

These minutes were approved at the April 4, 2007 meeting.

**DURHAM PLANNING BOARD
WEDNESDAY, FEBRUARY 21, 2007
TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Kelley; Arthur Grant; Steve Roberts; Richard Ozenich; Bill McGowan; Lorne Parnell; Councilor Needell

ALTERNATES PRESENT: Annmarie Harris; Councilor Carroll

MEMBERS ABSENT: Susan Fuller Wayne Lewis

I. Call to Order

II. Approval of Agenda

Bill McGowan MOVED to approve the Agenda as submitted. Arthur Grant SECONDED the motion, and it PASSED unanimously 9-0.

Chair Kelley suggested an amendment to Agenda Item VII, explaining that the first two items in it were relevant to the Zoning Ordinance in general, and not to a specific project. He said the third item was very specific to the Cuthartes application. He provided a suggestion for how Item VII should be worded, and made a motion to that effect.

Annmarie Harris was appointed as a voting member in place of absent regular Board member Steve Roberts.

Chair Kelley MOVED to amend the Agenda so that Item VII reads: "Discussion and Deliberation on what restrictions the Planning Board can place on 55-over elderly housing, and on whether the elderly density calculations apply to the entire project or just 80% of the units that are 55 or older" and "Discussion and Deliberation on issues related to the Subdivision and Site Plan Applications submitted by Cuthartes Private Investments relating to whether the density from both lots can be used on one lot." Councilor Needell SECONDED the motion, and it PASSED unanimously 7-0.

III. Report of the Planner

- Mr. Campbell said a large number of letters had been received concerning various issues before the Board, including letters regarding the proposed ORLI zoning district change; the Madbury Road application; responses between Attorneys Scott Hogan and Peter Loughlin; and a letter from resident Rob Keefe regarding the forestry provisions of the Zoning Ordinance.

- He said an application had been submitted to Plan NH regarding a possible charette on Mill Plaza.
- He said resident Doug MacLennan had received his approval from NHDES to go ahead with removal of Japanese Knotweed from his property.
- He noted that a synopsis, marked confidential, had been provided to Board members at the present meeting, and explained that it was from the Board's attorney regarding his executive session with them at the January 24th meeting.
- He said that on Monday, the Town Council had passed the amendment to the Zoning map regarding the lots downtown that were owned by Mike Davis. He said the Council also had voted to amend the building related fee schedule at that meeting, and in addition, had held a public hearing regarding possible adoption of an ordinance to enable the creation of TIF districts. He said there was a lengthy discussion on this subject at the meeting, with many pros and cons presented. He said the public hearing would be continued to the March 5th Council meeting.
- Mr. Campbell said the deadline for new applications had passed, and there were two new applications, one of which was a 9-lot subdivision application from Joe Caldarola regarding the Sophie Lane property. He noted that Mr. Caldarola had sent a letter requesting that his existing applications be tabled. He said a second application that was filed was for adaptive re-use of a fraternity house on Madbury Road. He said these two applications would be heard and possibly accepted by the Board on February 28th, and the hearings on them would be held in March.
- He said the Main Street design committee had recently met, and he said there were some issues going back and forth between the University and the Public Works Department that hopefully would be resolved soon.
- He said he and Mike Lynch had recently met with University planners Doug Bencks and Steve Pesci, to discuss possible improvements to the train station/multi-modal facility. He provided some details on this, and said the goal was to make it a truly multi-modal facility in the future.
- Mr. Campbell said he and Administrator Selig had met on Feb 5th with Chinburg Builders regarding the RFP the company had completed. He said some details were being worked out, and said a draft purchase and sale agreement had been received. He said the Economic Development committee would be meeting the following day, and might or might not be making a recommendation to the Council to accept the proposal and move forward with the sale.

Chair Kelley said he thought it was important to find out why other people who had taken copies of the RFP document had decided not to submit proposals.

Mr. Campbell provided details on companies who had done this.

Chair Kelley said finding out why these companies didn't submit proposals might influence whether the current proposal should be signed, or if instead more interest should be generated in the property.

Councilor Needell asked whether perhaps a break should be scheduled so the Planning Board would have the opportunity to read the letters that had appeared at the table at the present meeting. There was discussion about this.

- Mr. Campbell said the Mill Plaza Study committee had met that day, and had elected officers: David Howland - Chair, Julian Smith – Vice Chair; and Ed Valena – Secretary.
- He said he had met with Steve Kimball and his engineer, and said Mr. Kimball would probably be submitting a formal site plan application in the near future.

