

A meeting of the Chili Planning Board was held on June 23, 2004 at the Chili Town Hall, 3333 Chili Avenue, Rochester, New York 14624 at 7:00 p.m. The meeting was called to order by Chairperson Don Faso.

PRESENT: Ray Bleier, John Hellaby, Dario Marchioni, Karen Cox, John Nowicki and Chairperson Don Faso.

ALSO PRESENT: Keith O'Toole, Assistant Counsel for the Town; Daniel Kress, Director of Planning, Zoning and Development.

Chairperson Don Faso declared this to be a legally constituted meeting of the Chili Planning Board. He explained the meeting's procedures and announced the fire safety exits.

DON FASO: The signs were posted wrong -- the time that was on signs was wrong. The signs say 7 o'clock, not 6.

Sandy (Hewlett), for the record, let it show that the Chair asked the engineer to call him when the signs were posted. He did. The Chair went out and looked. They were posted properly. I had somebody keep an eye on the signs throughout the posting period. I did get a call that one of the signs was down. I called Mr. Farmer who went back out that afternoon and put the sign back up and I checked and it was back up, so the property was properly posted.

The Pledge of Allegiance was cited.

DON FASO: I will dispense with introductions and get to the meeting. I called Keith (O'Toole) this afternoon when we became aware of the problem with the sign. What Keith (O'Toole) -- we needed to convene the meeting at 6 for those that received it in the newspaper, or in the mail or read it in the newspaper. If we were finished with the hearing, the only thing we could do would be to adjourn until 7 o'clock, reconvene at 7 to hear anybody that might have seen the sign posted at 7. That is our only option.

So with that, we'll get into the formal part of the meeting.

1. Application of Dr. Robert Fallone, Jr., 3173 Chili Avenue, Rochester, New York 14624, property owner: Towne Plaza, LLC; for resubdivision approval of Lot #1 of the John Deere Subdivision into two lots at property located at 4390 Buffalo Road in G.B. zone.
2. Application of Dr. Robert Fallone, Jr., 3173 Chili Avenue, Rochester, New York 14624, property owner: Towne Plaza, LLC; for preliminary site plan approval to erect a 2,800 sq. ft. Tim Horton's restaurant at property located at 4390 Buffalo Road in G.B. zone.

Lou Terragnoli and Mel Farmer were present to represent the application.

MR. TERRAGNOLI: Couple comments. First, I would like to thank the Board and the Town staff for having this meeting to accommodate us and to keep our discussion moving on this project. I really appreciate everybody's time here tonight, especially on a nice evening where we haven't seen many days without a lot of rain. I thank you very much for that.

I know the Board is very familiar with the project, and has had a number of questions and comments that we have addressed. With me tonight is Mel Farmer from Sear-Brown. I will defer to the Board's discretion, if there are any further questions or comments regarding any phase of the project, either Mel or I would be very happy to address those questions and comments.

DON FASO: No. I don't have any questions at all.

DARIO MARCHIONI: According to Daniel Kress's interoffice memo, most of the issues have

been resolved. I'm satisfied.

JOHN NOWICKI: Are we all clear on the traffic pattern movement and the signage that

we'll put in place?

MR. FARMER: Yes.

JOHN NOWICKI: With the traffic movement?

MR. FARMER: Yes.

JOHN NOWICKI: I did have a request, again, if you could be a little more generous in the treatment of that roof design again and make sure that those rooftop units are hidden from view.

MR. TERRAGNOLI: My architect has assured me --

JOHN NOWICKI: Maybe a little more of a pitch to that roof, a little more architectural treatment. That is the only question I had.

MR. TERRAGNOLI: I will bring up that point.

JOHN NOWICKI: You guys did such a good job with Chili Center that they were really thrilled over that, but you don't have to go that far. But if you could dress it up a bit and make sure we have a good treatment there.

MR. TERRAGNOLI: We'll look at that.

JOHN HELLABY: Just a question out of curiosity more than anything. It doesn't pertain to this one, but the one on Chili Avenue. Rumor has it on the street that all of a sudden there is a problem with the sewer tie-in. How come all of a sudden, after this has been through engineering, why is that a problem?

MR. TERRAGNOLI: I have never heard that, a problem with the sewer tie. That is the first I heard it.

DON FASO: On behalf of Wegmans, is that what the piping is?

JOHN HELLABY: Nothing to do with us. Just because I heard a -- I'm friends with some of the members of the church up there, and apparently now there is confusion as to whether the sewer is tying in, if there is a pump station.

JOHN NOWICKI: They're on sanitary?

JOHN HELLABY: Yes.

DON FASO: There is storm pipe along the driveway.

MR. TERRAGNOLI: This is the first I heard of it.

JOHN HELLABY: It is a point of curiosity more than anything how you got that far without having the problems resolved?

MR. TERRAGNOLI: I'm not even aware there is a problem. We have "coming soon" signs that will be on the site very shortly. We're working closely with Benderson Development. Never goes as fast as any of us would like, but I'm aware of no problem whatsoever.

DON FASO: Dan (Kress), what is the piping along the driveway for Wegmans?

DANIEL KRESS: Actually have a call in to Wegmans to try to find it out. I don't have an answer back yet.

DON FASO: I didn't notice it until Monday night. I called Kathy (Reed) on Tuesday morning.

DANIEL KRESS: I wasn't aware until I went over for lunch and saw that and said maybe I'll call Art Pires and find out what that is.

DON FASO: And there is pipe stored in the back with gravel bedding.

KAREN COX: If it was sanitary, it would be the green plastic.

JOHN NOWICKI: That is all drainage pipe over there?

DANIEL KRESS: It certainly appears to be. It is all corrugated -- I think it is probably corrugated.

DON FASO: Yes.

KAREN COX: There is sanitary sewer on Chili Avenue. I mean I know that because I was involved in the design of the original road there, the improvement.

JOHN NOWICKI: They got to have sewer.

JOHN HELLABY: Well, it is not that it is not there, it is there. But I think the confusion lies that I didn't realize that the church bought all that whole road right-of-way and now they have to come all of the way across that. That is where the confusion lies. That's all. I didn't mean to stir up trouble.

KAREN COX: Yes, you did.

(Laughter.)

DON FASO: I do have one thing here. Dr. Fallone called me this afternoon and said that he would be here, but he had to leave. He left this with Lou (Terragnoli). It is a letter addressed to the Board with a map.

JOHN NOWICKI: He will not be here tonight?

DON FASO: No. I didn't realize that he had to leave. The letter is addressed to the Chili Planning Board regarding dumpster enclosures and HVAC screening at Towne Plaza. Timetable of when work was scheduled and when it had to be finished. First bullet, "Work will start 14 days after subdivision approval and site plan approval of Tim Horton's at Towne Plaza."

Second bullet, "Work will be finished 60 days after that date."

Third bullet, "Dumpster enclosures will be constructed of solid vinyl fencing, same type as sold at Home Depot in the areas indicated on the site plan," which I have.

The next bullet, "HVA screening will be of the same style by pressure treated."

The next bullet, "Any trash will be removed from the back of the building."

Next bullet, "Graffiti will be removed from the side and back of the building. Sincerely Robert Fallone, Jr."

KAREN COX: What is our hammer to keep that in force?

DARIO MARCHIONI: Letter of credit.

DON FASO: No.

KAREN COX: That is just a piece of paper saying we're going to do it.

DON FASO: If you take the 14 days and 60, you're up to 74 days, which will be a real problem for Tim Horton's. So the other thing that we have, and I will call on Dan (Kress) to inform the Board what transpired today.

DANIEL KRESS: Um, my office received a phone call this afternoon from an attorney at Harris Beach requesting a letter verifying that the property at 4390 Buffalo Road is in full compliance with all applicable zoning regulations and that there are no code violations on the property. This was just a phone message left for me. I didn't get to speak with the attorney directly. It was not entirely clear from the message, but apparently it is being requested on behalf of a buyer for the property.

In any case, I have in return left a message and still have not spoken with the attorney directly that says there is going to be a little problem providing that letter until a number of issues, such as what the Planning Board has been concerned about, are all addressed. So perhaps when you're concerned about what, for lack of a better description, leverage you might have to work with, there is also the added issue of the fact that, frankly, if that is going to hold up a closing, that work is going to have to be done first, otherwise no letter.

