

PLANNING AND ECONOMIC DEVELOPMENT COMMITTEE

DECEMBER 19, 2006

A meeting of the Planning and Economic Development Committee was held on Tuesday, December 19, 2006 at 7:00 p.m. in the Aldermanic Chamber.

Chairman Brian S. McCarthy presided.

Members of the Committee present: Alderman-at-Large Steven A. Bolton, Vice Chair
Alderman Richard LaRose
Alderman Michael Tabacsko

Members Not in Attendance: Alderman Mark S. Cookson

Also in Attendance: Alderman-at-Large David W. Deane
Alderman Daniel Richardson
Alderman Richard Flynn
Katherine E. Hersh, Div. Dir., Community Devel. Div.

COMMUNICATIONS

From: Richard Flynn, Ward 7 Alderman
Re: Concerns regarding a Nashua Planning Board Decision to Allow
A Change from a 2 Story Addition to a 3 Story Addition at the
MacMulkin Dealership at 3 Marmon Drive without a Public Hearing

**MOTION BY ALDERMAN BOLTON TO ACCEPT, PLACE ON FILE, AND REQUEST AN
OPINION OF THE LEGAL DEPARTMENT AS TO WHETHER ANY LAWS WERE
TRANSGRESSED AND WHETHER THE APPLICANT IS BOUND BY THE
REPRESENTATIONS HE MADE AT THE PLANNING BOARD HEARING**

ON THE QUESTION

Alderman McCarthy

Before we vote on that, I'd actually like to recap a couple of events that concern the memo. I'd like to ask Director Hersh to join us. Last Friday Alderman Flynn, Alderman Teeboom, and myself met with Mr. Bangs and some of the other abutters, and also with Attorney Prunier and the owner of the subject real estate. I had a fairly lengthy discussion of the events around the site plan. Alderman Teeboom has left us a note, which covers his impressions of that meeting. I have some slightly different impressions. I guess what I'd like to do is ask Director Hersh to update us on where we are based on having had that discussion.

Katherine Hersh

The conversation I think clarified what the thought process was to get to where we are today. That is that the plan that came into the Planning Board showed a 2-story building. Once that was approved as those plans started to come in, MacMulkin Chevrolet was talking about parking on the roof of the building, which was not part of the site plan and not part of the site plan approval, but apparently was part of the internal discussion. I'm not sure at what point. That in itself didn't seem to the planner to trigger going back to the Planning Board. Then as they warped through that, the Fire Marshal's office said if you're going to park on the roof, then it's going to trigger fire suppression, apparatus, which means you're going to have to put this structure up above the parking in order to be able to handle that. Then ultimately they came back and said it's just no different to put the roof on top of parking on the roof as opposed to putting in the fire suppression system.

The only reason I go through that is because you can see sort of how this kind of each piece of it kind of added on and incrementally didn't seem to in and of itself be that much bigger than the piece before it. In reality, it should have gone back to the Planning Board. It should have gone back to the Planning Board when there was a proposal to put the parking on the roof because that was an additional use on that site and additional use on the building. We are sending it back to the Planning Board. It should have gone back to the Planning Board. Certainly there needs to be Planning Board review because there needs to be some determination of the use of that third floor or limitations of use of that 3rd floor, or actually whatever the determination is of the Planning Board. We do about 10,000 inspections a year. I think we do about 4,000 permit applications a year. I don't even know how many things we have going before the Planning Board and the ZBA. We strive to be perfect. On occasion we miss one. We did miss this one, and I apologize.

We did talk a little bit last week about whether or not the laws that kind of triggered the fact that we didn't catch this, and I really don't believe that's really what the issue is. I really believe that we should have caught it. It was a change in the site plan. It should have gone back to the Planning Board. So it will go back to the Planning Board and hopefully we will catch every single one of them in the future. On occasion we may not.

Alderman McCarthy

So the situation at the moment is that we deem them to not be in compliance with the site plan, and they need to file for an amendment that describes what is, unfortunately, already built on the site.

Katherine Hersh

That's correct.

Alderman Flynn

(inaudible – not speaking into the microphone) – it's a little bit different than what I understood from Friday's meeting. It's not too far off from where we were on Friday. We had an approval for a 2-story building. My understanding on Friday was that somehow it had been overlooked that there was going to be cars parked on the roof. There was no plan put together with any comments from the fire department, so no one looked at the municipal needs for supporting the cars being stored on the third story.

Katherine Hersh

My understanding, and I am only getting this second hand some of which was really from that meeting as well, that is that there was no mention of the cars being parked on the roof at the Planning Board meeting, nor was it reflected on the site plan. From what Mr. Schofield from MacMulkin Chevrolet said at that meeting on Friday, his intent was always to park cars on the roof. That was just always part of his plan. It never got fertilized and never got on the plan. That planner wasn't overly clear, but I got the impression thought that that was not clear to him until afterwards, but it was something that Mr. Schofield had felt was always part of the plan even though it hadn't been verbalized. Is that the way you understood that meeting?

Alderman Flynn

He said you could make the natural assumption if we have an elevator going up to the roof that it must be to take cars up there.

Katherine Hersh

Right. But I don't think the elevator was actually part of the original site plan. It was part of what was submitted afterwards in comparison. If you remember that view that showed what the building permit application showed originally with the elevator up over the roof, over the parapet, and the second one showed the 3 story. The original site plan did not, my understanding; it did not show an elevator.

Alderman Flynn

So the situation kind of is here. This has been a hotly contested corner of this City now for over 30 years. We did have a public hearing the first time. There were some stipulations. At that public hearing I have gone through the minutes just as you have. There's no mention at all about parking cars on that roof. Now it sounds like you're saying that you've looked at the original submitted site plan, and it may not even show an elevator on the roof. There are no attachments showing that the fire department has looked at it and confirmed that they have no objections to building the building in its present configuration. Is that right?

