

TOWN OF NAHANT

Planning Board

September 14, 2021, 6 PM

LOCATION: ZOOM CONFERENCING, NAHANT, MA

Meeting Minutes



Dan Berman called the meeting to order at 4:05 pm, stating that the meeting was properly noticed, and called the roll of those members attending:

Daniel Berman, Chairman – Here
Calvin Hastings, Vice Chairman – Here
Shelia Hambleton - Here
Patrick O'Reilly – Here
J Shannon Bianchi – Here
Steven Viviano – Here
Rob Steinberg, Recording Secretary – Here

Kristen Standish (alternative member) - Here
John Stabile (alternate member) - Here

Public in attendance included the following persons:

Mark Cullinan (Selectman)
Nicole Costanza from KP law (legal counsel to Town)

Dan noted we are on the record to review Northeastern's proposal. Dan noted that we received today Northeastern's response to our second set of questions.

Dan asked if there was anyone from Northeastern attending the meeting and there wasn't.

Dan first turned to those responses. Dan said that NU resent the inadequate elevations and renderings, as well as a plan related to the retaining wall.

Dan said that NU gave us the acreage, but we don't know how reliable the numbers are and they didn't indicate whether they were based on the mean tide lines according to the 19 year data collection compiled National Geodetic Survey. Shannon sent a link to the Patriot Properties card to PB members showing the total acreage. The property card lists the acreage as 20.42 acres. The ANR plan says that the PB doesn't accept the low water mark basis for determining lot size. Dan suggested we get a copy of the ANR for the administrative record.

Dan then turned to the second question. Dan said that question inquires whether NU has grants, students, and faculty or are they shrinking like most other universities. Dan noted that they need to get grants to expand the research program, and they provided no credible responses.

Rob noted that the Campus Summary referenced in response to question 2 is not credible. It doesn't provide a time for when the existing FTEs were at the levels noted. Rob asked how can the existing FTEs be the exactly the same as the FTEs for the new building and do not show there is no indication when the FTE count will reach the levels identified in the new building? They said they are going to double their workforce. Is it going to be years from now when they can add 114 new people? Dan noted that they have added a great number of cross-listed faculty assigned to Nahant even though they are working in a different place. The problem is that NU will have a large building and will need to do something with it. Dan noted that if they don't provide the information on use, how do we know what they will do with the building. Is there a serious expectation that they will have an educational use?

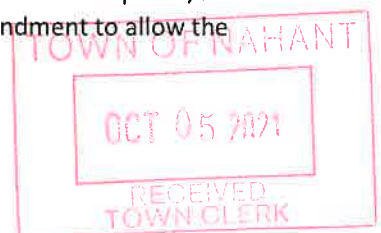
Shannon cited a Boston Globe article for 2014 where it was stated that NU plans a \$50MM research institute located in Nahant. The Globe noted that a \$25MM federal grant was to be made. Dan said that, in general for federal budgeting purposes, if you don't spend you grant by the end of the year, you lose it for the next year. Dan noted that the grant might have been lost.

Dan noted that the rendering and elevations are not improved over the defective documents previously provided. The only images of the building on top of the battery are the drawing of concrete wall panels and a tiny entrance at the top of a stair case. Dan said they are not giving us what our by-laws require. We asked to see the building before it would be hidden by planned trees, which NU hasn't provided. Most importantly, they didn't show the building on top of the battery. Dan said the fact the elevation of the addition doesn't include the building on which it is built is absurd.

On parking, NU says they have 26 parking space now, so 26 spaces are adequate for 114 people. So, if they provide a total of 125 spaces, you get 95 more parking spaces for the added 114 staff. Dan said the analysis is obviously flawed since the bylaws does not provide for a determination of incremental parking needs on the assumption that current available parking is sufficient for current parking needs; there is no basis for that presumption, which is clearly not accurate in this case. ~~if prior parking wasn't used-~~ Rather than saying they are required to have 197 spaces, we can accept Northeastern's claim that 125 spaces are sufficient and they need to deal with it. Rob notes that if NU must have 197 spaces, the parking would have far more impact on the wetlands and the floodplain. Dan said that if they violated an agreed 125 spaces, we could tow the excess cars. Rob said they claim to not have an interior plan so he doubts they have a parking plan in which all require width, walkway and other handicap dimensions are met. Shannon noted that the flood plain goes through the parking lot.

