

**Michael A. Kirby**  
**17 Summer Street**  
**Northampton, MA. 01060**  
**413 586 8834**

From: Mike Kirby

To: Mayor Claire Higgins  
Members of the Planning Board  
City Councilors.

I went to the planning department website the other day and found the following document on planning board rules. It outlines the procedure for holding a public hearing. I have underlined the relevant passages.

Public Hearings, when called, will be conducted in the following manner: A. The Chair will announce that it is time for a Public Hearing and will announce the subject of such hearing. B. The Chair will review evidence of adequate advertisement and legal notice and, if found to be appropriate and proper according to law, will have the advertisement read into the record. The Chair will then explain the procedure to be followed, including the time limits on speakers and the fact that each speaker shall give his name and address for the record. The Chair will then announce that the Public Hearing will begin. C. The Chair will report on any new or changed information pertinent to the subject, if any, and then have read into the record all memoranda, opinions, comments and recommendations of City departments or boards pertinent to the matter. D. The principal proponent or project staff person will then be asked to make a presentation regarding the matter. E. Other persons supporting the position of the proponents will then be allowed to express the fact of their support and to present such supportive information as was not included in the initial or previous presentations. F. Before opponents to an application or petition are called to speak, a member of the Board, may move for invocation of a summary procedure and, if seconded and approved by a majority of the quorum, may subsequently move to deny the request made by the applicant, based on a finding that the evidence presented was not adequate to justify the request. If the motion for denial is then seconded and is approved by the quorum, the public hearing may be deemed complete. G. Those persons speaking in opposition to the position taken by the principal proponent are then allowed to speak, each being allowed to express the fact of his opposition and to present such supportive . . . as was not included in previous presentations before the Board.

The recent public hearing that the Planning Board and the City Council Ordinance Committee held on the Educational Overlay Ordinance should be declared null and void and reopened, as it did not follow the rules set down by the Planning Department

The public hearing was opened at 7:00 pm with the announcement that this meeting constituted continued deliberations on a public hearing, and no public comment would be taken. During the discussion of the issue by planning board members several of the members made reference to a "helpful" memo they had just received from Wayne Feiden. Mr. Feiden posted a copy of the memo in the front of the chamber, and discussed it with the planning board and ordinance committee. To my knowledge, it was not released to the press, nor handed out to the audience, and not formally read into the public record by

the chair, as required by the above rules. It was, to my knowledge, the only new information supplied to the board by the planning department since the last hearing. There was no opportunity for the audience to address and rebut these “facts.” When, later, the President of the City Council asked if there were any questions, the briefing that the chair had made at the opening of the meeting inhibited the people attending from talking and addressing the substance of the Feiden memo. Only one person stood up.

The rules of the Northampton Planning Board give to the public the final word before the Board deliberates. At this hearing, procedures were stood on their head so as to steamroller through an agreement that means money in city coffers and more clout for the planning department. Instead of just making their presentation in the opening session, at the last minute planning staff delivered to the people holding the hearing an opinion devoid of any legal references or documentation. The closest parallel to this is some political group flooding the city with unsigned literature on the day before election.

To sum it up: The memo was unsigned and undated, it constituted new information; it was provided by the planning department after the time for public comment was closed; it was clearly biased to reflect the interests of the college. The memo itself reflects badly on the planning department. It was not professional, it was not signed, and there were no footnotes to document its assertions on the law and the history it outlined. It was little more than a broadside. The chair did not read the memorandum into the record, and the vote was taken without allowing public discussion of the issues raised in the memorandum. The meeting was conducted in violation of planning board procedures, and should be reheld.

Enclosures 1. Feiden memo  
2. PB minutes  
3. “What the memo doesn’t say”

Cc: Mayor Higgins  
City Solicitor  
Northwestern District Attorney  
The Media

Additional parking for the rezoned space will be provided across the street and the rezoning will not allow for retail space.

There was a brief discussion over who was asking for the change.

Teri stated that the initial request had come from Pro Corp but the City has a policy that if a private property owner requests a change that is consistent with the City's plan then the City will bring it forward. There was never any intent to mislead.

Councilor Bardsley stated that the Committee would come back to this item after the 7:00p.m. public hearing.

