

These minutes were approved at the April 14, 2010 meeting.

**DURHAM PLANNING BOARD
WEDNESDAY, FEBRUARY 10, 2010
TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL
MINUTES
7:00 P.M.**

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

ALTERNATES PRESENT:

MEMBERS ABSENT: Wayne Lewis; Kevin Gardner; Councilor Neil Niman

I. Call to Order

Chair Parnell called the meeting to order at 7:05 pm.

II. Approval of Agenda

Susan Fuller MOVED to approve the Agenda. Richard Ozenich SECONDED the motion, and it PASSED unanimously 7-0.

III. Report of the Planner

Mr. Campbell noted the following documents received by the Board:

- a memo on his recent meeting with Doug Bencks
- an email from Beth Olshansky regarding the Seacoast Repertory Theatre application
- a letter from Sharon Griffin, an abutter to Seacoast Repertory Theatre
- a letter from Attorney Scott Hogan, representing an abutter to Seacoast Repertory Theatre
- a letter from Code Administrator Tom Johnson regarding the conditions of approval for the Xemed application
- The site walk minutes regarding the Xemed application
- Information on a proposed voluntary lot merger

Mr. Campbell said the EDC would meet on Friday, and would continue their discussion on business retention and expansion. He said feedback on this issue had been received from the DBA, and would be discussed at the meeting. He said the EDC would also hold a roundtable discussion with some of the local business owners on the commercial real estate market downtown.

He said the Water Resource protection subcommittee met on February 5th, and continued its discussion on proposed storm water management amendments to the site plan and subdivision regulations. He said members of the subcommittee would attend the Board's

upcoming quarterly planning meeting to discuss these changes, and said Board members would get copies of the proposed amendments in advance of the meeting.

Mr. Campbell noted that the Strafford Regional Planning Commission would be moving its offices to Rochester at some point in 2010. He also said that at the recent TAC meeting, there was discussion about regional coordination for COAST buses in southeast NH; the MPO Unified Work Program; CMAQ grant applications that would be coming due, and the Transportation Enhancement grants. He noted that Durham was #7 on the TE grants list.

He said on Friday, UNH would be holding an informational meeting on their Green launch pad initiative, noting that Kevin Gardner was involved with this effort. He said \$750,000 was received this year for the initiative, and said hopefully this would launch some local green businesses that would stay in Durham.

Mr. Campbell said he had heard back from the B. Dennis Town Design regarding their draft report, and expected to receive it on Friday. He said he would send it out to Board members as soon as he got it.

- IV. **Acceptance and Public Hearing on an Application for Site Plan** submitted by 50 Newmarket Road Inc., Portsmouth, New Hampshire for the expansion of a non-conforming use of a performing arts facility with temporary housing for actors. The property involved is shown on Tax Map 6, Lot 9-8, is located at 50 Newmarket Road and is in the Residence B Zoning District.
- V. **Continued Public Hearing on an Application for Conditional Use Permit** submitted by 50 Newmarket Road Inc., Portsmouth, New Hampshire for the expansion of a non-conforming use of a performing arts facility with temporary housing for actors. The property involved is shown on Tax Map 6, Lot 9-8, is located at 50 Newmarket Road and is in the Residence B Zoning District.

Stefany Shaheen, managing director for the Seacoast Repertory Theatre, said their attorney would give a presentation to the Board, given some of the complexities involved with the application. She said she would be happy to answer questions.

Attorney Springer said he wanted to cut to the chase first, noting that there had been ongoing dialogue and issues with the abutter. He said he wanted to first address what the applicants were willing to do to address Mr. Hiller's and other abutters' concerns. He noted that a condition of the 2009 ZBA approval for this property was that the abutters' concerns must be addressed.

He said given the size of the property, the location and orientation of the buildings, the tree cover and vegetation on the Hiller property and the distances involved, the applicants thought these conditions would fully address his concerns. He said he had seen the most recent letter from Attorney Scott Hogan, and said he thought most of Mr. Hiller's concerns were light, noise, traffic, and hours of operation. He said he would address these first.

Attorney Springer said that regarding set construction, the applicants were willing to limit

the hours to Monday -Saturday, from 9:00 -8:00 pm. He noted that Craig Faulkner, the artistic director for the Theatre, would answer questions on this. He explained that hammers and nails weren't used for construction, and that screws were used instead. He said the set construction would take place in the garage, which was part of the closest building to the Hiller property line, but was a football field away from the house, and was perpendicular to it. He said the applicants would agree to close the doors to the garage whenever possible. He said it was felt that these things would address the abutter's concerns, and also noted that the applicants had to abide by the Town's noise ordinance.

He said regarding hours of operation, that they would agree to limit activities to the following. He said the youth camp could operate from Monday through Friday from 8:30 am to 6:00 pm, and dance classes, recitals, black box productions, and play and poetry readings could be held from 8:30 am to 11:00 pm on Monday through Saturday and from 8:30 am to 8:00 pm on Sunday.

Attorney Springer explained that a black box production was a scaled down play, involving fewer people, a smaller audience, and less elaborate sets. He said he had read several letters from Attorney Hogan, some of which contained the 24-7 argument. He said these had been the hours of operation during the Mill Pond days, including when Mr. Hiller bought his house. He said what the applicants were agreeing to now was significantly less than what had existed under the prior use, but he said Attorney Hogan had never acknowledged this.

He said the applicants felt that onsite parking was sufficient for their activities, and agreed that when there was a special event and this involved 100 or more invitations, Seacoast Repertory Theatre would arrange for a traffic control person to be present, and would have offsite/remote parking. He also said that regarding traffic issues, the topography was such that cars coming in and out of the site didn't shine their lights in Mr. Hiller's windows.

Attorney Springer summarized that these were fair and reasonable restrictions, and went a long way toward addressing the abutter's complaints. He then referred to points raised by Attorney Hogan in his most recent letter. He first noted that Attorney Hogan had said the existing use on the property had been abandoned, and said the applicants' response was that no Town official had declared this use to be abandoned. He also said it was not abandoned, and said his letter of January 8, 2010 laid the facts out concerning this. He said Ms. Shaheen and Mr. Faulkner could also speak to this issue, noting that Mr. Faulkner had moved in, in November.

