

These minutes were approved at the December 9, 2009 meeting.

**Durham Planning Board
Wednesday November 4, 2009
Durham Town Hall - Council Chambers
MINUTES
7:00 pm**

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

ALTERNATES PRESENT: Wayne Lewis; Kevin Gardner

MEMBERS ABSENT: Councilor Neil Niman

I. Call to Order

Chair Parnell called the meeting to order at 7:07 pm.

II. Approval of Agenda

Councilor Smith MOVED to approve the Agenda. Bill McGowan SECONDED the motion, and it PASSED unanimously 7-0.

III. Report of the Planner

Mr. Campbell noted a stack of material in front of Board members that didn't make into their packets regarding the Mill Plaza parking application:

- Letters from abutters
- Letter from Scott Hogan, representing the abutters
- Letter from Attorney Ratigan, representing the applicant
- Request for an opinion from the Planning Board's attorney
- Email from the Board's attorney in response

Mr. Campbell said the charrette that had been planned would start the following day. He provided details on the schedule, and said the public was welcome to attend all of the sessions. He noted among other things that design pinups would be available on Friday and Saturday evenings, and said the public was welcome to come see them and provide comments on them.

IV. Continued Public Hearing on an Application for Site Plan Review submitted by Douglas Greene, Kittery, Maine, on behalf of Colonial Durham Associates, New York, New York, to operate a Mexican restaurant in the existing rental space formerly occupied by The Movie Stop. The property involved is shown on Tax Map 5, Lots 1-1, is located at Mill Road Plaza, and is in the Central Business Zoning District.

Mr. Greene spoke before the Board. He noted that, as requested, he had submitted a drawing that showed the parking scenario and the existing and proposed conditions. He said the dimensions in question pertained to space out front. He said the proposed patio seating would be similar to the seating for the ice cream stand.

He said the existing fire lane was 8 ft wide, and the effective drive lane was 22 ft wide, for a total of 30 ft from the parking area over to the sidewalk. He said moving into the existing 8 ft travel lane would leave the 22 ft drive lane in tact. He said Chief Landry had told him he liked to see a 20 ft minimum drive lane to allow maneuvering, and said the 22 ft that would exist would be adequate.

Mr. Campbell said when Main Street was redone between Pettee Brook and the railroad tracks, those travel lanes were each 11 ft wide, for a total of 22 ft.

Mr. Greene said Chief Landry had said placing bollards, concrete planters, etc. similar to what was done for the ice cream stand would be good, and said he intended to do this.

Ms. Fuller asked if this would come out further than the ice cream place did, and Mr. Greene said it wasn't comparable, noting that the space was different because of the bump-out of the building itself.

Councilor Smith said the building was wider at that point, and noted that traffic had managed to get around the patio at the ice cream place.

Ms. Fuller asked if parking would therefore not be lost, as had happened in front of the ice cream place, and Mr. Greene said that was correct.

Mr. Kelley said this was the information he had asked for, and thanked Mr. Greene.

Mr. Ozenich and Mr. Kelley noted that the distance they had measured between the ADA parking space and the proposed patio was 16 ft.

Richard Kelley MOVED to reopen the Public Hearing on an Application for Site Plan Review submitted by Douglas Greene, Kittery, Maine, on behalf of Colonial Durham Associates, New York, New York, to operate a Mexican restaurant in the existing rental space formerly occupied by The Movie Stop. The property involved is shown on Tax Map 5, Lots 1-1, is located at Mill Road Plaza, and is in the Central Business District. Richard Ozenich SECONDED the motion, and it PASSED unanimously 7-0.

Tim Horrigan, 7 Faculty Road, said he was not speaking in favor or against the application. He said that regarding handicap parking, the State required a minimum of 7 handicap spaces here, and the parking plan had accounted for 12, so there were no legal issues with this. He noted that the handicap spaces had to be reasonably close to the entrances, and said this requirement had been met as well. Mr. Horrigan also said this project did not require expansion of the parking lot.

Hillary Scott, 20 Davis Ave., noted that she was not speaking in favor or against the application. She spoke about the fact that 7 parking spaces would be removed over time, with the restaurant expansion. She then said she would like to make sure that the existing path from Main Street was considered in terms of traffic flow. She said on that hillside, there were stone benches that were built there to build community, and noted that there were bonfires held in that area as a community event around Christmas time. She said she didn't know if that would affect the conditions of approval.

Mr. Campbell said this was also where the Main Street used to have events.

Ms. Scott asked what the appropriate avenue was for members of the public to bring forward questions or suggestions for the Planning Board about procedure.

Mr. Campbell said these questions could be brought to him, Chair Parnell or Administrator Selig, in person, in writing, by email or by phone.

Herman Ejarque said he was a former long time resident of Durham and a friend and associate of Mr. Greene, and he spoke highly of him as a person and as a creative business person. He said his plan for La Paz was excellent, and said Durham could use some exciting restaurant options. He noted that he was in the restaurant business himself, and had spoken with Mr. Greene about this plan. He encouraged the Board to approve the project.

Councilor Smith MOVED to close the Public Hearing. Richard Kelley SECONDED the motion, and it PASSED unanimously 7-0.

It was noted that draft Findings of Fact and Conditions of Approval had been provided at the previous meeting. Mr. Campbell noted that Finding of Fact #7 should indicate that the public hearing was continued on November 4th.

Mr. Kelley said the Findings of Fact should also be modified to include the roadway dimensional analysis submitted by the applicant.

Mr. Campbell said that regarding Condition of Approval #1 to be met prior to signature, if the Board was going to be waiving Site Plan Regulations 7.02 (D) for the surveyed site plan, it should say that the applicant would supply one paper copy for signature, rather than the mylar.

Chair Parnell said the Board needed to vote on the waivers the applicant had requested.

Richard Kelley MOVED that at the request of the applicant, the Planning Board waives Site Plan Regulation 7.02 (D) for a surveyed site plan, and 9.03 for a storm water drainage analysis. Councilor Smith SECONDED the motion, and it PASSED unanimously 7-0.

Mr. Campbell suggested that there be a condition that the building addition would in no

way block the walking paths behind the buildings.

