

*These minutes were approved at the July 25, 2007 meeting*

**DURHAM PLANNING BOARD  
WEDNESDAY, JUNE 6, 2007  
TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL  
7:00 pm**

**MEMBERS PRESENT:** Chair Bill McGowan; Vice Chair Lorne Parnell; Secretary Susan Fuller; Richard Kelley; Steve Roberts

**ALTERNATES PRESENT:** Councilor Carroll; Annmarie Harris

**MEMBERS ABSENT:** Richard Ozenich; Councilor Needell; Doug Greene; Wayne Lewis

**I. Call to Order**

Chair McGowan called the meeting to order at 7:12 pm.

**II. Approval of Agenda**

Chair McGowan said Julian Smith, the Town Council representative to the Conservation Commission, was present to provide findings from the Commission regarding the Kimball application. He said this would take place after the Report of the Planner and before the public hearings.

***Richard Kelley MOVED to amend the Agenda to reflect this change. Steve Roberts SECONDED the motion, and it PASSED unanimously 6-0.***

**III. Report of Planner**

Chair McGowan noted that Town Planner Jim Campbell was absent, and he briefly reviewed the report Mr. Campbell had provided to the Board.

Councilor Carroll said she was replacing Councilor Needell as a voting member that evening.

Julian Smith read a letter into the record from Cynthia Belowski, Chair of the Conservation Commission, regarding the Kimball site plan application and conditional use permit application.

In the letter, Ms. Belowski said the Conservation Commission would first like to commend the applicant for his willingness to utilize the new pervious surface paving technology, which was likely to be a great advantage over conventional impervious asphalt in attenuating the impact of stormwater runoff on a site. But she said the Commissions would like to stress that one of the purposes of a wetland buffer was to maintain natural vegetation in the immediate area of a wetland to ensure the proper functioning and health of the ecological system. She noted that in addition to providing habitat for wildlife, the trees and shrubs provided shade that kept the water within the wetland cooler than if that cover was lost.

She provided the following comments relative to Article XIII Wetland Conservation Overlay District, 175-61 - Conditional Uses in the WCO District B:

- Given the size of the proposed project, we have concluded that there is no alternative location on the parcel that is outside of the WCO, which is feasible for the proposed use. However, impact to the buffer could be greatly minimized if the overall size of this project were reduced.
- We recommend a written agreement to ensure minimal disturbance of the short term impacts of construction by full use of current Best Management Practices.
- We would like to commend the application for his willingness to reduce the size of the parking area thereby minimizing the impact of the project as currently proposed.
- The proper maintenance of the proposed pervious surface driveway and parking lot is critical to ensure that it functions properly over time. It must be made clear that the owner assumes full financial responsibility for the long term maintenance and replacement of this pervious system. Additionally, we recommend that it be a requirement of this conditional use permit that the owner of record submit an annual report to the Town Department of Public Works relative to the annual maintenance and current condition of the pavement system.
- We understand that the proposed driveway which is within the WCO is in a location that is already a gravel drive. The change to pervious cover will likely improve the current conditions.
- About half of the parking lot in the rear of the building will be within an area of the WCO that is currently undisturbed upland. If the size of the project is not reduced, and this impact cannot be avoided, we recommend that the applicant retain the services of a professional experienced in wetland restoration to develop a plan for restoration of those parts of the current gravel drive that will not be used within the proposed development - thereby mitigating the new impacts to the WCO.
- Vegetative cover planted by the applicant within the WCO in restoring the site after construction should be comprised of native species that are consistent with a wetland buffer.
- Disturbance to the vegetation in the southwest corner along Strafford Ave. should be minimized to the fullest extent possible.

Ms. Belowski's letter said the overall hope of the Conservation Commission was that a compromise would be crafted to reduce the size of the project in order to reduce the impact on the WCO district. She said that within the limitations of the project, the Commission hoped the Planning Board would take all necessary action to ensure that impacts to the wetland and associated upland buffer would be minimized to the fullest extent possible.

**IV. Continued Public Hearing on a Conservation Subdivision Application** submitted by Joseph Caldarola, Portsmouth, New Hampshire for subdivision of one lot into 9 lots. 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.

Susan Fuller recused herself for this application. Ms. Harris arrived at the meeting at 7:20 pm, and Chair McGowan said she would be a voting member in place of Mr. Ozenich.

Chair McGowan noted that the Conservation Commission had planned to do a site walk of this property the previous day, but it was cancelled because of the severe weather. He said the site walk had been rescheduled to June 14<sup>th</sup> at 6 pm.

***Richard Kelley MOVED to continue the public hearing on a Conservation Subdivision Application submitted by Joseph Caldarola, Portsmouth, New Hampshire for subdivision of one lot into 9 lots. Lorne Parnell SECONDED the motion, and it PASSED unanimously 6-0.***

Mr. Caldarola stated that he had made some flip comments at a previous meeting, and wanted to apologize for this. He said some important issues had been raised at that meeting, and he said he would like Reuben Hull, the engineer for the project, to respond to some of the questions that had been raised at that time.