### **7:00PM Continued Deliberations on Public Hearing – (No Public Comment will be taken)**

- Appendix A § 3.1, 3.4, 5.2 and 6.2 Create an Educational Use overlay district (referred to Planning Board, Economic Development Housing & Land Use and Ordinance Committee on 10/6/05, EDHLU voted in favor, Public Hearing closed on 11/15/05, continued deliberations scheduled for 6-13-06 with the Planning Board)

Members of the Planning Board present, Kenneth Jodrie, Keith Wilson, Fran Johnson, Jen Dieringer, George Kohout, Fran Volkman, George Russell. Wayne Feiden was present on behalf of the Planning Department.

Councilor Bardsley called the continuation of the joint public hearing to order at 7:03 p.m. and stated that this is the forth meeting held on this topic. The purpose of this meeting is to allow for the Board members to discuss the issue.

There are questions over various concerns and it was stated that the issue should be voted up or down or some amendments proposed.

Wayne Feiden passed out a handout, see attached. There was a lengthy discussion regarding the handout and questions were addressed.

Councilor Bardsley stated that seeing that no one had any more questions he would like to go around the room and let each Committee member explain their position on the issue, as there has been no opportunity for that yet.

Members explained where they stood on the issue and some further clarification was required. Feiden stated that a zoning change could be passed but not go into effect for 6 months.

Councilor Bardsley asked if anyone in the audience had any questions.

Richard Rice, Kensington Avenue – stated that there are kids walking and playing on Kensington Avenue and Smith lets trucks come down Kensington for deliveries. He wants to know what the Committee can do about keeping the trucks from hurting the kids playing on the street. He would like to see some amendment to keep the trucks off of Kensington Avenue for the safety of the kids.

Councilor Bardsley asked if there were any motions to be made.

**Fran Johnson moved to close the joint public hearing at 8:02 p.m. George Russell seconded. The vote carried 7 Yes, 3 No. (George Kohout, Fran Volkman, Michael Bardsley dissenting).**

- Planning Board, Yes – Ken Jodrie, Keith Wilson, Fran Johnson, Jen Dieringer, George Russell, No – George Kohout, Fran Volkman
- Ordinance Committee, Yes - Marianne LaBarge, Marilyn Richards, No - Michael Bardsley

77A-20

**Planning Board Vote - Keith Wilson moved to approve the overlay with the following recommendations to City Council, to strengthen the historic district on Elm Street and extend the Central Business Architecture District up Route 66 with design standards. Fran Johnson seconded the motion. The vote carried 5 Yes, 1 No, 1 Abstention. (George Kohout – Opposed, Fran Volkman – Abstained)**

**Keith Wilson moved to adjourn the Planning Board meeting at 8:15 p.m. George Kohout seconded. The vote passed unanimously (7-0).**

**Ordinance Committee Vote - Councilor Marianne LaBarge moved to recommend the overlay to the full City Council with the Planning Board's recommendations. Councilor Richards seconded. The vote carried 2 Yes, 1 No (Councilor Bardsley opposed)**

### **ORDINANCES:**

- Ordinance – Appendix A § 3.4 Rezone Land on Nonotuck Street from General Industrial (GI) to Special Industrial (SI) (referred from City Council 3-2-06 to Planning, Ordinance and EDHLU, Planning Board voted in favor, neighborhood meeting held in May, needs vote by Ordinance Committee, needs City Council action before end of July)

Councilor Bardsley stated that he would like to come back to the rezoning Ordinance for Nonotuck Street.

Kathy Silva was present and stated that the way Teri had explained the meeting was pretty much what occurred.

Todd Sienkiewicz was present and stated that he didn't learn anything new at the meeting and he sees no compelling reason for the zoning change.

Wayne Feiden stated that the developer had originally requested the change.

Councilor David Murphy was present and stated that he had attended the meeting also and most of the questions were about what would or wouldn't be allowed if the property is rezoned.

There was a lengthy discussion over why this is being done, what businesses would be allowed and if this is good for the community. There were some questions regarding the development agreement and it was stated that once this rezoning ordinance went back to Council a copy of the development agreement would be given to Council. As of now the development agreement has not been finalized and once it is it will be made public.

**Councilor Bardsley moved to recommend the rezoning Ordinance to the full City Council. Councilor Marianne LaBarge seconded. The vote passed unanimously (3-0).**

- Ordinance - Amend 20-210 Bus Stops be established on Elm Street and North Elm Street (may not be discussed until July)

Councilor David Narkewicz, Chair of the Transportation & Parking Commission was present and stated that Leslie Stein, a member of the T&P Commission has been working on bus stop ordinances for a while. This Ordinance is just for a bus stop sign, not a shelter. This will make the bus stop at the high school legal and now that the cable access center will be at the High School the bus stop should be very useful.

**Councilor Marianne LaBarge moved to recommend the Ordinance to the full City Council. Councilor Richards seconded. The vote passed unanimously (3-0).**

- Ordinance – Amend Chapter 24 & 25 Amend the Northampton Wetlands Ordinance (referred from City Council 3-2-06 to Conservation, Ordinance and EDHLU, no reports from Committees yet, no votes will be taken until committee reports are received)
- Ordinance – Amend 25-5 For Non Criminal Disposition: Enforcing Officer; Penalties (referred from City

EU ISSUES RAISED	FACTS
Science & Engineering building will displace the neighborhood	<ul style="list-style-type: none"> <li>• "Dover" allows this building AND board permits granted</li> <li>• EU Zoning will NOT effect</li> </ul>
Smith should not expand up to West Street	<ul style="list-style-type: none"> <li>• Expansion allowed by right under state law ("Dover")</li> </ul>
Height too tall along Elm Street	<ul style="list-style-type: none"> <li>• State law prevents denying height under ZONING for valid justifiable education mission</li> <li>• Elm Street Historic CAN deny height</li> <li>• Mayor and Planning Board committed to clearer historic district standards (Elm Street) and new Central Business Architecture (West Street) to control design</li> </ul>
<ul style="list-style-type: none"> <li>• Not enough public process</li> <li>• Development Agreement not discussed prior to negotiation</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Ad Hoc Working Group</b>, met for a year</li> <li>• The creation of a development agreement was recommended by the Working Group</li> <li>• Development agreements used for many projects (e.g. Coop on N. King Street and Turkey Hill preservation) developed same way</li> <li>• Development agreement NOT valid without zoning change, giving City Council effective veto power</li> <li>• Charrette prior to zoning</li> <li>• Two public hearings on Science building</li> <li>• Two public hearings on zoning change</li> <li>• One informal meeting on zoning change</li> </ul>
<ul style="list-style-type: none"> <li>• Housing is being lost as a result of Smith expansion</li> <li>• Smith will provide replacement housing even without development agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Smith IS replacing housing being lost from Science and Engineering building</li> <li>• Smith will NOT covenant to maintain replacement housing without Development Agreement</li> <li>• Smith will NOT covenant to limit replacement housing rental rates without Agreement</li> <li>• Smith will NOT guarantee future housing replacement in West Street area over the next 30 years without Development Agreement</li> </ul>
Development Agreement does NOT give the City anything	<ul style="list-style-type: none"> <li>• Guarantees replacement housing for all West Street projects over next 30 years</li> <li>• Guarantees replacement housing remains affordable for 99 years</li> <li>• Guarantees displaced residential and commercial tenants receive transition assistance</li> <li>• Guarantees commercial space at West/Green to 2015</li> <li>• Guarantees replacement commercial space before 10,000 square feet at corner of West/Green Street is lost</li> <li>• Guarantees City's first ever payment in-lieu of taxes</li> </ul>
Development Agreement not enforceable	<ul style="list-style-type: none"> <li>• Clear agreement easy to enforce in court</li> <li>• Building inspector can withhold or revoke occupancy permit for Science and Engineering Building if agreement not complied with</li> </ul>
The Zoning should stand on its own, regardless of development agreement	<ul style="list-style-type: none"> <li>• Avoid costly litigation for what is allowed by state law</li> <li>• Allows City to get mitigation for development which it could not otherwise get</li> <li>• Allows City to focus on design issues not limited by "Dover"</li> </ul>
Zoning changes are forever and the state might get rid of "Dover"	<ul style="list-style-type: none"> <li>• City Council can repeal the zoning anytime (and would then lose development agreement benefits from that point forward)</li> <li>• Reform of "Dover" died in legislature. No political support.</li> </ul>

What the Feiden Memorandum didn't say

**Mike Kirby**

On one side of the paper was "EU Issues raised" On the other, was a column entitled "Facts" The facts cited in it are anything but "facts". There are no law cases or agreements cited. There were no footnotes. While the Chair of the Planning Board does not remember how or when it was delivered to the board, it might have been delivered by hand just before the hearing. I will address just two of the issues.

**EU ISSUES RAISED**

**FACTS**

Height too tall along Elm Street

State Law prevents denying height under ZONING for valid justifiable education mission

This is simply not true. Height and bulk restrictions can be made under Dover:

"It is important to note that the fundamental protections afforded to colleges and universities under (40A) Section 3 principally relate to use. This section does not provide a blanket waiver to all local zoning. Far from it. Current law explicitly **allows municipalities to impose "reasonable" regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.**"

Richard J Doherty

Association of Independent Colleges and Universities in Massachusetts

June 29,2005

In the U.S. Appeals Case 99-1760, the court cites the Tufts College case ( 415 Mass. at 757, 616 N.E.2d at 437-38), stating that the Court applied setback, loading space, and parking space requirements to a library addition and underground parking garage. **The Court described the Dover Amendment as striking a balance between "preventing local discrimination against an educational use" and "honoring legitimate [zoning] concerns".** The Court upheld the application of the parking and loading space requirements to the library addition. It also upheld the setback requirement to the parking garage because there was "no particularized evidence ... as to the cost and difficulty of compliance". Id. at 762-764. Finally, regarding future projects, the Court held that site plan and special permit provisions of the ordinance could not be applied to Tufts, though that issue was not raised on appeal. Id. at 765, citing The Bible Speaks. However, the parking, setback and dimensional requirements "do not facially discriminate against educational uses and are presumptively valid". Id. **the purpose of the (Dover) Amendment was "to strike a balance between preventing local discrimination against an educational [or religious] use . . . and honoring legitimate municipal concerns that typically find expression in local zoning laws")**

The Trustees of Boston College v. the Board of Alderman of Newton, the Appeals Court of Newton, in a case decided August 9, 2003 decided to let the Boston College building project go forward, but upheld the right of the city to demand more in the way of parking. The court noted: (Westlaw summary)

“Dover amendment protections, placing restrictions of municipal zoning of nonprofit educational institutions did not prevent a municipality from exercising the sort of latitude it otherwise had to deny a special permit to a non-Dover user to reconstruct or expand a legally nonconforming structure, and **Amendment permitted reasonable density, dimensional and parking regulations to be applied to a Dover user.** “

“The Dover Amendment is intended to encourage ‘a degree of accommodation between the protected use....and matters of critical municipal concern.”

The balance inherent in the Dover Amendment is lost when it superseded by a local ordinance that gives the College a carte blanche to build to 85 feet. Inherent in the legislation is balance; the EU ordinance strikes at the heart of the Northampton planning board’s ability to determine, on a case by case basis, the “reasonableness” of a College design. Now they can build by right.

**EU ISSUES RAISED**

Smith will provide replacement housing without Development agreement

Housing being as a result of Smith Expansion

Smith will provide replacement housing

**FACTS**

Will not commit to limiting rent  
Could convert to non-housing in the future

Smith will not sign covenant limiting price of housing without development agreement

Will not commit to limiting rent without development agreement

In its website and Releases, Smith says:

“Smith College has pledged to replace all of the affordable housing removed for its science and engineering expansion.”<sup>1</sup>

“The \$3 Million fund would make it possible to offer replacement apartments at the same rent as the units that would be removed.

“The units will remain affordable for 99 years.”<sup>23</sup>

---

<sup>1</sup> "Building for the Sciences and Engineering", Smith College website

If Smith can be trusted to keep its word, which I think it can,<sup>4</sup> the College has pledged to replace all of the affordable housing removed for its science and engineering expansion, the present building and future buildings, and keep them affordable for 99 years. What more would we want? I am sure that the College will honor its commitments. The demonstrably false statements about Smith can only have only one objective: Intimidating the Planning Board and the City council into signing the development agreement.

The agreement discriminates against the “legitimate municipal concerns” cited in the law. How and why can a municipality go against its own neighborhood zoning that provides essential protections to adjoining neighborhoods? The answer is not to preserve affordable housing. Smith had pledged replacement and affordability. The answer, as it almost always is, is money. A poor town hopes to parlay this agreement into an "in lieu of taxes" agreement with its rich neighbor. Smith is now paying taxes on most of this property, but once the area is converted to educational and laboratory uses, property valued at \$15.1 million will be off the tax rolls. The loss to Northampton will be \$184,000 a year, every year, and Smith will recompense the city for this loss, if the city council signs the agreement. Both the planning department and the city's management will benefit from this agreement, the neighborhoods will not. It is as simple as that.

The attorney for the college is close to the Mayor; he has at least two contractual relationships that takes him inside city hall on a regular basis: counsel for MassDevelopment in connection with the State Hospital project; counsel for the Department of Public Works regarding the water treatment plan. The city solicitor and the attorney for Smith College have also had a close working relationship for twenty years; recently they have been co-counsel in two prominent cases, Warner v. Garden House at Look Park and Valley Aggregates v. Nejame et al. What Atty. Etheredge wants, Atty. Sheppard pretty much goes along with. The city badly needs to go outside Northampton and get a second opinion from an attorney with first hand knowledge of the Dover amendment and how it has been interpreted by the courts. Recently I talked with the head of Community Development for the City of Medford: she said that they pretty much got everything they wanted from the court when they appealed a ruling made on “Dover” in regard to Tufts. I also talked with Attorney Arthur Kreiger in Boston, who has worked for a number of towns in the Boston area on “Dover” cases. I started to read him Wayne Feiden’s memo and he exploded. “No way” he said, “No way are height and bulk matters not on the table.”

This is a small town; there is the conventional wisdom, and the conventional wisdom is often wrong. In this case the conventional wisdom is that the EU has to be signed. It is time to get a second opinion.

---

<sup>3</sup> "Whether or not the zoning overlay is enacted - and that is a matter for the City Council to decide, Smith stands by the commitments made prior to the development agreement," **Smith College position on proposed zoning district outlined**"

## PARTNERS

Stephen D. Anderson  
Arthur P. Kreiger  
George A. Hall, Jr.  
Douglas H. Wilkins  
Jeffrey L. Roelofs  
William L. Lahey  
Scott P. Lewis

## ASSOCIATES

Edwin D. Betancourt  
Mary Liz Brenninkmeyer  
Daniel C. Hill  
Scott F. Lacy  
Ryan D. Pace  
Elizabeth M. Pyle

## COUNSEL

Kevin D. Batt  
Maurva C. Sullivan

## MANAGER

Jane P. Ellis

## BOOKKEEPER

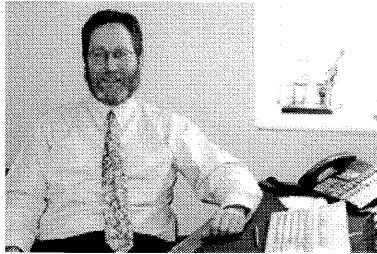
Donna Rubenstein

## PARALEGALS

Deborah Hall Andrews  
Regine Boursiquot

## SUPPORT STAFF

Lisa Alan  
Lori Bellino  
Loretta A. Bradley  
Joshua L. Dawson  
Eliza Nimon  
Shirley J. Mullahy  
Katy E. Noone  
Allison Romig  
Carla P. Roscoe  
Gail D. Vaccaro



### Arthur P. Kreiger, Partner

Arthur P. Kreiger, the co-founder of Anderson & Kreiger, is a leading environmental, insurance and land use lawyer. He has testified as an expert witness in both federal and state court. He has served as a Hearing Officer for the state Housing Appeals Committee, which hears affordable housing appeals. He has been appointed co-chair of the Boston Bar Association's Environmental Law Section for 2004-2006 and has served on its Steering Committee since 1992. He has also chaired the Section's Litigation Committee. Art also is a state-certified mediator and has successfully mediated many environmental and land use cases. He has taught Advanced Environmental Law at the Franklin Pierce Law Center. A cum laude graduate from the University of Pennsylvania, he earned his J.D. with honors from Columbia Law School.

In 2004 and 2005, he was named a Massachusetts "Super Lawyer" among the state's environmental attorneys. This designation was based on a survey of Massachusetts attorneys and reviewed by an independent blue ribbon panel. (Listed attorneys and finalists consist of the top 5% of attorneys in Massachusetts in polling conducted by Massachusetts SuperLawyers and Law & Politics Media.)

#### Articles/Presentations:

- Recent CERCLA Allocation Cases ~ 2001
- Updated Manual of Practice ~ 2001
- Zoning Update and the Dover Amendment ~ 2001
- Zoning & Environmental Issues: The Buyer's Perspective ~ 1999
- Limits of Municipal Power: Handling Troublesome Zoning Issues ~ 1997
- Mediating Environmental Cases ~ 1996
- Negotiating the Deal ~ 1996
- Insurance Coverage and Damage Claims ~ 1995
- Expert Testimony in Environmental Litigation
- Equitable Allocation of Response Costs ~ 1994
- Insurance: Pollution Exclusion ~ Kreiger, 1992
- Local Wetlands By-Laws and Hearings ~ 1991
- Challenging Locally Unpopular Land Uses

*"Art (Kreiger) and his firm have been very helpful to our company in dealing with all our environmental legal issues. I would highly recommend the firm to anybody other than a competitor!"*

*~Joe Hart, President  
Peterborough Oil Company, MA*