He said what was also important was that the applicants had a variance to do what they proposed on the property. He said in the case Attorney Hogan had cited, the person involved hadn't gotten a variance. He said the variance indicated that nothing had been abandoned.

Attorney Springer said Attorney Hogan's letter also discussed a boundary line encroachment, but did not provide facts to support this. He said if the applicants were changing the location of the parking lot, they would say they would get it surveyed, but he said this wasn't happening. He said they had asked for a waiver concerning having to do a boundary line survey, and noted that they were a nonprofit organization. He said it was unfair to require a survey based on that type of assertion.

Attorney Springer said Attorney Hogan's letter spoke about noise and light issues, but he said given the distances involved and the tree cover, the applicants thought there was an effective buffer. He also noted that Mr. Hiller had purchased the property when the Mill Pond Center was a going concern, and presumably knew what the use was there.

Regarding the traffic management issues addressed in the Hogan letter, Attorney Springer said he felt this had been addressed with what the applicant proposed. He noted discussion in the letter regarding the open house, and explained that this had been a one time event, which had showed the kind of support this project had in the community. He said the applicants felt the public roadway system, the driveway and the parking lot were more than sufficient to address traffic management issues.

Attorney Springer said the last issue in Attorney Hogan's letter was in regard to the Fire Chief's review of the property. He said it was his understanding that the Fire Department said the space upstairs couldn't have more than 49 people at one time. He said the applicants were willing to live with this, and said it was his understanding that this was a significant reduction from what the Mill Pond Center had been doing. He said this was a moot point as long as the applicants were willing to live with the 49 people, which they were.

He said that regarding the conditional use criteria, it was important to note that the applicants were not building new buildings, changing locations, adding parking lots, etc. He said he believed the application met all of the conditional use criteria. He said that in regard to external impacts, this was why he had begun his presentation with the restrictions the applicants were willing to live with.

Attorney Springer said the hours of operation were quite reasonable. He also said given the location and orientation of the buildings, and given the limits discussed about set construction and hours of operation, it was felt that the traffic, noise and hours of operation impact had been mitigated.

Regarding the character of the site development, Attorney Springer said he wasn't sure this applied because the applicants weren't proposing a new layout. He said if Mr. Hiller didn't like this, it was already there, and said he had moved into his property knowing this orientation.

He said criteria concerning the character of structures referred to new structures, and stated that no new structures were proposed.

He said that concerning the preservation of natural, cultural, historic and scenic resources, none of these, in terms that were generally understood, were at issue with this application. He said it wasn't felt that any of them would be impacted with the application.

Attorney Springer said they had heard from Mr. Hiller and Attorney Hogan regarding the issue of impacts on property values. But he said he had listened to the ZBA meeting and had read the Minutes, and said Mr. Hiller had told the ZBA that when he bought his property, the cost reflected the fact that it was next to the Mill Pond Center. Attorney Springer said that property value had therefore already been accounted for.

He said the applicants thought that what they had planned for their property would be a great asset to Durham, and would not impact the Town in a negative way. He noted that the ZBA had heard from a number of residents concerning this, and he also said that activities at the site would bring business to Town.

In regard to the site plan review criteria, Attorney Springer said the applicants weren't proposing to change anything on the site. He said they would be using the existing buildings, and said the letter of intent and waiver requests spoke for themselves, and met the various criteria.

Craig Faulkner, the artistic director for the Theatre, explained that they constructed sets with glue, screws, and staples. He said the only time this made some noise was when there was dense wood involved and the screws tended to squeal. He said otherwise, a set construction project could happen in the kitchen and someone in the living room wouldn't hear it. Mr. Faulkner also noted that he hadn't been aware of the Hiller property until the leaves had fallen.

Ms. Shaheen told the Board that Epping Septic had looked at the septic systems on the property. She said there were two separate systems, one of which was a newer one for the barn theatre structure, which was determined to be intact. She said the septic system for the house was found to be functioning appropriately, but noted that because the ground was frozen, they didn't drill down and determine how old the system was and when it would need to be replaced. She said she had the documentation on the analysis that was done.

Councilor Smith asked if it would be appropriate to ask Mr. Springer for a memo regarding what the applicants were willing to do to address the concerns that had been expressed.

Attorney Springer said he could provide this for the Board.

Chair Parnell also noted that Attorney Springer's comments concerning Attorney Hogan's recent letter would be useful for the Board to have in written form.

Mr. Roberts asked if the plan provided, dated March 4, 2003 from Doucet Survey was an accurate site plan for the facility.

Ms. Shaheen said they believed it be an accurate site plan for the facility.

Mr. Roberts asked if there would be a change to the facility regarding downward lighting.

Ms. Shaheen said they had stated on the record before the ZBA and at the Planning Board site walk that they would put reflectors on the parking lot lights. She noted that the lighting concerns had subsequently changed from these lights to car headlights. She said in either case, they had committed to doing that.

Attorney Springer said he would add this to the list he would provide to the Board.

Chair Parnell asked if the application was complete, and Mr. Campbell said yes, with the understanding that the applicants did not supply an updated site plan, and had used the site

plan from 2003. He said a waiver was requested for this. He said the Board could request an updated site plan during deliberations if it chose to do so. He said to the best of his knowledge, nothing on the plan would change except the date.

Attorney Springer said nothing would change.

Councilor Smith moved to accept the Site Plan Application submitted by 50 Newmarket Road Inc., Portsmouth, New Hampshire for the expansion of a non-conforming use of a performing arts facility with temporary housing for actors. The property involved is shown on Tax Map 6, Lot 9-8, is located at 50 Newmarket Road and is in the Residence B Zoning District. Susan Fuller SECONDED the motion, and it PASSED 6-1, with Richard Kelley voting against it.

