

PLANNING AND ECONOMIC DEVELOPMENT COMMITTEE

MAY 2, 2006

A meeting of the Planning and Economic Development Committee was held on Tuesday, May 2, 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 Mark S. Cookson
Alderman Michael Tabacsko

Members Not in Attendance:

Also in Attendance: Mike Lowe, Planning Board Liaison
Katherine Hersh, Div. Dir., Community Development Div.
Roger Houston, Manager, Planning Department

COMMUNICATIONS

**MOTION BY ALDERMAN BOLTON TO TAKE FROM THE TABLE THE COMMUNICATION FROM JEFFREY A. ZALL, ESQUIRE, REGARDING IMPACT FEE WAIVER – WALDEN WOODS
MOTION CARRIED**

From: Jeffrey A. Zall, Esquire
Re: Impact Fee Waiver – Walden Woods

Chairman McCarthy

Mr. Houston and Director Hersh please join us. Mr. Houston could you give us the background on the waiver?

Roger Houston

The applicant, Walden Woods, is requesting a waiver of the impact fee for 80% of the units. They are willing to pay for 20% of the units. That is what their waiver request is. The Planning Board recommended unfavorably. The Planning Director's report on this to the Planning Board recommended granting the waiver based on past practice, and how it has been interpreted in the past.

Chairman McCarthy

Are we confident that 80% of the units will not produce school-aged children?

Roger Houston

We haven't seen any of the larger scale projects generate any school children. That is not meaning to say they won't in the future. It is an impact fee designed to basically for new construction to generate the demand for new schools, capital improvements, school additions, new schools. It is our opinion that this type of project would not generate that demand. There is some evidence, and I think you have to have evidence to support a claim that they do produce an impact, and staff has not seen where that happens.

Chairman McCarthy

Can either you or perhaps Mr. Lowe give us some background on the Planning Board's decision?

Mike Lowe

We have been I guess at a quandary on this one because we know that the State and the Federal Government has said it's 55 and over that constitutes what these units are, and in today's world it only has to be one person – you have people who are marrying and moving in, you have older people who are moving in with high school aged children, and you can't control that. We felt that the only way to do it is to be fair to everybody. Someone moving into a neighborhood that is supposed to be 55 and older if they have kids they get to go they don't get the waiver whereas we are building in TerraVerde there are 15 homes there that are supposedly dedicated to seniors, but if one or two or all of those homes have children of high school or grammar school age they don't get to actually take the waiver on those homes. I am saying you have to be fair to everybody.

Chairman McCarthy

Mr. Houston is there a representative of the applicant here?

Roger Houston

Yes, Attorney Zall is representing the applicant, and is in the audience.

Chairman McCarthy

Attorney Zall would you join us please?

Jeffrey Zall, Esq.

I am an attorney with offices at 221 Main Street here in Nashua, and I represent the applicant and developer, which is White Family Ventures, LLC. White Family Ventures is a Nashua building company associated with Homes by Paradise, Inc., which has done a great deal of building in the Nashua area. They are a successful building company that has done a lot for the City of Nashua.

The Walden Woods development is a 96 unit elderly housing development located west of Northeastern Boulevard on a private road named Henry David Drive, which is at the end of Pittsburgh Avenue cul-de-sac right behind the new Harvey Industries building. It qualifies as an elderly housing development because there will be restriction in the Declaration of Condominiums that requires that at least 80% of the units must be occupied by one member

that is 55 years or older. That is in accord with state and federal law that allows you to discriminate in housing. By discrimination I mean saying that one person has to be 55. You cannot go further than that and say everybody has to be 55 or nobody can be under 18. The discrimination restriction that you are allowed to put in there under state and federal law is that one person has to be over 55, and that the development has to be one that is being developed primarily for older persons. It has to provide services and functions that are typical for older person development. This development will have that.

It will consist of two, four-story buildings for a total of 96 units. Right now, if you have been by there, you have seen one large four-story building going up. That is the smaller of the two buildings. That will have 32 units. Early next year, maybe this fall depending on how marketing goes, there will be another building constructed, four story building that will have 64 units. Approximately 2/3 of the units will be two bedroom units and the other 1/3 will be one-bedroom units. Since at least 80% of the units will qualify at age restricted elderly housing, White Family Ventures has petitioned the Board of Aldermen to waive the impact fee pursuant to Section 16-229 of the new Land Use Code that allows for waiver of Impact Fees.

