

# D-R-A-F-T

## ZONING BOARD OF ADJUSTMENT TUESDAY, OCTOBER 9, 2007 TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL 7:00 P.M. MINUTES

**MEMBERS PRESENT:** Jay Gooze; Mr. Gottsacker Gottsacker; Ted McNitt; Michael Sievert;  
Ms. Davis Davis;

**MEMBERS ABSENT:** John deCampi; Robbi Woodburn; Carden Welsh

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

The meeting came to order at 7:05 pm

### I. Approval of Agenda

Chair Gooze noted there were various documents the Board had been presented with that evening that might have bearing on the Agenda. He said the Board would first read through them. The Board then spent several minutes reading through these documents.

Chair Gooze said there was a request that Item II A, the Adams application, be withdrawn because the applicants were having more test pits done. He also said a letter had been received from Mr. Cleary, the applicant for Item II B, concerning the fact that the septic design had not been prepared in time, so a postponement was requested until the November meeting.

There was discussion about this by the Board, and it was agreed that the postponement of the Cleary application would be accepted, but that if there was another postponement, the Board would ask that the application be withdrawn and resubmitted in the future.

There was discussion that there was a request that Item II E, the Teeri application, be continued to the November meeting, because the applicants were looking at a number of possibilities, and also because Mr. Johnson's input was needed concerning this application.

***Jerry Gottsacker MOVED to approve the Agenda as amended, withdrawing Item II A, and continuing Items II B and II E to the November 13, 2007 ZBA meeting. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.***

### II. Public Hearings:

- A. **CONTINUED PUBLIC HEARING** on a petition submitted by Attorney Peter J. Loughlin, Portsmouth, New Hampshire on behalf of James & Kathleen Adams, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XXIV, Section 175-139 to install a septic system within a 5,000 square foot rectangular area, 125 feet from Hydric A and Hydric B soils with a test pit showing a depth of 27" to seasonal high water and a depth of 62" to ledge where 4 test pits are required. The property involved is shown on Tax Map 20, Lot 8-1, is located at 401 Bay Road, and is

in the Residence C Zoning District.

This application was withdrawn.

- B. PUBLIC HEARING** on a petition submitted by Michael Cleary, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article IX, Section 175-30(D)(3)(d) of the Zoning Ordinance to add a second floor to an existing house within the original footprint and from Article XIV, Sections 175-74(A) and 175-75.1(E) of the Zoning Ordinance to replace the existing septic system within the shoreland setback. The property involved is shown on Tax Map 12, Lot 1-15, is located at 26 Cedar Point Road, and is in the Residence C Zoning District.

This application was postponed until the November 13, 2007 ZBA meeting.

- C. PUBLIC HEARING** on a petition submitted by Paul Berton, Fall Line Properties, Portsmouth, New Hampshire on behalf of Epsilon Holding Corporation, Ipswich, Massachusetts for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 and Article XII, Section 175-53 to allow for a mixed-use building with residential and non-residential use and to allow four unrelated people to reside in each unit. The property involved is shown on Tax Map 2, Lot 9-4, is located at 17 Garrison Avenue, and is in the Professional Office Zoning District.

Mr. Sievert said he had no professional connection with the applicant, Paul Berton at this time, but asked whether because he had worked with him in the past, he should recuse himself. After discussion by the Board, it was agreed that it was not necessary for Mr. Sievert to recuse himself.

Mr. Berton said the property in question was a former fraternity house that was surrounded by apt buildings and other Greek facilities. He said this was a pretty unique location in that it was entirely surrounded by a student population. He said the property was located in the Professional Office zone.

He showed a new survey that had been done of the site and building, and explained that the main portion of the building would be residential and would have apartments, while the function space facing Garrison Ave would be used to meet the mixed use, professional office component. He said there would be mixed use on the first floor.

He noted that he had been approached about buying this property 10 years, ago, and then was approached again this year. He said he had no intention to be in the boarding house or fraternity business. He said the plan was to convert it to a 6 unit apartment building with six individual living units, 2 on each floor, and each of which would have 4 bedrooms to house 4 unrelated people.

He said right now there were 8 units on each floor, and said this would be divided up and made into two 4 unit areas, on each floor. He said 4 bathrooms would remain, and said 2 of the existing bathrooms would be made into kitchens,

Chair Gooze pointed out that retail was allowed in the Professional Office District, but that restaurants and restaurant take outs were not allowed.