Richard Kelley MOVED to open the Public Hearing on a Site Plan Application submitted by 50 Newmarket Road Inc., Portsmouth, New Hampshire for the expansion of a non-conforming use of a performing arts facility with temporary housing for actors, and to continue the Public Hearing on an Application for Conditional Use Permit submitted by the same applicant. The property involved is shown on Tax Map 6, Lot 9-8, is located at 50 Newmarket Road and is in the Residence B Zoning District. Councilor Smith SECONDED the motion, and it PASSED unanimously 7-0.

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

Susan Roman, 16 Little Hale Road, said she had resided in Durham for 20 years, and was delighted to see the activities resuming at the Mill Pond Center. She explained that her daughter had taken a number of classes through the Seacoast Repertory Theatre, and said they had been transformational for her. She said she only wished these classes had been available locally sooner than this. Ms. Roman also noted that she had been involved with adult classes at the Mill Pond Center, and was very pleased to see the facility back and restored to some of its former glory.

She said she had worked on the open house event, and said leading up to it, people were excited to see that there would be the opportunity to have a performance space, dance classes, etc in Town again. She said she did not hear negative comments at all, leading up to and during the event. She said a lot of things were done to try to ease traffic and make the situation work.

Ms. Roman said she wasn't sympathetic to the abutter in this case because they all lived in a community, and said he bought his property knowing he was next to a performing arts center. She said she had students living next to her, and it wasn't something she had expected when she bought her property. She said if there was a problem, she talked to the people involved. She said she was surprised at the vehemence of the abutter, whose house she had been unable to see when she had been in the parking lot.

Carolyn Singer, 5 Woodridge Road, said she was on the Board for the Seacoast Repertory Theatre, and said this was exactly the kind of organization she wanted in her community, as a place where people could come together on common ground. She said there would be a lot

of youth programming there as well as programming for senior citizens. She also said Seacoast Rep was willing to make more concessions than any other nonprofit she had worked with, and said she supported them.

Marion McCray, 40 Emerson Road, said she lived in a senior housing development in Durham, and was a member of their social committee. She said they often attended Seacoast Rep activities, but said it was a drive to get to Portsmouth. She said perhaps other seniors would find a lot of activities at the center, and she urged the Board to support these applications.

Ms. Shaheen said that regarding the special event that had been held on the property, they had had the Police Chief attend the planning committee meeting, and had worked closely with the Police Department. She provided details on the planning done for the event, said Chief Kurz had been supportive.

She said this event, along with enrollment for classes demonstrated that residents were ready for this programming. She provided details on this, and said the community had welcomed them with open arms. She said they hoped to continue to be the best neighbor possible and to serve the community as best they could.

Chair Parnell read a letter from **Beth Olshansky, Packers Falls Road**. Ms Olshansky said most arts organizations ran on a shoe string budget, and said Seacoast Rep could use the support of the Town in getting their endeavor off the ground. She noted that the property had sat empty for some time, but said it was a unique parcel, which could offer many recreational opportunities for the Town. She said Seacoast Rep would be a huge asset to the community, and she urged the Board to approve these applications.

Chair Parnell said the other letter was from **Todd Ziemek, 41 Emerson Road**, who said he had had the opportunity to videotape the open house. He said the response from the community was overwhelming, and said this was a strong signal that the Town needed what Seacoast Rep was offering to the Town.

Chair Parnell asked if members of the public who were opposed to the project or had concerns about to come forward to speak.

Jeff Hiller, 6 Laurel Lane, provided information packets to the Board. He said he wasn't opposed to Seacoast Rep being there, and said part of him was excited about this. He said what he was opposed to was a dormitory that housed actors, stating that he had bought a house that was next to a performing arts center. He said he now had a nice view of a dumpster, and said the garbage truck woke him up early in the morning. He said he'd had to deal with glare from headlights on several occasions because of patrons of Seacoast Rep entering and backing out of his driveway. He also said the back of the house experienced headlight and brake light glare.

He said during the grand opening, he had to sit in traffic because there were very inadequate vehicle control measures. He said on other nights, he heard remote keys and car alarms. He noted that in the winter, the Seacoast Rep driveway was icy, and said he had heard cars struggling to get up the hill. He spoke about traffic congestion that had resulted from this.

Mr. Hiller said when he was outside, he could hear voices from the parking lot, as well as delivery vans and plow trucks. He said there was no buffering from this. He said his privacy had now been eliminated, noting that with the prior owners, the use was intermittent, but that now it was 24-7, 365 days a year because people were living there. He said the streetlight had been an issue, but said the situation had been better lately.

He said Seacoast Rep's use of the property had been much more continuous than the use of the property by the previous owners, and also said the Mill Pond Center had never had an event as large as the recent grand opening. He said Attorney Hogan had said there were 500 people there. He said the event created a nonstop distraction for him, and cemented what he would be dealing with. He noted that people were shuttled in and out of the property, and said each time, the headlights faced his property.

Mr. Hiller noted his exchange with Fire Chief Landry, where he had asked him about assembly permits, and was told Seacoast Rep didn't need one because it could have a maximum of 49 people. He said it seemed that there must be some kind of fire ordinance or code that needed to be enforced for a crowd of 500 people. He spoke about the Warwick, Rhode Island nightclub fire, and said the Board needed to think long and hard about what legally was in the best interest of the Town.

He said he had been trying to reach a compromise in good faith with the applicants, and said it recently had become apparent that this wouldn't happen. Noting his concern about buffering, he said he had asked Seacoast Rep if they could survey the property in order to determine the boundary line, and they said no.

He said he then went out and ran a straight line from one boundary marker to the other, and determined that part of the parking lot might be on his property. He said he would ask the Board to consider what sort of survey was needed in order to ensure that there wasn't that sort of encroachment.

Mr. Hiller said he would like the Board to keep in mind that the property was in a residential district, and that as of the July 14, 2010 ZBA decision, the property was considered to be mixed land use. He said a community center was allowed there now, and said the biggest thing was that there was a dormitory use that was now allowed. He said that was the reason he was before the Board. He said another new use that was allowed was set construction.

