

*These minutes were approved at the May 12, 2010 meeting.*

**Durham Planning Board  
Wednesday March 24, 2010  
Durham Town Hall - Council Chambers  
MINUTES  
7:00P.M.**

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

**ALTERNATES PRESENT:**

**MEMBERS ABSENT:** Richard Ozenich; 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**

*Richard Kelley MOVED to amend the Agenda by moving Item VIII prior to Item VI.  
Susan Fuller SECONDED the motion, and it PASSED unanimously 6-0.*

**III. Report of the Planner**

- Mr. Campbell said he had met with University Planner Doug Bencks on March 9<sup>th</sup>, and noted that he had provided a memo to Board members on this. He said after the meeting, there was discussion with Mr. Bencks and others about the site for the new Business School and the layout of the new building relative to parking, deliveries, etc. He said there would be further discussion on these issues by the Traffic Safety Committee, and said it was expected that the project would come before the Planning Board in the fall.
- Mr. Campbell said he met with the Conservation Commission on March 11<sup>th</sup> concerning the proposed Shoreland Protection Overlay District changes to the Zoning Ordinance. He said the Commission had no problem with them, and also said the draft would be sent to the Board's attorney for comments. He said once these comments were received, the proposed changes would be put on an upcoming Agenda.
- He said that on March 16<sup>th</sup>, he met with Mitchell Blake, who was doing a market analysis for Capstone, the developer who was considering a possible project on the west side of Town.
- Mr. Campbell said the EDC had recently met, and he noted that going forward, their meetings would be held on the fourth Monday of each month, and would air live on

DCAT. He said there was discussion at the EDC meeting on efforts to get wifi downtown and on broadband capacity. He also said there was discussion with members of the Durham Landlords Association, and noted that the DLA had some concerns that the EDC was concentrating on student housing for economic development. He said it was a good discussion and expected there would be more of them.

He said Tom Elliot was the new Chair of the EDC, and said it was decided that several subcommittees would be created. He said there was also discussion on the idea of doing a market analysis for the entire Town, and said the EDC would probably be moving forward with that shortly. In addition, he said there was discussion about the fact that the Durham Farmers Market would be moving from its current Pettee Brook parking lot location to Mill Plaza, near Durham Marketplace.

**IV. Continued 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

***Councilor Smith MOVED to reopen the Public Hearing. Bill McGowan SECONDED the motion, and it PASSED unanimously 6-0.***

Chair Parnell asked that those in favor of the applications come forward to speak.

Attorney Springer spoke on behalf of the applicants. He noted that Mr. Hiller had spoken in opposition to the applications, and said he would provide rebutting arguments now but would not respond to every point raised by Mr. Hiller. He received confirmation that the Board had reviewed his March 18<sup>th</sup> letter regarding the set of conditions his client was willing to enter into.

He said he would go through these conditions, and said they were in response to the ZBA condition of approval that said the Planning Board should address the abutters' concerns. He said the applicants were willing to do these things on a voluntary basis, but he said they could also be conditions of approval

- Set construction to be limited to Monday through Saturday, no earlier than 9:00 am, and no later than 8:00 pm. No set construction on Sunday.
- Hours of operation for youth camp: Monday through Saturday, no earlier than 8:30 am and no later than 6:00 pm
- Hours of operation for dance classes: Monday through Saturday, start no earlier than

8:30 am and run no later than 8:00 pm

- Hours of operation for dance recitals, performances (including youth camp performances), black box productions, play/poetry readings, and rehearsals: on Monday through Saturday, start no earlier than 8:30 am and run no later than 11:00 pm; on Sundays, start no earlier than 10:00 am and end no later than 8:00 pm
- Parking: any time a special event is hosted and 100 invitations or more are sent out, there will be a traffic country person posted on Route 108, and Seacoast Repertory Theatre will arrange off-site, remote parking, with a shuttle van.
- Lighting in parking lot: will put deflectors on the lights in the parking lot (please note that the lights in the parking lot are already on motion sensors, at Mr. Hiller's request.)
- Outdoor sound amplification: the applicant will agree to limit sound amplification to no more than 4 times per year, and not more than one time per month, and not to commence before 12:00 pm nor continue past 9:00 pm

Attorney Springer said he thought these were significant concessions, and would go a long way to address the concerns raised by the abutters, and the issues discussed by the ZBA. He next said he would respond specifically to Mr. Hiller's previous presentation.

He said the first issue was that in the information provided to the Planning Board, Mr. Hiller continued to refer to the house on the property as a dormitory. He said it was significant that Mr. Hiller did this when he knew that it was not a dormitory, which was a house with 10 unrelated people that was subject to other rules and regulations. He noted that when Seacoast Rep first made its application to the Town, it asked for 10 unrelated people, but was told by the ZBA that this was a dormitory, so this number was cut back.

Attorney Springer said Mr. Hiller also said the property would be open 24/7, and 365 days a year, which made it sound like there was an expansion of the use. He said it was not, noting that there had been no time constraints on the uses at the Mill Pond Center in the past. He said there was no question about this, and said the applicants were in fact scaling back the amount of time the property would be open.

Regarding the property value issue, he noted a quote from ZBA Chair Jay Gooze in the material provided by Mr. Hiller, which came from a discussion on the applicants' variance application. Attorney Springer said Chair Gooze had said there was no evidence one way or the other that there would be an impact on property values if the variance was granted.

He also noted a quote from Mr. Hiller at that same meeting that his offer price was based on many factors, including the fact that the property abutted the Mill Pond Center and there would be some inconveniences. Attorney Springer said Mr. Hiller also said he knew what he was getting into with the Mill Pond Center when he bought his house.

Attorney Springer said the Mill Pond Center was doing exactly what the Seacoast Repertory Theatre did. He said the difference was the number of people in the house, but said in terms of the operation of the theatre, and much of what Mr. Hiller complained

about such as people going to plays, dropping off and picking up children, and noise issues concerning these activities, there wasn't much difference between what was going on well before Mr. Hiller bought his property, at the time he bought his property, and what the Seacoast Repertory Theatre proposed to do.

Attorney Springer said another point made by Mr. Hiller was that the Town's administration had not been responsive to the concerns he had raised. He then referred to a number of emails from the Fire Chief to Mr. Hiller, and said this was being very responsive. He also noted that Code Officer Tom Johnson had provided abutter Sharon Griffin with a detailed planning history of the property, which he said was very responsive. In addition, Attorney Springer said Mr. Hiller had dealt with Mr. Campbell, whose behavior one wouldn't call unresponsive although Mr. Hiller might not have gotten the answers he wanted.

Attorney Springer next referred to the parking summary Mr. Hiller had provided to the Planning Board. He said there were many things wrong with the numbers in it, and he provided details on this.

- He said the summary had a column for "average number of people", but said the number 50 was found several times in it. He said Mr. Hiller knew that there couldn't be 50 people for performances, but said he had still put this down as an average figure.
- He said the average number Mr. Hiller put down for "transient residents" was 14, but said that was the total number there could be in the house.
- He said Mr. Hiller had listed youth theatre classes/performances in several different ways, so had taken what was one use and repeated it four or five times
- He said Mr. Hiller had listed black box performances and small plays separately, yet these were the same thing.
- He said the rehearsal number and transient resident's number were listed separately, which was another example of double counting.
- He said the summary referred to the fact that there would be miscellaneous Seacoast Rep employees going onto the property, and he said this wasn't necessarily true
- He said set construction was listed as a separate activity, but said this would be done by some of the people living there, and wouldn't contribute to the trips in and out of the property.

Attorney Springer noted Mr. Hiller's estimate that there would be 120 vehicle trips per week for delivery and service calls, and said he didn't know how he had come up with this number. He said the dumpster would be emptied once per month. He said there would also be fuel delivery and said there would occasionally be a UPS package delivered.

Regarding the estimate that there would be 4900 trips in and out of the site per week, Attorney Springer said this wasn't even close to what the actual traffic count would be. He noted that Mr. Hiller's summary said there would be 16 activities per day on the weekend, but said this wouldn't happen. He noted that some of the activities listed were broken up into 3-4 categories, when there was only one. He also noted that some

activities would only take place in the summer.

