These minutes were approved at the October 9, 2007 meeting.

ZONING BOARD OF ADJUSTMENT
TUESDAY, AUGUST 14, 2007
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT: Jay Gooze; John deCampi; Jerry Gottsacker; Ted McNitt; Michael Sievert; Ruth Davis; Robbi Woodburn; Carden Welsh

MEMBERS ABSENT:

OTHERS PRESENT: Tom Johnson, Code Administrator/Enforcement Officer; Victoria Parmele, Minutes taker

I. Approval of Agenda

Mr. deCampi said he was not in favor of hearing Agenda Item II C, the Administrative Appeal of the Planning Board's decision concerning the Stonemark Management application. He said it might be in the public interest to talk about whether to hear it, so people in the audience could decide whether to stay or go home.

Mr. McNitt said he agreed.

Chair Gooze noted the August 14th letter from Attorney Pollock, representing Stonemark Management. He said one of the points in the letter was that the appeal violated ZBA procedure because the applicant had not used the proper form, which was required under the ZBA'S rules of procedure, when the appeal was filed. Chair Gooze noted that the application itself included everything one would need to see on the form.

Mr. McNitt said it would seem the Board would want do a site review for this matter, which would give the applicant time to file the form.

Mr. deCampi said he also felt that the ZBA shouldn't have a hearing on this matter until, or unless there was a member of the Planning Board in the audience to respond. He said the ZBA had no other facts than those provided by the applicant. He compared this situation to an administrative appeal situation involving Code Administrator Tom Johnson, where it was important that Mr. Johnson be there to speak with the Board about the original administrative decision.

Chair Gooze said he would like to know what the will of the Board was concerning the issue of the form.

Mr. deCampi said the rules of procedure said the hearing got deferred for one meeting if the application wasn't on the right form, and he said he was in favor of enforcing that rule.

Mr. McNitt said it made sense not to waste this month, and said the Board could therefore do a site review in the mean time.

Ms. Woodburn and Mr. Gottsacker recused themselves from discussion on this matter.

There was further discussion on what procedure to follow.

John deCampi MOVED to not to hear the matter until it is brought in on a proper application. Ted McNitt SECONDED the motion.

Ms. Davis said it seemed a shame not to hear the application when the Board had a lot of information on it, although she did say she was concerned about the precedent this might set.

Mr. Sievert said he didn't see how they could hear this if the rules said the information had to be on the form.

There was further detailed discussion on whether to hear the matter that evening.

Attorney Peter Loughlin, representing Stonemark Management, and Attorney Scott Hogan, representing the applicants for the appeal of administrative decision, agreed to waive the form requirement.

Mr. deCampi said he would still like to defer this matter for 30 days, and would like to have the Planning Board represented in the room when this matter was heard.

Chair Gooze said there were a number of issues involved with the Stonemark application, but said there were only a few of them that were within the Board's purview to deliberate on. He said having gotten the waiver from the two parties, and having talked with the Office of Energy and Planning and other entities about the form issue, he felt the Board should hear the case.

Mr. Johnson noted that neither the Town Planner, the Planning Board Chair or the Planning Board's Attorney planned to be at the meeting that evening.

After further discussion, Mr. deCampi withdrew his motion.

John deCampi MOVED to approve the Agenda as submitted. Ted McNitt SECONDED the motion, and it PASSED unanimously 4-0.

II. **Public Hearings:**

A. **PUBLIC HEARING** on a petition submitted by William and Carrie Salas, Durham, New Hampshire on behalf of Bruce Mohl & Marian Tucker, Meredith, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article IV, Section 175-11 to expand the existing gravel parking area beyond the 20 foot side yard setback. The property involved is shown on Tax Map 6, Lot 9-4, is located at 24 Newmarket Road, and is in

the Residence B Zoning District.

Bruce Mohl , the current owner of the property, explained that this was a follow-up to a variance approval at the June 19th meeting which allowed the residential use of his property to change to a professional office use. He said the present variance was needed concerning the side yard setback so that additional parking spaces could be located on the property. He said Mr. Salas, who was buying the property, would provide details on the present variance request.

Mr. Salas explained that based on the size of the structure, 8 parking spaces were required by the Zoning Ordinance. He described what was proposed: a handicap space with a handicap access area with a ramp at the correct grade; and an expansion of the existing gravel parking area to allow for 3 parking spaces.

There was detailed discussion on the side setback intrusion that would result from the expansion of the gravel parking area.

Mr. Welsh asked if any trees would be cut as a result of the expansion of the gravel parking area, and Mr. Salas said that only two small shrubs would need to be cut.

There was discussion about the abutting residential property to the south and how far it was set back from street, relative to the applicant's property.

Mr. Sievert said it didn't look like there would be enough room to pull in and back out of the spaces in the expanded gravel parking area without impacting the trees and shrubs nearby.

There was detailed discussion with Mr. Salas about whether the new spaces were going to negatively impact the southerly edge of the parking area as cars drove closer and closer to the trees there.

Ms. Woodburn asked what kind of trees were located there, and it was determined that they were Norway Maples. She explained that these were tougher than some other trees.

