

These minutes were approved at the July 25, 2007 meeting

**DURHAM PLANNING BOARD
WEDNESDAY, JUNE 13, 2007
TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL
7:00 P.M.**

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

ALTERNATES PRESENT: Councilor Carroll; Annmarie Harris

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

I. Call to Order

Mr. Parnell said he would be replacing Chair Bill McGowan until he arrived at the meeting. He said Annmarie Harris would vote in place of Chair McGowan in his absence.

II. Approval of Agenda

Richard Kelley MOVED to approve the Agenda as submitted. Susan Fuller SECONDED the motion, and it passed unanimously 7-0.

III. Report of the Planner

Mr. Campbell updated the Board on applications before the ZBA that related to applications before the Planning Board

- He said that at the June 12th ZBA meeting, the 3 variances requested by Arnett Taylor/Paine were approved, but he noted that this had gone from a three to a two lot pork chop subdivision, and the plans for this weren't available for the Planning Board meeting. He said the applicant would amend the existing application and said it would be on the July 11th Agenda. He reviewed the variances that had been received.
- He noted the Nadeau Conditional Use permit application that was on the Board's Agenda, and said the ZBA application by the Nadeau's had been tabled to the June 19th meeting. He said this was not a complicated application for the Planning Board to deal with, and said the Board could include a condition that the applicant would have to get the variance.
- He noted the acceptance consideration for the Teeri conditional use permit application which was before the Board that evening, and said the Teeri ZBA application had been withdrawn.

- He said the Lambs, who had bought the Highland House, had been granted a variance to allow a 10 room inn rather than one with six rooms. He noted that this had historically been a ten room inn, and said he expected that the Board would see an application concerning this property at some point in the future.

Mr. Campbell said the Main Street Enhancement project was going well. He also noted that Durham Point Road had recently been undergoing repaving as well as some drainage changes.

He said he had met with University planner Doug Bencks on June 4th, and said a memo had been provided to the Board concerning issues that were discussed.

He provided details on the need to schedule an additional Planning Board meeting for June 20th because of the number of applications before the Board. He also said he was setting the agenda for the upcoming quarterly planning meeting that would be held on June 27th, and said so far, it included discussion with the Lamprey River Advisory Committee on its draft management plan and a film and discussion on the conservation subdivision process, as laid out by Randall Arendt.

Councilor Carroll asked if as part of watching the film and discussing it, the Board could go through the different sections of the Zoning Ordinance and subdivision regulations it should be aware of that related to the conservation subdivision process. She said it was fundamentally important that Board members have the same basis for making decisions on conservation subdivision applications.

Ms. Harris noted that it had previously been suggested by members of the Planning Board that this video would be available to developers so they would have it in hand when making proposals.

Mr. Campbell said there would also be discussion at the quarterly planning meeting on emails, in light of various issues relating to them.

He noted the upcoming meeting of the Economic Development Committee regarding the draft TIF district for Stone Quarry drive, the upcoming meeting of the Traffic Safety Committee, and the meeting of the Housing Task Force, which would continue its discussion on density issues related to multi-unit housing.

There was brief discussion on what the discussion on density issues would involve.

Mr. Roberts said he wanted to note that at Dewey's Corner, drivers could no longer see the corner from the stop sign because of the amount of vegetative growth. And he said this was an accident waiting to happen.

IV. Public Hearing on a Subdivision Application submitted by Gary & Nancy Lonsinger, Durham, New Hampshire for subdivision of one lot into 2 lots. The property involved is shown on Tax Map 15, Lot 18-5, is located at 23 Timberbrook Lane and is in the Residential B Zoning District

Richard Kelley MOVED to open the public hearing on a Subdivision Application submitted by Gary & Nancy Lonsinger, Durham, New Hampshire for subdivision of one lot into 2 lots. Susan Fuller SECONDED the motion, and it PASSED unanimously 7-0.

Mr. Lonsinger spoke before the Board, and said he and his wife owned an approximately 50 acre tract of land off Timberbrook Lane and Route 108. He said he had built a house on it the previous year for his son and daughter in law, and now wanted to subdivide off the 2.5 acre section of land with the house on it and gift it to them. He said this lot would be serviced by Timberbrook Lane, and said he believed the application was complete.

Mr. Campbell said the application was in fact complete.