He said the ZBA decision had said that all living space was to be for non-rental, non-profit use only, but he said that certainly was not the case. He also said the new uses were in addition to the already existing nonconforming uses approved previously via conditional permits. He said one was granted in 1995 for a one bedroom apartment, and the other was in 1980 for the creative arts center containing a dance studio and a performing arts theatre in the barn. He also noted that there was an illegal in-law apartment in the farmhouse that was never approved by the Town.

Mr. Hiller said a condition imposed by the ZBA as part of granting the variance for this property last year was that the Planning Board would focus on mitigating all the abutters' concerns during the site plan review process. He noted that Chair Gooze had said he was

having trouble with the public interest criterion because of what abutters had said about people coming back to the property late at night, with resulting noise, and had said the Planning Board should think of ways to ameliorate the situation. He also said ZBA member Jerry Gottsacker had said he had a problem with whether granting the variance would injure the public and private rights of others. Mr. Hiller said it seemed that with the condition the ZBA had imposed, it punted to the Planning Board to deal with this.

He said there was a cost of doing business in a residential neighborhood, and said the applicants needed to accept some responsibility for the impacts of their intended uses. He said he thought there were still some open issues to get on the table. He said the non-conforming use issue would not go away, and said if the Board felt the applicants hadn't abandoned the use, so be it. But he said there would be a legal recourse for this if he couldn't come to some agreement with them.

Mr. Hiller said with the ZBA Superior Court appeal, it might be premature for the Board to deal with the site plan application. He noted that he was suing the Town, and wasn't sure this legal process allowed Board members to speak openly about issues regarding the application.

Concerning the issue of the public notice sign, Mr. Hiller he said his understanding was that the sign needed to be up while the public hearing was still open. He said the applicants took it down about two weeks ago, and said it could be an issue later.

He said the site plan review application was not complete, stating that the regulations clearly said that the deed and the purchase and sale agreement needed to be provided. He said Mr. Campbell had said that since Seacoast Rep now owned the property, they didn't need to supply it. Mr. Hiller said he had some interest in seeing it, stating that the purchase price was relevant to his arguments.

He noted that Mr. Kelley had said there was a burden for a concerned citizen to be before the ZBA and PB at the same time. He said this had been an expensive endeavor for him, but said he wouldn't give up his ground.

Mr. Hiller said a reason for the Board to conduct a thorough review of the additional uses was that this site had never gone through an extensive planning process in its 30 year history. He said a number of the uses approved in July were new uses. He said the Town and Administration hadn't been responsive to the concerns he had raised, noting that he had previously asked Mr. Campbell why the applicants didn't need site plan review, and didn't get an answer.

Mr. Hiller said there were 4 additional uses proposed, in a residential district, and said the biggest one to him was the dormitory. He said he was concerned about set construction and open houses, and said these were all additional uses. He said it was an arts center, and said he didn't buy a house next to a dormitory. He said 14 actors, for 6 different productions meant that there would be 84 different people as his neighbors in the course of a year, and said that was his biggest concern.

He said any planning regarding this property was done 30 years ago, when Route 108 was

much less congested, and there were fewer uses approved. He also said Laurel Lane had been a lot less developed at that time as well.

He said Mr. Kelley had said at the Dec 9th meeting that he wanted to hear what the planned use of the facility would be, and said he thought Mr. Kelley was looking for details on class schedules, number of cars coming and going, etc. He said these things had been left vague, perhaps intentionally.

Mr. Hiller said the applicants' use of the apartments for rental income contradicted the variance sought and approved, and he provided details on this. He then provided more history on the property, starting from when the performing arts facility was approved, and what was originally approved for the site. He noted that the permit granted in 1995 was for two apartments in the barn, and said as part of this, the owners said the arts related activities would be reduced. He said in 1996, the Houseman letter detailed the uses. He said the uses asked for in July of 2009 were all new.

He noted that in 2008, the ZBA denied an appeal of administrative decision to limit outdoor wedding activity. He provided details on this, and said the appeal was denied. He said the ZBA argued at that time that putting tents on the site was not an accessory use if it was done every weekend, so although weddings could be held, the tents couldn't be used.

He provided details on the traffic problems at the recent grand opening, stating that traffic was backed up in both directions, the parking lot was packed full, and that there was overflow traffic on Laurel Lane that impacted him. He said there were noise, fire safety and other issues, and also said there were inexperienced people directing traffic.

Mr. Hiller said he wanted to know how much additional traffic would be generated by activities at the site, and said because there would be new uses, this allowed the Board to look at issues like this. He said it was a very serious situation on Route 108, noting that he was used to it, but that a lot of people visiting the Mill Pond Center wouldn't be. He said Route 108 was on an incline near the site, and also said there was a blind S curve in that location. He said he was glad nothing bad happened the night of the opening, but said there was an accident waiting to happen there. He noted that a lot of activities planned there would take place during peak hours, before 9 am, and around 5 pm.

He said he had looked at all the uses he saw that Seacoast Repertory Theatre planned for the property, and said based on this, he had determined that there would be 2800-5000 additional car trips in the area each week. He said the low end figure was based on 100 patrons per day, 7 days a week, and dropping off and picking up kids. He said the Mill Pond Center never had had that kind of activity, and said as a citizen, he was concerned about a scenario where the Planning Board didn't vet this situation and there was then something tragic that happened. He said an attorney in the future would be able to see that the Board had had the opportunity to look at these things, but didn't.

Mr. Hiller said Seacoast Rep had tailored the message to the particular Board they were in front of, and he provided details on this, referring specifically to discussions on outdoor amplified sound and screening. He also said Ms. Shaheen had said at the site walk that

because they had gotten a favorable purchase price, they were in a position to make this a successful endeavor. He then said this was a residential neighborhood, and said there was a cost to doing business there.

He said the applicants were under some obligations, especially because there were new uses proposed. He said he realized they were a nonprofit organization, but said this shouldn't mean that they couldn't do a site plan, buffering, etc. He said the farmhouse was less than 100 ft from the property line, and said his house was 300 ft from the farmhouse. But he said the distance to the parking lot was much less,, probably around 150 ft.