Mr. Gottsacker noted that there were no dimensions provided in the variance request. He also said he thought there should be conditions if the variance were granted. In addition, he asked if there was any reason why the parking area couldn't be moved closer to the leach field, and Mr. Salas said no.

There was further discussion about the distances involved in pulling in and backing out of the parking spaces.

Chair Gooze said the Board didn't have exact dimensions for this application, and asked whether perhaps it could wait until the next meeting to decide on this application so it could get these dimensions.

Mr. Salas said he had a meeting with the Planning Board the following week, and Mr. Mohl said that if the variance wasn't approved, the Planning Board probably wouldn't consider the site

plan.

Chair Gooze said the Planning Board could make the approval contingent on getting the variance.

Mr. Sievert asked if there was any other place on the property to meet the parking requirement. He said that 32 ft was needed to make the parking situation work well.

Mr. Salas suggested that another alternative was to put another space more or less between space # 8 and space #3. He said in that case, there would be two parking spaces in the gravel area, which could run parallel to the driveway.

Mr. deCampi said he didn't have a problem with approving the 8 ft encroachment, stating that he had the impression that this variance was needed to meet a Town requirement, not a requirement of the business.

Ms. Woodburn noted that the variance would go with the property.

Chair Gooze asked if any members of the public wished to speak for or against the application. Hearing no response, he closed the public hearing.

Mr. Sievert said there was not really a way to put the parking any other way, and noted that the gravel parking area was already there. He also said the number of employees parking there would be minimal. He said the application seemed to meet the variance criteria.

Ms. Woodburn asked whether if the applicant got the variance, they would have the choice to change the orientation of the parking spaces.

Mr. Johnson said if they got the variance, they could go do to the Planning Board and work out the configuration to satisfy whatever dimensions the ZBA had come up with. There was discussion about this.

Mr. Gottsacker said he felt the application met the variance criteria, and said he would hate to see the applicant have to come back with more detail, especially since he would be going to the Planning Board where these things could be hashed out. He said he would like to see a proviso that details would be provided to the Planning Board, and that good dimensions would be included with this.

Chair Gooze said he agreed with Mr. Gottsacker, but he suggested that there should be a condition that the tree buffer would be maintained.

Mr. Sievert asked whether the variance was needed, and described another possible design.

Mr. deCampi agreed that the application met the variance criteria.

Mr. Welsh asked if there could be a condition that the parking lot would have to remain gravel.

Mr. Mohl said the plan was that it would remain gravel.

John deCampi MOVED to grant the petition for Variances from Article XII, Section 175-54 and Article IV, Section 175-11 of the Durham Zoning Ordinance submitted by William and Carrie Salas, Durham, New Hampshire on behalf of Bruce Mohl & Marian Tucker, Meredith, New Hampshire, for the property located at 24 Newmarket Road in the Residence B Zoning District, with three conditions:

1. ***that we are allowing parking within the sideyard setback on the southeastern side of the property;***
2. ***that the area at the southwest end of the existing driveway shall be gravel;***
3. ***and that the existing tree line along the southeastern property line will be maintained to the extent possible.***

Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

B. **PUBLIC HEARING** on a petition submitted by Alexander and Alexandra Bakman, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 to use an accessory building for multiple home occupations where the floor area exceeds the permitted floor area for a home occupation; from Article XIV, Section 175-74(A) to expand a driveway in the Shoreland Protection Overlay District; and from Article XIV, Section 175-75.1(A) to cut trees within the Shoreland Protection Overlay District. The property involved is shown on Tax Map 11, Lot 24-4, is located at 118 Piscataqua Road, and is in the Residence C Zoning District.

Attorney Michael McCarthy spoke before the Board on behalf of the Bakmans. He said there was a 1,000 sf limit on the size of a home occupation space, but the Bakmans would like to make use of the entire 4,050 sf barn. He said Mr. Bakman would like to finish off the bottom floor of the building he and his wife owned and use it for his computer related home business. He also said Mrs. Bakman would like to use the upper floor of the building as an art studio.

Chair Gooze asked if the art studio would be a hobby for Mrs. Bakman, and Mr. Bakman said yes, stating that there would be no employees. He said he would have a few employees for his home business, and would probably outgrow it quickly. It was noted that Mr. Bakman currently owned a business located at the Pease Tradeport.

Mr. deCampi noted that the Bakmans had asked for variance in terms of square footage, but not in terms of the number of employees. He said as long as that was the case, he thought he could be supportive of the variance request.

There was discussion about the other variances being requested by the applicants, concerning expansion of a driveway and the cutting of some trees on the property, which were needed because the property was located in the Shoreland Protection District. It was noted that no tree cutting program had been developed yet, and Mr. deCampi said this should be done before the Board dealt with that issue.

Ms. Woodburn asked if this was something the Conservation Commission was supposed to address as well, and Mr. Johnson said yes.
Attorney McCarthy said the Bakmans would therefore withdraw that variance request concerning the tree cutting for the time being.

Chair Gooze summarized that there was still the home occupation issue and the driveway issue for the Board to deal with. It was determined that the applicant was not asking for the variance to expand the driveway because a number of permits needed to be obtained first. Chair Gooze said the applicant was asking for a variance for the existing driveway.

Mr. Johnson said the proposed expansion might or might not be located within the Shoreland Protection Overlay district setback There was detailed discussion about this.

