

**City of Newburyport
Planning Board
June 7, 2017**

The meeting was called to order at 7:02 PM.

1. Roll Call

In attendance for the Planning Board: James Brugger, Anne Gardner, Joe Lamb, Jim McCarthy, Leah McGavern, Bonnie Sontag, Andrew Shapiro, and Don Walters. Andrew Shapiro and Bonnie Sontag left at 9:00 PM.

Absent: Mary Jo Verde

In attendance for the Planning & Development Subcommittee of the Council: Ed Cameron, Barry Connell, and Jared Eigerman

In attendance for the City Council: Robert Cronin, Charles Tontar, Greg Earls, and Sharif Zeid

Andrew Port, Director of Planning and Development, was also present

2. General Business

- a) The minutes of 5/17/17 were approved. James Brugger made a motion to approve the minutes. Bonnie Sontag seconded the motion and all members voted in favor.

Motion Approved.

During the course of discussion and consideration of this application, plan(s), supporting material(s), department head comments, peer review report(s), planning department comments and other related documents, all as filed with the planning department as part of this application and all of which are available in the planning department, were considered.

- b) Request for Waivers – 6 Perkins Way (2017-SPR-02)**

Anne Gardner made a motion to add the environmental impact and traffic analyses waivers to the Completeness vote. Andrew Shapiro seconded the motion and all members voted in favor.

Motion Approved.

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- c) Application Completeness Vote – 74 Storey Avenue (2017-SPR-03)**

Chairman McCarthy said an additional car wash bay was proposed, behind the existing car wash. A waiver was requested for a registered landscape architect.

Bonnie Sontag made a motion to approve Application Completeness and the landscape architect waiver. Leah McGavern seconded the motion and all members voted in favor.

Motions Approved.

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d) Request for Minor Modification – 1 Market Square (2017-SP-02)

George Carey, owner, Sea Level Oyster Bar, requested a sign change, from attaching individual letters to the exterior to attaching the letters to a wood backing that used existing holes in the exterior. The individual letters had too many points. Members agreed, as long as there was no impact to the granite and the wood matched what was in use. Mr. Carey said the rear sign would be presented to the Newburyport Historical Commission (NHC) first.

James Brugger made a motion to approve the ‘Option 1’ signage change as a Minor Modification. Leah McGavern seconded the motion and all members voted in favor.

Motions Approved.

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3. Public Hearings

- a) City Of Newburyport
83 Merrimac Street and 90 Pleasant Street
Major Site Plan Review (2017-SPR-01)
DOD Special Permit (2017-SP-03)
Special Permit for Use (2017-SP-04)
Continued from 5/17/17**

Chairman McCarthy wanted to discuss traffic.

Andrew Shapiro made a motion to disapprove the continuance for the Major Site Plan Review, DOD Special Permit, and Special Permit for Use to June 21. James Brugger seconded the motion and all members voted in favor.

Motions Approved.

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Members acknowledged that many people said the City could not afford to wait for a broader traffic study. Chairman McCarthy said the September study did not include peak season traffic or the Route 1-Merrimac Street intersection, but did prove traffic issues would not prevent building the garage. The board needed to understand how traffic patterns shifted and the mitigation required. Members also acknowledged many people struggled with the simultaneous effects of the parking garage, Ale House opening, and Waterfront West proceeding. Some people demanded a far greater scope, to include from Route 1-Merrimac Street to the library, before the opening the garage. Expanding the study would not show any cause not to build the garage. The garage mitigated the loss of the waterfront lot. That fact supported some separation in traffic studies. Nevertheless, a larger study completed before the garage opened was needed. It would take a year of hearings to change road directions. Incremental funding was needed quickly to support better downtown traffic management and a mitigation study. Funding anything less than a broader study now would not provide the information needed. Chairman McCarthy agreed. Traffic was related to parking. A TED Talk he heard explained that cars searching for parking constituted 30% of all traffic. One member said the study submitted was satisfactorily comprehensive. The NED traffic study would cover the other projects. Members said traffic pattern changes caused by the garage required a more comprehensive study right away. Chairman McCarthy said the applicant would be looking for permits on June 21.

