

This set of minutes was approved at the September 23, 2009 Planning Board meeting

**Durham Planning Board
Wednesday August 26 2009
Durham Town Hall - Council Chambers
MINUTES
7:00 pm**

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

ALTERNATES PRESENT: Wayne Lewis; Councilor Neil Niman

MEMBERS ABSENT: Richard Ozenich; Kevin Gardner

I. Call to Order

Chair Parnell called the meeting to order at 7:02 pm.

II. Approval of Agenda

Susan Fuller MOVED to approve the Agenda. Bill McGowan SECONDED the motion, and it PASSED unanimously 4-0.

Chair Parnell said Wayne Lewis would sit in as a regular Board member in place of Mr. Ozenich.

III. Request for Technical Review submitted by Scott Mitchell, Courthouse Ventures, for a Freezer & Cooler at 4 Dover Road, May 5, Lot 4-2.

Scott Mitchell, owner of the Irving Station spoke before the Board, and explained that Dunkin Donuts, had requested that they be allowed to put in a freezer within the loading zone. He said they had expanded their menu with more frozen items, so needed the freezer space. He noted that when the building was built, it would have been possible to put a basement in the building, but said he hadn't thought about the need for this at the time.

Mr. Mitchell said they did meet the loading zone requirements, so were not asking for relief from this. But he said his concern was how the freezer would look on the property. He said the architect, Shannon Alder, had worked on how to match it with the existing building, with clapboard, a fake roof, etc. He said he would also like to add a fake window, much like the side of the existing building facing Cumberland Farms had.

Mr. Roberts arrived at the meeting at 7:06 pm.

Mr. Mitchell said the freezer would only be accessible from the Dunkin Donuts side of the building.

Chair Parnell noted that the proposed structure wouldn't be attached to the existing building, and asked what there would be between them.

Mr. Mitchell said there would be a sidewalk. He also said half of the refrigeration unit would be a cooler and half would be a freezer, and said the electricity connection would be located underground, and would tie into the Dunkin Donuts meter.

Mr. Mitchell said he had a sense of what the Board wanted to see in this structure, and stressed that he didn't want it to be an eyesore. He said it could even be brick if necessary. Asked whether thought had been given to putting the unit behind the building, he said his engineer was concerned about structural problems, and he provided details on this. He said it was determined that it would be easier to put the unit in the spot that was proposed.

Councilor Smith noted that the size of the proposed structure was under the maximum size for a free standing building/accessory shed without a foundation, and said a structure of this size could be located almost anywhere on a property.

Mr. Campbell said he didn't see any issues with sending this application to the Technical Review Committee, and he recommended doing so.

Councilor Julian Smith MOVED to pass the Application submitted by Scott Mitchell, Courthouse Ventures, for a Freezer & Cooler at 4 Dover Road, May 5, Lot 4-2 on to the Technical Review Committee. Bill McGowan SECONDED the motion, and it PASSED unanimously 6-0.

IV. Discussion on ZBA Decision Regarding 6 Jenkins court and How to Address Future Appeals of the Planning Board's Decisions

Mr. Campbell noted that he had provided the Board with background information on this issue, including an email from Mr. Roberts, the materials sent from the Planning Board to the ZBA some weeks back, and the appeal application from the abutter, Mr. Christie. He also said that in his memo to the Board on the issue, he had said that despite disagreement with the ZBA decision, he thought the best course of action was to change the language in the Zoning Ordinance to make it more clear, and to reflect exactly the way the Board had been interpreting it.

He said this seemed to be a quicker solution, as compared to other alternatives, and he provided details on this, noting among other things that if the issue wound up in court, Mr. Crape wouldn't be able to go forward with his amended site plan approval until a court decision was made.

Mr. Campbell also said there were some other projects in the pipeline with issues similar to 6 Jenkins Court, which had gone to the ZBA for variances, and were preparing applications for review by the Planning Board. He said with the current ruling from the ZBA, these review processes would be slowed down. He said he believed that some Zoning changes should be approved by the Planning Board and recommended to the Town Council.

Chair Parnell asked what the current situation was with 6 Jenkins Court, and Mr. Campbell said Mr. Crape was in the process of fulfilling the conditions of approval for the amended site plan. Chair Parnell said he thought the ZBA decision had indicated that the Board would have to re-approve a site plan for the project.