Mr. Caldarola also said that given the fact that the Conservation Commission hadn't done the site walk yet, he would be agreeable if the Board thought the hearing should be continued to the next meeting.

Mr. Hull said some valid comments had been made by some citizens regarding how the project looked compared to a text book conservation subdivision. He noted that some months back, Mr. Campbell had commented on the uniqueness of this site, and that it was therefore a question of balance in applying the conservation subdivision approach. He said a question had been raised the previous week as to what this subdivision would look like if it had been done as a traditional subdivision, and Mr. Caldarola had said it wouldn't be much different. But Mr. Hull said this was not a cookie cutter subdivision in the guise of a conservation subdivision.

He said there were some things in the Zoning Ordinance and the conservation subdivision regulations that were somewhat turned on their head with this proposal, and said one thing was that all of the lots would have buildings located toward the front of the site. He said a lot of thought had been put into creating a design that tried to keep everything to the front of the site while trying to meet the letter of the Ordinance. He said for this particular site, the concern was the preservation of wetlands, respect for the wetland setbacks, respect for the wildlife corridors and the need to keep distance from the abutting properties on Ambler Way.

Mr. Hull said he had reviewed some ordinances from other towns, and said a lot of them had minimum lot area requirements for conservation subdivisions, with 20 acre lot areas the norm. He said this reflected the fact that there were limitations as to how conservation subdivision could be implemented. He said that when there was a smaller property involved, pulling out the various environmental constraints, and putting in setbacks, etc, tended to create a more fragmented piece of property in terms of layout.

He said in proposing to cluster the building locations to the front of the parcel in order to keep the development away from the abutters to the rear, and away from the wetlands and the setbacks, and with a smaller parcel to begin with, there was really no choice as to where to put those house lots. He said if this project was proposed as one lot with no lot lines, these house locations would be the same. He also said that if it was proposed that there would be nine house lots and one separate lot containing all of the open space, this too would not change the location of the houses. He said a lot of thought had gone into where the houses should be located, and noted that the general layout had been developed some months ago..

Mr. Kelley asked Mr. Hull to describe some of the other design layouts that had originally been explored.

Mr. Hull described a design that involved 2 cul-de-sacs, with houses circled around each, and which extended further to the back of the site than the current design. He said the amount of pavement needed and the amount of disturbed area would be similar to that of the current design, and he said that drainage would be more difficult to manage. He also said this design would fragment the lot more, and would impact the wildlife corridor at the back of the lot. He said they kept coming back to the design with the houses located to the front of the lot, throughout the design process, including the period when a multi-unit design had been planned.

Mr. Roberts noted the discussion at the previous meeting on drainage issues affecting neighboring properties, and how the design that was proposed would improve the drainage.

Mr. Hull said the applicant was proposing, as part of the drainage design, to reconstruct the Town drainage right of way that had breached and was spilling onto the neighboring property. He said the plan was that this would be part of the drainage analysis that would be reviewed and endorsed by the Public Works Department.

Mr. Kelley asked if the analysis had been done to determine if 12 inch pipe would work, and Mr. Hull said the analysis had been done and showed that this would work. But he said the revision had not been submitted yet. There was further discussion between Mr. Kelley and Mr. Hull on drainage issues.

Chair McGowan asked if there were any members of the public who wished to speak in favor of the application.

**Denise Day, 89 Bagdad Road,** said what the applicant had proposed was the best plan for the site, and said she was nervous about the design idea involving the two cul-de-sacs. She said her property currently didn't have any drainage problems, and said the idea of setting up four houses in that corner concerned her. She said the current plan addressed her concerns about drainage and possible impacts on her well.

Chair McGowan asked if there were any members of the public who wished to speak against the application.

**Beth Olshansky, Packers Falls Road** said she was not opposed to building on this property. She said every parcel of land was unique, and said one of the positive features of the conservation subdivision ordinance was that a developer had to consider the unique features of a property, for both the primary and secondary conservation areas. She noted that the word "shall" was used concerning this in the Ordinance.

She noted that according to the Ordinance, a subdivision plan was supposed to look at features like stone walls, rock outcroppings, etc and design around them in order to maximize the use of the property in a way that was environmentally appropriate, and took advantage of the special features of a particular piece of land.

Ms. Olshansky said in terms of the clustering idea, she didn't think it was wrong to put all the houses toward the front of the site, since the land toward the back was wet. But she said if one honored the primary conservation areas, including somewhat poorly drained soils, she didn't

think there could be nine house lots in this configuration.