Katherine Hersh

No, when they came in with the building plans, which is after the Planning Board approval when they came in with the building plans, that's when they came in with the elevator and they came in with the cars to park on the roof. That's when it triggered when the Fire Marshal's office reviewed it, which they wouldn't do with any building plan. That's when that triggered the discussion about needing the suppression system on the roof.

Alderman Flynn

Certainly the neighborhood would have expected, in looks like in this case there's been a shortfall on their expectations, but certainly the neighborhood would have expected that after the first public hearing, and the 20 pages of dialog, and the 15 people that got up and expressed their concerns about this encroachment into their home and into their backyards, that there would have been enough of a spotlight on this project to bring it forward again with any changes. Now we've had them change it to be parking on the roof. Then we've had a

subsequent change on top of that later on down the line. I don't know exactly when that happened. That must of happened in May of 2005 when they decided that now not only do we want to park cars on the roof, now we want to have it fully enclosed on the roof. So there's been a series of things going on, but no opportunity, I guess, to share that information with the neighborhood. That's always a terrible situation when the neighbors don't find out what's going on. They find out after the fact. Mr. Bangs found it – he did spend one afternoon going out and collective signatures because this is, as I say, this is a very difficult situation to find this out way after the fact, and after its all been built, and pretty much a sealed deal here. I'm not sure what can be done to help set things right.

Alderman Bolton

It can be torn down. If the Planning Board doesn't approve it...

Alderman Flynn

The problem here may not be that the dealership is in error, it might just be something within the City that has failed these residents. That's kind of my take on this at this point. I guess we'll have that discussion at a Planning Board meeting. Is that what you feel is going to happen now? There will be a memo from you or someone from your staff?

Katherine Hersh

Actually there was a memo that went to the Planning on Thursday night, but I was not at that meeting, so I don't know what the discussion was. Actually that was Thursday night before Friday's meeting. That wasn't really brought up at the meeting on Friday was it?

Alderman McCarthy

What I heard you say before is they're actually going to come in with an amended site plan, and there will be abutter notification and a public hearing, and a new approval process for the site plan as it currently exists.

Alderman Bolton

Really this is not an awful lot different than the situation involving the building out on Kinsley Street, which ended up being 3 stories when it was supposed to be 2 stories. Someone made an error, a building permit got issued in error, and the owner should have realized that that was different from the representations made when the approval was obtained. This is very similar. An error was made. If they got a building permit for this, an error was made because it did not comport with the approved site plan. But that it is the applicant's problem.

The applicant is not permitted to take advantage of errors that they sort of encourage the City staff to make, or that the City staff makes blindly. The applicant's plans ought to conform to the approvals they have previously received. If those plans do not, that is really a deception on the part of the applicant. The fact that some City employee doesn't catch one does not relieve the applicant of the obligation to follow all of the conditions of the previous approval. Condition means anything they submit is part of that approval package. So if they submit something showing 2 stories and then later on they come in with a building permit application for 3 stories, that is their problem and not the fault of the City personnel that did not catch it. They have no right to try and fool people. They get no benefit from fooling people. That should have been

apparent to this applicant. It certainly should have been apparent to that other applicant. That's the way these things have to be treated.

If they go back with an amended site plan, the neighbors will get all the notifications. They'll be in a position to say don't make us tear down what we already built can't we come to some accommodation. There may be some compromise that the neighbors can live with or that the Planning Board basically thinks the neighbors ought to be able to live with. I don't really think it's fair to castigate the City staff because mistakes will happen. It's unfortunate, but the fact is if the applicant submits building plans that do not comport with the site plan approval that that applicant has previously obtained. That is the applicant's fault. It's not the City's fault.

Alderman Teeboom

Have you introduced suspension of the rules?

Alderman McCarthy

No we haven't.

Alderman Teeboom

Could you introduce under suspension of rules?

Alderman McCarthy

We're in the middle of a motion on the original communication that was on the floor when you came in.

Alderman Teeboom

Help me out, which communication is that?

Alderman McCarthy

The one from Alderman Flynn, which appeared on the committee's agenda.

Alderman Teeboom

I did want to mention a couple of things on that submittal. I must agree with Alderman Bolton that if you look at the back of this document, the top of the drawing is 2 stories, and the bottom of the drawing is 3 stories. I mean anybody can see that. What kind of bothers me, I'm not quite as easy on the staff as Alderman Bolton is. What bothers me is you look at the back of Alderman Flynn's – right in front of this document there's another document. There was written on May 5, 2005. I remember this initial site plan was submitted in November 20, 2003.

A year and a half later up comes before the City apparently a request to change things. Because when you read this document, it's a very short document. It was written by Mike Yeomans. Mike Yeomans says and acknowledges that you now have a 3-story device. Three stories. He says it actually looks better. It looks prettier. I'm not paraphrased on exactly – I would have to read the paragraph, but he says it looks better. It is cost effective to build 3 stories instead of 2. It doesn't tell you in here it's cost effective because of the fire department's

issue about cars being parked on the roof. There's cars parked on the roof because that was in the original agreement that nobody knew about. Sort of a secret agreement to the Planning Board apparently because nobody knew this company was parking cars on the roof. When it came down to looking into the plans the fire department come up and said you're going to park cars on the roof that are fueled, cause they have an elevator but they are owner's cars, you got fire suppression. This came out in a meeting. Fire suppression meant kind of like an overhang, like a mobile gas station. That's not easy to build. So what they decided to do then is build a third floor. That came before Mike Yeomans. Mike Yeomans didn't say that's more than an error. That's more than an error. I'm sorry that is a lot more there. Mike Yeomans is an advanced planner. He's been on a long time. This is not his first job in the City. He considered this...

Alderman McCarthy

Alderman Teeboom, I don't want to get into discussions about the performance of staff. That is the province of the department. What we're dealing with here is the facts of what happened, and how we're going to remedy it, and how we're going to prevent from happening in the future. I'm not interested in talking about

Alderman Teeboom

The facts (inaudible – talking over each other) Mr. Chair.