Mr. Campbell explained that there were four points of appeal regarding the original site plan application, and that the ZBA had found in favor of the abutter on three of them. But he said before the ZBA had even heard the appeal, the Planning Board had approved an amended site plan, which completely took out the driveway, and therefore took out all four of the points the abutter had brought forward with the appeal. He said the Town attorney was clear that Mr. Crape could go forward with the approved amended site plan application, and didn't have to go backward.

Chair Parnell said it would seem there was something the Board should do that went back to the ZBA, and which got 6 Jenkins Court passed this.

Mr. Campbell said that was what had been done with the amended site plan, which the Board had approved, and said this had taken care of all the issues. He said the abutter could appeal on the building permit, but said he didn't think he could take it any further in terms of local remedies.

Mr. Roberts said he was concerned about the ZBA decision, and said the particular issues that were appealed were mischief types of issues. He noted Section 175-112 of the Zoning Ordinance. He said this indicated to him that the Board had not been served by legal counsel. He provided details on this, and said the same thing had happened with the 99 Madbury Road application.

He said the Board needed to change the way it worked, so that when there was an issue like this, legal counsel could help the Board reflect on the issues, and provide a clearer path. He noted that this particular Zoning issue related to Master Plan guidance, Town Council goals, and the main thrust of planning in the community.

He said he agreed on the approach for moving forward that Mr. Campbell had now outlined, but said a concern was if there was an appeal of the building permit, and whether the Board would have a comprehensive defense of its position on the amended plan.

Mr. Campbell said a question was whether the Board wanted to have a policy for future appeals of Board decisions. He said they could continue on with the way they had been

doing things, or could have an attorney represent them at ZBA hearings on appeals of Planning Board decisions. He said he needed guidance from the Board on this.

Ms. Fuller asked if there were any other choices.

Councilor Niman said he agreed with Mr. Campbell's approach, which was to make some changes to the Ordinance. He also said he agreed with Mr. Roberts that in the future, the Planning Board needed to be better represented if one of its decisions was appealed to the ZBA.

But he said at some point, he hoped the Board would talk about where the problems had come from in the first place. He said the Zoning Ordinance was cumbersome and lent itself to multiple interpretations, said as long as this was the case, someone involved with "mischief" could take the Board down this road. He said the question was how to address this.

Councilor Niman said they could perhaps clean up the Ordinance, but said that didn't really allow the Board to do much planning and interpretation. He said the Master Plan was almost 10 years old, and said while it was hoped that the Zoning Ordinance developed from it could anticipate everything that came down the pike, the way the Ordinance was written was that if it something wasn't explicitly allowed in the Ordinance, it couldn't be done.

He said there was no way to anticipate everything, so the default was always no. He said the Planning Board was trying to do an honest job of planning, and taking ideas and turning them into something that would be good for the community. But he said until the Board came to grips with the situation, it would continue to see these kinds of cases where a development was brought forward that someone didn't like.

Mr. Campbell said Councilor Niman was right, but said one thing the Board hadn't stressed enough with the 6 Jenkins Court application was the idea of administrative gloss, which meant if the Board had been interpreting a provision one way, the only way to change the interpretation was to change the provision.

Mr. Roberts noted the Manchester Ordinance, and said the definition section for parking was half as long as Durham's was. He provided details on this. He said Durham had a good planner, and a good Planning Board, but said they needed some legal tuning in order to do what Councilor Niman had suggested.

He said the Council in existence during the Zoning Rewrite process had a very different philosophy than the current Council, and wagged its finger at the Board if it provided too much latitude somewhere. He said using conditional use, as NH cities did, gave the Board more jurisdiction. But he said this approach had run afoul of an earlier Council. Mr. McGowan said it also came down to interpretation of the English language, and said if the Planning Board interpreted the Zoning Ordinance one way and the ZBA interpreted it another way, the ZBA had the final say unless it was taken one step further. He asked

what could be done to make sure some of these provisions in the Ordinance weren't interpreted in different ways. He said to him, "or" meant one thing or the other, but he asked who was to say that one interpretation was wrong and one was right.

Mr. Campbell said that was where the administrative gloss came in, noting that since he had been working in Durham, the provision Mr. McGowan had referred to had been interpreted the same way, and now it could not be interpreted that way.