Acting Chair Parnell asked if there were any members of the public who wished to speak for or against the application, and there was no response.

Councilor Needell MOVED to close the public hearing. Annmarie Harris SECONDED the motion, and it PASSED unanimously 7-0.

Mr. Kelley noted that the Board had the Findings of Fact and Conditions of Approval, and suggested that it could therefore go through the deliberations that evening. He said it should be noted in the Findings of Fact that the hearing was held on June 13th, 2007, and there were no comments received from the public.

Mr. Campbell said one more condition needed to be added, that the Class V and VI roads would be noted on the plan, prior to the signature.

Mr. Kelley noted that he had previously requested that the Title of the sheet be changed to “Subdivision of land“. He then reviewed the various waivers the applicant had requested (see the May 23, 2007 Planning Board minutes for details on this).

Richard Kelley MOVED to approve the Findings of Fact and Conditions of Approval as amended on a Subdivision Application submitted by Gary & Nancy Lonsinger, Durham, New Hampshire for subdivision of one lot into 2 lots. Richard Ozenich SECONDED the motion, and it PASSED unanimously 7-0.

- IV. **Public Hearing** on amendments to the following Sections of the Durham Zoning Ordinance regarding Forestry/Timber Harvesting: Article II, Section 175-7, Definitions; Article XIII, Sections 175-60, 175-61, 175-65, Wetland Conservation Overlay District; Article XIV, Sections 175-69, 175-71, 175-72, 175-75.1(A&C), Shoreland Protection Overlay District; Article XX, Section 175-109(L), Performance Standards; and Article XII, Section 175-54, Zone Requirements.

Steve Roberts MOVED to open the public hearing on amendments to the following Sections of the Durham Zoning Ordinance regarding Forestry/Timber Harvesting: Article II, Section 175-7, Definitions; Article XIII, Sections 175-60, 175-61, 175-65, Wetland Conservation Overlay District; Article XIV, Sections 175-69, 175-71, 175-72, 175-75.1(A&C), Shoreland Protection Overlay District; Article XX, Section 175-109(L), Performance Standards; and Article XII, Section 175-54, Zone Requirements. Richard Kelley SECONDED the motion, and it PASSED unanimously 7-0.

Ted McNitt, Durham Point Road, noted that he had been outspoken concerning this issue previously,

but said a lot of work had been done on the Ordinance provisions, and said they were now in better shape than they had been when this process was started.

Peter Smith, representing the Conservation Commission, handed out a letter from the Commission. He said that some months back, this matter had been referred to the Commission for discussion, said the Commission had recommended some changes to what the Planning Board had developed. He said one of these recommendations had not yet been accepted by the Board, and said the Conservation Commission wanted to voice its strong feelings concerning this. Mr. Smith then read the letter written by Duane Hyde, a member of the Conservation Commission. (This letter is available at the Planning Department).

He then said he would like to provide some additional comments. He said the Commission was concerned about what it saw as some ambiguity in what it believed was the Planning Board's intentions concerning whether forest operations were required to meet the BMP's in "Good Forestry in the Granite State". He noted that this book spoke about best management practices, but didn't use the word "shall". He said the premise the Conservation Commission was working from was that the Planning Board was already on board with the underlying concept that the standards in the best management practices should be a provision of the Ordinance that had to be obeyed.

Mr. Smith said the Planning Board had changed from what was in an earlier draft concerning this, and had gone in the opposite direction from the Conservation Commission. He said the wording now was that the best practices book was simply advisory. He said perhaps this was the original intent of the Planning Board, and said that if it was, it was good that it had now made clear what it had in mind. But he said the Conservation Commission didn't agree with this wording.

He reviewed the process by which the Conservation Commission had originally gotten involved in looking at these provisions, and noted that among other things, it had recommended that there should be standards for different classes of rivers, so landowners would know what was mandatory for their particular piece of property.

Mr. Smith said there was the issue of whether the Town had the authority to exercise mandatory powers and he noted that at the original public hearings on the proposed forestry related changes to the Ordinance, there was substantial discussion as to whether State statute provisions occupied the field, thereby depriving the Town of the right to develop its own mandatory provisions.