DON FASO: Keith (O'Toole), isn't there a new law that on commercial property, when it is filed, the file letter has to sign off that the property is in compliance with all of the local zoning codes?

KEITH O'TOOLE: I'm not aware of that. I will look into that.

KAREN COX: I mean I certainly don't want to penalize Tim Horton's for the Fallone issue, because they have gone out of their way to address our concerns and to try to please us as much as they can. But, you know, a letter is only as good as that piece of paper. He is saying, sure, we'll do it. We have nothing that we're holding -- I mean in the event that there isn't a buyer for the property, we have nothing, no hammer we can hold over the head, as far as I can see.

KEITH O'TOOLE: What you might want to do is -- since we're doing the subdivision, and which would indicate that they're buying the property, is require that a letter of credit be posted, as Dario (Marchioni) indicated. I would assume that the developer or rather the property owner can find the money for that letter of credit because he has the sale proceeds to dip into and make that happen. And how they do it is of, frankly, no concern to me. They can escrow funds, they can do whatever they want. But I suspect if the developer has the ability to develop the land next to the new Wegmans on Paul Road, that he can certainly find the money to get a letter of credit on this project. We have been messing around on this for too many years.

KAREN COX: I think it is the only way we'll get it done.

DON FASO: Without penalizing Tim Horton's.

KEITH O'TOOLE: It doesn't penalize Tim Horton's. The folks at Tim Horton's, they are a franchisee or whatever it is that is going to operate the place will put money on the table to buy the

property. Well, take some of that money and set it aside to make this happen.

JOHN NOWICKI: Let me ask you a question. Have -- these gentlemen here, does Tim Horton's have a contract in place to buy this parcel?

MR. TERRAGNOLI: Yes.

JOHN NOWICKI: There are interest terms and conditions in that contract that can be disruptive to this process?

KEITH O'TOOLE: Once the subdivision gets lopped off, and we have the map filed, we lose control here.

DON FASO: Over Dr. Fallone?

KEITH O'TOOLE: It doesn't matter what their purchase and sale contract has to say about it. So I mean personally, and I can't imagine that the buyer of this contract -- or this property can't sit back for another two months, frankly. I know the developer will scream it is not possible, and yet it tends to happen that way.

JOHN NOWICKI: I don't like the idea that he sends a letter -- I haven't seen the letter, but you read it to us. Have you seen that letter?

KEITH O'TOOLE: The one that Don (Faso) just read?

DON FASO: I was just handed it. Apparently he came in and left it with Lou (Terragnoli).

JOHN NOWICKI: Have you seen this?

KEITH O'TOOLE: I scanned it a few minutes ago. Frankly, in my estimation it would be better still just to sit back, let him get the work done. There is nothing on that letter that can't be done out-of-pocket.

JOHN NOWICKI: I don't think he has all of the items on this letter.

KEITH O'TOOLE: That's a different issue.

KAREN COX: But if we sit and wait and he is still not doing it, he promised -- he or Jr., if you will, promised last year that all of the work, the paving and lights would be up last year and it sat there for a year looking like East Beirut. And great, we have a promise from him. That's all -- to me --

JOHN NOWICKI: Another worthless piece of paper that said by the time this meeting took place he would have some of the work done or in the process of being done and we have nothing being done and a worthless piece of paper.

KEITH O'TOOLE: I don't disagree.

JOHN NOWICKI: And a map.

KAREN COX: And a map.

JOHN NOWICKI: We have a good applicant sitting out here who will do a good job and I feel sorry for him.

DON FASO: But I think the hook is -- Dan (Kress) is right. The sale of the property can contingence on that letter, that the potential buyer's attorney is asking for.

DARIO MARCHIONI: I would -- I like Keith (O'Toole)'s idea about putting some money where the mouth is.

KEITH O'TOOLE: I will take back that suggestion. Just sit back and let him get the work done. That would be my suggestion. This way we don't get involved in whether they owe us a letter of credit or -- under the law or whether conditions have been satisfied. If they want to file an Article 78, God bless them. But I have to tell you if I am a franchisee and I dumped in all this money to buy this site and have this site engineered, I won't be too quick to walk away from it. And I am if I'm Dr. Fallone and I have a contract that is contingent upon getting the deal done in X number of days and the only thing holding me up from getting that money for that lot is putting up a fence and some screens around some dumpsters, I'll bet you I find a way to get that done because I know there is money coming down the pike real quick. So...

JOHN NOWICKI: Well, you know and I know, and as members of the Planning Board know, there is a broader picture, too, of Mr. Fallone in other projects in the area that come into play here. At least it impacts my thinking here. Are you suggesting that on our agenda tonight we have two items; is that correct?

DON FASO: Yes. Subdivision and site.

JOHN NOWICKI: If we moved on the resubdivision approval, is -- is --

DON FASO: You have to do subdivision first because otherwise it makes the site a moot point. You can't do site without subdivision.

JOHN NOWICKI: But what I am saying is, the conditions we place on these approvals here, based on the letter we have from Mr. Kress, and the letter from Mr. Fallone, which is lacking in some areas, we put those conditions on both of these things.

KEITH O'TOOLE: We have conditions reaching back to 2001 that I'm aware of that haven't been satisfied. So conditions are not the issue. It is performance.

JOHN NOWICKI: How will we get this thing done?

KEITH O'TOOLE: I think what you do is sit back and refuse to do anything or deny the thing on the spot and let them refile until they get everything done. Keep in mind there is that clock in State law. We don't want to let this slide or else they will simply say we have our approval. But -- by default. But beyond that, I think you are waiting -- you wait and you get it done.

DON FASO: The clock starts tonight, though?

KEITH O'TOOLE: Yes.

JOHN NOWICKI: How many days or months from today?

KEITH O'TOOLE: I believe it is 61 days.

DON FASO: 60.

JOHN HELLABY: Keith (O'Toole), can you table this? Can you --

DON FASO: No.

JOHN HELLABY: Again, I understand, and it is not up to me, but feasibly, could it be tabled pending the filing of the letter of credit?

DON FASO: No.

KEITH O'TOOLE: That is a condition of approval.

JOHN NOWICKI: You know, a letter of credit. Let's get the work done. How are we going to get the work done? It needs to be done. A letter of credit will sit there and who will do the work? I want a contract by someone that is going in there and doing the work. I'm sick and tired of giving this guy every inch that we have given this guy. We have given him way too much and I'm tired of this guy.

KEITH O'TOOLE: Letter of credit or not, if we're talking about improvements on private property, we may have the financing, but we're not going to be too keen about going on private property to get the work done. That is why I was rethinking my earlier comments. Just better to have the work done and have the property owner get it done.

JOHN NOWICKI: Let me ask you this question. There are violations on that property?

KEITH O'TOOLE: Yes.

JOHN NOWICKI: Why can't we start issuing citations against all those violations?

KEITH O'TOOLE: We already have.

DON FASO: Have they gone to court?

KEITH O'TOOLE: And Dr. Fallone has had them adjourned again and again. I got to tell you, I'm tired of going to Town Court only to find out that the matters have been adjourned. It is a waste of my time and code enforcement time.

JOHN NOWICKI: He doesn't show up here either.

KEITH O'TOOLE: Last time I checked, that plaza is fairly leased at this point, so there has to be some money on the table to get these things done. Whether they have the financing or not, frankly, isn't our problem. It's their problem.

JOHN NOWICKI: Where do we find the leverage to get this thing done?

KEITH O'TOOLE: Deny it.

JOHN NOWICKI: Just deny it.

DON FASO: No. I don't want to do that.

KAREN COX: Then it penalizes a good applicant.

DON FASO: You're into construction season.

JOHN NOWICKI: I know you are.

DON FASO: The mylar is probably ready to be dropped off and signed, right?

MR. FARMER: Pretty much.

DARIO MARCHIONI: You got a cell number?

KEITH O'TOOLE: In you're unwilling --

DARIO MARCHIONI: If you do, I think he should come and discuss it or we'll --

KAREN COX: He already came and went.

DARIO MARCHIONI: Because he didn't want to face us, but maybe with these conditions he might want to face us.

DON FASO: We're penalizing a developer that has a good application before us.

JOHN NOWICKI: I realize this, but let's look at the picture of the community. What are we doing to Chili as a whole?

JOHN HELLABY: You will never drive home the message, I don't believe.

JOHN NOWICKI: We have to drive a message home to this guy that he has to do something physically to get this thing resolved. This paperwork is nonsense.