Councilor Niman asked if something could be added to the Zoning Ordinance that said if something had been done for eight years, the Board had the right to do it. He also asked if there could be something in the Ordinance that said that if there were two contradictory statements in the Ordinance, the Planning Board had the authority to pick the one that best fit the project before it, and which allowed it some leeway.

He said a question was whether there was a way to address the "gotchas" with a provision in the Ordinance. He suggested that perhaps it could say that if two things were contradictory, or a word was subject to interpretation, if the Planning Board adopted the version most commonly used, it had the right to interpret it that way.

Mr. Roberts suggested that they should contact Ben Frost, a land use planner/lawyer who really understood what was happening with planning in New Hampshire. He noted that Mr. Frost commented frequently on Plan Link. He also said big city ordinances had much cleaner definitions, and had larger tables of uses, which made things less subject to interpretation.

Councilor Niman said they needed to find a way where the Planning Board could apply common sense, within certain parameters.

Mr. Roberts said perhaps there was a way to mature the Ordinance more to that line.

Mr. Campbell said he believed they had taken the first step with Agenda Item V. He said he would like the Board to discuss these possible Zoning amendments that evening, and to move forward with the ones they agreed on.

Mr. Roberts said the only proposed Zoning change he had an issue with was Section 175-41(1)(2) Parking and Vehicular Access, regarding parallel parking. He said there were several situations in the Central Business District and Courthouse District where odd layouts made it very difficult to put parking behind the building. He noted the Cumberland Farms property as an example of this, and asked whether perhaps Conditional Use could help with this.

Councilor Niman thanked Mr. Roberts for bringing this up, stating that he was tired of looking at the run-down former Cumberland Farms building. He said it was his understanding that the parking restriction made the property un-developable, and said when the Zoning Ordinance was rewritten some years back, he didn't think it was the intention to lock that structure there forever.

Chair Parnell said it sounded like they were moving on to Agenda Item V. He asked other Board members how they felt about the way the appeal of the Board's decision on 6 Jenkins Court was handled, and the need for legal representation in the future.

Mr. McGowan noted that there was no one representing the applicant at the ZBA meeting, and asked what signal the applicant gave if he was not there. He noted that with the 99 Madbury road application, the lawyers were present.

Mr. Campbell said it had been the Town's position since he had worked in Durham that it was the applicant's application, not the Planning Board's application, and that if there was going to be representation at a ZBA hearing, the applicant should have some.

Mr. Roberts said this situation had pointed to the discontinuity in the Zoning Ordinance, and said the Board should have gotten a list from its attorney pointing out deficiencies. He said the Board should get one now.

Councilor Niman and Mr. McGowan had said that the applicant should have been at the ZBA hearing, but he said Mr. Crape had decided instead to amend his site plan. He said Mr. Roberts was saying there was a general issue independent of a specific situation, which was why they would continue to see Planning Board decisions appealed to the ZBA, with the question being whether or not the ZBA was going to take into account what the Planning Board had discussed, or its past practices.

Ms. Fuller said she realized that when the attorney was hired, this spent taxpayer money. But she said in the future, if there was an appeal of a Planning Board decision to the ZBA, she did think the Board should have legal counsel represent it, in part to help the ZBA understand the rationale for the Board's decision on an application.

Mr. Campbell noted that only two Planning Board decisions on applications had been appealed in the eight years he had worked in Durham.

Mr. Roberts said these two projects were the key representations of community development.

Councilor Niman said this related to the Council goal to create a more vibrant downtown. He said it was difficult to persuade someone to invest millions of dollars in a town when appeals like this occurred because the Ordinance or the process was flawed. He said he agreed that in the future, if there was an appeal of a Planning Board decision on an application, the Board should be represented by its attorney.

But he said he would prefer not to see things appealed anymore, and would like to see simplification of the Zoning Ordinance, and umbrella language in it so that things weren't being appealed right and left to the ZBA. He said he thought that was there they needed to go.

Chair Parnell said with both cases, he wasn't sure the appeals were against the Planning Board, but were a way of stalling a project, working with the system in place. He said that was certainly the case with the second application, and said he did think it would be a good idea to get opinions from its lawyer. But he said since the ZBA was a nonprofessional board, he thought the Planning Board should be involved in the appeal.