Patrick noted that they are likely happy to reduce the parking area because they have been parking for years on the grass which is also in the floodplain. Patrick said the fact that the PB doesn't have to abide by the bylaw for parking but has to do it for everything else an obvious inconsistency in NU's position. Parking in the floodplain is not an approved use of the floodplain. Shannon asked if we could tow people on private properties. Dan noted that it can be part of the condition that we have consent to count cars and access properties, and tow/ticket cars parked in the floodplain.

As far as the question on use of the Burlington property in the second set of information requests, Rob noted that the questions is not, as NU claims, irrelevant. NU used the Dover Amendment to allow the



Burlington development, and yet Raytheon and other companies do not appear to be engaged in educationally-related activity and appear to be renters on the site. And, Dan said the question goes to the point that NU is not telling us how they intend to use the property, or how they define educationally-related activity.

As to the question of ocean genome activity at the campus in Nahant, Dan said it looks like a business, but NU won't explain what they consider educational.

With respect to the retaining wall, Dan noted that NU claims to comply with applicable zoning rules, and thus the wall needs to be sufficiently far from the slope such that a five foot wall is structurally sufficient to support the slope. Dan said we need to have a condition to make sure that the retaining wall is sufficient. Dan said that, on the drawing, the retaining wall looks very close to the high slope. Patrick noted that the distance of the retaining wall is 2 feet to 15 feet from the slope. Patrick also noted there is no height listed for the retaining wall, although Dan thought there may be some indication of height. Patrick says the by-laws have a five or six foot limit on retaining walls. Dan noted that the retaining wall has to be consistent with the by-law and the wall has to hold up the public access road to Lodge Park.

On fire, NU has said they are complying with the state rules, and they are not concerned with local fire department capacity. Dan noted a possible condition in which NU pays for more fire equipment needed to service NU. Steve said the big concern for the fire department is whether they have sufficient water and sufficient pressure. Steve said the fire department would want to ensure sufficient water mains. Steve said we don't have resources to determine chemicals on site and the appropriate safety and response procedure. Dan said NU would have to provide up-to-date information as to the chemical use on site so that the FD's fire retardants keep up with chemicals in the building and the by-products thereof. Debbie Vanderslice noted that, for purposes of fire protection, the access roads must have a width of 20 feet and have an all-weather driving service. Debbie said there was no communication via radio in the building. Dan said if radio reception can't get through the bunker, the fire department would have to use alternative communication that would not need to connect with a central station.

Rob asked if any person from or representing Northeastern is on the phone to please identify themselves, and no one identified themselves.

Dan said he wrote up list of items for the PB to consider for decisions and conditions. PB sought input from the Conservation Commissions and the Board of Health and they have until September 16, 2021 to respond and they have not yet responded.

Dan then asked that we break until approximately 6:30 pm, as scheduled, to reconvene for deliberations.

Cal moved to recess until 6:30, seconded by Sheila. The vote was as follows:

Daniel Berman, Chairman – Yes
Calvin Hastings, Vice Chairman – Yes
Shelia Hambleton - Yes
Patrick O'Reilly – Yes



J Shannon Bianchi – Yes
Steven Viviano – Yes
Rob Steinberg, Recording Secretary – Yes

Meeting recessed at 5:20 pm.

Dan Berman called the recessed meeting back to order at 6:43 pm to continue the meeting on the record of the Northeastern site plan and start the deliberation portion of the meeting on September 14. Dan stated that the meeting was properly noticed, and called the roll of those members attending:

Daniel Berman, Chairman – Here
Calvin Hastings, Vice Chairman – Here
Shelia Hambleton - Here
Patrick O'Reilly – Here
J Shannon Bianchi – Here
Steven Viviano – Here
Rob Steinberg, Recording Secretary – Here

Kristen Standish (alternative member) - Here
John Stabile (alternate member) - Here

Public in attendance included the following persons (and others who could not be identified):

Nicole Costanza from KP law (legal counsel to Town)
Jeff Blake (legal counsel to the Town) joined midway through the meeting
David Linhart (counsel for NU)

Dan said we are meeting on the record to discuss the proposed expansion plan by NU and the site plan, and we have concluded our discussions. Dan noted we will moved into the deliberation phase.

Rob asked whether the statement in the response to the Town's second set of question that the site is used primarily for "educational use" is an admission by NU that there are currently or contemplated noneducational uses, or just a quote of the Dover Amendment language, and David indicated there is no noneducational use existing or contemplated.

Dan and Rob then discussed what NU must show to the PB. Dan said that NU didn't have a specific level of burden but must show that Dover requirements were met. Rob said they have to convince the reasonable and fair-minded people of this Board that the Dover amendment applies, zoning requirements are met, and that any conditions applied are unreasonable.

Dan noted that the PB decisions will all be independent of each other. Dan said, for example, if we have five separate grounds to deny NU's petition, each ground will be reviewed by the court independently and accepted or rejected independently. If the court accepts any one of the five separate grounds, then our denial would stand. But if the court rejects all of our grounds, then our denial would be reversed and the conditions become at issue.



Shannon asked when NU can come back to the PB and Dan noted that we can't control if the Court remands or takes final action itself. Dan noted that we can determine to reject the plan because it was not measured from the ground, and we might also tell NU what they can do, and set conditions. Nicole said you would not be able to deny and set conditions; you have to either deny or approve and set conditions, but can't do both. Dan said that was not the advice he received from Jeff Blake, lead counsel for the Town.

Dan then said let's turn to findings of fact, and began with a discussion of an incomplete application. Dan noted that NU provided no information on how they intend to use the property. They have made a blanket statement that there will only be educational uses, and Dan said that is a significant item of incompleteness. Dan said it is also required that the PB gets a site plan showing elevations of the building. Dan said there were some schematics elsewhere in the materials that showed a drawing of the different levels of the building as it fit on to the battery, but nothing of the kind was included in the site plan submission to the Planning Board. Dan pointed out that the most basic elevation is the main entrance of the building with the addition on top of it, and the plans submitted to us did not even show that. NU just shows a building floating in space and that does not comply with the requirement to have proper elevations. Dan said we asked for elevations that they provided for other projects and the same architects did those building, but Northeastern refused to provide required elevations.

Jeff Blake joined the call and said there was an issue of whether can deny and, in the alternative, approve and have condition in the same determination. Jeff noted that the Board can deny based on the information provided being woefully inadequate. Jeff said you can find it inadequate but if a court overruled us, we could place conditions on any approval.

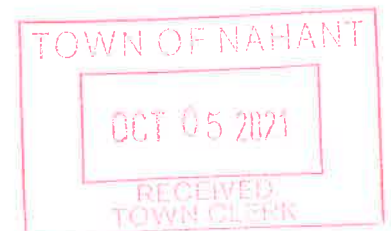
As far as the voting process, Jeff noted that the Board deliberates and then the Board can review the decision, and vote on the draft decision.

Findings of Fact

1. Shannon noted Section 10.2A denotes the floodplain district and has specific reference numbers, but those numbers are not on the plan submitted. Dan said the finding of fact that the bylaws require that, for zoning purposes, the FEMA maps specified the 2014 map and not the 2017 maps, and the proposal is using the 2017 map, the wrong map.
2. Dan said NU did not provide even a threshold description of use of the property, but just cited that it would be for an educational purpose. NU presented a case that applied the definition of educational to the facts before that court, but NU did not provide any facts so that we could apply the test in this case. The finding is that NU has not provided even threshold information on what they plan to do and why each use is an educational use.
3. Dan said NU needs to provide elevations but provided none. NU didn't show that this is an addition on an existing building and provided no view of the main entrance with the proposed new building or its elevations. NU is required to provided elevation and they know how to do it, but they didn't satisfy the requirement to provide elevations.
4. Dan then said that NU hasn't established they own the intertidal area. It is not covered in their deeds. They claim their ownership is based on a colonial rule from 1641 that doesn't seem legally controlling. This was discussed at the time of review of NU's perimeter plan by the PB. The PB rejected this claim in 2019 as shown on the endorsed plan. Shannon said NU at the time said they sent a drone up to determine a property line. Dan said that was their response then



- and now they are relying on the surveyor judgment. In any event, Dan said that NU can't come to the PB without showing the proper boundaries of their property for purposes of calculating whether they meet zoning requirements.
5. Dan noted that the deeds in the chain of ownership show ~~says~~ that ~~they~~ ownership of the property was conveyed to the high tide mark, and stated that the application is incomplete if NU doesn't display the property they owned, or improperly or falsely claims ~~what~~ property they don't own.
 6. With respect to the ConComm's rejection, Dan thought we should state as a finding of fact what the ConComm's decisions were.
 7. Even if NU had satisfied threshold of uses, they didn't provide enough information for us to know whether they satisfy the educational use prong of the Dover Amendment. They refused to provide information about the Burlington campus where they seem to have commercial uses. We need to understand how they intend to use the property to understand whether it is educational under the Dover Amendment.
 8. The conclusory statement that the use is educational doesn't prove that the unknown uses are educational, particularly where there was no showing they would use the building immediately and the university clearly engages in noneducational pursuits.
 9. The PB can't evaluate the parking requirements if NU does not disclose uses of the building,
 10. The PB can't evaluate the parking requirement and the adequacy of the proposed parking lots without having a proper floodplain delineation done based on the legally-required FEMA maps, since the parking is in the floodplain.
 11. With respect to parking, Dan noted that NU applied the requirements incorrectly by claiming current permissible parking is adequate which is contrary to what the bylaw requires, and by their own calculations they need 99 parking spaces for the exact same number of staff and students which shows that 26 spaces is not adequate. If 114 people require 99, than 26 is not adequate. The bylaw is clear that you are to look at total use of the property.
 12. Also, the bylaw on parking was not developed for any structure or activity of the size of NU in terms of square footage and personnel. So, a strict calculation under the bylaw is not a way to determine reasonable parking needs.
 13. Dan said NU's projection exactly doubling the FTE of faculty, staff and students is not a credible approach or based on any analytics or credible projections. Rob said NU nowhere explain when the FTE count have reached 114 in the existing building or will reach 114 in the new proposed building.
 14. The "either or" approach is based on students being in classrooms part of the time and in the assembly space, but it is not at all clear that the assembly space is for convening and conferences. NU has refused to disclose this information.
 15. Dan noted that R&D is not by its nature educational or tax exempt, so NU can't use the R&D parking criteria to determine parking.
 16. In prior discussions, we suggested if NU is asking for only 125 parking spaces they should be prepared to live for that many parking spaces, and NU's attorney agreed that they could be held to that limit.
 17. Dan said the parking count put forth by NU is wrong. We can't base parking on the minimum requirement in the bylaw but it must be based on use and need.



18. Rob said there were an unsubstantiated number of FTEs on which to determine appropriate parking.
19. Rob noted that NU presented a depiction of vegetation growth at the site which did not give a time period when the growth would hide the building to that extent, and there is information in the administrative record support showing that vegetation has difficulty growing on top of the bunker due to ocean spray and the fact it is a wind-swept cliff.

Finding of Fact on Legal Issues

1. Dan raised the issue of whether Dover applies. Dan notes that under Seventh Day Adventist decision, Dover does not apply in a natural resource area.
2. As a finding, Dan noted that NU cited a case that pertains to what constitute educational use which is irrelevant to the issue of this case. Dan said we can find that NU did not present an argument that Seventh Day Adventist doesn't apply.
3. Dan noted that NU refused to pay the obligatory fee charged by the PB of \$400 because we didn't hold a hearing and the PB incurred no publicity cost. Dan said that the fee doesn't cover the actual cost of advertising so we need fees even where there isn't a hearing, and the regulations require the fee regardless of whether there is a hearing or not.

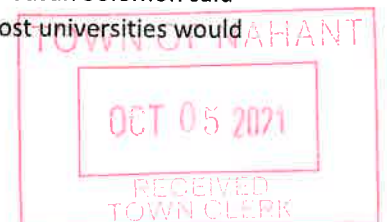
Finding of Fact on Conditions

1. It is clear that the Murphy battery is built on level ground and subsequently buried. The bylaw requires that you measure from the virgin ground, which is the ground where the current main entrance is.
2. If you measure 30 feet from the entrance, the proposal is much higher than the Nahant zoning allows. The ZBA has the authority to bring it up to 35 but no one has authority to allow them to build a building as high as they are proposing.
3. The original purpose of the dirt was to provide camouflage and the fill is integral to the building.
4. This building was not built into a cliff. Rob noted that the history of construction and the fact the land was flat when the structure was built is shown in the administrative record along with historic maps.
5. The retaining wall is very close to the property line and as close as 2 feet in some areas.
6. NU did not divulge the height of the retaining wall. NU's response is they will comply with the bylaw. Dan said it could be a condition that NU needs to comply with the height requirement. Dan noted that the fire access lane could be another condition.

Dan then noted various conditions relating to emergency access and the public right of way to Lodge Park. Dan said we could compute are own FAR ratio and said he would look at that before something goes to the PB for approval.

Dan said there are 3 elements we can deal with about bulk:

1. They are proposing to have low occupancy for a very large building. Susan Solomon said they could have a building 1/3rd this size which is the size building most universities would build given the research and classroom expectations.



2. The FAR ratio could be a bulk issue
3. Christian Bauta raised the issue of size of the proposal compared to size of the town. Christian noted that the proposal is 12 times larger per square foot than other proposals, with the document in the drop box and part of the administrative record at C.6

A final issue is fire safety. Dan notes that our jurisdiction does not include fire safety. Steve noted that when the Building Inspector needs to look at fire safety.

Jeff Blake noted that our jurisdiction is limited, and Jeff thought we are wandering from our mandate under Section 9.09A if we address fire safety. However, the Building inspector can issue certain restrictions based on fire safety needs.

Dan said we can find that the proposed construction does not count as a new building separate from the Murphy Battery but that it is an addition to that building and they should be considered as one structure.

Shannon said compliance with fire protection needs is not our problem but NU's problem. Shannon noted that if a bigger building comes to your town, your town has to beef up its fire department ability. Because NU is tax exempt, we will have to have a much bigger fire station with more firemen. NU is basically saying it's your problem.

Rob suggested a finding of fact that NU seems to have violated local requirements with respect to other projects, as a basis for very strong enforcement mechanisms if there is a violation of conditions by NU.

NU stated that they intend to comply with state fire rules but said they don't intend to comply with our local rules. Dan noted that NU says that it intends to comply with light and other requirement and said there will be very little signage.

Dan noted that the pumphouse needs a special permit and we need to make sure the building inspector knows it. Patrick noted that accessory uses may be permitted based on a special permit as long as it doesn't derogate from the public good. Dan said the accessory use does not automatically qualify if the building qualifies, as a matter of law, which should be a condition.

Dan said we should have a finding of fact based on the FinComm report on the cost to the town. Rob asked that it should be part of the administrative record.

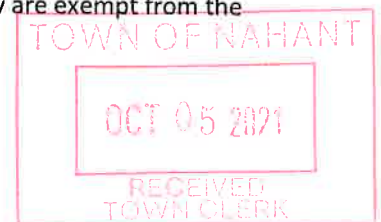
Dan said we want to be involved in building inspector decision-making but that isn't a finding of fact.

The Board talked about NU blocking Nahant Road and Patrick said it could be part of the parking issue because NU is claiming control of some part of a public road that they use exclusively for their own purposes.

Dan then said we have covered the findings of fact.

Patrick asked whether we should consider if the existing building is conforming or nonconforming. Patrick said if the buildings are nonconforming are they restricted to the existing footprint? Patrick noted that the proposed building is larger than the footprint.

Dan said if Dover would allow them to build a building, would it make sense they have less authority if they add-on to a building? Dan said if Dover applies and Dover protects them, they are exempt from the



rule that they can't build, but if they do build, are they stuck within the footprint? Jeff noted that it isn't that the PB is applying our bylaw under Dover, but rather that the PB is setting reasonable restrictions based on certain zoning areas. The bylaws can inform our decision about what is reasonable.

Dan said we can add findings of fact that the battery is a nonconforming use and that is eligible for grandfathering.

Dan then turned to the first set of questions and answers.

Dan noted that NU refused to address any of the categories of use on question 1 of the first information requests ("Info 1"), some of which are noneducational. Patrick asked whether we could have a condition of no noneducational use.

Dan said NU refused to provide any information as to the types of activities that would be conducted in the proposed space, including some that would not qualify as educational under the Dover amendment.

Dan said that, based on the record, NU acknowledges the Murphy bunker was constructed above ground and fill was added to hide it but was not built to a significant extent below the existing ground level.

On the record, PB members stated there were frequent observations of more than 50 vehicles on the NU campus despite having only 26 parking spaces, and NU did not refute these claims in its written response.

Patrick said if they can't have parking to the minimum requirements of the bylaws, they should reduce their population.

Dan said we should have a condition requiring them to comply with the bylaw on lighting.

Dan also said we need a condition about protecting the safe pedestrian passage.

Dan then said we are done with findings of fact

Cal moved to authorize the Chairman and Recording Secretary to work to prepare draft findings of fact, conclusions of law, and a determination for our next scheduled meeting on September 21, 2021. The motion was second by Pat. The vote was as follows:

Daniel Berman, Chairman – Yes
Calvin Hastings, Vice Chairman – Yes
Shelia Hambleton – Not Voting
Patrick O'Reilly – Yes
J Shannon Bianchi – Yes
Steven Viviano – Yes
Rob Steinberg, Recording Secretary – Yes

Dan then cancelled the meeting scheduled for September 15 at 2 pm.

Shannon moved to close the meeting, seconded by Cal. The vote was as follows:

Daniel Berman, Chairman – Yes



Calvin Hastings, Vice Chairman – Yes
Shelia Hambleton – Did not vote
Patrick O'Reilly – Yes
J Shannon Bianchi – Yes
Steven Viviano – Yes
Rob Steinberg, Recording Secretary – Yes

Meeting adjourned at 9:27 pm
Meeting Minutes prepared by Recording Secretary Rob Steinberg.
Approved by Planning Board on October 5, 2021.