That section of the Code provides that a full or partial waiver of the fee for new developments consisting of elderly housing, which can be reasonably expected not to require additional educational facilities, the Impact Fee can be waived for those things. Now the important words in there are that it is either full or partial, and that the elderly housing, which can be reasonably expected not to require additional educational facilities. It uses the words reasonably expected not automatic. There has to be a reasonable belief that there is not going to be sufficient amount of children in these units that will have an impact upon the educational facilities to require additional educational facilities to be provided by the City.

I am aware that the Planning Board recommended against approval of the Waiver because in a 55-year or older community, there is no outright restriction against children occupying any of the units. However, practically there is really no reasonable expectation that there would be enough children to occupy any of the elderly housing, 80% of the elderly housing units, so as to require those facilities. The evidence of that is first that there has got to be at least one person 55 or older occupying the units, which makes it unlikely. Not impossible, but unlikely that children will be occupying the unit along with them. The second is that this development is being marketed as an active adult community – not just the 80% of the units that have to be restricted, but 100% of it is being actively marketed as an adult community. The third reason is that these units are in two four, story buildings and there are no amenities or areas for children. It is unlikely that, it is not a conducive area for children to live. The fourth reason is that 2/3 of the units will be two bedroom units and one third will be one-bedroom units. Once again unlikely that children will be living there. The fifth reason is that experts have determined, and as Roger Houston has stated, it has been their experience that these types of 55 or older communities virtually have no school age children.

Back in May of 2005 you received a Petition for Colliston Yard, which is a 55 or older development. Attorney Brad Westgate addressed you. In the minutes of that meeting, it indicates he presented to you a letter from Mark Fougere. Mark used to be a member of the City Planning Department – well-respected member of the Planning Department and is now a

local Planning Consultant. He presented you with a letter that said in his opinion as a Planning Consultant, these types of 55 or older communities don't produce children. It is unlikely that children will be living there.

I researched the minutes of this committee and the Board of Aldermen for the past 2 or 3 years to see what you have done in other cases, and I found 3 of them. There was Westchester Colony Club, which is the one that Mr. Lowe talked about over on TerraVerde. That is a 55 or older restricted community. I think that is a lot different in that it is individual houses.

Mike Lowe

It started out at 64 units. It ended up with 15 houses. That is what the elderly housing on that particular deal started out as. That is why I have misgivings on all of these things. Time changes.

Jeffrey Zall, Esq.

In that one, now that is 15 houses. It is not a four story building like this one it is 15 houses with lots and lawns. That one received an unfavorable recommendation from the Planning Board, and when it came to this Board received a favorable recommendation, and the Waiver was approved by the Board of Aldermen. The other one that I found was Fields Grove – it may have come in under the name of Salmon Brook. It is at the end of Chestnut Street. It is the old Knights of Columbus building. I don't know what happened at the Planning Board level on that one. I assume it was recommended unfavorably, but at this commit it was approved, and the Board of Aldermen approved it. The last one was called Colliston Yard, which I referred to a few minutes ago. That one also received an unfavorable recommendation from the Planning Board, but was approved at this committee level and at the Board of Aldermen. Colliston Yard is virtually the same as what we have at Walden Woods.

Colliston Yard is a 77-unit development in one big three-story building. I think one unit is in the old Labombarde House, but the rest of them are in the three-story building. It doesn't have recreational facilities for kids, it is not an area that is conducive to kids, and it is being marketed as an adult community. Walden Woods is virtually the same as that one.

I would urge the board to grant our request for a Waiver for 80% of the units because for those 80% of the units will be restricted. There isn't a reasonable expectation that additional educational facilities would be required from those units because of the families living in them. I would also urge the board to grant the petition in fairness to be consistent with the application of its Waiver Ordinance where the other applicants have come to the board asking for waivers. I would be glad to answer any questions about the development.