Councilor Smith said the diagram indicated this, and the site walk had as well. He said he didn't see how there could be any blocking of the path up to Main Street, or any interference with the site of the bonfire.

Mr. Gardner agreed that this shouldn't be an issue, given the plan being submitted.

Mr. Campbell agreed that the plan showed that the pathway wasn't hindered at all.

Chair Parnell said the Conditions of Approval should mention that the Fire Department had, or would be approving the usurping of the fire lane.

Mr. Campbell said the Board could have the Fire Department submit something in writing on this. He suggested the following language to Condition of Approval #2 to be met prior to signature: "...and in addition, the Fire Department will supply a letter in the affirmative for the use of the fire lane in front of the building."

Mr. Campbell noted that in regard to Condition of Approval #2 to be met subsequent, the Town Engineer had requested that the as built construction drawings, plan and profile of the infrastructure improvements would be submitted to the DPW.

Mr. Kelley asked if the applicant had reviewed the Findings of Fact and Conditions of Approval.

Mr. Greene said he had seen it previously, and he looked at it again. He noted that the request by DPW regarding the as built construction drawings, plan and profile was new, but said he was ok with this.

Conditions of Approval - to be met prior to signature

1. The applicant shall supply one paper copy for signature by the Planning Board Chair.
2. The Fire Department shall approve the sprinkler system analysis and final design, and in addition, the Fire Department will supply a letter in the affirmative for the use of the fire lane in front of the building.
3. The applicant shall run a water model through Underwood Engineering.
4. The applicant shall secure a new wastewater permit from the Town Council.

Conditions to be met subsequent to signature

1. These "Findings of Fact and Conditions of Approval" shall be recorded with the Strafford County Register of Deeds at the applicant's expense.
2. As built constructions drawings, plan and profile of the infrastructure improvements at a scale of 1" to 20' shall be submitted to the Department of Public Works showing all underground utility tie-ins.

Richard Kelley MOVED to approve as amended this evening the Application for Site Plan Review submitted by Douglas Greene, Kittery, Maine, on behalf of Colonial Durham Associates, New York, New York, to operate a Mexican restaurant in the existing rental space formerly occupied by The Movie Stop, for the property shown on Tax Map 5, Lots 1-1, located at Mill Road Plaza in the Central Business District. Councilor Smith SECONDED the motion, and it PASSED unanimously 7-0.

- V. Continued Public Hearing on an Application for Site Plan Review** submitted by Daniel Sheehan, Durham, New Hampshire on behalf of Colonial Durham Associates, New York, New York, to expand the Mill Plaza Parking to create an additional 28 spaces. The property involved is shown on Tax Map 5, Lot 1-1, is located at Mill Road Plaza and is in the Central Business Zoning District.
- VI. Continued Public Hearing on an Application for Conditional Use Permit** submitted by Daniel Sheehan, Durham, New Hampshire on behalf of Colonial Durham Associates, New York, New York, to expand the Mill Plaza Parking to create an additional 28 spaces. The property involved is shown on Tax Map 5, Lot 1-1, is located at Mill Road Plaza and is in the Central Business Zoning District.

Chair Parnell asked the applicant if he would like to address the Board before continuing the public hearing.

Attorney Ratigan, representing the applicant, noted that at the last meeting, there were some housekeeping items that had been brought up. He first said they had supplied a legal opinion to address some Ordinance interpretation issues.

He said another item was a request for a professional planning analysis, and said Mr. Farwell would address the questions raised concerning this.

He said the last issue was in regard to the La Paz approval. He said the October 23rd memo from Tom Johnson on the number of parking spaces should include the additional 41 parking spaces approved in conjunction with the La Paz plan. He reviewed the numbers:

- Total minimum spaces required, not including the restaurant, is 310 spaces; 10% overage allows an additional 31 spaces, for a total of 341 spaces.
- La Paz requires 41 spaces (instead of 7 required for the Movie Stop) for a net increase of 34 spaces, bringing the total spaces required to $310 + 34 = 344$ spaces; 10% overage allows an additional 34 spaces, bringing the total to 378 spaces.
- Total spaces on the site currently is 349 spaces. With the La Paz restaurant moving in, there will be a loss of 7 of the existing 349 spaces at the Plaza, bringing the number of spaces that exist down to 342.

- 378-342 = 36 more spaces allowed, according to the Ordinance. The applicant is requesting 28 new spaces, which is within the 10% margin allowed.

Attorney Ratigan noted that these were the numbers Mr. Johnson had arrived at. He said the applicant met the requirements of the regulations.

Mr. Farwell next read the memo he had written. He said that regarding the idea of re-striping the parking lot for compact spaces, there were fixed raised islands that created a fixed width of 126.8 ft for rows of parking. He said this would not allow re-striping in order to obtain an additional row of parking, because the width required for 5 rows of compact parking was 146 ft.

He said additional spaces could be developed by creating narrower 8 ft spaces, and said with a row of 20 spaces that were each 9 ft wide, 2 spaces could be obtained with re-striping. He said the entire row of 20 spaces would be for compact cars only, but said the problem was that if regular cars used these spaces, this would impact the row next to it, negating the benefits of creating the additional parking.

Mr. Farwell noted that he had created a sketch of what he was talking about, and said the applicant had reservations about creating such small parking areas that would only be for compact spaces. He also said they couldn't get all of the additional 28 spaces they wanted just from having compact parking spaces.

Mr. Gardner asked Mr. Farwell if he had looked more holistically at the parking lot. He noted as an example that if the islands were taken out, this would free up a lot of space that was currently not being used.

Mr. Farwell said those islands were seen as a constraint. He said the applicant had considered re-striping rather than reconstructing the parking lot.

Councilor Smith asked if there had been consideration by Plaza management, or a recommendation by Mr. Farwell that they speak with the Fire Department about elimination of the fire lanes and converting those areas into short term parking, relocated handicap parking, etc. He said he thought the Fire Department might be amenable to this. He noted that right now, those fire lanes tended to be used for illegal parking.

Mr. Farwell said they had not looked at this scenario.

Mr. Roberts said there had been much public comment on the use of the rental spaces as being an unapproved use. He asked if the applicant had any response regarding this.