There was discussion about whether it was appropriate, and possible to table Mr. Caldarola's application, as he had requested in his letter.

Mr. Roberts arrived at the meeting at some point during Mr. Campbell's update, and was appointed as a voting member.

- IV. **Public Hearing on a Subdivision Application** submitted by Joseph Caldarola, Portsmouth, New Hampshire for the building of 21 condominium units of elderly housing. The property involved is shown on Tax Map 10, Lot 7-0, is located at the corner of Bagdad Road and Canney Road and is in the Residential B Zoning District. **(The applicant has requested that this application be tabled.)**

Bill McGowan MOVED to table the Public Hearing on a Subdivision Application submitted by Joseph Caldarola, Portsmouth, New Hampshire for the building of 21 condominium units of elderly housing. Lorne Parnell SECONDED the motion.

Attorney Mitchell said although the Board could do this, it would require re-noticing everyone, and also would affect the time constraints involved with the application.

Chair Kelley asked if it was appropriate to continue the hearing and not table it, and then ask the applicant to withdraw the application. He said he was concerned about the application being nested over a period of time, and said at some point, the Board had to make a choice. He also said having to re-notice the application and get extensions from the applicant didn't bother him, stating that he didn't think Mr. Caldarola would burn the Planning Board, but that there was still a risk.

Mr. Roberts said this was an inconvenient situation, but said as long as Mr. Caldarola met the timetable, he thought the Board should show support for the application process, and show no bias to the applicant. He said he supporting continuing to table the application, and said when the time came, the Board would call it as it saw it.

Attorney Mitchell suggested that it was unlikely that someone would make a complaint about the time period issue, but he suggested that if the Board was inclined to table the application, there should be a condition that there would be a written waiver of the written time periods.

Councilor Needell asked if the applicant could stop the clock in a waiver, and Attorney Mitchell said that was the amendment that could be made.

Councilor Needell MOVED to amend the motion to add the requirement that the Planning Board see written concurrence from the applicant that the time constraints would be waived. Bill McGowan SECONDED the motion, and it PASSED 5-1, with Arthur Grant voting against it. (Mr. Ozenich recused himself for this vote, stating that he lived in a house built by Mr. Caldarola's company)

- V. **Continued Public Hearing on a Site Plan Application** submitted by Joseph Caldarola, Portsmouth, New Hampshire for the building of 21 multi-family units of elderly housing. The property involved is shown on Tax Map 10, Lot 7-0, is located at the corner of Bagdad Road and Canney Road and is in the Residential B Zoning District. **(The applicant has requested that this application be tabled.)**

Bill McGowan MOVED to table the Public Hearing on a Site Plan Application submitted by Joseph Caldarola, Portsmouth, New Hampshire for the building of 21 condominium units of elderly housing, with the requirement that the Board see written concurrence from the applicant that the time constraints be waived. Lorne Parnell SECONDED the motion, and it PASSED 5-1, with Arthur Grant voting against the motion. (Mr. Ozenich recused himself for this vote, stating that he lived in a house built by Mr. Caldarola's company)

- VI. **Discussion on changes in Zoning District Map to incorporate Tax Map 9, Lots 1-1, 1-2, 2-1, 3-0 and 4-0 into the Office Research/Light Industry District.**

Mr. Campbell explained that the Planning Board and the Zoning Rewrite committee had discussed this issue over several months. He provided details on the properties involved, and said the Goss family had approached the Planning Board and then the Zoning Rewrite committee to rezone their property from the Rural to the ORLI district.

He explained that before the Zoning rewrite process a few years back, the land was in the old Office Research (OR) district. He said that when the revised Zoning map was first proposed, these lots were put in the Rural district, with everything below them in the ORLI district. He said after some discussion, Mr. Goss had persuaded the Zoning rewrite committee to adjust the map to include the land in the ORLI district.

He noted that at the same time, the Economic Development Committee was looking to find ways to increase the tax base, and was looking at the Technology Drive area, and a proposed plan to upgrade water and sewer on Beech Hill Road. He said a letter was sent to abutters concerning the proposed Zoning district change requested by Mr. Goss, but the abutters told the Economic Development committee they were opposed to it, and also argued their case before the Planning Board and the Zoning Rewrite committee.

He said the Planning Board at the time felt the abutters had some very strong arguments, so decided that everything north of Beech Hill Road should be in the Rural District, and everything south of it should be in the ORLI district. He said the request now before the Board was to change the properties involved back to the ORLI district.

Mr. Roberts asked what the Master Plan said about this, and there was discussion.