Alderman Bolton

My recollection as regards to Colliston Yard was that the developer was willing to put a provision in the Declaration of Condominium that the 55 and older restriction could not be eliminated without consent of the city Planning Board or Board of Aldermen or some city agency. Do you recall if that is the case or do you know if that is the case?

Jeffrey Zall, Esq.

I remember reading in the minutes there was a discussion of that. I don't remember how Brad Westgate responded to that, but I would point out that in that case as well as this case both developments were granted approval by the Planning Board. Our development was granted approval on October 8, 2002 as an elderly housing project in the City of Nashua, and as such it has to qualify. The Ordinance as it existed back in 2002, and I think it is the same thing now; it says it has to qualify under state and federal law as elderly housing with the ability to discriminate in favor of elderly housing. In order to do that you need 80%. If it was changed, if the members of the Condominium Association sought to amend the Declaration and change it they couldn't do it because it would violate the Site Plan approval, which is a requirement of the Declaration. It has to conform with the Site Plan approval.

Alderman Bolton

You are saying it would be unnecessary anyway, and it can't happen.

Jeffrey Zall, Esq.

Right. It would be unnecessary because it can't happen. I don't remember whether Brad agreed to add that into the Declaration, but if it is necessary to add that into the Declaration, that it can't be done without approval of the Planning Board I have no problem with that because that is the way the laws work anyway.

Alderman Bolton

I think you make a very good point, and you are probably right that it is unnecessary because at that point their land use approval would no longer be valid.

Jeffrey Zall, Esq.

If it fell below 80% or they amended the Declaration to get rid of that restriction completely the Certificate of Occupancy would be – would it be yanked I don't know, but it would be a violation of the Site Plan.

Chairman McCarthy

On the other hand, we would have to recognize that the Site Plan had been violated and take action. If it is contained in the condominium document itself, when the updated condominium document is filed with the Secretary of State they can notice that the original terms of the agreement have been violated.

Alderman Bolton

It isn't filed with the Secretary of State.

Chairman McCarthy

Doesn't someone at the State level keep track of condominium agreements?

Alderman Bolton

No. The initial approval has to be registered with the Attorney General's Office, but once they have approved it they – if ten years down the road someone goes in and makes an amendment nah..

Jeffrey Zall, Esq.

But the Declaration does require that the condominium adhere to the requirements of the Site Plan approval so it is in the Declaration. I take it one step further in this one –for the 80% of the units that are restricted I am putting it in the Deed so if someone gets a Deed they are not going to read my 30-page Declaration, but they are going to see their Deed, and in the Deed it specifically will say this unit is restricted as an elderly housing unit and it is defined what an elderly housing unit is – one member over 55. It is in their Deed as well.

Alderman Bolton

I think that is probably a sufficient safeguard.

Alderman LaRose

I believe that when this Petition came in front of the Planning Board I was at another meeting so I don't remember being in a discussion or voting on this at the Planning Board. I know that some of the members of the Planning Board have a hard time to grant these waivers because of some of the things that Mr. Lowe has stated. My personal feeling is that I would accept the 20% impact fee because there is that 80/20 split. The other thing that I have found from experience, because my brother does live in a condominium at Hampton Beach – I actually sold that one and he now lives in Exeter, but they both have the same type of restrictions, and I can tell you that people that live there move there for the specific reason that there will not be a lot of children, and I will tell you they keep an eye out on what happens. The condominium has rules and regulations and boy oh boy if someone breaks them man they are after their representative to make sure that those things are taken care of.

I think, although the Planning Board gave an unfavorable recommendation, I would vote to accept the 20% and waive the other 80%.

Alderman Tabacsko

I just wanted to clarify on the Deed restriction that you were talking about earlier, 80% of the units in total, and you are building this in two phases so when does the 20% come in and when does the 80%? Is it going to be evenly split between the two buildings?

Jeffrey Zall, Esq.

I would imagine so. We haven't set up any guidelines for that. They anticipate that this development will be built fairly quickly. The first building is just about done, and the second building they have started the foundation for it, but we haven't decided to apply the 80/20 per building.

Alderman Tabacsko

Eighty percent of the 96 deeds that are eventually created out of this will say what?