Alderman McCarthy

I'm not interested in talking about staff performance. You want to talk about...

Alderman Teeboom

The facts are in evidence in this document Mr. Chairman. You can't deny it.

Alderman McCarthy

That's fine. I'm not trying to deny them. This is not the appropriate venue to have that discussion. If you have concerns about staff, please take them up with the Director of the Division.

Alderman Teeboom

I already have a separate memorandum. Now back to the situation at hand. We had this meeting. That's in the memorandum, which I'll ask to introduce later. There were 3 discussions made to try to remedy the situation.

Alderman McCarthy

Why don't you hold off until your memo has been introduced?

Alderman Teeboom

Well 70 on this Alderman Flynn's memo and stuff from Mr. Bangs – 70 citizens. 69 or 70 citizens signed this petition.

Alderman Bolton

Point of order Mr. Chairman. Mr. Teeboom wasn't even here when the motion was made. So I don't know how he can be discussing it. He doesn't even know what it is.

Alderman Teeboom

I'm talking about Mr. Flynn's memorandum Mr. Alderman Bolton. That was obviously just explained to me.

Alderman McCarthy

Alderman Teeboom, I haven't recognized you.

Alderman Bolton

I'll bet you Mr. Chairman he cannot tell us what the motion is? So how can he possibly be...

Alderman Teeboom

Are we talking about this document that Alderman Flynn introduced?

Alderman Bolton

What's the motion?

Alderman Teeboom

I could care less what the motion is. I care about this document.

Alderman McCarthy

Okay stop both of you. I'm going to allow Alderman Teeboom to address the communication. For your information, the motion on the floor is to accept the communication and to place it on file.

Alderman Teeboom

And I gather that much because you said it was this communication.

Alderman Bolton

There's much more than that.

Alderman McCarthy

And there was a request – that's right. Alderman Bolton's motion was to request an opinion from Corporation Counsel as to whether anything was done. How did you phrase it Alderman Bolton?

Alderman Bolton

In contravention of the law.

Alderman McCarthy

Contravention of the law.

Alderman Bolton

And whether the applicant is bound by the representation that is made to the Planning Board at the public hearing.

Alderman Teeboom

I'll address the rest when I get to my other memorandum.

Alderman Richardson

Concerning that memo from Alderman Flynn, have we had any communication in any form that anybody knows of from the applicant or the applicant's representative?

Alderman McCarthy

Yes. The applicant and the applicant's attorney were present at the meeting on Friday and participated in that discussion.

Alderman Richardson

Friday the 15th?

Alderman McCarthy

Yes.

Alderman Richardson

Okay. I haven't seen any minutes of that meeting?

Alderman McCarthy

There are no minutes. It was a discussion. It's not a meeting under the terms of the Right to Know Law. There was no quorum of any committee present. There is a memo from Alderman Teeboom, which are his impressions of what happened at the meeting.

Alderman Richardson

I see. To tell you the truth Mr. Chairman, his impressions are the only ones that are available to me. Do you know of any other impressions that are available?

Alderman McCarthy

I have my own. I have not committed them to a memo to send to represent to this committee as if they were verbatim minutes. There are no verbatim minutes. We will have to rely on the opinions of those present. What it's important is the conclusions that are reached by this committee and what can be worked out between the staff, the applicant, and the abutters in order to resolve the situation before the Planning Board.

Alderman Richardson

Have there been any offers by the applicant or his representative so far?

Alderman McCarthy

The applicant has had substantial discussions Friday particularly about landscaping. There is another issue which is not I don't think addressed in Alderman Flynn's memo, which is that while there was a desire to keep a lot of the mature trees and cycle the landscaping fairly gradually, that the applicant – and I'm reading between the lines, in order to prevent sap from falling on the cars in the lot, took down a large portion of the pine trees all at once. That has also been the cause of some concern with the abutters. There was discussion of that the applicant is more than willing to look at ways to mitigate that. I think that will be a great topic for the assessment of stipulations at the Planning Board hearing on the site plan amendment.

Alderman Richardson

Okay. The other question I have is regarding the architect. Was the architect present at this meeting that you're referring to?

Alderman McCarthy

No.

Alderman Richardson

I would see them as a major player since they are the ones ostensibly who changed the design.

Alderman McCarthy

I would contend that that is between them and the company who hired them. I don't know that the architect under their contract owned the responsibility for obtaining permits. That may have been left to the applicant themselves.

Alderman Deane

Thank you. I had one question. Was it always the intent of the applicant to park motor vehicles on the roof?

Alderman McCarthy

That's a question that I doubt we'll ever know the answer to. Certainly the applicant seems to think that it was, but it certainly from what I've seen in the submissions did not become clear until after the original site plan approval was made.

Alderman Deane

I don't claim to be a structural engineer, but we do live in New England and we are subjected to significant snow loads at times. In order to park automobiles on the roof, there would have to be some substantial increases in the structural integrity of the steel I-beams, and whatever other source of structure would be submitted, and for them to overbeef and over spend that amount of money with no intention on doing something with it further just brings an interesting point. Why would somebody invest that kind of money?

Alderman McCarthy

Well unfortunately we don't get to see that level of detail at site plan review. That doesn't happen until the building application comes in with the structural plans.

Alderman Deane

But currently the building is constructed and it will support X amount of pounds.

Alderman McCarthy

It currently has a third floor. There is an interior floor where the roof was on the original submission.

Alderman Deane

So it probably is constructed well over to accommodate that significant weight.

Alderman McCarthy

It certainly looks like it.

Alderman Flynn

Well the meeting last Thursday night as we try to wrap up where we're going forward with this. I recognize what the motion on the floor is. Since you brought it up Director Hersh, I wondered if perhaps Alderman LaRose – what was the outcome of the letter that was presented by Mr. Yeomans recapping his assessment of an overview of the issues that were brought up by Mr. Bangs. Mr. Bangs actually is here tonight, but he asked me if I would just call him up if absolutely necessary. I know there was a letter presented by Mr. Yeomans and it talks about what his concerns were. I have a copy of that letter. I really haven't myself – it isn't clear to me what was the Planning Board's decision to do with that letter.

