



COMMUNITY DEVELOPMENT
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ZONING BOARD OF ADJUSTMENT

Approved Minutes

February 21, 2023 – 7:00 pm @ Community Development Department

Physical Location: 3 North Lowell Road (Community Development Department) Live
Broadcast: WCTV Channel 20 – Local Cable TV
Live Stream: http://www.wctv21.com/

To access via Zoom: ZBA Meeting
Meeting number/access code: 865 4393 1593 Password: 250013 To join by phone: 1 646 876 9923

Attendance:

- Betty Dunn, Chairman- present
Nick Shea, Vice Chair- excused
Pam Skinner, Secretary- present
Michelle Stith, regular member- present
Neelima Gogumalla, regular member- present
Mike Scholz, alternate- present
Galen Stearns, alternate- excused

Staff:

- Alexander Mello, Community Development Director
Anitra Lincicum, minute taker

Rehearing Request – Case #40-2022: Parcel 17-M-5, 17 Armstrong Rd

Chairman Dunn recused herself for this case and appointed Mr. Scholz as the Chair.

Mr. Scholz read the rehearing request into the record. Mr. Scholz stated that he has viewed the minutes posted and stated he feels they are insufficient and more detail can be added. The draft has not yet been approved so the Board would like to look at the draft, watch the tape and make necessary changes to the draft prior to granting the rehearing request. Mr. Scholz also said that this case was heard by a 4-member Board on that evening.

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A motion was made by Ms. Stith to move the rehearing request for Case #40-2022 to March 7th, 2023. Seconded by Ms. Gogumalla.

Vote 4-0.

Motion passes.

Chairman Dunn was seated once again as the Chair.

Case #39-2022 Parcel 18-L-300
Applicant – Angle Wood Pond Realty Trust, Inc.
Owner – Angle Wood Pond Realty Trust, Inc.
Location – 55 Range Road
Zoning District – Mixed Use (PBT / Residential District A / WPOD)

Variance relief is requested from **Sections 602.1.6.2, 603.1, 614.2** to permit 100 multi-family dwelling units, which would include 28 two-bedroom units in the Residential District A, 56 two-bedroom units in the Professional Business Technology (PBT) District, and 16 one-bedroom dwelling units also in the PBT District. The application is also requesting the 16 one-bedroom dwelling units in the PBT to permit Customary Home Occupation(s), which are proposed to be located above professional and business offices in four mixed-use buildings, without being required to obtain a Conditional Use Permit.

Chairman Dunn reviewed the history of Case #39-2022.

Attorney Morgan Hollis of Gottesman and Hollis of Nashua addressed the Board and is representing the applicant along with Mr. Karl Dubay.

Attorney Hollis referred the Board to Exhibit E in the booklet of documents presented to the Board around the estimate of potential students. Attorney Hollis stated that the estimate of Mr. Fougere was that 19 students total across all grades would be the potential impact from the proposed 100 units. Attorney Hollis stated that the potential impact on the schools would be negligible.

Attorney Hollis stated that he did briefly review the letters that were submitted today and he can speak to those letters in rebuttal if needed. Attorney Hollis reiterated that this is a single parcel of land in town encumbered by many complicated problems. Attorney Hollis stated that some of the details of the plan is to be decided on by the Planning Board if approved. Attorney Hollis also stated that the original plan did have housing units, 33 of them. This plan has 100 housing units; hence, the request is for 69 additional housing units from what has already been approved. He noted that the application was for “up to” 100 units. The actual number of units will be reviewed and decided by the Planning Board. Attorney Hollis sees this as a single, unique parcel in town.

Ms. Gogumalla asked about the letters from the public and if he might speak to one of the issues in the letters. The Board will wait to discuss the letters.

Mr. Karl Dubay of the Dubay Group addressed the Board and is also representing the applicant. Mr. Dubay wished to address the potential impact on the schools of this proposed plan. Mr. Dubay compared the proposed site to the Tuscan Village in Salem. The estimated impact on the school district for both sites were approximately .2 pupils per unit in independent studies. Mr. Dubay stated that the reality at Tuscan Village is that the actual number is .06 school aged children per unit so it is even lower than the estimate. These numbers are from the Salem SAU and he has reached repeatedly to Windham’s SAU to acquire more

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information. Mr. Dubay also submitted a letter from Salem's town planner regarding school aged children in developments like this. Mr. Dubay stated that there is also a letter from Mr. Mark Fougere speaking to the school age children estimate contained in the public packet which has been referenced previously by both himself and Attorney Hollis.

Mr. Dubay stated that there are more luxury units in this proposal than previously planned. Mr. Dubay mentioned this because the Tuscan Village shifted to a similar plan which led to even less of an impact on the schools.

