

These minutes were approved at the September 8, 2009 meeting.

**Durham Zoning Board of Adjustment
Tuesday July 28, 2009
Durham Town Hall - Council Chambers
MINUTES**

MEMBERS PRESENT: Chair Jay Gooze; Jerry Gottsacker; Ruth Davis; Carden Welsh; Edmund Harvey; Sean Starkey

MEMBERS ABSENT: Robbi Woodburn

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

I. Approval of Agenda

Chair Gooze brought the meeting to order at 7:04 pm.

Sean Starkey MOVED to approve the Agenda. Ed Harvey SECONDED the motion and it PASSED unanimously 5-0.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Slania Enterprises Inc., Durham, New Hampshire for an **APPLICATION FOR APPEAL FROM AN ADMINISTRATIVE DECISION** of the Planning Board as per RSA 676:5(III) regarding the approval of a Site Plan Application to build a new three-story, mixed use building. The property involved is shown on Tax Map 4, Lot 8-0, is located at 6 Jenkins Court, and is in the Central Business Zoning District

The applicant, Tom Christie, spoke before the Board. He said he represented the abutter to the property, Slania Enterprises, Inc., and first asked if any Board members needed to recuse themselves.

He said he was present because he was concerned that some of the issues covered by the Planning Board review process for the 6 Jenkins Court site plan application were completely contrary to, or did not follow the Zoning Ordinance. He said his understanding was that he should come to the ZBA first if there was a Zoning issue, before proceeding to Superior Court. He said he felt the issues he was concerned with fell into that category.

Mr. Christie said he also thought that if the ZBA voted on this, it should vote as to whether the Planning Board followed the proper procedure or not. He said it was not necessary for the Board to come up with a solution for the situation. He also pointed out that these issues at hand were brought forward, and judgments were made on them by the

Town Planner, not the Zoning Administrator.

#1. Section 175-117 (A)(2)

Mr. Christie said Section 175-117 (A)(2) of the Zoning Ordinance required that a driveway construction permit shall have been received and issued “prior to any site review or building permit approval.” He said it was his feeling that it was the duty of the Planning Board and the ZBA to read the words on the page, period. He said this provision spelled out the process that was supposed to take place, regarding getting a building permit.

He said the reason for this was clear, and said those who authored it had the intent that the process was first to get a driveway permit, and then to go forward and make a site plan application. He said in this instance, the applicant did not do this, and the process was not properly followed.

Mr. Christie said the Planning Board had been advised that this was the way things were done in the past, but he said that didn’t justify doing it that way this time, or those other times. He said he was looking for the ZBA to determine that the proper process was not followed.

#2. Section 175-41 (F)(2)

Mr. Christie next referenced Section 175-41 (F)(2) of the Zoning Ordinance, which stated that “No new vehicular access or driveway shall be located or pass between the front wall of the principal building and the front property line.” He said to allow vehicle passage through the front yard would be contrary to the vision of the Zoning Ordinance, which outlined in great detail what the front yard was supposed to be used for; as a “designated pedestrian area”. He said whether it was in fact a pedestrian area could perhaps be addressed at a later time.

He said he could argue that there was at least one new driveway, and said it could easily be argued that there would be three, depending on how one viewed the access proposed for the dumpster location. He noted that those other accesses wouldn’t enter the front line of the property.

Mr. Christie said the Planning Board had erred, and didn’t defend his property rights by allowing a new vehicular access located or passing between the front wall of the principle building and the property line. He said this clearly did that.

#3 Section 175-116 (A)

Mr. Christie next referenced Section 175-116 (A) of the Zoning Ordinance, which required that a buffer strip of at least 10 feet in width abutting a public right-of-way must be landscaped. He said the site plan did not show such a buffer, and said if the applicant didn’t want to have one, he should come before the ZBA to get a variance.

He said the argument made by Mr. Campbell was that this was indoor parking, but he said under the Zoning Ordinance definitions, parking areas were not defined as to whether they were indoor or outdoor; they were defined as to whether they contained 5 spaces or more. He said whether they were indoor or outdoor parking areas had no bearing.

Mr. Christie said he had spoken to the Planning Board about this during the site plan review process, but said it had indicated that because the parking area would be indoors, the buffer didn't matter. He asked the ZBA to refer to the Ordinance definitions, which didn't delineate between indoor and outdoor parking.