Attorney Ratigan noted that he had provided written comments on this, and he summarized them. He said the Table of Uses in the Zoning Ordinance identified surface parking and surface parking facilities as permitted uses in the CBD. He said this was ground level parking, which was how the Ordinance would describe a parking lot such as the Mill Plaza lot.

He said the Ordinance also distinguished between buildings and structures, and noted that structures could be parking. He said the question had arisen as to whether the leased spaces were lawful under the Ordinance. He said what was involved here was a change of use of a structure, and said there was no mention of a structure, as compared to a building, having to come before the Planning Board for site plan review.

Attorney Ratigan also said the Ordinance said a parking structure was allowed as an accessory use, and had to have a meaning going along with but subservient to the principal use. He said it didn't make a distinction as to how the space was used, whether as leased space, etc. He said he didn't see anything in the Ordinance that said site plan review was needed for this, or that leased space was illegal. He also noted that the 28 leased spaces weren't before the Planning Board anyway, in that they were only seeking to expand the parking.

Attorney Ratigan noted that there were a lot of leased spaces in the Central Business District, and those spaces had never come before site plan review, and hadn't been characterized as something that required site plan review.

Councilor Smith noted that Attorney Ratigan spoke about the 370 spaces allowed at the Plaza. He said he didn't recall discussions on how many spaces were allowed in the 1970s during the second stage of the Plaza, but he said there was detailed discussion on how many spaces were required, based on the square footage of the building, for customer and employees.

He said the Plaza management and owners asked for and received permission to pave fewer than the required spaces, with the stipulation that the additional required spaces would be paved when there wasn't adequate parking for customers and employees. He said when Zyla's closed down and the Fitness Center opened, there was a greater need for parking.

But he said the Plaza had enough parking to accommodate them, and was still renting additional spaces. He said it was important to pay attention to how many spaces the Planning Board believed the applicant should be required to have for customers and employees, rather than how many were allowed.

Attorney Ratigan said many business owners there had said more parking capacity was needed to support their businesses. He noted the new Mexican restaurant, which would demand parking and which could impact other businesses.

Councilor Smith said the previous week he had spoken with John Pinto, who asked him where new parking could be put.

Councilor Smith said he had reminded Mr. Pinto that the Grange on Main Street, which was owned by the Town, could be purchased and would make good access to a parking deck above surface parking. He said there were other options, when it became obvious

that more parking was needed for the Plaza.

Mr. Ratigan said he was sure the signals the Planning Board gave to the business community would inform their decisions on investment matters.

Councilor Smith MOVED to reopen the Public Hearing. Richard Kelley SECODNED the motion, and it PASSED unanimously 7-0.

Chair Parnell encouraged members of the public who had not spoken before to speak first, and those who had spoken previously to be brief. He noted that there had been many comments and many letters so far, some of them repeating what had already been said. He said the Board would be interested in hearing new ideas.

Chair Parnell asked those people in favor of the application to come forward. There was no response, and he then asked those who were against it or who had concerns about it to come forward.

Annamarie Harris, 56 Oyster River Road, said she had lived in the Faculty neighborhood and shopped at the Plaza since 1969, and had never had any difficulty parking close to the stores. She said the request for more parking was completely unnecessary, and also said the approved plans indicated that the parking spaces were intended for customers at the Plaza, not for rental.

She said she believed they had just missed an opportunity to require a site plan review, noting that the La Paz had asked to expand the building size. She urged the Board to consider moving reconsideration of the restaurant application, based on the fact that it was being expanded.

Ms. Harris noted that when the Pettee Brook lot was reconfigured several years ago, the goal was to maximize the number of spaces. She said the plan that had worked best was diagonal parking off a one way travel lane. She said the width of the travel lane there was 16 ft rather than the 26 wide lanes at the Plaza. She also said the individual spaces were smaller. She said the travel lane in front of the ice cream place at the Plaza was 16 ft wide.

She said professional redesign of parking at the Plaza would provide substantially more spaces on the existing site without encroaching on the buffer the community valued very highly. She said she had been on the Planning Board for 10 years, and said she thought the time was right to require site plan review\ with a revised parking plan that included the existing conditions as well as the recommendations of the Mill Plaza Study, which emphasized protection and enhancement of the buffer.

Councilor Robin Mower, 11 Faculty Road, said with the leaves off the trees, she had the best view of the Plaza of anyone in Town. She said a camera focused on the Plaza from her house would never find the parking lot full, either in the past or present. She said there would be plenty of spaces for any restaurant there, and said they would be in

trouble if they creating parking spaces in anticipation of business.

She said there was considerable question of the legitimacy of the claim of the applicant that more spaces were needed for customers and tenants, irrespective of the non-conforming use for 28 rented spaces. She said given that question, some residents had wondered if there was a hidden agenda, and she suggested that the burden of proof of need remained squarely on the applicant. She said no empirical data had been provided on this.

Councilor Mower said the overarching constraint remained that if a Conditional Use permit was to be granted, it had to meet the Conditional Use criteria, and also had to rise to the purpose of Conditional Use and the Ordinance itself. She said the purpose of the Zoning Ordinance as a whole was "...to regulate the use of land for the purpose of protecting the public health, safety, convenience and general welfare of the residents of Durham."

She said she had read Section 175-21 on Conditional Use permits to a lawyer at the Local Government Center, who, although she didn't have the entire Zoning Ordinance before her, had agreed with her own interpretation that one clause in it that reflected the entire purpose of the Ordinance, that the Planning Board must be convinced that by granting a Conditional Use permit, it would "...ensure that the Conditional Use will have a positive economic, fiscal, public safety, environmental, aesthetic, and social impact on the town."

Councilor Mower said it would be difficult for the Planning Board to make this argument for this application, and it therefore must reject the application. She noted that her earlier letter to the Planning Board suggested that the Board should encourage the applicant to return with a proposal that acknowledged the values of the community that had supported his business for decades.

Attorney Scott Hogan, representing 8 abutters, said the applicant had the burden to demonstrate the need for what was being requested, and that there were no feasible alternatives. He said the engineer had indicated why a re-striping could not achieve 28 spaces, but he said there were 28 spaces ready and available for use for customers, tenants and employees.