Alderman LaRose

What we did is we accepted and placed on file and I advised the Planning Board that your letter that was accepted and placed on file would be discussed at this meeting this evening. So that's as far as we went with it.

Alderman McCarthy

I think part of it, Alderman Flynn, is that since that happened there has effectively been a decision by the planning staff that the building that's there does not match the site plan that is approved, and that another site plan submission to the Planning Board needs to be made. That puts them back one. That doesn't need to be a decision of the Planning Board. The staff can decide that something requires action by the Planning Board. That is what has happened. So at this point, I anticipate that they must submit an entire new site plan for amendment and that that will trigger the normal Planning Board process, and there will be a hearing scheduled on that site plan amendment.

Alderman Flynn

So that is over and above what we discussed last Friday of course. That subject didn't come up last Friday (inaudible) confused and thought that the original plan called for parking on the roof.

Katherine Hersh

That's correct.

Alderman Flynn

Or that's the way it was presented to us by the dealership.

Katherine Hersh

We continue to go through and pull all of the plans and all of the applications, and all of the submissions. Some projects come in and they just come in all in one piece. Like the whole building comes in in one building permit. This came in in 3 phases. So it was a lot to pull and find. The Planning Director Mr. Houston has spent quite a bit of time both Friday afternoon and yesterday and determined after reviewing all of that information that it really should have gone back to the Planning Board.

Alderman Deane

I had a question through you Mr. Chairman to Director Hersh. So if there were any amended structural plans that will be noted by a stamped date of when they were received?

Katherine Hersh

From when the City received them?

Alderman Deane

When the plans were brought in for review of the structure, they go through the process. You can get the permit and they go through Bruce or someone goes through and looks at the structural engineering drawings and everything. We should basically have one set of structural drawings for that building. If the original structure was beefed up to carry that sort of a load, it should be displayed. If there was an amended plan brought in after the fact that should also be on file and stamp dated too?

Katherine Hersh

Yes. That's correct.

Alderman Deane

Okay. Thank you.

Alderman Bolton

I think there's some confusion about what has to be submitted at the time of the site plan approval. You may not even have the entire structure designed at that point. It may be a rendering of what the façade will look like. But there's no requirement at that point in time that all of the engineering drawings and everything else that will eventually be required to get a building permit be submitted at the time of site plan approval. Frankly even when they are, it wouldn't be unusual for the Planning Board to delve into the structural integrity and whether the loads are going to be carried. That's not really the Planning Board's role. That's the building official's role and the Building Department purview at the time when a building permit is applied for. I don't know what the actual sequence here was. But it would not at all be a typical to get site plan approval and only then hire your architect and engineer to actually design the building. Whatever the drawings were at the time of site plan approval, the later building has to be consistent with. There may not be anything that shows us at that point in time whether they had decided what thickness the columns had to be.

Alderman Deane

Maybe I misunderstood and Director Hersh I thought she said the building was brought in in 3 different phases?

Katherine Hersh

That's for a building permit, not for...

Alderman Deane

I'm talking about the building permit itself and not the site plan approval as Alderman Bolton has alluded to. So it was brought in in 3 different phases?

Katherine Hersh

Well there's 3 different phases of construction that were brought in.

Alderman Deane

Okay. That was my question. Thank you.

Alderman Flynn

I'm sure you know these pages in and out. I'm very likely they missed to fall into some place I don't want to be. Under Section 16-122 of the NROs under site plan submission, Section g, it says, "the following information must accompany the site plan". Item 2 is a certificate from the fire department that fire requirements must be met. Wouldn't we have had to have that if we had known that there was parking on the roof? So there would be a certificate from the fire department in that file at the time the plan is being approved? It has a list of information that must be shown on the site plan, and a list of information that must accompany the site plan. I'm on Section 16-122, Section (g)(II).

Alderman McCarthy

In the old zoning ordinance...

Katherine Hersh

But this project was approved by the old zoning codes. So Alderman Flynn is in the right book. My understanding is that there was no mention of parking on the roof, and so therefore the fire department did not weigh in that we needed a suppression system on the roof because there was no indication when they initially reviewed this as part of their site plan, as part of the preliminary application for the Planning Board that there was parking on that roof. That came in afterwards. When the building came in for a building permit, this issue of the parking on the roof came up. That's when the Fire Marshal's office weighed in and said oh, parking on the roof. The Fire Marshal's office doesn't go back and look at what was approved by the Planning Board or anything else like that. They say parking on the roof by the Fire Code, you need to have a fire suppression system, blah, blah, blah, then they go off in that direction. So it's pretty clear that the whole issue of parking on the roof was not brought up at the Planning Board meeting and was not on the site plan. So that's why there wasn't anything from the Fire Marshal's office with concern about the parking on the roof or the need for a fire suppression system.

Alderman McCarthy

I guess I would add that while there is a requirement that the fire department sign off on site plans, that is not a comprehensive review of all fire details about it. Things like the nature of the fire suppression systems are not known at that time. That's reviewed as the plans for the actual building are reviewed. Typically their site plan review is through the accesses from the public ways provide ample opportunity to get trucks in and out. Is there sufficient water in the area to allow fire operations? Are there enough access from different directions so that the building can't be cut off by a tree falling across a road? When the building permit comes in, issues like

is the fire suppression system sufficient? Is there the right emergency lighting or the place of sprinkler does it need to be sprinklered? All of those issues are reviewed further then. While I would expect they might have noticed parking on the roof if it were in submission, it's also clear that they could potentially pick that up during building permit review because it is a suppression issue not an access site plan issue.

Alderman Flynn

But we would have a document form them, so it would give us quite a bit of information what they really saw in the site plan?

Alderman McCarthy

We should have something about the site plan, yes.