He said that in addition, the buffer made sense for this project, noting that the way the parking was drawn in the site plan, one would be able to see the cars in the indoor parking area, and the area where the cars drove out of the parking area. He said the reason for a buffer was to block the view of such vehicles.

#4 Section 175-117(C)(2)

Mr. Christie next referenced Section 175-117 (C)(2) of the Zoning Ordinance, which limited the number of driveways in the Central Business District to a maximum of 2 per lot. He said the conditionally approved site plan showed 4 access points: one up by the copy center, one down by the proposed exit, one entering the parking area, and the other for trash to be loaded and offloaded. He said the ones on the frontage weren't permitted, and certainly weren't permitted in advance of getting the driveway permit, in advance of making the application.

He said everyone should be treated the same, and said the Zoning Ordinance should be applied as written for everyone. He said this was not done with this site plan application, and also said he believed that the way it was approved lessened greatly the safety on the property. He said a 10 ft buffer strip properly oriented toward the parking area would at a bare minimum provide a 10 ft safety zone.

Mr. Christie said that concerning the issue of aesthetics, it aggrieved him that the Zoning Ordinance's vision for the Central Business District spoke at great length about the need for pedestrian friendly areas. He said he didn't believe that this conditionally approved site plan application fell within this vision.

Mr. Christie said there was no question that there had been a timing issue, in that the applicant for 6 Jenkins Court had been able to proceed with the application at a rate that was far greater than would normally been allowed to, if the Board had followed the process. He said this was an injustice to anyone else going through this process. He said he was aggrieved as a property owner, taxpayer and resident of Durham.

He said there was no question in his mind that accepting the application and conditionally approving it prior to the permits being in place clearly set the timing off, and also

impacted his property value if the Zoning Ordinance wasn't followed. He said he was depending on the ZBA to defend his property rights. He said if the ZBA didn't do this, Durham would get to be known as a Town that didn't do this. He asked the Board to make the situation right.

There was discussion between Chair Gooze and Mr. Christie that safety, timing and aesthetic issues were underlying issues in this instance, and that these issues would be specifically addressed by the ZBA if this was a variance request., but not as part of an administrative appeal application.

Chair Gooze asked if there was anyone who wished to speak for or against the application.

Lorne Parnell, Chair of the Durham Planning Board, noted the letter the ZBA had received from Town Planner Jim Campbell, which outlined the views of the Planning Board on all of the issues Mr. Christie had raised. He said this information spoke for itself, and indicated that all of the issues had been addressed by the Planning Board as part of the site plan review process.

He said the Planning Board believed that it had followed the proper procedure, with the methodology stated in the letter. He asked ZBA members if they had any questions he could perhaps answer.

Chair Gooze asked if an applicant had ever been denied a site plan application approval because he didn't have a driveway permit before the site plan review process was completed.

Mr. Parnell said not that he was aware of. He said when the Board approved an application, this approval was contingent upon the applicant obtaining the necessary permits.

Code Administrator/Enforcement Officer Tom Johnson said the Planning Board didn't deny building permits, but said he would, if the applicant didn't have the driveway permit.

Chair Gooze asked if anyone one had been denied a driveway permit since Mr. Johnson had worked in Durham because he didn't have it in before he went to the Planning Board for site review.

Mr. Johnson said he denied the building permit if the applicant didn't have the driveway permit, but said he didn't review building permits until the applicant had Planning Board approval of the site plan.

Chair Gooze said trees in an indoor parking area didn't make sense, but said there didn't seem to be anything specific in the Zoning Ordinance regarding indoor parking areas.

Mr. Parnell said the landscaping aspect of the buffer was something that went with surface parking, but didn't make sense with inside parking, and no setback. He said the Planning Board's view had been that requiring the buffer went against the principle behind covered parking, so requiring it didn't seem to be the proper way to go.

Chair Gooze asked if there had been any project before the Planning Board where landscaping was required when the building was going to come right up to the street.

Mr. Parnell said outdoor surface parking wasn't allowed to come out to the street, but the parking for this application happened to be inside a building. He said the building footprint went close to the property line, which was allowed in the CBD, and said there was to be a pedestrian walkway between the edge of the building and the road. He said he didn't believe that vehicular access was an issue in that area, aside from the driveway.

There was discussion on the accesses proposed for the project, including the new access and egress from the covered parking garage. Mr. Parnell said it would start at Store 24, and come through to Jenkins Court.