Mr. Campbell noted that the Town of Lee Selectmen had sent a letter saying they opposed the idea of the properties being part of the ORLI district, due to their own zoning nearby.

Mr. Roberts said he had understood that this area was intended as a corridor for rural and recreational land.

There was discussion on how to proceed, and what it meant if the Board voted that this issue should go on to public hearing. Mr. Campbell said if such a motion passed that evening, the Town would post the public hearing, and he would draft a proposed revised Zoning map. He said if the Planning Board didn't pass the motion, the landowners had the option to petition the Town Council to make this change.

Mr. Roberts said that Stafford Regional Planning Commission was looking to develop a regional greenway, and this area of Durham was part of that concept.

Councilor Carroll said the Board's perspective on this issue depended on how cooperative it wanted to be concerning this bigger plan for the area. She said the Planning Board and the Town were involved in this plan in some way.

Richard Ozenich MOVED to go to public hearing on March 28, 2007 regarding changing the Zoning District Map to incorporate Tax Map 9, Lots 1-1, 1-2, 2-1, 3-0 and 4-0 into the Office Research/Light Industry District. Lorne Parnell SECONDED the motion.

Councilor Needell noted that at a Zoning Rewrite meeting where this issue had recently been discussed, he had opposed bringing it before the Board. He said he was now opposed to sending it to public hearing, stating that he believed it directly contradicted the Master Plan. He said the Board had to have a compelling reason to change the district line, and was not supposed to do so without careful analysis. He said he hadn't seen that a case had been made for this change, also noting that there had been a thorough discussion about it in the past. He said he also thought this stood out as an unusual thing to do, and said it didn't make sense to go forward with it.

Ms. Harris said the Planning Board didn't usually do spot zoning.

Councilor Needell said that the old Office Research district had been a holding place, with the anticipation that there would be a new Zoning Ordinance and Master Plan. He said the properties in question had been in the old OR district but were never in the ORLI district.

Board members noted that there had been a lot of discussion about this issue in the past.

Mr. Ozenich asked why these properties could not revert to OR. He also said he disliked seeing individual pieces of land zoned one way, and then zoned another way, with a resultant loss of value for the property owner.

Mr. Roberts said when he was on the Planning Board in the 1970's, the OR district reflected the idea that it was to be an extension of the University. But he said not much development had actually occurred there. He said what he thought had occurred was that there was a sorting out process when the Master Plan was updated in 2000. He said the thinking was that the Town needed more intense economic activity, but had to be careful where to put development, and would have to include buffering and would have to fit with major transportation patterns.

Mr. Roberts said his concern was that although it was a valid point regarding possible economic loss if this Zoning district change wasn't made, there was a big difference between an OR district and an ORLI district. He said the Town was trying to allow light industry when it was carefully buffered, and met specific requirements, but said during the Master Plan process, they couldn't get support for light industry in that area. He said he thought the Town needed to have more light industry, but said one had to be careful where to put it, and had to give consideration to the surrounding community. He said this perhaps was not a wise place to put it, and instead was spot zoning that the community couldn't support, given that its center was completely separated in terms of traffic patterns.

Mr. Ozenich said they were really talking about office research development, which wouldn't have place the demand on infrastructure that light industry would, and he also said he didn't really see light industry coming to Durham. In addition, he said monolithic buildings weren't being built anymore, and the trend was to work with existing buildings.

Mr. Parnell said the Master Plan said the area south of Route 155 was ORLI, but this area was changed back to Rural because of pressures from people in that area. He said the same thing seemed to be happening in this instance, where landowners had the impression the area would remain as ORLI, but it was then changed back to Rural due to pressures during the Zoning rewrite process.

He said he agreed with Mr. Ozenich that if people had an expectation of what the Zoning was going to be, they should be made aware of changes being made concerning this, and should be able to make their comments at that time. He said the property owners believed they had lost some value, and said this was something the Board should be avoiding.

Councilor Carroll said that 99% of the time she supported the idea of having a public hearing, but she said in this instance, the Master Plan was very clear. She said there had been a lot of opportunity to speak about this issue when the plan was worked on. She said when the decision was made to zone the area in question Rural, she had driven that road, and she said it was very clear that it was a rural area. She provided details on this.

She said it didn't fit to put a section of this area into the ORLI district, and she also noted that there were other things the Goss's could do with their land. She said she realized the Master Plan would be revised at some point, which would bring changes to some properties. She noted that

right now, there were other neighborhoods in Town that were being impacted as a result of changes that had been made to the Master Plan.