Alderman Teeboom

If you look again at the drawing and you look at Mike Yeoman's report May 5, 2004, which is in Alderman Flynn's documentation, it says there are 2 elevation drawings. The upper drawing reflects what was supposed to be built. It doesn't say when it was proposed to be built and 14 site stipulations that went before the Planning Board back in 2003. It doesn't mention anything about parking. Nevertheless it mentions here proposed to be built. So it not clear when it was proposed to be built. When we talked about this last Friday in the meeting, the developer made clear if you look at the drawing; there's a heavy reinforcing area on the top of the roof. That heavy reinforced area was reinforced, as you said, to provide parking. What you don't see is the suppression part. It's like a blue structure on top of that.

Then after that was submitted with the reinforced parking, the fire department came in. The proposal was changed, and then they come up with a new proposal where he talks about the roof could be entirely enclosed. The bottom shows a revised image. The top of the elevator is still somewhat visible, but the overall look of the building is greatly enhanced. That's what the staffer said and on they went. There's a process that's faulty here. Between the 14 site stipulations, it didn't mention any of this. Then the parking on the roof has lead to the fire suppression thing, which lead to the enclosure, which lead to this report. None of which was revealed to the neighbors apparently until the building went up. That process is faulty. It's busted. It's broken. It isn't just a single instance. I don't know what can happen.

I looked at one of the planning laws and it says if mistakes are made and the mistakes are so serious that you build it, you don't necessarily have to tear it down as a State law definition of not forcing the developer to take that third story out. So it's not a clear-cut case at all on what would happen. We should get to the remedy that's provided in that meeting of the 15th whether it is satisfactory or not. I do think Director Hersh should review her entire process between the time this gets submitted to the Planning staff, to the Planning Board, and the secret of events that happened after that. It's certainly a broken process.

Katherine Hersh

I'm sorry. It's not a broken process. It's not a broken process at all. We deal with thousands of these things a year. This one should have gone back to the Planning Board. Because it came in incrementally, and it might have been before you came in Alderman Teeboom, but it is consistent with what we heard on Friday. Each one of these changes came in incrementally, as a planner dealing with 15 or 20 other ones of these on his desk at any given time, he's looking at this oh it's just a very small change from the...and didn't go back and look at the Planning Board approval. Should have gone back and looked at the Planning Board approval. It should have gone back to the Planning Board. It's very clear. We're very clear on what our process is. It's clear in the ordinances and it's not a broken process. It is on occasion there is human error, or human judgment that is inconsistent with what it should have been. It's the way it is. We regret it. We would love to be perfect. Everybody would love to be perfect, and we're not perfect. I think we do actually an excellent job. Given the amount of work that we do and given the minimum number of planners that we have, and you can compare our number of planners to any other community of our size or smaller, and you will find that we have a smaller staff.

The other part of the issue in the City of Nashua, which I'm sure I've mentioned before, and that is that we're into redevelopment. Redevelopment is far more complicated than development is. Redevelopment has all kinds of other issues because what was there was built under one set of laws, and then there's changes in laws, and it's complicated. It's complicated because it's not just building a auto dealership in the middle of a field or on someplace where there isn't anything else. These things happen when you have a community that is fully developed. When there's any kind of development or redevelopment, it impacts somebody else. Even if it's a building lot that is – all they have to do is come in and pull a permit to build a single-family house, there is somebody that will say wait a minute, why are they building a house on that lot next to me? It's that impact when you're into a community that is so fully developed. I regret that this did not go back to the Planning Board. It should have gone back to the Planning Board per our process, which we are very serious about. It should have gone back to the Planning Board.

I want to comment on and agree with Alderman Flynn that when people go to the Planning Board and it's presented that there will be a 2 story, 22,000 square foot building and that's what's going to be developed on that site, people have that expectation, and people have a right to that expectation. They went through the process. They took the time to go to those meetings, to attend those meetings, to voice their opinions, and so when a 3-story building gets built it's not right. It is an intrusion. I really regret it. As a citizen in this city if that happened to me, I would be very upset about it. I can understand very well. I can't say any more. It happened. I can't promise you although we always endeavor to be as perfect as we can, I can't promise you that there won't be some other glitch. It's not a problem with the system or the process. It is just a problem with – there's just so much work and so many hours in a day, and humans make mistakes on occasion.

Alderman Flynn

I would just say that the neighborhood certainly is upset about this. I think we both agree that they should be upset. If anybody hasn't taken a drive down to this south Nashua corner and seen what's happened to this, especially the South Main corner and the Superior Drive, they should do so. It's very intrusive and certainly everyone would be upset where the process has left them. I'm sure that at this point the 2 things that seem to be about to happen, again there will be a new public hearing to discuss this in front of – give everybody an opportunity again to

try to figure out what they are going to do going forward. I guess that's the minimum that they can certainly look forward to. This motion before the board tonight to try to get a more legal opinion of where we stand in this particular situation, and I imagine the legal opinion will give us some idea on how we would handle other issues if there were any that should appear in front of us going down the line, we'd all have a better understanding what the latitudes are or should not be exercised in these situations. At least something is going to happen. We can't take back what's happened. I'm afraid. In any case, I certainly would support what we are proposing to do at this point.

Alderman Richardson

Through you Mr. Chairman, I'd like to know what the status of the certificate of occupancy is at present?

Katherine Hersh

The status of the certificate of occupancy is that it has not been issued and it won't be issued until the site conforms with the site plan.

Alderman McCarthy

There is a temporary certificate of occupancy for some portion of the construction is there not?

Katherine Hersh

I haven't checked on that. It's got to be because they are using some part of the building. They won't receive a certificate of occupancy for the whole building.

Alderman Deane

Has a cease and desist order been put on the project?

Katherine Hersh

I don't know the answer to that question. Director Houston was working on that today. So I'm not sure. He hadn't contacted Mr. Schofield when I left, but I left early this morning for some meetings out of the office. So I don't know the answer to that question.

Alderman Deane

I just look back at that other 3-story item that Alderman Bolton had referred to, and there was a cease and desist order put on that. You would think...

