to ask questions and identify concerns.

Chad Branon introduced himself as a Civil Engineer with Fieldstone Land Consultants located in Milford, New Hampshire. “I represent Ms. Goohs and the Magic Flute Child” he said. Mr. Branon noted Parcel No. U018-069-000 in the Village Commercial District would be a retail store for children’s clothing and toys. He also noted “there have been a number of communications that have taken place since the first time we were before this Board.” He went on to add “we have made plan changes to address and meet the concerns of this Board as addressed in the Staff memo.” He noted he would simply “go through the staff comments and walk you through the plan.” Mr. Branon then distributed the updated plan to the members.

**Lighting:**

Mr. Branon reiterated the 1650 lumen restriction with no light trespass over the property line for the existing light pole located on Route 202. “We have modified the lighting plan to accommodate that” he said. He went on to note the minimum luminance of 0.0, the maximum of 9.1 and the average of 1.29 “falls under the requirements for lumens.”

**Curb Cuts:**

Mr. Branon stated the Staff report noted the current curb cuts were wider than regulations allow and that an actual curb cut at each access point with turning radii must be identified.

**Travel Lane:**

Mr. Branon noted the Staff Report indicated better delineation of traffic flow for the site. He pointed out additional painted arrows to reiterate the one-way traffic flow. He noted he had put together turning and movement work sheets which showed a standard UPS delivery vehicle maneuvering around the southwest corner of the building.

**Buffer:**

Mr. Branon noted the applicant has met the zoning requirements for the 30-foot buffer; “we have dealt with the buffer” he said adding “and it seems to be a topic of some differences of opinion.” He went on discuss what may be done to enhance the buffer including the addition of a stockade fence along the back side of the swale to prevent parking in that area. He re-emphasized “we have no intention of using that area for parking.” Chair Monahon asked about the height of the fence with Mr. Branon replying “actually it is a split-rail fence similar to the one on the north side of the building.” He also pointed out additional landscaping to enhance the buffer adding “this is very similar to what was requested by the abutter.”

**Parking and Proposed Uses:**

Mr. Branon noted the plan showed five (5) parking spaces “which is one *more* than what is required for a retail use this size.” He acknowledged the store sold Italian Ice and Gelato and noted “we have taken the advice of town staff and redone the parking calculation.” He reported that the applicant estimated that 2% of her business is associated with candy and ice cream and that 5% of her floor space is dedicated to that use. “Essentially that does not change the parking requirements” he said adding “but by adding one space we have addressed the concern accordingly.” Mr. Weeks asked “did you take into consideration the outdoor seating for the ice cream?” Mr. Branon replied “no, that area is not intended specifically for eating ice cream” adding “it can be used to just sit and read a book. Not to mention that on Phase II that whole area goes away.” A brief discussion about the eating area followed with Chair Monahon interjecting “I have never of heard of outdoor seating being included in parking calculations.”

**Drainage:**

It was noted that the drainage for the site goes to a catch basin at the southeast corner of the lot and that. Mr. Branon noted the concern of Mr. Stewart and his counsel that the catch basin be assessed to make sure it can accommodate the run off. Mr. Branon noted that the run off should actually be reduced with the addition of vegetation and the reduction of the impervious material on the site. Mr. Branon reviewed the amount of impervious material being removed noting “it is fairly substantial in both Phases.” He also noted the catch basin in question had been cleaned of significant debris that may have caused problems in the past. “It is in full operation now” he said adding “and given the rain we recently had it did very well.”

Chair Monahon asked if they planned to have asphalt under the grass area. Mr. Branon replied that for the first phase “we intend to leave it in and mulch/loam/seed over it. “It is a matter of economics” he said. He likened having the asphalt to “not very different than having a septic tank in your lawn, when you put enough over it to make it viable for (vegetation) growth.”