Ms. Davis asked how the front of the building would be oriented, and Mr. Parnell said the front would be on Jenkins Court. She noted the words "vehicular passage through the front yard", and asked for clarification concerning this.

Steve Roberts, a member of the Planning Board, said the front yard term came from Mr. Campbell's letter in regard to Section 175-41(F). He quoted from Mr. Campbell's letter: "When the section speaks to vehicular access or driveway not being located or passing between the front wall of the principle building and the front property line, it means that the access or driveway cannot run, or pass, between the front wall and the front property line, running parallel from one side of the building to the other."

Mr. Roberts said this meant the Ordinance provision was intended to apply to a situation where there was parking parallel, or there was a driveway parallel to the building, which wasn't the case here. He said there was no such passageway through the front yard in the 6 Jenkins Court application. He demonstrated this for Ms. Davis on the site plan, and there was discussion.

Mr. Roberts said the issue regarding the driveway permit had been overstated. He said there were all kinds of issues the Planning Board had to address with this site plan application, and said the plan would not be signed off on until those issues were addressed. He said this included the driveway permit issue. He said there was preliminary site plan approval, and said final approval wouldn't be granted until the conditions were fulfilled.

Mr. Christie said an applicant was required to have a driveway permit before site plan review, so the Planning Board had not followed the Zoning Ordinance. He said it was the obligation of the Planning Board, as well as the ZBA, to follow what was on the paper. He asked where it said anything about a parallel roadway in the Ordinance, and also

noted references that the vehicular access would be in approximately the same location. He said that wasn't the issue, and said the issue was whether there was any vehicular access that crossed the front line, between it and the building.

He said if the answer was yes, then there was vehicular access that was not allowed. He said there was nothing in the Zoning Ordinance about turning it sideways and running it parallel. He said the Ordinance wanted the front property lines to be devoid of vehicular traffic for aesthetic and other reasons.

Mr. Christie asked someone to show him a driveway permit with a date on it that was prior to the date that the site plan application was accepted. He said if that could not be done, the letter of the law was not followed.

Chair Gooze asked how anyone could ever get from the street onto to the property.

Mr. Christie said that in the Central Business District, the vision was that cars didn't do this, and that this would be a pedestrian area, - an area where there wouldn't be cars cutting across sidewalks, cutting up the alleyways and creating a dangerous situation.

He noted that it had been said that it wouldn't make sense to have landscaping if the parking was underground, but he said interpreting the Ordinance was not up to the Planning Board. He said the Ordinance said there needed to be a buffer if there were more than 5 parking spaces, and said the fact that this didn't seem to make sense was not the issue.

He said the Planning Board could have provided more detail in the Zoning Ordinance regarding the issue of indoor vs. outdoor parking, but it didn't. He said he didn't feel the Planning Board had the authority to make that delineation.

Lynn Christie said there was a diagram in the Zoning Ordinance that defined the front yard, and showed different configurations. She said the starting point of analysis should be the Ordinance itself and the words written there, not what had been done in the past. She said she believed this was the first new development under the CBD provisions in the new Ordinance, and said it was important that everyone was clear on what they said, and that they be applied this to this site plan.

She said that regarding the comment that the vehicles would be located under the building and visual buffering therefore didn't make sense, it wasn't as if the parking area would be completely enclosed, and that one wouldn't be able to see the cars. She said she thought the words chosen for the Ordinance were regarding the idea of having a visual buffer, and said if the Planning Board or the applicant didn't think the Zoning Ordinance made sense regarding this, there was the option to get a variance.

Ms. Davis said the vehicular access proposed didn't look too much different from what was there now.

Mrs. Christie said the Code Officer had determined that the driveway permit was needed

because the curb cut would be in a different location, and the cars would be oriented differently. She said it was similar but new.

Chair Gooze asked if the opposing side would like to say anything, and there was no response.

Jerry Gottsacker MOVED to close the Public Hearing. Ed Harvey SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Harvey said the fact that things had been done a certain way in the past didn't mean that it should be done this way now. He also said the wording in Section 175-116 (A) included the word "all", and did not refer to just outdoor parking. He said the language seemed to say the owner of 6 Jenkins Court should have come to the ZBA before going before the Planning Board.

Chair Gooze noted that he had been on the ZBA for some time, and said there were different ways to handle an application. He said someone proposing a project could go to the Planning Board first, or could go to the ZBA first if a variance was needed. He said he didn't think going to the Planning Board first was wrong in itself.