He said he was convinced that it was not correct to say that State statute eliminated the right of the Town to have its own enforcement procedures. He said the issue then became whether the Town, because it had the legal right, should seek to exercise its legal authority. He said an argument made to the Board was that Durham didn't have the expertise to work on this matter, and that enforcement should be left to a State agency.

But he said he disagreed with this, and provided details on this. He said this situation was no different than other situations where the Town needed assistance, and could contract out to get it, but he said most of what the Town would be dealing with code be handled by the Code Enforcement Officer.

Mr. Kelley referred to RSA 483-B: 8 regarding municipal authority, under the State's

Comprehensive Shoreland Protection Act , and the wording in it that “Municipalities may adopt land use control ordinances relative to all protected shorelands which are more stringent than the minimum standards contained in this chapter.”

Mr. Smith said he would decline to give legal advice concerning this wording at that moment, and would need to do some research on it first.

Amanda Merrill, 8 Meadow Road, said she was a member of the Planning Board from 2002-2005, had also served on the Zoning Rewrite committee. She said she hoped the proposed amendments concerning forestry brought the Town closer to a policy for productive, economically and environmentally sound timber management in Durham. She noted the input from various people and places in changing this language, and said the Board could benefit from further comments from the Conservation Commission and others.

Ms. Merrill said that during the final draft of the Zoning Rewrite process, although there were many public hearings, there weren't comments received that were specific to forestry. She said she wished there had been discussion earlier in the process with foresters and landowners who would have been impacted by the language. She noted that the Zoning rewrite process had been a long one, which involved a revolving cast of characters. She said she hoped the Board was closer to a decision concerning these provisions, and said she felt they had been arrived at in an informed way.

William Hall, Durham, said the Planning Board had previously dropped the forester requirement from the regulations, in order to make it easier for people to be able to practice forestry on their property on their own. But he said the Board had now gone in the other direction, and he provided details on this.

Craig Seymour, 110 Durham Point Road, said he represented the Trustees of the Trust Fund, which represented the Town as a major landowner of forestry tracts. He said the Trustees were pleased with the changes that had been made, and said the previous regulations had severely restricted their ability to manage places like the Doe Farm and therefore to carry out the terms of the Trust on that farm.

He provided details on the forest management plan for this parcel of land, and said active forest management was essential in order to maintain it as a resource for the community for recreational and other purposes. He said the new provisions would work much better for the Trustees, as a major land owner in Durham.

Councilor Needell asked if Mr. Seymour was familiar with the change the Conservation Commission recommended, and what effect it would have on the ability to maintain the Town's forest tracts.

Mr. Seymour noted that the Doe Farm had a lot of streams and the Lamprey River itself, and said there needed to be some flexibility in order to be able to practice good forestry on the property.

Councilor Needell asked if the provisions on best management practices would inhibit forest management, and Mr. Seymour said it was better to leave this to professionals, instead of having arbitrary standards.

Rob Keefe, 59 Piscataqua Road, said the State forest licensing system was a valuable program, and noted that good forest management incorporated more than considering the value of wood.. He said the kind of forest ecosystem management proposed by Bill Leak of the US Forest Service typified good forestry in New Hampshire.

He said if the Board had concerns about water quality, soil erosion, wildlife habitat, etc, it should keep the licensed forester requirement. He said this was a much better way to go than having the Town come up with its own set of best management practices. He then provided details on what he and his family hoped to do concerning forestry on their property, and said for a lot of people in Durham, forestry was about something more than just timber production.

Richard Ozenich MOVED to close the public hearing. Richard Kelley SECONDED the motion, and it PASSED unanimously 7-0.

Councilor Needell recommended that the Board put off deliberating on this matter until the end of the meeting, and Board members agreed with this.

Councilor Carroll said she had a question for a forester, and said she would like to ask it now because she wasn't sure they would still be at the meeting later on. She said one of the things that had come out during the various discussions on forestry in Durham was that the area where it was felt there could be problems was in the shoreland protection overlay area. She said a question to the forestry community was whether the provisions the Board was proposing would be strong enough to address this.