Mrs. Stewart asked if the improvements to the buffer and the incorporation of the fence and landscaping were to be in Phase I or Phase II. Mr. Branon replied “Phase I.” A brief discussion about the time frame for the improvements to be installed followed. It was noted that the type of trees requested were difficult to obtain this time of year. Ms. Goohs noted “they will be planted as soon as possible.” It was noted that the plan note an allowance time frame for vegetation to be installed.

**Performance Standard #6:**

As noted by Mr. Weeks in an earlier meeting this performance standard is not met on the plan and

cannot be waived by the Board. Mr. Branon noted it was possible to have internal connections to adjacent lots “but I don’t think it applies to adjacent lots where no development exists.” He went on to note “given the wording of the staff memo and the inability of the Board to waive this we have provided a sketch for you.” He added “If it is a requirement and absolutely needed we could accommodate an access.” He presented the sketch to the members and pointed out the access. As he did so he also pointed out the many constraints of the lot. Chair Monahon interjected “thank you for addressing that.”

Mr. Branon continued “and last, traffic” he said.

**Traffic:**

Mr. Branon reviewed the threshold for traffic studies. He addressed the questions of whether or not a traffic study was indicated or required and the current status of the intersection as well as the anticipation that Ms. Gooh’s use would further degrade the intersection and lower the Level of Service from an “E” to an “F” (failed) category. He cited a traffic study by Stephen Pernaw done in 2001 for the potential expansion of the Cumberland Farms store that occupied the space at that time. He noted a correspondence from Mr. Stewart’s attorney that the study determined the level of service at that time as being an “E” thereby requiring the Planning Board, under its own regulation to consider §233-35 of the site plan review regulations. Mr. Branon noted “for the record, I disagree” adding “§233-35 of the regulations “pertains to requesting a waiver when you think you are creating a problem.” This proposal will have no significant impact on the intersection or the level of service. It will not trigger any problems” Mr. Branon also pointed out some corrected hatch marks on the plan.

Chair Monahon thanked Mr. Branon and asked if the members had any questions. Mr. Weeks asked for clarification on the definition of the 30-foot vegetative buffer and the bituminous surface and curb.

Jim Stewart introduced himself and his wife. He noted for the record that he is the abutter to the south and north adding “our primary concern has always been buffer and how the proposed use will impact us on safety and traffic.” Mr. Stewart looked to the members and said “at the last meeting someone said something about trying to work together to see if we could come to a resolution. We thought about that and there are some minimal things that we could come to an agreement on and not pursue this any further.”

Mr. Stewart continued with what he referred to as the fence (ownership) debate. He gave a brief history of who built the fence and when. He noted where most fences are 6 or more feet tall, this one was only 5 feet in height. He noted he was 6 feet tall “and with the exception of my wife, we are a pretty tall family.” Mr. Stewart submitted several photographs of the fence from different areas of his house and yard for the record. He pointed out the views noting “there is not much for screening or buffering.” Mr. Stewart then referred to his screening plan which included a row of Arborvitae trees amongst other landscaping. He noted these trees grew quickly to heights of 12 to 15 feet tall and 8 to 10 feet wide. “It is a good choice for a vegetative type of buffer” he said.

Mr. Stewart went on to note his concern over people parking in the buffer if it is not well defined. He touched on several ways (“curbing, gravel, picket fence, whatever”) to delineate that area. The

members briefly discussed these options. Mr. Stewart noted “anything but grass, that is not a vegetative screening.” He also noted the pavement would have to be torn up to plant the trees correctly, noting “a 3-foot *Arborvitae* in three inches of dirt will never become a 15-foot tree.”

Mr. Stewart briefly spoke about the lighting as well. He read from §245-33 D *Light and Glare* and contended there was a conflict between that regulation and the exemption for a low light (1650 watt) incandescent bulb. He added “when any provision of any ordinance seems to be in conflict the most restrictive provision prevails.” He suggested the applicant had two choices, remove the light and carry on or go to the ZBA for a variance. He reminded the members of §233-5 which states all projects must comply with the town’s zoning regulations before being approved for site plan review and any requests of the ZBA must be approved/obtained before the final approval is granted.