Mr. Gottsacker said that regarding the process question and whether it was followed properly, the ZBA couldn't rewrite the Zoning Ordinance. He said that was up to the Planning Board and the Town Council. He said the ZBA was the only place to get a variance from the Zoning Ordinance, and the Planning Board didn't have the opportunity to look the other way. He said he agreed with Mr. Harvey regarding the wording issue, and the idea that the process was not followed. He said just because it was always done that way didn't justify not following the process.

There was detailed discussion about what permits had been approved for the project. Mr. Starkey then said he believed the letter of the law needed to be followed concerning getting the driveway permit before site plan approval. He said it didn't look like the permits had been received, and also said it didn't look like final site plan approval had occurred.

Ms. Davis noted that the language in the Zoning Ordinance said a driveway permit couldn't be issued "prior to any site review or building permit approval". She said the use of the word "or" made this provision ambiguous. She said sometimes the Zoning Ordinance was tested with these kinds of things, because the language in it wasn't precise.

Regarding Section 175-41 (F)(2) concerning new vehicular access, Ms. Davis said her first thought had been that it was there now, but Mrs. Christie had said that technically it was new because it moved a bit. She said if the intent of the Zoning Ordinance concerning the Central Business District was to have no traffic across the pedestrian way, she could see why this should be looked at. She said people walking down that street would have to be careful if there were cars coming out there, and said if that was the case,

it would seem that a driveway permit was central to this project.

Concerning Section 175-116 (A) regarding the buffer issue, Ms. Davis asked what was considered enclosed parking, and also asked how covered the parking would be.

Chair Gooze said the Ordinance didn't mention indoor covered spaces, so the ZBA needed to decide if indoor parking was so different that another provision would be needed to address this, and in the meantime it would be ok to do what the owner of 6 Jenkins Court had proposed.

Ms. Davis said she thought the owner of 6 Jenkins Court should have come before the ZBA to ask for a variance for the buffer.

Mr. Gottsacker said the Zoning Ordinance was sometimes ambiguous. He said the wording regarding driveway permits might not describe the best process, but it was not for the Planning Board to decide this, or for the ZBA to rewrite the Ordinance. He said if there was bad language that made it difficult for the Planning Board, this didn't get resolved by avoiding the language. He said the issue either needed to come to the ZBA, or the Ordinance needed to be changed.

Chair Gooze said there had been adequate opportunity for the issue of needing to get a driveway permit before issuance of a driveway permits to come before the ZBA over the years. But he said this was the way the Town had interpreted this. He said the wording was ambiguous, and said when it was, that was where the ZBA got to make the interpretation. He said with this particular issue, he was therefore not uncomfortable with saying the Town had the right to do this.

Chair Gooze said Mr. Christie's argument concerning Section 175-41 (F)(2), regarding vehicular access was compelling. He said when he read the Ordinance, he could interpret it as indicating that the goal was to keep driveways from going across pedestrian areas, and that Mr. Christie was correct.

Concerning Section 175-116 (A) regarding the buffer issue, Chair Gooze said it didn't make sense to have trees in a covered parking lot. He noted Planning Board decisions to allow pervious pavement for projects, something which was not specifically addressed in the Zoning Ordinance, and said the ZBA had allowed this interpretation. He said he would try to use common sense in regard to this issue.

Mr. Gottsacker said the buffer definition included walls and decorative fencing , so they were not just talking about trees.

Chair Gooze agreed. He said he was therefore leaning more toward Mr. Christie's perspective on this too, because of the wording in the Ordinance.

Chair Gooze said that regarding Section 175-117 (C) (2), the requirement that there be a maximum of 2 access points, he didn't consider the area on the left of the building going

between Store 24 as access to the building, and said it was an egress out from that lot. He said he wasn't sure he considered that a driveway for the 6 Jenkins Court building.

Mr. Gottsacker said the definition of driveway was very broad, and he read the definition. There was further discussion.

Chair Gooze said he was comfortable that there were two driveways on the plan, and that the others weren't driveways.

Chair Gooze said he didn't agree with Mr. Christie concerning issues #1 (Section 175-117 (A)(2) regarding the driveway permit) and #4 (Section 175-117(C)(2) limiting the number of driveways in the CBD to a maximum of 2 per lot).

But he said he was not comfortable with issues #2 (Section 175-41(F)(2) regarding new vehicular access or driveway located or passing between the front wall of the principal building and the front property line) and #3 Section 175-116 (A) requiring that a buffer strip of at least 10 feet in width abutting a public right-of-way must be landscaped), and couldn't get around them. He said this was the way the language in these provisions had been written.