He said this was a change of use, and said the consulting planner in 2002 had said it was unlawful and unapproved. He said that issue was one of the basic background issues of the application. Attorney Hogan also noted that he had previously said the Board had no authority to approve an application that violated the Zoning Ordinance.

Attorney Hogan said what the applicant had just said was that re-striping was one thing, vs. reconstruction of the parking lot. He said the implication throughout was that they didn't want to explore other options, like taking out medians, and redesigning the lot rather than re-striping. He said there was a different cost to the applicant of doing something like this.

He said having read every letter submitted to the Board, the applicant's expressed need for the spaces defied everyone else's experience with this Plaza, including his own, since 1985. He said it was hard to find parking some places in Durham, but not at Mill Plaza. He said if they stopped leasing 28 spaces, there was no basis for the request. He said even if there was, the applicant had to prove there were no feasible alternatives. He said there was no way the burden of proof had been met on these things.

Attorney Hogan noted that the Board attorney's legal opinion had been rendered, and he asked that it be shared, and that there be a discussion on it before the public hearing was closed.

He said there were any number of reasons why the Board must deny this application, in addition to clearly violating the Zoning Ordinance. He said there was the 70 ft buffer, which a previous Planning Board had determined was appropriate, and beyond that, the unlawful bulldozing that was not remedied and the parking spaces that were proposed on a portion of that area.

Councilor Smith MOVED to release the information from the Planning Board's attorney. Richard Ozenich SECONDED the motion.

Mr. Roberts said it was inappropriate to release it because he believed it was incomplete.

Chair Parnell said he agreed with Mr. Roberts, but said it might be a bit too late.

Mr. Roberts noted that the response from Attorney Ratigan had not been available to Attorney Mitchell, and said he should have the opportunity to weigh that argument.

Mr. Kelley received clarification that Attorney Mitchell did have Attorney Ratigan's letter before providing his response.

Mr. Gardner said it seemed appropriate to release the letter, even if it was incomplete.

Mr. Kelley said he believed the question that arose may have been initiated with him, and said he believed the Board's attorney had addressed this to his own satisfaction. He said he supported releasing it.

The motion PASSED 6-1, with Steve Roberts voting against it.

Councilor Smith read the letter out loud, which said Attorney Mitchell believed that neither attorney involved with this application had properly focused on the issue of long term leasing of spaces. He said the core facts were that the Planning Board had granted site plan approval to the property in 1978, and as part of this granted a waiver to create only 277 spaces instead of the 370 spaces required by the Ordinance.

Attorney Mitchell's letter said implicit in that was that at minimum, that number would remain available for the approved use. He said once the owner leased 30 spaces for long

term parking, these spaces were no longer available to support the uses, and from that point on, the owner had been violating the site plan approval, and apparently still was.

Attorney Mitchell's letter said absent an amended site plan approval to incorporate the second principal use, (noting he did not agree this parking was an accessory use since it was not incidental to the second principal use), the use must cease. The letter also said in order to be approved as a second principal use, the owner would have to obtain a Conditional Use permit from the Board.

Councilor Smith noted a follow-up question to Attorney Mitchell from Mr. Campbell about whether the Planning Board should not approve the application for reasons stated by Attorney Hogan. He said Attorney Mitchell's response was that right now, there was a reason not to approve it, but not necessarily for the reason described.

Attorney Mitchell's letter said to approve the plan would approve the second principal use, but he said the Board couldn't do that, since the Conditional Use had not been applied for. The letter said that without that, the Board was not in a position to approve the present plan.

Chair Parnell asked if there were any questions concerning this letter.

Attorney Hogan said this in essence was what the decision of the Planning Board was in 2002, when the consultant had advised it that this was an illegal use and that the applicant had to go through the site review process. He said beyond the 28 spaces issue, there was the question of the implication for traffic patterns, volumes, circulation and queuing that had to do with this parking lot. He said these were reasons for site plan review.

He said Attorney Mitchell's opinion indicated a Conditional Use Application was needed, and said the feasible alternative issue would come up. He said if they looked at redesigning and reconstructing the parking lot, that was a different proposal than striping, but he said this was the applicant's burden in going through that process, to talk about deficiencies concerning storm water, traffic circulation, lighting, landscaping, buffering, etc. He said it had been decades now.

He said every letter from residents showed support for the success of the Plaza, but said this had to be done according to the regulations. He said parking for the Plaza should address these things. He said for a variety of reasons, this application could not be approved in its current state.

Deborah Hirsch Mayer, 19 Garden Lane, said there had been 260 signatures last time, representing 60 streets in Durham, and said now, there were 310 signatures, representing 70 streets in Town. She noted that former Town Council and Planning Board members were on this list.

Attorney Ratigan said that in light of Attorney Mitchell's comments, he would like to continue the application to a date certain, to allow him to review this with his client in

NY, and decide whether to revise the application or proceed with it. He said this information deserved consideration. He said the public input was appreciated. He said the application should square with the regulations, and said this was the appropriate way to proceed.

Councilor Smith asked if the applicant might consider withdrawing the application in its entirety.

Attorney Ratigan said he would provide the applicant with all the possible alternatives, and said it could include withdrawing the application.

Councilor Mower asked that the Minutes note that Attorney Ratigan was out of the room when Attorney Hogan has just been speaking, and presumably did not hear part of the discussion regarding Attorney Mitchell's letter.

She then said this situation could provide an opportunity to look at the Town's parking regulations. She noted materials she had provided to the Planning Board that many in the planning community felt the type of parking ordinance the Town had was outdated, and suggested that the parking calculations for the Plaza were based on square footage and the number of employees per store, and did not take into account things like overlaps in use of stores by customers, the large number of college students, and the fact that residents walking to Mill Plaza.

She noted that the applicant had rejected the idea of requesting a waiver from the required spaces, so it might be time to look at the regulations again

Hillary Scott, 20 Davis Ave., said if the 28 spaces were not approved, she questioned why this application was before the Planning Board at all. She said Attorney Mitchell's letter spoke to this, and she asked how this had come before the Board. when this issue had been ongoing since 2002.