Mr. Stewart then mentioned ice cream. He noted the potential for 6 or 7 ice cream windows in 900 square feet of space. Mr. Zeller immediately replied the statement was irrelevant “let’s not bring Kimball’s into this, they have hundreds and hundreds of customers a day” he said. Ms. Vann added “and ice cream is the only use for that part of the building.” A brief discussion of the use and how an applicant would have to come back to the Planning Board if the use changed followed.

Mr. Stewart looked to the members and said “if you require any food on premises be consumed inside, I would be happy with that. If it is so small it should have no effect on her.” Mr. Stewart brought up the example of a local convenience store that had come before the ZBA saying they wanted to serve coffee “and we wound up with a Dunkin Donuts.” He added “that was not an honest application to the Board and I believe this is not an application to the Board.” “I take offense to that” replied Ms. Goohs.

Mr. Stewart went on to point out several other factors. He noted the addition planned for Phase II “is twice the size of the Ocean Bank which has two exits to two separate highways.” He noted that approval of Phase II was premature and questioned whether or not the project should phase with two separate applications. He also spoke briefly about the Level of Service (LOS) at the intersection and asked Mr. Branon about his qualification as a traffic engineer. Mr. Branon replied with a list of his qualifications “and while I am not a professional traffic engineer, through my dealing with DOT and District 4 as well as contact done through due diligence I think the site is feasible. We have the driveway permit for Phase I and Mr. Belanger (4<sup>th</sup> District) did not see any problems with the approval for Phase II.” Mr. Stewart replied “what is the Level of Service right now? Can you tell me?” Mr. Harrington intervened asking “what is the intent of this questioning?” Mr. Stewart replied “the intent is to show his professional opinion has no impact.” Mr. Harrington asked Mr. Branon if his conclusions were based on his involvement with the traffic professionals. Mr. Branon replied “yes, and you would have to find a use much larger than this to change the Level of Service.” Mr. Stewart interjected “I would like to go on the record to state he is not qualified, that is all I want.”

A brief discussion about trips-per-day and peak seasons followed. Mr. Branon reminded the members the applicant has an existing store just ½ mile away. “Her customers are already using the intersection” he said adding “I own a number of manuals on trips per hour (“I do too” interjected Mr. Stewart); this is not a big toy store, it will have no significant impact on the adjacent intersection.”

In closing Mr. Stewart noted “my last question. Will you keep both stores open?” Several members

noted that question as irrelevant to the case and asked to move on. Mr. Stewart noted they were basing traffic impact on what the store does currently, “how is that not relevant” he asked.

Mr. Branon reiterated a traffic study was not indicated “it is merely an exercise and has no positive gain before us” he said. He added “and the traffic study in 2002 was done for Cumberland Farms projections.” Mr. Branon added “we come before you with a low generation use, missing typical peak hours and a design that is sensitive to the one-way traffic flow. We have consulted with DOT on a number of occasions, there is no reason in my mind that a study is warranted.”

Mr. Stewart asked for clarification noting “the buffer is all in Phase II, what if it never happens?” he went on to say “please apply this as a condition to Phase I, thank you.”

A brief discussion and reiteration about the buffer, split rail fence, curbing, swale and traffic flow followed. Specifically Mr. Harrington asked about a portion of the southwest corner of the lot. He noted the grade was such that “it looks like the water is not even getting to the swale.” Mr. Branon was quick to point out the elevation distance and slopes that would allow drainage. Mr. Harrington replied “thank you, that is why I am a lawyer and you are an engineer.”