But she noted that the new Ordinance didn't have minimum requirements for lot sizes, and said there could be a design that kept the houses toward the front but shifted things somewhat in terms of the locations of the houses. She suggested that perhaps a few of the houses could be clustered closer together, and said perhaps the math would come up with nine, or at least eight houses. She provided additional details on the flexibility of the current conservation subdivision ordinance that would allow a somewhat different design.

She said she would like to see Mr. Caldarola go back to the drawing board, and said a much stronger design could be developed that respected the concerns of the neighbors and still followed the Ordinance. She also said she respectfully disagreed with Mr. Hull that this design followed the intent and spirit of the Ordinance, when there were nine individual lots and no set aside for the common open space.

Mr. Kelley said that the previous week, he had asked Ms. Olshansky which was better, having a continuous open space, or a more fragmented one. He said he had also asked her whether, if the Planning Board and the Conservation Commission were given some flexibility in recognizing scenarios that were better than following the letter of the law, they should exercise that discretion.

Ms. Olshansky said she would like to see an attempt made to follow the Ordinance, stating that there were some aspects of it that were perhaps not understood when this design was developed. She noted again that one problem was that there were nine single lots, with no set aside for the open space. She said the applicant should follow the conservation subdivision design process, and see where things came out.

There was further discussion on what such a design would look like, and whether it would result in the kind of cul-de-sac design Mr. Hull had previously described.

Ms. Olshansky said that given the flexibility allowed in terms of lot size and shape, she didn't see why the somewhat poorly drained soils areas couldn't be eliminated from the buildable area the applicant planned to use. She also said there could be some small adjustments made to the basic idea of clustering the houses toward the front, and said she didn't see why the only alternative would be to push them to the back of the lot.

Mr. Caldarola said the primary reason the proposal had been to have an easement for the open space and not to include it in a separated deeded lot was the rear setback requirement to the lot line. But he said Ms. Olshansky had mentioned the previous week that the setback from the building site to the conservation area could be varied in a conservation subdivision, and he said he hadn't realized this. He said if the Planning Board preferred to have a short setback from the building sites to the conservation area, he would see that as equivalent. He said he agreed that this would perhaps have a stronger psychological impact on a homeowner.

He said that regarding the idea of trading some primary conservation area for back areas of the site, it boiled down to where the usable land on the site was. He said he had proposed nine house lots, and said if one had to be eliminated because of the primary conservation area issue, the house lot would go someplace else on the site. He also said he hadn't wanted to tighten up

the lots any more than he already had because 40,00 sf was typical for this neighborhood. He provided details on this.

There was discussion between Ms. Harris and Mr. Caldarola concerning possible design alternatives that would be preferable to using some of the non-usable area and doing the tradeoff with land toward the back. Ms. Harris said because of the constraints of the land, he should either have to reduce the number of buildable lots or somehow squeeze the lots closer together.

Mr. Kelley noted that the majority of land the applicant was proposing to swap out was somewhat poorly drained soils, and not poorly drained soils.

Councilor Carroll thanked Mr. Caldarola for bringing up the idea of whether the open space should be contiguous or located on individual lots. She said one of her concerns had been that the houses in the development would have no backyard, and she provided details on this.

Mr. Caldarola noted that this was not a site plan the Board was considering, and said the details of the buildings were not part of this process. But he said the houses would probably be designed so they would have small backyards. He agreed it was not a good idea to build the houses right up against the woods. He noted that the boxes for building were shown on the subdivision plan, but he said the reality was that they wouldn't necessarily build houses that big, and said there might be decks or porches as part of the design.

Councilor Carroll said it was important that homeowners be happy, and have a backyard. She said some might not realize how a conservation subdivision worked, and that they couldn't touch the conservation portion of the property. She said if they had some area for a backyard, then perhaps there wouldn't be the pressure on the conservation area.

Mr. Kelley said the idea of having a separate conservation area made a lot of sense, and went a long way to establish a property line in the back yard.

Mr. Hull stated that regardless of whether there were an easement for the open space or it was considered a separate common open space lot, some kind of physical marker would be needed to denote the open space boundary. He said this demarcation would be included before the properties were purchased.

**Robin Mower, Faculty Road**, said she had listened with great interest to the discussion on this application. She said she felt there were people who would be thrilled to back onto conservation land, and said there didn't need to be concern about having backyards. She said conservation subdivision provided the opportunity to create new kinds of development that would create true conservation. She noted that one idea was to reduce the size of a house but to get a return on investment similar to that of a larger house by using higher quality design and materials.

Ms. Mower said she was concerned about the concept of swapping land, and the precedent it would set. She said every attempt should be made to work with the Zoning Ordinance, and said if this didn't result in maximizing the return on investment, that was sometimes the way the cookie crumbled.