Councilor Carroll said the letter from the Town of Lee was asking the Planning Board to look at a much larger picture, including the existence of conservation easement properties in this area. She said it didn't make sense for this potential greenbelt area to back up against the ORLI district. She said with all due respect to the owners, she thought the Board had enough information now to make a decision, and should move away from the idea of changing the Zoning district

There was discussion on what might happen if the Goss's sold their property, with Mr. Ozenich saying there were no guarantees, and that it could even become a trailer park, or a gravel pit. He also said he thought there should be a discussion on this proposed Zoning district change by the whole Board, and not just the Zoning Rewrite committee.

Chair Kelley said the reason he supported the motion was that he would like to hear from the public on this issue. He said he would also like the Goss's to have the opportunity to explain their perspective to the public. He said his perspective had nothing to do with the pros and cons of the issue.

The motion PASSED 4-3, with Chair Kelley, Richard Ozenich, Lorne Parnell, and Arthur Grant voting in favor of it.

Arthur Grant MOVED to reconsider the previous vote. Steve Roberts SECONDED the motion, and it PASSED unanimously 7-0. This motion resulted from the fact that two of the affected landowners in the audience had asked that the public hearing date be changed.

Arthur Grant MOVED to set the public hearing for April 11, 2007 regarding changing the Zoning District Map to incorporate Tax Map 9, Lots 1-1, 1-2, 2-1, 3-0 and 4-0 into the Office Research/Light Industry District. Councilor Needell SECONDED the motion, and it PASSED unanimously 7-0.

Recess for 15 minutes

VII. Discussion and Deliberation on issues related to the Subdivision and Site Plan Applications submitted by Cuthartes Private Investments relating to what restrictions the Planning Board can place on 55-over elderly housing; whether the elderly density calculations apply to the entire project or just 80% of the units that are 55 or older; and whether the density from both lots can be used on one lot.

Chair Kelley said the first issue was whether the Board could place additional restrictions on 55+ elderly housing. He suggested that the Board should perhaps put a motion on the table.

Councilor Needell said he thought the Board could vote on the general question of whether it could apply any restriction. He asked whether the Board could foresee all possible circumstances concerning this.

Chair Kelley said there had been a suggested restriction on the 20% by the applicants. He said if there was no question that the Board didn't have authority concerning this issue, they could move on, but he said if there was some question concerning this, the Board should resolve it.

Councilor Needell said if someone had a restriction in mind, he/she could bring it forward, but he said that other than that, he didn't know if it was useful for the Board to take the step of saying it wouldn't do something in the future.

Chair Kelley said it was his understanding that the Board couldn't discriminate concerning this. He said what the Federal government allowed for elderly housing was very narrowly defined, - 100% for age 62 and older, and 80%/20% for age 55 and older. He said the developer could put in further restrictions, but the Board could not.

Councilor Needell said he agreed with this, but said his point was that he didn't see the point of trying to foresee what might come up in the future.

Chair Kelley asked if the other members of the Board agreed that the Board could not put restrictions on the elderly housing, but the developer could. There was agreement among Board members concerning this.

Chair Kelley said the second issue was whether the elderly housing density calculations applied to the entire project, or just the 80% of the project that was for residents who were 55 and older. He said this was something the Board definitely had to resolve.

Mr. Grant said his recollection was that both attorneys had said the Planning Board couldn't do anything about the 20%.

Chair Kelley noted the density bonus provision wording in the Zoning Ordinance, regarding elderly dwelling units.

Councilor Needell said he had reviewed this wording, and said that after the Board's consultation with legal counsel, he had felt this was something that needed to be added to the Zoning rewrite list, and corrected. He said the current wording flew in the face of Federal law, in terms of the definition of an elderly housing project.

Chair Kelley said many of the Board members had been on the Zoning rewrite committee, and he said he personally had never noticed that the provision said only 80% got the density bonus and the remaining 20% didn't.

Mr. Roberts and other Board members said they agreed with Councilor Needell's perspective on this. Mr. Roberts also noted that regarding the first issue that had been discussed, the Board's concern had been the way the applicant had applied certain age restrictions, which could be onerous for the code enforcement office.

Chair Kelley said this issue would probably come up when the Board got into the application further.

Mr. Grant pointed out the applicant's comment that this matter was the condo association's responsibility, not the Town's responsibility.

Chair Kelley asked that a motion be put on the table, to start the discussion concerning the third issue, - whether the area of both lots could be used in the density calculation

Steve Roberts MOVED that the Planning Board consider the two lots as one lot, for the purpose of density calculations, for the Stonemark subdivision application. Bill McGowan SECONDED the motion.