Chair Gooze said he was willing to say that what was proposed would be located outside of the setback. He said this application therefore came down to one issue, concerning the home occupations.

There was discussion about what the building had previously been used for.

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

Chair Gooze said he wouldn't count the art studio as a home occupation since it was considered a hobby by the applicants. He noted that the Board had seen a situation that was similar to this with a previous variance request.

It was noted that second class home occupations were allowed in this zone, and that the home occupation activity would be completely enclosed inside the building.

Chair Gooze said one of the biggest issues concerning home occupations was potential traffic impacts. He noted that the property was on Route 4, and said he didn't think there would be an impact on the traffic on that road.

Ms. Davis asked if the barn was a residential dwelling unit, and there was discussion.

Ms. Woodburn asked whether by approving this variance request, the Board would be allowing, through a variance, the use of an accessory structure for a home office, and not the primary dwelling unit.

Board members said yes, and there was discussion.

Chair Gooze said he felt this application met the variance criteria, as long as the use was kept at the level that had been described. He said there was a hardship with that particular building.

Mr. deCampi said it was to the applicants' advantage if the Board considered the second floor to be a hobby, because it allowed Mr. Bakman to have all three employees, including himself, on

the first floor. He said he didn't have a problem with this application.
There was discussion as to whether the home business should be confined to the first floor, and it was determined that it didn't really matter if some of Mr. Bakman's computers were put on the second floor.

It was noted that in voting in favor of this application, the Board would be granting one home occupation limited to 3 employees in an accessory structure that was not a dwelling unit. It was also noted that the applicant would be creating software, not building computers.

Chair Gooze MOVED to grant the petition for Variance from Article II, Section 175-7 of the Durham Zoning Ordinance submitted by Alexander and Alexandra Bakman, Durham, New Hampshire for the property located at 118 Piscataqua Road in the Residence C Zoning District, to allow a second class home occupation in the barn-like structure next to the main house, and that we are allowing more than 1000 sf, with the understanding that the other variance requests have been withdrawn. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Recess from 8:12-8:23 pm

C. **PUBLIC HEARING** on a petition submitted by Scott E. Hogan, Esq., Lee, New Hampshire on behalf of Bob & Sally Heuchling, Pam Shaw, Peter & Laura Flynn, Ken & Margaret Jones, Robert & Janet Doty, Jack Quinn and Duke Little, Durham, New Hampshire for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a June 20, 2007, decision of the Durham Planning Board approving the Site Plan and Subdivision Plan for a 66-unit condominium facility. The property involved is shown on Tax Map 1, Lot 6-8, is located at 97-99 Madbury Road, and is in the Residence A Zoning District.

Ms. Woodburn, Mr. Gottsacker, and Mr. Welsh recused themselves. Chair Gooze said Ms. Davis would be a voting member on this application.

Chair Gooze asked Mr. Johnson if there was some aspect of this project that involved an innovative land use control. He noted that that question pertained to what the ZBA could hear and could not hear.

Mr. Johnson said he didn't know, stating that he hadn't attended the Planning Board hearings on this application.

Chair Gooze said he had talked with the NH Office of Energy and Planning to get a clear idea of what issues the ZBA had the right to hear appeals on from the Planning Board decisions. He said he had determined that with an interpretation of the Zoning Ordinance, the ZBA could hear it, but if it was an issue regarding a discretionary decision of the Planning Board, it was not appealable to the ZBA. He said as he looked at the appeal, he saw that there were three items in the appeal that were the province of the ZBA.

He said one issue was whether the two properties were contiguous, and the definition of what contiguous was. He said a second issue was concerning Section 175-55 E (Minimum

Contiguous Area). He said a third issue was concerning the Elderly Housing density bonus (Section 175-56).

Chair Gooze said he didn't feel that the issues concerning the purpose of the Zoning Ordnance and the Residence A district (Sections 175-3 and 175-38A) were appealable, because these were areas where the Planning Board had used its discretion in deciding on them.

He said the ZBA could discuss whether the issue concerning Section 175-55 F 9, concerning calculation of usable area should be heard, but he said he didn't see how it would make a difference. (This provision states that "any otherwise usable area that is fragmented or isolated by unsuitable areas such that the contiguous area of usable land is less than 5,000 sf or is narrower than 50ft" can not be used in the calculation of usable area.)

There was discussion on this issue, and it was agreed that it should be kept in as one that the ZBA would deal with.

Chair Gooze asked that the Board take a vote on this.

Mr. deCampi agreed that the issues the ZBA should hear should be narrowed down to the 4 issues Chair Gooze had listed.

Chair Gooze said if the public hearing was opened and the applicant's attorney tried to convince him that the ZBA should hear more issues than the 4 that he had listed, he would listen.

Mr. McNitt said he felt the Board was restricting itself unduly, in terms of what aspects of the appeal it should hear. He said that for any appeal that came before it, the ZBA was supposed to look at the purpose of a Zoning district. He said if the Board failed to do this, it was not fulfilling its responsibility to the Town.

Mr. deCampi said this was an administrative appeal, and said he felt they got viewed more narrowly.

Mr. McNitt said that in anything it did, the ZBA needed to determine the impact on the Town and the impact on the neighborhood.