Chair McGowan noted again that the Board had not yet heard from the Conservation Commission concerning this application, and that the Commission would be doing a site walk on June 14<sup>th</sup>. He said he thought members of the public might want to respond after the comments from the Conservation Commission were received. He said Mr. Campbell had recommended that the Board have a meeting on June 20<sup>th</sup>, and said this hearing could be continued to that date. There was discussion about this.

Mr. Roberts said before close the public hearing, he would like to see the report from Town Engineer Dave Cedarholm and the report from the Conservation Commission, so members of the public could comment on them.

***Steve Roberts MOVED to continue the public hearing on a Conservation Subdivision Application submitted by Joseph Caldarola, Portsmouth, New Hampshire for subdivision of one lot into 9 lots, until a convenient time after the receipt of the reports from Town Engineer Dave Cedarholm and the Durham Conservation Commission.***

Councilor Carroll spoke about the new Energy Committee that had recently been launched by the Town Council. She noted section 7.13 of the homeowners' association document, which prohibited the use of clothes lines. She said clothes dryers used about 14% of the total energy used by a household, and asked that Mr. Caldarola and Mr. Hull think about this. She said she realized this issue was not within the purview of the Planning Board, but said it would be helpful if energy conservation measures were considered in the construction of this project, noting that they paid for themselves in the long run.

Mr. Kelley noted the idea of a possible density bonus for LEEDs certification.

Ms. Harris said she had heard complaints that Fitts Farm did not allow clothes lines. She also said she agreed with the idea of using green building practices for this project, and said this could be an excellent selling point in Durham.

Mr. Roberts noted that when he had lived in the Netherlands, he had hung clothes on a clothes line, but said they then needed to be ironed with an electric iron.

***Mr. Kelley MOVED to amend the motion - to continue the public hearing to June 20<sup>th</sup>. Lorne Parnell SECONDED the motion, and it PASSED unanimously 6-0.***

Mr. Caldarola said he would extend the application if the report from the Town Engineer and the Conservation Commission weren't in by that time.

Recess from 8:20-8:30

- V. Public Hearing on a Site Plan Application** submitted by Steven F, Kimball, Auburn, New Hampshire for building of a 16-unit residential and a 4000 square-foot commercial, mixed use building a piece of property. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue and is in the Professional Office Zoning District.

- VIII. Public Hearing on a Conditional Use Permit Application** submitted by Steven F, Kimball,

Auburn, New Hampshire for building of a 16-unit residential and a 4000 square-foot commercial, mixed use building a piece of property. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue and is in the Professional Office Zoning District.

John Chagnon of Ambit Engineering said the applicant had provided revised plans that incorporated the items that had been discussed at previous meetings.

- He said the parking area had been reduced by 4 spaces, and said they had reduced the edge of the pavement further from the northeast property line at the request of the abutter.
- He said the proposed porous pavement had been included on the plan. He said essentially the entire pavement on the site would be porous.
- He said the parking calculations and the percent of cover calculations had been updated.
- He said the site plan had been updated to include data from the updated flood insurance maps.
- He said the entrance had been widened to 24 ft at the request of the Fire Department.
- He said one of the handicap spaces had been put inside the parking area at the request of the Code Enforcement Officer. He said a van accessible handicap space had been put outside.
- He said a place had been designated inside the garage for bicycle parking.
- He said notes had been added to the site plan concerning underground utilities on the site.
- He noted that an alteration of terrain permit was not required.
- He said the outlets to sub-drains from the porous pavement were labeled more clearly.
- He said the lighting plan had been adjusted in accordance with the new layout, and he provided some details on this.
- He said the plan to have geo-textual fabric under the porous pavement had been eliminated, at the request of Dr Roseen.

Mr. Chagnon noted that the Conservation Commission had reviewed the site plan, and had provided a letter concerning it. He said that hopefully the Board could close the public hearing that evening, and begin deliberations.

Mr. Parnell asked if anything had been done concerning the idea of a fence.

Mr. Chagnon noted there might be some conflicting ideas as to where the fence should be, and said it was understood that this was still an open item. There was detailed discussion about existing and potential routes of travel in this area, and how this would be impacted by the specific placement of a fence on the site.

Mr. Chagnon said the applicant appreciated the abutters' concerns, and said a fence was proposed on the property boundary. He said they were willing to extend this fence along the property boundary, but said they didn't feel that putting up fencing near the parking lot was appropriate. He provided details on this.

Ms. Harris said she believed that one of the concerns was that people might congregate on the extended space if the fence wasn't there.

Mr. Kimball said the purpose of the fence was not visual because there would already be a substantial landscape buffer. He said there was nothing unique about this situation, and said

screening a multi-unit development that abutted a residential area was clearly addressed in the Ordinance. He noted section 175-121 and 175-56 D, in terms of what was required concerning screening, and said the Ordinance was clear that he was not required to provide additional screening.