She said people had paid money to hire Attorney Hogan, when perhaps this application shouldn't even be before the Board. She said she hoped there was consideration of looking at outstanding issues before bringing it before the Planning Board. She also said it was disturbing that townspeople felt they couldn't be heard by the Board without hiring an attorney.

Frank McCann, 17 Oyster River Road, said he had lived in Durham since 1971, and had never seen the lot full. He said he was shocked to hear that 28 spaces were being rented secretly, and noted that there were no signs for these spaces. He said since it was a structure, perhaps the taxation on these spaces should be considered, because the use was different. He said money was being made on the property without any indication that it was occurring. He said the application should be dismissed, and said too much time and money had been spent on it already.

Larry Harris, 56 Oyster River Road, said this would be a wonderful opportunity for

the Town to re-set the bar. He said the Town could gain a great deal more if it held the owner of the Plaza accountable for his actions, and made him live up to the agreements he had made.

Hillary Scott, said she appreciated the idea of setting the bar higher. She also asked Mr. Campbell if the application checklist included a review of past illegal uses of a property.

Mr. Campbell said there was nothing on this in the checklist. He said consideration had been given to whether the application should be moved forward since it had been denied in 2002. But he said there was new material being submitted with the application, which was the stormwater drainage plan material, so it was allowed to move forward again.

He noted that people could apply for things despite legal opinions. He said he couldn't simply say that he thought something was illegal, so it couldn't move forward, He said it was important to get the legal arguments out and discuss them.

Ms. Scott asked if when this application came before him, Mr. Campbell was aware that there was no Conditional Use approval of the 28 spaces.

Mr. Campbell said he knew that the surface parking, if applied for, was a conditional use. But he said if he had thought it was illegal, and thought the application shouldn't move forward, he would have said so originally. He said he did know that spaces were being rented there, as well as in many other places in Town.

Ms. Scott noted that legal counsel had been sought that day and not earlier, and said she wondered why.

Mr. Campbell said this was requested by the Planning Board.

Beth Olshansky, 122 Packers Falls Road, said Attorney Mitchell's opinion was pretty clear regarding the 28 spaces, and said that gave them 28 new spaces. She said it was her understanding that a reconfigured proposal/plan would mean the process would have to start at the beginning with a new application.

Mr. Campbell said the Planning Board could continue the application to a date certain, but said most likely the applicant would have to come back with a new application. Ms Olshansky said she would like to see the Planning Board make a decision on this application, and then the applicant could chose to come back with a new one if he wanted.

Mr. Campbell noted that the applicant could possibly come back with the same application.

Mr. Kelley said the Board couldn't act until the public hearing was closed.

Chair Parnell noted that there had been no discussion by the Board yet.

Mr. Roberts said some of the most successful site review applications were ones where there were a great number of changes to an application as a result of public input and Planning Board input, which would be in both the public interest and the applicant's interest.

Ms. Olshansky said she would like the Town to respond to Attorney Mitchell's determination that the rental of spaces must cease.

Annmarie Harris said she was involved on the Planning Board with several applications that turned out well. But she said with the Mill Plaza property, there was a history associated with the owner/representatives for the Plaza, who had not acted in good faith on behalf of the well being and values of the community. She said in this case, it would therefore be entirely appropriate to deny this application and let the applicants come back afresh.

Joshua Meyrowitz, 7 Chesley Drive, said he appreciated the ruling from Attorney Mitchell, and said it sounded correct. But he said it neglected to mention the other important reasons the Board had heard from residents for not approving this application. He said even if the Conditional Use Permit for the 28 spaces was approved, those reasons would not go away. He asked that the Planning Board not continue this process, and instead to deny this application.

Katie Ellis, 26 Coe Drive, noted that she walked to the Plaza and had grown up in Durham, and had seen the Plaza go through many changes. She said there had been a lot of discussion about the common good, and said the people of Durham needed a vibrant Mill Plaza. She said she was in favor of that, but said the Town should require that the owner repair what was done. She said the owner should start over, and whatever was done should be for the good of the Town.

Councilor Mower asked at what point a site plan review would be required for the entire Plaza, noting the issue of the buildout for La Paz, and the planned bump-out for the bank. She said it did seem that this was an old plaza, with some grandfathering involved, but she said there should be consideration of the infringement on the buffers, stormwater issues, etc. She said she hoped the Board would keep in mind the criteria that would require that a complete site plan review should be done.

Mr. Kelley asked Mr. Campbell for guidance on this.

Mr. Campbell said it was a good question. He said even when the Plaza was approved in 1978, the Planning Board had said each use would need to go through site plan review, not that there would need to be a review for the entire Plaza. He said that was pretty much the process that had been followed.

Councilor Carroll, 54 Canney Road, asked that individual Planning Board members indicate the thinking behind their votes on applications, so the public could understand

this. She noted that there were times when this didn't happen. She said the public deserved an explanation of the reasoning behind a vote.

Councilor Smith said he appreciated what Councilor Carroll had said, but noted that when he had shared his reasons for voting against a motion at a recent Council meeting, this had resulted in questions on his reasoning, motive, etc. He said it shouldn't be surprising if some Board members didn't share their thinking, although noting that he would share his thinking on his vote.

Peter Andersen, 8 Chesley Drive, said he had spent over \$4,000 in time and money on this application. He noted that the area under consideration was RA when the Plaza originally purchased it, and said that was a factor in the original determination on the buffer.

He noted that the lighting impacts on his property from the Plaza had not been solved yet, and provided details on this.

Mr. Andersen referred to the 6 page parking study he had just provided, and summarized it. He then said the hotel/conference center wanted to have 100 valet parking spaces at the Plaza, and said this had never been brought up. He said Administrator Selig supported working with the hotel/conference center developer, and said this started around the time this whole process regarding the Plaza had started. He noted that he supported such a project as long as the regulations were followed.

He then spoke in detail on the numbers calculated by Mr. Johnson on how many parking spaces were required. He said in 2002, consultant John Harwood had come up with a need for 230 spaces, and said he himself had come up with 234-254 spaces. He also said no one had produced evidence of a shortage of parking spaces.

