

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

**ZONING BOARD OF ADJUSTMENT
TUESDAY, AUGUST 28, 2007
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.
CONTINUATION OF AUGUST 14, 2007 MEETING**

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. Call to Order

II. Approval of Agenda

Chair Gooze said this was a continuation of the August 14th meeting, and the Board was in the deliberative phase, having closed the public hearing. He said there was the possibility that the hearing might be opened again if there was a call for a rebuttal of some kind.

John deCampi MOVED to approve the Agenda as submitted. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

III. Public Hearings:

- A. **CONTINUED DELIBERATION WITH POSSIBLE 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.

Mr. Gottsacker, Ms. Woodburn and Mr. Welsh recused themselves.

Chair Gooze said that if a Board member had a specific informational question that could be answered by someone who was present, this question could simply be asked. But he said if it was a question that required an opinion to be expressed, the public hearing should be reopened in fairness to others present.

Chair Gooze also noted that both Attorney Hogan and Attorney Pollock had waived having the Town print out and distribute to ZBA members all the Planning Board minutes where this application was discussed.

Mr. Johnson said the Planning Board's attorney had instructed Mr. Campbell to copy everything in the Planning Board file and provide it to ZBA members. He said he sent an email to Attorney Hogan and Pollock asking them to waive this, since the files were available at the Town offices. He asked that

they acknowledge for the public record that they did in fact agree to this waiver.

Attorney Hogan said he had no objection to not having all the contents in the file copied, noting that his only concern had been that ZBA members know that this information was available. Mr. Pollock also agreed to this waiver.

Chair Gooze next provided an overview of what the ZBA would be deliberating on. He explained that the ZBA had decided at the last meeting that it would not be hearing appeals relative to Section 175-3 and Section 175-38(A) because they involved discretionary policy of the Planning Board. He then went through the issues the ZBA would be hearing.

He said the Board had decided to deliberate on the definition of what contiguous was, as found in Section 175-7, Definitions (the definition of a Lot “A legally recorded and defined parcel of land or two(2) or more contiguous parcels to be uses as a unit under the provisions of these regulations”. He said Section 175-54 (Table of Dimensional Requirements) went along with this, because the determination on contiguous determined what density could be used.

He said a second issue the Board would deliberate on was Section 175-55 (F)(9), (Calculation of Usable Area - Any otherwise usable area that is fragmented or isolated by unsuitable areas such that the contiguous area of usable land is less than five thousand (5,000) sf or is narrower than 50 ft”).

He said a third issue was Section 175-107 (E), Maximum Development Density, relying calculation on usable area.

He said a fourth issue the Board had decided to deliberate on was the elderly housing bonus Section 175-56.1 (Density for elderly residential uses).

Ms. Davis asked that Chair Gooze clarify Section 175-107(E). She said she thought this had been lumped in with Section 175-55(F). Chair Gooze provided details on Section 175-107(E).

Deliberation on Section 175-55(F)(9)

Chair Gooze said he did not feel this provision of the Zoning Ordinance had been misinterpreted by the Planning Board.

Ms. Davis said the “unsuitable area” spoken of in this provision referred to the 20 ft easement. She said the right of way wasn’t even owned, so she didn’t think this provision was really even relevant to it.

There was general agreement that the Planning Board had not erred concerning this provision.

Deliberation on Section 175-107(E)

Chair Gooze said if this was in fact one subdivision, he didn’t think the Planning Board had made an error concerning this provision.

The other Board members agreed the Planning Board had not made an error concerning this provision of the Zoning Ordinance.

Deliberation on Section 175-56

Mr. deCampi said he thought the Planning Board had clearly made an error concerning this provision.

Chair Gooze said he felt the language in this provision was very specific, and said there was nothing there that said if the split was 80% age 55 and older and 20% non-age restricted, one then used everything. He said it was a very specific ordinance by dwelling unit.

He noted a letter from the Town Attorney that referenced previous elderly housing projects in Durham that had used 100% of residency in the density calculation, and said he had asked Mr. Johnson to provide him with details concerning this.

There was discussion, and Chair Gooze asked Mr. Campbell to speak concerning this.

