

NASHUA CITY PLANNING BOARD
February 3, 2022

The annual training session of the Nashua City Planning Board was held on February 3, 2022 at 7:00PM in the 3rd floor auditorium in City Hall AND via Zoom virtual meeting.

Members Present: Scott LeClair, Chair
 Adam Varley, Vice Chair
 Mike Pedersen, Mayor's Rep
 Maggie Harper, Secretary
 Dan Hudson, City Engineer
 Bob Bollinger
 Mark Meehan

Also Present: Matthew Sullivan, Planning Manager
 Linda McGhee, Deputy Planning Manager
 Carter Falk, Deputy Planning Manager
 Scott McPhie, Planner I

FLEXIBLE USE OVERLAY DISTRICT OVERVIEW

Mr. Sullivan said they are calling this a training session on the agenda but would like this to be more of an open dialogue. There have been very few applications in the Flexible Use Overlay District in recent years. It's possible one may come to the Board in the future, so they thought it would be good to dust this one off the shelf and have a conversation about it. It's an interesting district which more considers relief than waivers. They should be keeping their questions objective and not discuss potential upcoming development proposals.

Mr. Sullivan said within the purpose statement of this district there is a plan reference that he is having a hard time getting his hands on. He's not going to present that this evening, but will talk about what that means and will get that to the Board after this session. He provided a brief overview of the presentation.

Mr. Sullivan said the district is an overlay zone, intended to supersede the R30 zoning. This was conceived as a residential zone, albeit with complimentary retail uses to help this area of the city function as an independent village district. The two plans

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referenced are the 1997 Terra Verde plan, and the 2001 Landsco Concept plan, which together form the boundaries of the district. Many of these are associated with the Maplewood subdivision.

Mr. Sullivan said this was conceived as an innovative land use control, and passes what would normally be under the authority of the Zoning Board to the Planning Board. This allows the Planning Board to grant relief for use, dimensional regulations, and other aspects codified by the zoning district. This gives the Planning Board a lot of power when it comes to applications in this overlay district. This was a well-conceived residential development within the city.

Mr. Sullivan said the intent was to create a mixed use village development plan that protects open space and provides recreational access.

Mr. Varley said the original Terra Verde plans proposed this as the location for a new school. Did that influence the decision to place the school nearby?

Mr. Sullivan said he can't say for certain.

Mr. LeClair said that is where Rosewood is right now. The school kind of slid down a bit clockwise.

Mr. Bollinger asked if the Mixed Use village district is part of the FUOD.

Mr. Sullivan said yes, it's almost like a district within a district. It has its own permitted uses and standards.

Mr. Meehan asked if chronologically it was residential, and then the mixed use district was created.

Mr. Sullivan said much of this was unbuilt, undeveloped land at one time. This was open space property. The city had the unique opportunity to do a planned community. There were very limited land uses existing.

Mr. Falk said it is an R30 zone, which requires lot sizes to be at least 30,000-sqft. Most of those lots are not. What they did was cluster the lots closer so that all the residents could share the open space.

Mr. Sullivan said this overlay has different lot sizes and dimensions to accomplish the goal Mr. Falk described. It's similar to cluster style subdivision. The ordinance has gone through several iterations. Via O-88-05 it was originally a planned residential development known as Hall's Corner. It was amended in 1997 as the Flexible Use Overlay District. In 2008 there was a comprehensive code rewrite. He doesn't believe there have been any amendments since then.

Mr. Sullivan said within the overall district there is one permitted by right use, single family residential. It was conceived as phases of subdivision. That said, there is the mixed use subzone where there are actually additional permitted uses.

Mr. Sullivan said that for the single-family residential properties there are unique dimensional standards, namely lot sizing and setbacks. This allowed the developer to achieve a compact cluster style which preserved the open space and recreational assets. They were also very deliberate to avoid the "row house" effect and staggered the houses to create a more village like feeling.

Mr. Sullivan said there are some interesting restrictions, such as there can be no more than sixty elderly housing units built. Fourteen units are currently built, on Houston Drive. There are forty-six units remaining that can be built within the overlay district.

Mr. Bollinger asked how they would qualify the elderly housing.

Mr. Sullivan said the Housing for Older Persons ordinance is a 55+ development. It also has other restrictions, such as unit size.