Mr. Roberts said the application showed a creative use of land, which offered tremendous advantages to the community, including securing land for open space in perpetuity. He said his opinion concerning this would not prejudice the possibility that there might be other issues where he would be against the application. But he said the Board needed to consider that the acreage linked to other restricted lands, and that the application followed the guidelines of the Master Plan in providing density, that would be shielded, in the central core of Town.

Mr. McGowan said he agreed, and he noted that 10 acres of open space would be maintained for everyone. He said if there were a 30-lot subdivision built there instead, this would be more detrimental to the entire area.

Councilor Needell said he was trying to stay narrowly focused on what the question was, - whether the Board could apply the rules of conservation subdivision to non-contiguous lots, taking into account what role the right-of-way played, and whether it was a path to a transfer of development rights between two lots.

He said the applicant had raised the question of why the Board was going into this now when the issue should have been settled a long time ago, and he said he had wrestled with this. He noted that there had been no conceptual review of this project, which was a required element of the process, although the applicant had gone through the design review phase with the Board. He said the lots themselves weren't looked at during the design review phase; it was stated by the applicant that it was a given that they would be treated as one lot, and the process moved on.

He also said there was a waiver request to not review the four step design process, also noting that this waiver request was never actually voted on. He said the process had failed them, and said this was why the Board was addressing the two lot/one lot issue now. He said the questions were whether this was or was not a transfer of development rights, and how the right of way fit into this.

He said it was clear that the Board wanted a conservation subdivision, but he said the problem was that they were dealing with an 11 acre parcel and a 5 acre parcel, and were ending up with a situation where the density could be taken from a larger lot and shifted to another, smaller lot. He said the applicant was therefore trying to fit something into a 5-acre lot that had no business

being there. He said if it were a 15-acre parcel, there would be no argument. He said this was the part he found troubling, and said he felt this was a transfer of development rights that the Ordinance did not permit. He said he opposed this.

Mr. Grant provided written comments concerning this issue. He said the Madbury Commons project required legal and technical decisions that would have important consequences, and would establish precedents regarding future interpretations and applications of the Zoning Ordinance. He said the Board had discussed with the three attorneys the fundamental issues that surrounded this project, and said all three – Town Attorney Walter Mitchell, the applicants' attorney, Ari Pollock, and the abutters' attorney, Scott Hogan, all agreed that this property consisted of two lots – not one lot. He said that moreover, all three attorneys agreed that these lots were not contiguous.

Mr. Grant said this determination was critical because the conservation subdivision provisions of the Zoning Ordinance required that lots be contiguous. He said by the definitions in the Ordinance, the two lots on which the Madbury Commons project was proposed were not contiguous. He said neither State law nor the Zoning Ordinance made provisions for combining non-contiguous lots.

“State law – RSA 674:39 (a) – provided that an “owner of 2 or more contiguous lots or parcels who wishes to merge them for municipal regulation and taxation purposes may do so by applying to the Planning Board”. Note that the lots must be contiguous.”

He said the third issue was that the Zoning Ordinance contained no provision for the transfer of “development rights” from one parcel to another. He said that under the Durham Ordinance, what was not expressly stated as allowed was not allowed. He said that therefore, in his opinion, the density bonuses that the applicants had associated with the larger lot did not extend or carry over to the smaller 5-acre lot on which the actual construction was to take place.

Mr. Grant said that to him, this meant that the applicant and the Planning Board must focus exclusively on the smaller 5-acre lot, which, given its acreage, did not allow the size, scope and density the applicants had proposed for their project.

He said he was not uncaring about the financial aspects of the project, which the applicants said would add more than 20-million-dollars to Durham's tax base, or about the public benefits of adding an additional 11 acres to conservation lands in a prime setting, or about the possibility of accommodating upwards of 200 new residents in our community. But he said he felt the Board must base its decisions on the most careful interpretation of the law and the facts of the Zoning Ordinance.

Councilor Carroll said she was concerned with the precedent here. She said the two lots were not contiguous, and the Board was being asked to allow one of the lots to have the density of both parcels. She said she didn't see the mechanism in the Zoning Ordinance that allowed this.

Chair Kelley said he supported the motion, and said he felt this was a very site-specific situation. He said the details of this application were such that he did not view this as a transfer of development rights. He said he saw this as an easement between the two tracts as a means for the

owner to get from one lot to the other. He said the parcels were conveyed by a single instrument to the present owners and to the owners before that, and he noted that they were referred to as tracts throughout the deeds.

