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Town of Charlotte
DEVELOPMENT REVIEW BOARD
Special Meeting Conducted at Town Hall and via Teleconference
February 17, 2022

As approved by the Development Review Board, 3.2.22

Development Review Board: Charles Russell (Acting Chair), JD Herlihy, Gerald Bouchard, Christina Asquith

Staff: Larry Lewack, Town Planner; Danielle Atherton, Recording Secretary

OTHERS: Sharon Mount, Louise McCarren, Sarah Thompson, Kyra Wegman, Frank Tenney, Robert Bloch, Bill Stuono, Paul Plante, Joseph Obuchowski, Richard Hendrickson, Ronda Moore, Kelly Devine, James Faulkner, Lane Morrison, Scooter McMillan, Louis _____?

Posted Agenda:

4:00 PM Call to Order; changes to agenda (if any)
4:05 PM Public Comment (not pertaining to pending applications)
4:10 PM Consider & resolve two complaints alleging DRB violations of Open Meeting Law
4:50 PM Other business: Interim officer elections
5:00 PM Adjourn

CALL TO ORDER: Charles Russell called the meeting to order at 4:00 pm

Public Comment: Sharon Mount wants to complain there was not enough notice for the meeting, and it was scheduled at an inconvenient time. JD Herlihy explains the board only has a 10-day window to respond to the complaint. One member is going to be away all of next week, so it was imperative to schedule this discussion this week, so that all could participate.

CHANGES TO AGENDA: *(There were none.)*

Consider & resolve two letters of complaints alleging DRB violations of Open Meeting Law:

1) Sarah Thompson Feb. 10, 2022 letter of complaint:

Charles Russell addresses the letter sent by Sarah Thompson, which included two allegations: one regarding the DRB's 1/26/22 meeting, and another regarding the DRB's 2/2/22 meeting. Charles Russell and JD Herlihy refer to the minutes, which confirm the topic of reconsideration process was not on the warned meeting agenda, or added to the agenda at the beginning of the meeting. Christina Asquith did request at the beginning of the meeting for clarification on the preparation process for meetings. She also adds if process questions come up again, the board should speak more generally about the process, without specifics from any application. JD Herlihy stated a members' question about process to consider a request for reconsideration of prior decisions is not a violation of Open Meeting Law. Individual Board members are free to raise questions not on the agenda. This was not a deliberate oversight by the Board, as it was not anticipated by the Board as a whole. Larry Lewack suggests a lesson learned: if a member or public participant wants the Board to discuss a topic that's not on the agenda, they should take initiative to ask that it be added to the agenda at the beginning of the meeting.

Ms. Thompson's second complaint concerned the Feb. 2 DRB meeting, where she was not allowed to testify or provide additional evidence concerning her letter requesting the DRB reconsider the ZBA's decision on the Vermont Commons School conditional use approval of ZBA 21-256-CU. Charles Russell stated the DRB sought advice from the town attorney about the appropriate and legal process to follow in conducting meetings to discuss requests for reconsideration ahead of this meeting, and followed that advice to the letter. This meeting was conducted as a deliberative session, which

53 means it's for Board member discussion only, with no further testimony or evidence allowed. At that
54 meeting, the Board openly discussed each of Ms. Thompson's points in her reconsideration request
55 letter in open public session, and did not accept any of them as a valid basis to re-open the ZBA's
56 decision for new hearings. This is always how deliberations are conducted; the town attorney
57 confirmed the process the Board followed is in full compliance with provisions of Vermont's Open
58 Meeting Law, per 1 VSA § 312 (e) and the Charlotte LURs, at Sec. 9.9.E.4.

59 Christina Asquith noted the DRB's meeting rules are complicated, and can understand how the
60 public may not understand the decision to accept no further testimony on a reconsideration request.
61 She believes there would have been no harm in seeing new evidence. Sarah Thompson took time to
62 prepare additional information for this meeting, but was not permitted to present it. Gerald Bouchard
63 responded that it would have been inappropriate for the Board to accept new evidence at that point,
64 because the decision at issue was already finalized by the ZBA in December, after warned public
65 hearings on the project were formally closed.

66 JD Herlihy stated he does not believe that this constitutes a violation of the Open Meeting Law.
67 However, we should acknowledge the Feb. 2 DRB agenda was unclear this was a deliberative session
68 just for DRB members to consider and decide whether to re-open the ZBA decision for reconsideration.
69 Charles Russell agreed that, going forward, DRB agendas should clearly warn deliberative sessions as
70 such, and the Chair should reiterate the ground rules for deliberative sessions at the start of each
71 meeting that includes them, so there is no confusion about the Board's process.

72

73 2) **Bill Stuono Feb. 12, 2022 letter of complaint:**

74 This letter alleges three separate Open Meeting law violations:

- 75 a) Interested parties have a right to participate in any quasi-judicial proceeding (Feb. 2 & 9).
76 b) At the Feb. 9 DRB meeting, members of the Planning Commission were denied the right to
77 defend their decision on the 125 Lake Rd. project (PC 21-241-SD), and were not allowed to
78 testify on the applicant's request for reconsideration of that decision.
79 c) There were private email exchanges among DRB members about the merits of the
80 reconsideration prior to the meeting.