Mr. deCampi disagreed, and said the ZBA's role here was to determine if the Planning Board had interpreted the Zoning Ordinance correctly and applied it fairly.

Chair Gooze read from the Board of Adjustment Handbook, 2007, concerning what issues were discretionary, and said he didn't feel that those issues other than the 4 he had identified were appealable to the ZBA.

Mr. deCampi said he didn't feel that the issue of whether the development fit with the neighborhood was appealable. He said it was a decision the Planning Board had exercised its judgment on.

Mr. McNitt said his perspective concerning this was based on having been on the Durham Planning Board, and said this was a difference of opinion.

The informal vote of ZBA members was 4-1 in favor of limiting the issues to be considered to the 4 items identified by Chair Gooze.

Attorney Scott Hogan said he had represented the abutters and neighbors before the Planning Board concerning this project. He said he would address these 4 issues, and see where this led. He said he agreed with Chair Gooze that the only issues that should before the ZBA were those involving a direct application, interpretation or construction of the Zoning Ordinance itself, not the Planning Board's regulations, and not any Zoning Ordinance that was an innovative land use control. He said those other things were being appealed separately, and were not relevant to the ZBA's decision that night.

He said the only thing he would disagree with in terms of what the ZBA should be considering was the issue of two separate lots, and the potential to combine their density. He said this clearly was something that the ZBA should be looking at. He said this right went to the definition of a "lot" in the Zoning Ordinance.

He said from his clients' perspective, one couldn't use non-contiguous lots as if they were contiguous. He said even if one could, and even if this were one lot, one would have to exclude the rear portion pursuant to the usable area calculation from the Zoning Ordinance.

He also said even if one didn't have to exclude the rear portion of the property, the mass, scale, and intensity of this particular project would otherwise be prohibited because even it were allowed under all the other provisions, it violated the fundamental purposed of the RA district, - which was to preserve and maintain the integrity and character of the existing neighborhood.

He said the purpose of the RA district was a Zoning Ordinance provision, and one the Planning Board had interpreted. He said he wanted it stated for the record that he did believe it was an issue that was relevant.

Chair Gooze said the decision the Planning Board had made concerning this was discretionary. He said there was nothing specific, and no standard in the Purpose statement in the Zoning Ordinance that defined what was compatible with the neighborhood. He said this was why he felt this kind of issue needed to go to court rather than to the ZBA.

Attorney Hogan said he understood this, but said he would like to have his statement entered for the record anyway.

Mr. McNitt said he would like to state for the record as well that he felt the ZBA should address this issue.

Attorney Hogan spoke about another preliminary matter, the concern raised at the beginning of the hearing about not having Planning Board representation at the meeting. He said the rules of procedure concerning administrative appeals were clear, regarding the furnishing to the ZBA of

the records of the case. He said there was an extensive record on the applications before the Planning Board, and said he was counting on the fact that the ZBA would read the Minutes, etc. so they wouldn't have to take his word for any of this. He said the record would speak for itself.

Chair Gooze said he had made sure the ZBA had the chance to review the comments from the various attorneys on the contiguous issue.

Attorney Hogan said RSA 676:14 specifically stated, concerning provisions of a Zoning Ordinance that differed, that the provision with the greater restriction shall be controlling. He said the Durham Zoning Ordinance mirrored this language, in Section 175-11.

He said he was raising this as a preliminary matter, because in this case, the point had been made that the Town had allowed elderly housing throughout the Town by right. He noted that the Ordinance spoke about the fact that although elderly housing was permitted by right, if a new ordinance was adopted and there was some inconsistency with a prior ordinance, the more restrictive standard would apply. He explained that the reason he was mentioning this now was that he had not cited Section 175-11 in his administrative appeal.

Attorney Hogan noted concerning the two lot/density issue that when the project was first presented, the proposal was for a 78 unit age restricted condominium proposal. He said the only possible way to do this was to combine the 5 acre lot and the 11 acre lot, which were separated by a 20 ft wide right of way. In answer to a question from Mr. deCampi, he said the right of way was not owned by the owner of these two lots.

Mr. deCampi said Attorney Hogan's argument concerning whether the two lots were contiguous became much stronger if neither lots owned the 20 ft strip of land.

Chair Gooze asked which deed the easement was in, and Attorney Hogan said the easement was mentioned in the chain of title for the 5 acre parcel. He said this issue came down to the Zoning Ordinance's definition of a "lot".

Mr. deCampi received clarification that neither of the two lots owned the right of way, and simply had the right to use it. There was discussion that a third party owned the right of way.

Attorney Hogan noted that a number of attorney opinion letters were submitted concerning the contiguous issue, and said ultimately, the decision upon which the Planning Board was acting, from Attorney Mitchell, was that the Durham Zoning Ordinance, Section 175-54, (Table of Dimensional Requirements) used the terminology "minimum lot area per dwelling unit". He said the word "lot" was separately defined in the Ordinance as a legally recorded and defined parcel of land, or two or more contiguous parcels of land to be used as a unit under the provisions of these regulations. He said Attorney Mitchell said the two parcels owned by the applicant might qualify as a lot, provided that they were found by the Planning Board to be contiguous within the interpretation of the Durham Zoning Ordinance.