Katherine Hersh

Yes. I will check into that.

Alderman Deane

We wouldn't want to be allowing some to continue and others not to continue. That's not right. Everybody should be playing by the same set of rules.

Alderman Teeboom

Is it your understanding Director Hersh that the site plan was approved for 2 stories?

Katherine Hersh

That is my understanding.

Alderman Teeboom

It doesn't reflect, at least the minutes I have here which are not the minutes but they are the stipulations doesn't address that at all.

Katherine Hersh

Actually the application if you looked at the Planning Board agenda for that November 2003, if you looked at the agenda it said 2 story. In fact, the motion I thought I read the motion to be 2 story.

Alderman Flynn

If you read the last motion.

Katherine Hersh

Yes. Two story, 22,000, blah, blah, blah square foot building.

Alderman Teeboom

Okay so 2 stories is the site plan?

Katherine Hersh

That's what it said in the motion. Even though, and understand that, the height limitations I forget are 60 feet or something in that zone, but the point is really goes back to the point that Alderman Flynn is making and I have concurred with, and that is what was presented to the Planning Board was a 2 story, 22,000 square foot building. That was the expectation of the Planning Board. That was the expectation of the neighborhood. That was what was approved.

Alderman Teeboom

So on the motion, Mr. Chairman, does that motion include the legal review of the site plan to ascertain this 2 stories or not? Is the motion encompassing that?

Alderman Bolton

It is so general it encompasses the entire nature of what occurred.

Alderman McCarthy

I think we have a determination from the administrative officer that it was an approval for a 2-story site. So I don't know that any further review of that is necessary.

Alderman Teeboom

Well it's 3 stories now. I don't know how you can resolve that question.

Alderman Tabacsko

At some point here, I would like to ask Alderman Bolton to restate the motion because I did not get it down the way he stated it initially. Perhaps we can refer to the tape now.

Alderman Bolton

You're going to make me say it for the third time. The motion is to accept the communication, place it on file, and request an opinion of the legal department as to whether any laws were transgressed and as to whether the applicant is bound by the representations made at the public hearing for the site plan approval.

Alderman Teeboom

Just on that point, the public hearing did make it clear that it was 2 stories?

Katherine Hersh

They said it was 2 stories?

Alderman Teeboom

That's true?

Alderman LaRose

I was going to ask the question, would it still be considered a 2-story building if you could park on top, but because they put a roof on it it became a 3-story building?

Katherine Hersh

I'm not allowed to interpret those things. I have to go back to...

Alderman Flynn

I would just say if you look at the memo and you look at the picture of what was the original presentation and the 3 story building that they built, there's no doubt what's happened. Look at the picture.

Alderman McCarthy

I think that parking on the roof of a building of that type is unusual enough that one would if it weren't called out directly, expect it was not to be a feature of the development.

Alderman Teeboom

On this drawing there are 5 bays on top, as I call a window a bay. I don't have the full picture, but it looks like there's a 6th bay peeking out the corner. Does the site plan define also the length of the building?

Katherine Hersh

The site plan shows you the footprint of the building on the site. My understanding is that only shows part of the building and not the entire building.

Alderman Teeboom

The top and the bottom.

Alderman Bolton

There's an answer to this. Mr. Yeoman's memorandum makes reference to the fact that it shows a possible future addition at the right hand side. That's what you're seeing as it tails off in that direction.

MOTION CARRIED**MOTION BY ALDERMAN BOLTON THAT THE RULES BE SO FAR SUSPENDED AS TO ALLOW FOR THE INTRODUCTION OF A COMMUNICATION RECEIVED AFTER THE AGENDA WAS PREPARED****MOTION CARRIED**

From: Fred S. Teeboom, Alderman-at-Large
Re: Failure to Fully Disclose Construction Changes

MOTION BY ALDERMAN BOLTON TO ACCEPT AND PLACE ON FILEON THE QUESTIONAlderman McCarthy

I want to call attention to – I'm not sure that all of the things stated as facts are not in dispute or not in dispute, but for the moment we'll take them as Alderman Teeboom's recollection. Under the section on page 2, which says, "to prevent this from happening in the future," the second one – to lower the 60-foot permitted building height. For the record, I never said that I would

introduce such an amendment. I said that one could be introduced if we believed that that was the correct policy change to make with regard to buildings in that zone. I did discuss the other two issues. After some discussion with Director Hersh, I believe the department believes that both of those points are adequately covered in the existing text of the law, and that were it properly interpreted, those 2 requirements would be in effect. Is that correct? The fact that the – fire suppression requirements was not one of them. The things I had mentioned were that the site plans should require the building heights and elevations, and that changes to the number of stories would be something that required a amended site plan. I believe it was your opinion that both of those are adequately covered by the existing zoning ordinances.

Katherine Hersh

I believe, yes.

Alderman Deane

I'm a little confused now. You had this meeting with the individuals as stated up front. SO now you've talked to Director Hersh. Item #2 you said that if we wanted to change the zoning ordinance we could introduce an ordinance to do that?

Alderman McCarthy

Yes.

Alderman Deane

Okay. Item 3 Planning Director Hersh will introduce a procedure to require planning staff to submit a substantial change of a site plan to the Planning Board for a public hearing. So that's already in place?

Katherine Hersh

That is in place.

Alderman Deane

You've had a discussion after the fact, and that already exists.

Alderman McCarthy

Yes.

Alderman Deane

It goes on – so this exists. Thank you.

Alderman Teeboom

I wrote this up Friday night after the meeting because I know there was not minutes taken and recollections change with time. I just took an hour or so to write this up. I have passed this memorandum in draft form to Alderman Flynn. I've passed it in draft form to David Bangs, and I've passed in draft form to Attorney Prunier. Before we get to the happening in the future, go to the other 3 that I want to talk about. What possible remedial action can there be other than the fact that you have a legal opinion? It was discussed. The developer in that meeting said he would redo the landscaping and hire a professional landscaper. Admitted what was done was not professional. B lamed it on lack of sunlight or poor soil or whatever. They will try to get higher growth trees...