Mr. Kimball also said that regarding the idea of students possibly congregating, he had spoken to a number of people about the idea of fencing within the boundary of a property. He said the issue concerning this was that fences created blind spots and broke sight lines, and he provided details on this

He also said that the idea of people cutting through residential properties was an existing problem, and noted that he had tried to address this problem on his property in the past. He provided details concerning the invisible fence he had put on his property, which he said had been effective in preventing people from cutting through the property.

He said he agreed that a fence along the property line would reduce pedestrian traffic through the lot, but said there would need to be cooperation from the abutters if they felt there was an issue with trespassing across their properties. He said the trespassers didn't originate from his property, and said it was just being used as a thorough-fair. He said it was not his responsibility to protect the surrounding properties from this, and said he hoped the Board would see this was an issue of private landowner cooperation, and not a part of this project.

There was discussion on where the pedestrian traffic actually came from, with Mr. Kimball stating that it came from single family homes rented by students, on Meadow Road and another nearby road. He said if he had to put up a fence along the property line, he would do it, and said this wouldn't stop the project. But he said if had to chop up the lot with an interior fence so he didn't have access to his own property, this would probably be an issue.

There was discussion about the letter that had been received concerning this application from the Conservation Commission, with Chair McGowan noting that the Board had just received this letter.

Mr. Kimball said he and his management team had looked carefully at the issue of reducing the parking area, and said their decision on this had not been arrived at lightly. He said parking was a valuable resource in Durham, and said there would be an increase in parking pressure in this district. He noted the parking issues that Xmed, a company that occupied the site next to him, was currently having.

He said that instead of 2 spaces per dwelling unit, he was now asking for 1 space per two residents, and said this number had been determined based on discussion with the University regarding the parking spaces they were providing for new student housing on campus. He said using this number reduced the total number of parking spaces required by 8. He provided details on the fact that the number of commercial parking spaces for employees had been increased slightly. He said the parking lot design that was now proposed significantly reduced the impacts on the wetland buffer, and he provided details on this.

Chair McGowan noted that there were some other conditions that were discussed in the letter from the Conservation Commission.

Mr. Chagnon said the recommendations of the Conservation Commission were appropriate, and said the applicant didn't have any issues with them. He said the Commission had concluded, based on the 4 conditional use items in section 175-61 of the Ordinance regarding the Wetlands Overlay District, that there was no alternative location that was feasible, given the allowed use, and the fact that the building couldn't be put within 75 ft of the wetland. He provided details on this, and reviewed the Commission's comments concerning the application.

Mr. Chagnon said the applicant didn't have a problem with the Commission's recommendations regarding the maintenance of the porous pavement, and noted that the Commission had said the project was likely to result in an improvement to the existing conditions. He noted that currently, there was some washing of gravel from the driveway into the wetland. He said the applicant agreed that some of the areas of the existing gravel drive, which had previously been wetland, would be restored back to their original condition.

Mr. Kelley asked if there was an outlet to the wetland area.

Mr. Chagnon said surface water flow was higher on the back end of the site, and also said there was a culvert under the existing driveway and another culvert under Strafford Ave. He said the general direction of flow was to the southwest.

Ms. Harris left the meeting.

Mr. Kelley asked what the contributing area to the culvert was.

**Jamie Long, NH Soil Consultants**, said he had not delineated the entire wetland so didn't know the answer to that question. He noted that most of it was beyond the property in question. There was discussion on what portion of the wetland had been delineated, and what the delineation itself had been based on. Mr. Long explained that three parameters were used in delineating the wetland - hydrology, hydric soils and hydrophytic vegetation.

Mr. Kelley asked if this was a wetland of significant value.

Mr. Long said this was a nice wetland in terms of its soils and vegetation. He said there would be no wetland disturbance from this project, and said the majority of it would be constructed on land that had already been built on. He said the wetland acted as a buffer from other properties, and also noted that it would stop people from traveling on a portion of the site.

Councilor Carroll said she wondered how the Planning Board and the developer could help to enhance the wetland ecosystem. She said it had already seen a lot of pressure from development, and noted that there had been some wetland where the gravel driveway now was located.

Mr. Long said there was some sedimentation into the wetland from the gravel driveway when there was storm activity. He said the applicant would be rectifying this by removing the gravel driveway, and would be restoring the upland area adjacent to the wetland. He said it was already a good, functional wetland system.

There was discussion about the location of the previous wetland area that would be restored.

Mr. Chagnon said the Conservation Commission had asked him to work with NH Soils Consultants to replace and restore any areas that were disturbed, and in some cases to make these areas better than they were now.

Chair McGowan asked if any members of the public wished to speak.

**Dr. Arthur Dimambro, 49 Madbury Road,** asked if this would be the last opportunity for members of the public to speak. He said he wanted to provide some history concerning this area, stating that this was relevant to him and some other property owners. He described the rural nature of this area when he moved there in 1960, and said there were families that moved in there. He said student housing came in later, and brought various problems with it. He said the situation concerning this had improved somewhat in recent years, but was still not solved. He said his home was about the last single family home in the area, but said he still liked living there.