KEITH O'TOOLE: Only money is motivation.

DON FASO: Where did that letter go? It is an original.

KEITH O'TOOLE: Short of denying this, what you might want to do, restate all of the conditions that you want done and withhold all of the mylars, withhold any building permits. That still doesn't get Tim Horton's where they want to be as quick as they want to be, but if we're talking two months or -- you know, two and a half months, that is still building season.

DON FASO: Two and a half what?

JOHN NOWICKI: That is still building season.

KEITH O'TOOLE: Asphalt plants don't close down until late in the year.

JOHN NOWICKI: I wouldn't mind seeing that happen, as far as listing all of the conditions from the previous time to the last time to this time, and -- and not -- and with a statement in there, because there is a new buyer coming up here, too, based on your conversation.

KAREN COX: You think?

KEITH O'TOOLE: Maybe. Maybe. Unless that was just a convenient call.

JOHN NOWICKI: I don't know. But anyways, all of those conditions should be part of anything that we approve tonight, and no mylar should be signed, no permit should be granted until all those conditions are met. That's the only way I can see leverage.

DARIO MARCHIONI: I just have a question. By him giving us this letter right now, last minute, making that he will do X and X and X, where did he get this information that that is all that would satisfy us? I mean he --

DON FASO: You mean all those bullets I read?

DARIO MARCHIONI: He must be getting the wrong information from somebody, or something -- or we're not communicating here at all.

KAREN COX: Because he doesn't have all of the -- well, there is communication problem because he refuses to show up here. We can communicate really fine if he would.

DARIO MARCHIONI: He should show up. We still have to 7 o'clock. Maybe we should call him up and say he has to show up here or else we'll deny it. You have his cell number. You call him.

DON FASO: Well, Keith (O'Toole) --

KEITH O'TOOLE: Yes, sir.

DON FASO: -- on the subdivision approval, he is breaking this little tiny lot off with the big lot. So essentially, as subdivision approval, couldn't we make these a condition of approval for subdivision and then as soon as these are satisfied -- this way Tim Horton's will be all over his back to get this done ASAP. Maybe not start in 14 days, have it completed in 14 days. What will it take to put up fencing and paint the buildings?

JOHN NOWICKI: He has more than that. Believe me. He has a road ahead of him. There are other questions here. For example, you drove through there today. What do you do now? We have sold the parcel out to the Bank of Geneva. You look at the parking lot over there where you go into John Deere's in the back, to the post office, who is responsible to pave all that area? Is that him, or is that the Bank of Geneva, the post office or John Deere? That parking lot is a mess.

KAREN COX: Probably not the post office because they lease that building.

JOHN NOWICKI: I was going to ask that question when he was here, because I have drove through here and there is more crap than last time. There are beds back there -- what do they call them? Day beds and mattresses laying behind the building.

KAREN COX: Where are they coming from?

JOHN NOWICKI: I don't know.

KAREN COX: Are people using the back of the plaza as a common dumping ground?

DARIO MARCHIONI: Would you elaborate what you said previously? If we put all of the

conditions, what is the enforcement factor?

DON FASO: They have to be met before the mylar is signed.

DARIO MARCHIONI: That takes us off the hook then and puts the building --

DON FASO: It will be Tim Horton's all over the phone, getting it done.

To answer your question, other than I don't know what the cross access easements are, but here is the responsibility for paving, right here (indicating). This is the new -- this is the --

JOHN NOWICKI: This is all a mess here (indicating). This is a mess (indicating).

DON FASO: Mess in here (indicating). So right in here (indicating), this is the plaza (indicating).

JOHN NOWICKI: Yes.

DON FASO: There is now a building here (indicating), which would be the responsibility of John Deere.

JOHN NOWICKI: That is John Deere. His dumpsters aren't enclosed.

DARIO MARCHIONI: He didn't get a final yet. Right? He didn't get a final?

DANIEL KRESS: Their C of O to open, the first phase of construction -- I remember the Planning Board actually approved two phases to that project --

DON FASO: Right.

DANIEL KRESS: -- was conditioned on the site work being completed. So they're well aware they have additional work to do on the site.

JOHN NOWICKI: Because I don't think the landscaping has been done totally to the Conservation Board's requirement.

DANIEL KRESS: No, not yet.

JOHN NOWICKI: So you still have issues over there to deal with on the John Deere building.

RAY BLEIER: This is quite an issue with the dumpsters and everything. As a matter of fact, what is going to prevent the Town from not issuing a C of O until all dumpsters are enclosed?

DON FASO: As part of subdivision?

RAY BLEIER: Then we don't have to worry.

DON FASO: Will that work, Keith (O'Toole)?

KEITH O'TOOLE: What is that?

DON FASO: Not issue any C of O.

KEITH O'TOOLE: To who?

JOHN HELLABY: Now you're on a separate parcel.

DON FASO: Tim Horton's as part of the subdivision approval.

KEITH O'TOOLE: I wouldn't want to go there.

DARIO MARCHIONI: You're penalizing Tim Horton's for somebody else's --

DON FASO: That is my problem. I don't want to penalize them.

JOHN NOWICKI: That is all of our problem. They're not the problem.

DON FASO: We're going to go to 7 o'clock anyway, guys.

DARIO MARCHIONI: What do you suggest, sir?

MR. TERRAGNOLI: Well --

KAREN COX: You probably talk to him more than we.

MR. TERRAGNOLI: Well, I will tell you what I know.

DON FASO: You're dealing with him on a contract --

MR. TERRAGNOLI: We're trying to buy the property. Typically the seller does not have much involvement in our proceedings unless they had to do a sign-off, and typically even when we do a subdivision, we tell the seller, okay, we'll go handle it so we can control the process and the timing. I'm very respectful of the Board. There are years of frustration here. I would not want to step into that. I don't have an answer. I can tell you what I know.

I urged Dr. Fallone two times over the past few days to make sure that letter was here and ready or whether he was coming or not. But to at least have that letter ready because what I heard the last time we were here, the Board wanted a letter outlining what he would do in specific timetables. Now, whether that letter encompasses everything you wanted in it, I will leave that to you, and it sounds like it doesn't. I urged him to make sure that letter was done. In fact, he told me some of the items that were in the letter. I said, "Well," I said, "There was a couple things I heard at the last meeting you're not addressing in the letter regarding removing trash from the back of the building and getting rid of the graffiti." That is what I remember hearing. I'm fully respectful there may be other items. That is what I

heard. I urged him to put that in the letter, which he did. That was my involvement with trying to get that to this point, which is usually a lot more than -- we typically just like to represent ourselves and speak for ourselves and that is usually the best way to do it, but that is what happened over the past several days.

KAREN COX: It is too bad the good, responsible applicant has to babysit a developer that really doesn't care what the neighborhood looks like or what the neighborhood even thinks. It is really not up to Tim Horton's to babysit this guy.

DARIO MARCHIONI: Can we still discuss this?

DON FASO: Yes.

DARIO MARCHIONI: Let's give him the subdivision approval, with conditions, site plan approval, to Tim Horton's, and then at least we have done our job and put conditions on this, the things that have to be done. We put these five items here.

KAREN COX: Everything dating back.

DARIO MARCHIONI: Then that is as far as we can go. What else can we do?

JOHN NOWICKI: With a stipulation, because I want the stipulation there -- I would like to have the Board think about this, is that no drawings are signed, no permits are issued until all of the above are done. Period.

DARIO MARCHIONI: Until we go on.

JOHN NOWICKI: Is that possible, Mr. O'Toole?

KEITH O'TOOLE: I like my proposal better.

JOHN NOWICKI: What, letter of credit?

KEITH O'TOOLE: No. Just the -- to deny it.

DARIO MARCHIONI: I don't think it is fair for these people.

KEITH O'TOOLE: I think if you take a steel-tip boot and drive it up somebody's backside, they will finally get the message, if you will excuse me for being blunt.

KAREN COX: I have my steel toes on right now. I would be willing to go do it.

KEITH O'TOOLE: I have to believe if somebody is about to watch a lot of money go away -- and we wouldn't be here if there wasn't real money on the table -- they would finally figure out what to do to get it done right, and get it done yesterday.

JOHN NOWICKI: If we did that, if we just deny a -- deny them both is what you're saying?

KEITH O'TOOLE: Yes.

JOHN NOWICKI: Now that leaves the door open for us, though, as far as time limits go and things like that.