At this time Chair Monahon clarified that Phase I included the buffer requirements. “The fence, the swale, all in Phase I” he said. Mr. Branon nodded his head and said “Phase I.” Mr. Stewart interjected “the plans show them in Phase II.” Mr. Branon touched on phasing, “it is similar to what the performance standards are seeking in the Master Plan” he said adding “what are our intentions? Here we show two plans, it is an excellent approach.” Mr. Branon went on to note that while Phase I would be substantially complete before moving to Phase II “the importance of getting them both approved at the same time is important.” He noted they would have to receive DOT approval for the curb cut “but we would not have to come back to this Board” he said. He also noted there was no intention of Phase II happening within a one-year time frame. “If that happens all is going *very* well. But that is not reasonable and is not my client’s intension, we need to express that.”

Chair Monahon commented on the Master Plan approach Mr. Branon spoke about “knowing your intentions is good, but Phase II being approved without a re-visit is something we have to address.”

George Sterling introduced himself and advised the Board “in my opinion you don’t have to read too deeply into the Village Commercial District (VCD) regulations to know that its intent is to develop light manufacturing, retail and commercial endeavors while encouraging residential development on the second and third floors.” He went on to note the use and re-use of buildings is always encouraged. Mr. Sterling noted that encouraging mixed use residential and retail development would reduce the probability of commercial sprawl but would increase traffic in the VCD. “There is no mistake” he said adding “you cannot have one without the other.” He encouraged the commercial properties along Route 202 to work together and “be good commercial neighbors.”

Mr. Sterling spoke about the intent of a 30-foot buffer in the ordinance and noted “that buffer is intended to protect the homes on the north side of Ames Avenue, not the commercial lots next to each other in the VCD.” He concluded by noting it made no sense to have buffers between the commercial properties “when the intent (of the ordinance) is to increase the use and density of every property in the VCD.” He concluded by advising the Board not to use the ordinance against itself. “I

believe this plan, both Phase I and II meets the site plan review of the Village Commercial District and fits very nicely within the Master Plan. Thank you.”

Ms. Goohs spoke briefly about her belief that the building itself was never abandoned. “It has always been for sale” she said. She noted the building was owned by Rite Aid Corporation and that she has tried to obtain it “for some time now.” She noted the site had been tied up in unrelated litigation “but the taxes have been paid and Rite Aid takes care of the property.” She thanked the Board for hearing her and reiterated the building/site has never been to a level of abandonment.

Mr. Galus asked for clarification of what her store consisted of. Ms. Goohs replied her store was a combination of children’s clothing, toys, candy and Italian Ice. She noted she had items on consignment as well adding “in the new spot I have less room so I will be leaving the consignment behind.” Mr. Galus also asked about the fenced-in seating area, specifically its size and its use. Mr. Branon interjected “for the record the 30 to 40 people figure was represented by Mr. Stewart, not us.”

Mr. Stewart contended he did not represent anything and stated “I said it was about 30 by 32 square feet” adding “that is a fact, not my representation.” Mr. Branon noted that there was a large gravel area on the site (where the fuel tanks used to be) and they felt it appropriate to cover the blighted area. Ms. Goohs also noted it would help keep the children in a confined space. A brief discussion about the planting of trees and shrubs, what would be needed to confirm vegetative growth over asphalt and drainage issues, catch basins and swales followed.

Mr. Zeller asked who managed the site with Ms. Goohs replying “PJC Realty manages it.” Mr. Zeller asked “is it fair to say they have provided no assistance in improving the site?” Ms. Goohs replied “no.” Mr. Zeller continued “is it not uncommon for them to offer assistance if they have a direct interest in the property?” Ms. Goohs reiterated that she has not received any assistance from the Rite Aid Corporation or PJC Realty Management.