Mr. Berton said restaurants/take out seemed to be one of the feasible uses in that location, to get the highest and best use. He also said one of the reasons he was going for the 4 unrelated was the way the

building was already laid out, and he provided details on this. He said the total occupancy as a fraternity was 36 people, and said he would be reducing this down to 24 people. He said the design would allow the ability to include ADA features, and was one of the advantages of having a residential component on the first floor.

He said he had met with Town department heads, and had letters of support from them. He noted that parking was not an issue because there were more than enough spaces available relative to the demand from the residential component.

Mr. Berton said there was as yet no clear vision concerning the retail component that should go there. He said he had been approached with different ideas, and said whatever he decided to do, he would be back before the Town boards to finalize these ideas.

Chair Gooze asked if this project would still go forward if a restaurant or other food service was not allowed.

Mr. Berton said if the residential units could be stabilized, he would have some flexibility in finding the highest and best use.

Chair Gooze noted that this was a use variance, and that restaurants were not an allowed use in the Professional Office district. He said the Board would have to decide whether it wanted to grant this.

Mr. Berton said a restaurant had struck him as being the highest and best use in that location, but he said the project was still feasible without that use.

There was discussion by the Board as to whether Mr. Berton was actually asking for a variance to allow the restaurant use, and whether that issue should be addressed separately from the present application. It was noted that three variance requests were listed in Mr. Berton's application.

After further discussion, Mr. Berton said he would withdraw the variance request B "to allow a similar non-residential use in the PO district of restaurant/carry out", and would just have the Board deal with variance requests A and C.

He then went through the variance criteria, stating that granting the variances would not decrease the value of surrounding properties, and in fact would raise the bar for other properties in the area. He explained that the apartments were needed on the first floor because he needed to have six apartment units in order to be able to stabilize the property financially, and to therefore be able to experiment with retail/professional office uses.

He said all the properties that surrounded the site were University housing or other "Greek" residents, and said he would be concerned about their impact on his future property values.

He said granting the variance would not be contrary to the public interest because the Zoning rewrite and Master Plan called for mixed uses and multi-units in the district. He said fraternities were not the preferred use, and said professionally managed properties had been recognized as a positive for the community.

He said denial of the variance would result in unnecessary hardship because if the variances were not

received, the change of ownership and use would not be possible, and the property would remain a fraternity.

Mr. Berton said granting the variance would mean substantial justice would be done, because a more positive use of the property would result in heading in the direction the community would like to see. He said the spirit and intent of the Ordinance would be met in granting the variance because there would be mixed use of the property, a reduction in overall occupancy, and professional management. He said all of these things would reduce the drain on municipal resources.

Mr. Gottsacker noted that putting in an ADA compliant unit would be more expensive on a higher floor.

Mr. Berton said he planned to have a high quality development, and said he envisioned a facility where walking would be encouraged, and cars would be discouraged, given its central location. He said this would be important for the commercial component as well as the residential component. He noted that the building had sprinklers.

It was noted that the Police Department and the Code Enforcement Department supported this application. Board members read letters to this effect.

**Tom Richardson, 11 LittleHale Road**, said he had been in the building in question many times, as a member of the Fire Department, and said this was the best idea he had seen for it in 25 years. He said he supported the idea of having residential units on the first floor, and said having ADA compliant units was excellent, and that it was extremely desirable for students with special needs, given that the building was so close to campus. He said it was also a fantastic idea to get rid of the party room. He said a retail establishment or small restaurant would probably do well in this location, without cars, and said this would tend to keep people where they were already congregating.

Mr. Berton read a letter from Ann Lawing, UNH Senior Assistant Vice President for Student and Academic Services, noting that she was very involved on the Rental Housing Commission. The letter spoke very favorably concerning this proposed mixed use development.

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

The Board agreed to discuss the two issues under consideration separately.

#### Mixed use Variance request

Mr. Sievert said the application met the variance criteria because of the way the development had been set up. He said there would be no decrease in the value of surrounding properties, and said granting the variance would not be contrary to the public interest. He said it was already a residential use, and said the new residences would be ADA compliant.

He noted that this was a use variance, and said having to move the existing the existing residential upstairs would be unreasonable. He said it would be a different story if there wasn't already residential on the first floor. He said substantial justice would be done in granting the variances, and said the spirit and intent of the Ordinance was met, given that this would be a mixed use development.