Mr. Campbell said this was one of three elderly housing developments the Board had received since the Zoning Ordinance had been updated. He said one was currently on hold, the Stonemark project was the second, and the third had been turned into single family housing.

Mr. Sievert said he believed there was a density bonus for Fitts Farm, although it wasn't exactly the same as the one for this project.

Mr. Campbell said they had density bonuses for duplexes, after a certain amount of square footage was reached.

Mr. Sievert noted that for Fitts Farm, there was an elderly housing portion of the development as well as a residential cluster subdivision. He asked if a density bonus was given to the residential portion of the development, and Mr. Campbell said no, because they were single family houses.

Mr. McNitt noted that the Minutes indicated that a member of the Planning Board had said there was no precedent for this. Mr. McNitt said he personally had not run into this kind of thing when he was on the Planning Board.

Chair Gooze said he didn't feel there was anything in the Ordinance that allowed this. He said he was not speaking against the Planning Board, but said he felt they had made an error in interpreting the Zoning Ordinance concerning this.

Mr. deCampi said only 80% of the development would have elderly occupancy, so granting 100% was wrong. He said the Planning Board was hard working, and also said he would have no problem changing the Ordinance to allow this. But he said that based on how this provision was written now, he would have to disagree with the decision the Planning Board had made.

Mr. McNitt said the Zoning Ordinance was consistent concerning this. He said this might be called an elderly housing development, but the Table of Dimensional Requirements spoke about "dwelling unit". He said when it came down to figuring dimensions, it was done on the basis of a dwelling unit.

Chair Gooze said he was looking at this in terms of the density bonus aspect. He said he didn't see a precedent for doing this. He said the Ordinance was very clear in saying "dwelling unit for elderly occupancy", and he said it didn't say anywhere that the 100% could be counted.

Mr. Sievert said it didn't say anywhere that it couldn't be counted. He said he was having trouble saying the Planning Board had made an error concerning this. He said if one looked at the Ordinance and how it was set up, it talked about a development as a whole, and didn't break things down and say that given the State requirements concerning elderly housing, there could only be an 80/20 split. He also said that concerning the purpose of this kind of thing, the Master Plan stated that density bonuses should be given to elderly development, not to elderly units.

Mr. deCampi said the Ordinance was written by the unit, noting it said specifically said "a dwelling unit for elderly occupancy." He said it didn't provide the same leeway for a unit that was not for elderly occupancy.

Mr. McNitt said he thought elderly housing was a generic term, but he said they had to work with the idea of a dwelling unit.

Mr. deCampi said the part of the Ordinance that granted the density bonus only allowed it for dwelling units for elderly occupancy, and he said this was very specific.

In response to a comment from Attorney Pollock in the audience that he would like to speak concerning this, Chair Gooze said he had read the Minutes, and believed he understood where both sides were coming from on this issue. He said he agreed with Mr. deCampi that this wording was very specific, and said the Ordinance was being interpreted as it had been written. He said if the wording just said "elderly housing", perhaps there would be discretion for the Planning Board, but he said the Ordinance was very specific in terms of how much one got for density for an elderly dwelling unit.

Mr. Sievert noted the wording "...principally designed and adapted for elderly citizens..." in the Ordinance referenced by attorney Mitchell in his letter, and that Attorney Mitchell had said the Ordinance didn't say it could only be applied to 100%.

Mr. deCampi said elderly housing didn't have to be 100%, but to qualify for the density bonus, it had to be a dwelling unit for elderly housing. He said he didn't see any other way to read this.

Attorney Pollock noted his objection that the ZBA was overlooking the definition of "occupancy" in the Zoning Ordinance.

Ms. Davis said there were differing opinions from different attorneys, which the Board needed to take into account. But she said the Board also simply needed to read the wording in the Ordinance. She noted the word "unit" in "a dwelling unit for elderly occupancy", and said she agreed with Mr. deCampi.

Ted McNitt MOVED that the Planning Board made an error in its interpretation of Section 156(A)(1). John deCampi SECONDED the motion, and it PASSED 4-1, with Mike Sievert voting against it.