Concerning the dumpster issue, Attorney Springer said the applicants hadn't been able to put the dumpster where they had initially wanted it because of the snow on the ground, but said it would be moved to the back corner of the property behind the barn when the ground dried up.

Attorney Springer said that as he had stated to the ZBA, the bottom line was that Mr. Hiller's house was a football field away and there was heavy tree cover; the house sat on a hill and the front of it looked away from the Seacoast Rep property; and it was a preexisting use. He said Mr. Hiller had bought his property knowing it was there, and had admitted that the purchase price reflected this. Attorney Springer said the applicants felt they had done exactly what the ZBA asked them to do, which was to ameliorate Mr. Hiller's concerns. He said they also felt they had met the criteria for a conditional use permit, noting that he had gone through these the last time he was before the Board.

**Brigitte Reagan, 6 Littlehale Road,** said she had worked with Seacoast Rep for six years, and had also worked with the theatre company at the Mill Pond Center and was their stage manager for one show. She said she felt that Seacoast Rep was looking to do the same kinds of things that the Mill Pond Center had done, and said the conditions they had offered seemed to be pretty reasonable given the circumstances. She said the Mill Pond Center was a community place, and said the Town was fortunate that Seacoast Rep had purchased it. She said the arts were a very important part of peoples' lives.

**Joanne Dodge,** said she was the artistic director of Senior Moments, a senior theatre group sponsored by the Seacoast Repertory Theatre. She said it meant a lot to her and others in the group that Seacoast Rep had recognized the need for seniors to get involved in the arts, which could help with pain management, prevent depression, etc. She said Seacoast Rep had been a good friend to them, noting that they provided these educational programs as a public service. She also said the rehearsal space on the Seacoast Rep property was better than the one at the Grange.

**Carolyn Singer, 5 Woodridge Road,** said she had spent 30 years working for nonprofits, including raising money. She said these were extremely challenging times for nonprofits, and said she thought they should be doing everything possible to enable Seacoast Rep to thrive rather than restricting them in any way. She asked that the Board be as flexible as it could with the restrictions, and said any unnecessary restrictions would not be to the advantage of the community.

**Mike Hoffman, 300 Durham Point Road,** said when he came to Durham 24 years ago, the Roberts family used the Mill Pond property as a theatre, and it was a community asset. He noted that in developing the Master Plan, a resounding theme had been the need for a sense of community and a community center. He said this property had provided this since it was the Smith tavern hundreds of years ago.

He spoke in some detail about the role the Mill Pond Center had played in Durham, and

noted among other things that having it there had meant kids didn't have to travel to Portsmouth for activities. He said he was surprised that Seacoast Rep had to go through this much of a process in order to do what the Mill Pond Center had done for several years. He noted that a number of people used to live there, and said there had been residences throughout the building.

Chair Parnell noted that an issue the Board was dealing with now was the use of the facility as temporary housing for actors, and they weren't discussing whether the property would be allowed to operate as a performing arts center.

**Jen Sayre-McKiernan, 35 Durham Point Road**, said she lived close to the property, and noted that two of her children had been very active with Seacoast Rep in Portsmouth. She also said she was on their Board of Trustees, and said when Seacoast Rep had considered purchasing the Mill Pond Center property, she had rallied strongly for this for her own family and on behalf of hundreds of people in the Durham and Oyster River area.

She said they were thrilled to have the cultural opportunities they provided, and said she personally was thrilled both as a board member and as a resident. She said it was an incredibly professional and caring organization. She also said that concerning the caliber of the people living there, she said some of them were directing kids in plays. She said she had worked closely with some of the people living there, and said she couldn't speak highly enough about the professionalism of the organization.

Stefany Shaheen said regarding the issue of housing of actors that they were not intending to run a dormitory. She said the house would generally house 4-5 actors from 6 to 8 weeks at a time, and sometimes as long as 3-6 months depending on how many shows they were in. She said the majority of actors in the shows were from the area, and said some were coming from New York. She said it would be rare that there would be as many as 9 actors in the house, and said it was in the summer that they might need to house this many people.

She said Seacoast Rep had tried to be very transparent about what they were trying to do and how they wanted to operate there. She said they had had Mr. Johnson to a site walk, noting this was the first time he had been on the property. She said they had had the Fire Safety inspector do an analysis of the property, and had met many times with Mr. Johnson and Mr. Campbell. She said Seacoast Rep would continue to be transparent and straightforward with their plans, and said they had done everything they could to ameliorate the abutters' concerns, and would continue to do this as they operated the facility.

Chair Parnell read a letter into record from **Beth Olshansky, 122 Packers Falls Road**. The letter said most arts organizations ran on a shoestring budget, and noted that this property had sat vacant for a long time, and could use the support of the Town in getting its endeavor off the ground. Ms. Olshansky said it was a unique parcel that had the potential to offer the community many recreational opportunities, both in its classes as

well as its performances. She said Seacoast Rep could be a huge asset for the community if supported by the Town. She urged Planning Board members to support this new endeavor by granting the expansion of a non-conforming use and conditional use permit, stating that it would surely be “of benefit to the community.”

**Attorney Scott Hogan, representing Jeffrey Hiller**, said they supported the use of the facility as an arts center. He said the reason for Mr. Hiller’s concerns was that he looked at the traditional uses of the Mill Pond Center and the use of the property by Seacoast Rep. He said when Seacoast Rep went to the ZBA for a variance, Mr. Johnson made it clear that all the uses now proposed were new uses from a technical, legal perspective. He said the concerns now were about the differences in use.

Attorney Hogan said Attorney Springer had noted that 9 people in a house was not a dormitory. But he said in Seacoast Rep’s applications and the Town notices for those applications, the word dormitory was used. He said that was how this word had entered the process, and said it was what they had been looking for to house transient actors, as part of what they wanted to do with the property.

He noted that when the ZBA granted the variance, there was a condition that in the Planning Board’s site plan review, the abutters’ concerns would be addressed. He said a concern he and Mr. Hiller had up front was that the applicants had only applied for a conditional use permit, and hadn’t applied for site plan review. He said he had claimed that this was a change of use, which would subject Seacoast Rep to the site plan review process as well. He said they had been concerned about what the scope of review would be for the facility.

Attorney Hogan said one of the biggest concerns resulted from the open house event. He said there was no question that the property had been overwhelmed that night in terms of the number of attendees and the traffic. He provided details on this, and noted that one of the problems was that a lot of people had to turn around in Mr. Hiller’s driveway. He said the structures themselves were overwhelmed by the people who came to the event, and said there was no question that this illustrated that there was huge support for what Seacoast Rep was trying to do there.

He said the Planning Board’s job was to deal with noise, traffic, aesthetics, lighting, etc., and said the focus should be on how these things were different now than was the case with the historical uses at the Mill Pond Center. He said the open house event had confirmed the concerns about what the newly proposed uses would mean.

Attorney Hogan noted that when the Mill Pond Center ceased operations, the Town had looked really hard at whether it wanted to purchase the property, and had done a specific assessment of the property. He said there were numerous troubling findings about the structural condition of the buildings, the property’s ability to handle large crowds, and its water, electrical, and other systems. He said the Town had already determined that there were deficiencies in numerous areas, and he provided details on this.

Attorney Hogan said at this point, it wasn't clear what the scope of activities proposed were, with related vehicles, attendees. He said a maximum of 49 people would be allowed inside the building for theatrical activities, but said outside events weren't subject to that restriction.

He said the Planning Board needed to address a variety of issues, including water supply, fire suppression, parking, traffic access, the physical capability of the buildings, what the scope was of the future use of the property, and how this could be done safely while making sure that all of this didn't negatively impact the abutters.

He said there was no question that when Mr. Hiller purchased his property, it was somewhat of a financial consideration in terms of the purchase price, regarding having a commercial facility next to a residential neighborhood. He said the concern now was what was going to be different about the Seacoast Rep proposed use of the property than the Mill Pond Center use.