He said during the Zoning rewrite process in recent years, Mr. Kimball had gone to the Zoning rewrite committee and was able to make this area into a commercial area. He said when this was done, he didn't get a notice, but was told later the notice was in the paper. He said this present project had then come along.

Dr. Dimambro said he was not against turning the property in question into a commercial property, but he said there were a lot of unanswered questions. He said the site contained less than an acre and half, but he said this was a huge project that was proposed. He also said he had heard the property would be managed, which was fine, but he said the property would be sold at some point. He asked whether, if the property were sold, this property management would continue.

Dr. Dimambro noted that there would be commercial space on the first floor, but said it wasn't clear what kind of retail businesses might be there, and whether alcohol would be sold. He said he would like to see some answers concerning this, and some guarantee that when the property was sold, there would be enforcement of the conditions. He noted that the porous surface would need to be cleaned at some point, and asked what would happen concerning this after the property were sold.

Mr. Kelley said his understanding was that because this was a conditional use application, the Planning Board had greater authority than it otherwise would have, and said the conditions put on the project would go with the land if Mr. Kimball sold it. He also said the Code Enforcement Officer could pull the approval for the use if it was not meeting these conditions.

Mr. Kelley suggested that if the Board saw that the porous pavement idea took off in Town, it could suggest that those developments who used this pavement could collectively solicit bids for maintenance of it on their properties.

Councilor Carroll asked if the Planning Board had the right to say there could be no sale of alcohol on the property, and there was discussion that the Board had not heard back yet from its attorney concerning this.

Attorney Jim Shulte said he represented Marty and Jay Gooze, who could not be present at the meeting. He noted a letter from them, which he would like to reaffirm, and said he would also like to address the letter from the Conservation Commission. He said the Gooze's letter suggested that the Master Plan, in establishing this zone, said that the existing residential neighborhoods that would be impacted by this kind of commercial development needed to be protected.

He said it was apparent from the presentations by Mr. Kimball and Mr. Chagnon that they were starting with the assumption that they were allowed to do the maximum amount that the Zoning Ordinance allowed. He said the Ordinance said the Board didn't have to allow the maximum amount, and had the right to reduce the project in terms of the number of occupants, the setbacks, buffering, etc.

He said the Goozes had tried to be cooperative during this process, but said a primary concern of theirs was that there should be no alcohol sale on the premises. He asked that the Board not close the public hearing until there was an answer concerning that issue. He said the developer could say that evening that there could be a condition that there would be no alcohol sales.

Attorney Shulte said it was the right of the Planning Board to impose buffers in order to protect the abutters from the student rental units and commercial/retail activity, noting that there was the potential to create some attractive nuisances there. He said development of this site could create a magnet for this kind of thing, and he said it was therefore imperative that there be some kind of a barrier. He noted that Dr. Gooze had indicated where he would like the fencing to be, and that he would like there to be a solid fence with vegetation outside of it, and enough lighting of the area inside the fence so there wouldn't be a safety hazard.

He also said the Goozes had asked that there be some real teeth with respect to some professional management of the property, and noted that there potentially could be 48 students living there.

Attorney Shulte referred to the letter from the Conservation Commission, and said this project would have a substantial impact on the wetland buffer. He noted that the Goozes had sent a marked up plan that showed that the buffer ran through the parking area, and included all of the driveway. He noted that the developer had said that if he was allowed to pave the driveway, the wetland would be better off. Attorney Shulte said the developer he hadn't done a good job of maintaining it in the past, and said it was now disingenuous to say he would now make it better.

He said the Conservation Commission would prefer that the project be reduced in size. He noted that 14 parking spaces would be located within a portion of the wetland buffer area that was currently undisturbed. He said if the Board decided the size of the building needed to be reduced in size, this would be consistent with the position of the Conservation Commission. He also noted that the Ordinance entitled the Board, under the conditional use criteria in section 175-23 to limit the number of occupants on the property, the size of the building, the number of parking spaces, and to increase the setbacks.

Attorney Shulte said Mr. Chagnon had said the applicant didn't have a problem with the idea of doing periodic maintenance of the porous pavement. But he said a condition of approval should

be that there would be a rigorous, written schedule of what had to be done concerning cleaning and eventual resurfacing of the pavement. He provided details on this, and said there was a need for additional information, also stating that this was another reason why the public hearing shouldn't be closed yet.

He also said that in order to grant the conditional use permit, the Board had to find that all 4 standards under section 175-61 of the Ordinance, regarding conditional uses in the Wetlands Conservation Overlay District were met. He reviewed these standards, and provided details on how they were not met with this application.