She said that in the proposed Ordinance changes, it was required that there be a licensed forester to develop a management plan for the shoreland area. She said this was intended to strengthen that area against potential over-cutting or mismanaged timber harvesting. She then read a sentence from Mr. Hyde's letter, which she said was the crux of the issue:

"It appears that under the current draft of the overlay districts, a landowner with wooded frontage on, for example, the Oyster River of Little Bay who under our currently enacted ordinance was very limited as to what vegetation they could cut and remove, can now hire a forester to prepare a forest management plan and remove far more of the shoreland vegetation and just have to meet the basal area law. This is not an unrealistic scenario, given the high price of shoreland property and the strong desire of home buyers to have water views."

Mr. Kelley said that regardless of this, there was still a 50 ft no cut zone within the shoreland district, regardless of whether there was a development or legitimate timber harvesting,

Don Quigley, licensed professional forestry and forestry professor at the Thompson School, said the professional forestry community didn't want to see the book "Good Forestry in the Granite State" become law. He said it was intended to provide voluntary guidelines for landowners who wanted to take a step further than State law in terms of forest management.

He said forestry was dependent on having a supply of trees and a motivated landowner, and said when it was restricted too much, this was considered to be a taking. He said it shouldn't be entered into lightly when a landowner was asked to give up taxable assets. He suggested that there might already be a mechanism to deal with residential landowners who had forestland on their property, - current use taxation.

He provided details on this, and said it was owners of properties under 10 acres, which didn't qualify for current use, that was the hardest group to get to. But he said it would be a shame to design the forestry language around that group of people. He provided additional details on this issue, and there was discussion. He noted that it was important to remember that trees eventually grew back. He also said this discussion was one that a lot of towns were having, and said the Town of Durham was right to have this discussion.

- V. **Acceptance Consideration of an Application for Boundary Line Adjustment** submitted by Catherine Nadeau, Durham, New Hampshire, to change the boundary line between two lots. The properties involved are shown on Tax Map 10, Lots 20-2 and 20-5, are located at 36 and 38 Dover Road and respectively and are in the Coe's Corner and Residence A Zoning Districts.

Mr. Campbell said that Kevin McEneaney, of McEneaney Survey Associates was present to represent the applicant. He said this was a modified procedure, and said the Board had the power to accept and act on this application at the same meeting. He noted that Findings of Fact and Conditions of Approval had been developed.

Mr. McEneaney said the Nadeaus occupied lot 20-5, and said they also owned lot 20-2, which contained a single family home that was currently a rental unit. He said they wanted to add a small strip of land, 35 ft by 310 ft to Lot 20-2, which would allow the new house they wanted to build on this lot to meet the setback requirements. He explained that during the most recent rezoning in Durham, Lot 20-1 was rezoned so that it was now in the Coes Corner District, which didn't allow single family residences, He said this was why a variance was needed from the ZBA.

There was discussion about the Zoning change that had impacted Lot 20-2, and about the labeling error on the site plan concerning the zoning districts. It was noted that this would have to be changed on the plan.

Councilor Needell said that unfortunately, changing the lot lines would not change the Zoning, so the zones would be what they were. There was discussion about this.

Mr. Kelley asked why there were two rights-of-way on the plan, one for one parcel and another for the other, and Mr. McEneaney provided details concerning this. Mr. Kelley also said to the east of the Bubar property, appears to be a lot line, with no owner, and it was clarified that this was the edge of Beard's Creek.

Mr. Parnell asked if there were any abutters who wished to speak regarding this application. There was no response.

The Board reviewed the Findings of Fact and Conditions of Approval. Mr. Campbell noted that a certificate of monumentation was required as part of the Conditions of Approval, as were copies of the current deed and the future deed.

Richard Kelley MOVED to approve the Findings of Fact and Conditions of Approval on an Application for Boundary Line Adjustment submitted by Catherine Nadeau, Durham, New Hampshire, to change the boundary line between two lots. Councilor Needell SECONDED the motion, and it PASSED unanimously 7-0.

Chair McGowan arrived at the meeting.

Recess from 8:35-8:47 pm

- VI. **Acceptance Consideration and Public Hearing on a Conditional Use Permit Application** submitted by Catherine Nadeau, Durham, New Hampshire for the rebuilding and expansion of a single family home. The property involved is shown on Tax Map 10, Lot 20-2, is located at 36 Dover Road and is in the Coe's Corner Zoning District.

Chair McGowan said that since he was now present, Ms. Harris would no longer be a voting member.