Attorney Hogan said the concerns now included what had been done to address the various issues, and what the scope of the uses was. He noted the conditions Attorney Springer had listed, but asked what the conditions were for outside amplified sound and for traffic management. He asked how the Planning Board was looking at how these things were quantified, in terms of the number of events, etc, and what specific conditions related to them. He spoke about sight distance as an example of what he was talking about, and noted that this issue had come into play the night of the open house.

He said that regarding the issues of light, noise, buffering and screening, there was a clear line of vision between the Hiller property and the Seacoast Rep property. He noted that the back of the Hiller property took advantage of the view and was used for outdoor activities. He also said Mr. Hiller had seen the difference in activity since his purchase of the property. He said Mr. Hiller was supportive of and understood the traditional uses of the property, but said the whole point of him being before the ZBA and the Planning Board was that what was proposed by Seacoast Rep wasn't the same use that the Mill Pond Center had for the property.

Attorney Hogan said Seacoast Rep had made the point that their use of the property would be less than what had occurred there before, and had also said there had been outdoor activities when the Mill Pond Center owned the property. He noted that when these outdoor activities had started taking place a few years before the Mill Pond Center sold the property, the abutters had told the Town that these activities, including outside amplified sound, were an irritant.

Attorney Hogan also said the Mill Pond Center had never operated as a dormitory and 24/7, and he said the ZBA was cognizant of that. He said there were numerous issues with almost every aspect of the use of the property. He noted as another example of this that Mr. Hiller had identified the portion of the parking area that encroached on his property. He said that concerning any possible loss of parking area, that the parking area was already very tight.



He said they were asking the Planning Board to look at what the reasonable limitations should be on the scope of Seacoast Rep's use of the property, and what it should ask for in terms of reasonable screening and buffering. He said this was a difficult application, stating that they all wanted Seacoast Rep to succeed, but there was a place to draw a reasonable line in terms of the volume, frequency, and intensity of the uses. He said there needed to be reasonable accommodations to the abutter.

Attorney Hogan also said he was trying to get a determination from the Town as to whether the uses on the property had been abandoned. He said there were legitimate issues that any reasonable abutter would bring. He said Mr. Hiller was clear that he knew what the Mill Pond Center had been all about, but said if he had known of the uses proposed there now, he wouldn't have bought the house.

**Bill Hall, 3 Smith Park Lane**, said he hoped these issues could be resolved and that Seacoast Rep could move forward. But he said there were some serious traffic problems the night of the open house, and he provided details on this. He said for the sanity of all involved, they all needed to come to serious agreement about how traffic would be handled at that driveway. He suggested that the property still had use of the northern driveway, which was almost opposite the veterinary hospital, and said it might be an answer. He said there also needed to be some kind of oversight by the Police Department for events.

**Sharon Griffin, 28 Newmarket Road**, noted that she had sent the Board a letter previously stating her concerns about the applications. She said she wouldn't repeat most of them now, but said Mr. Hiller wasn't the only abutter who was concerned that this large scale commercial enterprise was going on in a residential neighborhood. She said for many years, variances that had been granted against the Town Ordinances were done for families who wanted to have small theatre productions and a few art shows. But she said what was proposed now was uses of a totally different scale. She said while it would be fabulous to have this in a commercially zoned part of Durham, but not in a residential neighborhood.

She said the concern about the Mill Pond Center occurred when they started having outdoor events. She said this same concern was raised when these applications had come forward, and said Ms. Shaheen had reassured them that there wouldn't be outdoor events. But she said Seacoast Rep had now said there would be outdoor events, which was a shift.

Ms. Griffin also said Seacoast Rep had claimed that the main uses of the property would be to house actors and make sets, and said if so, they shouldn't have events like this. She said she was nervous about what the property would be used for, and asked that the Town put very clear limits on what they could do. She said she didn't think it was unreasonable to put a ban on amplified sound. She said while the ZBA had approved the variances, to her, what Seacoast Rep had asked for was a violation of the Zoning Ordinance.

**Jeff Hiller, 6 Laurel Lane**, noted that at the previous meeting, Attorney Springer had said that given the size of the property, its location and orientation, etc, the conditions would fully address his concerns. Mr. Hiller said while he had tried to work out conditions with the applicants regarding the buffer, hours of operations, and limiting the participant level at any event, he had been unsuccessful.

He said the applicants didn't want to spend money on the buffer, and he also said the hours of operation they proposed were 14 hrs a day, 6 days a week. He said he thought Walmart had more restrictive hours, and said this proposed use would be in his backyard. He said this was not a typical commercial use, if the applicants were entertaining doing what the Mill Pond Center had done as well as the additional uses, and said it would mean overburdening what was already an overburdened residential neighborhood.

Mr. Hiller said Attorney Springer had noted that when the vegetation was out, the view was reduced. He said while it was true he couldn't see as much then, the tree cover didn't totally address his concerns. He noted that the leaves on the trees were above the line of sight, and were only on the trees for 6 months.

Concerning the boundary line issue, Mr. Hiller said if the applicants would pay to have a property line survey and it turned out that the parking lot was not on his property, he would reimburse them. But he said it was pretty obvious that it was on his property. He said perhaps this had happened when the conservation easement was done, and said the Board couldn't rely on that plan for its site plan. He also noted that the sight distances, etc, were not documented, and said a full site plan was therefore in order.

Mr. Hiller noted that Mr. Kelley had stated at the November 18<sup>th</sup> meeting that he would like to see an engineer's assessment regarding the septic system. But he said what was presented last time, from Epping Septic, appear to be two systems, and he also questioned whether this was an engineer's assessment. He also said if there was a newer system put in 1980, it wasn't recorded anywhere and was an illegal system. He questioned whether this system was put in at all.

He noted Mr. Johnson's June 22<sup>nd</sup> letter to Seacoast Rep that said among other things that there had been no formal inspections of the property in terms of whether it met the various codes. He said if these inspections had now been done, they should be available for review, and said if they hadn't been done, they should be done. He also said the Fire Department needed to play a more active role concerning what was acceptable on the property. He said when a complaint had been filed, a fire lane was designated, but he said there wasn't one during the open house.

Mr. Hiller said if in fact, part of the parking lot was on his property, and a 50 ft setback was required for a commercial property that was in a residential neighborhood, and on the other side there was a fire lane, there would probably be a significantly reduced parking lot.

Ms. Shaheen said she was sorry that Jen-Sayre McKiernan wasn't there to speak about

the open house because she was the person who chaired the events committee, and was the liaison with the Police Chief. She said there had been three meetings with the Police Chief, and he attended one of their event committee meetings on the property. She said there had been a detailed traffic plan, including 3 overflow parking lots that were accessed. She said there were also two vans that transported people back and forth from the parking lots.

She said the Police Chief said he would do his best to someone at the start of the event, but this wasn't possible. She said areas of the facility were shut down based on prior approval, so no one was in the third floor theatre space during the event. She said the majority of the event took place in the dance studio and the first floor of the main house, and said there was also some activity outside.

She said the accident that occurred happened after the event, and was related to the backup at the light, and she acknowledged that there was more traffic in that area because of the event. She noted that one of the conditions they had offered was that for any event with more than 100 people invited, they would work with the Police department, as they had for the first event to make sure there was an officer there to help monitor traffic.

Ms. Shaheen said Seacoast Rep had understood when they first met with the abutters was that one of the biggest concerns abutters had had with the Mill Pond Center was amplified sound from events on the grounds of the property. She said Seacoast Rep didn't intend to have large outdoor events, but she said having said that, they felt they had to be careful that they complied with the noise ordinance. She said she the plan was not to erect large outdoor tents on the grounds of the property and hold special events. She said the plan was to hold youth day camps.

She said regarding the analogy to Walmart, they were talking about 9-12 year olds going to acting classes, and not 75 people going to special events every day. She said that wasn't what they would be using the facility for. She also said there would be an onsite property manager living next to the garage where the set construction would be, and said actors would also live above it. She said the idea that set constructive would be disruptive to them or the neighbors was therefore not the case.