Councilor Cameron said the initial study examined streets adjacent to the garage. He supported performing a broader study right away. Changing streets was not easy. Councilor Eigerman agreed. The City needed a downtown circulation and parking study in any event. He supported transferring funds for a larger study now. Councilor Connell said extending hours in existing lots and using differential rate structures would send cars to the garage. An expert opinion was needed for implementing differentiated rate structure before the garage opened.

Director Port said the initial traffic study, for the garage only, showed queuing did not cause back ups. NED needed a traffic study as well. An analysis of the entire downtown, necessary for the garage to proceed, was underway with John Burke. The questions of Waterfront West and peak summer traffic could be handled with conditions for recommendations on parking and traffic on peak summer days, downtown parking restrictions, and garage rates. Chairman McCarthy wanted a study that tied together parking, incremental rate structures, and flow mitigation in a continuing process that considered each project as it came on line, ahead of the fact. Director Port said key analysis elements were the garage and future build. The study included how traffic flow was affected and a recommendation for Green Street directions. Should analysis be performed once the garage opened? Chairman McCarthy said the board needed data showing whether two police officers were needed to empty the garage in 20 minutes.

Public comments.

Rob Germinara, 2 Ashland Street, said the state would take a long time to address the Route 1-Merrimac Street intersection. How would the state be involved?

Jeannette Isabella, 1 Lime Street, asked why the City would put \$12 million into a building and not open it until traffic information was available?

Public comment closed.

Chairman McCarthy asked how the board would craft a condition that captured what was needed in time for a June 21 vote? The MA DOT survey data from last summer did not include the garage or Waterfront West. Director Port said MA DOT wanted to make improvements, but their funding could not precede a design. NED is funding the design that incorporates the impact of future traffic patterns from Waterfront West and the Ale House. That was Phase II. Chairman McCarthy said mitigating flow was not in the current study and was needed.

Don Walters made a motion to continue the Major Site Plan Review, DOD Special Permit, and Special Permit for Use to June 21. James Brugger seconded the motion and all members voted in favor.

Motions Approved.

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4. Joint Public Hearing with the City Council's Planning & Development Subcommittee and Committee of the Whole

a) Proposed Zoning Amendment: Variances and Basis for Hardship Claims

Councilor Cameron opened the City Council portion of the hearing. Councilor Eigerman proposed deleting the justification for hardship criteria in zoning variances. The City learned that the hardship justification was illegal three and a half years into the zoning rewrite. Director Port discussed the discovery with Councilor Eigerman in late March, who subsequently put in an appeal. City counsel agreed the justification for hardship was illegal.

Director Port said the Planning Office agreed with the amendment as put forward. He read from legal counsel's letter that identified conflicts with state statute.

Board member comments: Enforcement would not change. What type of enforcement would be in place? Should the City do anything more in accordance with M.G.L? Did other towns have anything more strict? Director Port said ZBA variances for dimensional standards based on the

proportions of other lots were requested for out-of-scale projects. There were other ordinance criteria for true hardship. The ZBA had granted variances using the faulty criteria. Members asked for examples of harm to the City? Could someone sue? Director Port said no, applicants had 20 days to file. There was no criminal liability. Members asked about home rule? Director Port said home rule gave a municipality leeway to go above and beyond state regulations but did not support laws in conflict with state regulations. Members asked if the hardship variance happened more than a twice a year? Director Port said there had been a few. Councilor Eigerman had not heard anyone claim the provision was invalid. Everyone agreed it was preempted by state law and therefore illegal. It was hard to look the other way on variances granted. Abutters had been deterred from challenging the ordinance because of the legal fees and court costs.

Public comment open.

John Kolterjahn, 64 Federal Street, co-chair, Newburyport Preservation Trust, was in support.

Jeannette Isabella, 1 Lime, said non-conformance was not a reasonable hardship argument.