Attorney Hogan said his position at the time was that there was clearly not the legal authority in the Ordinance to allow the two lots, with the easement, to be considered as contiguous. He said

the first issue he argued at the time was that if this were allowed, it would be a transfer of development rights. He explained that this approach was traditionally used to protect a parcel with high natural resource values, where density was transferred to another parcel that could handle a higher level of density. He noted that the Town of Durham had not adopted this innovative land use approach.

He said the applicant at the time said there was a well defined concept of a Zoning lot, for the purpose of subdivision approval. He said he didn't disagree with this. But he said in this situation, what was involved was really a construct, and he said there was no legal authority to go outside of the traditional definition of lot, which had been applied by the ZBA and other boards in Durham.

He said he conceded that there was some variety in the definition of "contiguous", but he said the most common definitions included the fact that two lots shared a common boundary. He said in looking at the facts, these two parcels had always been considered separate lots of record, with an easement allowing the right to pass between them, but no legal authority to consider them to be contiguous.

He said he had raised the two lot density issue throughout the process, and had looked for the legal authority for this. He noted that the preliminary conceptual review was skipped, and then waived during the review process, so there wasn't the chance to vet these kinds of threshold issues earlier in the process. He said even the applicant's attorney had said they weren't saying this was one lot, but they were saying the easement allowed the two lots to be connected for density purposes. He provided further details on this

Attorney Hogan said his second issue was that even if this were one lot, the back lot would have to be excluded because of Section 175-55 F 9, concerning the calculation of usable area. He noted that #9 in this section said to exclude any area that was isolated by a strip of land less than 50 ft in width. He said the petitioners had argued during the application process that the 5 acre parcel on which the building was proposed to be constructed was the front portion, but the 11 acre back parcel was isolated from the front portion by the 20 ft right of way.

Chair Gooze and Attorney Hogan discussed in detail possible interpretations of the language in Section 175-55 F 9.

Attorney Hogan also said that Section 175-107 E, regarding the maximum development density, caused the argument for treating the two parcels as one lot to fall apart.

He said another issue on the table was the elderly housing bonus issue. He reviewed this issue, and explained that the Planning Board had determined that the bonus applied to all of the units, even thought the split was 80% elderly housing units and 20% non-elderly housing units. He said the only reason the Ordinance would say "..dwelling unit for elderly occupancy" was to specifically denote the units that were age restricted. He said his feeling had been and remained that the bonus was too generous, and should have been restricted to units intended for elderly occupancy.

Attorney Hogan noted that the Table of Uses limited building height in this zone to 30 ft. He said there was language in the Ordinance that a building could exceed this height with the permission of the Planning Board, but he said there was no standard of review for this, to determine the criteria that would allow this. He noted that he had argued that the criteria from the conditional use permit process should have been used, because they seemed to be written to take into consideration, scale, mass, etc. He said he was noting this because although this was an area where the Board had discretion, there were no parameters set for this issue.

Attorney Hogan said the vast majority of the concerns of the abutters and the neighbors were that the 66 unit structure on 5 acres of land violated the provisions he had just discussed, and violated the purpose of the RA district. He provided details on this, and noted the issues involved concerning traffic impacts, aesthetic impacts, which were things associated with site plan issues. He said this project was of such a scale and intensity of use that it objectively violated the purpose of the Zoning Ordinance for this district. He said this seemed to be something that was the province of the ZBA, to look at the specific purpose of the different districts.

Chair Gooze said he would accept that into record, but he asked that people not to speak to this issue.

Attorney Hogan noted that the objection to the current Appeal of Administrative Decision said that the two lot/one lot issue was not a zoning issue. He also said there was an objection to the petitioners' position that the calculation of usable area issue was an issue for the ZBA. He said he didn't understand this, and said it was absolutely the ZBA's authority to decide on this issue.

Chair Gooze said the ZBA had already agreed on this.

Attorney Hogan said it had not been easy for his clients to bring this appeal, and said they had done so reluctantly. He said everyone understood that this land would be developed, but he said it was the mass, scale and intensity of the project that was beyond what could have been expected.

Ms. Davis noted the access from Madbury Rd, and asked if that was an easement too.

Attorney Hogan said no, stating that it was a primary access to the property, and was owned by Stonemark Management. He showed a model of the proposed development and surrounding properties, which had been presented to the Planning Board during the application process. Attorney Hogan said it would be submitted to the ZBA.

Chair Gooze said he would like to hear the opposing view.

Attorney Peter Loughlin, said he was there on behalf of Stonemark Management, and was there in place of Attorney Ari Pollock. He noted that he had provided a legal opinion when the project application was heard by the Planning Board. He then described the layout for the project.

He read State RSA 674:33 concerning the jurisdiction of the ZBA, and said he felt the scope of the ZBA in this case was narrower than Mr. McNitt had described, and was to determine if the Planning Board had made an error. He said the record was important concerning this, and noted that there had been at least 8 public hearings on the original application since January of 2007, which resulted in 91 pages of minutes. He said that every issue being discussed now had been discussed at great length by the Planning Board.

