



# Town of Merrimack, New Hampshire

Community Development Department

603 424-3531

6 Baboosic Lake Road

Fax 603 424-1408

Town Hall - Lower level - East Wing

[www.merrimacknh.gov](http://www.merrimacknh.gov)

Planning - Zoning - Economic Development - Conservation

## MERRIMACK PLANNING BOARD

### APPROVED MINUTES

**TUESDAY, AUGUST 19, 2014**

Planning Board members present: Robert Best, Alastair Millns, Tom Koenig, Michael Redding, Lynn Christensen, Stanley Bonislowski, Desirea Falt, and Alternate Nelson Disco.

Community Development staff: Community Development Director Tim Thompson and Recording Secretary Zina Jordan.

#### **1. Call to Order**

Robert Best called the meeting to order at 7:30 p.m.

#### **2. Planning & Zoning Administrator's Report**

Chairman Best announced that the 2015-2035 Regional Transportation Plan is available for review and comment on the Nashua Regional Planning Commission (NRPC) website. The newsletter about transportation initiatives in New Hampshire is available on Newsletter:TransportationNH.org.

Tim Thompson reported that General Government contacted him about state law changes to the junkyard section of the Zoning Ordinance. He will bring administrative changes, such as converting Board of Selectmen to Town Council, to the Planning Board in the coming months.

Agenda item #4, Michael Maliar, was taken up before agenda item #3, Edgebrook Heights.

**4. Michael Maliar (owner)** – Review for acceptance and consideration of Final Approval of an application to permit a Home Occupation for a firearms service, maintenance, transfers and assembly business located at 11 Blair Road in the R (Residential) and Aquifer Conservation Districts. Tax Map 6C, Lot 170.

Michael Maliar proposed to perform gunsmithing services, namely the maintenance and repair of firearms. There will be no sales, no gun cases and no firearms discharged. Customers will leave their firearms and will return to pick them up when they are fixed. They will not stay while Michael Maliar does the work. As part of receiving permits and licenses from the Merrimack Police Department and the Bureau of Alcohol, Tobacco and Firearms (ATF), Michael Maliar is authorized to sell pistols and revolvers, but he does not intend to do so. Firearms sales and transfers will be from special orders only. The customer base will be limited to 20-25 clients who will come by appointment only. There will be no walk-in services, store front or advertising on the premises. The business will be part time with hours of operation from 5:00 p.m.-8:00 p.m. on weekdays and noon-4:00 p.m. on weekends, after his day job ends.

In answer to Board questions, Michael Maliar gave the following information. Only he and his wife are in the home. His workbench area is 600 square feet. He has locked gun cabinets for his personal firearms collection that are 5½' tall, 10"-15" wide and 20" deep. The three steel locked cabinets are bolted together and drilled to the foundation. The State inspection license was signed by the Town Manager and the Chief of Police. As part of its inspection, the ATF wants permission from the Police Department and Town Council. Although he has worked on firearms for over 30 years, Michael Maliar is new to the business. He took classes at Ashford College, learning to assemble, disassemble, clean and align barrels, and change sights and stocks. No alarm system is required. The only ammunition will be for his personal collection rather than for the business. He will not fire anyone's weapon; that will be done off-site. He has always had guns at his home. The change will be to bring unloaded guns to the neighborhood. If ammunition jams, Michael Maliar will confer with other gunsmiths about safety precautions. He will use only sprays, oils, swabs and alcohol wipes rather than harsh chemicals. He will always wear latex gloves. With chemical use, he will wear a mask. Double thickness trash bags will be used. Tim Thompson explained that his understanding is that the license expiration date would be finalized and the seal would be affixed after Town Council approval.

Michael Maliar does not hunt or fish. He goes to Manchester Firing Line to shoot targets. He likes building guns and has maintained his equipment for many years. He legally owns the full range of pistols and hunting rifles. He prefers working with bolt-action rifles and pistols, but can work with a range of guns. He primarily wants to do maintenance/cleaning, which takes 1½-2 hours. The unannounced yearly Federal home inspection lasts 3½-4 hours. The permit allows Michael Maliar to remove something from the barrel and to do bluing at his home, although he does not intend to do so. If he decides to provide more services, he will return to the Planning Board. He will have no employees.