Ms. Stith asked the number one reason people move to the town. Mr. Dubay stated that that is largely an opinion-based question. Mr. Dubay stated that the school system might be one of the reasons. Ms. Stith asked if people move to Salem for the school system; she is not sure these are comparable properties based on what each community might attract.

Mr. Dubay stated that 16 of these units are one-bedroom efficiency luxury apartments. Mr. Dubay also stated that the 2-bedroom units will not attract school age families in his opinion. Mr. Dubay is not convinced that families of school aged children will be moving to these units when they can potentially purchase a free-standing home for a comparable price.

Mr. Dubay stated that he has one other pdf to submit which is a summary of where they are on the final project. Mr. Dubay reviewed the previously approved plan which had retail at the front of the site and the back of the site was residential. The middle of the site was proposed office space as that was a need at the time according to Mr. Dubay. Mr. Dubay stated that because Windham does not have town water and sewer, it was not attractive to some companies, partly due to their own financing. Mr. Dubay also stated that the restrictions in the Lake Overlay District are even more restrictive than before.

Mr. Dubay then reviewed this newly proposed plan. Mr. Dubay stated that they are eliminating any water extraction from the site by hooking up to the water source that will now be available. Mr. Dubay stated that they are increasing the buffers to the neighbors in particular on the back side of the lot near residential homes in the area. Mr. Dubay stated that impact fees have also been increased and road improvements have also been proposed. Mr. Dubay stated that the applicant is trying to do the right thing and he does believe that this aligns with the current Master Plan. Mr. Dubay does not think a warrant article is advisable in this situation.

Mr. Dubay stated he and Attorney Hollis would like the opportunity to rebut those that may not have all the information.

The Chairman invited public comment at this time.

Ms. Jean Schipelliti, Woodvue Road. Ms. Schipelliti asked what might happen if something were to happen to the pipe that is piping in the water down the road; she is concerned that the wells might not be viable at some point as well and she would like to know who is responsible.

Chairman Dunn stated that the applicant can answer that in rebuttal and the system will be managed by the Town of Salem

Justin Seavey, 10 Lowell Road, addressed the Board. Mr. Seavey stated that the transfer station and the impact on the transfer station in particular is of concern to him but also other resources such as the town hall with a population increase. Mr. Seavey stated that persons under 18 live with families and 18% of the population in New Hampshire is under 18 and he would like more information about school aged children. The Chairman cited Exhibit E online. The Board stated that the estimate by the applicant was 17 school aged

children in the proposed development. Mr. Seavey stated that his family purchased their home for the schools in Windham.

Mr. Tom Earley, 7 Westchester, addressed the Board and made a presentation about the present and projected housing stock. Mr. Earley stated that the applicant's report for school impact is fundamentally flawed because it is based on bedroom sizing because it is based on homes built in the 1980's which are smaller homes. In his presentation, Mr. Earley stated that 8% of the housing stock has not yet been built. Mr. Earley stated that this project account for 2% of that housing increase. There was discussion between Mr. Earley, the Board and staff around the total number of students and where the statistics might have been derived from. Mr. Mello stated that the 8% includes housing under construction as well as proposed projects so this potential project is 2% of those projects. There are about 400 proposed projects in various stages in Windham according to Mr. Mello. Mr. Earley talked about the Town's purpose in zoning this as commercial, especially in light of the significant growth in the residential development. He is concerned that moving away from business and industrial use on this site for residential might not be the best use. Mr. Earley stated that he would like to work with Dr. Sharma to come up with a plan for the site.

Mr. Matt Rounds, Timberlane Road addressed the Board. Mr. Rounds stated that the individual buildings on the approved plan need to be individually approved on the site per the approved plan. Mr. Rounds suggested going back to look at the original plan and that should clarify the facts of the approval. Mr. Rounds stated that the demographics of Windham show that the population has a large school aged population, more so than the rest of the state.

Mr. David Riese, 2 Lakewood Road, addressed the Board. Mr. Riese stated that the new development does seem to be completely different than what was voted on by the town and what was voted on by the voters but he would like to see something done with the site. Mr. Riese stated that this seemed to be a change of use. Even though he appreciates the new proposal as it appears to have less of an impact on the site and the area. Mr. Riese did say that he benefitted from variances in the past but this seems to be a slightly different scenario.

Mr. David Tannis, 48 Northland, addressed the Board via Zoom. Mr. Tannis suggested having an impact fee remain in escrow during the development of the proposed property. Mr. Tannis also stated that school can be very attractive to families in developments like this.