Councilor Needell said the Board was being asked to exercise some discretion here. He said it was being asked to approve something that was a significant increase in density, and which exceeded anything that would be considered on a 5-acre parcel if there were not the larger parcel. He said if this had been a 17-acre parcel, the issue wouldn't have come up, and there would be a different discussion.

He said the shape and structure of the building was a separate issue. He said there were areas of discretion regarding this, but this was not the issue before the Board at present.

Chair Kelley said tracts I, II and III totaled 5 acres, and said he felt the easement language allowed the usage of tract IV along with the other three tracts. He said although lots III and IV were not contiguous in terms of having a common property line, there was an easement between them.

Councilor Needell said he was not trying to throw roadblocks in front of the project, and was looking at the regulations. He said the conservation subdivision requirements were applied to a lot, and said he didn't see that there was leeway for exercising the discretion the Board was being asked to exercise. He said in his mind, this was a simple issue.

Mr. Grant said what he was concerned about was the precedent, and he said who knew what the next proposal would entail. He provided an example of a possible application where a farmer with an old farm road could claim the same kind of density benefits, using land that was only connected by a cow path. He said to him, the word contiguous meant that the properties had to abut one another.

Mr. Parnell said the Board had been wrestling with this issue, and had gotten a legal opinion on it. He said there was no clear answer as to what the Board could do. But he said the answer had to be specific to this situation, and had to involve common sense. He said there were two properties that were joined by an easement, for the benefit of the owner. He said the lots being talked about involved a similar use, which to him made the two parcels contiguous.

Mr. Roberts said he supported what Mr. Parnell had said, and said if one went to the site, there wouldn't be a differential use that would be seen between the two lots. But he also said that the Board should hold the developer's feet to the fire to achieve buffering to protect homeowners' values. He also said this present situation wasn't like what Mr. Grant had said might happen.

Chair Kelley said he supported this motion, based on the specifics of this site, this application, and this land.

Mr. Grant asked where in the Zoning Ordinance Chair Kelley had gotten that interpretation.

Chair Kelley asked why the land involved couldn't be called five pieces of land, and said he felt the easement allowed them to be treated as one tract of land.

Mr. Grant said that was a subjective judgment, which was not supported by the Ordinance. He also said State law and the Zoning Ordinance didn't allow a merger of non-contiguous lots. He said the strip of land was said to be for the purpose of access, not for the purpose of conveying rights from one property to the other.

Chair Kelley said he didn't think that kind of language could exist in the deed.

Councilor Carroll said she was still concerned about the issue of a precedent being set. She also said there was nothing in the Zoning Ordinance that supported this, and said if it was going to happen, it must be based on the Ordinance.

Mr. McGowan said he wasn't sure how allowing this would set a precedent, given the piece between them that linked them together. He said the 11-acre parcel would never be developed.

Councilor Needell said he agreed there was a similar use of land involved, but he said this was a unique situation, in part because of the way the easement was put together, so that everything was constrained into this one lot. He said the fact that there would be two conservation pieces together made the issue more confusing. He also said that in order to consider this one lot, the parcels had to be contiguous. He said the Ordinance was clear on this.

Mr. Ozenich said he liked what Mr. Grant and Councilor Needell had said, stating that this had been his contention all along.

The motion PASSED 4-3, with Councilor Needell, Mr. Grant and Mr. Ozenich voting against it.

- VIII. Continued Public Hearing on a Site Plan Application and a Subdivision Application** submitted by Cuthartes Private Investments, Boston, Massachusetts, on behalf of Stonemark Management Co. Inc., Stratham, New Hampshire to build a 78-unit, age-restricted condominium development. The property involved is shown on Tax Map 1, Lot 6-8, is located at 97-99 Madbury Road and is in the Residential A Zoning District.

Councilor Needell MOVED to continue the Public Hearing on a Site Plan Application and a Subdivision Application submitted by Cuthartes Private Investments, Boston, Massachusetts, on behalf of Stonemark Management Co. Inc., Stratham, New Hampshire to build a 78-unit, age-restricted condominium development to the February 28, 2007 meeting. Mr. Roberts SECONDED the motion, and it PASSED unanimously 7-0.

Recess from 9:00 pm to 9:10 pm

- IX. Discussion on Excavation Regulations and on the proposed change in the Table of Uses to make Excavation a Conditional Use in the Rural District**

Arthur Grant MOVED to have a public hearing on the proposed change in the Table of Uses to make Excavation a Conditional Use in the Rural District at the March 13, 2007 Planning Board meeting. Richard Ozenich SECONDED the motion.