### **Public comment**

Chairman Best read the following into the record: Dr. Edward Hall, 12 Dodier Court, wrote that he is afraid about safety in a family neighborhood with young children. A gun business is a prime target for burglary and other unsafe activity. A business selling and servicing firearms belongs in a commercial zone and not in a residential area. Melanie and Kevin Carter, 24 Whispering Pines Lane, wrote that they are not opposed. Edward Hall, 12 Dodier Court; Carol & Mike Mullan, 21 Brenda Lane; Alan Sprague, 6 Whispering Pines Lane; Carol & Richard Provost, 58 Brenda Lane; Carol Babel, 6 Brenda Lane; Rebecca Thompson, 14 Brenda Lane; Joelle & Douglas Lantine, 29 Brenda Lane, wrote in opposition on the grounds that a gun shop will devalue their property, bring crime to their neighborhood, and will be unsafe for their children.

Bob O'Neill, 31 Brenda Lane, who lives across the street, is concerned about a business that he said does not belong in a safe, residential neighborhood. There will be inventory. The business will bring the wrong element of people into the neighborhood and become a target. There are two firearms businesses two miles away on D.W. Highway. People should use existing companies in the commercial area. The value of real estate will diminish. There is a safety issue for families with young

children. In over 50 years, there have been no stores or shops in the neighborhood. There is no compelling reason for a firearms business there. This is not a Second Amendment rights issue, but one of retaining the character of an established neighborhood and protecting it from an adverse affect. Bob O'Neill did not know that Michael Maliar has had guns in his home for over 30 years.

Daniel Jaskiewicz, 16 Whispering Pines Lane, shared Bob O'Neill's concerns. There will be no alarm system. A gun cabinet does not have the strength of a gun safe. Two people can open it with a crowbar in less than two minutes. There is a difference between a steel filing cabinet and a vault. Daniel Jaskiewicz asked what would prevent sales and what recourse neighbors would have. Could a manufacturer ship guns to Michael Maliar? What are the limitations? Is there an audit of the types of customer guns? Who would inspect the records and confirm that the business is operating within the limits of the permit? There are young children in the neighborhood. Daniel Jaskiewicz, who is also a gun owner, does not want guns brought in by people from outside the neighborhood. He does not have an alarm system or a 4" thick gun safe. Chairman Best explained that the Planning Board would approve Home Occupation for what Michael Maliar described and no more. His business cannot creep into sales. Only gun dealers can ship guns to a private party, who must undergo a background check.

Danielle Jaskiewicz, 16 Whispering Pines Lane, asked about record keeping and how customers would be chosen. Would there be a limit of 25? Would more weapons be kept in the house? Chairman Best explained that records are not part of Planning Board deliberations. The number of customers can be impacted by traffic, hours of operation, and number of employees. Those are areas to which the Planning Board can ask Michael Maliar to commit. The number of customers is not within the Board's purview.

David Preysnar, 15 Blair Road, who lives next door, agreed with the previous speakers. There are four cars in the driveway all the time. More cars would have to park in the street. How much more traffic would there be? David Preysnar's little granddaughter rides her bike on the street. He predicted that the hours of operation would increase over time. He objects to any business in a residential neighborhood because it would diminish property values. Mr. Preysnar clarified his position after a question from the Board, stating that he is not opposed to any Home Occupation, just this specific business.

Bob Beville, 12 Blair Road, is an abutter who gave a power point presentation in opposition. The business is an improper use of the Home Occupation permit. There is no local or state agency that regularly monitors firearms businesses. ATF admits that it inspects firearms businesses only once every 5-17 years. The business will change the character of the neighborhood and have a detrimental effect on other residential properties in the vicinity. It would create safety concerns and introduce an element of fear to the neighborhood. Bob Beville reviewed the definitions of Home Occupation by the courts over the years. None includes this type of business. It must be a recognized profession that does not change the character of or have a detrimental effect on the neighborhood. There are safety concerns: lack of oversight/inspections; gun dealers

are prime targets for theft, burglary and loss of property; licensees who violate federal laws are a major source of trafficked firearms; and once registered, the home address of the licensed dealer becomes public information and is readily available to anyone on ATF's website. Of the six firearms licenses in Merrimack, three are residential and three are commercial. After gaining a permit, Michael Maliar can sell firearms from his home. Although the Town notified only the seven abutters of this meeting, Bob Bevill notified the other neighbors. Mr. Bevill refused to answer Alastair Millns' questions about whether he has a home alarm system or a gun safe.

Frank Ventre appeared for his mother in law, abutter Catherine LaRocca, 25 Brenda Lane. Her opposition is based on property devaluation and increased traffic that will bring different types of people into the neighborhood. It happened where he lives in Merrimack. Traffic built up so much that the firearms business had to move. Frank Ventre is ex-military.

George Fitch, 3 Brenda Lane, says the State allows personal services but no goods for Home Occupation. This type of business is the same as receiving hardware in a home and is of a different character from what the courts addressed. Chairman Best disagreed, noting that a crafts or dressmaking business, which are Home Occupations approved by the courts, produce products for sale.

Scott Kutsch, 7 Dodier Court, is concerned for the safety of his four children. He worries about the lack of an alarm system and the ability to sell firearms. People who want to break in will find the business and the neighborhood on Google. The wrong element will be attracted. What will happen if a gun arrives from another dealer while Michael Maliar is at work? Who will sign for it? Will it be left at the door? Scott Kutsch is not particularly concerned about property values.

Eric Hanscom, 5 Dodier Court, who has two young boys, is concerned that someone could hurt them and that the business will not remain small and innocent. Will someone bring ammunition? Will hours of operation be convenient for customers? Are there any limits on the types of guns that can be transferred or cleaned? What if someone unexpected shows up to drop off a gun? Neighborhood safety is a concern. Many people walk every day. Eric Hanscom predicted that the neighborhood would change. Alastair Millns explained that other businesses would have as many customers and cars. Is the issue guns or more people? What if the Home Occupation were a hairdresser? Eric Hanscom replied that he is concerned about weapons and people who might bring ammunition with them.

Jan Bevill, 12 Blair Road, lives across the street in a wonderful neighborhood. It is an incredible nightmare that her first grader and two others will stand in front of a gun shop to catch the school bus. She invoked the Sandy Hook Elementary School shootings. If the wrong person comes to the neighborhood after seeing the business on the Internet, it could become something more than cleaning. Will people knock on her door if they come to the wrong house? Jan Bevill does not want to be home alone if someone tries to break into Michael Maliar's house.

Frank Ventre said the proposed business would attract a different element of people than a hairdresser would, as well as increased traffic.

Michael Maliar said several neighbors are gun owners. He is not doing anything illegal. Other occupations are allowed. He came to the Planning Board in order to do what is right and legal. He is not doing anything that is dishonest.

Responding to public comment, Michael Maliar explained that he must sign for a delivery; it cannot be left at the door. A notice will be left for him to retrieve it. He has three cars in the driveway. One is in the garage, leaving six more spaces in the driveway. He has three gun cabinets that are made to store firearms. He keeps the only keys on him all the time. A saw or crowbar can break into a cabinet or into a safe. His cabinet is not like a file cabinet. It is a heavy duty, rugged steel cabinet. He would increase security, possibly with an Xfinity in-home camera, as a condition of approval. Although the ATF does not require it, he has insurance. The insurer will know that it is for a business. Michael Maliar would provide the insurance certificate if it is a condition of approval. Very few people will arrive each day. The busiest time will be during hunting season. Customers would come by appointment only. There will be no more traffic in the neighborhood than there is now. Tim Thompson noted that Michael Maliar stated on the application that there would be one or fewer customers per day. Michael Maliar added that he does not expect a client every day. As to being a target for burglary, he noted that there was a rash of vandalism in the neighborhood 15 years ago caused by neighborhood children. They never touched his home. He anticipates no increase in such activities because of his business. Stanley Bonislowski agreed that there would be no increased traffic if people must make an appointment and Michael Maliar would make no more than two appointments a day between 5:00 p.m.-8:00 p.m.

Tim Thompson was not aware that the license would allow Michael Maliar to do whatever he likes, as Bob Bevill claimed. The statute says that a firearms business cannot be treated differently from similar types of uses. The Planning Board must treat this business as it would any other Home Occupation. Any change would require Michael Maliar to return to the Planning Board. Chairman Best agreed that the Town has no authority to regulate a gun dealership, but that Home Occupation is subject to conditions of approval like any other business.

Michael Redding asked if the business is similar to small engine repair. He surmised that, like small engine repair, chemicals could be toxic, but there are no regulations about how much can be used. Tim Thompson did not know if the businesses are similar, but he said the chemicals are commercially available for anyone to use at home. There will be no external evidence of a Home Occupation; someone driving by will not know there is a business in that home. Chairman Best said small engines and broken lawnmowers make lawns look like junkyards. Lynn Christensen likened the business to DVD or camera repair that is small and shows no evidence outside the home. Chairman Best said it is important to consider the definition of Home Occupation. In the past, the Planning Board has treated firearms as eligible for Home Occupation. Tim Thompson said that is the reason the issue was brought before the Board, since the proposed use has been similarly treated as a Home Occupation in the past per determinations by prior Planning & Zoning Administrators. Chairman Best said the Planning Board could not overturn the Planning and Zoning Administrator. A federal firearms license is a personal license, similar to a professional license. The business depends on a single licensed individual in order to operate. The business

does not exist as a separate entity, similar to a law or accounting practice. It is not like real estate, an auto shop or a roofer. Lynn Christensen countered that real estate, which does not exist unless a person is licensed, is not allowed in a residential area. Tom Koenig noted that real estate and roofing are done at other people's homes. Tim Thompson informed the Board that, having served on the Concord Zoning Board in the late 1990's and since the 1971 Concord case, Concord has revised their Zoning Ordinance to specifically listed real estate as eligible for Home Occupation. Michael Redding opined that the activity is industrial enough to leave chemical residue behind when the house is sold. It is a heavy use for a residential area.

Stanley Bonislowski reminded the Board that Michael Maliar had to go to the Police Department in order to get a license to sell, but he does not want to sell firearms. He wants to do maintenance only on a part-time basis, as in many other Merrimack homes. His house had to be checked. The neighbors have many guns. Chairman Best added that the State Department of Safety, the Town Manager and Police Chief, and the ATF all approved the license. The ATF says the proposed arrangement is sufficient. He cannot second-guess those authorities. These authorities know more about safety than he does.

Lynn Christensen stated that her source says breaking into a cabinet is easy, while breaking into a safe is hard. She suggested that a safe should be a condition of approval. Stanley Bonislowski said that depends on how it is built. A steel cabinet is not a filing cabinet. A cabinet and a safe should be clearly defined. The Board should not automatically say that a cabinet is no good. Desirea Falt said that lock mechanisms, hinges and type of steel are variables. There are no standards.

Robert Best could not overrule the ATF and the Police Chief concerning security. He investigated Bob Bevill's statistics about the targeting of gun dealerships: 127,000 firearms were lost or stolen. Those are nationwide figures over the last 5-8 years, including guns that were unaccounted for and not necessarily stolen. In 2012 the U.S. Department of Justice did a study of every state. In New Hampshire, 435 guns were lost or stolen, of which 426 were stolen. Seven were federally licensed, of which three were larceny/stolen by employees, and 4 were from two burglaries. There were only two burglaries of federal firearms licensees in New Hampshire in 2012, so a federal license is not particularly attractive to criminals.

Desirea Falt suggested the following conditions of approval: that the applicant shall provide a copy of the insurance certificate for the home occupation with the Community Development Department; the applicant shall provide documentation/proof that the home occupation will utilize gun safes rather than gun cabinets for the storage of firearms used in the home occupation operations; and the applicant shall provide documentation/proof that the home occupation will utilize an appropriate security/alarm system. Tim Thompson suggested the condition that the applicant shall obtain, if applicable, final approvals (including Town Council if required) to any state or federal licenses required for the operation of the home occupation, and provide copies of such to the Community Development Department. Michael Redding suggested the conditions that the applicant shall store any flammable materials in an appropriate flammables cabinet, shall dispose of wastes associated with the home occupation in accordance with State/Federal

requirements and no discharge of hazardous liquids/chemicals shall be permitted into the on-site septic system.

Stanley Bonislowski said the oil would be for cleaning and that there is no chemical issue. The gun owners present at this meeting have cleaners in their homes. The Board should not take on the Police Chief and the State. It is silly to require a safe for one gun. Chairman Best noted that the applicant stated there would be no bluing or ammunition on site. Tim Thompson stated that the Planning Board's decision must only be about Home Occupation rather than storing personal firearms. Although they both opposed it, Lynn Christensen and Alastair Millns doubted the Planning Board could deny the application. Robert Best was less concerned. The applicant is honest, but the business will be divisive for the neighborhood. Michael Maliar would have the legal right if granted Board approval, but perhaps he ought not to do it. He suggested that Michael Maliar reconsider based on his neighbors' emotions.

Staff recommends that the Board vote to accept the application for review and grant final approval of the home occupation, with any conditions it believes are appropriate.

**The Board voted 6-1-0 to grant Final Approval, with the following conditions to be fulfilled within 6 months and prior to operation of the Home Occupation, on a motion made by Stanley Bonislowski and seconded by Desirea Falt. Michael Redding voted in the negative.**

1. The applicant shall provide a copy of the insurance certificate for the home occupation with the Community Development Department;
2. The applicant shall provide documentation/proof that the home occupation will utilize gun safes rather than gun cabinets for the storage of firearms used in the home occupation operations;
3. The applicant shall obtain, if applicable, final approvals (including Town Council if required) to any state or federal licenses required for the operation of the home occupation, and provide copies of such to the Community Development Department;
4. The applicant shall provide documentation/proof that the home occupation will utilize an appropriate security/alarm system;
5. No ammunition related to the home occupation shall be permitted on the premises;
6. The applicant shall store any flammable materials in an appropriate "flammables cabinet";
7. The applicant shall dispose of wastes associated with the home occupation in accordance with State/Federal requirements and no discharge of hazardous liquids/chemicals shall be permitted into the on-site septic system.

- 3. Edgebrook Heights, LLC. Wigston Properties, LLC and Q. Peter Nash 1987 Rev. Trust I (co-applicants/co-owners)** – Continued Public Hearing for consideration of Final Approval of an application for a Conditional Use Permit to permit a future mixed-use development consisting of retail, office, multi-family residential and assisted living. Parcels are located at # 1, 37, 39, 55 and an

unnumbered parcel, D.W. Highway in the I-1 (Industrial), Aquifer Conservation and Flood Hazard Conservation Districts. Tax Map 1E, Lots 004-01 & 004-02 and Tax Map 2E, Lots 006-02, 007 & 008. ***This item is continued from the March 18, 2014, May 20, 2014, June 17, 2014, and July 22, 2014 Planning Board meetings.***

James Petropulos, President/Principal Engineer, Hayner/Swanson, Inc., said the key issues at the last meeting were fencing, buffers, phasing and fiscal questions. In his July 14, 2014, letter, Attorney Greg Michael, Bernstein Shur, representing Nanocomp, outlined concerns about the northern access drive and pedestrians walking across their property. Edgebrook proposes to fence the back edge of the 24-unit building along the entire north property line to the main entrance curb cut and to install a 6' chain link fence in the buffer area along the common property line. The closest building is 70' from the tree buffer. Edgebrook will supplement the buffer with under-planting. In the cleared area, it will create a 6'-8' high berm, plant evergreens and retain the fence. A Category D Type 3 buffer is proposed, consisting of a 50' separation with a combination of plants and fencing. A 100' no-touch zone is not as good as a buffer. A detailed landscape plan will be submitted later in the process.

James Petropulos noted that the Planning Board does not want to build pieces that are a negative drain on the Town. The infrastructure will be built first: a 400' road, a four-way signal at the four-way intersection, a pedestrian crossing, and a sewer line. Phase 1 will be the 156 unit residential component, an access road, utilities and sewer. Phase 2 will be the commercial district at the northwest corner. All the commercial uses have not been decided. Phase 3 is two small buildings for commercial offices with parking and access from a cul-de-sac. Phase 4 is the assisted living at the corner.

Mark Fougere's fiscal study concludes that each phase will have a positive financial impact for the Town. Annual income would be \$254,000 from the apartments, \$20,000 from the commercial use, \$25,000 from the offices and \$84,000 from the elderly component. The town's consultant, Arnett Development Group, agrees.

As to the intersection on D.W. Highway between the north access drive, Traffic Operations Engineer Steve Pernaw disagrees that the left turn into Skip's Marine conflicts with the left turn into the northerly access drive and says it will function no different from any other arterial roadway.

Changes that have been made are added parking at the multi-family units, swapping the locations of the elderly and office components, reducing the number of apartments from 168 to 156, thus increasing the buffer at the north property lines, and revising the north access from full access to entrance only.

Attorney Brad Westgate, Winer & Bennett, said the application meets all Conditional Use Permit (CUP) criteria and addresses all Planning Board issues and criteria. Staff recommends approval. NIP's finding that the three criteria are not satisfied is contrary to Staff's. NIP says its lease should be taken into account, but whether one business affects another is not standard in fiscal analysis. No one can know whether there will be adverse fiscal impact on a business, but one can know the impact on Town services, which will be positive. Entry only at the north entry to accommodate Nanocomp is

viable. The buffer and fencing are appropriate. The Master Plan calls for this type of development in this area and describes this property. More detailed site and subdivision plans will be submitted later.

Chairman Best said the CUP process is designed for mixed use, but Phase 1 is not a mixed use. There will be no mixed use until the Phase 2 residential and commercial components are complete. There should be a mixed use in every phase. Attorney Westgate said the Ordinance is bare bones concerning phasing. Phase 1 infrastructure will provide roads and utilities for the entire project and make the entire site ready for all the elements. The residential component has the largest amount of impervious surface. It makes sense to build it as a whole first because it is in back. Edgebrook will build from the back out. To build part of the residential and part of the commercial components would create a disruption for the residents who live there as well as a safety issue because they must go by the construction to get to the back. There is also a financing and fiscal issue because no one will finance fragmented components. The residential and commercial uses must complement each other. One cannot know what the commercial uses will be unless the residential use is in place. It is impossible to predict the market. It does not make sense to build part of the residential component and guess what the commercial component would be. That outweighs building mixed use first. Chairman Best said the issue is that, if five residential buildings were erected and the project were to stop, it would completely defeat and undermine the mixed use intent. Attorney Westgate responded that it would take a very well heeled developer to construct everything simultaneously vs. a developer who would try to mix different uses. Chairman Best disagreed, stating that is why a minimum lot size is required. A CUP is something big that requires a substantial developer. Chairman Best stated that commercial uses could not be “fiction” until someone finances them. James Petropoulos replied that something should not be built just for the sake of building it. It depends on the market. Agreeing with Chairman Best, Alastair Millns said that all developments build from the front to the back. Referring to an unfinished mixed-use development at the other end of Merrimack, he had no confidence that the commercial and retail components would be built. Building the residential component and hoping to build the commercial one does not meet the criteria. What if the five residential buildings are erected and the rest cannot be filled? Attorney Westgate responded that any developer might not finish a project. Chairman Best emphasized that this is mixed use; the development cannot be built otherwise. Attorney Westgate objected that Ordinance does not state that different uses must be built simultaneously. No one can guarantee commercial tenants.

Chairman Best presented Alastair Millns’s suggested phasing plan: 3 residential buildings, followed by the commercial area next to Nanocomp, then two more residential buildings, then offices and senior living. Attorney Westgate repeated that it is impossible to predict how the market will play out. Building the residential component first makes the other pieces more probable. Alastair Millns worried that building five residential buildings and no commercial component would mean the Planning Board had not done its job. Attorney Westgate stated that the Ordinance could not mandate a sequence of development established by fiat rather than the market. The market determines the sequence of development. Chairman Best disagreed.

Bernard Plante, Edgebrook Heights, LLC., said commercial uses on D.W. Highway are of more value to the applicant than the residential piece. It behooves them to construct them as quickly as possible because they will generate more cash than the residential portion of the project. He will build the infrastructure for the entire site. He has not hired a broker nor marketed the project. An assisted living group was interested, but they went elsewhere. Edgebrook's assisted living may turn into something else. They cannot go to market without a CUP. The best way to create activity is to start with the residential component. Grading and utilities for the other sites would be prepared to make the project ready to go when the market is ready. There is a favorable financing market for multi-family rental housing.

Chairman Best said that building the gas station and the retail component along with the residential component would satisfy him because it would be mixed use. There is a need for a gas station at the south end of Merrimack. Tom Koenig, Stanley Bonislowski and Nelson Disco agreed. Lynn Christensen added that a gas station and a retail component would make the site visible from the street. Chairman Best agreed that placing it in front of the residential component would make it more attractive. Michael Redding said one use generates the other. There is an element of risk. The developers know better how mixed use would work and they are trying to make it work.

Bernard Plante committed to erecting a gas station in Phase 1. The multi-family units will take 18 months to construct. A gas station will be underway by the time of Certificate of Occupation (CO) for the last residence. Alastair Millns objected, saying that it should be up and running by then. Tim Thompson and Chairman Best said they would be satisfied if there were substantial construction on the gas station at the time of CO. Tom Koenig said that, when the CUP was first defined, the idea was that it would have industrial, commercial and residential pieces built by a developer able to erect all components together. He opined that there must be a better way for residents to drive out, perhaps a loop road. The Planning Board wants to see various people interested in building various elements at the same time. They must look like a cohesive unit. Chairman Best added that is why there is a Master Plan. Bernard Plante said everyone waits to see what the other one will do in a mixed use project. He will build the gas station and residences first and try to finish the commercial component simultaneously. Tom Koenig said the Harris Pond commercial component is poorly utilized. Developers with vacant commercial buildings in other parts of town want to convert them to residential instead. The Planning Board wants to be confident that the mixed use will happen as presented. Attorney Westgate responded that, since the Master Plan mentions phasing, it does not contemplate building everything at once. Chairman Best emphasized that the Ordinance does not contemplate a phasing plan that undermines the point of the Ordinance. Bernard Plante thinks he can fill the commercial component because it would be new construction at the south end of Merrimack and he has received expressions of interest from tenants in old buildings on D.W. Highway who want to be near a residential development. He said that Harris Pond retail space did well for a while, but it is aging, does not meet current retail users' requirements, and there is not enough traffic for retail. That is why Edgebrook is including other uses, such as assisted living, which could alternatively be a single-story 32,000 square foot

office building. Bernard Plante does not anticipate a walking path from the residential to the retail component because of the steep slope.

Tim Thompson clarified that other mixed-use projects mentioned earlier are not planned unit developments. This project and Flatley's are the only two Mixed Use CUPs and they are different.

### **Public comment**

Attorney Michael agreed with the Planning Board that the residential development would be premature without mixed use. The applicant must develop a phasing plan that meets the intent of the Ordinance. Nanocomp's concern is the north entrance. The Planning Board must determine what is safe, appropriate and meets the standard rather than what the developer can legally do. There is safe access at the light, which can be used to access the property without a one-way entry. Attorney Michael applauded the buffer and fencing proposals. He stated that Edgebrook and not Nanocomp is the interloper. Nanocomp is in an appropriate location in an industrial zone; Edgebrook is not. Another access is not needed and will conflict with some Nanocomp traffic. Nanocomp wants the access point as a solid buffer between mixed and industrial use. It is important for Nanocomp's expansion that the entrance be completely fenced in and have a berm and not interfere with the continued use and development of its property. The entry would create a safety hazard on Route 3. It is not a good situation to make a left turn on a four-lane road with three other access points that do not match up.

Chairman Best agreed with Attorney Michael about access not being necessary for a gas station and residential component, but it would make sense when there is a commercial component. Tim Thompson stated that there would be another opportunity to look at traffic and access when the site plans come before the Planning Board. James Petropulos said there is no need for a right turn in for a gas station and the residential component. The time to consider it is later. It will not be part of the infrastructure application. Tom Koenig said that Attorney Michael's argument to separate industrial use from retail or commercial use has merit. Making a clear distinction between the two areas could be beneficial. Attorney Westgate said that, according to Steve Pernaw, even though the light at the intersection can handle the traffic, there is value for a right turn entry at the north end because of pass-by/impulse traffic. No access would thwart the mixed-use goal: If the commercial component cannot be accessed through the north entrance, potential users would drive by it without the ability to turn in. Chairman Best opined that would depend on how the buildings were designed. Alastair Millns noted that the Section 6 of Steve Pernaw's July 14, 2014, letter is incorrect about the offset intersections being similar; they are not. He is beginning to support the one-way entry. Desirea Falt said the view of the project is good south to north but not in the other direction. Vegetation will be cleared, creating the visibility to see the development. There is no need for the road. Chairman Best cited a development in Bedford that people do not drive by, even though it has only one entry.

Tim Thompson suggested that a condition of approval be that the one-way access be evaluated at the time of site plan approval for Parcel A. Desirea Falt suggested that a

condition of approval be “coordination of the architectural design of the various components of the project”. The Planning Board agreed that Phase 1 would include erecting the gas station and residential units.

Staff recommends that the Board grant conditional final approval to the application with precedent conditions to be fulfilled within 12 months and prior to Planning Board final endorsement of the Conditional Use Permit.

**The Board voted 5-2-0 to grant Final Approval, with the following conditions, on a motion made by Desirea Falt and seconded by Lynn Christensen. Alastair Millns and Tom Koenig voted in the negative.**

Precedent conditions:

1. The applicant shall include an updated and final Fiscal Impact Analysis as part of the project package, containing all the revisions and addenda prepared during the review of the project, and prior to final endorsement of the Conditional Use Permit by the Planning Board;
2. The applicant shall revise the Master Site Development Plan and application narrative, as applicable/appropriate and as directed by the Planning Board (adding a note to the Master Site Development Plan to indicate that the proposed northerly 1-way access drive to be evaluated at the time of site plan review of “Parcel A”), to indicate project phasing (requiring that the gas station/convenience store to be part of the initial development of the first phase including the multi-family residential) as required by the ordinance;
3. The applicant shall provide for review by the Town’s Legal Counsel (at the applicant’s expense), a Development Agreement or other similar instrument specifying the phasing, timing and sequence of the improvements contained within the development; coordination of architectural design of the various components of the project; the performance guarantees relating thereto; and any other such development-related information the Board deems necessary to insure the successful completion of the development;
4. The applicant shall address any forthcoming comments from Town Departments as applicable;
5. The applicant shall include as part of the final submission of the Conditional Use Permit package a page (preferably the first page after the cover page), including a signature block for the Planning Board’s final endorsement. The applicant shall provide 4 full and updated “packages” (containing all information and plans) updated as applicable through the review of the project and addressing all precedent conditions for the Planning Board’s final endorsement;
6. The applicant shall address the following technical comments from Community Development Department Staff:
  - a. The applicant shall update Sheet 1 of the Master Site Development Plan to add the following notes:

- i. Add a note indicating that the proposed roadway improvements are subject to review and approval by NHDOT as part of the subsequent site plan and subdivision review process;
  - ii. Add a note indicating “The approval of the Conditional Use Permit does not authorize the applicant to undertake any construction related to the proposed development. The applicant shall subsequently obtain subdivision approval for the platting of individual lots and site plan approvals for buildings or sites within the mixed use development in accordance with the Town of Merrimack Subdivision/Site Plan Regulations and Section 2.02.4(C)(6) of the Zoning Ordinance.”;
- b. The applicant shall correct the regulatory reference in the note on sheet 2 of the Master Site Development Plan to indicate Section 10.01(4) rather than Section 7 of the regulations;
  - c. The applicant shall clarify the type, height, and materials of the proposed fence indicated on sheet 2 of the Master Site Development Plan running along the property boundaries with lots 2E/006 and the B&M Railroad right-of-way.