Mr. Zeller addressed Mr. Stewart and noted “you showed us several photos of the lot taken from your house and yard.” He asked “were you living there a year ago?” Mr. Stewart replied he and his family had been there for 2½ years. “How did (Hurricane) Irene affect your property?” asked Mr. Zeller. Mr. Stewart replied a portion of the temporary fence fell and hit and took down a portion of the stockade fence. Mr. Stewart also noted a major water main break earlier this year in front of his house on Route 202; “it was a massive break” he said. He noted a lot of flooding and the basin being washed out. “It was fixed a few months ago and did well during the last heavy rains we had” he said. Mr. Zeller noted Mr. Stewart bought the house next to this site, and seems to be completely content with it going unoccupied forever. “What is it you want?” he asked. Mr. Stewart replied “what is mentioned in my letter, I would be happy with that.” Mr. Harrington interjected “he is not obligated to say anything, in fairness to him.” Mr. Zeller replied “I was just wondering how he felt.”

Ms. Vann asked “is there TIF money available?” with a laugh Mr. Harrington said “excuse me that was my question, I just asked Ivy that!” A brief discussion about storm water run-off and the catch basin followed. Mr. Branon noted “the drainage from a storm water standpoint is much improved.”

Chair Monahon summarized with “I think we have exhausted the topic” and asked the members how they felt about deliberation given the time. The members responded positively and Chair Monahon noted “alright, the smartest way to approach this will be using the Staff memo.”

#### Lighting:

Mr. Harrington stated that the issue raised by the abutter about the existing light fixture in the southeast corner of the lot had been adequately addressed. A brief discussion of §245-33 D (9) followed. Mr. Clark noted “the light has been there, it was there when they bought the house. It did not just appear.”

#### Curb Cuts:

The revised plan and introduction of curb cuts and the redefinition of the sidewalks was discussed. Mr. Harrington noted “this has been adequately addressed in their proposal.”

#### Travel Lane:

A brief discussion about the travel lane through the site ended with Ms. Vann noting “it is adequate, we saw the UPS truck getting through, it made the turn.”

#### Buffer

One member noted “ah, the infamous 30-foot buffer.” They members briefly discussed the proposed line of vegetation (including Arborvitae and Cherry trees) as being fast growing and full screening. It was noted that given the time of year it would be difficult to plant the trees. Mr. Clark noted he understood that “but there should be a time frame imposed on the planting.” Chair Monahon noted “screening is a sensitive issue.” Mr. Weeks, acknowledging the problem of obtaining the trees in the fall noted the trees should be planted as quickly as possible. Ms. Goohs interjected “when the snow melts I will put them in.” The members agreed the screening should be completed as soon as possible allowing 12 months as an absolute maximum time limit.

The members also briefly discussed the pervious/impervious ground covering on the lot. Ms. Vann felt the impervious material should go “all of it” she said. Ms. Miller disagreed noting an additional hardship for the applicant. The members also had a brief discussion on the definition of “gravel” with Mr. Clark noting “we need to be clear in terminology.” Mr. Weeks suggested using the term “bituminous material.”

Mr. Harrington interjected “I would like to address a couple of issues raised by the abutter.” He reviewed the existing fence noting its height but adding “there is no height requirement for a fence.” He went on to note that when a commercial use abuts a residential use a minimum of a 30-foot buffer will be provided. “That buffer may consist of either a fence or of vegetative screening” he said. The members briefly discussed the function of screen/buffering. Referring to the buffer Ms. Vann noted “it is not the DMZ.” Mr. Galus added “the buffer is not the playground.” With Mr. Clark concluding “well the argument is the buffer *should not be* the playground.”

#### Parking/Proposed Use:

It was clarified that there were now 5 parking spaces in Phase I. Both Ms. Miller and Mr. Weeks agreed the plan satisfied the regulations. The members also discussed the seating capacity of the outdoor (fenced-in) area and agreed on a maximum number of 12 seats. A brief discussion about

the sale of gelato and ice cream followed with Mr. Harrington noting “it is not based on ice cream, it is based on 10 customers an hour in a higher profile space.” Ms. Vann noted that if a customer drives in and finds the lot full they would simply drive back out. With a smile Mr. Harrington replied “not my wife, she likes to open the wallet.” “They have met the criteria” concluded Mr. Clark.