Mr. Campbell said the reason this matter was before the Board as conditional use application was that the existing house, before the Zoning changes, was legally conforming, but became a nonconforming use when it was rezoned to become part of the Coes Corner district. He said the plan was to move the house toward the water and expand it. He read the wording of Article IX, section 175-28.

Mr. Campbell said the previous evening, the Nadeau variance application concerning this was tabled until June 19th. He said the Board could accept the conditional use permit application at the present meeting, hold the public hearing, and then deliberate on it at a later date, - or it could also deliberate on it at the same meeting, and a condition of approval would be that the variances would have to be approved. He said if the variances weren't granted, the conditional use permit would be null and void.

There was discussion about what the variances were needed for, and that some might no longer be needed because of the boundary line adjustment. There was also detailed discussion about why a conditional use permit was required, under Article IX Nonconformance, Section 175-28, Nonconforming Uses.

Mr. McEneaney explained that it was the fact that the single family use was not permitted in the Coes Corner district that was the issue with the ZBA. He said he didn't agree with Mr. Johnson regarding the setback variance issue because with the boundary line adjustment, the setback requirements would be met. He also said the plan was to demolish the existing house, not move it, and to build a new house, not expand an existing one. But he said Mr. Johnson said the new building footprint would be larger so it would be considered an expansion.

There was further detailed discussion by the Board on this situation.

Mr. Kelley asked if the application was complete, and Mr. Campbell said it was, although noting that the applicants needed to provide the deeds resulting from the boundary line adjustment.

Richard Kelley MOVED to accept the Conditional Use Permit Application submitted by Catherine Nadeau, Durham, New Hampshire for the rebuilding and expansion of a single family home. Lorne Parnell SECONDED the motion, and it PASSED unanimously 7-0.

Richard Kelley MOVED to open the public hearing Conditional Use Permit Application submitted by Catherine Nadeau, Durham, New Hampshire for the rebuilding and expansion of a single family home. Lorne Parnell SECONDED the motion, and it PASSED unanimously 7-0.

There were no members of the public who wished to speak.

Richard Kelley MOVED to close the public hearing. Richard Ozenich SECONDED the motion.

Councilor Needell asked if there was any interest in doing a site walk of the property before closing the hearing. He said he had no objection to what was proposed, but said he was having a hard time visualizing the site so wouldn't mind having the chance to see it.

Other Board members didn't express an interest in doing a site walk.

The motion PASSED unanimously 7-0.

Chair McGowan noted the letter from the applicant regarding how the required criteria for the conditional use permit were met. He then suggested that the Board go through the conditional use permit checklist.

The Board determined that all the preliminary items on the checklist were met.

1. Site suitability
2. External impacts – no
3. Character of site development – not incompatible
4. Character of the buildings and structures - not incompatible
5. Preservation of natural, cultural, historic and scenic resources

Ms. Harris recollected that in past, this was a property that had been impacted by a lot of clearing, and said perhaps as part of the conditional use process, it should be determined whether there were trees along the shoreland that needed protection. She said photos could be taken so there would be documentation, noting that it had been suggested that documentation of shoreland trees and cutting, in general, was needed.

There was discussion about this by the Board.

Councilor Needell said he hadn't previously appreciated that the existence of shoreland was an issue for this property.

Ms. Fuller said the Board could require, in the conditions to be met subsequent, that the applicant would be required to allow the shoreland to re-vegetate in a natural manner if there had been clearing.

Mr. Campbell said 175-75.1, Performance Standards in the Shoreland Protection Overlay district, already required that natural vegetation be allowed to grow back.

Mr. Parnell said the existing regulations concerning shoreland development would seem to take care of what would be caused by a new home.

Mr. Kelley said he agreed with the suggestion that photo evidence should be submitted, as a condition of approval prior to signatures.

Councilor Needell said he was concerned about the Planning Board giving conditional approval, and thereby pre-judging the ZBA's decision-making. He said he didn't know that the Board wanted to offer an opinion to the ZBA as to whether it should grant the variances. He also asked whether, if the ZBA granted the variance to construct a single family home, this application would even be before the Planning Board. There was discussion about this with Mr. McEneaney.

Mr. McEneaney said photo evidence could be provided.

The Board reviewed the remaining criteria for the conditional use permit

6. Impact on property values
7. Availability of public services
8. Fiscal impacts

Ms. Harris asked if the intent was to apply for a dock for the property.