Councilor Needell said that after reading though the State RSA 155-E on Excavation, he had determined that with a permissive Zoning Ordinance, if regulation of excavations wasn't mentioned, the RSA provisions took over. He said these provisions clearly stated that if the local Ordinance didn't deal with excavation land uses, the ZBA had to handle them as a special exception, for anyone anywhere in the Town who wanted to have this land use. He said the question was therefore whether it would be better to just leave excavation land uses out of the Zoning Ordinance, and instead follow the RSA and treat excavation as a special exception.

He said his concern was why this land use should be allowed as a conditional use in the Rural district, and not allowed in other districts in Durham like the Rural Coastal district, the ORLI district, etc. He said he thought the Town could be challenged concerning this, and he provided details from the statute regarding this. He said he thought the Town was on thin ice in singling out one district.

Mr. McGowan said that given what was known about Durham, where else would this land use happen. There was discussion about this.

Mr. Roberts said they had checked the soils maps to see where in Town the excavation resources were most likely to be located. But he said if some other districts in Town besides the Rural district had such resources and this was ignored by the Board, Councilor Needell was right.

Councilor Needell said if everyone was comfortable that there was a scientific basis for choosing the Rural district, that was one thing. But he said his sense was that this choice had been a convenient out for the Board, and he said he couldn't defend that. He said there had to be a good reason why only the Rural district had been chosen.

Chair Kelley said a convenient out would have been choosing the Central Business district. But he said he agreed he would like to make sure the Board didn't make a mistake regarding where the sand and gravel resources were actually located in Town.

There was discussion that these resources were predominantly located in the Rural district, in the southwest quadrant of Town. It was noted that there were also some sand and gravel resources in the Rural Coastal district.

Mr. Grant said the Zoning Ordinance was already too big, and said they should therefore let the RSA take over concerning this land use.

Chair Kelley said he would lean toward that as well, but said he hadn't done the amount of homework that Councilor Needell had done on this issue.

Mr. Grant suggested that Board members should all have some time to think about this, and Chair Kelley agreed.

Mr. Campbell said the biggest thing that would result from reverting to the RSA was that proposed excavation land uses would go before the ZBA instead of the Planning Board.

There was discussion on special exceptions, and there was also discussion about the wording of RSA 155- E 4.

Mr. Grant said he would like to withdraw his motion, to allow the Board to give some further thought to this issue.

Chair Kelley said Councilor Needell's comments had merit, and said the Board should read over the Statute further.

Mr. Grant and Mr. Ozenich withdrew their motion.

X. Other Business

A. Old Business: Forestry Discussion—Please refer to the memo from the Conservation Commission.

Mr. Grant said he thought the Conservation Commission's findings were fine.

Mr. Campbell reviewed the process the Planning Board had gone through concerning revising language in the Zoning Ordinance concerning timber harvesting/forestry. He said of the three recommendations recently made by the Conservation Commission, it was the third he was having trouble with. He said he thought it had been decided that the Town wasn't the best entity to be enforcing forestry related provisions, and now this recommendation was saying the Town would be doing this.

Chair Kelley noted the letter resident Rob Keefe had written concerning this.

Mr. Keefe spoke before the Board. He said he had written that letter some weeks back, to the Town Council. He also said he agreed with what Mr. Campbell had said.

Councilor Carroll said she had great difficulty with the second recommendation made by the Conservation Commission, - that landowners planning to do timber harvesting had to sign off that they would abide by the forestry provisions in the Zoning Ordinance. She asked why they had been singled out in this way.

Chair Kelley said that perhaps a concise packet could be put together for landowners planning to harvest timber. He said he supported providing this information, but said the part about having to sign off bothered him.

Mr. Roberts said the rationale for conservation subdivision was that denser housing conditions would be created and would require vegetative buffers so the rural areas would still seem rural.

He said a price of having that kind of zoning was that there had to be a heightened sensitivity to the forest.

Councilor Needell said Mr. Hyde's reading of the Ordinance was that it was mandating best management practices, but in doing so was referencing a document that was not a law but was a set of recommendations. He said this had raised the possibility that there was a lack of clarity in the Ordinance that needed to be addressed.

Mr. Campbell said his own opinion was that what was intended by the language was that these best management practices shall be referenced, but not that everything had to be followed to the T.

There was additional discussion.

Councilor Needell said the Conservation Commission interpreted the Ordinance as saying a landowner shall meet the requirements, and that it therefore made sense to put these requirements explicitly in the Ordinance. He said if the Board didn't mean "shall meet the requirements", it needed to fix this.

Mr. Campbell said he believed the Conservation Commission had misinterpreted what the Board meant. He said the Board didn't intend that the best management practices were law, and he agreed the wording therefore needed some work.