KEITH O'TOOLE: It shuts down the process. It puts the ball back in their court and they can either do what they have to do to fix their problems, or they can take us to court. Which, by the way, is a delaying issue, as well. But, of course, I'm not here to give them legal advice.

DON FASO: Define for the Board with prejudice and without prejudice.

KEITH O'TOOLE: Without prejudice is the right to refile. That's all it means to me. As opposed to what we used to call in law school res judicata. You had your day in court, we made our decision, now go away forever.

JOHN NOWICKI: Is that legal, can you do that?

KEITH O'TOOLE: I think denying with prejudice doesn't necessarily get you all that much, because it will -- creative developer will refile with a few minor changes saying it is a new application.

KAREN COX: So we have to slam the door shut.

KEITH O'TOOLE: It is sufficient to say you deny it. If they come back with a new application and fix the problem, great. If they come back with a new application and don't fix the problem, the problem still exists and my recommendation would be the same.

DARIO MARCHIONI: You know when I was a kid, there was an old saying it is better to light one candle than curse the dark. I would say it -- we should let Tim Horton light the little candle they have there.

KEITH O'TOOLE: Dario (Marchioni), God bless them. The folks at Tim Horton's have the patience of Job, or at least the patience of 72 days. That is my guess.

JOHN NOWICKI: I think the Tim Horton people realize the Planning Board is in their corner. I think we have to think of the Town as a whole.

KAREN COX: I agree.

JOHN NOWICKI: We have legal counsel here that is trying to advise us correctly so we have the right hammer to put these nails down into the top of this box here, and I -- I want that -- I want that rubbish gone because I don't want this Town hurt by this gentleman. We have enough problems with him on other sites I'm very concerned over, and until he acts in a professional way, to get these problems resolved in North -- in North Chili -- and proved to the Planning Board that he can act as a developer and a builder, I am not going to try to accommodate this individual one way or another until he comes before the Planning Board and says he is going to do it and keep his word. I would be very honest with you, if he brought his father and two brothers with him next month and said, "I'm going to turn it over to them," I would feel a big sigh of relief. But that is probably not going to happen.

DON FASO: Oh, Senior is a man of his word.

JOHN NOWICKI: He is. I have known him. He has a wonderful father. But this guy here, I -- I agree with Keith O'Toole. I would rather deny it and let's go to war on this thing.

KAREN COX: And --

JOHN NOWICKI: It is not against you at all. Believe me.

RAY BLEIER: I think we're a little bit at fault here.

DON FASO: Probably.

RAY BLEIER: When you go back a couple weeks at the last meeting, you know what we asked for. We asked for a letter, a timetable when he is going to do these things. And this is what he --

DON FASO: We got it.

KAREN COX: He got it.

RAY BLEIER: We should have stepped forward right then and there and told him the work has to be done.

JOHN NOWICKI: He didn't put a lot of thought in the letter. He didn't cover the bases.

RAY BLEIER: Regardless, John (Nowicki). I don't care if he touched all of the bases.

JOHN NOWICKI: I'm going to the fact that he has gone to court, he has citations against him, he doesn't even honor those. Come on. This guy is not showing any value here. Terrible. Terrible. I'm sorry.

KAREN COX: How can you go to court with -- I would love to know --

DON FASO: I don't know.

KAREN COX: We take him to court, and he gets off?

DON FASO: He gets it adjourned.

KEITH O'TOOLE: You get to ask for adjournments and it is at the pleasure of the Court, but my understanding is the violations still have not been cured. They're continuing violations. So adjournment or not, they're still violations.

KAREN COX: How many adjournments are you allowed before you are out of -- you know, out of the bank, if you will?

KEITH O'TOOLE: That is up to the judge. My bigger concern, frankly, is -- aside from those continuing violations, is that we have violations from the 2001 approval, and they're -- the dumpsters, I mean that law has been on the books forever. And as I pointed out back in 2001, their parking lot is encroaching on Town property. How long does it take to hire someone with a diamond saw to cut out the offending asphalt encroachment? I mean this stuff is just beyond annoying. They had -- they had a contractor there paving and he couldn't fix it then?

KAREN COX: Contractor would have had a diamond saw then.

KEITH O'TOOLE: And it is shown on their map, so they obviously know about the encroachment. So...

JOHN NOWICKI: Let me ask you a question. If we deny this thing, okay, and he says okay, and he is going to go sell this parcel -- say he sells it to buyer X, is it all transferable to buyer X? Does he realize what he is getting into?

KAREN COX: Maybe that is the reason for a call.

KEITH O'TOOLE: You don't buy a pad site without subdivision approval, unless you're really, really not doing your job.

JOHN NOWICKI: But if he is selling this parcel off separately to these guys and the rest of the plaza to party X?

KEITH O'TOOLE: Well, the plan appears to me, and you can disagree, and this is more -- not

so much legal as just interpreting what is going on on the site is what we're doing is carving off the prime cuts and leaving the grizzle dump in the rear, which at the moment is not such a bad thing because the space seemed to be leased. Once you put up all these pad sites and walk away with the easy money, that space will be left. It will probably be flipped before the leases go out and then you find out whether they can find new tenants or get extensions on the leases.

JOHN NOWICKI: I don't think we have any choice but to deny it.

KAREN COX: It is not a good choice.

JOHN NOWICKI: It is not a good one, but the only one we have got.

KAREN COX: If that does happen --

JOHN NOWICKI: Can we wait until 7?

DON FASO: We'll wait until 7 for a decision. I can go to the audience.

DARIO MARCHIONI: Tim Horton's over there will improve the plaza tremendously. At least we're taking a right step towards the right way. Rather than -- so I think we should give these gentlemen here -- here with conditions -- what they're asking for.

JOHN NOWICKI: Can't do it.

KAREN COX: Dario (Marchioni), as much as I don't like to penalize an applicant that has really worked hard to please us, the bottom line is, he is trying to buy a parcel from a developer who doesn't care, and he, you know -- he is being penalized for that, but the only way -- the only way you will get through to them is what Keith (O'Toole) says. You deny it. You close the door. I mean this is -- this is what I do with my kids all of the time. You said no, you mean no.

DARIO MARCHIONI: What if he says, forget Tim Horton's, I still won't do anything there?

DON FASO: I don't think he will walk away.

DARIO MARCHIONI: You don't think so?

DON FASO: No.

KAREN COX: Tim Horton's may say forget you.

JOHN NOWICKI: That is what Tim Horton's will do.

COMMENTS OR QUESTIONS FROM THE AUDIENCE:

GAIL LYLE, 736 Paul Road

MS. LYLE: Good evening, Mr. Faso, Town Board, side board, members of the audience.

Maybe I have an answer for your solution. I'm one of the people who called this afternoon after discovering the time in the North Chili Plaza was 7 o'clock when the paper said it was 6. Now let me be sure that I understand this. When you want to do something like this, you put signs posted on the property, letters are sent out to the people that are affected, the bulletin board notice has to be up in the Town Hall and has -- you said there is also a website. Now, the problem I'm having is, last evening, at the Zoning Board of Appeals, a sign fell down for two hours. Someone drove by from the Zoning Board, a member, noticed the sign was down two hours. Now, you said the sign has been located there for ten days, yet nobody picked up on the time difference? That gentleman's application was tabled because the sign was down two hours. Now here we have a sign that has been up for ten days with the wrong time. Why is he told he has to be tabled when he was even here last night?

DON FASO: As I explained, as Keith (O'Toole) explained to me, we start at 6 o'clock for the people that got the notice in the mail.

MS. LYLE: Because I called Mr. Stowe and asked him exactly why this happened. But then --

DON FASO: It happened because Kathy (Reed) was just so used to doing 7 o'clock.

MS. LYLE: That's not an excuse. I'm sorry. It is not an excuse.

DON FASO: Gail (Lyle), we're going to hold a public hearing at 7 o'clock.

MS. LYLE: You're doing the whole thing again at 7 o'clock and tell the people all these things that you're hearing now, that you're going to do at 7?

JOHN NOWICKI: Right.

MS. LYLE: You play games.

KAREN COX: Why is it games?

MS. LYLE: Because it is one rule for one person and a different rule for Mr. Fallone.

DON FASO: No, no, no. You know, as far as the sign being down, I'm going on the record

saying that the applicant made a good faith effort to keep the property properly posted. I'm not going to penalize him if the wind blew a sign down. What the Zoning Board does is up to the Zoning Board. But nobody made a motion to table this application because the sign was down for half a day.