He noted that if the ZBA decided that one or more of these 4 issues had not been addressed properly by the Planning Board, it was saying it agreed with Mr. Christie that the approval of the site plan application was wrong

There was discussion as to whether there had been final approval of the site plan by the Planning Board.

Chair Gooze re-opened the Public Hearing, and asked Planning Board Chair Lorne Parnell that question.

Mr. Parnell said the site plan application had not been approved yet because all of the conditions had not been met yet

Mr. Christie said the law was clear that he had 10 days to make an appeal to the ZBA based on the approval of the site plan. He said the Planning Board had granted conditional approval, but hadn't signed the final plat. He said the accesses and other issues had been approved, but there were other issues that had to be addressed in order to get final approval.

Mr. Parnell said the Board had approved a document with certain conditions on it, and when those conditions were met, final approval would be granted.

Chair Gooze asked if Mr. Christie would have the ability to come back to the Planning Board later regarding the issues he was concerned about, and it was determined that he would not have that ability.

Chair Gooze closed the Public Hearing. He restated that if the ZBA decided that one or more of the 4 issues had not been done properly by the Planning Board, it was saying it agreed that the approval of the site plan application was wrong

Mr. Johnson suggested that Board members should address all 4 issues, so the property owner would know which issues he would need to get variances for.

Mr. Gottsacker said he agreed that if ZBA members were in agreement that at least one of the 4 issues had not been addressed correctly by the Planning Board, the site plan application should not have been approved.

Mr. Starkey said he agreed with Chair Gooze, and was comfortable with the Planning Board's decisions on issues #1 and #4, but was not comfortable with their decisions on issues #2 and #3.

Ms. Davis said she was still thinking that she saw 3 driveways, and asked Mr. Johnson how many he saw.

Mr. Johnson said he saw one driveway, the one re-located next to the Slania property. He provided details on the other 3 areas Mr. Christie had characterized as accesses.

Chair Gooze said he was ok with saying there were not 4 accesses.

Ms. Davis said she agreed with the Planning Board regarding issue #4. But she said the language in issue #3 was unclear, and said she found with the applicant on this issue. She said she also found with the applicant on issue # 2 and issue #1.

Mr. Gottsacker said he agree with Ms. Davis, and said he would go with the applicant on everything except issue #4.

Mr. Harvey said he too would go with the applicant on issues #1, #2 and #3. He spoke in detail concerning his view that a driveway permit should be received prior to undergoing site plan review.

Sean Starkey MOVED that the ZBA finds for the applicant, concerning an Application submitted by Slania Enterprises Inc., Durham, New Hampshire for Appeal from an Administrative Decision of the Planning Board as per RSA 676:5(III) regarding the approval of a Site Plan Application to build a new three-story, mixed use building. The property involved is shown on Tax Map 4, Lot 8-0, is located at 6 Jenkins Court, and is in the Central Business Zoning District. The majority of the Board found for the applicant on Section 175 -117(A)(2), Section 175-41(F)(2) and Section 175-116(A). Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Recess from 8:31 to 8:36 pm

- B. PUBLIC HEARING** on a petition submitted by Ionian Properties LLC, Dover, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-62

of the Zoning Ordinance for the redevelopment of the parcel with a new 4-story, mixed use, commercial/residential building within the wetland setbacks. The property involved is shown on Tax Map 2, Lot 12-11, is located at 10 Pettee Brook Lane, and is in the Central Business Zoning District.

Chair Gooze noted that Mr. Welsh was now at the table. He said Mr. Harvey would be a voting member for this application. He opened the public hearing.

Mike Sievert of MJS Engineering spoke before the Board. He noted that the applicants had been before the ZBA in May to request 4 variances, and said all but one were granted, - a variance to allow a 20 ft by 55 ft bump-out within the wetland buffer zone.

He said that with the previous variance application, the applicants had been unsure about what the actual size of the final lot would be. He explained that the Town owned the adjoining lot, and that there had been discussion about selling it to the Costas. He said the Costas now had a purchase and sale agreement with the Town to buy that lot.

He said the applicants had not been before the Planning Board yet, so the site plan was still conceptual, and said a Conceptual Redevelopment Plan and a Landscape Plan had been developed. He said the amended plans had relocated the building, and also showed enhanced drainage out back.