Deliberation on 175-7 definition of lot, which references the word "contiguous"; and 175-54 Table of Uses.

Chair Gooze noted that the deeds had been provided, one of which referenced the right of way. He said the right of way was part of the common land for the Fairchild Drive Subdivision, and said Tax Assessor Rob Dix considered it to be private land.

He also said he had done an extensive search concerning the definition of “contiguous,” and had found over and over that the most common definition seemed to be properties that touched each other, except for properties separated by a public right of way such as a river, stream, highway, etc. He said he had looked for any kind of situation where there were two properties divided by another property that joined them, and which was owned by someone else. He said he couldn’t find anything like this.

He said he had found one mention of “contiguous” in the State of New Hampshire, under the Current Use statute. He said this statute allowed the appending of a parcel onto an existing current use parcel if they were contiguous. He said he had called an organization called SPACE, and asked them what their policy was concerning this. He said they said the right of way made this determination difficult, and told him to speak to the Department of Revenue Administration.

Chair Gooze said he was then told by the Department of Revenue Administration that if the land under a right of way was not owned by the person who had the right of way, and was owned by another party, they (the lots on either side) would not be considered contiguous under their policy. He said he realize this was not the same situation, but he said he was looking for way to see how the word “contiguous” was used in New Hampshire. . He said the most common usage was what needed to be used, when there wasn’t a definition in the Ordinance.

Mr. McNitt noted the Meaning of Words, Section 175-6 of the Zoning Ordinance, which said that when terms were not defined in the Definitions section, “they shall have their ordinary meanings or such as the context may imply.”

He also reviewed the definitions of contiguous from various sources. He said Webster’s 9th Collegiate Dictionary used the following wording in the definition: “being in actual contact; touching along a boundary or point“. He said the Oxford English dictionary definition of contiguous was essentially the same. He said that Black’s Law dictionary included the wording “touching along a point or a boundary“. He said this appeared to be the ordinary usage of the word contiguous.

Mr. McNitt said he had also looked up the words “right of way“, and had found “a legal right of passage over another person’s ground; a right to pass through property owned by another.” He said the common definition was pretty specific.

Mr. deCampi said he agreed, noting that he had checked dictionaries as well. He said it was basically the sharing of a portion of a boundary. He said this might only be a short area, although noting that it wasn’t in this instance.

Chair Gooze noted that the Planning Board had gone through the process of looking at the definitions of contiguous. He said it was the ZBA’s job to decide if what the Planning Board had decided was an error or not.

Mr. Sievert said he had looked up the dictionary definition of contiguous as well. But he said the issue still came down to a narrow issue of whether the Board had erred. He said the ZBA had to take into account other information and opinions the Planning Board had gotten from the various attorneys on

this issue, and he said he didn't know that they had made an error, based on this. He said the Planning Board had to have discretion in its decisions, but he said he didn't think the ZBA did. He said this was the trouble he was having, and said this was the trouble he had had in the discussion on Section 175-56.

Chair Gooze said the ZBA was making a determination on the definition of contiguous, and said if it felt it was not what the Planning Board came up with, it could say an error was made.

There was discussion on this, including discussion on the definition of a lot in the Zoning Ordinance. There was also discussion about the fact that properties divided by a public right of way were considered to be contiguous, and about the implications of this.

Ms Davis said if Durham had allowed the transfer of development rights in the Zoning Ordinance, this was probably the avenue that would have been taken for this project. But she said that since the Ordinance didn't include this, the developer had tried to join the two parcels in this way, which was tricky. She said this felt like a transfer of development rights.

Mr. McNitt said the Planning Board could have written a request for a change to the Ordinance concerning this, but it hadn't done this.

Chair Gooze noted the communications from Attorneys Mitchell and Bates concerning this issue over time. He said the attorneys couldn't decide, and he said it was the ZBA's job to determine the most common definition of this word. He said eventually, this would probably wind up in a higher court, but said he would do what he thought was right.

Mr. McNitt noted that at various stages of the site plan review process, the applicant had said these were two separate lots.