Chair Parnell asked about the septic system information.

Ms. Shaheen said it was sent to Attorney Springer, and said she would make sure the Planning Board got it.

Attorney Springer noted the information provided by Epping Septic Service, dated January 5 2010.

There was discussion by the Board that there was supposed to be a follow up to this information once the weather got better.

Ms. Shaheen said they hadn't gone back yet to inspect the system further.

Attorney Springer noted that his January 8<sup>th</sup> letter to the Board had vehemently denied that there had been abandonment of the use. He also said that regarding the life safety code issues, inspection of buildings, etc. he hadn't seen the letter Mr. Hogan had referred to. He noted the emails from Mr. Hiller to the Fire Chief, noting that one of the emails from the Deputy Fire Chief referenced the pre-sale walk through. He said they talked about the occupancy, the sprinkler system, and said an email from Chief Landry referenced the 2003 life safety code, and said the occupant load for the third floor was 49. Attorney Springer said the Fire Department was on top of this issue for the property.

Attorney Hogan noted that Attorney Springer had said he hasn't seen the Town's assessment of the property. He said when he had seen the Town's findings, he had assumed that these things must have been addressed during Seacoast Rep's due diligence to buy the property and their subsequent applications to the Town.

He referred in great detail to the findings of the Town assessment, and said these were critical, troubling issues the Town had identified. He said he and Mr. Hiller were expecting to hear how these things were addressed, but said they weren't raised. He said Mr. Hiller had found them, and said they had just heard that Attorney Springer was not familiar with this assessment.

Attorney Hogan said someone living next to this property would expect that these issues would be raised and addressed during the Planning Board's review. He noted that the document he was reading from was an April 2005 Property Condition Assessment. He said he hoped someone would tell him that these things had been assessed and addressed.

***Richard Kelley MOVED to close the Public Hearing. Councilor Smith SECONDED the motion, and it PASSED unanimously 6-0.***

Break from 8:30-8:37 pm

Chair Parnell asked the Board if they would like to deliberate that evening.

There was a motion to go into executive session to discuss a legal motion with the Board's attorney, Walter Mitchell.

Attorney Mitchell said what the Chair would actually be doing was to suspend the meeting so the Planning Board could meet with its legal counsel. He explained that this meeting was an exception to the Right to Know law, and said no motion was needed and no Minutes needed to be taken., if the Board followed the Chair's lead on this.

There was no objection from Board members. Chair Parnell said the meeting was suspended.

The Planning Board then met with Attorney Mitchell from 8:39-8:57 pm. After the meeting with legal counsel, Chair Parnell said the Board would not deliberate on the

Seacoast Repertory Theatre applications that evening, and would ask Mr. Campbell to prepare a list of issues related to the applications that he thought the Board should discuss. He said the Board would go through these issues at the next meeting, and would hopefully come to some resolution.

**VI. Acceptance Consideration and Public Hearing on an Application for Conditional Use Permit** submitted by Thomas P. Sawyer, Durham, New Hampshire for the building of a shed to house two (2) goats. The property involved is shown on Tax Map p, Lot 18-0, is located at 8 Spinney Lane and is in the Multi-Unit Dwelling/Office Research Zoning District.

The applicant, Tom Sawyer said he wanted to have two goats. He said for a goat shed, the distance from the property line had to be 100 ft, and said he was below that on several sides. He said his brother lived on one side and didn't mind that the distance was 92 ft. He said there was 290 ft in the front to the main street so the shed would be out of sight from that road. He said the property on another side, which was 80 ft away, was vacant UNH property.

He said the property on another side was his brother's 20 ft driveway, which was 75 ft away, He also said the Hoenes' house on that side was 700 ft off through a large wooded area, and said they didn't mind the goats. He said the only property he was concerned about was the Hoenes' student rental property, an old house built in the 1940's. He said the shed would be located 200 ft from that house. He noted that the shed had been located to the back of the property, so the wind wouldn't blow from the shed toward that rental property.

Mr. Sawyer also noted that his property contained 2.2 acres, when 3 acres was required. But he said on two side of the property there was open hayfields that the University owned. He also said the Hoenes had a huge buffer of woods, and he noted again that they didn't mind what he was proposing.

Mr. Kelley determined from Mr. Campbell that the application was complete.

***Richard Kelley MOVED to accept and open the Public Hearing on an Application for Conditional Use Permit submitted by Thomas P.. Sawyer, Durham, New Hampshire for the building of a shed to house two (2) goats at the property located at 8 Spinney Lane in the Multi-Unit Dwelling/Office Research Zoning District. Councilor Smith SECONDED the motion, and it PASSED unanimously 6-0.***

Mr. Campbell said he had spoken with abutter Dick Gsottschneider, who said he had no issues with the application, and would like the Planning Board to accept the application and let Mr. Sawyer do what he wanted with the property.

David Sawyer, Tom's brother, said there used to be a shed in the same place that his brother wanted to put the goat shed now. He noted that they used to have one goat, who they later found had died of loneliness, which was why they wanted to have two goats

now. He said his brother was a very responsible person, and said he didn't think the goats would get loose. He also said the shed would be out of sight of everyone.

Mr. McGowan asked if this needed to be restricted to two goats.

Tom Sawyer said there would only be two male goats, which would be castrated.

Mr. Roberts said restricting the number to two goats might not be in Mr. Sawyer's interest.

Tom Sawyer said there was a question as to whether the two goats might also be lonely, but said he wasn't planning on having more than two.

Ms. Fuller confirmed that there would be a fenced in area for the goats.

Tom Sawyer said there were two large garden areas, and said there would be a 1000 sf pen for the goats next to them, as well as a 750 sf pen to the back of the property. He said livestock could create odor problems and ecological damage, and said this would be a learning experience for him. But he said he would keep the goats fenced in.

Mr. Campbell noted that this was a situation where the Planning Board hadn't really known what was in the Ordinance until someone applied for something. He pointed out that the ORLI District was surrounded by farmland.

Mr. McGowan determined that where this was a permitted use in Durham, there was no restriction on the number of animals.

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

David Sawyer said he was concerned about the two goat limit, and said that would not be in his brother's best interests. He asked the Board to perhaps limit the number to four or something like that.

Tom Sawyer said he was only planning on having two goats, and could come back to the Board if he needed more than that.

***Richard Kelley MOVED to close the Public Hearing. Councilor Smith SECONDED the motion, and it PASSED unanimously 6-0.***

Chair Parnell said the Board would be able to deliberate on the application that evening.

Mr. Kelley asked about the note on the subdivision plan that said there would be 50 ft of no soil disturbance.

Mr. Sawyer said this was the wetland buffer. He said that was a third issue, that the goat shed would be about 15 ft within that buffer. But he said he'd been told that this would

probably be permissible.

Mr. Roberts said it could be permissible as part of the Conditional Use process, with the approval of the Planning Board, after consulting with the Conservation Commission.

Mr. Sawyer said the preferred location for the shed was in that setback.

There was discussion that the variance application before the ZBA on March 30<sup>th</sup> didn't address the wetland setback encroachment.

It was noted that conditional use criterion #3 could be waived upon the advice of the Conservation Commission.

Mr. Campbell said the Board could add this to the list of conditions.

Mr. Sawyer said the wetlands were back in the woods, and noted again that the place he wanted to put the shed was where there previously had been one. He said the area was clear of trees, and said if he had to put the shed somewhere, he'd have to cut some trees. He also said the existing location would keep the shed clear of the neighbor's property.

Mr. Campbell suggested that the Board could say that the Conservation Commission would have to make a positive recommendation regarding the incursion into the wetland buffer. He said he was comfortable with that.

The Board went through the Conditional Use Permit criteria, and had no issues concerning the application meeting any of the criteria.

Chair Parnell noted the draft Findings of Fact and Conditions of Approval. It was agreed that there would be a Condition #5 regarding a recommendation from the Conservation Commission concerning the wetland encroachment.

Mr. Roberts asked if they should add that the Planning Board found that the application was sufficient to support up to four goats.

Mr. Kelley said he didn't believe so, stating that the applicant had asked for two goats, and had stated this again that evening.

**Findings of Fact:**

1. The applicant submitted an Application for Conditional Use Permit with supporting documents on February 19, 2010.
2. The applicant submitted the deed for the property on February 19, 2010.
3. The applicant submitted a letter of intent on February 19, 2010.
4. The applicant submitted a site plan entitled "Subdivision Plan Land of Albert K. Sawyer, Tax Map 9, Lot 18-0, Spinney Lane, Durham, Strafford County, New Hampshire" on February 19, 2010.

5. A Public Hearing was held on March 24, 2010 and testimony was received in favor of the application.

**Conditions of Approval to be met Prior to issuance of a Certificate of Occupancy by the Code Enforcement Officer:**

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. A building permit shall be submitted to and approved by the Code Enforcement Officer for any new construction. All appropriate building codes shall be met.
3. The Zoning Board of Adjustment must approve a variance to allow for the goat shed on a lot less than 120,000 square feet and within 100 feet of the lot line.
4. A Conditional Use Permit shall be issued by the Zoning Administrator.
5. The Conservation Commission shall make a positive recommendation for the incursion into the wetland buffer.

**Conditions to be met Subsequent to the issuance of a Certificate of Occupancy by the Code Enforcement Officer:**

1. No animals shall be pastured within twenty-five (25) feet of any property line.

*Richard Kelley MOVED to approve the Findings of Fact and Conditions of Approval as amended, for the Application for Conditional Use Permit submitted by Thomas P. Sawyer, Durham, New Hampshire for the building of a shed to house two (2) goats at the property shown on Tax Map p, Lot 18-0, located at 8 Spinney Lane in the Multi-Unit Dwelling/Office Research Zoning District. Councilor Smith SECONDED the motion, and it PASSED unanimously 6-0.*

- VII.** Public Hearing on Amendments to the Site Plan Regulations to address management and control of the discharge of stormwater. The changes would include the addition of definitions pertaining to stormwater and the amendment of Sections 9.03, 9.04, and 9.05

Town Engineer Dave Cedarholm noted that he had presented the draft amendments to the Board at the February 24<sup>th</sup> meeting. He said this project had been started by former Town Engineer Bob Levesque several years back to get the Town's stormwater regulations/ordinance into compliance with its federal MS4 permit.

He said that permit had expired two years ago, and said the Town should have adopted the regulations prior to the expiration date. He said the new permit was expected to be issued in the fall, and said it was imperative that the Town adopt more up to date regulations soon. He said a stormwater report was due to EPA by May 1<sup>st</sup>, and said it would be very helpful if the regulations were adopted prior to that. He provided copies of



the permit to Board members.

Mr. Kelley asked what would happen if the Town wasn't in compliance with that permit.

Mr. Cedarholm said the Town could face some fines, and he provided details on this.

Mr. Kelley noted the language in the regulations that said a stormwater system proposed had to meet the requirements of the Town Engineer. He asked if the proposed regulations would make it clear for developers and the public what those requirements, which Mr. Cedarholm had already been implementing with projects, actually were.

Mr. Cedarholm noted the general language currently in the Site Plan regulations was that all development had to provide adequate disposal of drainage. He said it had been a challenge to help the Planning Board and developers define something that was adequate.

He also noted that the EPA required pre construction and post construction best management practices, and said the Town currently didn't address preconstruction BMPs, and didn't define post construction BMPs in regard to operation and maintenance and erosion control plans. He said the draft regulations really defined these things.

Mr. Cedarholm then read a statement into the public record on the proposed regulations. He said the proposed Stormwater Management Section to the Durham Site Plan Review Regulations were developed over a period of at least 6 years, through numerous iterations involving two Town Engineers, the Town Council, Planning Board, and the Conservation Commission. He said this process had involved multiple presentations and public hearings. with much input from members of the community and consultants representing local developers.

Mr. Cedarholm said these regulations were a step forward in satisfying requirements of the Town's federal stormwater discharge permit, which would soon become more stringent due to the numerous rivers and streams within the Town of Durham that were included on the EPA's 303d list of impaired water bodies. He said these impaired water bodies included the Oyster River, Pettee Brook, College Brook, Johnson Creek, Bunker Creek, and the Great Bay.

He said all these impairments were directly linked to stormwater runoff, and said it was the Town responsibility to adopt regulations and implement measures to begin addressing the causes of these impairments. He said to satisfy the State's obligations with respect to the federal Clean Water Act, NHDES was also in the final process of adopting strict Water Quality Standards and Anti-degradation Rules that required "water quality standards to be met in all water at all times".

Mr. Cedarholm said poor water quality and flooding degraded private and public property values, and cost tax payers money because of frequent and repeated repairs and maintenance of public and private infrastructure. He noted that the area of impervious surface in the Seacoast had doubled over the last 20 years, and said the increased

impervious surfaces at properties with lacking or ineffective designed stormwater management systems in upstream areas were directly responsible for much of the degradation to downstream water resources and public and private properties.

He said for decades, stormwater management had taken a back seat to development, and said it was now realized that the approach engineers had taken to stormwater management even just 10 years ago was extremely short sighted. He said most of the systems installed over the last 20 or 30 years were well built and with good intentions, but said they did not adequately consider the affect on downstream resources, habitat, and water quality.

Mr. Cedarholm said it was important to realize that most of the easily developed lands in Town were built-out, and that the majority of what was left were very complex sites that would require careful consideration of hydrology, soils, and site characteristics to get it right. He said the stormwater management systems today were designed to better protect downstream resources, and had been shown to be cost effective and to greatly enhance the desirability and value of the development.

He noted that during his presentation to the Planning Board on February 24<sup>th</sup>, he had pointed out that the regulations being considered actually required less than what developers had recently been proposing. He said this had mostly to do with site specific issues and the developers' understanding their responsibility to minimize the impact on the hydrology of the site and downstream resources.

He said these regulations provided definition that had been greatly missing; would do much to help streamline the approval process; and had a much greater chance of spurring development than creating a hindrance.

***Richard Kelley MOVED to open the Public Hearing on Amendments to the Site plan Regulations to address management and control of the discharge of stormwater. The changes would include the addition of definitions pertaining to stormwater and the amendment of Sections 9.03, 9.04, and 9.05 Councilor Smith SECONDED the motion, and it PASSED unanimously 6-0.***

**Jamie Houle, 95 Mill Road**, spoke in support of the regulations, noting that he had helped draft them. He said he was a professional in the area of storm water management, and did not take this subject lightly. He said what was proposed would provide the necessary protections and update to the site plan regulations, in a way that was consistent with the State's revised stormwater regulations that were released in December of 2008, and with what was known about the draft for the Phase II permit under the federal regulations.

He said the draft regulations also clarified and codified many of the guidelines Mr. Cedarholm had been applying to development sites already, on almost a weekly basis. He said the major problem with the existing regulations was that they were inconsistent and a little vague.

Mr. Houle said the regulations represented a sharing of some of the liability, stating that impervious surfaces contributed to non-point source pollution, which comprised 60-70% of what was impairing the State's water bodies. He noted that all of Durham's water bodies were impaired in some way, so were on the State's 303 D list. and were afforded some protections under the federal regulations.

He also said at some point TMDL(total maximum daily load) standards, which were effluent standards, would have to be met, and said the Town would be completely liable for meeting the requirements of this regulatory framework. He said whether EPA enforced this or not, the Town still needed to put forth its best effort to address the requirements.

Mr. Houle said nature was demonstrating that the Town was already paying a high price for development. He noted that these proposed regulations did not address the majority of existing development, so there was no remediating of those properties. He said what was proposed now was an attempt to address some of the impairments that had already occurred to the Town's water bodies. He said the interest rate of inaction was very high, and recommended that the Planning Board accept the regulations.

**Mike Sievert. 28 Riverview Road,** noted that he owned MJS Engineering, so was an engineer who worked on stormwater management plans as part of site plan applications. He said Mr. Cedarholm had asked him to review the draft. He said he wished to speak in favor of what was proposed, stating that it was a positive step, but said he did have some comments on it.