Mr. Gottsacker said he agreed with Mr. Sievert, and said the uniqueness of this property was that it was an existing fraternity house. He said if this were a brand new building proposed, there would be a different set of issues to consider.

Mr. McNitt said he agreed with Mr. Sievert on all points, and said the variance request met all five variance criteria.

Ms. Davis asked what the intent was in the Ordinance to allow residential above, and office below.

Chair Gooze said the intent was that if there was a retail use on the bottom floor, a landlord would be more likely to keep the management of the residential units under control than if there were only residential units in a building. There was discussion about this.

Ms. Davis said given that, she thought that having a business right next to a residential unit on the first floor would also serve to control things. She said she therefore felt that granting the variance would not be against the spirit and intent of the Ordinance. She said she agreed with others that the other variance criteria were also met.

Chair Gooze said he too felt that the variance request met all five criteria. He said it was an important point that this was not an undeveloped property where the development was proposed, and that the applicant would be making the best use of the existing building in terms of what was feasible.

#### 4 Unrelated Variance request

Chair Gooze said allowing 4 unrelated was all right in this instance because the building was already there and was set up a certain way, so this was a unique situation. He noted that he was ordinarily against allowing 4 unrelated people.

Mr. Gottsacker said the numbers spoke for themselves, and said going from 36 residents to 24 residents, in upgraded units, was clearly a win for the Town.

***Jerry Gottsacker MOVED to allow residential in the two units on the first floor and to allow four unrelated people to reside in each unit, at the property located at 17 Garrison Avenue, in the Professional Office Zoning District. Mike Sievert SECONDED the motion, and it PASSED unanimously 5-0.***

- D. **PUBLIC HEARING** on a petition submitted by Milton T. & Edda M. Martin Jr., Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 to allow for a subdivision of one lot into two lots where the new lot contains less than the required square footage and has less than the required frontage. The property involved is shown on Tax Map 2, Lot 1-2, is located at 81 Madbury Road, and is in the Residence A Zoning District.

Mr. Martin explained that he and his wife had originally planned to put an addition on their existing house, but had decided to subdivide the property instead. He explained that part of his plan was to remove the existing structures on his existing lot that were in violation of the Zoning Ordinance (a metal shed, a single car garage, and a screen house), and to replace them with one structure, a 24 ft by

24 ft two car garage with a 12 ft by 16 ft attached shed, which would be in conformance with the Ordinance,.

He said there were two existing driveway cuts. He said if the property was subdivided, 94 ft of frontage and 10,000 sf would be provided for the second lot. He said the proposed house on that new lot would be in keeping with the existing house, and among other things, would look toward the existing house. He said it would meet all the other dimensional requirements except for the lot size and frontage requirements

Mr. Martin said he had moved to Durham in 1996, and said his desire was to improve the property and make it more functional. He said there also appeared to be a lack of single family, less expensive dwellings on the market in Durham. He noted that the site had ready access to public water and sewer, as well as utilities, and said this subdivision would assist in creating more revenue stream for those utilities.

He said this property would be intended for young families or older who needed an average size house and would like to be able to walk to town. He said the median house price in this area was around \$290,000, and he noted that Mr. Johnson had said that if he had made the improvements to his house that he had originally planned, he would probably overshoot the property values in this neighborhood. Mr. Martin said he thought the subdivision approach was a good idea. He said the new house would be 2100 sf, would have 3 bedrooms, 2 ½ baths, and a 2 car garage. He provided additional details on the design for the new house.

There was discussion that the available frontage was only less than what was required, and that the main issue was that the lot size requirement was not met.

There was detailed discussion on the student rental issue, and to what extent this could be controlled in this new property if it were built.

Mr. Gottsacker received clarification from Mr. Martin that he and his wife planned to live in the existing house and to sell the new house that would be built.

Ms. Davis asked why the lot line was drawn the way it was, and Mr. Martin said it was drawn that way to included the driveway. There was discussion about this.

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

Ms. Davis said she lived near this property, and noted that she had a quarter acre lot. She said the Master Plan encouraged infill development in this district, and said a question was whether it was encouraging an increase in density. She said the proposed orientation for the new house made it seem more like an increase in density.

Mr. Gottsacker said his house was turned this way as well, and this didn't impact livability.

Mr. McNitt said he tended to favor granting this variance, on the basis that the lot was in family ownership before the new Zoning Ordinance was passed. He said the new Ordinance had taken away the ability to divide the lot, for all practical purposes.

Mr. Gottsacker said he agreed, and said his only hesitation concerning this would have been if abutters had spoken at the public hearing. He said he knew some of these abutters, and said he thought they would have been present if they really cared about the proposed subdivision.

Mr. Sievert said he thought the variance request met the criteria, and said he thought a special condition of the property was that it almost had enough frontage. He also noted that the lot size was larger than the original lot size that was required by the Ordinance.

There was further discussion by the Board concerning the wording in the Master Plan on infill development

Mr. McNitt explained that the minimum lot size was increased in the Zoning Ordinance because as a result of the new conservation subdivision provisions, it was determined that it was conceivable that such a development could end up with more houses than a conventional subdivision.

Chair Gooze noted that most of the properties in that area were fairly small. He said he didn't think that what the applicant was proposing wouldn't be out of character. He also said the abutters had had the chance to speak but had not chosen to do so

Mr. Gottsacker said the change in the Zoning Ordinance had taken away some opportunities concerning the property, and he said there was some unfairness in this.

Chair Gooze went through the variance criteria. He said there was no evidence that granting the variance would decrease the value of surrounding properties, and also said there was no evidence that granting the variance would be contrary to the public interest. He said that concerning the hardship criterion, the application met this because of the special conditions of the property, given what the applicants wanted to do with it. He also said substantial justice would be done in granting the variance, and said the spirit and intent of the Ordinance was met.

Mr. McNitt said if the neighborhood was full of 40,000 sf or even 20,000 sf lots, he would be against this, but he said a purpose of the Residential A district was to maintain the integrity of the neighborhood, and said this application wouldn't hurt this.

Mr. Sievert noted that sewer and water would be available to the new lot.

Chair Gooze noted that there had to be special circumstances of the property. There was discussion on this.

Mr. Sievert said a special circumstance was that the property was close to meeting the frontage requirement

Ms. Davis said what made this property unique was the shape of the lot.

***Ruth Davis MOVED to grant the Variances from Article XII, Section 175-54 to allow a subdivision of one lot into two lots where the new lot contains less than the required square footage and has less than the required frontage, for the property located at 81 Madbury Road, in the Residence A Zoning District, and to reference the plot plan diagram as to frontage and lot size for the proposed***

*subdivision. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.*

- E. **PUBLIC HEARING** on a petition submitted by Attorney Christopher A. Wyskiel, Dover, New Hampshire on behalf of Robert S. Teeri Living Rev Trust and Gale S. Teeri Living Rev Trust, Durham, New Hampshire for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a June 13, 2007, decision of the Durham Planning Board denying a Conditional Use Permit Application to expand a non-conforming use and occupancy of 15 Main Street by ten individuals as a Rooming and/or Boarding House. The property involved is shown on Tax Map 5, Lot 2-2, is located at 15 Main Street and is in the Church Hill Zoning District.

This application was continued to the November 13, 2007 ZBA Meeting.

Recess from 8:40- 8:46

### **III. Board Correspondence and/or Discussion**

- A. **REQUEST FOR REHEARING** from Stonemark Management Company Inc. on an August 28, 2007 partial denial of 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.
- B. **REQUEST FOR REHEARING** from the Durham Planning Board on an August 28, 2007 partial denial of 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 recused himself from the discussion on this Agenda item.

Attorney Pollack requested to speak, and Chair Gooze said the public hearing was closed, but said Attorney Pollock's request was noted for the record.

Chair Gooze noted that the documentation in the current Request for Rehearing stated that he had been biased and had made some errors of procedure concerning the Application for Appeal of Administrative Decision. He said he would address these comments.

He said he had lived in Durham for 30 yrs, and said his wife, Marty Gooze, had been on the School Board for six years and had served as Chair for four years. He said she had written numerous letter during that time, and had spoken on various warrant articles. He said she was very capable of making her own decisions, some of which didn't agree with his own. He said that at any time she had told him



she was going to talk with anyone about the application on the Stonemark project, he had said to keep him out of it.

Chair Gooze then went through in detail items in August 21, 1007 letter from Attorney Pollack on behalf of Stonemark Management, which described his supposed actions and comments concerning the Stonemark project. He said everything said about him in this letter was not true.

In reference to items 9-11 in that same letter, he noted that he had been blamed for not having the Planning Board's August 23, 2007 letter to the ZBA provided to ZBA members. He said he had looked carefully at the August 14<sup>th</sup> Minutes, and said at the end of a long discussion, he had said "Chair Gooze closed the hearing". He said that had been his typical way of handling public hearings. He noted that he would occasionally allow testimony if the Board had an informational question to ask a member of the public, and that if this was something that would require a rebuttal, he would open the public hearing specifically for that, and then would close it.

He said the August 28<sup>th</sup> Minutes (**It think this should be August 14<sup>th</sup> Minutes**) indicated that the only information the ZBA asked for was concerning whether the 80/20 rule had been there previously. He said there was nothing that required a rebuttal, so he had not re-opened the public hearing.

Chair Gooze said the reason he didn't put the letter into the Board for deliberation was that the public hearing was closed. He said if he had, this would essentially be opening the hearing again, and would have meant the Board would have to take rebuttals from the other side. He said he had felt that doing this was inappropriate since the public hearing had been closed.

He said the proper place to speak was during the hearing, when there was ample opportunity. He said he had been struck that there were only a few Planning Board members at the public hearing on August 14<sup>th</sup> to speak. He noted that at that time, Planning Board member Richard Kelley had spoken about the 80/20 rule, and the ZBA listened and then deliberated.

He said he had tried to be very careful to separate out Planning Board details from what the ZBA had to base its own decisions on. He said the ZBA voted 4-1 to only hear 4 items, the items that were under the jurisdiction of the ZBA. He noted that Mr. McNitt had wanted to address them all, and said he thought he had been thinking more as a Planning Board member, because he had served on that Board for a long time in the past.

He said the ZBA voted 5-0 to say an error had been made in terms of the lot definition and the contiguous issue, and voted 4-1 on the 80/20 issue. He said he was only one member of this Board.

Chair Gooze referred to Mr. Roberts's testimony to the ZBA concerning the contiguous issue. He said his own contention at the time was that the ZBA had to do a strict interpretation concerning the definition, and it didn't matter if one liked or didn't like the particular project involved. He said that if he had been biased against the project, he would have suggested that the ZBA address all of the issues that had come before it from the abutters, including whether it was good for the neighborhood. He said the record spoke for itself on this.

Chair Gooze said he didn't see anything different now than what had been presented to the ZBA previously. **He noted a letter from Attorney Walter Mitchell that stated that everything was said to the ZBA at the August 14<sup>th</sup> meeting, when there was ample opportunity to present it. NOT**

**SURE WHAT THIS IS REFERRING TO, AND IF THIS MAKES SENSE**

He said the ZBA had also had ample opportunity to read any of the Minutes of the Planning Board meetings.

He said he didn't feel the ZBA had done anything incorrectly concerning the Appeal of Administrative Decision that would justify rehearing it, but he asked what the will of the Board was concerning this. He also said he had simply wanted to respond to the allegations concerning bias on his part. He said there had been no bias in terms of what he had dealt with.

There was discussion on the letter from the Planning Board date August 23<sup>rd</sup>, 2007, and that it was surprising that it hadn't been presented now along with the Request for Rehearing.

Mr. McNitt said he had been very conscious throughout this process that the ZBA used a different set of criteria than the Planning Board. He said the question really before the ZBA now was whether it had now been presented with anything that would justify rehearing the case because it was new information.

Ms. Davis said there wasn't anything new here about the density bonus, and Chair Gooze agreed. Chair Gooze also noted that Mr. Kelley had spoken on this issue at the August 14<sup>th</sup> meeting, so it was not that true that the ZBA had cut anyone off from speaking on this.

Mr. McNitt noted that Arthur Grant, who had been member of the Planning Board during about half of the original application on the Stonemark project, had spoken on this issue on August 14<sup>th</sup>.

Mr. Sievert said he didn't see a bit of new information., and also said he didn't think Chair Gooze was biased. He suggested that the two Requests for Rehearing should be separated, because although he didn't think the Stonemark application passed the test, he wondered if the Planning Board request should be heard. He noted that it had been said that Chair Gooze had not allowed the Planning Board to speak, and that Chair McGowan had said this should be allowed as a courtesy to another major land use board in Durham.

Chair Gooze said there was a public hearing on August 14<sup>th</sup> where the Planning Board had the opportunity to speak.

Mr. Sievert said perhaps the point here was valid that the boards were supposed to work together.

Chair said he tried to bend over backwards to not treat the Planning Board any differently than any resident of the Town. He said it was not fair to do otherwise than this.

Mr. Sievert said he was not arguing against that, but said he did care about the other Boards, and said perhaps the ZBA should be able to treat other board members differently. He noted that they looked at the regulations a bit differently than, say, an abutter, who might have a bias. He said the Planning Board had a lot of information to look at, and noted that the ZBA had postponed the Appeal so it could get all the information that was available. He said the ZBA had gone out of its way to do this, but said the Planning Board apparently felt that the ZBA didn't get enough information.

Chair Gooze said when the ZBA got all this information, he hadn't seen anything different in if from

what had been presented in the condensed version at the public hearing. He said this was an announced public hearing, and said the abutters and the Planning Board had had the chance to come and speak.

Mr. Sievert said if one looked at this in terms of whether there was any more information that had now been provided, there wasn't, from this letter. He said that was the way the ZBA therefore had to rule on this.

Mr. McNitt said the question was whether Chair Gooze knew the Planning Board wanted to be heard when he closed the hearing.

Chair Gooze said he had checked this in the Minutes. He noted that he had said, after the public hearing closed, that in case there was information provided that would require rebuttal, it would be appropriate to open the public hearing. He noted that he had asked the question concerning the 80/20 issue.

He referred to Item #16 in the Planning Board's Motion for Rehearing, concerning a legal concept called "administrative gloss," which referred to a situation where a town had consistently interpreted and applied an ambiguous zoning provision in a particular way. Concerning this, Chair Gooze said he had asked very specifically if there was any elderly housing developments that had been done after the revised Zoning Ordinance was put in place, and the answer was no, and that the Stonemark development was the first one. He said one couldn't talk about interpreting and applying ambiguous Zoning provisions when they weren't even in the Ordinance. He said this had been his whole point concerning the 80/20 issue.

Mr. Sievert said it was now being said that the Town, through the Planning Board, had consistently been applying Section 175-156 (concerning the elderly housing density bonus)

Chair Gooze asked how one could say this if the Ordinance wasn't even there before.

There was further discussion on this, and on the amount of testimony by the Planning Board at the August 14<sup>th</sup> meeting.

Chair Gooze noted that the vote regarding the contiguous issue by the Planning Board had been 4-3, while the ZBA's vote on this issue had been 5-0.

Ms. David noted that document requesting the rehearing said that Chair Gooze had cut off the Planning Board when members of the Board tried to explain its decision.

Chair Gooze said if he had done any cutting off, this was because someone wasn't referring to the specific Ordinance provision the ZBA was discussing at that time. He said he tried to be very consistent about doing this.

Ms. Davis said Chair Gooze's description of the situation was her recollection as well.

There was discussion as to whether Item #4 in the Planning Board's Motion for Rehearing referred to the first or second ZBA meeting in August. It was noted that the public hearing was not open at the Aug 28<sup>th</sup> meeting, and that this applied to everyone who tried to speak.

Chair Gooze said he had looked at the Minutes for the August 28<sup>th</sup> meeting, and had seen that he had 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 that if it was a question that required that an opinion be expressed the public hearing should be reopened in fairness to others present.” He also said the Minutes indicated that he had noted that Attorney Hogan and Attorney Pollack had waived having the Town print out and distribute to ZBA members the Planning Board minutes where the application was discussed.

He also said in regard to the charge that he was biased that he had recommended that the Board deny two of the requests for Appeal of Administrative Decision, and the ZBA had agreed 5-0 that the Planning Board hadn’t made a mistake concerning these two issues. He also noted that the rest of the Minutes indicated that the ZBA, not himself, had made the decisions concerning the Appeal of Administrative Decision.

Mr. McNitt noted that anyone who had wished to speak at the second meeting in August was not allowed to, because the hearing was not re-opened.

Chair Gooze explained that this reflected a policy of his.

Mr. McNitt said other than accusations of bias, he didn’t see any information now that was not presented to the ZBA Stonemark Management’s Attorney over the course of the first hearing. He said he didn’t agree with quite a few of the statements that been made by the applicants in the Requests for Rehearing. He said he didn’t see new information to justify saying that the Board was in error. He said a big piece of the difference between the ZBA and the Planning Board was that the ZBA was obliged to follow the Ordinance in virtually all cases, and to follow criteria. He said if someone felt he/she didn’t have to look as closely at the Ordinance as the ZBA did, this could lead to a difference of opinion.

He said he felt that the Planning Board had the opportunity during the public hearing process on the original Stonemark site plan application over a 6 month period to go to the Council and ask for a modification to the Ordinance, if it felt the Ordinance was wrong.

Ms. Davis noted Item #32 of the Motion for Rehearing from Stonemark, which asked “..if the ZBA was convinced that the Planning Board properly treated the rear parcel as useable acreage for the project, how it could simultaneously find that the two parcels were not sufficiently connected”. She said she thought this was a misinterpretation of the ZBA’s decision, and provided details on this. There was discussion on this.

Chair Gooze said this was a good example of how each Ordinance provision was looked at individually, and the interpretation was based on whether there was one conservation lot and only part of the parcel was used, which had nothing to do with whether the lots were contiguous. He said this had been his essential point, and was his best interpretation of the Ordinance. He said he thought this was why the ZBA had voted that an error hadn’t been made concerning this. He said the ZBA’s charge concerning this was different than the Planning Board’s charge. He said he wanted to be sure that whether this was a good project, or a bad one would not be part of the ZBA’s decision.

Ms. Davis said she didn’t see new information here, and didn’t see evidence that the ZBA had made an error. She said the ZBA had been very careful in its deliberations. She also said she didn’t feel the charges of impropriety had any merit.

There was discussion as to whether to do separate motions for each for the Requests for Rehearing, and it was agreed to address them with one motion.

***Ruth Davis MOVED to deny the REQUEST FOR REHEARING by Stonemark Management Company Inc. and the Durham Planning Board concerning a partial denial by the Durham Zoning Board of Adjustment on August 28, 2007 of an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION 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 from a June 20, 2007, decision of the Durham Planning Board approving the Site Plan and Subdivision Plan for a 66-unit condominium facility located at 97-99 Madbury Road, in the Residence A Zoning District. Ted McNitt SECONDED the motion, and it PASSED 4-0.***

## **V. Other Business**

### **A. Discussion of Jack Farrell's Letter regarding Emery Farm Variance Approvals.**

Mr. Farrell said what had been submitted to the Planning Board concerning the proposed expansion had more detail in it than what had been presented to the ZBA. He said there were 3 notes on the site plan approved by the Planning Board that the ZBA hadn't seen, and said all of them were housekeeping items, and none would require additional variances.

***Chair Gooze MOVED to update the plan dated January 9, 2007 referenced in the variance approval to the plans submitted on October 1, 2007. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.***

## **IV. Approval of Minutes**

### August 14, 2007

Page 4, 7<sup>th</sup> full paragraph from the top, should read “..would be minimal. He said the .....”

Page 10, 5<sup>th</sup> paragraph from bottom, should read “..were contiguous became much stronger...”

Page 11, 2<sup>nd</sup> paragraph from bottom, should read “He said another issue...”. Also, separate last two paragraphs on the page with a space.

Page 14, 2<sup>nd</sup> paragraph, should read ““..one of these issues, in great detail, over several...”

6<sup>th</sup> paragraph, should read “..he didn't see that this was a subdivision....”

***Ted McNitt MOVED to approve the August 14, 2007 Minutes as amended. The motion was SECONDED by Jerry Gottsacker, and PASSED unanimously 5-0.***

### August 28, 2007

Page 1, 2<sup>nd</sup> paragraph from the bottom, should read “..to ZBA members all the Planning Board minutes where this application was discussed.”

Page 2, 5<sup>th</sup> paragraph, should read “...Section 175-107(E) Maximum Development Density, relying on calculation of usable area.

Page 3, 2<sup>nd</sup> paragraph, should read “..non-age restricted, one then used everything.”

Bottom paragraph, should read “..of the density bonus aspect. He said he didn’t....”

Page 5, bottom paragraph, should read “...take into account other information and opinions..”

Page 6, top paragraph, should read “..the Planning Board had to have discretion in its decisions, but...”

***Jerry Gottsacker MOVED to approve the August 28, 2007 Minutes as amended. Mike Sievert SECONDED the motion, and it PASSED unanimously 5-0.***

**V. Other Business**

There was brief discussion on the Christensen court case.

**VI. Adjournment**

***Ted McNitt MOVED to adjourn the meeting. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.***

Adjournment at 10:00 pm

Victoria Parmele, Minutes taker