He said it was very clear that part of it encroached on his land, and said either the conservation easement wasn't accurate, or the parking lot had expanded since 2003. He said according to the Ordinance and the regulations, because this was a commercial business, the parking lot required a 50 ft setback from his property.

Mr. Hiller said according to Section 175-72 B of the Ordinance concerning Conditional Use, the applicant had the burden of proof, and he reviewed these Zoning provisions. Regarding site suitability, specifically vehicle and pedestrian access, he noted a Town Council meeting discussion in January 2009 regarding the Mill Pond property where some Councilors had spoken about the need to update the driveway, and were concerned about the cost of doing this. He also noted that there was no pedestrian access to the property, and that it wasn't a safe place to walk.

Regarding public services, Mr. Hiller said based on the open house, he questioned the ability of emergency vehicles to gain proper access to the property. Regarding the availability of appropriate utilities, he said he expected to see more details on the septic systems. He noted that the septic system was an issue in 1980, and said there was no record of a new system being put in for the barn. He asked the Board to look at this, noting the site's proximity to Mill Pond, the river, and properties nearby.

Mr. Hiller said regarding external impacts on abutting properties, the 24/7, 365 day usage by 14 people did create a larger impact than past uses. He provided details on this, and said there were no other uses here or in other residential neighborhoods in Town that were even close to what was proposed here. He also said the new use for set construction as well as the community center needed to be considered. He said the mixed use designation opened the door to mixed retail and residential, and also said that regarding the idea of a community center, various classes had already been scheduled. He also said he would have to listen to saws and screws because of the set construction.

Mr. Hiller said he thought his property values would be impacted, stating that the basic law of supply and demand meant that there wouldn't be as many people interested in living next to a dormitory as would be interested in living next to an arts center. He said if he went to sell his property tomorrow, he would be damned if he noted the various review processes underway, and also would be damned if he didn't do so.

He said this was enough proof to have the Board consider remedying the situation by putting the proper conditions on this application. He said the question for the Board was how the

applicant met the burden of proof for the Conditional Use Permit criteria. He said he didn't think the applicant could do so, even with the conditions the Board might place on the uses.

He said there were things he could live with, which he would like the Board to consider. Regarding impacts on property values, he said he would love to see a Finding of Fact that detailed a plan of how the conditions placed on the new and expanding uses would ensure that the impacts of the uses were no greater than any other uses permitted in the RB district.

Mr. Hiller recommended several conditions of approval for the Conditional Use Permit. He said front, side and rear setbacks should be in excess of the minimum requirements. He also said the parking lot was either on the property line or on his land, and said the regulations required a 50 ft setback. He said the Board had the discretion to require more than this in order to mitigate abutter concerns

He said screening of the premises from the street or adjacent property should be required to be in excess of the minimum requirements. He went through the conditions listed in Section 175-116 of the Ordinance concerning landscaping and exterior screening for parking areas, and noted among other things that there was a condition that there be a six ft high solid evergreen screen when a parking lot bordered or was adjacent to a residential zone.

Mr. Hiller said in order for the buffer to serve its purpose, it was reasonable for the Board to conclude that the screen could be higher, and said it would need to be something higher than this to impact his line of sight. He noted the recent ZBA decision regarding the Pasay property, which said the buffer would have to meet the satisfaction of the abutter. Mr. Hiller said that was all he was looking for. He said a visual screen would mean he wouldn't have to see constant activity from the dormitory. He said he hoped the Board would require more than 6 ft for screening.

He said there should be limitations on the number of occupants and days and time of operation. He said the Board could limit these things, stating that this was a residential neighborhood and that the patron numbers had grown from what was anticipated in 1980. He noted that Attorney Springer had said the applicants had made an offer to limit patrons and hours of operation, but said what they offered weren't limits, and instead were dictated by when people would want to come to the property.

He said there had been discussion about limiting the number of patrons to no more than 49 people, except for special events. He said that wasn't much of a limit, and was what the Fire Department said they could have there. He said he was looking for something less than this.

Attorney Springer said Mr. Hiller was quoting from settlement negotiations between legal counsel, and said this was inappropriate, especially since negotiations had been cut off.

Chair Parnell agreed that bringing up details of the negotiations was inappropriate, but said this was a public hearing, and that Mr. Hiller was still speaking.

Attorney Springer acknowledged this, but said Mr. Hiller's comments on what the lawyers had discussed was inappropriate.

Mr. Hiller said he apologized if he had offended anyone. He said the negotiations had stopped because they weren't going anywhere and he was spending a lot in legal fees. He said he wanted to be a happy abutter, and said he still hoped there was a way to work this out.

Chair Parnell said the negotiations took place outside of the Planning Board meeting. He also suggested that Mr. Hiller highlight the items where there some issues.

Mr. Hiller said it was within the purview of the Board to limit the number of patrons and hours of operation to what was reasonable for the abutter, and what was safe for Route 108. He said the Board also had the purview according to RSA 236:13 to address the issue of a driveway that was unsafe and needed to be upgraded.

He said the Board could ask the applicants to reposition the parking lot, get it off his property, put it behind the barn, and restrict the number of vehicles allowed to what the access could safely accommodate. He said he had seen nothing regarding the safe capacity for that parking lot, and said he thought that was one of the reasons for site plan review. He said Mr. Johnson had made it clear in a recent presentation to the Council that any parking lot needed 9 ft by 18 ft spacing. He asked that the Board decide what number of vehicles could safely park there, and how emergency vehicles could be accommodated.

Mr. Hiller said according to the site plan regulations, the Board could require additional studies, including a traffic study, which might be warranted to protect the legal liability of the Town.

In rebuttal to a letter from Richard Winn regarding site suitability, he said it wasn't true that the applicants would use the property less than the previous owners. He spoke in some detail on this, and said they were using it a lot more than the previous owners.

He said 14 new neighbors would have an impact on property values, and said this was the basis of his appeal to Superior Court. He said ZBA Chair Gooze had said the Board didn't have definitive proof one way or another. Mr. Hiller said this wasn't a ringing endorsement from the ZBA that there would not be an impact.

He recommended that the Planning Board determine if these uses were additional uses, and he provided details on this. He said the Town's ordinances and regulations clearly stated that new uses and conversion from residential to a nonresidential required full site plan review. He said there should be no waivers or shortcuts of this process, and asked how one could do a site plan review without a site plan.

Mr. Hiller said the fact that they were a nonprofit and couldn't afford this shouldn't carry any weight, and said what should carry weight was the impact on abutters, and on the public safety. He then asked that there be a full traffic analysis and an analysis of the suitability of the existing driveway, width, grade, etc., stating that they weren't appropriate, and that cars couldn't come down the driveway while cars went up.

He also asked for an analysis of the suitability of the parking lot to accommodate patrons and to address the issue of the 50 ft setback. He said appropriate setbacks, screening for the

four new uses should be determined. In addition, he said a septic design was called for, and also said a fire safety review needed to be conducted.

Mr. Hiller asked that the following conditions be included in the applicants' approval, noting that he would like to find conditions that worked, and didn't want to go to court:

- buffer erected along the entire edge of his parking lot that would block the view to the satisfaction of the abutter. He said it didn't need to be elaborate but needed to work, and should provide sound screening as well.
- buffer along the entire edge of driveway.
- permanent sign in the parking lot that there is a residential neighborhood nearby so those visiting the site should keep the noise down
- no external amplified sound
- intersection will be as unobtrusive as possible
- full time property manager
- lighting of parking lot to remain as it is today; motion detector for street light
- The Planning Board has the jurisdiction and obligation to limit hours of operation. Mr. Hiller said if there were residential people coming and going at all hours, it was fair to limit business hours somewhat
- daily maximum number of 49; maximum of 99 on weekends
- survey property line
- no alcohol permitted at any events. Mr. Hiller noted that he had raised this issue concerning weddings at the Mill Pond Center. He said he didn't want people who had been drinking alcohol driving through his neighborhood.
- set construction to be limited to 9:00 am -5:00 pm, Monday through Friday
- a limit of 4 special events per year, or a maximum of one per month. a limit on the number of people at these events
- Deliveries and trash pickup only on weekdays, during business hours

Mr. Hiller asked that Seacoast Rep remove the mixed use wording from the variance received, and also asked that they not seek additional variances. He said the time limit for these things could be May 1st, 2010. He said he stood by a comment made to the ZBA that the Town had been a co-conspirator in shaping the history of this property, and said few of his concerns had been considered by the Town, the Administration or the property owner. He said the regulations were there to protect his interests too. He said the purpose of the Planning Board was to come up with a plan that worked for everybody. He said the

Findings of Fact must support all the issues, or he would request that the Board deny the applications.

Chair Parnell read a letter from abutters Sharon Griffin and Paul Dubois, February 9, 2010. The letter said they had been frequently disturbed during the past 3-4 years by amplified music played at outdoor events by previous owners of the Mill Pond Center property, noting that any sound emanating from it was naturally amplified by the lay of the land area, and was above and beyond the noise level typically produced by amplified sound equipment.

They requested that in order to protect their right to enjoy their home, that the Planning Board, in acting on the acceptance consideration of the variances granted by the Durham ZBA last Fall, specifically state that the use of outdoor amplified sound was not permitted on the 50 Newmarket Road property.

They said the request seemed a small consideration for abutters of the property in light of the growing number of zoning variances that had been granted to owners of this property over the years, which seriously compromised their property values. They said having some protection from the Town for their right to enjoy their property in peace would make these variances more palatable. They noted a meeting organized by Mr. Johnson in the fall of 2009 between abutters and Seacoast Rep. officials, where Ms. Shaheen told them explicitly that the organization had no intention of using outdoor amplified sound.

Ms. Griffin and Mr. Dubois noted that they had accepted an invitation to attend the December open house, but when they tried to enter the driveway, the road was blocked by cars that had already entered the driveway but could go no further because several cars were trying to leave the driveway. They said all three entering cars were told to back up and park elsewhere, but said backing up on Newmarket Road was problematic because 5-6 cars were parked along the highway directly adjacent to the driveway, which left little room to maneuver.

They said that meanwhile, cars attempting to travel in both directions along Newmarket Road were stalled by the parked cars and by attempts to back out of the driveway. They said this was an accident waiting to happen, and said this did not bode well for future events there. They requested that the Board put serious limits in place concerning the Seacoast Rep property, in order to give good protection to the rights of all abutters.

Richard Kelley MOVED to continue the Public Hearings to March 10th, 2010. Susan Fuller SECONDED the motion, and it PASSED 6-1, with Julian Smith against.

There was discussion that the applicants would have a chance to speak again at the March 1st meeting.

Recess from 9:11 to 9:24 pm

Chair Parnell noted that Mr. Kelley and Ms. Fuller had left the meeting after the break for personal reasons.

VI. Public Hearing on an Application for Site Plan Review submitted by Bill Hersman,

Xemed Holdings LLC, Durham, New Hampshire for the construction of a larger building on a lot to continue the existing commercial use. The construction will be phased to build and occupy the new building, followed by the demolition of the existing building and subsequent completion of the front parking spaces. The property involved is shown on Tax Map 2, Lot 8-3, is located at 16 Strafford Avenue, and is in the Professional Office District.

John DeStefano, the construction manager for the project, said there were a number of items that came up after the site plan application was presented. He also noted that there had recently been a site walk. He said there was an updated set of site drawings, and new architectural elevations relative to entries and lighting. He said there was also a letter requesting a waiver concerning height.

He said they had provided pictures of the device Xemed assembled, and had also submitted the potential evaporation rate of site solvents, which would be no more than 100 ccs on an annual basis, an amount far under what NHDES considered as a permit requirement, along with a memo from Tim Drew of NHDES. He also said construction guidelines on the lab hood were provided.

Darryl Ford of the McGuire Group said the site plan remained essentially the same as when the Board had last seen it. He said minor modifications were that there were now 24 parking spaces. He said he believed the plan that the Board had showed one handicap space, and said that might change to two, depending on discussion with Mr. Johnson. He said the size of the space wouldn't change.