Mr. Andersen said the biggest reason for Mr. Johnson's inflation of the numbers was that he included in the total square footage such things as the bar area, vestibule area, area behind counter, etc, for restaurants. He questioned how Mr. Johnson had calculated 2,000 sf for the Bagelry, and also questioned how he came up with 32 parking spaces needed for Moe's and 25 spaces for Dominoes.

He also said the numbers required were not consistent, noting that when he built Wildcat Pizza, 9 parking spaces were required. He said there was a misapplication of the code, and said the numbers for the Plaza were wrong. He said he wondered why Mr. Johnson wanted to inflate the numbers so high for the Plaza, unless there was some hidden agenda.

Mr. Campbell said he knew nothing of any deals between the hotel and the Plaza, and said he didn't like to be represented like that. He said the only valet parking spots he knew were being considered were at C lot and the Depot Road parking lot, and noted that the latter would require busing back and forth.

Mr. Andersen challenged Mr. Campbell's statements on this, and there was discussion.

Councilor Mower said she had asked Administrator Selig whether there would be valet parking in C lot, and said that was exactly what they were talking about. She said she didn't think there had been discussion of valet parking at the Plaza.

Deborah Hirsch Mayer, said there was enough information, especially from Attorney Mitchell, to urge the Board to reject the application. She said if the Plaza owners wanted more parking, they could come back with a new application. She said they had all spent a great deal of time on this already, which perhaps didn't need to be spent. She agreed with Mr. Roberts that plans could get better with discussion, but said in this case, a new application should be required. She said the Plaza had heard some new ideas, and might get some as well from the charrette next week.

Peter Andersen said Mr. Johnson had no plans to enforce the parking regulations, because it would open a can of worms. He then asked that the Planning Board strongly suggest that the code enforcement official ask that the hillside be restored.

Dave Howland, 1 Littlehale Road, thanked the Board for their patience, and said he looked forward to other productive discussion.

Councilor Smith MOVED to close the Public Hearing. Richard Ozenich SECONDED the motion, and it PASSED unanimously 7-0.

Break from 9:58 to 10:07 pm

Chair Parnell said the Board would now deliberate on the application.

Mr. Kelley said he was fully prepared to deny the application, and said the reasons were pretty clear. He said his reason for denying it was the lease of parking issue. But he also said the Board should be aware of what it could lose by not continuing the application that evening.

He said he had about 6 items that would have been conditions of approval, including requiring that the applicant go for a Conditional Use permit for the leasing of parking; requiring a circulation and safety analysis to identify vehicle, pedestrian and bicycle corridors; requiring striping, marking, signage, loading and unloading zones; requiring construction of a raised multi-use path installed along the southern property line; and requiring a complete stormwater system that managed all the water in the parking lot.

Mr. Kelley said if the Board denied the application, there was no guarantee that there would be a revised application, or one that required a Conditional Use Permit. He also questioned whether this permit would be required if a new proposal did not include use of land in the buffer zone.

Mr. Gardner asked if any of this was a possibility, given the opinion of the Board's

attorney.

Mr. Kelley noted that his list of conditions was created before hearing Attorney Mitchell's opinion, and said he agreed with Mr. Gardner.

Councilor Smith said he would vote against the application, and was sorry it had come forward. He said he had watched the Plaza built 40 years ago, and was glad the Town had it. He said he was sympathetic to the management, and appreciative to them for accommodations they had made to residents who parked there and went up to Main Street to shop. He also noted that the Plaza had allowed employees of businesses on Main Street to park there.

He said he understood why the owner had been renting spaces for years, as did many businesses in Town. He said he was also sympathetic to the problems the owner had inherited when he bought the Plaza. He noted that the reason the original owners had asked the Planning Board to be able to pave fewer than the required number of parking spaces was that they didn't want to go to the expense of building parking for employees on the hillside to the north of the second building. He said building that would have been very expensive, and would have resulted in the loss of some beautiful trees, etc. But he said it was what was originally planned.

Councilor Smith said for 30 years, there had been a compromise, and a good one, that the spaces required didn't need to be paved until it was demonstrated that customers and employees needed them. He said this had not yet been demonstrated. He said he didn't see that the Planning Board was at the stage of requiring more parking at the Plaza.

Mr. Gardner said if he had a vote, he would vote no on this application. He said there was a clear rationale for voting against this, and said he agreed with Mr. Kelley that it was a simple case of inappropriate use of the spaces. But he said it was also important that the Board make it clear that they had heard what the public had to say.

He said the questionable need for parking had emerged, and noted that reality was always better than a model, in terms of what might be needed. He said the Board had heard about the value the citizens placed on the buffer zone for ecological and social purposes. He said there was a clear expression of community values, which were important for the Board to hear. He said these were all reasons not to support the application. He also said it was important to remedy unlawful activities like illegal rental spaces and plowed hillsides.

Mr. Gardner said this had been a great energizer for the Town. He then said Durham needed ordinances and a Master Plan that were proactive and worked for the people of the Town. He said if the Board was having trouble saying no to an application that went against what everyone in the Town felt, they had a problem in these documents.

He noted that there had been questioning by residents about the purpose of the upcoming charrette, as something whose results would perhaps not be paid attention to. He said he

paid attention to what people in Town said, and said it was important to change the Zoning they had in a proactive manner. He said there was a love/hate relationship with the Plaza, but said it didn't have to be this way. He said he hoped people would take their energy to the charrette, and create some positive outcomes.

Mr. McGowan said given the legal opinion the Board had received from its Attorney, it was pretty clear that this application would have to be denied. He said there was a long history with the Plaza, some good and some bad. He suggested that the parking lot should be redesigned and improved, based on recommendations from the Mill Plaza study and ideas expressed during this application process.

Ms. Fuller said she agreed with Mr. McGowan, in light of the opinion of the Board's attorney. But she said she hoped the owner would come back after considering some things he had heard from the public and the Planning Board. She said it was an old Plaza, and said one of the biggest things she had heard were safety issues.

She said the Plaza had tremendous pressure from vehicle and foot traffic, and said it would be a boon to the whole area if there was a more organized way to move people around. She noted that she wasn't sure this would be accomplished with the original walk lane that had been proposed.