General and subsequent conditions:

1. The approval of this Conditional Use Permit does not authorize the applicant to undertake any construction related to the proposed development. The applicant must subsequently obtain subdivision approval for the platting of individual lots and site plan approvals for buildings or sites within the mixed-use development in accordance with the Town of Merrimack Subdivision/Site Plan Regulations and Section 2.02.4(C)(6) of the Zoning Ordinance;
2. The development agreement (or other suitable legal documents) shall be signed by the applicant and the Town prior to commencement of any construction related to development proposed as part of this Conditional Use Permit;
3. Architectural design review of all proposed structures/facilities shall be required at the time of the subsequent site plan applications to ensure compliance with Section 12.04.3 of the Subdivision/Site Plan Regulations and Section 15.03.D.3 of the Zoning Ordinance as applicable;
4. The applicant is responsible for obtaining any federal, state, or local permits that may be required as part of any subsequent subdivision or site plan approval following the granting of this Conditional Use Permit;
5. The applicant is permitted to undertake minor deviations (such as building orientation on a site, decreases in density or building size, etc.) from the Master Site Development Plan and Conditional Use Permit documentation in such instances where the deviations do not increase the impacts to the Town as demonstrated through the traffic impact analysis or fiscal impact analysis. Any other deviations shall require the applicant to return to the Planning Board to amend the Conditional Use Permit approvals. In no circumstance shall any uses permitted through the approval of this Conditional Use Permit be

modified/changed without an amended Conditional Use Permit approval from the Planning Board;

6. If this Conditional Use Permit approval is not acted upon within a period of two (2) years from the date of the final endorsement by the Planning Board, then the approval shall be null and void. Actions sufficient to vest an approval for a conditional use permit include Planning Board issued by the Building Department where no Planning Board approval or building permit is required. However, should any site plan or subdivision approval or building permit expire unused after the conclusion of the two-year validity period provided for herein, the conditional use permit granted as a precondition to said site plan or subdivision approval or permit shall become void as well;
7. Should the applicant need to extend the two-year validity period, the applicant shall demonstrate to the satisfaction of the Planning Board that it was impossible or impractical to receive the necessary approvals to move forward in reliance on the permit granted within two years;
8. Any renewal/extension application shall be filed with the Planning Board no sooner than 90 days, nor later than 30 days, prior to the expiration of the Conditional Use Permit;
9. The Planning Board may, in its sole discretion, grant such extension of the above validity period as it deems warranted.

**5. Dumas Lane Road Bond Reduction** – Discussion/possible action regarding the reduction of a road bond for Dumas Lane.

**The Board voted 7-0-0 to reduce the Dumas Lane performance bond from \$226,596 to \$78,434.37, on a motion made by Alastair Millns and seconded by Lynn Christensen.**

**6. Discussion/possible action regarding other items of concern**

Stanley Bonislowski noted that ConvenientMD Urgent Care is seeking a ZBA variance to enlarge its sign by 50%, contrary to the Planning Board's original stricture. Tim Thompson said a reasonable compromise is being discussed: the applicant is proposing that there be no freestanding sign if there is a larger wall sign.

The Board endorsed the draft 2015 meeting schedule.

Michael Redding said the CUP Ordinance is not clear. The Board should be prescriptive. Tim Thompson said that the Master Plan recommends that the Planning Board examine a new approach to mixed use. It might look at new zoning rather than the existing CUP process. The Town must take a harder look at mixed use. After Tim Thompson takes a comprehensive look at the Ordinance, the Planning Board can look at substantive areas the Master Plan recommends.

**7. Approval of Minutes – August 5, 2014**

**The minutes of August 5, 2014, were approved as submitted, by a vote of 6-0-1, on a motion made by Lynn Christensen and seconded by Desirea Falt. Alastair Millns abstained.**

**8. Adjourn**

**The meeting adjourned at 11:08 p.m., by a vote of 7-0-0, on a motion made by Alastair Millns and seconded by Lynn Christensen.**