He said it was within the discretion of the Planning Board to allow the applicant to include the area of the back lot in calculating the density of the front lot on Madbury Road. He said the Board's counsel had said this was a discretionary decision, and he said the Planning Board had then made a factual determination that the two lots should be counted together. He also noted that Attorney Mitchell, had said he believed the decision to combine the two lots would be upheld by the court. He noted that Attorney Mitchell had also submitted a letter to the Planning Board which spoke about a rationale for what they were really trying to get at in allowing the two lots to be considered as one, for density purposes.

Attorney Loughlin said this property was the subject of an earlier development proposal where there would be access onto Fairchild Drive. He said the Town Council had determined at that time that the access wasn't allowed and that the property wasn't landlocked because of an easement out to Madbury Road. He said that set the tone that there could be access to Madbury Road. He said everything that had come from Town counsel since that point had been consistent with this.

He said in this case, the back parcel would be used as open space, which tied in with an existing large open space area created for the existing neighborhood. He said the fact that there was a 20 ft strip of land had no bearing on the ability to use the back lot it for its proposed purpose, - as open space. He noted that he had had difficulty interpreting Section 175-55 F 9, but said he didn't think that section was meant to be interpreted the way Attorney Hogan did. He said he didn't think the back parcel was fragmented or isolated, and said the 20 ft strip of land could be used to access it. He said the fact that in this case there was an easement had no practical or legal effect.

Attorney Loughlin gave as an analogy two parcels that abutted a public roadway, and said in most cases the road was owned by the landowner to the center, on both sides, subject to the public's right to use it. He said this didn't lessen the public's right to use a public road.

Chair Gooze said if the right of way was owned by one of the properties, he didn't think there would be any question.

Attorney Loughlin said the impact was irrelevant whether it was owned in fee simple or the easement was owned, so Stonemark had the right to use it, - just like he had the right to drive on a public road. He said there was a deeded right to use the easement, so there was no practical difference between ownership and easement in terms of how the property could be used by the properties owners on each side.

Chair Gooze said the right to drive onto a property and to use that property for some purpose

weren't the same thing.

Attorney Loughlin said if the back parcel were just an easement, that would be an issue in terms of whether the density could be used. But he said the strip of land wasn't critical to counting density, it was critical to connecting the two properties. He said the ownership of the strip didn't really make any difference.

He said the Planning Board had weighed every one of these issues, in great detail, over several meetings. He noted the Minutes of the meeting on May 30th, 2007 indicated what had happened at the Planning Board level concerning this issue. He said the petitioners now were asking the ZBA to second guess the Planning Board. He said he didn't think the Planning Board made a mistake, it made a determination which the petitioners now disagreed with, but he said this wasn't the issue before the ZBA.

He said unless the petitioners could show that the Planning Board made a mistake, the administrative appeal should be denied. He said this situation was very similar to the more common situation for the ZBA concerning Mr. Johnson's decisions. But he said in this case, the Planning Board had had several months of deliberation before making its decision.

Chair Gooze asked Attorney Loughlin to deal with 175-107 E, concerning maximum development density, and also asked if this was a conservation subdivision.

Attorney Loughlin said his guess was that the provision meant that only part of a property was being included in a conservation subdivision. He said in this case, the entire 17 acres was being used for the subdivision. He said the applicant couldn't come back in the future and say he wanted to develop the back lot.

Mr. deCampi said he didn't see that this was a subdivision, and said the entire 17 acres were being used. He said it was almost a reverse subdivision.

Mr. Sievert said it had been determined it was a subdivision because there was condominium ownership, which all were considered to be subdivisions.

Attorney Loughlin also noted that there was a conservation easement on the back parcel, so the parcel couldn't be developed in the future.

Jack Farrell, a representative for Stonemark, said the point here was not where the building took place, it was whether all of the density was used up for all of the land. He said in this case, there couldn't ever be more development because all the density rights for those two parcels had been calculated. He said the density for the two parcels together was used up, and said there was now the area to be developed, with the rest in conservation easement.

In answer to a question from Mr. Sievert, Mr. Farrell said 30-40% of the parcel was required to be in open space, and he said this plan far exceeded that.

Chair Gooze said in other words Mr. Farrell was saying that there was a conservation

subdivision for the whole parcel. Mr. Farrell said that was exactly what was happening here, and he provided details on this. Chair Gooze asked what would occur if only part of the parcel was used, leaving density still available for a future date. Mr. Farrell provided further details on this.

Attorney Loughlin said this was not a situation where land was being reserved for possible future development.

Mr. McNitt asked how the contiguous issue was decided by the Planning Board.

Attorney Loughlin said the issue was voted on at the February 21, 2007 meeting, and the issue was then revisited a number of times by the abutters and the Town's counsel. He said the Board considered whether to reconsider their original decision, at the May 30, 2007 meeting, but decided not to do so. He provided details on this. He also noted that the Findings of Fact were very detailed, and so reflected the way this issue was treated by the Planning Board.

Mr. deCampi noted the charge by the petitioners that it was incorrect to give the density bonus on 100% of the units when only 80% of them were age restricted. He asked Attorney Loughlin to defend this.

Mr. Farrell said their position was that the definition of age restricted senior housing in the Zoning Ordinance was based on state and federal law, which said that 80% of the housing had to be age 55 and older, and 20% of the housing was unrestricted. He said all of the elderly housing projects in New Hampshire had this provision. He provided details on this, and said the very definition of age restricted housing was one person 55 and older in 80% of the units. He said this was the way this had been applied in Durham as long as he had been involved with the Town.