Mr. Keefe said he supported Mr. Campbell's interpretation. He said the intention was that landowners would refer to the best practices document, but not that the recommended practices should be enforceable. He said after the Conservation Commission meeting where this issue was discussed, he had spoken with several foresters who questioned how the table that was proposed for inclusion in the Ordinance would be enforced.

Chair Kelley said he had thought he could support these recommendations, noting that when the Board had gone through the process of looking further at the forestry related provisions in recent months, the thing that he was really committed to was protecting the water resource areas, while not creating too much hassle for forestry.

Mr. Keefe said it was important not just to protect wetlands, but also to protect forests. He said there might be some good reasons for people in Durham to practice forest management, noting that selective thinning operations made forests healthier, so that they grew more rapidly, and with fuller crowns. He said that dense, mature stands, individual trees experienced more stress. He said it was important to think about the health of the forests.

Councilor Needell said he was not worried about foresters doing a good job, but he said the reason for these ordinances was the "evil doers". He said they had to ask themselves where the potential for abuse was, and whether the Board was doing due diligence to protect the Town's resources. He said he didn't quite know how to fix that, but he agreed that the present wording in the Ordinance was not clear, and had to be fixed.

Mr. Parnell said he thought the issue of the “evil doers” had been covered previously, and he also said that if best management practices had to be enforced, he didn’t think there was anyone in Town who was qualified to do this. He also said the recent recommended forestry related changes to the Ordinance had meant the State would be taking some of the responsibility for enforcement. He said that was the proper way to handle things, and he said he was not sure what would be accomplished by changing things again.

Chair Kelley said with a speed limit, enforcement might or might not occur, but he said most people abided by it, whether there was oversight or not.

There was further discussion on the enforcement aspects of this issue.

Mr. Parnell said the third recommendation by the Conservation Commission was unenforceable, and he said it was not the Board’s intent in the first place.

Bill Hall, Durham, said the State would have to be brought in for enforcement anyway, stating that town staff was not equipped to do this. He also questioned in general the need for these forestry provisions in the Zoning Ordinance. He said if the goal was to protect water and wetlands, the cutting could be done in the winter, and he also noted that cutting trees helped provide food for wildlife. He also said people didn’t come to Durham to do ad hoc forestry, and provided details on this. He said there wasn’t a problem with bad forest management in Durham.

Councilor Carroll said a flip side of the forestry issue was that the Town could be reaching out to landowners who were managing their forests. She said that perhaps the Town could offer something to residents with large enough tracts of forestland in current use, and perhaps could invite them to talk with the Board about their woodlands, and about forestry issues. She said the Board could listen to what they had to say, and could learn about what their needs were.

She said the Town needed to celebrate its woodlands, and forestry. She noted that the Town of Lee provided tours of farm/forest properties, and said doing something similar in Durham regarding well-managed forests properties could be an important opportunity.

Chair Kelley said he definitely supported this idea, especially because of the vast amount of undeveloped tracts the Town had, which needed to be taken care of. He said the Board had become fairly well educated on this issue, and needed to advocate before the Council on management of Town forest lands.

He summarized that the Board appeared to be ok with recommendation #1 from the Conservation Commission; that the Board agreed with recommendation #2, that information should be provided along with the filing of the intent to cut form, but that no signature should be required indicating that this information had been abided by; and that concerning recommendation #3, the word “shall” needed to be changed to “should”.

There was discussion on how the wording of #3 should be changed, and it was agreed that Mr. Campbell would do some work on clarifying the language.

Arthur Grant MOVED to go to pubic hearing on this matter on April 25, 2007. Richard Ozenich SECONDED the motion.

Mr. Campbell made note of the fact that the Conservation Commission had been sympathetic to forestry and people who owned forest land, and feared that some of the things that might be done with the regulations might cause people not to hold onto their property. He said the intention of this discussion was not to be hard on them.

The motion PASSED 7-0.

B. New Business:

Mr. Campbell asked Board members to fill out the survey they had received from some UNH students in the fall of 2006.

C. Next meeting of the Board: **February 28, 2007**

XI. **Approval of Minutes** – (postponed)

December 13, 2006

January 10, 2007

February 13, 2007

XII. **Adjournment**

Mr. Grant left the meeting at 10:00 pm.

Richard Ozenich MOVED to adjourn the meeting. Chair Kelley SECONDED the motion, and it PASSED unanimously 6-0.

Adjournment at 10:00 pm

Victoria Parmele, Minutes taker

Susan Fuller, Secretary