Stephanie Niketic, 93 High Street said the hardship loophole had been used multiple times. It was the major justification for infill in the historic district. Abutters that appealed spent \$10,000 before giving up. That was unfair to citizens.

Public comment closed.

Leah McGavern recommended the amendment for Variances and Basis for Hardship Claims. Joe Lamb seconded and all members voted in favor.

Barry Connell made a motion to approve the amendment for Variances and Basis for Hardship Claims. Jared Eigerman seconded the motion and all members voted in favor.

Motion Approved.

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b) Proposed Zoning Amendment: Zoning Administrator

Councilor Eigerman said zoning codes could be administered in different ways. In today's overheated market, the City was handling business the same way it had for decades. Adding zoning code oversight to the building inspector's job resulted in poor interpretation of the code. Zoning administrators, used in other cities, had the final word on zoning issues such as the boundary line of zones. The position did not lessen the building inspector's ability to look at zoning compliance, which the zoning administrator would also do. Many responsibilities would continue to be shared with building inspector. Duties and issues for which the final word rested with zoning administrator were laid out. The building inspector had the final word on building

regulations. The two positions would work out recordkeeping. The zoning administrator was required to investigate a violation and handle prosecution. There was an appeal process. Responsibility for permission to use a mechanical saw in the repair of historic masonry went to the zoning administrator instead of the planning board. Secretary of the Interior standards would be followed. The zoning administrator would also ensure that unoccupied historic buildings were not left open to the weather for demolition by neglect. The position, funded by building permit fees, was delayed to January in order to grow the current enforcement officer into the job.

Director Port said the small Planning Office was expected to do quite a bit that prevented them from being out in the field. A zoning administrator solved that issue. The primary concern was enforcement of ordinances. Part-time enforcement would be full time in September. The Planning Office supported some independence for the position and supported language that the ZBA would take testimony without penalty of perjury. He said voting on the job every year would have an unwanted effect on the quality of candidates. Cause for removal should be defined to avoid being subjected to political issues. He agreed with Councilor Eigerman on masonry oversight. He could codify the requirements to streamline the process. Standards for development should be strict without a burdensome process for property owners.

Chairman McCarthy said a huge percentage of downtown did not conform. The ZBA was considerably more active compared to other cities. Expecting that volume of work from a building inspector was unmanageable. The position was overdue. A separate zoning enforcement administrator could follow the process from the written decision through to construction. Director Port said all ZBA and Planning Board permits would be enforced. Members said historic masonry reviewed by the administrator should include a review by the Newburyport Historical Commission (NHC), as with the board's process. Were masonry and the protection of unoccupied historic buildings typical items for a building inspector? Director Port said the reason for separating those responsibilities was to avoid situations the City had faced. He agreed that masonry was more typically a building inspector's role, but not the protection of an unoccupied historic building.

Councilor Eigerman accepted all grammatical comments from the Planning Office. The mayor and the City Council should have the joint ability to remove the person. He proposed extending the position to two years. Eigerman said the ZBA took testimony without penalty of perjury when investigating a violation. Councilor Connell proposed alternate years from Council election cycles and asked why wait until January 2018? Director Port said the administration requested January 21 to phase in the part-time person. Councilor Cameron supported the changes.

Board member comments: There was widespread support. Applicants would benefit. Check for inconsistencies in the DOD ordinance. Check the entire ordinance for the grammatical error 'he' and replace it with 'they.' A two-year term could sync up with a mayoral election. That was problematic. NHC advice should be retained. Securing an unoccupied building to protect against damage was a function for the building inspector, despite past issues. A zoning administrator could not determine if a building was properly secured without specific and key qualifications. Councilor Eigerman said the zoning administrator was part of a team for all the conditions of an approved decision. The technical knowledge would be gleaned from colleagues.

Councilor Zeid asked what long-term problems needed to be resolved, other than issues in the underlying zoning? Using building department funds without sufficient justification was not acceptable when other things could be done with the money. He heard that the building inspector was too busy. Staff now said there were no problems with the new building commissioner. He wanted numbers. How many zoning issues the administrator would handle? What were the practical implications? Who was the sole responsible party if the administrator was on vacation or fired? The concept of catching something in process was attractive. Where in the process would a zoning inspection occur? Weren't the majority of issues front-loaded when the application came in? Were there enough problems on the back end to warrant the position?

Chairman McCarthy said zoning violations in the historic downtown were more critical than the average zoning code violation. Administering the sheer volume of non-standard issues going through the ZBA warranted immediate attention. Only someone with knowledge of all 26 pages in the Evergreen decision could enforce them effectively. At present, occupancy permits for two Towle project buildings were withheld because a condition for a perpetual preservation restriction that took considerable time lacked follow-through. Conditions taking the longest needed to start the earliest. Litigation costs for one zoning code violation could fund a full year of salary. Making the process smooth, with consistent outcomes that were fair to applicants and neighbors was a capital investment in the City. There were a lot of conditions other than garages and height to administer. There was the negative good will with the Lime Street issue, and two doors up, another builder had to take nine inches off the floor height. The mayor's time was involved. Playing catch-up all the time discouraged capital investment. Members said the administrator would not work in isolation, nor did the Planning Office. The building inspector was the back up position. Procedurally, the City would not want it known when the zoning administrator would arrive. Inspections would be done on a regular basis. If finances were a concern, consider the minor project on Pine Street that resulted in steep court costs for the City.

Councilor Connell said Councilor Zeid's concern was whether the position was necessary. City staff and boards had talked to mayors for the past 11 years about the need for the position. Today's problems were not a recent phenomenon. They were more prevalent and visible. Now was the right time to act to address the Building Department's volume of work. The personnel director ensured better management of implementing new positions. Councilor Eigerman said building fees should be used for building-related issues. He supported Chairman McCarthy's statement about the imbalance of 90% of City's revenue coming from property taxes but only 1-2% was spent on the Planning Department. Any officer could delegate before leaving for vacation. Authority would still be retained with building inspector. A longer vision was important. Over heated development was normal, not just today's problem.

Councilor Tontar asked about potential conflicts between the zoning administrator and the building inspector? Zoning was incompatible uses and dimensions. Building codes related to safety. Director Port cited an example where an applicant had to return to the approval board before securing an occupancy permit. The zoning administrator would not overrule on building and safety issues. Councilor Eigerman said the zoning amendment concerned Appendix A. A separate chapter on buildings was the exclusive purview of the building commissioner.

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Councilor Zeid asked for an example of how the position worked in the field? Chairman McCarthy said there was an increased level of complexity. The 26-page Evergreen decision was effective only if someone actively understood and managed each condition. Every condition required follow-up in the field and all the conditions had to be enforced. The building inspector's concern with safety and structure was distinct from zoning and decision conditions. Director Port had never seen any building commissioner keep up with the number of permits the City reviewed and still have time to monitor in the field. Tracking the unique conditions to each project could prevent issues like those on Strong, Lime, and Pine Streets, which added up over time. Members said after a building inspection, if something did not look right, the zoning administrator could be asked to stop by the site. Both positions worked in the same office and shared information. Chairman McCarthy said the enforcer would take a case and call the applicant to discuss all conditions. Was anyone watching the School Street project that had sold to another developer? The conditions were important to the project's success.

Public comment open.

Jeannette Isabella, 1 Lime Street, supported the position and cited the costs of time and money with Mr. India's demolition by neglect and an unoccupied Lime Street house that was found with windows open. Developers, despite good faith agreements, did not follow all their conditions.

Rob Germinara, 2 Ashland Street, supported funding the position regardless of what the previous building inspector did. He suggested a one-year first term and two years each subsequent term.

Art Currier, 100 State Street, supported amending the position to two years.

David Powell, 3 Salem Street, said other cities used a code enforcement committee for all codes, including building, fire, police, and Board of Health, and with authority similar to the Transit Advisory Committee. Chairman McCarthy said he tried for an 'all codes' enforcement position. The inadequate staffing in many departments had prevented taking things to that level.

Tom Kolterjahn, 64 Federal Street, co-chair, Newburyport Preservation Trust, was in support.

Joe Lamb moved to recommend the Zoning Administrator amendment. Leah McGavern seconded the motion and all members voted in favor.

Jared Eigerman made a motion to approve the Zoning Administrator amendment, incorporating Mr. Germinara's term idea. Barry Connell seconded the motion and all members voted in favor.

Motion Approved.

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5. Public Hearings (continued)

***b) Six Perkins Way Nominee Trust
6 Perkins Way
Major Site Plan Review (2017-SPR-02)***

Attorney Adam Costa, Mead, Talerman & Costa LLC, 30 Green Street, went through the plan as presented on May 8. Access to the site faced the 4 Perkins Way side. An order of conditions from both Newburyport and Newbury Conservation Commissions included extensive requests. A technical review committee meeting with the City almost two years ago resulted in plan modifications to incorporate recommendations and address conservation commissions' concerns. Modifications increased flood storage and relocated a sewer pipe. A full mitigation plan for wetlands would be submitted. The traffic excerpt showed 29 peak hour trips. Deputy Chief Bradbury had given his approval. A photometric plan with cut sheets was prepared. Comments from CSI would be addressed in the next meeting.

Bill Holt, WGH Land Surveyor and Sons, Merrimac, demonstrated features on plan drawings. Chairman McCarthy asked if everything went into the ponds? Mr. Holt said infiltration to the ponds was more than double the requirement for recharging. Roof drains led to the ponds. Chairman McCarthy asked if the wetlands on the plan functioned? Were wetland improvements required? Mr. Holt said yes. He described replication in two areas as a net improvement for the watershed. Members asked to see the letters from CSI before the next meeting.

John Sava, architect, 141 Bridge Road, Salisbury, presented images of the building, upgraded for small business and manufacturing. The metal roof would probably be standing seam with a quarter pitch. Plumbing included handicap accessibility. Parapets hid the HVAC systems. New energy codes made the building more efficient. Members asked about solar panels? Mr. Sava considered solar an option for the future. An architectural band lowered the building's appearance. Members said the Tree Committee letter referenced using a landscape architect. Attorney Costa requested a waiver. Plantings went above and beyond for both Conservation Commissions. Chairman McCarthy asked about the number of trees? Mr. Holt showed a where number of trees would be planted along the front and sides of building, and along the pond's berm. The Conservation Commissions had asked for five different species. There were 60 trees and 60 shrubs though out the property. Members said the Tree Committee should see the Conservation Commissions' request and resulting plan. Chairman McCarthy said tree locations by type were not specified. The Tree Committee's domain was public property, not private. Mr. Sava said the landscape plan was done by Mr. Holt's office. Attorney Costa would get a sign off from the Tree Committee before next meeting.

Public comment open.

Rob Germinara, 2 Ashland, asked about screening dumpsters and upholding the industrial park covenants? Chairman McCarthy said those were Planning Office functions. Re-envisioning the park's uses was on hold. Sidewalks and other measures would come in the future. Members asked if City zoning preempted the 30-year term covenants? Director Port said most had a 30-year term, but he could not speak for all. Two different levels of compliance were required.

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Issues raised by peer reviewer CSI were not yet resolved. The board recommended continuing.

Don Walters made a motion to continue the Major Site Plan Review to July 5. Leah McGavern seconded the motion and all members voted in favor.

Motions Approved.

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- c) David Hamel and Karen Damon c/o Mark Griffin, Esq.
496 Merrimac Street
Special Permit Amendment (2016-SP-07a)**

Chairman McCarthy read the notice. Attorney Mark Griffin, Finneran & Nicholson, PC, 30 Green Street, requested a continuance. A member requested incremental benefits to the City.

Joe Lamb made a motion to continue the Special Permit Amendment to June 21. James Brugger seconded the motion and all members voted in favor.

Motions Approved.

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6. Adjournment

James Brugger made a motion to adjourn. Leah McGavern seconded the motion and all members voted in favor.

The meeting adjourned at 9:43 PM.

Respectfully submitted -- Linda Guthrie