KAREN COX: Or because the time was wrong.

DON FASO: Or the time was wrong.

JERRY BRIXNER, 14 Hartom Road

MR. BRIXNER: I got a phone call this afternoon that there was a special Planning Board meeting tonight. Now, past couple days I have not been to the Town Hall, so if anything was posted, I -- I wouldn't have been aware of it. Could you brief me on what we're doing tonight? There is no agenda back there.

KEITH O'TOOLE: Mr. Brixner, you may have my agenda. It is still in one piece.

DON FASO: There are two applications, Jerry (Brixner). One is for resubdivision approval of one lot, of the John Deere Subdivision at 4390 Buffalo Road. The other application is for preliminary site plan approval to erect a 2,800 square foot Tim Horton's restaurant at the same property.

MR. BRIXNER: Okay. Give me the address of the property again.

DON FASO: 4390 Buffalo Road, which is the plaza.

MR. BRIXNER: I hear you. Thank you very much.

BERNICE WILCOX, Stuart Road

MRS. WILCOX: I would think that possibly you might put Mr. Fallone in jail like you did the 78-year-old grandmother.

KAREN COX: I was waiting for that one.

MRS. WILCOX: Maybe he would do his job. I'm glad you're trying to address the problem. I certainly think it's serious.

DON FASO: You see our dilemma.

MRS. WILCOX: We do like to use that plaza ourselves, and we are concerned about the -- what you're discussing, but I am not familiar with the issues that --

DON FASO: Which --

MRS. WILCOX: Which you wanted Fallone to address.

DON FASO: Well, apparently over the years there have been several applications before the Planning Board for various approvals, and in the course of the approvals, conditions were placed on Mr. Fallone, and as we're finding out in this process, they have not been corrected.

MRS. WILCOX: Yes.

DON FASO: He has been issued tickets. He had gone to court, asked for adjournments. The courts have granted the adjournment. That is not in our control.

MRS. WILCOX: Was the letter he sent designed to address the issues? Was that --

DON FASO: Was what?

MRS. WILCOX: The letter that Mr. Fallone sent, was --

DON FASO: Yes, but apparently, we're finding out that not everything has been addressed. These were the main things that were brought to Mr. Fallone's attention through the course of the Tim Horton's application. What he is in violation of in 2001, I'm not really sure because I wasn't on the Board back then.

MRS. WILCOX: I agree with Mr. O'Toole on this. I think you really have to be serious about this, and do something definite in order to solve the problem. I --

KAREN COX: That is what we're talking about.

MRS. WILCOX: We have a very serious problem here, and we have had people before, I remember, Mr. Spector on Scottsville Road, it took years to resolve, and once you let these people in, and -- I feel sorry.

DON FASO: If you remember how it got resolved was the transfer of money from one hand to the other.

MRS. WILCOX: Once the money is handed over, forget it.

DON FASO: No. You see it was taken care of prior to the money changing hands.

MRS. WILCOX: It is a serious problem.

ELAINE CROWELL - 3248 Union Street.

MS. CROWELL: Elaine Crowell. I own property -- I own 3248 Union Street, right across the street. So I came to get information. Sorry I haven't been to a few more meetings. I think I won't throw my letters away.

DON FASO: Did you read the sign or get a notice in the mail?

MS. CROWELL: I got a notice in the mail. That is -- I work in real estate, too. I'm also selling a house that is near a train.

(Laughter.)

DON FASO: I'm sorry, I can't hear with the horn.

MS. CROWELL: I came because I wanted to see a little bit more about the traffic patterns and through the years, which we have owned the property almost 23 years, um, we have had problems with trash in our yard, and when we did previously go to Towne Plaza, they basically took care of it.

DON FASO: But that was Mr. Perry, right?

MS. CROWELL: Yes, because we needed more knowledge about who to go to. I could see improvements, but I could see more things coming up the pike. I wondered about traffic and how it would affect my property directly across the street.

DON FASO: Where are you in relation to the Glue Factory?

MS. CROWELL: To the left of the Glue Factory. We own between the Glue Factory and the whole corner of Barry Lane.

DON FASO: Any trash in the back of the plaza?

MS. CROWELL: It blows over into the front yard and the ditch. And how long has this gentleman owned this?

KAREN COX: Five or six years.

DON FASO: Anybody answer that? How long has he owned the property?

DANIEL KRESS: Five or six years is about right.

MS. CROWELL: I guess with the pattern I wouldn't have somebody coming over saying I would be glad to help you take care of your trash. I just wanted to see the impact in the whole area. I was born and raised in North Chili, over 50 years. I do not live in that house currently. I have owned it over 23 years with my husband.

DON FASO: What they're proposing has no additional curb cuts, so what is there will be there afterwards. There are no additional curb cuts. The curb cuts will be improved. The traffic flow and the pattern will be addressed with directional signs.

KAREN COX: When you said "traffic flow," do you mean on Union Street?

MS. CROWELL: An increased amount?

DON FASO: Well, as they stated in prior discussions with the Planning Board, their peak hours are really morning, coffee hours. They are open 24.

MS. CROWELL: Which is nice for the college, too.

DON FASO: So other than a morning peak, there probably will be no noticeable change. I mean we all realize and recognize that that intersection is a problem. I think it is an F-intersection.

KAREN COX: Or close to it.

DON FASO: Or close it to it. Intersections are graded from A to F. F is failure, which means long delays in excess of --

JOHN NOWICKI: Don't they start construction in July?

MS. CROWELL: When does that start exactly?

DON FASO: July.

MS. CROWELL: The State has contacted us.

KAREN COX: I don't think you would expect -- there is a lot of traffic that does go by there early in the morning because they're heading to 490. They're heading west to -- or east to Buffalo Road. I don't -- I wouldn't expect somebody who would normally head north to work say, "I will go by and can grab a cup of coffee from Tim Horton's." People that are going to go there in the early morning would be the ones going by anyway.

MS. CROWELL: Well, just listening to your discussion on somebody owning up to what it is they're supposed to do, I know it is just unbelievable in my business, just for one single house, what I have to go through for months and months. So I would at least support that when the project is finished, it is finished right. Obviously we're dealing with some zoning issues and things like that. And

owning -- I will keep my eye on it. I am right across the street from it.

DON FASO: You see we have done the same thing with Tim Horton's. They are going into the K Mart plaza.

MS. CROWELL: I read about that a little bit.

DON FASO: So we're familiar with Tim Horton's. We're very pleased that they have selected Chili.

MS. CROWELL: I'm just trying to see the whole picture for North Chili.

KAREN COX: Once this is done, it will be a good improvement for the area. Something new looking and a place where people from the college can go and --

DON FASO: Aesthetically, it will be similar in character to Eckerd's.

MS. CROWELL: Well, if you do have control over the dumpsters and the roads as were brought up, too, because I use that whole area. My elderly parents live a block from there. I have used it my whole life. But there is bad stuff there, too, that you're trying to get taken care of.

DON FASO: Okay. We can't do anything for another ten minutes, so I will digress and inform the Board of a couple of things.

There was a discussion off the record.

DON FASO: On the record.

I got a call from Roger Brandt. Apparently the Town, a citizen dropped off a condition letter that the Planning Board back in 1996 placed on Union Square, the condition that no topsoil be removed, and conversely no top -- or no fill be brought in back in 1996. So that was -- that was you (indicating), you (indicating) and John Cross. The only thing --

KAREN COX: Good.

DON FASO: You're the only two that still remain. On the record back then, apparently Parrone, who was the engineer, said that there was an earthwork balance so therefore nothing had to be removed, nothing had to be brought in. The calculations were wrong. They do have spoils and they would like to sell it off. I told Roger (Brandt) the only way to do that is to get the Planning Board to remove that condition and I would take a straw poll tonight to see what the Board's opinion is, and should he come back in in July for a public hearing for that one condition. I don't know why that condition was placed on it because I personally feel that there is no prohibition in the law that says that they can't sell the topsoil.

JOHN HELLABY: It was a trucking issue, if I remember.

DON FASO: There is still no prohibition against topsoil.

KAREN COX: Maybe the perception is the topsoil was there, and -- this happened where I lived. You're supposed to get three or four inches -- they strip it, you know -- they strip it, sell it all off. You might, if you're lucky -- we got two, and so maybe the perception is because they sold it all off, they don't want to buy enough to replace what they sold.