Mr. Ozenich said he would vote to reject this application for many of the reasons Board members had already expressed. He also said he would like the applicant to bring what he had into compliance, and to restore the areas he had destroyed.

Mr. Roberts said he was not prepared to vote that evening. He said he didn't have confidence that what the Board's Attorney had proposed had been coordinated with the Town position on code enforcement. He also said he didn't think the Board had a way to solve the issues that had been dropped on the table.

He said the applicant was one of the Town's largest property owners, and should at least be able to respond. He said that response should be coordinated, and he provided details on this. He said he didn't see a way forward right now, and said more research was needed on this.

Mr. Lewis said if he had a vote, he would not support the applicant because of the reasons already discussed. He said more important was that the Board needed to look at issues that had been raised over and over again, including the buffer zone, tree cutting, and the need for a raised sidewalk and bike path. He said the Board owed it to the residents to figure these things out, and said at some point he would like it to discuss them and put each one to rest.

Chair Parnell said he was pleased the commercial venture wanted to expand its parking, because retail in Durham was a tough business. He said he would oppose this application regardless of what the Board's attorney had said in his letter. He noted that this recent information had now added a lot of confusion to the process, and made it

confusing as they went forward.

He said right now the Board had a site plan before it, which it could decide one way or the other on. He said when he looked at the original site plan and the as built plan, neither included the area proposed to be converted from green space into a parking lot. He said this area was environmentally sensitive, and said he had a problem with that.

Chair Parnell noted that a parking lot didn't have to be full in order to expand, and said people would go elsewhere if they couldn't find a place to park. But he said the need for more parking had not been demonstrated by the applicant.

Councilor Smith MOVED to deny the Application for Site Plan Review and Conditional Use Permit submitted by Daniel Sheehan, Durham, New Hampshire on behalf of Colonial Durham Associates, New York, New York, to expand the Mill Plaza Parking to create an additional 28 spaces, at the property shown on Tax Map 5, Lot 1-1, located at Mill Road Plaza in the Central Business Zoning District. Richard Kelley SECONDED the motion.

Mr. Campbell said he was the last person to be-labor this application. But he said he should be directed to come up with Finding of Fact and a Notice of Denial for the application, based on the reasons the Board had stated that evening. He said this would be similar to what was done in 2002. He said he therefore didn't think this should be voted on this evening, and should be voted on once those things were in place. He said this was the way things had been handled in the past.

Ms. Harris said her experience was that the motion could be voted on, subject to conditions the Board would receive at the next meeting.

Mr. Campbell said in 2002, there were draft documents the Board went over three times. He noted that this was done for approvals and denials.

Councilor Smith MOVED to amend the motion to include "and directs the planner to draft the Findings of Fact and Notice of Denial for the application." Richard Kelley SECONDED the motion.

Mr. Meyrowitz questioned the procedure, noting the procedure in 2002.

Mr. Kelley restated the amendment to "suspend the vote this evening, pending Mr. Campbell's preparation of Findings of Fact and Notice of Denial."

There was discussion that this wording was inappropriate, and that the correct wording was:

Councilor Smith MOVED to amend the motion to include "and directs the planner to draft the Finding of Fact and Notice of Denial for the application for the next meeting." Richard Kelley SECONDED the motion.

The motion to amend PASSED unanimously 7-0.

There was discussion that the Board would be voting to deny the application that evening, with the amended motion, and that Mr. Campbell would bring back the Findings of Fact and Notice of Denial for the Board to vote on at the next meeting.

Mr. Kelley said he thought there had been discussion about suspending the vote on the application that evening.

Councilor Smith said he had asked if they were going to table the motion, and the answer was no.

There was further discussion about the original motion and the amendment.

Mr. Kelley thanked Attorneys Barrington, Ratigan and Hogan, along with Mr. Farwell for conducting themselves in an exemplary manner. He also thanked Chair Parnell for his patience during this process. He then stated in response to an earlier comment from a member of the public that the site plan review had occurred for La Paz that evening, and was approved.

He then noted that the passion the Planning Board brought to an application was no different than what abutters brought. He said it wasn't true that they didn't feel that passion. He also said when it came down to weighing the merits of an application, it was the Zoning Ordinance and Site Plan Regulations they could utilize, not the Mill Plaza Study. He said this did not detract from the study, which was wonderful, but said it carried no regulatory authority.

Mr. Kelley said instead of exercising so much energy in front of the Planning Board, he believed people should try to find a way to make the plans in the Mill Plaza study work. But he said he appreciated everything the public had brought forward, and said they had provided some very specific facts that were relevant to the Board's decision.

The original motion as amended PASSED 5-2, with Steve Roberts and Bill McGowan voting against it.

Mr. McGowan said he had voted against the motion because he wanted to wait until the next meeting to see the Findings of Fact and Notice of Denial.

VII. Other Business

A. Old Business

B. New Business

Mr. Roberts said the Bellamy River and Oyster River communities were meeting with town leaders on Nov 12th at the Madbury Town Hall, with a full presentation by NHDES and the federal government on how to cope with stormwater and surface water issues. He said there were regulations proposed that could have significant implications for Durham and its Zoning Ordinance, and said it was important for the Board to understand this. He said the participants included Barrington, Dover, Durham and Portsmouth.

Mr. Kelley noted that the Lamprey River Advisory Committee provided grant funds of \$5,000 or so for studies on the Lamprey River. He said they had been doing nitrate studies, and said the results were shocking. He said the Oyster River exhibited the same level of nitrates, and noted that this was just one pollutant.

Mr. Roberts said the DPW of Portsmouth had been saying that upgrading the wastewater treatment plant wouldn't solve the problems because 60-70% of them were somewhere else that had nothing to do with the treatment plant. Mr. Roberts said a question being considered was whether there should be revised septic regulations, septic inspections, etc, and said this was what the meeting was about.

Mr. Kelley restated that the data on nitrates was shocking. He then noted that he had provided Town Engineer Dave Cedarholm with a model stormwater ordinance from New York, and said hopefully Durham could use this as part of moving forward with developing its own stormwater ordinance. He said it would make a difference with applicants coming before the Board with redevelopment projects, and would also make it easier for the Town to get NPDES permits, down the road.

C. Next meeting of the Board: November 18, 2009

VIII. Approval of Minutes - September 23, 2009

Page 1, should say Councilor Smith arrived at approximately 7:05 pm; also under Members Absent, should include Neil Niman

Page 2, 2nd paragraph, should read "...the Moher property contained..."

Same page, 7th paragraph should read "Mr. McEneaney said yes."

Page 3, 4th paragraph, should read "Ratigan" (Spell it this way throughout document)

Same page, bottom paragraph, should read "...Planning Board get a table laying out..."

Page 4, 6th paragraph from bottom, should read "...convenient for Town residents who were parking at the Plaza and going to businesses elsewhere,"

Same page, 5th paragraph from bottom, should read "...were required to be provided for customers or employees of Plaza businesses."

Page 5, bottom paragraph, should read "...to see the as built drawing and the final..."

Page 7, 2nd paragraph, should read "...about the idea of having bikeways included on paved shoulders adjacent to traveled ways, for ease of maintenance."

Page 11, 4th full paragraph, should read "...was full of boats, but now was a narrow mud hole at low tide."

Page 12, 5th paragraph, should read “Mr. Roberts said he had attended some BORWPP Association meetings, and when the idea of nominating the Oyster River had come up, he had expressed concern that the nomination might be unfavorable for the Town’s use of the river for its water supply for additional supply until the current Spruce Hill aquifer well hole project was developed.”

Same page, 6th paragraph, should read “Administrator Selig said that was his concern as well.”

Same page, 3rd paragraph from bottom, should read “There was discussion on the present high nutrient loading in the Oyster River...”

Page 14, under VIII. A should say Old Business. Also under New Business, should say “Discussion of Parking Requirements in the Courthouse District”

The paragraph below this should say “Councilor Van Asselt..”

Page 17, 2nd paragraph, should read “...He provide details on this, and noted that the Mill Plaza study report could be entered into the Master Plan and Zoning Ordinance for incorporation after the fact.”

Councilor Smith MOVED to approve the September 23, 2009 Minutes as amended. Richard Kelley SECONDED the motion, and it PASSED 6-0-1, with Richard Ozenich abstaining because of his absence from the meeting.

VII Other Business (continued)

Mr. Campbell said Perry Bryant had asked that the Board do the acceptance and public hearing for his application on the same evening. He asked the Board if they would be ok with this, and noted that he would need to send legal ads and abuttal notices soon that reflected this.

He explained that Mr. Bryant was proposing that instead of 4 additional buildings in addition to the 1 larger building, he wanted to consolidate the 4 buildings into another large building, which would have the same number of units as the other one. He said he would be asking for one additional parking space, and said other aspects of the development, including the pervious pavement and green roofs, were still planned.

The Board had no issues with scheduling the acceptance and public hearing on the same evening.

Mr. Campbell said there would also be a conceptual consultation regarding a proposed hotel. He also said there would be a Conditional Use application from the Seacoast Repertory Theatre for expansion of a non-conforming use of a performing arts facility with temporary housing for actors at the former Mill Pond property.

Chair Parnell asked if the Board would be discussing the situation regarding the letter from the Board’s attorney on the Mill Plaza parking, as well as other issues pertaining to it.

Mr. Campbell said that was why he didn’t like the Board to approve things without

having a list in front of them. He then said he would type up what had been said at the table.

Mr. Gardner suggested that the Board could be more detailed on this at the meeting, when they saw the draft Mr. Campbell had provided.

Mr. Campbell noted that the Planning Board usually didn't deny an application until it had that draft in front of it.

Mr. Roberts said before the applicant could move forward, it needed to be resolved.

Mr. Campbell said that would be taken care of. He said they would be going after everybody else.

Mr. Kelley said now anyone leasing parking would be required to come before the Board for a Conditional Use Permit.

Mr. Campbell said that would depend on what zone the parking was in. He noted that surface parking as a principal use wasn't allowed in the residential zones, so people wouldn't be allowed to do this anymore without a variance.

Mr. Roberts said Attorney Mitchell hadn't provided enough meat to counter Attorney Ratigan's argument.

Chair Parnell said this opened a can of worms, and Mr. Campbell noted that it was coming anyway because the abutters' lawyer was pushing it as an issue. He said this brought it to the forefront, and would require that the Board deal with it town-wide.

There was discussion that there were various ways to address this issue.

Mr. Kelley asked where the enforcement mechanism was, and Mr. Campbell said in terms of the Planning Board, it could request that appropriate action be taken.

Mr. Kelley said he would like to see that request in the Findings of Fact and Notice of Denial for the Mill Plaza application.

Mr. Roberts said another point was that in 1978, employees were counted as part of determining the parking requirement for a business, unless it was within 300 ft of a Town parking lot. He said this was the normal way to figure out parking spaces. He said in the late 1990's, the Ordinance was changed, and went with no employees for certain categories. He said this was a guesstimate that the conditions of Durham made it work. But he said there was an open question as to whether it would work, and he provided details on this.

Mr. Kelley said the parking requirements had been put out by the ITE, and worked off of square footage, etc. But he said this didn't take into consideration the population of the

surrounding area. He said what might be too much parking in Durham, for the same square footage of business might not be enough in Dover and Portsmouth because there were more people going in and out of stores in Dover and Portsmouth.

Ms. Fuller said with the addition of the Mexican restaurant, she thought the parking lot would be too small.

Mr. Roberts said he had done two surveys this week, at 5:30 pm in front of the market and in front of Rite Aid, and said they were absolutely full in the front, but spaces opened up beyond that. He noted that this was without 350 students who would be living downtown with no cars.

Mr. Campbell said the parking regulations in Durham had nothing to do with need, and said a certain number of spaces were required. He said the Board should take a look at this.

Mr. Ozenich suggested that the Mill Plaza application should be at the bottom of the Agenda on November 18th, because if it was first, they would never get to the other items.

Mr. Campbell said the point was well taken

There was discussion on the schedule for the upcoming charrette, and what sessions Planning Board should especially want to attend. Mr. Campbell also noted that any planning ideas could be discussed any time during the process.

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

Adjournment at 10: 20 pm

Victoria Parmele, Minutes taker

Stephen Roberts, Secretary