Chair Gooze said he believed Mr. Sievert was saying that if that was the case and the Planning Board knew this, it made the discretionary decision to call it one lot. But he said he didn't think the ZBA was just there to say the Planning Board had made an error of discretion; it was there to make a determination as to whether the Planning Board used the correct definitions in reaching their decision.

Mr. Sievert said he was asking the question of whether the Planning Board had made an error. He said Attorney Loughlin had said there was a narrow window for the ZBA to look at with this appeal. He said he heard ZBA members saying what they thought concerning whether the two lots were contiguous, and making a decision based on that.

Mr. deCampi noted that former Planning Board member Arthur Grant told the ZBA that he didn't think the two lots were contiguous, and that the Planning Board shouldn't have voted that way. But he said the Planning Board as a whole felt they should be voted as contiguous. He said this had not been a clear cut decision. But he said the ZBA had to interpret the Ordinance as it read it, and in the simplest possible terms. He said he didn't think this was a complicated issue, and said it was a straightforward issue.

Chair Gooze said if the vote of the Planning Board had been 5-0, he would still be here saying it made an error in interpretation of the Ordinance, because of their use of the definition of contiguous. He said it didn't get it right.

Mr. Sievert said he agreed the lots were not contiguous, but he said the question was whether the ZBA was voting on its reading of the definition, or on whether the Planning Board made a mistake.

John deCampi MOVED that the ZBA feels that the Planning Board has erred in its interpretation of the word “contiguous” in the definition of “Lot” in Section 175-7, which has direct bearing on Section 175-54, the Table of Dimensional Requirements, and for that reason, the combining of the two parcels to be used in the density calculation is in error. Ted McNitt SECONDED the motion, and it PASSED 5-0.

Chair Gooze MOVED that the Planning Board did not make an error in the interpretation of the Zoning Ordinance concerning Section 175-55 (F) and Section 175-107-E . John deCampi SECONDED the motion, and it PASSED unanimously 5-0.

IV. Approval of Minutes

June 12, 2007

Page 2 5th paragraph, should read “F.X. Bruton”

Page 5, 3rd paragraph from bottom, remove highlighting of the word “two”.

Page 9, 2nd paragraph from bottom, should read “Resident Edie Bauer”, without an address.

June 19, 2007

Page 1, Robbi Woodburn should be listed as being absent from the meeting.

Page 2, 2nd paragraph, should read “Coe’s Corner”.

Check to see that Section 175-30 (D) (3) is formatted correctly throughout the Minutes.

Page 4, 2nd full paragraph, should read “.... the reality was that this would not happen.”

Also, 3rd full paragraph, “HDC” should be spelled out as “Historic District Commission”.

Page 7, 1st full paragraph, should read “..the location of the property almost forced the change of use.

Mike Sievert MOVED to approve the June 12, 2007 and the June 19th 2007 Minutes as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

(Ms. Davis was a voting member for this vote.)

V. Other Business

- A. Mr. Johnson provided details on the currently proposed changes to the definition of home occupation in the Zoning Ordinance, as proposed by the Town Council, to address the reality of virtual employees of some of these entities. He noted that as part of these changes, a definition for “premises” had been added to this section. There was discussion by ZBA members concerning these proposed changes.

There was detailed discussion on the work of the Zoning Rewrite Committee, and the role of ZBA members as part of the Zoning Rewrite process.

Mr. McNitt asked that when changes to the Zoning Ordinance were voted on by the Planning Board, and were being sent to the Town Council, it would be good if ZBA members could get a copy of these proposed changes.

Mr. Johnson said when the agendas were set that included hearings on these things, he would be sure they were sent to ZBA members.

Mr. McNitt said the ZBA could take up proposed changes to the Zoning Ordinance under Other Business.

Mr. Johnson reviewed the current cases in the courts regarding previous ZBA applications. He then reviewed planned applications for the September meeting.

B. Next Regular Meeting of the Board: ****September 11, 2007**

VI. Adjournment

Ted McNitt MOVED to adjourn the meeting. Mike Sievert SECONDED the motion, and it PASSED unanimously 5-0.

(Carden Welsh was a voting member for this vote.)

adjournment at 8:30 pm

Victoria Parmele, Minutes taker