Mr. McEneaney said he didn't know, and there was discussion about this issue.

Councilor Needell said this issue had come up at the ZBA meeting the previous evening concerning a variance application for another property, and it was noted that eliminating a dock didn't necessarily prevent shoreland erosion.

Mr. Roberts agreed that a dock could be a remediation measure with some unstable shoreland soils.

Mr. Kelley suggested that the response from Code Enforcement Officer Tom Johnson and Public Works Director Mike Lynch should be added to the Findings of Fact. Mr. Kelley noted that Mr. Johnson's comment had to do with the variance issues, not the conditional use permit application.

There was discussion concerning the fact that there hadn't been adequate signage on the property concerning the application. Ms. Harris said violation of the policy in general was the concern, and said she wasn't especially concerned about it in this instance.

Councilor Needell said he shared the concern about the sign, and also said he was concerned about the idea of granting the conditional use permit with a condition that the variance would be received. He said he would prefer it if the variances were in place first.

Mr. Campbell said if the Board wished to proceed this way, it could continue its deliberations on this application to June 20th, the day after the ZBA meeting.

Richard Kelley MOVED to continue the deliberations on this application to the meeting on June 20th, 2007. Richard Ozenich SECONDED the motion.

Mr. McEneaney urged the Board to grant conditional approval at the present meeting, and said it was understood that the applicant took the risk concerning the fact that the sign hadn't been put up. He said it appeared that all of the conditional use permit criteria were met except for the sign issue.

Chair McGowan said the concern of the Board was that the ZBA variances should be granted before they decided on the conditional use application.

The motion PASSED unanimously 7-0.

- VII. **Acceptance Consideration on an Application for Subdivision** submitted by Arnet Taylor Jr., Durham, New Hampshire, on behalf of Katharine Paine, Durham, New Hampshire to subdivide a property into 3 porkchop lots. The property involved is shown on Tax Map 11, Lot 35-1, is located at 51 Durham Point Road and is in the Residence C Zoning District.

Mr. Campbell recommended that this Agenda item be continued to the July 11th meeting, and noted that there was a letter from the applicant concerning this.

Councilor Needell MOVED to continue the acceptance consideration on an Application for Subdivision submitted by Arnet Taylor Jr., Durham, New Hampshire, on behalf of Katharine Paine, Durham, New Hampshire to subdivide a property into 3 porkchop lots to the July 11th meeting. Richard Kelley SECONDED the motion, and it PASSED 7-0.

- VIII. **Acceptance Consideration on a Conditional Use Permit Application** submitted by Attorney Thomas G. Ferrini, Dover, New Hampshire on behalf of Robert S. & Gale S. Teeri Living Rev. Trust, Durham, New Hampshire to expand a non-conforming use and occupancy of 15 Main Street by ten individuals as a Rooming and/or Boarding House. The property involved is shown on Tax Map 5, Lot 2-2, is located at 15 Main Street and is in the Church Hill Zoning District.

Mr. Campbell said this was another situation where there was a legally nonconforming use that was being expanded, so a conditional use permit was required. He said the Board would see from the comments of the Code Enforcement Officer that he did consider this a single family dwelling, not a boarding house. He said the applicants argued that they had sufficient evidence to the contrary, and wanted to continue the boarding house use. He provided details on this.

Councilor Needell said in order to entertain this application, the Board had to be convinced that the property currently was being used as a boarding house, but Mr. Johnson was saying it was a single family dwelling. He said if the Board agreed with the applicant that this was not an existing nonconforming use, granting the conditional use permit should not come before this Board.

Mr. Campbell said if the Board determined that it was legally existing as a boarding and rooming house, it would be a legally nonconforming use, which potentially could expand by 50%.

Attorney Thomas Ferrini represented the applicants. He said the Teeris purchased the house in 1998, and said there was a well-known pre-existing nonconforming use that had been acknowledged by the Town. He said in 2005, the Code Enforcement Office had expressed concern about bringing the habitable space up to code, and he said his client shared these concerns and wanted to comply with the code.

Attorney Ferrini said this situation didn't really involve an enlargement of the building, and said the issue was bringing it into conformance. He provided details on this, and said the expansion issue was for the Board to address through the conditional use process. He said the only role for the ZBA in this situation would be if there were an appeal of the Planning Board's decision.