Jeffrey Zall, Esq.

It will say this unit #1 is an elderly housing unit as defined in the Declaration, and there is a defined term in the Declaration, and refer to the section of the Declaration, and include a brief summary of what that is, which means that among other things one occupant of the unit has to be 55 years or older. The deed restriction will run for the life of that unit. That I felt was the best way to have control that 80% of the units would qualify. If you require the association, and a lot of these other developments have the association have the obligation to make sure that 80% of them are so restricted and honored, but they really can't ride herd on that. By putting it in the deed restriction – violating the deed restriction is a significant violation as opposed to violating the Bylaws of the Association.

Alderman Tabacsko

Thank you. That is all I had.

Alderman LaRose

The other thing Attorney Zall mentioned Mark Fougere's memo. I remember that memo coming to us, and my recollection was that he had a list of about 12 different places, and out of the 12 the total amount of children in those 12 different places was 5.

Alderman Cookson

You're saying that 20% of the units would not be categorized as elderly?

Jeffrey Zall, Esq.

Up to 20% of the units may not be categorized as elderly.

Alderman Cookson

So you are looking at approximately 19 units that would be available for ownership with someone living there less than age 55.

Jeffrey Zall, Esq.

With everybody living there with nobody age 55. I would like to point out that even though we are restricting it to the 80/20 rule, which complies with the statute and federal law, the intention is to make as many, up to 100% of them, restricted or with older persons there because that is the way it is being marketed. My client has already got people coming to look at it and saying well there be children there, and they are saying well there is a possibility that up to 20% of them may not be restricted. The likelihood is that even for the 20% they may be restricted in the deed if that is the way they go, but at least 80% have to be so restricted. I haven't asked for

100% of the waiver as Colliston Yard and the others did because frankly I can't tell you that 20% of them are not going to be restricted and 20% of them are not going to have kids. They are not likely to have kids, but I can't say that with a straight face. I am not going to ask for 100% because I don't think it is right.

Alderman Cookson

Do you anticipate any additional building on that lot or is there only enough space for the two footprints that you have now, the 32 unit and the 64 unit?

Jeffrey Zall, Esq.

That is it. There are just two buildings there.

Alderman Cookson

No additional plans in the future to ...

Jeffrey Zall, Esq.

No. The Site Plan has already been approved. It is not expandable. I think it is a four-acre tract. I don't believe the site plan had any out buildings or anything like that. There may be a maintenance shed. There is underground parking in each building and outside parking.

Alderman Cookson

Thank you.

Chairman McCarthy

I think there would be significant comment from the abutters if there were any additional units proposed.

Jeffrey Zall, Esq.

There were a lot of comments from the abutters back in 2002. I wasn't involved in it at that time, but I remember it was pretty controversial.

MOTION BY ALDERMAN BOLTON TO RECOMMEND APPROVAL OF THE EIGHTY PERCENT WAIVER IN ACCORDANCE WITH ATTORNEY ZALL'S LETTER

ON THE QUESTION

Chairman McCarthy

Mr. Houston didn't we have some of these that came in where the covenant applied to all of the residents? I thought that some properties, and perhaps we never actually built any of them, but particularly the ones that Mr. Slattery was proposing in a couple of areas, had covenants that said no one under 18 could live there for more than a month out of the year.

Jeffrey Zall, Esq.

I can answer that. That is Colliston Yard. Colliston Yard has a provision in there that says; in the Declaration it says “No guests or other invitee under the age of 18 years of age shall be permitted to occupy any unit for a period of more than two months.” Now that is a guest or an invitee. If someone does have a child living with them I guess that kid’s friend can’t stay over for more than two months. It doesn’t prohibit an occupant, a family member who is under 18 from occupying it. You can’t do it. State and Federal law doesn’t allow that restriction. You can do two types of restrictions to qualify for age discrimination in New Hampshire or under Federal law. The first is nobody under 62 completely. That would ensure no kids. The second is one person over 55 and providing services that are applicable for older persons housing. It is the belief of the State and Housing and Urban Development that if you do provide those things it is more likely that older people are going to be occupying them not the other people. That provision in the Colliston Yard one doesn’t really mean a heck of a lot.