DON FASO: Herein lies the problem. Back in 1999, then Supervisor Kelly, through an arrangement with the builder, or the contractor, somebody over there, the Town needed topsoil for some projects. The Town went in and pulled topsoil out of there. Didn't buy it. They offered as much as we needed. So the Town went in and pulled it out, which in my opinion would be a violation of the condition of no removal of topsoil. So that was in 1999.

KAREN COX: So the citizen is unhappy?

DON FASO: The citizen brought it to the Building Department's attention that in 1996 a condition was put on there that there should be no removal of the topsoil.

JOHN NOWICKI: There were a lot of projects being proposed at that time. They probably wanted to make sure that the topsoil was there to finish the development in its entirety. Maybe that the landscaping issue was taken care of. If there is a surplus and it can be proven, I don't have a problem.

KAREN COX: How would they prove that there was a surplus?

DON FASO: I imagine the Project Engineer would have to come back and say that he erred in '96 when he said it balanced.

DARIO MARCHIONI: Don (Faso), is that project fully developed now? We're still not done with development? Isn't that premature to discuss hauling things out of there until the whole

development is at least -- I don't know.

DON FASO: But I still say there is no prohibition against selling topsoil.

RAY BLEIER: Do they want to pull any more out of there?

DON FASO: The answer would be yes.

JOHN NOWICKI: Yes. They're processing now.

DON FASO: They're pulling it out. I called Roger (Brandt) and I said don't do that. Even Mr. Kress was unaware of that condition back in 1996, and issued the permit to go ahead and do it, which he has now rescinded.

RAY BLEIER: I was wondering if that issue was brought up by the applicant at that time, and therefore -- during the course of the meeting if we just said okay, fine, we'll put that in as a condition.

DON FASO: I did not read the minutes. I did not read the minutes. This all transpired this week.

KAREN COX: The minutes might show why.

DARIO MARCHIONI: I have a question. If he pulls that topsoil out, how will that impact the future development of that site?

DON FASO: I can't answer that.

DARIO MARCHIONI: I think we should know that before we even think about it.

KAREN COX: So you think the idea would be to have him come in, John (Nowicki)?

DON FASO: That would be my idea.

JOHN NOWICKI: Informally.

DON FASO: To rescind a condition from a previous approval, a public hearing?

KEITH O'TOOLE: No. I consider it an informal.

DON FASO: Pull him in in July?

KAREN COX: Yes.

RAY BLEIER: Can we get the minutes from that meeting?

DON FASO: Dan (Kress), can you get the minutes for that meeting in '96 to the Board?

DANIEL KRESS: Yes.

DON FASO: Does everybody want the minutes?

JOHN NOWICKI: As long as Ray (Bleier) gets them, if he gets them and he can scan them.

DARIO MARCHIONI: Actually, just the page pertaining to that. We don't need the whole minutes.

KAREN COX: If I'm voting on something that transpired before I was a member, I would like to know the background behind why that condition was put on. So the minutes might reflect that.

JOHN NOWICKI: I will trust Ray (Bleier)'s interpretation.

There was a recess in the meeting.

DON FASO: I have two applications before us. I will dispense with this and get right to the heart of it. Two applications tonight to be heard are the following applications.

1. Application of Dr. Robert Fallone, Jr., 3173 Chili Avenue, Rochester, New York 14624, property owner: Towne Plaza, LLC; for resubdivision approval of Lot #1 of the John Deere Subdivision into two lots at property located at 4390 Buffalo Road in G.B. zone.
2. Application of Dr. Robert Fallone, Jr., 3173 Chili Avenue, Rochester, New York 14624, property owner: Towne Plaza, LLC; for preliminary site plan approval to erect a 2,800 sq. ft. Tim Horton's restaurant at property located at 4390 Buffalo Road in G.B. zone.

DON FASO: With that, Mr. Nowicki just handed me -- this guy has everything. The decision letter dated November 19th, '01 signed by Mr. John Cross. Application for preliminary site plan approval to erect two additional, two new buildings totaling 22,200 square feet to include revised site improvements at property located at 4390 Buffalo Road in GB zone. Applicant amended at public hearing for one additional and two new buildings totaling the 18,000 square feet.

"Dear Mr. Fallone. The Chili Planning Board at the November 13th, 2001 public hearing unanimously approved by a vote of six the above described amended application with the following

conditions: Number one, pending approval of the Town Engineer. Number two, applicant to submit landscaping plans (signed and sealed by a licensed landscape architect) to the Chili Conservation Board for review and approval. Number three, applicant to address drainage issues with the Town Department of Public Works Commissioner, Town Engineer and adjacent neighbor to the west, Pride Mark Development. Number four, applicant is to address exterior treatment on rear buildings in the plaza and show location of dumpsters. Number five, applicant is to screen all rooftop HVAC units. Number six, petition the Chili Town Board through the Town Clerk's Office to include this parcel in the Chili Consolidated Drainage District if not already in said district. Please note that the Planning Board has waived final site plan approval on the proposed IGA addition consisting of 7,600 square feet."

And the last paragraph is the one about SEQR. It looks like the only one that is done is the Drainage District.

JOHN NOWICKI: That's it.

DON FASO: I will reiterate again what I addressed earlier, the problem with the signage. The hearing was set for 6 o'clock tonight, and we voted to adjourn to that meeting. It was posted on the Town Clerk's bulletin board. The legal notices were mailed. It was also on the website as advertised at 6. Unfortunately the Building Department made a mistake when they gave Mr. Farmer the new signs for tonight's meeting and she automatically wrote down 7, so there was some confusion.

I talked to Mr. O'Toole earlier in the day. He said we basically have to hold two public hearings, one at 6 and 7. We have gone through the 6 o'clock, and now we're here for the 7 o'clock hearing, and just to reiterate and recap, at the 6 o'clock we had a large lengthy discussion on the applicant's failure to meet the previous conditions which I just read into the record. Applicant had submitted a letter which I just handed the Building Department with some bullets that were needed to be addressed that he said would be addressed within 14 days of subdivision approval and to be completed within 60 days of the date of that approval.

There was some discussion following that on the Board, and the lack of control that the Town has had over this particular applicant. Mr. O'Toole has stated that there were citations issued. Court dates were adjourned and no court action has been taken.

Do you have any recollection of how many adjournments over the last couple of years?

KEITH O'TOOLE: As to these particular tickets, two. I'm not going to say we should penalize the applicant for adjournment. What I think there is case law to support, however, is that when you're in violation of existing permits, we don't hand you new permits. That is the issue.

DON FASO: Right.

I think I have addressed everything, haven't I?

KEITH O'TOOLE: For the record, for the 7 o'clock hearing, the encroachment on Town property.

DON FASO: Oh, okay. As was pointed out, there was an encroachment of the asphalt onto the Town property where the community center is. As Mr. O'Toole has pointed out, when the parking lot was paved, it would have been a very minor and insignificant issue to just go with a diamond saw and cut out the encroachment and remove it from Town property.

With that, I will go to the audience.

KAREN COX: Don (Faso), if I may, for the record, for the 7 o'clock hearing the Board is all in agreement that the particular applicant from -- or Tim Horton's, the applicant has gone out of their way to work with the Board and meet our requests and our interests. I just wanted to read that into the minutes.

JOHN NOWICKI: I think the Board supports that.

DON FASO: I will reiterate for the record, Sandy (Hewlett), that the applicant has made a good faith effort to keep the property properly posted.

JOHN NOWICKI: Absolutely.

COMMENTS OR QUESTIONS FROM THE AUDIENCE:

WILLIAM WILCOX - Stuart Road

MR. WILCOX: Now, what is going to happen with this, that you're messing around? I know they were here last month and they're back again.

DON FASO: And the month before that, and the month before that.

MR. WILCOX: I feel sorry for these guys because I know they're not from around here, which they said the one meeting before. Now, is this going to be settled by the Town? Or is it going to be settled by Fallon? Or who is it going to be settled by?

DON FASO: That is our dilemma. We're going to try to sort that out now.

MR. WILCOX: Well, that's why I'm here. I feel sorry for these two guys. They have been here before.

DON FASO: The six of us feel sorry for them, too.