After some discussion, Councilor Needell said there was no point in discussing the conditional use permit application unless the Board decided this was appropriate. He said this issue should be settled first.

Attorney Ferrini said the Board needed to consider the chain of title and occupants of record concerning this property, and he provided detailed information concerning this. He went through the various exhibits, and said the summary page indicated that there was no proof the applicants were aware of, including Mr. Johnson's May 31st email, that indicated that this was a single family house, and not a pre-existing nonconforming use as a boarding house. He said the number of occupants had ranged from 7-10 over the years, and he provided details on this. He said there was sufficient evidence to allow the Planning Board to talk about the conditional use permit application.

There was further discussion about what process should be followed in this instance.

Councilor Needell said in order for the conditional use process to be the right venue now, the Planning Board would have to determine that this was a boarding house, and that this was an ongoing nonconforming use, which would essentially over-ride the Code Enforcement Officer's July 2005 decision. He asked if the Board had the authority to override this decision, and said he thought that was something for the ZBA to do, not the Planning Board.

Mr. Kelley said that was his understanding as well.

Attorney Ferrini said it was still a matter of right for the applicant to bring forward the conditional use permit application.

Councilor Needell said only if it was a valid application.

There was further detailed discussion on this.

Mr. Campbell said Mr. Johnson had seen no evidence that the use as a boarding house was permitted. He provided details on this, and said his own opinion was that he didn't see the documentation that this was a boarding house, although he could see that several people lived there.

Ms. Harris said just because the records weren't complete and didn't state that this was a rooming house, lots of students had lived in rooming houses in Durham that weren't called rooming houses. She said she recollected that this house had been used for student occupancy, and said the Board was looking back in time with the expectation it had now for the property.

Councilor Needell said the question of whether this was a boarding house was not the issue before the Board. He said the question was whether the Board had the authority to essentially negate the ruling of the Code Enforcement Officer. He said as far as he knew, the venue for that was an Appeal of Administrative Decision before the ZBA.

Chair McGowan noted the 2005 letter from Mr. Johnson. He said two years had gone by, but this had never gone before the ZBA.

Attorney Ferrini said there had been discussion between the applicants and Mr. Johnson over the period of 2005-2007. He said the Appeal of Administrative Decision was scheduled for the ZBA meeting the night before, but said it had been their understanding that the conditional use permit application was the appropriate venue to make their argument, because ultimately, this was a planning decision.

Mr. Campbell said it hadn't been suggested to the applicants that the application before the ZBA should be withdrawn, but it was said they could apply for the conditional use permit, and the Planning Board could deny this application. He also it would be reasonable if the Board said it would go with the judgment of Town staff, and that this was the wrong application. But he said if the evidence tonight was overwhelming that this was a boarding house, the Board could go forward with the application.

Councilor Needell asked what the option was for the applicant if the Appeal of Administrative Decision was heard and rejected by the ZBA, and Attorney Ferrini said this could be appealed to Superior Court.

Councilor Needell asked what the applicant's option was if the Planning Board denied the conditional use permit application, and Attorney Ferrini said this could be appealed to the ZBA or Superior Court.

Ms. Harris said she thought that in this instance, it would be appropriate to ask the Board's attorney which approach was appropriate.

Chair McGowan said this was a good point, and he asked how the Board should proceed if it wanted to get an opinion from its attorney.

Mr. Campbell said the Board could continue this application to another meeting, and request that the Board's attorney review the files on this property.

There was further detailed discussion by the Board on how it should proceed concerning this application. It was suggested that Mr. Johnson could speak with the Board about this property. Mr. Parnell asked if perhaps the Board needed to get a legal opinion first and then needed to speak with Mr. Johnson.

Susan Fuller MOVED to deny the acceptance consideration on a Conditional Use Permit Application submitted by Attorney Thomas G. Ferrini, Dover, New Hampshire on behalf of Robert S. & Gale S. Teeri Living Rev. Trust, Durham, New Hampshire to expand a non-conforming use and occupancy of 15 Main Street by ten individuals as a Rooming and/or Boarding House. Councilor Needell SECONDED the motion.