Mr. Ford said they had added a note for snow removal, which the Public Works Director had requested. He said snow would be stored in the rain garden, which would remain has had been proposed, and said the excess would be trucked off site. He said the site would remain as a half an acre, with the building taking up 3300 sf of it, and the parking area taking up a good portion of the rest of it. He said they were under the 75% impervious coverage the ZBA had approved at their meeting, and noted that they had incorporated porous pavement in a couple of places. He said this along with the rain garden would limit runoff to predevelopment flows for the 2, 10 and 25 year storms.

Chair Parnell confirmed that the 75% imperviousness assumed that the porous pavement was 100% pervious. There was discussion that the parking spaces were pervious, but that the travel spaces were impervious.

Architect Bill Schoonmaker provided updated elevations of the new structure. He then reviewed the layout of the building, and said they were looking at a standard asphalt shingle roof, horizontal siding with a combination of vinyl clapboards, and double hung and fixed windows.

He said there had only been some minor changes, which included the addition of another entryway at the front of the building, and the extension of a canopy over it so there would be a secure front entry. He said to the right of this would be an employee entry that would bypass the other entry. He said it was anticipated they might not need the secure vestibule initially, because there wouldn't be a lot of public traffic. He said the building would be

constructed so this modification could be made in the future without disrupting the canopy.

Mr. Schoonmaker said there were no additional decorative dormers proposed. He said the east elevation had three area lights above the first band of windows, but said it wasn't yet clear exactly where they would be located. He noted that three possible types of lights could be used. He said there would be a canopy light in the roof of the rear canopy, and said there would be one or two lights recessed in the canopy at the front of the building. He said there would also be stair lights at the stairs and at the ramp way, which would not shine out more than 4-5 feet.

Mr. Roberts spoke in some detail about whether this use was classified as professional office or a laboratory/light industry.

Mr. Campbell noted that the first application for Xemed was approved as a professional office use, and said with this application, they weren't approving the use, but were approving a new building. He said if someone wanted to appeal this, it would have been earlier, although he said that was not to say it couldn't be done now.

Mr. Ozenich said a professional office didn't usually have a loading dock.

Mr. Roberts said he appreciated that the applicant had gone to the ZBA. He said if the applicant was going to do something like pacifate aluminum, he didn't know how he would meet the criteria for a professional office use. But he said the applicant knew what his needs were.

Councilor Smith MOVED to open the Public Hearing on an Application for Site Plan Review submitted by Bill Hersman, Xemed Holdings LLC, Durham, New Hampshire for the construction of a larger building on a lot continue the existing commercial use, for the property shown on Tax Map 2, Lot 8-3, located at 16 Strafford Avenue in the Professional Office District. The construction will be phased to build and occupy the new building, followed by the demolition of the existing building and subsequent completion of the front parking spaces. Bill McGowan SECONDED the motion, and it PASSED unanimously 5-0.

Steve Kimball, 20 Strafford Ave., said he was an abutter. He said the architect had done a great job with the building design, and said it was in keeping with the character of the neighborhood. He said he shared Mr. Roberts' concern that this was advertised as continuing the current commercial use, and said if that was the case, there wouldn't need to be a loading dock on the front, and a 4 story building stuffed onto the lot. He said this would be a factory building that manufactured machines, and stated that Strafford Ave was not a large road, and that he didn't think this was an appropriate location for a factory building.

Mr. Kimball said he understood this was not a use hearing, but said if the building was built and someone then objected to the use in the future when operations were scaled up, the applicant would have spent millions of dollars on a facility he couldn't use. He said this was heavy manufacturing, involving giant magnets and exotic compounds, and said it belonged in the ORLI district or on Technology Drive, and not on Strafford Ave. He spoke further on this.

In answer to a question, Mr. Campbell said the Code Enforcement Office was well aware of what was going on at the site.

Bill McGowan MOVED to close the Public Hearing. Richard Ozenich SECONDED the motion, and it PASSED 5-0.

The Board agreed to deliberate on the application, and reviewed the Findings of Fact and Conditions of Approval.

Chair Parnell asked the Board their views on the concerns expressed by Mr. Roberts.

Mr. McGowan said he would defer to Mr. Campbell on this, and also said the Code Officer knew what was going on at the business. He said he felt that based on this, the concerns had been addressed.

Chair Parnell said after visiting the operation on the weekend, he thought it was not a manufacturing operation, and was a very slow assembly process. He said this was an extremely low output operation, and said he didn't see it becoming a manufacturing operation in the near future. He said it wasn't exactly a lab, but was somewhere in between. He noted that the Board had approved the operations at the building a few years ago, and said nothing had changed much except that the scale had changed a bit.

Mr. Ozenich said there would be only 3-4 units shipped per year, and said he didn't see that there would be traffic issues or that there would be a need for 18 wheelers. There was discussion that a box truck would be used to move the equipment. There was further discussion on the Findings of Fact. Mr. Roberts asked if a note was needed regarding the staging and the used of the adjoining Damambro property.

It was noted that the NHDES issue was addressed in FOF #9. Mr. Campbell also said an additional Condition of Approval to be met subsequent was that "all uses were to be in compliance with the terms of NHDES letter dated 2/4/2010 by Timothy Drew, NHDES Administrator.

He said another Condition of Approval to be met subsequently, requested by Mr. Johnson, was that "the existing office building and garage shall be removed and all site work completed within 6 months of receiving a Temporary Certificate of Occupancy from the Building Inspector for all or any part of the new proposed building."

There was discussion about this with Mr. Hersmann, who said he was ok with this condition.

Chair Parnell suggested that the height waiver be to allow 35 ft.

There was discussion about whether 6 months would be enough time, and Bill Hersmann said he was ok with this. There was also discussion that the drainage plan had been approved by the Town Engineer.