DARIO MARCHIONI: I -- not to penalize Tim Horton's, and this is my greatest concern, I am for -- to approve this, all these conditions, and tighten up these conditions, you know, so that he will -- that -- along with that letter saying he is going to do these things --

KAREN COX: It will not work. We -- he -- he had conditions on the 2001, Dario (Marchioni), and he did not follow through. And -- I mean, my experience in the business I'm in is if I deny a contractor a payment because he is not doing something that he is supposed to or that I have asked to do several times, once I tell him I'm not putting a pay request through, things get fixed quickly. And Keith (O'Toole)'s point is that if we deny this with a steel-toe boot, then that Tim Horton's -- then there is money involved, possibly Tim Horton's will say I don't want to deal with this, I'm walking away. So I think Keith (O'Toole) has a good point.

DARIO MARCHIONI: But we're still penalizing these people here for somebody else's wrongdoing.

KAREN COX: Maybe not.

JOHN NOWICKI: Maybe not. Because we -- there are a few of us on the Planning Board, including you, Dario (Marchioni), that have been here a long time, and I can't recall in all of the years we have been on the Planning Board to have a developer ignore, ignore a Town so poorly. I can't recall such treatment in all of the years I have been here. This is not fair to this Town or to the Planning Board or to this applicant.

DON FASO: Or the residents of North Chili.

JOHN NOWICKI: The residents of this community. I have said it before, and I happen to feel that we just have to use the strongest tool we have available to us to get this man to perform. And if it is denying this application, unfortunately, I feel bad for the applicant, but if that is the strongest tool we have got, we have to take that tool and use it.

DON FASO: Lou (Terragnoli), you said earlier or you reconfirmed what I said, that I was sure that the sale was pending all necessary Town approvals.

MR. TERRAGNOLI: I was just going to address that. Maybe this helps the Board. If -- if approvals are granted with contingencies, and if the subdivision can't be filed until the contingencies are met, final site plan isn't technically approved until contingencies -- we can't close. You can't close, my seller doesn't get the money. To deny the application puts Tim Horton's in a very bad position, because, you know, we -- we're being used as leverage. That is the word we have heard a lot tonight. I mean, it is hard to be put in that position and come back. I don't think the company will want to be able to do that, but I think you could accomplish what you will want to accomplish by putting contingencies. Because we can't close until all those municipal approvals are in place. Our contract is subject to those municipal approvals. We're not going to buy any piece of property without everything being in order, in order to -- in order to the next day to go ahead and bid. We just don't do that. We don't take chances with the Board. We don't, even close. Building permit looks good, you'll have it in two weeks. That is not us. Everything is in place before we do it.

So I think the comments about, you know, spending a lot of money and site plans and, you know, a franchisee. It is not a franchisee. This is Tim Horton's corporate. We lease to a franchisee. We do have a franchisee. I'm not involved with that process. A franchisee, just to put yourself in their position for a second, they will come and buy this business from Tim Horton's. That means they're working in this business full-time. So they're either leaving a full-time position or they're selling an existing business. Now, if that is somebody from the area, that is great. If it is somebody outside of the area, they're selling a home and coming into this area and buying a home. These are all decisions that a franchisee has to make, and we on my end try to give them the most accurate information as to when something may be approved or not approved, because those are life decisions. That's tough. There are kids involved usually, things like that. So I mean when you make a comment about a franchisee, it is not that easy. They have a very difficult road ahead of them when it comes to timing issues.

I just reiterate we can't close until all approvals are in place, and if there are contingencies to approvals, there is no closing, because we don't have the Town's full approval.

KAREN COX: So if there were contingencies and you couldn't close, what I am understanding is that puts the heat on -- money doesn't get passed to Dr. Fallone?

MR. TERRAGNOLI: Correct me if I am wrong, we recently did a subdivision. One of the items was back taxes had to be paid. Until that owner of the property we bought it from paid the back taxes, we can't record the subdivision map, we then can't close. So our seller here has to do the items, you know, listed in the letter, and that's -- I mean I'm not crazy even about this. Believe me. I don't want to let you believe I think this is a great solution, but I'm trying to get a solution where everybody can at least have a game plan of moving forward rather than a stop and let's see what happens. I don't think that is good for anybody.

DON FASO: Keith (O'Toole), I'm thinking out loud here, which is always dangerous. We have an application to break off this one parcel and create a two-lot subdivision, right? He has one parcel, we're breaking this off, and he has requested a two-lot subdivision. How about if we amend that to a one-lot subdivision and we approve this one-lot subdivision and leave him with an illegal lot? Am I right or wrong?

KEITH O'TOOLE: Don't go there.

JOHN NOWICKI: Good thought, though.

KEITH O'TOOLE: That is beyond the intent of what they're applying for. That would be -- no, I -- I wouldn't want to do that.

DON FASO: Okay. I said it was dangerous.

KAREN COX: Can we do what Lou (Terragnoli) just suggested?

KEITH O'TOOLE: I have no doubt that the folks at Tim Horton's, who certainly have a financial wherewithal and history of getting things done, do their part, but their part is a smaller part of the entire parcel. I really feel leery about carving this off and hoping in some future date these will get done.

DON FASO: But if it is a condition of the subdivision approval?

MR. FARMER: It doesn't get carved off until the contingencies are met.

DON FASO: Which means they're on his back to get them done as quickly as possible.

JOHN NOWICKI: Let me ask you this question: You have a contract with the seller?

MR. TERRAGNOLI: Correct.

JOHN NOWICKI: Have you ever seen that contract?

KEITH O'TOOLE: No, and I'm not sure in this instance -- excuse me, in this instance it gets us anything. I assume they're a contract vendee with X number of days or months or whatever to get all of the necessary municipal approvals or else they're not moving forward with the purchase.

JOHN NOWICKI: Standard type real estate contract?

KEITH O'TOOLE: That's pretty much it, yes.

DARIO MARCHIONI: We don't sign the mylar for the subdivision unless all of the contingencies are met. Period.

KEITH O'TOOLE: And then you go to court, and they argue that the condition of withholding the mylar is illegal, give us your mylar, here is your court order, we're taking the mylar. I would prefer not to go there.

JOHN HELLABY: I, unfortunately, have to agree with Keith O'Toole. I mean it is unfortunate that Tim Horton's is caught in -- I look at this application before us tonight. Both applications are from Robert Fallone, not Tim Horton's. And where is he? But again, I -- I couldn't agree more, you know -- I don't think that he can't close without the conditions being met. If we get them resolved and they come back in, we can deny it without prejudice. It is a three- or four-week window one way or another. Again, I have to agree with you. I don't think that is going to actually kill anybody in that three- or four-week window.

DARIO MARCHIONI: But can we adjourn this meeting to the next?

RAY BLEIER: No.

KAREN COX: We have been doing this all along. We're just stringing them along, a slow death.

DON FASO: I'd rather not do that, but Ray (Bleier) hit -- we should have pulled the trigger two months ago.

JOHN HELLABY: Last meeting.

JOHN NOWICKI: Mr. Chairman, I think you should take a vote on it. Somebody should advance a motion.

DON FASO: What is the motion?

JOHN NOWICKI: I make a motion we deny this application, both of them.

RAY BLEIER: Without prejudice.

JOHN NOWICKI: Without prejudice. Yep.

JOHN HELLABY: I'll second that.

DON FASO: Which means if they're taken care of in two weeks, they can come back in.

JOHN NOWICKI: Absolutely. We have to make this man understand he has been playing with us too long and I'm tired of his playing around. He has to come to this playground and play on this playground, here.

DON FASO: Your sandbox.

KAREN COX: He is not playing well in the sandbox.

DON FASO: John (Nowicki) made a motion.

JOHN HELLABY: Second.

DON FASO: Motion has been moved and seconded to deny this application, which I guess makes SEQR a moot point?

KEITH O'TOOLE: Yes.

DON FASO: This is -- this subdivision, resub.

DARIO MARCHIONI: Not the site plan, just the resub.

DON FASO: Application Number 1, first. Moved and seconded to deny the application without prejudice. On the vote?

RAY BLEIER: As much as I dislike to, I have to vote yes.

KAREN COX: Unhappily, yes.

JOHN HELLABY: Yes.

JOHN NOWICKI: Yes.

DARIO MARCHIONI: I'm voting yes, but I'm sorry for these people. They have done everything they could.

DON FASO: I didn't want to go down this road. I'm going to vote no. So that carries five to one denied. Denied.

Keith (O'Toole), do we need to do findings?

KEITH O'TOOLE: You bet.

The Board discussed the proposed findings.

DON FASO: Applicant -- when we say "applicant," we're actually talking about Fallon?

KEITH O'TOOLE: Yes. They're an agent for the property. That is my understanding.

JOHN NOWICKI: I assume that we're -- as far as why we denied it, we're going to go back to the beginning, 2001, and start there; is that correct, that there was non-compliance with our request over the last three years?

KEITH O'TOOLE: You're going to -- whatever I'll suggest, then it is your decision. There is the encroachment on Town property which was evident on their 2001 sub application.

DON FASO: Is this a finding?

KEITH O'TOOLE: Yes.

DON FASO: Two?

KEITH O'TOOLE: Failure to comply with the conditions contained in the November 19, 2001 letter.

DON FASO: Let's address these in a particular order here. Landscaping plans, were they ever submitted wet sealed?

DANIEL KRESS: Not to my knowledge.

DON FASO: Okay. Were the drainage issues addressed with the Department of Public Works?

DANIEL KRESS: Actually, I believe those were.

DON FASO: Exterior treatment on the rear of the plaza, and show location of all dumpsters, that was never done?

DANIEL KRESS: No.

DON FASO: Condition Number 2, I'm going to refer to Condition Number 2 on the letter which is the landscaping.

Finding Number 3, is going to be failure to address the exterior treatment on the rear of the building.

Finding Number 4 is applicant failed to screen the rooftop units, which is Condition Number 5.

Finding Number 5, it is in a Drainage District, right? It is?

JOHN NOWICKI: Yes.

DON FASO: What else? I have the encroachment on Town property, the landscaping, the Condition Number 4 -- I'm going to have to get a copy of that. The exterior treatment.

RAY BLEIER: He is in violation of not enclosing all of the dumpsters, any --

JOHN NOWICKI: All dumpster violations have never been addressed.

RAY BLEIER: There are 12 dumpsters along the backside. Plus around the front are two more.

JOHN NOWICKI: Trash on the property.

DARIO MARCHIONI: Graffiti.

JOHN NOWICKI: Graffiti on the walls, trash on the property that hasn't been picked up.

DON FASO: That would be addressed under the -- address the exterior treatment on the rear of the building.

JOHN NOWICKI: What other choice of words?

RAY BLEIER: The dumpsters are a separate issue.

JOHN NOWICKI: Yes. This letter from Mr. Kress here, one was the recently paved parking was only done in the front on Buffalo Road and does not extend to the either two out parcels or the areas to the west or north of the building, so you have a paving issue here.

Number two, a number of handicapped spaces -- a very serious problem here. Handicapped spaces are lacking signs or are not in compliance with the requirements. None of the dumpsters are enclosed and there is refuse and/or old furniture not in the dumpsters. No screening has been provided for the rooftop mechanical units.

DON FASO: Well, I don't want to get into conditions that he can come back and say he has no control over. If somebody dumps an old chair next to a dumpster without throwing it in. The dumpster screening, the rooftop, those are in his control.

JOHN NOWICKI: Those are fold-away beds and mattresses here.

DON FASO: We're talking denial and findings of fact.

JOHN NOWICKI: He used the right word, refuse. Leave it at refuse. We have to do something to show people we're serious about property being run down and decaying without any action being taken.

KEITH O'TOOLE: You put down your laundry list and list them all.

JOHN NOWICKI: List them all. I understand what Don (Faso) is saying about trash. But the dumpster enclosures are a violation.

DON FASO: Those are down. Those are addressing on the --

KEITH O'TOOLE: They're operating a business on site without a C of O. These are the code violations I was referring to that are pending in court. That is a continuing violation. They did work on the plaza without permits. That's a violation.

JOHN NOWICKI: Put that down.

DON FASO: Wait, wait, wait.

JOHN NOWICKI: Get that down.

KAREN COX: Does he operate his personal business the same way he runs these? It has to be a shambles.

DON FASO: Work on the property without proper permits. Findings?

JOHN HELLABY: Can you state that he -- the applicant personally failed to appear to address some concerns of the Board?

KEITH O'TOOLE: That is not a legal requirement. These folks are acting as agents for him.

MS. LYLE: How about the potholes in the driving?

KAREN COX: That goes in with the paving issue.

JOHN NOWICKI: How about any problems with the variances that were mentioned back

here? Do we have any zoning issues that you know of? Any zoning problems?

KAREN COX: Not now, according to Dan (Kress)'s memo that we have tonight.

DANIEL KRESS: No. If you're talking about the issues mentioned on the first page, I don't believe those are issues.

DON FASO: Then we're done. That was subdivision.

How do we handle site, contingent on the sub? Do we deny it?

KEITH O'TOOLE: Cite the same conditions.

DON FASO: The site plan denied for following reasons?

KEITH O'TOOLE: Yes.

DON FASO: All right. Then I need a motion then on the site plan.

JOHN NOWICKI: The same motion?

DON FASO: What do you want to do?

JOHN NOWICKI: Site plan denied for the following reasons.

JOHN HELLABY: Second.

DON FASO: Seconded by Al (Hellaby).

RAY BLEIER: You can't do site plan without the subdivision approval really.

DON FASO: Right.

RAY BLEIER: So I don't -- can't you just cite that as the reason?

KEITH O'TOOLE: You can cite that as a finding, but I'm not sure that is quite the case. Why can't you have a site plan on a unified plaza as opposed to one that has been subdivided? That is essentially what you did at K Mart plaza with Tim Horton's.

DON FASO: But there it was clear there would be a lease arrangement.

KEITH O'TOOLE: Why is that relevant to the site plan?

MR. FARMER: Could the site plan be tabled?

JOHN NOWICKI: Could we do that?

KEITH O'TOOLE: You could. But I guess if you're going to do that, why not just table the subdivision, as well?

JOHN NOWICKI: No. That doesn't send a great message.

KEITH O'TOOLE: My understanding is Tim Horton's, the gentleman (Lou Terragnoli) who is no longer here, had indicated that the deal is they want the parcel. This is not a ground lease. So if they don't get the subdivision, then the site plan is irrelevant, to my understanding.

MR. FARMER: That's correct.

KEITH O'TOOLE: So if you're going to turn something down, turn it down. Turn the whole thing down.

DON FASO: A motion made, seconded to deny the site plan. On the vote?

RAY BLEIER: Yes.

KAREN COX: Yes.

JOHN HELLABY: Yes.

JOHN NOWICKI: Yes.

DARIO MARCHIONI: Yes.

DON FASO: No.

Same reasons plus subdivision was denied?

KEITH O'TOOLE: I would leave the subdivision thing out of it, frankly. I don't -- I don't see that.

DON FASO: So the same five conditions.

KEITH O'TOOLE: Same findings, yes.

DECISION ON APPLICATION #1: Denied without prejudice by a vote of 5 yes to 1 no (Don Faso) with the following findings of fact having been cited:

1. Applicant has failed to remove the encroachment of the parking lot on the Town of Chili's Community Center property.
2. Landscaping plans have not been submitted to the Chili Conservation Board for review and approval as per the Planning Board decision letter dated

November 19, 2001.

3. Applicant has failed to comply with condition #4 of the Planning Board's decision letter dated November 19, 2001 regarding exterior treatment of the rear of the buildings and his failure to enclose the dumpsters.
4. Applicant has failed to comply with condition #5 of the Planning Board's decision letter dated November 19, 2001 regarding the screening of all rooftop HVAC units.
5. Applicant continues to work on the Plaza without the proper permits.

DECISION ON APPLICATION #2: Denied without prejudice by a vote of 5 yes to 1 no (Don Faso) with the following findings of fact having been cited:

1. Applicant has failed to remove the encroachment of the parking lot on the Town of Chili's Community Center property.
2. Landscaping plans have not been submitted to the Chili Conservation Board for review and approval as per the Planning Board decision letter dated November 19, 2001.
3. Applicant has failed to comply with condition #4 of the Planning Board's decision letter dated November 19, 2001 regarding exterior treatment of the rear of the buildings and his failure to enclose the dumpsters.
4. Applicant has failed to comply with condition #5 of the Planning Board's decision letter dated November 19, 2001 regarding the screening of all rooftop HVAC units.
5. Applicant continues to work on the Plaza without the proper permits.
6. Site plan approval was based on the resubdivision of lot #1 into 2 lots which was denied by the Planning Board.

The meeting ended at 7:30 p.m.