Chairman Dunn stated that the Zoning Board has no control over impact fees. Mr. Mello reviewed how impact fees work and how they are proportioned to a specific use

Chairman Dunn stated that there were 8 letters submitted today from the public. These letters asked the Board to deny the variance. Chairman Dunn also stated that the application included a packet full of letters and petitions in support of the project. These letters and all the exhibits were also available online. Chairman Dunn stated that the applicant recently submitted letters of support for the project.

Mr. Mello explained that Mr. Earley submitted a list of names and dates submitted to the Board and he was not sure what it was in connection to. Mr. Earley addressed the Board to explain that a petition was created in opposition to this variance request and it does have the support of the 84 residents listed; the original document was submitted via email and it may have been lost. The Chairman stated that the town has been having email issues

Mr. Dubay addressed the Board once again for rebuttal. He stated that the prior plan would have required additional Planning Board approvals only for things like siding on the building and other details. Mr. Dubay stated that the trash and recycling would be handled by the property management.

Mr. Dubai then returned to the school statistics. Mr. Dubai stated that there is 100,000 square feet of commercial space on the overall plan including the commercial area that presently exists on the site. Mr. Dubai referenced the Windham Economic Committee letter that summarizes the goals of the site quite well. Mr. Dubai stated, in response to Mr. Earley's comment about the parks on the site, that the parks are passive parks, no athletic fields or play structures. Mr. Dubai stated that there was also an effort to create even larger buffers on the back side of the lot. Mr. Scholz wished to clarify that there were 100 proposed residential units; Mr. Dubai stated that there are 100 units total. Mr. Dubai stated that the DOT criteria to make offsite improvements would be the first phase of development. This was in response to Mr. Scholz asking about the phased plan. Next, the middle section of commercial space would be second (the blue section). The 80 townhouses would be installed after the roads were installed on the site according to Mr. Dubai. Mr. Dubai and the Board discussed the different DOT plans that have come forward; there would be approximately \$1.2 million dollars in improvements. Mr. Dubai stated that there is room on some of the floor plans to accommodate a small elevator to accommodate the needs of some residents along with ramps as needed. Mr. Dubai stated that he considers this ADA adaptable. Mr. Dubai stated that there will be rules in the condo association on the site. Mr. Dubai stated that many of the units could go up for rent and there would potentially be strict rules for the renter.

Mr. Mello stated that he has a few questions from residents who are on Zoom. Mr. Tannis' asked about the undated documents and how the Board can rely on them as documentation. Chairman Dunn and Mr. Scholz stated that they have not been seen by the Board prior to this evening and they are taking the applicant at their word. Mr. Tannis asked if this was an HOA community. Mr. Dubai stated that residents would need to pay into the HOA and would not likely be able to opt out of the organization. Mr. Tannis asked if these would be public or private roads. Mr. Dubai stated that they would be privately maintained roads. Mr. Dubai clarified that the request is for a maximum of 100 residential units, of which 84 have 2 bedrooms and 16 have one bedroom. Mr. Dubai stated that DOT requires that the road improvements be done before the rest of the construction is approved. It is likely they would do the middle section -the mixed-use area- before the townhouses in the rear. The Planning Board has jurisdiction over the sequence of development. Ms. Dunn asked if any of the units were designed for people with disabilities or for seniors. Mr. Dubai said that the units have room for small residential luxury elevators and the garages are large and adaptable. Ms. Gugumalla asked if any of the units would be rentals. Mr. Dubai said that they could be rented but could be controlled under the condominium contract.

Mr. Mello said the other questions asked via Zoom chat have been answered by the applicant.

Chairman Dunn stated that this case has been weighing on her mind for some time. Chairman Dunn stated that she has all the town reports back to 1972. Chairman Dunn stated that in 2000, the original PBT ordinance was set up. In 2001, this property and others were put into PBT from Commercial A. Also, the 93 widening was happening around this time along with the Salem by pass. This construction started in 2005. In 2009, there was a Citizen's petition to move this back to Commercial. This petition did not pass. There was also a Citizen's petition once again in 2010 of the same nature that also failed. In 2012, there was an amendment regarding an employment center in this area and that did pass. In 2018, there was an amendment to prohibit the allowing of a drive up and that failed.

In 1972, the property was owned by a real estate investment company. Over the years, there have been several temporary uses. In 2000 the State eventually purchased the property and Chairman Dunn recalls a large sum was paid because it was such a developable site. At about that time, 2001, that the property was changed from Commercial to PBT, it was owned by the state according to Chairman Dunn. Mr. Mello stated that the assessor's office has the sale price as being \$3.7 million. Chairman Dunn stated that the State used the property as a loading station for construction. It was eventually put on the market. At that time, the State

said that there would be no traffic light on that corner. It was known that that the access to the site would be limited. The property was eventually purchased by Dr. Sharma. Chairman Dunn stated that Dr. Sharma paid slightly less for the property than what the State had paid for it, but there was slightly less frontage from the initial sale.