He said this was a good, well written set of regulations, and said a major benefit was that it established standards, and provided a checklist to make sure these standards were met. He noted that they eliminated the need for a stormwater management plan for a site disturbance under 10,000 sf, which was good, but said he didn't agree with the idea of setting that bar. He said he thought it was a little too low for development beyond the downtown area for sites from 10,000 sf up to 100,000 sf, where the alteration of terrain requirements set in.

He said another positive element was the reduction factors in infiltration. He said Mr. Cedarholm had focused well on the quality of water and the ability of a design to treat that, with not so much focus on infiltration and reducing the volume of water. He said while the latter was important, it wasn't easy to do, especially in a place like Durham where there was either ledge or clay soils.

He said under #4 under stormwater plans for new developments on page 6, he didn't agree totally that stormwater and erosion and sediment control BMPs needed to be outside of the specified buffer zone. He said he thought some buffer zones were too large, in the context of isolated wetland areas, poorly drained areas on large sites, etc.

He also said some of the BMPs, like rain gardens and infiltration swales would not be a

detriment to buffers, and he suggested that there should be openness to working with developers and Mr. Cedarholm, or through waivers during the site plan review process, on a case by case basis. He noted that he wasn't speaking about buffer zones for drinking water or rivers.

Mr. Sievert said the wording on page 7, regarding reduction in infiltration being dependent on soils, was good. He also said the performance standard concerning no degradation of offsite or downstream channels of adjacent properties was a must. He said that concerning the performance standard that biological and chemical properties of receiving water would not be degraded by stormwater from a development, while it was a great statement, he wasn't sure how this would be determined. He said he hoped developers wouldn't be required to test this now, noting that there were cost issues.

He said that concerning the performance standard on page 8 regarding pervious parking surfaces, he thought these systems were not perfected, and there were a lot of structural problems with them. He said putting these systems on the majority of sites in Durham wouldn't work that well because of the clay and ledge soils. He said there were also problems with construction and maintenance of pervious pavement, and he provided details on this. He said encouraging that it be used was a great idea, but said requiring this was another thing.

Mr. Sievert said he thought #5 Redevelopment Project Requirements on page 8 provided leeway regarding redevelopment downtown.

He said page 9, regarding bonding, made him nervous because it added a lot of costs to projects. He spoke in detail on this, and suggested requiring a smaller amount that would allow the Town to stabilize a site if needed, but not to actually complete the stormwater system. He said he wasn't sure that he had a good answer for this.

He said under 10 c. on page 10, the statement regarding post construction inspection, that hopefully the Planning Board wouldn't be actually going out to the site. He said the inspection should be done through the DPW, which would report back to the Planning Board.

Mr. Sievert said that on the checklist, there was no definition of "no water quality threat". He said Mr. Cedarholm had clarified that this didn't necessarily refer to a threat to the receiving waters. He suggested this wording should be clarified.

He said other than that, he thought Mr. Cedarholm had done a great job.

Mr. Kelley asked Mr. Sievert what percent of the construction value was required to get a performance bond.

Mr. Sievert said especially on a site plan, the question was whether they wanted to include all the earthwork for a development under a performance bond. He noted that the Town ultimately had the control because of the occupancy permit.

Mr. Kelley said the performance bond was for the Town to be able to stabilize a lot if the developer left town. He asked what it would cost a developer to get a performance bond for \$1 million of work. There was discussion that it varied from developer to developer, depending on their bonding capabilities.

Mr. Campbell noted that the Town already required a financial surety under Section 8 of the Site Plan Regulations. He said he didn't know if what was proposed in the draft stormwater regulations said anything different than that.

Mr. Sievert said he was giving some general feedback regarding bonding. He said it was a different situation when there was a subdivision, where the Town could get caught with a lot more disturbance in a more widespread area as compared to a more confined site plan situation. He said the question was how much money the Town would need if it just had to go in and stabilize a site temporarily.

Mr. Campbell noted that the language spoke about a lot more than stabilizing a site.

Mr. Sievert said a question was whether the Town would complete a project, or instead just stabilize it and let the property get sold and then completed.

Chair Parnell asked Mr. Sievert if he had worked in other towns with storm water regulations, and if there was anything in what was proposed with the draft regulations that would make Durham less attractive to developers.

Mr. Sievert said he had experience in Northwood, which had gone way beyond, and had adopting the AOT rules in their draft form. He said Newington had regulations similar to what was proposed here.

Mr. Roberts noted Mr. Cedarholm's comparison of stormwater management systems on existing development sites in Town, which indicated that they all passed what was in the Ordinance. He asked Mr. Sievert if there was anything in his current work experience that was a concern.

Mr. Sievert said no, but said these were nice standards proposed now because at least he would know where he was going with them. He said he thought these regulations would work well for urban downtowns, but said he wasn't sure they were doing justice to the 10,000-99,000 sf on larger parcels on the outskirts of Town, which weren't dealing with immediate discharges to surface water such as was the case downtown.

Mr. Campbell noted that there was language on page 3 of the draft that gave the Planning Board the right to require a stormwater management plan for sites less than 10,000 sf.

Mr. Sievert said he would therefore take back what he had said previously said about it being a positive feature of the draft regulations that a stormwater plan wasn't required for sites less than 10,000 sf.

**Derek Sowers, 32 Oyster River Road,** said he would speak as a resident as well as a staff member of the Piscataqua Regional Estuaries Partnership. He said the organization's main goal was to protect and restore the water quality of the Great Bay and Hampton/Seabrook Harbor estuaries. He said the water quality impairments were very real, noting levels of bacteria, low levels of dissolved oxygen needed to protect native species, and toxics in fish tissues and sediments that were alarming, all of which were related to stormwater runoff. He said Durham could be part of solving this problem not just because of the EPA but also because it cared about its local waters.

He said a lot of the stormwater requirements at the State and federal levels were triggered at relatively high thresholds, so there were a lot of smaller and medium sized developments that could impact water quality. He noted that his organization had worked with Newington, New Durham, and Brentwood to update the stormwater provisions in their site plan regulations.

Mr. Sowers said to not pass these regulations would delay the inevitable. He also noted that this was an economic issue too for taxpayers, in terms of having to address flooding and water quality impairments if there was not good stormwater planning and management.

He said the development standards referenced in the draft regulations had been shown to do a lot better job protecting water quality than conventional approaches, which weren't designed to address water quality. He said the BMPs would address both peak flows as well as water quality improvements, which represented a major improvement over the existing subjective regulations. He said it would be good for an applicant, the Planning Board and the Planner to know what standards needed to be met for a particular development site.

He said that regarding the idea of easing into this, he said he thought they were doing this, noting that the site plan regulations could be updated relatively easily by the Planning Board if needed.

Mr. Sowers said that regarding specifics in the regulations, it was important to keep stormwater management strategies out of the buffers, including the 50 ft no disturb zone for wetlands and similar protections for shorelands. He said an undisturbed buffer as well as the wetland itself was the best way to provide natural water filtration, and said it didn't make sense to impact an existing natural treatment infrastructure, which was free, and impact it with something related to the development. He noted that there might be some sites where it made sense to waive those rules, and said the draft regulations provided the flexibility to allow this.

He said that concerning isolated wetlands, many in the region were vernal pools, and many of these were very significant for wildlife. He noted that in Maine, there was a 200 ft buffer requirement for significant vernal pools, and said requiring a 50 ft buffer and keeping stormwater systems out of them wasn't unreasonable.

Mr. Sowers said that regarding having different standards for in-town as compared to out-of-town development, he thought the larger parcels that had not yet been developed represented the most significant places to make sure that they did things right the first time. He said he didn't see the need for different standards, and said the specifics could be handled as part of the application process.

He summarized that these draft regulations were well done and timely.

**Malcolm McNeill, 44 Colony Cove Road**, said he wasn't opposed to the concept of having more highly defined site plan regulations for Durham, but said that from a legal perspective, he had many concerns relative to the criteria of the regulations being reasonable and reasonably interpretable.

He said he was concerned both about the process of drafting the Regulations and their impact on Durham's competitive position to obtain tax stabilization provided for in the Master Plan, on the very few parcels of land in Town zoned for and capable of commercial development.

He said he was concerned that there should be differentiation in these controls between downtown impacts to the Pettee Brook area, which appeared to be the focus of concern of the regulation, and separate requirements for the other commercially zoned areas in the community such as the MUDOR and ORLI zones. He said the new controls should not have the effect of limiting or eliminating the density that was permitted under the Zoning Ordinance, or significantly increasing development costs.

Mr. McNeill said he was also concerned that these Regulations had been taken to some degree from the town of Newington, which was a far different community with its heavy industrial and retail presence, 11,000 ft runway and major highways, as well as other components not analogous to Durham. He also noted that the Durham regulations were more stringent than those of Newington.

He said the Newington regulations had not been tested, and also said the impact on the cost of development was unknown. He said he suspected that was also the case for Durham. He spoke about the involvement of UNH in the drafting of both sets of regulations.

Mr. McNeill said there were very few areas in Durham that were capable of commercial development that was subject to the Site Plan Regulations. He also said in-town development presented different stormwater challenges than out of town development in the ORLI and MUDOR zones.

He then reviewed the various Town regulations a developer already had to confront, in bringing forward a development proposal, and also noted that the Conservation Commission was considering redrafting the Shoreland Protection Overlay District and a new Stormwater Ordinance. He said the challenges to achieve tax stabilization in

Durham through development became more difficult with the passage of each new regulation. He said this was not a circumstance where Durham was not presently reasonably protected with its extremely expansive regulatory controls.

Mr. McNeill said while he respected the integrity of everyone involved in developing these regulations, he believed there should have been significant developer involvement in drafting them, to determine whether they were reasonably balanced, would impose significant construction costs, and would affect the intensity of permitted density under the Zoning Ordinance.

He said the group that drafted these regulations was heavily weighted with Conservation Commission members and parties very sensitive to environmental issues, but he said there were no builders or others who had to take the development risks.

He said the proposed controls were far more stringent than the 100,000 sf ft disturbance requirements of the new controversial State's Alteration of Terrain Permit requirements, and said he wasn't convinced that Conservation Commission members had reviewed them. He said it also might have been desirable to have the EDC involved in order to determine economic impact issues under their jurisdiction.

Mr. McNeill said the draft stormwater regulations were very difficult for a lay person to understand. He asked if it had been determined what the cost effect of this would be on the competitive position of commercial property in Durham to reasonably develop. He said while it might be greener, the question was whether it would be balanced.

He asked whether a 10,000 sf threshold was reasonable when the Alternation of Terrain Permit dealing with similar issues was 100,000 sf in most circumstances, and when Newington had chosen 20,000 sf. He said while EPA was talking about stormwater management and criteria, there were no uniform or mandated standards in the State, or else all the regulations would be the same. He asked if there should be different standards for in town and the outskirts of Town in the Commercial zones. He then recommended the following specific changes to the draft stormwater regulations.

### **Section 3.02 Definitions:**

**Buffer** - "zone" needs to be further defined; "sensitive resource" needs to be defined

**Maximum Extent Practicable** - replace the word "possible", and "highest practicable" with "reasonable"

**Riparian buffer** - replace ""possible" with "reasonable". He also said this was a floating, ill defined buffer that required greater specificity and limitation.

**Water Quality Volume** - He noted that the water quality volume needing to be captured and treated was 90% in Newington's regulations, yet it was 10% for Durham.

### **9.03 Stormwater Drainage -**



**A. General Requirements** - Should say “reasonable”, not “adequate” management of stormwater runoff. He also asked why the number 10,000 sf was used, rather than 20,000 or 30,000 sf. He said there were no criteria or standards to apply as to when to impose those controls. He also asked why the number 10,000 sf should be used throughout the Town.

### **9.03.1 Design Standards**

#### **4) Stormwater Management for New Development -**

**Under a.,** he questioned the idea of requiring BMP’s to be located outside the specified buffer zone. He said this would create another area of property that couldn’t be developed, and said there could be reasonable integration of these controls within the buffer itself.

**Under b.,** he said the word “reasonable” should be placed in front of “LID site planning and design strategies must be used...”

**Under h.,** concerning controlling post-development peak runoff so it didn’t exceed pre-development runoff for storm events, he said if anyone could explain to him what the wording in that paragraph meant, it would be helpful.

**Under i.,** concerning measures taken to protect against on and off site channel erosion.....”, he asked how far down the stream one must study to meet the requirements, and said more precise criteria were needed.

**Under q.,** concerning efforts to use pervious parking surfaces, he said the word “reasonable” should be inserted at the beginning of the paragraph. He said there was wide dispute about the efficacy of these systems.

**Under r.,** concerning retaining native site vegetation, he said the sentence should begin with “wherever reasonable”, and not “wherever practicable”

Concerning the second paragraph under **5) Redevelopment Project Requirements**, he said this was like trading air quality credits, and was not meaningful or realistic for Durham.

Concerning **7) Bonding**, Mr. McNeill noted the current extremely difficult banking environment, and said the only interest the Town should have was in being able to complete the mandated improvements of a project that protected health, safety and welfare. He said no town was in the business of completing a defaulted project, and instead was in the business of stabilizing a project that was in default. He said the bonding paragraph therefore needed to be reworked.

He questioned **8) Plan Approval and Review**, concerning the idea of the Planning Board retaining a third party to review stormwater plans. He said Mr. Cedarholm had drafted these regulations with the assistance of the UNH Stormwater Center and the

Conservation Commission, and said a well drafted set of regulations from these people should be able to be interpreted by these same people.

Regarding **10) c**, regarding post construction inspections, Mr. McNeill asked if the Planning Board really wanted that work. He said he knew of no community he worked in that would wish for that power, and said it could be delegated. He also said the question was how many inspections should occur, and said the word “reasonable” should be included to protect private property rights.

Concerning section **9.03.3 Waivers & Exceptions**, Mr. McNeill said he thought controls of this nature should be in an ordinance, subject to the protective review of elected officials and a more expansive review process. But he said if the Planning Board did this through the site plan regulations, the waiver standard needed to be reasonable.

He questioned the present wording in the draft “for reasons heretofore well demonstrated”, and recommended what Newington had used, which was “for good reason shown”. He said other towns had similar language, such as “after the developer has made reasonable efforts to comply with the regulations...”

Mr. McNeill also noted wording at the end of the draft regulations that said they were to be reviewed in the context of the Zoning Ordinance and the Subdivision Regulations in order to maintain consistency. He said this was hard to do because there was no consistency between these documents, and said he wondered if this had been done.

He said he didn’t mean to criticize Mr. Cedarholm, or to indicate that he was opposed to water quality issues. He said there needed to be regulations that worked, were enforceable, were reasonable, and produced a result that was reasonably consistent with the Master Plan so development could occur in Durham.

Mr. McNeill said he thought more work was needed on these regulations. He determined from Mr. Campbell that the draft had not been reviewed by a lawyer, and said the Board’s attorney should have the chance to respond to some of the issues he had raised. He said he would be happy to document these issues. He also suggested that some input from developers would be helpful, and he spoke in some detail on this.

He said the challenge to the regulations should not occur after it passed, and said the challenge was to pass a good set of regulations that protected water quality in a reasonable way, that was interpretable, had measurable standards a person could understand and plan by, and could have predictable results.

Mr. McNeill said the prior stormwater provisions were not fair because it imposed too much power on any one person who was trying to do a good job. He said this draft was an improvement. But he said it had to be considered in the context of Durham, the marketability of the community, and combining that with reasonable standards that were not overreaching one way or the other.

**Robin Mower, 11 Faculty Road**, said she hoped the Planning Board would take a leadership role, in terms of looking toward the future concerning the impaired water bodies in Durham and Great Bay. She said agreed with some of Mr. McNeill's comments regarding language, but said they all were not necessarily looking for a happy medium, and it really was a question of leadership.

In response to Mr. Roberts, Mr. McNeill said he could email his comments, including his legal comments.

Mr. Cedarholm said he appreciated the comments from Mr. Sievert and Mr. McNeill. He said from the start, the intention was to put regulations together that were workable and reasonable. He said Durham needed good quality development, and said these comments could easily be addressed. He said he agreed with the idea of replacing certain language with reasonable. He also said the buffer definitions could be tweaked, and said some of them had come from the Newington document. He said he agreed regarding the use of the word reasonable in regard to the riparian buffer.

He said that regarding the 100% for volume for Durham versus 90% for Newington, Newington didn't make a distinction between infiltration and filtration, but Durham did. He noted that while some soils in Durham didn't allow much infiltration, filtration of the water could still be done relatively easily. He noted the proposal for Mill Plaza last fall, where infiltration of all the water from the entire area they were looking at couldn't happen, but filtration could be done.

He also said considering acknowledging the difference between the downtown and out of town commercial zones might make sense. He said Newington adopted a 20,000 sf threshold, which was specific to commercial and industrial sites, and didn't feel they would have much in the way of residential development. He said perhaps a 20,000 sf threshold for outside of the downtown in Durham could make sense.

Mr. Cedarholm said it made sense to use the word reasonable in regarding to low impact development approaches and the use of pervious pavement.

He said he agreed that regarding the idea of offsite trading, this was somewhat difficult. He said this idea had been obtained from Newington, and said he would be interested to see how this would be done.

He said what Mr. Sievert and Mr. McNeill had said regarding bonding made a lot of sense. He noted that the bond requirement in the site plan regulations had been in place for some time but had never been tested, and said perhaps it was time to revisit that.

He said inspections were a critical piece of the federal requirements, and said it would require extra time for the DPW to do this. He said the stormwater systems would need to be maintained for as long as they were in place.

Mr. Sowers said he thought some good edits to the language had been recommended. But

he said the performance standards were not unique to Durham or Newington, and were in the State's model ordinance. He said there had been a lot of peer review and vetting of these regulations. He said the consulting firms his organization had worked with in New Durham was Appledore Engineering, and said the firm that worked in Brentwood was VHB. He said they didn't have any issues with the standards that were required.

***Councilor Smith MOVED to close the Public Hearing. Bill McGowan SECONDED the motion, and it PASSED 5-1 with Richard Kelley voting against it.***

Chair Parnell asked the Board how it wanted to proceed.

There was discussion that it was the Planning Board that would decide whether the proposed changes to the regulations were adopted.

Mr. Campbell said the Board could vote this up or down, or could direct someone to review the comments made, possibly make some changes, and then bring the draft back to the Board.

Mr. Kelley suggested that the subcommittee should review the comments that had been made that evening, and he noted that some of the members were at the meeting. He also said the Planning Board could perhaps make the changes.

Ms. Fuller asked Mr. Cedarholm and members of the subcommittee if they would be willing to incorporate the changes they thought were good into the draft, and then bring it back to the Board.

The subcommittee members said they would do this.

Ms. Fuller asked Board members how they felt about having the Board's attorney review the draft, and said she didn't think that was a bad idea.

Chair Parnell said he agreed with a lot of the issues that had been raised that evening. He noted that some of the changes recommended that evening would be substantial while others would be less so. He said he would be in favor of third party review by the development community.

There was discussion about whether the public hearing should have been closed, and whether some of the proposed changes mentioned that night, if included in the draft, would require another public hearing anyway.

Mr. Roberts noted the issue raised that evening as to whether outlying areas of Town should be handled with a different approach. He asked Mr. Cedarholm if the State model ordinance provided any guidance concerning this.

Mr. Cedarholm said he wasn't a big fan of the model ordinance, and said while it was used the first time the draft regulations were worked on, they wound up starting pretty much from scratch. He noted that the model ordinance did look at stormwater that was

not associated with developments, and said this issue was the reason Durham did need to have a separate storm water ordinance that addressed illicit discharges in stormwater, in addition to having stormwater provisions in its regulations. He said most illicit discharges were related to existing development. He said he would therefore need to go to the Town Council with a separate ordinance to address the detection and elimination of illicit discharges.

Mr. Roberts said the aquifer ordinance was pretty powerful, as was the proposed drinking water ordinance, and said a question was what land would be left after these were considered.

Mr. Cedarholm said there was a lot of land. He noted that the aquifer protection district was specific to stratified drift aquifers, and said when groundwater aquifer protection was considered, this was a sketchy area. He said he would prefer not to confuse these things with the stormwater regulations and an illicit discharge approach in a proposed stormwater ordinance.

Mr. Roberts asked Mr. Cedarholm if he was willing to consider a different approach for outlying areas.

Mr. Cedarholm said if the threshold was increased to 20,000 sf, the Planning Board could still have the ability to require a stormwater management plan for developments less than 20,000 sf that posed a water quality threat that contributed to a water quality impairment. He said it was a disturbance threshold, and said this would depend on where the site was located. He said if the site was near an aquifer or water body of concern, the Board could require some kind of stormwater management plan, primarily to address water quality. Councilor Smith asked Mr. Kelley if there was a reason the public hearing should have been left open.

Mr. Kelley said the changes from the subcommittee could be substantial, but noted that the Board could re-advertise.

Chair Parnell asked Mr. Sievert if he could provide written comments, and was told yes. Chair Parnell then asked Mr. Kelley to take these comments and Mr. McNeill's comments back to the subcommittee.

Mr. Cedarholm noted that Eric Weinraub of Altus Engineering had provided some preliminary comments.

Chair Parnell asked that these comments be followed up on. There was discussion as to whether this would be sufficient in terms of third party review.

Mr. Campbell said the subcommittee would look at the draft again and then bring it back to the Board and explain why it did or didn't make each of the proposed changes. He said at that point, if the Board was satisfied with the document, it could send it to its attorney for review, before the next public hearing.

Planning Board members agreed with this approach.

Mr. McNeill said he would get his comments to the Board as soon as he could.

Mr. Cedarholm said it would be good if this could be wrapped up in April.

**VIII. Public Hearing on an Amendment to the Site plan Regulations to remove Section 9.07 “Off-Street Parking and Loading.”**

***Richard Kelley MOVED to open the Public Hearing on an Amendment to the Site plan Regulations to remove Section 9.07 “Off-Street Parking and Loading.” Councilor Smith SECONDED the motion, and it PASSED unanimously 6-0.***

There were no members of the public who came forward to speak.

***Bill McGowan MOVED to close the Public Hearing. Councilor Smith SECONDED the motion, and it PASSED unanimously 6-0.***

***Bill McGowan MOVED to Adopt the Amendment to the Site plan Regulations to remove Section 9.07 “Off-Street Parking and Loading.”. Susan Fuller SECONDED the motion, and it PASSED unanimously 6-0.***

**IX. Other Business**

**A. Old Business:**

Mr. Kelley noted that he had gone to the pre-construction meeting for the Xemed project, but said it didn’t get off the ground because a Request for Rehearing had been filed with the ZBA. He said the project schedule was therefore thrown off, and said he would have notes on this for the Planning Board.

He asked if the bonding information had gotten to DPW, and Mr. Campbell indicated that it had.

Ms. Fuller asked what the board thought about the EDC reviewing the storm water regulations, in terms of whether they were developer friendly, and whether involving them would help cohesion between boards. She said it sounded like a good idea.

Mr. Kelley said it was there for anyone to look at, and asked Ms. Fuller if she meant there should be a specific request from the Planning Board.

Ms. Fuller said if nothing else, it might familiarize the EDC with the Ordinance.

Mr. Campbell said he would bring this up with EDC Chair Tom Elliot, and he could decide whether to put in the agenda.

B. New Business:

C. Next meeting of the Board: April 14, 2010

**X. Approval of Minutes – February 10, 2010**

Postponed

**XI. Adjournment**

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

Adjournment at 11:05 pm

Victoria Parmele, Minutes taker

---

Stephen Roberts, Secretary