81 **Re: Stuono's complaint a)**, Bill Stuono claims that as an interested party, Sarah Thompson
82 should have been allowed to present additional testimony at the Feb. 2 DRB meeting. Charles Russell
83 reiterated that, as discussed earlier, the town attorney advised the Board in advance that its February 2
84 reconsideration of Ms. Thompson's request should be conducted as a deliberative session, not a public
85 hearing, and they followed that advice. Thus, it was appropriate for the Chair to bar further testimony,
86 or accept additional evidence in that meeting.

87 Larry Lewack explained the 2 phases of the reconsideration process: First, the Board receives a
88 request in writing for reconsideration of a prior decision. They schedule agenda time to discuss the
89 request in public session. At that point, they are only considering whether or not to re-open the original
90 decision for a new hearing, based on their assessment of whether or not the reconsideration request
91 before them meets criteria as spelled out the Charlotte LURs at Sec. 9.9.E.4.b.1. If the Board finds the
92 request meets those criteria, it will schedule a new public hearing to re-open the original decision, that
93 must be warned at least 15 days in advance, with all interested parties notified. If the Board believes
94 the request does NOT meet those criteria, it may dismiss the reconsideration request, the matter is
95 closed, and the original decision stands. (Interested parties may still appeal the original decision within
96 30 days from that Board determination.)

97 With respect to the Feb. 2 meeting, in that deliberative session, the Board duly considered, and
98 rejected, Ms. Thompson's request for reconsideration by determining none of the issues raised in her
99 letter met the criteria as spelled out in Sec. 9.9.E.4.b.1. It concluded there was no basis to re-open the
100 ZBA's original decision, thus no new public hearing is appropriate. Re: the 125 Lake Rd. project, the
101 Board accepted the applicant's reconsideration request at its February 9 meeting, which means they
102 have agreed to re-open the decision, and have scheduled a new public hearing for March 16th. At that
103 point the applicant, interested parties and the public will have the opportunity to speak.

104 At both the Feb. 2 and Feb. 9 meetings, the Board was consistent, in not allowing any testimony
105 or accepting new evidence from those requesting reconsideration, or anyone else. JD Herlihy said he
106 does not believe this constitutes an Open Meeting Law violation. He reiterated the Board conducted
107 these meetings following the reconsideration process as recommended by the town attorney,
108 consistent with state statute and the LURs about how the Board conducts public deliberative sessions.

109 Charles Russell would like the Charlotte LURs amended to clarify the reconsideration process.
110 JD Herlihy and Christina Asquith do not agree excluding public testimony from that deliberative session
111 was a violation. The board will take steps to prevent this in the future, by clarifying their intention to
112 have a deliberative session in writing & also presenting the ground rules at the start of each session.

113 Frank Tenney asks:

- 114 1) How can this be a deliberative session from a Planning Commission decision?
115 2) They accepted the letter for reconsideration, which could be considered as new evidence.
116 3) How is a person supposed to know what to put in the reconsideration letter?

117 Charles Russell reiterated the Board followed the process as advised by the town attorney.
118 Bill Stuono explains you can't have a deliberative session without a formal motion to enter deliberative
119 session. He believes the reconsideration letter was a form of testimony/evidence, but the DRB denied
120 testimony from interested parties, which denied them their rights. Larry Lewack disagreed: it's
121 accepted practice that the Board is not required to make or approve a motion to enter into a public
122 deliberative session. Also, no testimony was taken from requestors, or anyone else at the Feb. 9
123 meeting. A reconsideration request letter is not testimony, and not evidence. The Board is obligated to
124 consider each such request, and can discuss and resolve that request in deliberative session.

125 Charles Russell said going forward, DRB meetings that include a deliberative session will be
126 clearly warned as such, and it will be clearly stated at the outset that the public can't participate.

127 Christina Asquith thinks that the Feb. 9 meeting was troubled and should be re-done with the
128 assistance of the PC members. She also feels she was inappropriately discouraged from attending the
129 Feb. 9th hearing. JD Herlihy does not agree that decision needs to be reopened, and there wasn't a
130 violation of the Open Meeting Law, since town counsel's advice was followed. He adds the letter of
131 reconsideration did not state any new evidence, so it was appropriate to consider on its merits.
132 Charles Russell explains if there was an Open Meeting Law Violation, the meeting would need to be
133 reaffirmed. If there is no violation, the decisions as made, stand. Gerald Bouchard agrees and adds that
134 evidence needs to be presented before a hearing is closed, and the board bases their decision on what is
135 in front of them, not what could have been.

136
137 **re: Stuono's complaint b)** Alleges that members of the Planning Commission were denied the
138 right to defend their own decision, nor allowed to testify on the reconsideration request items.