Mr. Sievert said the reason for the slight movement of the building in the revised plan was to try to enhance the landscape plan. He explained that the entire site had been enhanced by shifting the building about 3 feet to the west and 1.5 ft to the north. He said this allow a 6 foot buffer. He said while the applicants couldn't put a lot of tall trees on the site, what was now the Town lot would provide a lot more vegetation down front.

He referred to the Conceptual plan and said what had previously been approved was the dashed grey line. He said the darker dashed line on the plan was what the applicants were asking for now. He said there was no longer a bump-out, and said the applicants were asking that they be allowed to construct a building that went all the way down to the ground.

Mr. Gottsacker said it looked like it shrunk closer to the building by 5 ft, and expanded off to the east by about 10 ft.

Mr. Welsh received clarification that there was no longer a bump-out. He said it seemed that the applicants were asking for more this time, even though they had been turned down last time regarding the wetland buffer.

Mr. Sievert said he didn't think they were asking for more this time, and said he would see how the Board felt about this. He noted that the pavement would be removed from what was now the Town property, and said there would be a rain garden/bio-retention area to treat runoff and infiltrate it into the ground. He said there was a catch basin right now that sent water directly into the brook, and said it was essentially a point source

discharge.

He said the revised plan moved the building further away from the property line, which allowed more windows and thus more light into the building. He provided details on this. He said the applicants had also planned for a covered entry area, on columns, and said as a result there would be twice as much landscaping on the front area as had previously been proposed. He said instead of 7-8 ft, there would be 15 ft.

Mr. Sievert said the reason the applicants were back before the ZBA was the same as had been the case with the previous variance application: to allow a mixed use residential/commercial building within the 75 ft wetland buffer.

Chair Gooze suggested that because the Board had approved everything except the bump-out with the previous variance application, that just the wetland buffer issue should be addressed.

Mr. Welsh said with the previous variance application, the building went 5 ft further toward the brook, and now, it was proposed that the whole building would go a foot closer to the brook.

Mr. Sievert said it would be one foot closer on the left hand corner, but it would be about 15 ft closer further back from what was previously approved.

Mr. Welsh summarized that what the applicants were requesting was 5 ft less than last time, but the building would be going from top to bottom, and on the left hand corner, it was slightly closer to the brook than last time.

There was discussion that an area variance was being requested. Chair Gooze noted that a mixed commercial/residential building wasn't an approved use in the Wetland Conservation Overlay District without a variance, so he wasn't sure that this was an area variance. He asked Mr. Sievert if he was prepared to go for a use variance.

Mr. Sievert said he didn't think a use variance was needed because a mixed use building was an allowed use in the Central Business District. He said he was looking for an area variance to allow the footprint within the 75 ft wetland buffer.

Chair Gooze said again that he would like to restrict the discussion to the back of the building, because the Board had approved everything else last time.

Mr. Johnson noted that one of the issues the last time was that the applicants didn't own the property in the back.

Mr. Sievert said now that there was a purchase and sale agreement, and some things had changed on the back of the property, the applicants had enough land to get a certain number of units. He said he would address this.

Chair Gooze said Mr. Sievert should focus on the back of the building to prove that the brook wouldn't be hurt.

Mr. Sievert said the applicants were trying to strike a balance, gaining as much landscape frontage through setting the building back, modifying the porch, increasing the setback from the municipal parking lot, and creating the bio-retention system. He said this system would be a drastic improvement, and noted that another improvement would be a 4% decrease in the impervious cover within the 75 ft buffer, as compared to what was there today. He said this took into account the fact that the building would go down to the ground in the back.

He said expanding the footprint was the only way to get 17 units. He said with the total new lot area now proposed, the applicants were allowed 17.3 units. He said they were coming back to the ZBA that evening with a layout where the units would be slightly more than the minimum 200 sf per person in the units, to make them more comfortable and rentable. He also said the increased setback would allow better lighting for the common areas, etc. He said it was a balancing act to get the design to work on the site.

Ms. Davis asked why the applicants didn't ask for a building of this size in May.

Mr. Sievert said they were in negotiations at that time with the Town about possible purchase of the town property, and also noted that the DPW had used the property for snow storage. He said that situation had now changed, and also said there was now the Purchase and Sale agreement. He said there was a sewer easement on the Town property, and said the sewer line was the only thing the Town would need to have access to in the future. He said the proposed retention area would not preclude this.

Ms. