

## WEST WINDSOR PLANNING COMMISSION

Draft Minutes  
October 12, 2010

Present: Hal Pyke, Elvin Kaplan, Barbara Truex, Al Keiller, Glenn Seward, Martha Harrison

1. Call to Order – Chair Hal Pyke called the meeting to order at 10:10 AM.
2. Changes or Additions – None
3. Continue revising zoning regulations – Hal said the Development Review Board (DRB) recently spent a lot of time on nonconforming structures and would appreciate it if the Planning Commission (PC) would clean up the inconsistencies in the zoning regulations. The PC talked about Section 1.7(7) which addresses exterior alterations to structures which do not result in an increase in the footprint or height or a change in use. Hal described the situation with which the DRB was recently confronted and noted that Section 1.7(7) led the DRB to determine that no permit or variance was required. There was discussion about what is meant by “change of use,” with some members interpreting it narrowly (e.g. patio v. sun porch) and others interpreting it more broadly (e.g. residential v. commercial). The PC talked about nonconforming structures and what constitutes “an increase in the degree of nonconformance.” Martha said when she described the application that the DRB recently considered to Jim Barlow at the Vermont League of Cities and Towns (VLCT), he said most Zoning Administrators would consider it an increase in the degree of nonconformance but, because of the exemption in Section 1.7(7), a permit could not be required. If it weren’t for the exemption, the DRB would have had to consider the application under the variance criteria. Barbara noted that Section 1.7(8) exempts residential stairs, excluding decks and porches. By putting a roof over a patio, Barbara asked, are you creating a porch because Section 1.7(8) excludes porches from exemption. Glenn suggested eliminating Section 1.7(7) and including waiver language somewhere in the regulations. Glenn read the waiver language from Manchester’s zoning regulations. Barbara said she thinks we need to clarify the purpose of setbacks. Elvin said he thinks the exemptions allow for interpretation, which isn’t bad because the circumstances of each application are different. Martha said she thinks the situation that the DRB recently considered should have been reviewed under the variance criteria but, because of the exemption in Section 1.7(7), it didn’t get that far. Hal said the owner would never be able to get a variance because one of the criteria is that the hardship is not the fault of the owner. Glenn said he thinks waiver language would take care of that and provide additional wiggle room. Al asked if there is any litigation history in this town about this kind of thing. Martha said she is worried about Manchester’s waiver language because it’s a little fuzzy. Elvin agreed. Martha said South Burlington’s bylaws were thrown out in the JAM Golf case because they were too fuzzy. Martha said Norwich’s bylaws were also thrown out recently because they were less restrictive than the state requires with regard to pre-existing small lots. Martha said if the purpose of the regulations on nonconformities is to reduce or eliminate them, she’s not sure it’s a good idea to add waiver language that allows them to expand. Al asked if the existing variance language would allow the DRB to approve the construction in this situation. Martha said the DRB has granted variances in the past in situations where a house was built prior to zoning. Barbara said this is a non-conforming structure which is covered in Section 3.9. Hal said if a structure is nonconforming prior to the issuance of the zoning bylaws, it is legally nonconforming. Martha said a variance in that

situation would be a variance of the nonconformity. Hal said the problem is that the third variance criterion requires that the unnecessary hardship was not created by the appellant, but any change which increases the degree of nonconformity would be created by the appellant. Martha said in the past the DRB has determined that the house, which was built too close to the property line prior to zoning, is the hardship and the person requesting the permit isn't the one who created the hardship. Elvin read Section 3.9(B)(3) and asked what "these regulations" refers to. Hal said "these regulations" refers to the footprint. Martha said she thinks "these regulations" refers to the zoning regulations. Hal agreed. Elvin said because Section 3.9(B)(3) refers to these regulations, and these regulations include Section 1.7(7), the proposed construction considered by the DRB does conform. Martha said that's why the DRB in this case said, "You don't need a permit. You don't need a variance. Here's your money back." Martha said she doesn't think that's a good idea but, because of the exemption, our regulations allow it. Elvin said it sounds legal. Martha agreed that it's legal but asked if that's the way the PC wants this type of situation to be handled in the future – to not require a permit for an addition to a house that is one foot from the property line. Barbara said if you don't need a permit, there's no oversight. Glenn said there needs to be some sort of review and suggested, again, the inclusion of waiver language. Hal said he doesn't have a problem with a waiver but he does have a problem with using a variance to correct this problem. Glenn had a copy of the state statute on waivers. Glenn agreed that Manchester's waiver language is a bit loose, but said it provides a framework. Martha asked Glenn if he has a problem with using the variance criteria in this situation. Glenn said yes. Glenn said the variance criteria don't just apply to setback issues, but to a number of other issues as well. Glenn added that the waiver criteria would just be for setback issues. Hal directed the PC's attention to page 20 of the "*Sample Bylaws and Definitions*" document created by the Vermont Land Use Education & Training Collaborative and read a sample bylaw that allows increases in nonconformities based on cost. Barbara said she would stay away from including cost as a criterion. Barbara said if the house on the adjoining property had been on the same level and closer to the nonconforming house that would have made a big difference so you need language to address those issues. Barbara said she thinks the exemption language should apply to conforming structures only. Al agreed that Section 1.7(7) should apply to conforming structures. Barbara suggested that the heading for Section 1.7 should be "Exemptions for Conforming Structures." Al asked about the situation where someone has a legally nonconforming structure and wants to incorporate an agricultural use as specified in Section 1.7(1). Martha said the PC could just add "or an increase in the degree of nonconformance" to the end of Section 1.7(7) rather than change the heading of the Section. Regarding Section 1.7(8), Barbara asked why we're excluding decks and porches from the exemption. Martha said most towns don't require permits for patios but, if we're going to determine that a patio is part of the footprint, then we shouldn't ignore them because we'll have people putting patios in the setback area and then adding onto them under the exemption in Section 1.7(7). Elvin asked about the usage of the words "waiver," "exemption" and "variance." Al said if you don't meet the criteria for an exemption, then you have to apply for a permit. Martha said the variance criteria are spelled out in state statute. Martha said her question about the waiver idea is: Are we just passing regulations that will allow everything and, if so, what's the point of zoning? Al said it depends on whether you trust the DRB to be reasonable in situations where you don't want them to be unreasonable. Martha said the waiver standards would need to be a little more specific than Manchester's in

her opinion. Martha said if the house has been used the way it is for 30 years, it's hard to argue that the proposed change is necessary. Barbara asked where the language in Section 1.7(8) came from. Hal said it's probably state law. Al said in the case recently considered by the DRB the nonconformance has to do with the setback so putting a roof over the patio does not affect the degree of nonconformance. Martha said if you have a flat patio in the setback area and you put a roof over it, you're making it bigger and therefore increasing it. Al said if the nonconformance has to do with the setback and you're not going outside the footprint, then you're not increasing the degree of nonconformance. Barbara noted that an increase in volume could be considered an increase in nonconformance. Al said if that's the case, it should be stated. Glenn said the phrase "degree of nonconformance" has to be defined. Glenn said his opinion is that if the vertical line of the nonconforming structure does not extend further into the setback, then the degree of nonconformance is not increased. Glenn said he does not agree that increasing the volume within the setback increases the degree of nonconformance. Martha illustrated her opinion with a diagram. Hal said the nonconformity is a legal nonconformity. Martha said it is legal as it is, but not if it's increased in size. Hal said if the owner wants to enclose it with screens, then that's a change of use, which would require a permit because it's no longer a patio, it's a screen room. Martha said it doesn't change the use from residential to commercial. Martha said "change of use" will have to be defined. Martha said something flat, like a patio, does not have the same impact on the neighbors as something that is two stories high. Glenn said that's where waiver language could come in because of the adverse effect on a neighboring property. Hal said our definition for "nonconforming use" isn't helpful. Martha said our definition is the same as the statutory definition. Hal said the state doesn't have a definition for "degree of nonconformity." Martha said VLCT, and all the Zoning Administrators who responded to her question, agreed that adding a roof over a patio that is within the setback increases the degree of nonconformance so the PC is interpreting it differently. Hal asked Martha if VLCT gave her a definition for "degree of nonconformance." Martha said anything that is not defined has its customary definition so "degree" would refer to "extent" or "amount." Hal said he would like to clarify the regulations so we don't get into these situations. Al agreed that we need to define "change of use." Martha said if the PC members all agree that putting a roof over a non-conforming patio is not an increase in the degree of nonconformance than it wouldn't help to modify Section 1.7(7) as she suggested earlier. Al said that would depend on the definition of "change in use" and "degree of nonconformance." Barbara said we want permits so there is at least some review process. Elvin said that goes back to why we have setbacks; what is the reason for them. Martha said fire safety and privacy are two reasons for setbacks. Barbara suggested reviewing our thinking about setbacks and asked how we would have handled it if the neighbor had objected. Glenn suggested including input from abutting property owners as one of the waiver criteria. Barbara said that's why the neighbors are notified, isn't it. Martha said if a similar situation arose today, she would tell the applicants that they don't need a permit so the neighbors would not be notified. Martha said one argument against exemptions and waivers is that the neighbors get notified of variance hearings but if there's a waiver or an exemption, they don't get notified so you don't know how they feel. There was discussion about the requirements for various structures: single family homes, additions, decks, etc. Returning to the issue of "change of use," Barbara asked if the phrase refers to the use of the whole structure or the use of the addition. Hal said it should be thought of as a residential dwelling unit, which includes the patio. Martha said she

would not consider it a change of use if someone encloses an unenclosed porch. Al said he thinks a change of use is a change from a residential use to a commercial or agricultural use or vice versa. Hal agreed that we need to define “change of use.” Elvin said he doesn’t know how you change the concept of a footprint to include volume. Hal read the following from *Sample Bylaws and Definitions*: “The phrase ‘shall not increase the degree of nonconformance’ shall be interpreted to mean that the portion of the structure which is nonconforming shall not increase in size (or decrease in the event of failing to meet minimum standards such as parking and lighting). Therefore, portions of a structure within a setback area cannot be enlarged, portions above the maximum height cannot be expanded, a nonconforming deck or porch cannot be enclosed...” Al said if the PC agrees with that definition of the phrase ‘shall not increase the degree of nonconformance,’ then it needs to be included in the zoning regulations. Barbara asked for copies of the statute on waivers and Manchester’s waiver regulation. Martha said she will email them to the PC. Elvin said if this is what the law is, then Martha’s right. Al added that the footprint of the nonconforming structure is irrelevant. Hal suggested adding the wording from *Sample Bylaws and Definitions* to our zoning regulations. Al asked how someone with a nonconforming structure that is not exempt would be able to do what they want to do. Hal said they could do it by getting a waiver. Martha said, in the past, the DRB has granted variances in this type of situation. Al asked if it meets all the variance criteria. Martha said the fifth variance criterion requires that the variance requested is the minimum that will afford relief. Martha said she’s not sure it would meet that criterion, but the variance criteria are always open to interpretation by whoever happens to be on the DRB. Al asked if there is a need for waiver language. Hal said a waiver is more arbitrary and doesn’t have to meet specific criteria. Martha said a waiver should have to meet specific criteria, otherwise it would be considered “standardless discretion” by the courts. Al asked Martha if she could try to draft waiver language. Martha agreed. **Elvin moved to incorporate the language from paragraph #4 and #5 on page 22 of the *Sample Bylaws and Definitions* into the West Windsor Zoning Regulations. Al amended Elvin’s motion to include adding “or an increase in the degree of nonconformance” to the end of Section 1.7(7). Elvin accepted the amendment. Al seconded the motion, which passed unanimously. Al made a motion to clarify that the phrase “change in use” should be interpreted broadly in the definitions section of the bylaws, subject to sufficient clarification provided by the new definition of “increasing the degree of nonconformance.”** Elvin said if we more particularly define “use,” we’re stepping into a hornet’s nest. **Hal seconded Al’s motion for purposes of discussion.** Al asked if it is necessary to define “change in use” having clarified Sections 3.9 and 1.7(7). Elvin said he doesn’t think so. Al said he is asking the question because the members of the PC clearly had different interpretations. Al said he thinks “change of use” should be defined broadly as a change, for example, from agricultural to residential or from residential to commercial use. Al said that way we don’t have to talk about porches versus patios. Al noted that “use” is not defined. Hal said the uses allowed in each district are defined in Section 2.3. Martha said the zoning regulations also have a section called “Conversions and Changes of Use” on page 16. Al said Sections 2.3 and 3.3 don’t consider a change from a patio to a screened-in porch a “change in use.” Al suggested referencing Sections 2.3 and 3.3 parenthetically, after the phrase “change in use” in Section 1.7(7). The PC agreed and **Al withdrew his motion.** Accessory Dwelling Units: Hal noted the email that Martha forwarded about the state’s law on accessory dwellings being in conflict with the VT Fire and Building Safety Code. Martha said she thinks we can still relax our limitations on accessory dwellings as long as we notify people that the Department of Public

Safety may look at apartments a little differently and they should check with them. However, Martha said, the change to Section 4.1 that the PC approved at the last meeting may be illegal because placing a 750 sq. ft. size limit on apartments appurtenant to houses that are more than 2500 sq. ft. doesn't meet the state requirement that towns allow apartments as long as they don't exceed 30% of the total floor area of the house. Martha suggested that the change approved by the PC at the last meeting should only apply to houses with 2500 sq. ft. or less, and that the old language should apply to houses with more than 2500 sq. ft. Hal said we also have to determine if a camper is a mobile home or not. Town Plan cover: Martha showed Sara McCracken's photos to the PC. All agreed that they like photo #22 the best.

4. Minutes - June 30, 2010: **Elvin made a motion to approve the minutes of June 30, 2010, as written. Al seconded the motion, which passed unanimously.** July 7, 2010: **Elvin made a motion to approve the minutes of July 7, 2010, as written. Al seconded the motion, which passed with Barbara abstaining.** September 15, 2010: **Elvin made a motion to approve the minutes of September 15, 2010, as written. Hal seconded the motion, which passed with Al abstaining.**
5. Other Business – Next meeting: November 17<sup>th</sup> at 6:30 PM.
6. Adjourn – The meeting was adjourned by consensus at Noon.

Respectfully submitted,

Martha Harrison