Mr. Varley said there is a density bonus and they have to have certain services. Are those standards out the window with this overlay?

Mr. Sullivan said he believes the Housing for Older Persons ordinance makes specific references to zoning districts.

Mr. Falk said that is correct. The FUOD is not listed.

Mr. Sullivan said the interesting question becomes if they used the R-30 base zoning, if it would apply here. He thinks that a

developer could take advantage of those density bonuses, but the cap on sixty units would supersede any bonuses that might exist.

Mr. Falk said that within the elderly housing development they would need to provide services, such as recreational amenities, information areas, or gathering spaces.

Mr. Sullivan said because of that they would likely be subject to the same allowances.

Mr. LeClair asked if they have the capability to modify or waive that in this overlay.

Mr. Sullivan said no. The way that it is written he would say they only have authority over the standards within this district, not those pulled in by an application from another district.

Mr. Falk said a lot of the time they get grants which require them to provide those support services. They may not have a choice.

Ms. McGhee asked if a developer wanted to exceed the 60-unit cap, would they be able to apply to the Planning Board for a variance? Another requirement is that no more than 250-unit shall be built; do we know how many are built? Do they exceed that already?

Mr. Sullivan said yes, a developer could seek a waiver for more than 60-units using the variance criteria for the Planning Board. The district was very deliberate when it was created. The threshold is already very high for a variance. He is wary of a waiver or variance when something is explicitly codified in the overlay standards. He is less worried about a dimensional variance that may be appropriate based on the site plan proposed.

Ms. McGhee asked how many units have already been constructed.

Mr. Sullivan said he doesn't know. He can find out.

Ms. McGhee asked if there are any permitted Accessory Dwelling Units in the overlay.

Mr. Sullivan said he doesn't know.

Mr. Falk said one or two at most, if any. The Zoning Board doesn't see anything in this zone.

Mr. Sullivan said Phase VI of Maplewood was revised multiple times, so he is not sure how many there are. It shouldn't be hard to find out.

Mr. Sullivan said within the mixed use village there are a different set of permitted uses. It was intended to serve as a retail hub for the residents in surrounding areas. They see fairly good occupancy of the land there, but there is still open land that could be developed. He provided a brief description of the uses permitted by right or by conditional use permit.

Mr. Sullivan said also within the mixed use village district there were a set of design standards adopted. He has vintage 1987 copies of the document if the Board is interested in reviewing it. These standards are important, and they deliberately wanted the architecture to be a certain way.

Mr. LeClair asked if there is an electronic version.

Ms. McGhee said they can get it scanned in.

Mr. Meehan asked if there is an HOA.

Mr. Sullivan said is one for the residential areas. The village has an HOA under a condominium ownership. There are some portions they having issues with ownership, as there is some strange infrastructure. It's an interesting situation, but was contemplated as a public road.

Mr. Meehan asked if the trails were public.

Mr. LeClair said yes.

Mr. Sullivan said it would be hard for an association to maintain this level of infrastructure. There's a lot going on here.

Mr. Sullivan said the design standards also set up a five-person design review committee. That committee must approve the architecture of any project proposed in the village district. That committee has not met in fifteen years. Two members of the Tamposi company, the Planning Director, a resident property owner, and a person qualified with New England architecture that must be designated by the Nashua Historical Society. The Planning Board does have jurisdiction to modify or appoint, but they don't know if all these members are present to participate. He would not

recommend abolishing the committee, but they could explore it during a revisit of the zoning ordinance. This is an additional regulatory hurdle for any developer. In the most recent approvals, fifteen years ago, it was allowed to be a condition of approval that the proposal would go to the committee after Planning Board approval.

Mr. Bollinger said he can understand the Tamposi company being involved in 1997, but what about 2022? It seems like a potential impediment thirty-five years later.

Mr. Sullivan agreed. If they were to revisit anything, it's the one component that seems to be a relic.

Mr. Varley asked if the Board could modify that so the committee's approval is not binding.

Mr. Sullivan said they could waive the architectural standards as a provision of the zoning. The writers were smart when they wrote this because it states that the any changes to the design committee bylaws had to agreed to by the Planning Board and two-thirds of the committee. If they are going to use this district there may be a need to explore what latitude the Planning Board has.

Mr. Varley said that might govern the committee but there could be something different for how the committee functions under the ordinance.

Mr. Sullivan said the ordinance states they must follow all procedures and guidelines. Therefore, they have to follow the process. The general design intent is important and should govern development proposals, but should the design committee be responsible for administering those? The answer might be no. They can explore a legal opinion of how to work with it, as it may cause issues.

Mr. LeClair said they could generalize the roles.

Mr. Sullivan said 30% of the total area is supposed to be left as open space, and intended to be deeded to the City of Nashua to develop a trail network; this has been done. The trail network was required to be complete before the homes could be occupied, in order to incentivize the developer. The city maintains these trails. Open space frontage of 125-ft was required along Ridge

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Road along with the removal of the foundations there, which he believes was done.

Mr. LeClair said it could mean historic buildings. A brief discussion ensued.

Mr. Sullivan said the retail uses had some considerable restrictions, including a maximum build floor area of 80,000-sqft in the mixed use village, and they are not quite there yet.

Ms. Harper asked how much is there now.

Mr. Sullivan said about 55,000-sqft. He briefly outlined road standards, sign standards, and hours of operation.

Mr. Sullivan said one of the big things is that this is an innovative land use district. It does not require variances through the Zoning Board. The Planning Board may waive all use and dimensional requirements through a waiver process. The difference is that they use the variance criteria the Zoning Board would apply rather than the waiver criteria the Planning Board traditionally uses. One of the objectives is to give the Board a background on how to apply those criteria.

Mr. Bollinger asked if it is required to go to the ZBA first.

Mr. Sullivan said the Planning Board's power appears to be dimensional and use requirements. It's not clear where the Planning Board could grant variances from hours of operation or other standards.

Mr. Bollinger said he was looking for a circumstance where they would go to the ZBA.

Mr. Sullivan said he can't think of one.

Mr. Falk said the only thing that may would be a special exception for wetlands buffer. That would have to go to the Conservation Commission first and then the Zoning Board. There were several special exceptions to work in wetlands when the development was first installing infrastructure.

ZONING BOARD OF ADJUSTMENT VARIANCE CRITERIA

Mr. Falk introduced himself as liaison for the Zoning Board. The ZBA considers variances, special exceptions, and equitable waivers. Probably 90% of the requests are variances, currently about 120 per year.

Mr. Falk said the Board was provided with copies of NRO §190-137, which outlines the approval criteria necessary for a variance. The meat of it is the five points of law that the Zoning Board has to consider for all variances. They are public interest, spirit and intent of the ordinance, substantial justice, property values, and hardship. He will be going over each point.

Mr. Falk said these points of law are interrelated. They sound similar, but are asking for specific things.

Mr. Falk outlined potential impact to property values. The Board will have to determine whether the proposed request could negatively impact property values. The applicant will have to tell them what they are doing to not make surrounding property values go down, what they are doing to improve the property values. On some of the more difficult cases they may get a report from a property appraiser from the applicant arguing that the proposal will improve property values, as well as a report from the angry mob of abutters which says the opposite. They both can be very convincing. It will be up to the Board to determine who is right.

Mr. Sullivan asked what if the applicant has an appraisal but the angry mob of abutters doesn't.

Mr. Falk said it's up to the abutters what they want to submit to support their case. They have just as much of opportunity to provide something. If they don't, the abutters can request the case be tabled to give them time to provide that information. That is a reasonable thing for the Board to do.

Mr. LeClair asked if they can require them to do so.

Mr. Sullivan said the challenging thing is when one party has an report from an appraiser or realtor and the other doesn't, when they are relying on non-expert testimony. Often the ZBA will rely on expert testimony.

Mr. Falk said often the applicant will provide a heavily detailed report on how much the property values will increase. It will probably look very convincing. It will be up to the Planning Board to determine whether it is credible.

Ms. Harper said it would be something she would consider, but not rely on.

Mr. Falk said it is part of their due diligence to convince the Board they are meeting the five points of law. It's up to them to prove it to you.

Mr. Varley said it would be hard as a board member to dismiss expert testimony in favor of the non-expert testimony.

Mr. Sullivan said what the ZBA often sees is that the abutters will often bring a report of their own. He agrees that it is a challenge when only one side is represented by an expert.

Mr. Falk said the Board also receives conflicting reports, both for and against. It's up to the Board to sift through and decide what is a valid argument or not.

Mr. Falk outlined the spirit and intent of the ordinance. The request has to promote the health, safety, and wellbeing of the neighborhood. Generally it's done by looking at traffic, fire protection, safety. It needs to provide for adequate light, space, and air. This is important because back in the turn of the 20th century there were no zoning laws. In large cities like New York and Chicago there were slaughterhouses right next to residential developments. There was no separation of uses and structures, no concern for safety.

Mr. Falk said if they think of a typical standards quarter acre subdivision, everyone has their lot, their building setbacks, their shed and their pool. Picture that. The spirit and intent of the ordinance is to provide for that neighborhood, provide for that space and light in between all of the residences. Something that would not be in the spirit and intent of the ordinance just doesn't fit, like an industrial plant or a used car lot. The same goes for along Daniel Webster Hwy or Amherst St; a single family home wouldn't fit in there either. It's not what the ordinance intended for that section of the city.

Mr. Falk said in all of the residential, commercial, and industrial zones, there are proper setbacks, open space, maximum building heights. They all have dimensional standards, and they have to be met for good reasons. When they look at a variance, they have to ask: does this match the spirit and intent of what was originally planned under the ordinance?

Mr. Falk outlined public interest. He said it is very similar to the spirit and intent. Does it violate the basic objectives of the zoning ordinance? Every zoning district has dimensional criteria and permitted uses. Does it violate the essential character of that neighborhood?

Mr. Sullivan said often zoning boards will consider public interest and the spirit and intent of the ordinance together because they are so similar.

Mr. Falk outlined hardship. That's the one that everyone gets hung up on the most. Informally, that's the hardest one to meet. The applicant has to prove that the variance is needed to enable the proposed use of the property, given the special conditions of the property, and that the benefit they seek cannot be achieved by any means other than this variance. It has to be a reasonable use.

Mr. Falk said a good example of this is if you live on a street with 30 houses, all about the same size lots, and 29 of them have an attached two-car garage. Your house doesn't because you have something unique about your property, something physical that means you can't have the garage. You would need to go into that setback to put your garage in. There has to be something physically special about your property. Like the topography, the lot shape, the lot size, or nearby uses.

Mr. Falk said you have to take a look not only at that property, but what's around the property. What's the essential character of that neighborhood? The ZBA members perform drive-bys of the property to get a feel for the neighborhood. Picture it as if the request has been granted. How is that going to look? How is that going to impact the neighbors?

Mr. Falk said they have to look at the characteristics of that property, and what makes it special. What makes it unique? It could be very simple, like being a corner lot. The topography may make it special, or the strange shape of the lot. Maybe just one corner

of the addition is in the setback. The hardship has to be something that makes the property a little bit different than the others.

Mr. Falk outlined substantial justice. One of the most common responses is that since all of the other criteria are met, substantial justice would be served by granting this request. It's a culmination of all necessary points of law to do something that is not allowed by the land use code. The benefit to the applicant outweighs any impact to the neighbors. All of the criteria have to be met. You can't meet four out of the five.

Mr. Falk said a variance cannot be granted for financial gain. They hear a lot of applicants claim that even though they don't have the land area for an additional apartment unit, the rent will help them pay their mortgage and maintain the property. That can't be used as a point of law, and the courts will never support it.

Ms. Harper asked if hardship cannot be financial.

Mr. Falk said it can never be financial hardship. That's not a hardship of the land. It cannot be personal or financial hardship.

Mr. Falk said when an applicant is done with their presentation and the public hearing is closed, during the public meeting the Board needs to discuss all the points of law. If someone wants to make a motion, they need to state the specific reasons why they feel the request meets each point of law.

Mr. Sullivan asked if he recommends that the Board members poll on each of the points of law independently.

Mr. Falk said that takes a lot of time, but they can. The ZBA members will typically go around the room to state their opinion and why the request meets or does not meet the criteria. This gives them a sense of how many members support the request and what kind of motion the chair should ask for.