Attorney Morgan Hollis addressed the Board for limited rebuttal. Attorney Hollis stated that the history of the site, as a Chair stated, is both lengthy and unique. Attorney Hollis stated that he feels as if he and Mr. Dubay have stated the facts and refuted some of the information cited in the recent letters. Attorney Hollis stated he believes the applicant meets the five criteria; he does not think it is necessary to decide if the student data information is accurate or many of the other issues presented as those are Planning Board issues.

Mr. Justin Seavey asked about the 100 units. The Board stated that there were 100 dwelling units.

Mr. Matt Rounds addressed the Board again to state that the Planning Board does not have the power to create zones. Mr. Rounds does not think that one of the Board should make a decision. Mr. Rounds stated that this is a voting issue.

A motion was made by Mr. Scholz to enter deliberative session. Seconded by Ms. Skinner. Vote 5-0. Motion passes.

There was a brief recess.

Chairman Dunn stated that they received advice from town council this afternoon but she, and some other board members have not had an opportunity to study it. She sees the value of starting to deliberate.

Mr. Scholz does not think it will diminish the value of surrounding properties. Chairman Dunn agrees. Chairman Dunn stated that there are people that will be upset no matter how this site is developed. Chairman Dunn stated that cleaning up the site is a positive for the area. The Board agreed.

Ms. Stith stated that she has been looking at the Master Plan from both 2005 and from last year. Ms. Stith stated that the language in the Master Plan states that zoning should be left up to the voters. Ms. Stith stated that she is not sure how they can guarantee that a development like this will not negatively impact the schools. We have no firm school data on this kind of development specific to our Town.

Ms. Stith read from the Master Plan survey from 2022 about the potential housing requests of the voters. Those that took the survey also stated that residents were looking for an employment center in the town. Ms. Stith said that we should look at the Substantial Justice variance criteria Taking away an employment center and instead adding constructing this type of housing may not be a fair tradeoff.

Mr. Scholz mentioned the substantial justice prong. Mr. Scholz stated that he thinks the applicant has brought forward a good mixed use proposal. Mr. Scholz has asked questions of the applicant around affordable housing and age restricted homes. Mr. Scholz stated that if the property had more work force housing and affordable housing, that might weigh in favor of the applicant. Mr. Scholz stated that residents would like to see more places to shop in town. That is also a need.

Mr. Scholz mentioned the potential traffic improvements on and near the property.

Ms. Gogumalla brought up the spirit and intent of the ordinance and she questions if this was what the voters wanted. She does not think this meets the intent of what the town wanted. Mr. Scholz agrees that this is not

an employment center as s was the will of the voters.

Chairman Dunn stated that the essential character of the neighborhood is not residential. As you approach the intersection on 111, it is clearly commercial all around the intersection. Chairman Dunn stated that this is a commercial neighborhood and to insert a major residential site plan would alter the essential character. Chairman Dunn stated that there would be a change in neighborhood.

Mr. Scholz stated that the town would like it to be an employment center. However, Mr. Scholz does not think this will alter the health, safety and welfare of residents. Mr. Scholz thinks they need to look at the spirit of the ordinance and applied the tests they have been asked to look at but he does not think it meets the second criteria. Nor does he think it meets the first criteria.

Chairman Dunn stated that there will be some effect on the schools even in a development like this but the impact would not be as significant if it were single family homes. Yet, this is something to consider regarding the health, safety and welfare criteria.

The Board discussed the access challenges on the site. Chairman Dunn stated that there will still be problems with accessing the site. The Board discussed this in reference to the special conditions of the property. Ms. Gogumalla stated that the access challenges would still be present no matter what is developed on the property. Chairman Dunn stated that the access challenges are not a result of the zoning requirement. Developing this land is going to be difficult and there is a challenge to this property regardless of use. Ms. Gogumalla stated that it is not a condition that requires relief. Chairman Dunn stated that the commercial use of the property is an approved plan.

Mr. Scholz is struggling with the fifth criteria and he thinks the applicant did a very good job presenting this. Mr. Scholz does agree that this is a unique site.

The Board briefly discussed the current residential market.

Ms. Stith stated this proposal is triple the residential and about a third of the commercial from the previously approved plan.

A motion was made by Mr. Scholz to continue Case #39-2022 to the second case for March 7, 2023. Seconded by Ms. Skinner. Vote 5-0. Motion passes.

The Board adjourned.

Respectfully submitted by Anitra Lincicum