He said whichever member of the Planning Board represented the Board during the appeal process should be extremely well prepared, stating that he had not been, and could have expanded upon Mr. Campbell's notes. He also said he thought the applicant and the Planning Board must attend the ZBA meeting when there was an appeal.

Mr. Roberts said a 20-30 page response was needed to provide an adequate argument in a situation like this, and said it would be appropriated for the Board's lawyer to do this.

Chair Parnell asked Mr. Campbell how he thought the Board should handle this, and Mr. Campbell said he would like to see the Board make a decision on this now.

Mr. Roberts suggested that Mr. Campbell should develop a proposal for this.

Ms. Fuller said she agreed there should be wording changes in the Zoning Ordinance that would help the Planning Board. She said she also thought they should decide that if another application was appealed, the Board would seek legal counsel

Susan Fuller MOVED that if in the future, a Planning Board decision is being appealed to the ZBA, the Board will hire legal counsel to represent it at the ZBA to outline its decision and why the Board made it. Steve Roberts SECONDED the motion.

There was discussion on the process of hiring an attorney in this instance, with Mr. Campbell explaining that the Board's regular attorney, who was the Town attorney, would be hired.

Mr. Roberts said he thought there should be a discussion with the Board's attorney about the Board not being served in this situation, and the fact that there needed to be a better way to work with him.

Mr. Campbell said it could have been that he had not asked the attorney the right questions.

Ms. Fuller said she thought the fault lay with the Zoning Ordinance, stating that as a third party, Mr. Mitchell couldn't necessarily interpret the outcome of Mr. Campbell's questions.

Councilor Niman asked Mr. Campbell to talk with Administrator Selig in order to see if the Town would be better served in the future if a land use attorney rather than a general practice attorney took charge of this approach. He noted that Mr. Roberts had discussed the idea of not just having an attorney render an opinion on an appeal of a Planning

Board decision, but also helping the Board fix flaws in the Zoning Ordinance. He said he didn't know if that was in the purview of Mitchell and Associates, and said perhaps a land use attorney could take that next step.

Mr. Campbell asked if Mr. Roberts wanted an attorney to go through the Ordinance and find all the ambiguities.

Mr. Roberts said he realized that was impossible, but said on this subject, the attorney should have gone through the Ordinance and found the contradictions before answering the questions.

Councilor Niman said perhaps Mr. Campbell could contact Ben Frost regarding possible language that addressed the fact that when the Zoning Ordinance contradicted itself, the Planning Board had the discretion to choose that portion, or that language most appropriate to the case before it, in which case the problems went away, and they didn't have to clean up the Ordinance.

Mr. Campbell said if there was confusion in the Ordinance, the law was that the more restrictive of the two provisions applied. But he said it was worth asking about.

The motion PASSED unanimously 6-0.

- V. Discussion on Possible Zoning Amendments** - The Planning Board will discuss possible zoning amendments including setting a public hearing date for any amendments. The possible amendments include the following:

Definitions: Creating a definition for "contiguous"

Mr. Campbell said this had become an issue with a prior Planning Board appeal, and said the wording he had included for the Board now came from Black's Law dictionary, and the latest definition for land use projects, and said he had combined them. He noted that Black's said two parcels didn't have to be touching, and could be in close proximity.

Mr. Kelley arrived at the meeting at 7:49 pm.

There was discussion on which version of Black's Law dictionary each of the people at the table were dealing with.

Mr. Kelley said perhaps two definitions were needed. He said he would prefer to see the definition in line with Black's Law, but said they could also use the words abutting or adjacent, and revise the Ordinance elsewhere accordingly.

Councilor Smith said abutters living across the street from a property were not contiguous.

There was discussion on the contiguous definition regarding forestry under RSA 483B, as

well as the definition under the excavation provisions.

Mr. Campbell said what it came down to was whether the Board felt contiguous meant that properties should touch at some point. He said if they did, that was the definition they should go with, but said if they instead felt his version of Black's Law definition, including "in close proximity to" made sense, they could go in that direction.

Councilor Smith said perhaps Black's definition had changed from the edition Mr. Campbell had to the edition he was looking at, because of the kind of situation they had in Durham, and that the definition was contrary to standard usage in ordinary dictionaries.

He said the definition proposed said "in close proximity to", which was not touching or contiguous as he understood the term. He said the next phrase was "near though not in contact", which meant a truck could be driven through the definition. He said the same thing could be said about "abutting", and said the definition finally got there with "touching".