139 Kyra Wegman noted that Planning Commission members were advised by the Town Planner
140 several weeks ago that the DRB's Feb. 9 meeting on the 125 Lake Rd. reconsideration request would
141 provide an opportunity for them to clarify for the DRB how the Commission arrived at the conditions
142 which the applicants questioned. She doesn't believe the PC's views on this should be dismissed; they
143 deserve the chance to dispute misinformation in the reconsideration request. She believes the DRB and
144 the PC should collaborate to reach a shared understanding of the situation, in the best interests of the
145 community. Larry Lewack responded with an apology: once the town attorney advised the DRB on the
146 correct process, he didn't circle back to let PC members know that their feedback would not be allowed
147 on Feb. 9 unless & until the DRB decided to re-open the decision and warn a new public hearing, at
148 which time their views could be heard. With the DRB's decision to re-open the hearing on March 16,
149 they will now have that opportunity.

150 Robert Bloch feels since the DRB had the written records of the PC's decision they could have
151 consulted the records in advance. JD Herlihy explains a meeting folder was given to them in advance
152 and it was indeed reviewed by members.

153 Charles Russell asks Christina Asquith about her being discouraged from attending the Feb. 9
154 meeting: does she believe that was itself a potential Open Meeting Violation? She responded she
155 believes it was. JD Herlihy asks if that answer is based on other's testimony, or because of the meeting
156 itself, since she was not present. Christina Asquith answers she was told not to attend in person or in

157 Zoom. The Board discussed & agrees this did not constitute an Open Meeting Law Violation. However,
158 this concern will be discussed separately at an upcoming DRB meeting, on March 2 (*see below*).
159

160 **re: Stuono's complaint c):** alleges there were private email exchanges among DRB members
161 about the reconsideration requests ahead of the Feb. 2 and Feb. 9 DRB meetings, and about Christina
162 Asquith's requested recusal. He further alleges staff did not honor his request to post all emails and
163 requests for public view.

164 Larry Lewack explains this allegation is based on hearsay, and does not need to be discussed.
165 Bill Stuono still believes it is a violation. JD Herlihy explains the emails in question represented one
166 person's point of view, that solicited responses from other Board members. He immediately flagged this
167 as a potential Open Meeting Law violation, and suggested all recipients (including several town boards)
168 stop the email discussion immediately. Herlihy pointed out Stuono's multiple emailed complaints to
169 multiple Boards on this topic were themselves a clear violation of this Open Meeting Law standard. He
170 believes those (and the Board's earlier emails) were inadvertent, and noted it stopped immediately
171 (except for the filed OML complaints, which were widely shared) following his warning.

172 The Board agreed that distribution of emails concerning pending DRB agenda topics from any
173 DRB members to full boards are inappropriate, and must be avoided per Open Meeting Law. (One
174 important exception: the Board can use email to discuss draft decisions.) Charles Russell noted this
175 guideline was covered in a recent training to the DRB members, and will continue to be clarified with
176 Board members as needed in the future. He further stated the 'cure' should be remind members NOT to
177 'reply all' to opinions expressed by members in email. Opinions should be directed only to staff, who
178 will convey a summary of key points to all members of the entire Board. Important topics should be
179 scheduled for discussion at a warned meeting, not dissected or resolved via email.
180

181 **Additional complaints received:**

182 Larry Lewack spoke to additional complaints received by the DRB last week, all of which expressed
183 either complaints about former DRB Chair Lane Morrison's conduct (who has since resigned), or about
184 alleged denials of interested parties' due process rights at the Feb. 9 DRB meeting. DRB members have
185 reviewed all complaints & believe the following letters did not allege specific violations of the Open
186 Meeting law that were not already addressed in depth during the prior discussion tonight:

- 187 • A letter from Barry Finette.
- 188 • An email from Kyra Wegman.
- 189 • A letter by Sarah Thompson.
- 190 • An email by Barry Finette.
- 191 • An email from Bill Stuono.
- 192 • A letter from Sharon Mount.
- 193 • A letter from Bill Stuono.

194
195 **Note:** Christina Asquith left the meeting at 5:25 p.m.
196

197 **Next Steps:**

198 1) The DRB has scheduled a special meeting on March 2nd to more fully address questions raised in
199 these complaints about the DRB's compliance with ethical standards re: conflict of interest, different
200 meeting types (reconsiderations, hearings and deliberations), rules for public participation, and timing
201 of presented evidence, as stipulated in statute, the Charlotte LURs, and our adopted Rules and
202 Procedures. The Town Attorney will be present to answer participant's questions on these topics.

203 2) Larry Lewack will draft a letter summarizing DRB findings and responses on all these Open
204 Meeting complaints, and share the draft with the DRB to review and approve for public distribution.
205

206 **Adjournment:**

207 **MOTION** by Gerald Bouchard to adjourn the meeting; seconded by JD Herlihy. VOTE: 3 ayes, motion
208 carried. The meeting was adjourned at 5:30pm.