He also noted the eight criteria listed under section 175-23 C, and said if there was a commercial use, the hours of operation should be restricted, especially if there was a retail business. He said especially with alcohol sales, buffering of adjacent properties would be needed. He said natural and scenic resources should also be preserved, not just the wetlands, but also the mature trees, which would be impacted if this project maximized the potential development of the site.

Attorney Shulte stated again that the Goozes were asking that the public hearing not be closed yet because there were some important issues that the Board needed more information on. He said they also asked that the project be reduced in size to reflect the Conservation Commission's concerns about the need to protect the neighbors and the environment.

Mr. Kelley noted that Attorney Shulte's opinion was that the Board had the authority to prohibit alcohol sales, and he asked him how he had come to that conclusion.

Attorney Shulte said he based this on the Zoning Ordinance, which indicated that a use couldn't occur unless all the requirements were met, and potential impacts were minimized. He said the conditional use process addressed social, economic and public safety impacts and said these provisions would be sufficient to allow the Board to say that alcohol sales would have these kinds of significant impacts.

Mr. Kelley asked if there was some kind of precedent in the State concerning this, and Attorney Shulte said not that he was aware of. He said he believed the requirements in the Zoning Ordinance were sufficient. He also noted that it was not uncommon to run across restrictions on the sale of alcohol in some older deeds, and said this could be a precedent in some sense.

There was discussion between Mr. Kelley and Attorney Shulte regarding the concept of attractive nuisance, with Attorney Shulte stating that it was a relevant concept in this instance.

Mr. Kimball said when the project was originally proposed, it had been a permitted use in the zone it was in. He said Marty Gooze had submitted a proposal to the Town Council to make the use a conditional use, and said this change was made to the Zoning Ordinance. He said the Goozes were now asking for significant relief based on that change. He said he believed this represented a conflict of interest, even if things were done legally.

He said it had been proposed that the Board should impose significant conditions on the use of his property, and said most of the concern regarding this had come from the rumor that there would be alcohol sales. He said he had no plans to apply for a liquor license, and said there was

little in the way of unmet demand for such an establishment in Durham. He also said he was not interested in encouraging the use of alcohol in the student apartments.

Mr. Kimball said he often heard people say that the property could be sold, but he said there was nothing special about this project regarding that, which made it different from other projects in Durham. He said the Board couldn't meet the public's desire for responsive property management through requiring arbitrary conditions, and said his company had a number of innovative approaches to property management. He said an excessive layering of conditions could have unforeseen negative consequences.

He said that prohibiting all alcohol sales on the property could limit the possible uses there, noting as an example that an art gallery wouldn't be able to hold a wine and cheese party, and that an establishment that produced local wines would be prohibited. He said a dentist office, which used mouthwash, would also not be allowed, and said the Board therefore needed to be very careful concerning the restrictions it placed on the use. He provided details on this, and asked that the Board consider the objectives it was trying to achieve.

Mr. Kimball said he was agreeable with the idea of having to provide a management report concerning the porous pavement.

Mr. Kelley asked Mr. Kimball if there was more specific language concerning alcohol sales, he might sign on to this.

Mr. Kimball said he would consider this. He said he had no intention of opening up "Kegs are Us", and said he didn't see this as ever being an appropriate use of the property. But he said a simple statement that there would be no alcohol sales could have undesirable side effects. Mr. Kelley said there had been discussion in the community that the Table of Uses was currently missing some things, and said it was possible that in the near future, alcohol sales would be limited to the Central Business District.

Mr. Kimball asked if there might be a draft definition for some kind of retail for this property, with the intention of applying it to the entire Zone, so his property wouldn't be at a disadvantage.

Mr. Kelley said it was his understanding that this would be developed.

Mr. Chagnon said he and the applicant were at a point where they felt a condition could be fashioned that a plan for proper maintenance of the porous pavement could be worked out with Dr. Roseen and the Town Engineer. He noted the May 8<sup>th</sup> letter concerning this issue.

Mr. Kelley noted that another application before the Board had submitted substantial specifications concerning the installation and maintenance procedures for porous pavement. He asked if Mr. Chagnon and the applicant were looking to adopt these, or something similar.

Mr. Chagnon said there had been discussion with Mr. Roseen about using the same specifications, and he said Mr. Roseen had agreed to make this available.

Mr. Kelley said these were tight specifications, and would be challenging to meet.

Mr. Chagnon said they all wanted the porous pavement system to succeed on the site.

Mr. Kelley asked whether it was just the bituminous product or also the granular sub-base that would need to be replaced. There was discussion about this, and the need to discuss this with Dr. Roseen.

Dr. Dimambro said that regarding Mr. Kimball's request that the Board not put too many restrictions on the project, the whole Zoning business was a huge imposition on the private property owners who lived in the district, so it went both ways.