Jim said the definition from Black's law came to him in 2007 from the Town attorney. There was discussion.

Councilor Niman said the issue seemed to be that in today's world, there were human made artifacts/legal constructs like right of ways, easements, etc, and said the question was whether if such an artifact was created and the pieces of land no longer touched, that changed whether the parcels were contiguous or not.

Ms. Fuller said she liked the definition Mr. Campbell had provided.

Mr. McGowan said a question was whether or not the Board wanted to allow two parcels to be combined for building purposes.

Councilor Smith said it wasn't a matter of not wanting development, and noted that in the recent case, there was a transfer of density from one property to another.

There was discussion that the easement involved had been in favor of the owner of the two parcels, over the land of the abutting open space.

Councilor Smith said he would like "near, though not in contact" removed from the definition.

Ms. Fuller said if one considered that right of way, it was a bundle of ownership, and was a contiguous part of that ownership.

Councilor Smith said if the right of way provided a contiguous relationship, then those two parcels were contiguous, if the right of way could be seen as something owned by the owner of the two parcels.

Mr. Roberts said Black's Law was the reference used in the Findings of cases.

Mr. Campbell said what it came down to was that the Board didn't want someone to find a way to get around the definition it decided on, and said the definition should therefore be as clear and concise as possible.

Chair Parnell said the only way to do that was to say contiguous meant that the properties were touching.

Mr. Kelley said an issue was whether they had the liberty as a town to come up with their own definition.

Chair Parnell said given the history of this item, the Board was at liberty to make something as definitive as possible. He said the only way to do this was to say that two properties had to be touching.

Mr. McGowan said a question was what kind of configuration they were looking for, noting that two triangular properties could touch each other at a point.

Mr. Roberts said in the instance in question, there was a permanent easement that made it contiguous by use, but said the parcel by ownership wasn't contiguous.

Mr. Kelley said the ruling by the Superior Court hadn't addressed that issue. He suggested that the Board should ask its attorney whether it could create a definition of contiguous that might not be in complete agreement with what was in Black's Law.

Councilor Niman said the issue was what they were trying to accomplish. He said with the case in question, there had been a transfer of density, which involved properties that were close to each other, and which was an easy way to accomplish the goal without having transfer of development rights regulations in place.

He noted that during the Stone Quarry TIF discussion, there were those who said they could support the TIF if the front lots weren't developable, in order to protect the viewscape. He said the developer had said he couldn't do that, and those interested in protecting the front lot had then suggested transferring the density to the back lot.

He said a definition of contiguous then would have been helpful, in a situation where the parcels weren't necessarily touching, but represented a social good rather than a social harm. He said the issue was whether they wanted to provide an easy way to shift density between parcels in close proximity to one or another, or if they wanted a more stringent requirement where they had to be touching, which then reduced the ability to transfer density.

Mr. Kelley said that seemed to be an entirely separate issue. He said perhaps the Board was going about this the wrong way, and said perhaps they needed to change the definition of lot, by striking the word "contiguous" in it.

Mr. Roberts suggested that they use Black's Law definition, and if the definition then changed again in that dictionary, the Board could change it's definition again as well. He also said he agreed that there should be transfer of density to allow more flexibility.

Councilor Smith said the concept of transfer of density was a separate issue, which they should do something about.

Mr. Campbell read the wording of the definition of "contiguous" in Black's Law Dictionary: "in close proximity; near though not in contact; neighboring, adjoining, near in succession, in actual close contact, touching, bounded, or traversed by."

Mr. McGowan said there was still the question of who had the final say, if there were different interpretations of the word by an applicant, the Planning Board, and the ZBA.

Councilor Niman said the words in the definition would provide the flexibility. He said what the ZBA had been saying was that there were no words in the Ordinance for what contiguous meant. He said if the Board, with this definition, said there were all these different situations that applied, he didn't think the ZBA had the authority to pick and choose between them.

Bill McGowan MOVED to go with the definition of "contiguous" in Black's Law Dictionary Susan Fuller SECONDED the motion, and it PASSED 6-1, with Councilor Smith voting against it.