Alderman McCarthy

He did, in fact, that it was done by a non-professional. He was quite adamant that he had a landscaper who does his work for him. That was who had done the planting of the trees. The trees died subsequently from lack of sunlight or other cause.

Alderman Teeboom

I certainly used the word professional landscaper and he did not disagree with me. That will be done. New trees will be planted. The painting and I think Attorney Prunier brought this up, just to give you that – repainted some color will make it more neutral obviously the yellowish in the picture was introduced by David Bangs.

The third one Attorney Prunier made a comment back to me – he said he remembered talking about the fence. He does not remember agreeing to putting up a fence. But he would take it back to the owner to ask whether a fence ought to be put up. There was some discussion – in the site plan it takes about extending the fence.

Alderman McCarthy

There was a short discussion about putting up a stockade fence. I don't believe there was a discussion of height. I will tell you that unless we changed it in the new ordinances, you will not be able to put up an 8-foot fence without a variance.

Alderman Teeboom

Well there was talk about a fence. I'll leave it at that. Attorney Prunier said he would talk to his owner. If this thing goes back to site planning after review of this whole shading, and buffering, and all the rest of it anyway because obviously the neighbors are all upset about the height of this building, and an intrusion of the building into their quality of life.

As far as this not happening in the future, I remember distinctly discussion about the 60-foot height. We could reduce the 60-foot height by zoning, whether we should take the topography into account. It turns out the building sits up on a hill area. The neighbors are below that hill area, so it makes the height even more intrusive. If this building was in a valley and the neighbors were sitting on the hill, it would be less intrusive. It just happens to be the opposite. So this 60-foot thing – 60 foot zoning in that area ought to be reviewed. The building is not 60 foot high. It is well within the permitted height. I don't know exactly what the height is.

Alderman McCarthy

I believe it's 46 feet.

Alderman Teeboom

It's because aggravated because it sits on the hill with all of the other neighbors. I don't know about the Planning Director Hersh – if she introduced a procedure. I addressed it earlier today. She said it is not broken. I think it is. It doesn't matter; it's under her control. The first one – the fire suppression, the (inaudible) was never introduced. Well if there's no parking introduced, then the fire suppression isn't introduced. But at the point in time, the fire suppression is known to be – a requirement ought to be introduced back to the Planning Board if that affects the building. So these, again, are things that had to be addressed in zoning. I'm not that familiar with the zoning book to address each of these. These are my recollections. These are the minutes. I've got I think Alderman Flynn reviewed these. I'm not sure he completely agreed with what I typified. He can address me, but he didn't have any remedial language to present. I then sent a draft out to everybody else on this committee and I didn't get any comments back. So here we are. If you want to correct these minutes, feel free to correct them at this point.

Alderman Bolton

I don't think we ought to be dealing in what's an effective remediation or not. That will be an issue that the Planning Board will have to address and the neighbors should have an opportunity to weigh in on that. They certainly know a lot more about this than we do sitting here. I don't think we ought to be trying to influence whether the suggestions by the applicant's attorney are sufficient to address the problem. I don't mean that this committee by accepting this communication and place it on file endorses any of these. I think that ought to be made clear. The process will be that this applicant has a burden to go forward and convince the Planning Board that the alternations to the site plan ought to be approved. The neighbors have an opportunity to come in and say no they shouldn't be approved or if they are approved, there is a whole bunch of remedial measures that need to be taken maybe more than this, maybe less than this. As I said, it is not up to us. By accepting the communication, it's just that. It's not approving anything necessarily contained therein.

Alderman Flynn

That was very well said. That's pretty much why I put up my hand the first time. My understanding in that meeting is that Mr. Bangs did collect the signatures. He is somewhat of a spokesman for the neighborhood, but he certainly was not in a position to decide what made sense. These neighbors need to be heard, and a new public hearing will certainly move us in that direction. That being said, the only other comment I wanted to make was I do believe that under item 3 we do have that in place now to prevent this from happening in the future. I believe item 3 is true. However, I do believe that we did mention in that meeting, and I guess I'll look for some input on this maybe a different night or from other people, but I do believe that we said we could rather than leave it to the discretion of the – I guess Director Hersh will introduce – I think right now the planning staff had some discretion over what they are going to reintroduce to the Planning Board. We could remove the discretion on whether it goes from 2 story to 3 story in like an HB zone. We could make that specifically something that would have to go back before the Planning Board rather than be discerned or decided whether that was a sensible thing to do. Didn't we talk about possibly doing that...**end of Tape 1, Side A...**

Katherine Hersh

I think it's on page 207 in the new Land Use Code. It's called minor site plan review. It does articulate when something can be administratively approved. There is a process for administratively approving that internally. It is articulated in the ordinances what qualifies for that and what doesn't qualify for that. So if the Board of Aldermen chose to amend that, that's certainly your prerogative to do so. That would be where I would think that you would go and take a look at if that was your interest to do so. I think you'll find that if you look at the number of applications and the amount of work that we're processing, that overall our record is really excellent with respect to making the right decisions. This one happens to be one that didn't work so well. Generally I think that the ordinance is pretty clear. It is entirely up to you.

Alderman Flynn

I think what I'll do is I'll send you an e-mail maybe tomorrow and ask if you could send me that particular section.

Katherine Hersh

Sure. Absolutely.

Alderman Flynn

That would send me along the right path.

Katherine Hersh

I'll even right it down and then I'll remember to do it.