Chair McGowan said the Board needed to make a decision as to whether to close the public hearing or continue it. He said there were two issues that had been raised by those who said the hearing should be continued, - the alcohol issue and the porous pavement issue. He said the Board had received information and public comments on both of these issues, and asked if there would be anything new that would be received.

Mr. Roberts said he felt enough information had been received concerning pervious pavement, but not enough information had been received concerning alcohol sales. He said the Board needed clarification on its right to decide on this, and he recommended that the hearing be continued so this could be determined.

Councilor Carroll said she agreed with Mr. Roberts, and said she had already been leaning in that direction before Attorney Shulte spoke. She said Dr. Dimambro and the other neighbors deserved the opportunity to provide a response to additional information. She said she supported continuing the hearing, and she asked that the Board get a response from Attorney Mitchell as soon as possible.

Mr. Kelley said that regarding the issue of alcohol sales, the Board had heard from one Attorney that it was within its power to regulate this. He said Attorney Mitchell would provide his own opinion, but he said he didn't think these various opinions would change the minds of the abutters or members of the Board. He said he thought the Board needed to vote based on what it thought was right, regardless of the possibility of future litigation.

Regarding the pervious pavement issue, Mr. Kelley said that if Dr. Roseen said the base had to be removed in 25 years, this would be made a condition of approval, with or without further public testimony.

Ms. Fuller said she agreed that the Board could close the hearing, and said it could then work with Mr. Kimball, within the context of the deliberations, to get what each of them found to be acceptable.

Mr. Parnell said he was satisfied that the Board had enough information on the pervious pavement that was proposed. He also said he wasn't sure much additional information would result from continuing the hearing because of the alcohol sales issue. He said members of the public had expressed their views on this issue, and said he was not sure what they could add after the Board received the opinion from its attorney. He said he was agreeable to closing the hearing, but said the Board could also err on the side of keeping it open.

Chair McGowan said he didn't think the Board would be seeing new information. He reviewed the various categories of information the Board had received, concerning the pervious pavement system, wetlands, traffic, etc.

Mr. Kelley said it hadn't been thought that an independent review of the traffic study was needed. He also said outstanding issues concerning the lease agreement could be addressed during the deliberations.

It was noted that the building height information was clear.

Councilor Carroll said a lot more discussion was needed regarding the parking area, but she said this could be done during the deliberations.

***Richard Kelley MOVED to close the public hearing on a Site Plan Application submitted by Steven F, Kimball, Auburn, New Hampshire for building of a 16-unit residential and a 4000 square-foot commercial, mixed use building a piece of property, and a Conditional Use Permit Application submitted by Steven F, Kimball, Auburn, New Hampshire for building of a 16-unit residential and a 4000 square-foot commercial, mixed use building a piece of property. Susan Fuller SECONDED the motion, and it PASSED 4-2, with Steve Roberts and Councilor Carroll voting against it***

The Board agreed that deliberations on the two Kimball applications would begin at the June 20<sup>th</sup> meeting.

## **VII. Old Business**

Mr. Kelley suggested that the Board should wait until Mr. Campbell was available to discuss the proposed building height criteria, since he had formulated this.

## **VIII. New Business**

Chair McGowan said the proposed site walk for the Madbury Road application would take place on Sunday, June 10<sup>th</sup> at 9 am.

Mr. Roberts said the purpose of this site walk was for the Board to visually approve the proposed buffer, since it was key concerning arguments about the project. He noted that the buffer, and the idea of adding to what was already there, hadn't been reviewed at the first site walk the Board had done for this application.

It was also noted that it had been winter time when the previous site walk was held.

Mr. Parnell asked if landscape architect Robbie Woodburn would be present for the site walk, and Chair McGowan said he believed she would be.

Mr. Roberts asked that the Board have sufficient opportunity to ask the applicant questions during the site walk, noting that this had been difficult at the previous site walk because of the number of people who attended it.

## **IX. Minutes**

April 18, 2007

***Richard Kelley MOVED to approve Minutes of April 18<sup>th</sup> Lorne Parnell SECONDED the motion, and it PASSED unanimously 6-0.***

April 25, 2007 Minutes

**Page 9** - correct spelling for Sally Ann Heuchling

**Page 11** - remove the text concerning Doug Greene remaining as a voting member.

**Page 12** removed capitalized text, and insert - “There was discussion on the appropriate allocation of non-pervious surfaces to the pervious pavement, and whether 50% was the right number”.

***Lorne Parnell MOVED to approve the April 25, 2007 Minutes as amended. Susan Fuller SECONDED the motion, and it PASSED 5-0-1 with Richard Kelley abstaining because of his absence from the meeting.***

## **XII. Adjournment**

***Richard Kelley MOVED to adjourn the meeting. Susan Fuller SECONDED the motion, and it PASSED unanimously 6-0.***

Adjournment at 10:14 pm

Victoria Parmele, Minutes taker