Chairman McCarthy

What happens under the covenant if one of the restricted units is co-owned by someone who is over 55 and someone who is under 55 and the older person passes away?

Jeffrey Zall, Esq.

Good point. This is one thing that the Human Rights Commission in New Hampshire that has authority over, this age discrimination in housing, looks for. There has to be a provision in there that says that if the person over 55 dies or divorces and moves out or abandons the spouse, and the spouse is under 55 or under any other occupants are under 55, they can continue to live there, but at the next change of ownership or occupancy of the unit it has to be occupied by someone who qualifies – one person over 55. You can’t punish the poor spouse because the other spouse abandoned them or died and force them to move out and sell their unit, but when they do move out and sell their unit, the next occupant has to qualify.

Alderman Cookson

I am curious. What would be the consequence of having a favorable recommendation for this and then finding out once we start getting occupants in this community that we do have a burden on the school system, that it does have an impact, is there any recourse? Is there any way that we can make this subject to the occupants of the condominiums and the demographic makeup?

Chairman McCarthy

I suspect not.

Alderman Bolton

I think the important thing here is not that there is 100% certainty it will never have a school aged child in the whole complex. I think the important thing is we can have some reasonable assurance that this project will not produce school-age children at the same rate that a non-restricted single-family home development of 96 units would. I think you can say with near certainty that the ratio of school-aged children in a place like this is going to be minor in comparison to 96 single-family homes over the next 50 years. That is the reason for the Waiver. I think frankly the 20% that we are going to get is probably a good deal, and we’re

going to actually be collecting more than what we would be entitled to if we actually measured it out over some decade and decade long length of time.

Chairman McCarthy

Attorney Zall what is the size of the units?

Jeffrey Zall, Esq.

They are 1,050 square feet to I believe 1,450.

Chairman McCarthy

And the impact fee at the moment is...

Jeffrey Zall, Esq.

Based on square footage isn't it?

Chairman McCarthy

Yeah. Is it \$.50 a square foot right now?

Roger Houston

It is \$.50.

Chairman McCarthy

So we are looking at per unit impact fees which are \$525 to \$725 per unit out of the somewhere between \$10,000 - \$20,000 per seat that it costs us to build schools. Even if we were to recognize that as a problem the magnitude of the problem doesn't change very much if we do collect the impact fee or if we don't. I think that actually is an important point that we need to understand in terms of the Land Use Code and the densities that we allow for those developments. If by some chance those developments give you service requirements that are similar to single family homes, but built at densities in the 15+ units per acre, I think we have a substantial problem we need to deal with otherwise.

Alderman Cookson

Could you just run through those numbers again to make sure that I understand? We have looked at the 1,450 and the 1,050 square feet, you multiplied it by the \$.50 per square foot to come up with a cost per unit ...

Chairman McCarthy

Of \$525 to \$725.

Alderman Cookson

And then we are also saying that 80% of those would be waived, but we don't know if it is a combination of the 2 bedroom and the 1 bedroom so we actually don't know what the actual dollar figure would be at the end of the day, but you also mentioned that the cost per student to educate them was...

Chairman McCarthy

It is not per education it is the cost to provide the capital facilities of the school.

Alderman Cookson

Okay, and that figure that you ...

Chairman McCarthy

That number was running us at the time we instituted the impact fee about \$8,000 per seat. The high schools probably come up closer to \$15,000 and I think when we looked at building elementary schools they are probably closer to \$20,000 a seat.

Alderman Cookson

Okay so the \$8,000 a seat is an average?

Chairman McCarthy

It is not anymore. That fee hasn't changed in more than a decade as well. When we had the analysis done it was believed we could justify about a dollar per square foot, and we decided to implement the fee at \$.50 a square foot. It would probably, a similar analysis today; we would come up with a number that was between \$2.00 and \$3.00 a square foot.

Roger Houston

The maximum fee is \$500 per unit. If there are 19 units times 500 it is \$.50 per square foot, but the maximum fee possible is \$500 per unit under the Code.

Chairman McCarthy

Is that true for all units or only for single families?