Drainage:

The members agreed they had gone through this issue in detail. “We have exhausted that” said one member.

Performance Standard #6:

Chair Monahan noted “as this is written in my view it is not contemplating the condition of the site.” The other members agreed and briefly discussed the intention of the performance standard and how to handle it. Ms. Vann asked if it was alright just to “pass on it.” Mr. Weeks replied “I don’t think we can.” Ms. Miller suggested that “in an attempt to meet the requirement” that guidance from the town attorney may be helpful. The members agreed providing a sketch of the accessibility to the other (undeveloped) lots would suffice for this application.

Mr. Weeks noted in accordance with §245-339 D (6) “outdoor lighting shall be turned off or reduced in intensity by 11:00 p.m.” and asked “can we put that on the plan?” Mr. Harrington noted that that for safety and/or security reasons the lights may be reduced in intensity but not completely turned off.

Ms. Miller interjected “that site has been blighted for more than 15 years. As a Board of Selectman member I get more calls about that area than anything else.”

Ms. Ogilvie noted “we still have not talked about Phase II.” Ms. Vann suggested the Board approve Phase I with “whatever conditions warranted and with the understanding they would have to come back for Phase II so we don’t have to hash it out right now.” Mr. Harrington interjected “it is not because we don’t want to *hash it out* tonight! Ms. Vann replied with a laugh, “I meant it was premature in that we don’t know what the use is a year out.” Mr. Branon replied “I disagree” adding “over time things change, regulations change. In a year’s time my client may not be able to use the plan I prepared for her. Securing Phase II is an important part of this application.”

Mr. Weeks noted exterior elevations, a state driveway permit and the addition of a bicycle rack were necessary for Phase II. Ms. Miller noted that financing opportunities would be more attractive with an approval for both phases. Mr. Carrara noted the first 25 feet of the driveway must be paved per Town regulations.

A motion was made/seconded (Vann/Harrington) to approve both Phases of the Magic Flute application with the following conditions:

Phase I will be approved with the addition of planting arbor vitae trees in the buffer, the addition of one more parking space, the paving of the first 25 feet of the entrance to the lot and the removal of all of the impervious surfaces on the lot.

Phase II will be approved with the provision of external elevations (meeting all zoning regulations) and a bike rack. That plan for the outdoor seating area be restricted to a maximum of 12 people and that for security and/or safety purposes the lighting may remain on but must be dimmed at 11:00 p.m.

There was no second. Ms. Vann withdrew her motion.

Chair Monahan noted “I see we have some pros and cons here” adding “can I take a straw poll of who is *for* total removal of the impervious surface (Mr. Weeks and Ms. Vann) and *against* (Ms. Miller, Mr. Clark, Mr. Harrington and Mr. Zeller).

As a result of that poll Chair Monahan noted “alright, we have a majority, the asphalt will not be completely removed.”

A second motion was made/seconded (Vann/Harrington) to approve both Phases of the Magic Flute application with the following requirements: that the outdoor seating for 12 persons be marked on the plan, that the plantings for the buffer be in Phase I of the plan, that an additional parking space (bringing the total to 6) be marked on the plan. Additionally, approval for Phase II requires exterior elevations for the addition, the addition of a bike rack to the plan, and approval from DOT for the curb cuts given the increased size of the building.

Those in favor were Ms. Miller, Mr. Zeller, Ms. Vann, Mr. Harrington, Chair Monahan, and Mr. Clark. Mr. Weeks was opposed. Alternates Cass and Galus did not vote.

Mr. Stewart asked for clarification regarding the timing of the requirements (asking for example if several years went by before Phase II could be initiated would the approval still be valid). Ms. Vann replied “yes it would, it is approved tonight so it will be approved when the time comes.”

Respectfully submitted,

Laura Norton  
Administrative Assistant