Findings of Fact

1. The applicant submitted an Application for Site Plan Review with supporting documents on January 6, 2010.
2. The applicant submitted the deed for the property on January 6, 2010.
3. The applicant submitted a letter of intent on January 6, 2010.
4. The applicant submitted a waiver request on January 6, 2010.
5. The applicant submitted a Standard Property Survey and Topographic Site Plan on January 6, 2010.
6. The applicant submitted a plan of Exterior Elevations of the new facility on January 6, 2010.
7. The applicant submitted a Proposed Site Layout on January 21, 2010.
8. The applicant submitted a Hydrologic Impact Assessment prepared by Maguire Group Inc. on January 22, 2010.
9. The applicant submitted updated Site Plan Drawings, an Architectural Elevation Plan, Exterior Lighting information, a letter of waiver request, pictures of the device is assembled on site, a memo on the potential evaporation rates of the site solvents used, a memo from Tim Drew, DES, regarding permit requirements not needed, and Lab Hood Construction Guidelines on February 5, 2010.
10. A Site Walk of the property was performed on February 6, 2010.
11. A Public Hearing was held on February 10, 2010.
12. An agreement was made to allow the applicant to stage/store material on an abutting property.
13. The applicant must perform site work for water before the repaving of Strafford Avenue.

Waivers

The applicant has requested a waiver from Section 7.02(D)(4)(q) of the Site Plan Regulations requiring location of all buildings, wells and leach fields within one hundred and fifty (150) feet of the parcel. The Planning Board has considered this request and hereby grants the waiver.

The Planning Board has also approved a building height greater than thirty (30) feet. The maximum height of the building shall be thirty-five (35) feet.

Conditions of Approval to be met prior to the Signature of Approval on the Site Plan.

1. The applicant shall supply one mylar plat and one paper copy for signature by the Planning Board Chair.
2. All final plans must be stamped by appropriate professionals.
3. The Director of Planning and Community Development shall receive a memorandum/letter from the Town Engineer approving the drainage plan.
4. The applicant shall be granted a new sewer permit from the Department of Public

Works.

5. The applicant shall post an acceptable financial surety prior to the signature of the final Site Plan that is approved by the Planning Board. The financial surety shall be in an amount sufficient to ensure the completion of drainage, sewer, water, landscaping and/or any other improvements required by the Town. The financial surety shall be effective until the issuance of all certificate of occupancies needed for the property. The financial surety shall be approved by the Town as to the form and type. The Town will accept cash, pass book savings in the Town's name, letter of credit or a construction surety bond. At its discretion, the Planning Board may require approval of the construction guarantee by the Town Attorney. The amount of the surety shall be determined by the Department of Public Works.

Conditions to be Met Subsequent to the Signature of Approval on the Site Plan

1. These Findings of Fact and Conditions of Approval shall be recorded with the Strafford County Registry of Deeds, at the applicant's expense.
2. Maintenance Guarantee--a financial surety to guarantee that all site work was properly done shall be posted by the applicant with the Town. Such maintenance guarantee shall be in an amount of two (2) percent of the estimated project cost and shall remain in force for two (2) years after site improvements are completed. If such repairs are needed and are not satisfactorily installed by the developer, then such guarantee shall be used to complete and/or install such improvements.
3. As-built construction drawings, plan and profile, of all infrastructure improvements shall be submitted in electronic and paper copy at a scale of 1" to 20', including, but not limited to:
 - Underground Utilities (sewer lines, storm drains, water lines, electrical, phone, cable, natural gas lines, etc.)
 - Drainage ways, ditching, impoundments, swales, etc.
 - Road construction
4. The construction staging, timing, and techniques shall be reviewed and approved at a pre-construction meeting prior to any demolition or construction. The pre-construction meeting shall be held with the Durham Police Department, Fire Department, Code Enforcement Officer/Building Inspector, the Department of Public Works, a member of the Planning Board and the Director of Planning and Community Development with a summary provided to the Planning Board.
5. During construction the applicant is encouraged to have site security to safeguard materials and ensure the safety of casual trespassers.
6. All uses shall be in compliance with terms of NHDES letter dated February 4, 2010 by Timothy W. Drew, DES Administrator.
7. The existing office building and garage shall be removed and all site work completed

within 6 months of receiving a Temporary Certificate of Occupancy from the Building Inspector for all or any part of the new proposed building.

Councilor Smith MOVED to approve the Findings of Fact and Conditions of Approval as amended, for the Application for Site Plan Review submitted by Bill Hersman, Xemed Holdings LLC, Durham, New Hampshire for the construction of a larger building on a lot continue the existing commercial use at the property shown on Tax Map 2, Lot 8-3 located at 16 Strafford Avenue in the Professional Office District. The construction will be phased to build and occupy the new building, followed by the demolition of the existing building and subsequent completion of the front parking spaces. Bill McGowan SECONDED the motion and it PASSED unanimously 5-0.

VII. Other Business

A. Old Business:

B. New Business:

Mr. Campbell said an application for a voluntary lot merger had been submitted by Country Line Holdings LLC, Aka, Jack Farrell, for 3 lots he owned off of Woodside Drive: Map 2, Lot 20-5; Map 2, Lot 20-7 and Map 2, Lot 20-9. He said Mr. Farrell wanted to merge them into one lot, and said he had a building permit that had stipulations that the lot line merger was required prior to the start of work.

Mr. Campbell explained that this was a requirement because they were vacant lots and were undersized. He noted that according to State Statute, no notices or public hearing were required, and also said the Planning Board must allow the lot merger unless it created a violation. He said the lot merger would actually take care of a violation.

Bill McGowan MOVED to approve a voluntary lot merger for Country Line Holdings LLC for Map 2, Lot 20-5; Map 2, Lot 20-7; and Map 2, Lot 20-9. Steve Roberts SECONDED the motion, and it PASSED unanimously 5-0.

IX. Approval of Minutes

No Minutes

X. Adjournment

Richard Ozenich MOVED to adjourn the meeting. Councilor Smith SECONDED the motion, and it PASSED unanimously 5-0..

Adjournment at 10:05 pm
Victoria Parmele, Minutes taker

Stephen Roberts, Secretary