Bob Doty, 12 Adams Circle, said that on the appeal of the 99 Madbury Road application, the Superior Court had identified a different definition of what "contiguous" was, in Black's Law dictionary from 2004. He said this was in the Court order.

There was further discussion on what the most recent copy of Black's Law Dictionary said, concerning the definition of "contiguous".

Article XII, Zoning Requirements, Section 175-41(F)(2)

Mr. Campbell said what the Zoning Rewrite Committee had tried to do with this provision was to not allow a car to come in to the front of the lot and pass between the front property line and front wall of the building, because this area was supposed to be for pedestrians. But he said it did not pertain to having an access to the property. He said with this revised definition, he was trying to make it clear that there could be an access allowed to the property in front.

Mr. Roberts asked how this proposed change related to the Cumberland Farms property, and Mr. Campbell said that property was in the Courthouse District, and the only prohibition there was parking in front of the building. He said it was only in the Central Business District and Professional Office District where the vehicular access provision was found.

Mr. Kelley asked if the intent of the Ordinance was to place the driveway to one side or the other of the principle building.

Mr. Campbell said the intent was to cut down on the chance of a pedestrian coming upon a car in that front area, and said those front areas were supposed to be for pedestrians more than anything else. But he said it wasn't meant to say that there couldn't be access to the property.

Mr. Kelley said he had struggled with the ZBA's finding on this. He said the approved site plan showed a new driveway passing between the front wall of the building and the front property line on Jenkins Court. He said he didn't see how one didn't do that unless they put the driveway on one side or the other of the building. He also said if one was so inclined to have a building with underground or structured parking, a question was where the principle building ended.

Mr. Roberts said he thought the Board should recommend no new vehicular access except by Conditional Use.

Mr. McGowan asked where in the downtown there would actually be access running parallel to the property line.

Mr. Kelley noted that this configuration would take up valuable property.

Mr. Roberts asked if there were house layouts in the Professional Office district where it was difficult to get to the parking area.

Councilor Smith said perhaps this provision should be expressed in positive terms: "any new vehicular access shall be to the side of the building". He said what they were really talking about was that any new vehicular access should be perpendicular to the street, and run to one side of the building.

Mr. Kelley said with the one-way road segments in Durham, sometimes a skewed entrance made more sense.

Councilor Smith suggested that any access between the street and side or rear of the building should be the shortest distance between the front property line and a corner of the building, and couldn't be in front of the building.

Mr. Roberts said this was an issue that was begging to be abused. He said the goal was to allow the optimum layout for safety and access, and said it didn't make sense to steer this in advance.

Mr. McGowan asked if "relocated" was the same as new.

Councilor Smith asked if there was any harm in striking the whole thing.

Richard Kelley MOVED to remove 175-41 (F)(2) for both the Central Business District and the Professional Office District.

Councilor Smith said if this was taken out, the Board would still have the option to say a driveway wasn't safe or appropriate, for instance in a case where there wasn't parking nearby. He noted that with the Jenkins Court application, the applicant had been trying to continue the parking there, but gave it up, which would probably make for a better building and better use of the site.

Mr. Kelley said if there was a new driveway, a permit was required, and safety was a paramount concern.

Councilor Smith said he didn't think the Ordinance needed to specify exactly how any new driveway should be laid out, or where it should be laid out. He said no one in his right mind would have a driveway between the front property line or the sidewalk and the front of the building. He said he supported the motion.

The motion PASSED unanimously 7-0.

Article XII, Zoning Requirements, Section 175-56(A)

Mr. Campbell said when the Board applied the density allowance for the 99 Madbury Road project, it had applied it for 100% of the development, including the 20% that could be non-age restricted. He said the ZBA had disagreed with the Board on this. He said he disagreed with the ZBA's interpretation, but said to make things as clear as possible, he had added the words "to the entire development" to 175-56(A)(1).

Susan Fuller MOVED to add the language "to the entire development" to the end of 175-56(A)91). Councilor Smith SECONDED the motion, and it PASSED unanimously 7-0.

Article XXI, Off Street Parking and Loading, Section 175-116

Mr. Campbell said he had added the word "surface" to the provision: "All surface parking areas for over five (5) vehicles shall meet the following conditions..."

Mr. Parnell said he thought the wording "all surface and uncovered parking" should be used, stating that surface parking could also be covered.