Ms. Fuller said she wanted to respect Mr. Johnson's time, in terms of asking him to speak to the Planning Board about this property. She said she thought the applicant had another venue to follow other than coming before the Planning Board.

Councilor Needell said if this motion passed, the applicant could take this denial to the ZBA or to Superior Court. He said if the decision was then overturned, the application would come back to the Planning Board.

Mr. Kelley noted that the Board could accept the application that evening, and deny it in the future based on the fact that it was not a boarding house and was in fact a single family home.

Mr. Campbell agreed this could be done, but he said it was hard to say what the ramifications of doing this would be.

Mr. Roberts said he would vote against this motion. He said he thought the conditional use process provided the power to protect abutters and the community. He said conditions could be imposed, including one dealing with the opinion from the Code Enforcement Officer. He said in denying the acceptance consideration, the Board was asking someone else to solve this problem.

The motion PASSED 4-3, with Steve Roberts, Richard Ozenich and Lorne Parnell voting against it.

- X. Continued Deliberation 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 66-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.

Hillary Scott noted from the audience that the Board was not supposed to start any major business after 10 pm.

There was discussion on how the Board should proceed.

Susan Fuller MOVED to continue deliberation 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 66-unit, age-restricted condominium development, and that the Planning Board work on this until 10:30 pm. Mr. Kelley SECONDED the motion.

Mr. Campbell noted that the Board had to address Item XI because there was a time limit involved.

After discussion, it was agreed to speak only briefly on the Cuthartes application that evening, and to continue it to the meeting the following Wednesday.

Councilor Needell noted that there were questions at the previous meeting concerning the stewardship plan and the condominium bylaws. He also said that if the Board had any comments or questions concerning any incomplete documentation, it should let the applicant know this now.

Susan Fuller MOVED to continue the deliberation on Agenda Item X to next week, to move to Agenda Item XI, and to adjourn at 11:15 pm. Richard Kelley SECONDED the motion.

Attorney Pollock said his only concern was that there needed to be an appropriate amount of time for the Board to deliberate on this application at the meeting the following Wednesday.

The Board agreed that this application would be placed first on the Agenda for the following week's meeting.

The motion PASSED 5-2, with Councilor Needell and Richard Ozenich voting against it.

XI. Discussion of Proposed Zoning Ordinance Changes to the Definition of "Home Occupation."

Richard Kelley MOVED that this matter should go to public hearing for the July 11, 2007 Meeting. Lorne Parnell SECONDED the motion.

Councilor Needell said the most controversial piece of this proposed Ordinance change was part (e). He said there was much discussion on it by the Council, and said there was general agreement that the provision should be included. But he said the Council wanted to be sure the Planning Board weighed in on this.

Ms. Fuller asked what the Council's rationale was for deducting density, and Mr. Campbell asked why this should be done for first class but not second class home occupations.

Councilor Needell noted that the original intent of the proposed Ordinance change was to add virtual home occupation, where the number of employees was not relevant because they were not on the site. He said the idea with part (e) was to put a limit on having people coming and going in and out of a neighborhood, and said the first suggestion had been to allow either home occupations or accessory apartments, but not both. But he said it was then decided this was not the way to go, and the density deduction was suggested.

Ms. Fuller said most new construction would have covenants against accessory apartments and home occupations, and said for those properties where they were allowed, this provision would therefore be pretty restrictive.

Mr. Greene agreed that the provision was too restrictive, and said he supported the idea of taking it out.

Ms. Harris agreed that it seemed severe.

Richard Kelley MOVED to schedule the public hearing on Proposed Zoning Ordinance Changes to the Definition of “Home Occupation.” for July 11, 2007. Susan Fuller SECONDED the motion, and it PASSED unanimously 7-0.

XII. Other Business

A. Old Business:

There was a discussion that the Board could deliberate on the proposed forestry related provisions at the quarterly planning meeting on June 27th. Mr. Kelley suggested that the meeting could start at 6 pm so there would be time to cover everything, and it was agreed the Board would do this.

XII. New Business:

XIII. Approval of Minutes

May 9, 2007 - postponed

May 23, 2007 - postponed

XIII. Adjournment

Richard Ozenich MOVED to adjourn the meeting. Richard Kelley SECONDED the motion, and it PASSED unanimously 7-0.

Adjournment at 11:10 pm

Victoria Parmele, Minutes taker