Mr. Sullivan said he could caution the Board members that if they state they do not support one of the points of law but still vote to approve, that's a huge issue. That's an invalid vote. You have to clarify that clearly as part of the record because all of the criteria have to be met.

Mr. Falk said the person that makes the motion will give all the reasons why it should be approved. The person who seconds the

motion is agreeing with you. When the vote comes around, if you don't feel the variance has met all the points of law, you would not vote in favor of it.

Mr. Varley said ordinarily for a waiver, they would incorporate each of those into the motion. Would they consider this as a separate vote?

Mr. Sullivan said these have to be notified as functionally different applications as individual waivers, basically. They should be taken as independent votes. He thinks they should address the waivers prior to reviewing any site plan that would be contingent on approval of the waivers. They may need to get further guidance to the Board on that.

Mr. Varley said they will often take related cases together, like a subdivision and a site plan. They hear them together and vote on them separately.

Mr. Sullivan said they could take the cases together for the presentation, and then have a separate discussion. The only challenge is that you want the public testimony to be focused on the five variance criteria. By taking all cases together they would inherently broaden the discussion.

Mr. LeClair said they sometimes refuse to hear cases before they are reviewed by the ZBA for variances, as they are incomplete.

Mr. Varley said the issue is whether the site plan is dependent on the variance.

Mr. LeClair said if it is denied they would have to revise the site plan.

Ms. McGhee said if they do the variance and site plan separately, if they have an angry mob of abutters they will be going up to speak twice. Zoning Board has a timer to limit each speaker to five minutes.

Mr. LeClair said a lot of Boards do that. The Planning Board hasn't had to do that.

Mr. Varley said there have been occasions where he wished they had a time limit.

Mr. Falk said they used to have abutters take an hour to talk about a sign variance when they could have said it in three minutes just fine.

Mr. Bollinger said they have built in several extra meetings into the calendar. If they are going to have multiple presentations for one proposal they can't have eight other site plans on the agenda.

Mr. Sullivan said they would most likely have a special meeting under those circumstances. It's fair to everybody.

Mr. Falk said one of the real basic questions for a variance is, is this a reasonable request? If you lived next door or across the street, would you want to look at it? How would you feel? Is the traffic reasonable? Is the parking reasonable? Is the height, shape, and bulk of the building reasonable? Would you want to live next to it?

Mr. Hudson said this is unique because they have a residential use and then a little downtown area. In what context are they evaluating it? Is it in the residential area, or is it in the area that was always intended to be mixed use?

Mr. Pedersen said they had a case a long time ago where all the abutters were against it. One of the abutters came up to the microphone and said, think about it from our perspective what this would be like. If you live there, think about how you would have to put up with this every day. All five criteria would have to be met, or this would not fly.

Mr. Falk said a lot of the time an application can meet the five points of law, and you still not like it. You may not overall like the request, but they have a convincing argument.

Mr. LeClair said the difficulty comes a lot with the edge conditions. There may not be the best zoning anymore, where it doesn't reflect the current area. The edges of districts morph.

Mr. Falk said it can be hard to tell where one zone starts and another ends, especially along the major corridors.

Mr. Hudson said a lot of the mixed use village area is divided by open space. That's city property.

Mr. Sullivan said they have been deeded to the city as open space, but are not under any conservation easements.

Mr. LeClair said in that area there are a lot of wetlands.

Mr. Sullivan said they should still remain open space. There is a specific section of the code that refers to what that needs to be. That definition has been stretched quite thin by some of the recent conservation subdivisions that might not strictly meet the definition. They probably should read it a little bit more strictly. Developers have used lawn as open space. It's something they should be more sensitive to. It's supposed to be forested open space or have some kind of habitat value.

Mr. McPhie said that could be maintaining trails.

Mr. Falk said it can't have manmade objects or structures, no pavement.

Mr. Sullivan said they want to be sensitive to everyone's time, if they have any other questions they can reach out. It's an interesting district.

A brief discussion ensued of other zoning districts that could be incorporated into future training sessions.

MOTION to adjourn by Mr. Pedersen at 8:20 PM

MOTION CARRIED 7-0

APPROVED:

Mr. LeClair, Chair, Nashua Planning Board

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Prepared by: Kate Poirier

Taped Meeting