Mr. Roberts said the definition of structured parking in the Ordinance needed to be changed. He also said if it had been changed to say "any structure primarily for the parking or garaging of 5 or more vehicles that is not surface parking", the distortion would not have occurred.

He said the landscaping clause was designed to deal with a dedicated structural parking

facility, but said when there was a building where structured parking was not the primary use, it shouldn't be treated purely as a parking facility. He said this had occurred with the Jenkins Court application appeal, which twisted the whole idea of what the building was used for and how it should be treated.

Mr. Campbell said a structured parking facility could have other uses besides parking. He said he was trying to get his hands around what the landscaping/exterior screening was for.

Mr. Roberts noted that landscaping was not a part of the definition of the Central Business District.

Mr. Kelley said he was fine with the proposed change.

Mr. Roberts said he wasn't against doing that, but said he did think the definition of structural parking should be cleaned up, to say "any structure primarily for the parking or garaging of 5 or more vehicles that is not surface parking".

Richard Kelley MOVED to add the word "surface" to 175-116, to read "All surface parking areas for over five (5) vehicles." Susan SECONDED the motion.

There was discussion about possible additional language regarding uncovered parking, with Chair Parnell stating that it could otherwise be ambiguous. He said there could be surface parking on a building's roof, but said what they were referring to was an outside parking area that required landscaping.

Mr. Campbell noted that uncovered parking was in the definition of surface parking, and it was agreed that there was therefore no need to amend the motion.

The motion PASSED unanimously 7-0.

Steve Roberts MOVED to modify the definition of structural parking by adding the word "primarily" after the word structure.

He said doing this would exclude all the little parking garages at apartment complexes, etc. He said it would apply in all districts where structural parking was allowed, and noted that he had seen this distinction made in Concord, Manchester and Portsmouth.

Mr. Campbell noted that structured parking was allowed in all zones except the residential districts.

Ms. Fuller SECONDED the motion, and it PASSED 6-0-1, with Richard Kelley abstaining.

Article XXI, Section 175-117(A)(2)

Mr. Campbell said administrative gloss went back 8 years on this provision. But he said the wording he was recommending was: “A written construction permit application must be obtained from and filed with the Durham Public Works Department by any abutter intending driveway work as per Subsection A(1) above. Said permit shall have been reviewed and a construction permit issued prior to any site plan review approval or building permit approval.”

Mr. Campbell also suggested that the word “final” could be included, to read “..prior to any final site plan review approval..”

Mr. Kelley noted that the ZBA had said that if the drafters of the Ordinance meant the provisions to mean prior to site plan or building permit approvals, they could have done so. He said perhaps the provision just needed to say “prior to any site plan or building permit approvals“. He said the word “review” was what the ZBA had gotten hung up on, and had looked at site review as starting the process. He said the Board understood that an applicant couldn’t invest all the time up front on getting the driveway permit, and the DPW couldn’t invest the time either.

Richard Kelley MOVED that the wording of Section 175-117(A)(2) read “Said permit shall have been reviewed and a construction permit issued prior to any site plan or building permit approvals.”

It was noted that the wording Mr. Kelley had quoted was from the abutter who had appealed the decision. But Mr. Campbell said the ZBA had obviously agreed with the abutter’s argument on this issue.

Mr. Kelley said he thought Mr. Christie had provided the solution.

Ms. Fuller agreed that the word review should be taken out. But she said she liked having the word “final” in the provision.

Mr. Kelley said he was fine with having this be a friendly amendment to his motion.

Richard Kelley MOVED that the wording of Section 175-117(A)(2) read “Said permit shall have been reviewed and a construction permit issued prior to any final site plan or building permit approvals.”

Mr. Kelley said what they were trying to accomplish here was to allow themselves to put in conditions of approval for an approved driveway permit.

Mr. Campbell said the final site plan approval was when the Chair signed off on the plan, after the conditions were filled.

Chair Parnell asked if this could be done before the driveway permit was obtained, and Mr. Campbell said no.

Mr. McGowan asked if it should say “site plan approval or building permit approval“, in other words, one or the other.

Mr. Roberts said the Board would like to think that the driveway proposal and construction proposal would be reviewed by the Planning Board, and the driveway permit would be to the satisfaction of the DPW before the issuance of a building permit. He said the whole thing wasn’t approved until the plans were signed, but the abutter wouldn’t accept that. He said the question was how to make this crystal clear.