Roger Houston

Garden style and multi-family condominiums, which is what this, would be classed as under that table or it could be an other, which is the same fee.

Chairman McCarthy

Just to complete those numbers, my recollection when we did the study for the density of school aged children in unrestricted garden apartments was about .19 per unit or thereabouts.

Katherine Hersh

The number we used is .185.

Alderman Tabacsko

I have a question for Mr. Houston. On the previous developments that we were talking about earlier, did we ever collect any of the impact fee? Any percentage? This is offering to pay 20% and waive 80%. Did we collect any impact fee on the other ones that were mentioned earlier?

Roger Houston

No we did not. This would be the first where they are offering to pay 20%.

Alderman Tabacsko

I think I tend to agree with a previous speaker that I think maybe at 20% this is probably a good deal, and probably makes sense from just a what is right because you can't guarantee that it is not, and it just seems to fit and is a good gesture on both sides I think.

Alderman Bolton

Just to add to the complexity of the numbers, it is not as soon as you have one child there for one year that the \$10,000 expense is properly applied. You would have to average one child there forever for the \$10,000 to make sense. Frankly I don't think you are going to see even that much, but if you do you would be in accordance with everybody else.

Chairman McCarthy

And we would have to build the new school within six years of collecting the fee.

Alderman Bolton

Unlikely that would happen also.

Alderman Cookson

If my numbers are correct, and I don't know if they are even important to the conversation now because of Mr. Houston's comments that the 19 units by \$500 would give us a \$9,500 fee. That would be the impact fee, the 20% that we would receive? Okay. So if we actually take the 20% of the total, if you multiply out the square footage by the number of units, you said 2/3 were two bedrooms so that would be 64 units, and you said 1/3 were one bedroom so that would be 32 units...

Jeffrey Zall, Esq.

That is an approximate number.

Chairman McCarthy

It actually doesn't matter because of the cap on the impact fee.

Alderman Cookson

Ultimately 20% of if we use real numbers would be \$12,600, a difference of \$3,000. Thank you.

Chairman McCarthy

I guess I am generally prone to support it. Looking at the size of the units they are not ones that are likely to generate a lot of child rearing.

Jeffrey Zall, Esq.

Just one last statement to that if you will allow me.

Chairman McCarthy

Sure.

Alderman Cookson

I don't have children yet. I plan on having children. I anticipate by the time that I am 55 that I may have a 10 year old. I don't think that it is unlikely that a person that is a minimum of 55 years old would have a school-aged child. I think it is probably more likely today than it ever has been. I think some of the locations that Alderman LaRose had mentioned whether it be Hampton Beach or some other location are probably less likely to have children because it is a resort area potentially, but that would be my opinion. Again, I think my comment is that I think at age 55 it is probably more like today that you will have school-aged children than ever before.

Chairman McCarthy

I guess I wasn't commented on the age, but more on just how small 1,450 square feet is when you are sharing it with a school-aged child.

Alderman Bolton

I guess I want to concur with that last sentiment since I am very familiar with two current middle school students who will still be in high school when their Father turns 55. It is highly unlikely they will be living in Walden Woods.

Chairman McCarthy

The motion was to approve the waiver. Is there any further discussion?

MOTION CARRIED

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

MOTION CARRIED

From: James and Victoria Donchess, 4 Rockland Street
Peter and Jane Vincent, 67n Wellington Street
Wendy Ritter, 64 Wellington Street

Re: Revision of Nashua's Land Use Code – A Proposed Important First Step

**MOTION BY ALDERMAN LAROSE TO ACCEPT AND PLACE ON FILE
MOTION CARRIED**

DISCUSSION

A discussion ensued regarding issues that have arisen around the topic of corner lots.

In addition, discussion ensued regarding elderly housing requests received and the density in elderly housing vs. other density of that particular zone. Mr. Houston will gather the necessary information for Chairman McCarthy to draft appropriate legislation with regard to elderly housing.

UNFINISHED BUSINESS – None

NEW BUSINESS – None

DISCUSSION

ADJOURNMENT

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

The meeting was declared adjourned at 9:00 p.m.

Alderman Michael J. Tabacsko
Committee Clerk