There was discussion about the provision included for this development that in the 20% of the units that didn't have one person age 55 or older, the inhabitants had to be 30 or over. Mr. Farrell said this was added because of the Town's concern about school age children.

Mr. deCampi said his question was whether in 100% of the units, there would be no one under age 30, and Mr. Farrell said yes.

Ms. Davis asked how other communities that had developments like this calculated this.

Mr. Farrell said it was his understanding that age 55 and over was the standard, and that if this was met, the developer got whatever bonuses accrued to it. He said he could find some examples of this, and also said this was how it had been applied with other such developments in Durham, such as Spruce Wood.

Mr. deCampi noted the definition of elder care facility, which said "..housing principally used…."

Chair Gooze said there appeared to be nothing in the Zoning Ordinance that said 80/20.

Mr. Farrell said the federal requirement was what it was, and said a town couldn't say 100% had to be elderly housing, although noting that a developer could say this.

Attorney Loughlin said a town could say that all residents of an elderly housing development had to be over 62 years of age. He said there was no flexibility for this age category, but with the age 55 and over category, some flexibility was allowed.

Mr. deCampi said the definition on page 10 basically supported the argument of the developer.

Mr. Sievert noted that the regulation said a dwelling unit for elderly occupancy.

Chair Gooze said the federal 80/20 requirement still didn't say how the Zoning Ordinance should treat a development. He said there was nothing in the federal requirements or the Ordinance that said that 100% of the development had to be considered for density, or if the bonus applied to the 100%.

Jim Bolduc of Stonemark Management said this issue had been discussed at great length, and he provided details on this. He noted that the condominium documents had been rewritten several times, to be sure they reflected what the Planning Board had asked for. He also noted that he had done other projects that had the 80/20 split.

Chair Gooze said his point concerning this issue was that the Zoning Ordinance didn't say how to count the 80/20, in terms of the density bonus.

Mr. Bolduc said there was a letter in the file from Mitchell and Bates concerning the 80/20 rule. He said the issue was discussed at great length, and could be found in the public record. He provided further details on this.

Chair Gooze said the ZBA still didn't have an answer to his question. He agreed there were letters from the Town attorneys concerning this, but said the ZBA still had to decide whether it agreed with the interpretation.

Mr. Farrell provided further details on this, and noted that this was how it was treated for Fitts Farm.

Chair Gooze said perhaps the ZBA could get some clarification on this issue from a member of the Planning Board. He said he would like to know how this was done with other elderly housing projects in Town.

Richard Kelley said he was a member of the Planning Board and a member of the Zoning Rewrite committee. He said the Planning Board had found that it didn't need to vote on the density bonus issue because it was its understanding that the bonus applied to the 100%. He said this understanding existed throughout the Zoning Rewrite process, and was the general understanding of the Planning Board. He said Board members all felt the same way in this instance, and he noted that this was how it had been applied for the Fitts Farm development, which was also 80/20.

Chair Gooze asked if the petitioners wished to rebut.

Attorney Hogan said they agreed that by meeting the federal 80/20 requirement, the developers had met the standard for elderly housing. But he said they didn't meet a standard for the elderly housing bonus. He said the density bonus had nothing to do with the age discrimination aspect of the project. He said Section 175-56 of the Zoning Ordinance said "… dwelling unit for elderly occupancy", and said only 80% of the units were for elderly occupancy. He said this wording clearly had to have some effect. He also noted the wording of State RSA 354-A:15 concerning this.

Attorney Hogan said the Planning Board considered all of these things, but he said the Minutes indicated there was always a consistent minority of Board member who questioned the authority in the Ordinance to do certain things. He said a big concern regarding the two lot/density issue was that if the two lots could be combined, this would set a precedent for other properties in Town. He provided details on this.

He also said that regarding the past history of these parcels, and why practically speaking it might be a good or bad idea to use the easement or to combine the two lots in this way, those arguments were only relevant if the applicant were seeking a variance from the definition of a lot, or density. He said for the provisions he was saying prohibited this density, it was only relevant what the past practices were concerning this property if substantial justice or the spirit and intent of the Ordinance were being argued. He said for this administrative appeal, the only legally relevant thing was whether it was legally a lot. He said right now a lot was a lot, and if lots were combined, they had to be contiguous. But he said these lots were not contiguous.

Arthur Grant, 261 Mast Road, said he had been a member of the Planning Board so was involved in some of the deliberations on the Stonemark applications. He said he was speaking now as a private citizen, and said he had been consistently concerned over time that the Zoning Ordinance be specific as to what it required, and that it be applied fairly and accurately. He said he did not believe in ordinances that allowed a lot of discretion.

He said in this instance, he had voted in the minority because all three attorneys agreed verbally and in writing that these were two separate lots, and also agreed in writing and verbally that they were non-contiguous lots. He said he could not find it anywhere in the Zoning Ordinance that non-contiguous lots could be considered a single lot. He also noted that State law said that lots must be contiguous in order to be merged.