Alderman McCarthy

If you look at those, there is basically a limitation on the size of the structures, which I believe that this plan probably did not meet. Although, and this is where when I thought about this it gets sticky, I think on what was submitted we're okay because the submission was for a 2 story building. However, if you were to look at the 2 diagrams that are on that page that Mr. Yeomans gave us, simply stating that a change in the building height triggers a site plan review doesn't help because those 2 buildings are the exact same height. The highest point on the building doesn't change in between. The one with a tower on it and the one with a roof at that level. We get into the same issue that we get into everywhere. Frankly, a lot of this just has to be somewhat subjective. When you look at the plan you can see it. It's really tough to write wording that anticipates that 5 years in advance of that particular plan coming in. I think the existing statutes deal adequately with the 2 sites that are there. It does say under site plan requirements that it must show the building dimensions and the height of floors. Under the

criteria for administrative review, it does list limitations on the changes and the dimensions. By belief is that if we were properly interpreting those, this plan would have gone back to the Planning Board for site plan amendment through the standard review process.

MOTION CARRIED

UNFINISHED BUSINESS – None

NEW BUSINESS – RESOLUTIONS – None

NEW BUSINESS – ORDINANCES

O-06-71

Endorser: Alderman Daniel L. Richardson

AMENDING THE “LAND USE CODE” BY RESTORING A TIME LIMIT FOR IMPLEMENTING VARIANCE APPROVALS

MOTION BY ALDERMAN BOLTON TO LAY ON THE TABLE ORDINANCE

O-06-71 PENDING THE PUBLIC HEARING SCHEDULED FOR JANUARY 16, 2007 AT 7 PM IN THE ALDERMANIC CHAMBER

MOTION CARRIED

TABLED IN COMMITTEE

Alderman McCarthy

Is there any desire to remove any of the 3 ordinances held in committee at this point?

Alderman LaRose

I don't have a desire to remove anything, I have a question from the Planning Board to this committee on 06-57 – amending the Land Use Code to authorize acceptance of land or interest in land when deemed appropriate by the Planning Board/Zoning Board of Adjustment as a condition of approval. At last Thursday's Planning Board meeting we were going to take this up. They were going to give a favorable recommendation, but my recollection was that at the previous Planning and Economic Committee meeting when this was in front of us, my recollection was there was some discussion or a short discussion on what happens – I guess the thoughts were that some of the members were worried that by implementing this, that we might end up by picking up pieces of land that have hazardous waste on it or something. Was my recollection correct?

Alderman McCarthy

That was the issue that was brought up. I don't recall at this instance, but the resolution to that was I think we were planning to have Corporation Counsel come and have some discussion of that with us.

Alderman LaRose

Because members of the Planning Department their feeling was that whenever something like this would happen, there would be reviews by Corporation Counsel and other people so that us accepting something that was inappropriate for us to accept was unlikely to happen. I guess

the idea behind this is sometimes when – for instance, when we were discussing Wal-Mart for their expansion, they were going to give us a strip of land so that we could widen the roadway. We would have to bring in a resolution to accept it and all that. That's what this is supposed to be able to do that if there's that condition put by the Zoning Board or the Planning Board, it would be accepted and we wouldn't have to bring in a resolution. I'm looking for direction. The Planning Board, obviously, if the Planning Board gives it a favorable recommendation, it's just a recommendation. It's not something that this board has to accept. You kind of want to be in sync with one another.

Alderman Deane

Did you state earlier that you were going to have Corporation Counsel come in and discuss this? That sounds like what the concerns that were raised by the Planning Board as described by Alderman LaRose, it sounds like that may be a good idea.

Alderman McCarthy

I must admit I have to go back and refresh my memory as to what the discussion was. Perhaps Alderman Bolton can do that. I think he brought up some of the issues.

Alderman Bolton

Well I raised the issue. I think 99 times out of 100 no problem will arise. Probably even a higher number than that. 999 times out of 1,000 no problem comes in. It's a strip of land that we're going to expand the road that passes by the property. It's some requirement to do with storm water detention, sewer lines, or something. It's perfectly fine most of the time. It's just that every once in a while you wonder what you're getting. I guess what I would like to see before this gets adopted is to know that either within the ordinance itself or within the practices of the Community Development Division and/or the Public Works Division there is some process whereby someone has the responsibility to make an assessment and sign off as to whether we ought to grab this piece of property that is being dedicated or we ought to go to a further level of review and require of the applicant that some environmental scientist provide a certification as to the appropriateness of the site or something like that. I can understand the idea of streamlining the approval process and so forth. Most of the time, as I say, that will work just fine. In those cases it shouldn't take much for whoever is going to have this responsibility to sign off and say no reason to be concerned, sign off. Sometimes there probably would be a reason to be concerned, and then that would require further steps be taken.

Alderman McCarthy

I think we'll see some amendment made to address that concern.

O-06-51

Endorsers: Alderman-at-Large Brian S. McCarthy
Alderman Richard LaRose
Alderman Michael J. Tabacsko
Alderman Robert A. Dion

AMENDING THE DEFINITION OF "TWO-FAMILY DWELLING" IN THE ZONING ORDINANCE TO ESTABLISH STANDARDS FOR COMMON WALLS

O-06-52

Endorsers: Alderman-at-Large Brian S. McCarthy

Alderman Richard LaRose
Alderman Michael J. Tabacsko
Alderman-at-Large James R. Tollner
Alderman David MacLaughlin
Alderman Robert A. Dion

**AMENDING THE PROVISIONS OF THE ZONING ORDINANCE WITH RESPECT
TO ELDERLY HOUSING**

O-06-57

Endorsers: Alderman-at-Large James R. Tollner
Alderman-at-Large Brian S. McCarthy
Alderman Michael J. Tabacsko

**AMENDING THE LAND USE CODE TO AUTHORIZE ACCEPTANCE OF LAND OR
INTERESTS IN LAND WHEN DEEMED APPROPRIATE BY THE PLANNING
BOARD OR ZONING BOARD OF ADJUSTMENT AS A CONDITION OF
APPROVAL**

DISCUSSION

ADJOURNMENT

**MOTION BY ALDERMAN BOLTON TO ADJOURN
MOTION CARRIED**

The meeting was declared adjourned at 8:12 p.m.

Alderman Michael J. Tabacsko
Committee Clerk