There was further discussion, including discussion about Councilor Smith’s suggested wording: “prior to the final approval of any site plan or building permit.” Mr. Kelley withdrew his motion, in favor of Councilor Smith’s wording, and also suggested that the wording should say “approval of the site plan or building permit”, not “approval of any site plan or building permit.”

Richard Kelley MOVED that the wording of Section 175-117(A)(2) read “Said permit shall have been reviewed and a construction permit issued prior to the final approval of the site plan or building permit.” Councilor Smith SECONDED the motion, and it PASSED unanimously 7-0.

VI. Other Business

A. Old Business
None

B. New Business

1.Request for Extension on Conditions of Approval for the Subdivision at 51-53 Durham Point Road submitted by Katherine Paine

Mr. Campbell said there had been two extensions so far. There was discussion on the conditions that had to be met. He said the hold-up was that Ms. Paine was trying to broker a deal with the Nature Conservancy to conserve some of the land. He said the conditions were separate from this process.

Richard Kelley MOVED to grant an Extension of six months on the Conditions of Approval for the Subdivision at 51-53 Durham Point Road at the request of the applicant, Katherine Paine. Councilor Smith SECONDED the motion, and it PASSED unanimously 7-0.

Mr. McGowan asked how long extensions could be granted, and there was discussion. Mr. Campbell said if there was another request for an extension in the future, he would ask Ms. Paine to come speak to the Board.

2.Request for Extension on Conditions of Approval for the Site Plan of 90 Bennett Road submitted by Stephen Lamb

Steve Roberts MOVED to grant a six month Extension on the Conditions of Approval for the Site Plan of 90 Bennett Road submitted by Stephen Lamb. Councilor Smith SECONDED the motion.

There was discussion that the Lambs were working hard on the project, and were within days of completion.

The motion PASSED unanimously 7-0.

Councilor Niman left the meeting at 8:54 pm

VII. Approval of Minutes

July 8, 2009

Page 1, It should be noted that Bill McGowan and Councilor Niman were not at the meeting. Also bottom paragraph, should read: "He explained that Durham's rules for bikes in Town were somewhat different than the University's.."

Page 2, 2nd full paragraph, should read "...community development."

Page 3, 3rd paragraph, should read "The board agreed to open the Public Hearing on the application that evening."

3rd paragraph from bottom, "...they wanted to create a new, handicap accessible entryway..." - remove comma after new

Bottom paragraph, should read "...would prevent the current sheet flow from leaving the site." Last sentence should read "...there would be treatment for this water as well."

Page 4, 4th paragraph from bottom, needs period at the end.

Page 6, **Suggestions were made to change the wording of these conditions, but I got these directly from the Planning Office. I did not get them from the meeting itself. I therefore did not include these corrections here.**

Page 11, after the motion at top of the page, it should be noted that Mr. Roberts returned to the table.

Page 17, 3rd full paragraph, should read "...enough of a code compliant walkway.."

Page 20, 2nd full paragraph, should say "Joe Caldarola"

Page 23, 1st full paragraph should have one period at the end.

Page 24, under Approval of Minutes, delete "Should say the meeting adjourned."

Richard Kelley MOVED to approve the July 8, 2009 Minutes as amended. Susan Fuller SECONDED the motion, and it PASSED unanimously 6-0-1, with Bill McGowan abstaining because of his absence from the meeting.

July 22, 2009 Minutes

Page 1, under Members Absent, should say Councilor Neil Niman

Page 3, 7th full paragraph, should read: "Regarding Note #10 on the site plan..."

Page 7, 2nd paragraph, should read "...correspondence from Code Administrator.."

2nd paragraph from bottom, should read "...with Mr. Campbell noting that this..."

Page 9, after wording on the Break from 8:11-8:23 pm, it should say that "Ms. Fuller returned to the table."

Bill McGowan MOVED to approve the July 22, 2009 Minutes as amended. Susan Fuller SECONDED the motion, and it PASSED 5-0-2, with Steve Roberts and Richard Kelley abstaining because of their absence from the meeting.

VIII. Adjournment

Susan Fuller MOVED to adjourn. Julian Smith SECONDED the motion, and it PASSED unanimously 7-0.

Adjournment at 9:13 pm.

Victoria Parmele, Minutes taker