He said the second problem he had with this application was that nowhere in the Ordinance was the transfer of development rights from one parcel to another allowed, and said no procedure was specified in the Ordinance for doing this. He said State statute allowed this, but local ordinances had to specifically incorporate these provisions.

He noted that in the Planning Board's vote in February of 2007 concerning the two lot/one lot issue, there was no mention of the word contiguous. He said this issue was never decided on by the Planning Board. He said this issue was important because further down the road, things

could start to become very discretionary concerning lots. He said contiguous was a very clearly understood word, and it ought to be read for exactly what it meant.

He said he applauded the ZBA for hearing these issues, stating that it was important that there be some clear direction as to how the Ordinance was to be interpreted. He said Attorney Mitchell's letter said the Board had some discretion, but also must occur within the interpretation of its own rules and regulations. He said the Zoning Ordinance and Planning Board rules didn't provide the discretion to do the things that would have to be done in order to uphold the decision the Planning Board had made.

Attorney Loughlin said concerning the Planning Board vote on February 21, 2007, concerning the combining of two lots into one lot for the purpose of density calculation, that there were two legal opinions from Town counsel that said the Board could do this. He said he didn't think the definition of contiguous in State statute was relevant, and said the issue was whether the Board had erred in following the advice of Town counsel. He said he felt the Board was totally within its right in doing so, and he said the ZBA should therefore deny the appeal of administrative decision.

There was discussion on issues and attorney letters that referenced the Fairchild Drive access and how they related to the Stonemark application off of Madbury Road.

Mr. Sievert asked if someone owning land on both sides of Route 4 could combine those properties.

Attorney Loughlin described a court case related to this, where it was determined that there could be one lot. He also noted that a State statute said that a roadway did not within itself create a subdivision.

Chair Gooze asked whether, if there was one mile of easement between two properties, the lots on both sides could still be combined.

Attorney Loughlin said that wouldn't make practical sense, but he said the two lots in this instance were always treated together. He said he thought this was what Attorneys Mitchell and Bates were saying, that the lots could therefore reasonably be treated as one lot. He said what he was saying now was that this was within the discretion of the Planning Board, and therefore was not an error.

Attorney Hogan reviewed the chronology of legal advice, dating back to 2003, that the Planning Board had received concerning this issue. He said that nowhere did Attorney Mitchell or Bates say to the Board that it could combine these two lots for density, and he said they did not provide the legal authority for doing this.

Chair Gooze said Attorney Loughlin had said that this was a discretionary opinion of the Planning Board. He said that while that might be what the Planning Board and the Town attorney felt it was, he felt it was within the purview of the ZBA to make an interpretation of the Ordinance. He said he therefore had to see something, other than the fact that the ZBA had

been told this was a discretionary decision by the Planning Board, that convinced him that he couldn't make a decision on his own as whether contiguous meant something other than what this property was.

Attorney Loughlin said on this narrow issue, the question was whether the Planning Board had erred. He said he had indicated that the Town counsel said the Planning Board had the discretion to count these two lots together for density. He said Attorney Hogan had the burden of proof here, and said he hadn't cited anything that said it couldn't be done.

Steve Roberts, a member of the Planning Board, said he had made the motion on contiguous. He said he had also spoken to his motion at the time, and said this went back to why the Planning Board planned. He said the benefit to the community from this project was the large chunk of land that would be set aside as open space. He said the Board had used a test that might have some application.

Robin Mower, Faculty Drive, noted that a question had been asked concerning who owned the right of way. She said it was her understanding, from email correspondence with the Town Tax Assessor, that the property was commonly owned by many people in that neighborhood.

She also noted regarding the question of whether an error had been made by the Planning Board that when the vote was taken on density, there was discussion on the use of the term contiguous. She said it became clear that some members of the Planning Board didn't know what it meant. She said reference was not made to dictionaries that were complete enough to provide context, and she also said the definitions that were chosen weren't taken from planners' resources, which also could have provided the proper context. She provided further details on this. Ms. Mower also said common sense said the two lots had to touch at some point, and she noted that the Latin for "contiguous" indicated a touching point.

Chair Gooze closed the hearing.

Mr. deCampi said he though the ZBA was missing a substantial number of documents, which needed to be read and digested. He recommended that the discussion be continued to another meeting.

Board members debated whether they could reach a decision that evening, and agreed that lengthy discussion would be required in order to accomplish this.

Chair Gooze proposed that the ZBA get all the necessary documents and make the decision on this application at the next meeting. It was agreed the meeting would be held on August 28th, 2007.

Ted McNitt MOVED To continue until August 28, 2007 deliberation on an Application for Appeal of Administrative Decision from a June 20, 2007 decision of the Durham Planning Board approving the Site Plan and Subdivision Plan for a 66-unit condominium facility, to be located at 97-99 Madbury Road, in the Residence A Zoning District. John deCampi SECONDED the motion, and it PASSED 4-0.

Chair Gooze suggested that the attorneys be present to answer questions the ZBA might have.

III. Approval of Minutes –
June 12, 2007 - not done
June 19, 2007 - not done

IV. Other Business

V. Adjournment

Chair Gooze MOVED to adjourn the meeting. John deCampi SECONDED the motion, and it PASSED unanimously 4-0.

Adjournment at 10:45 pm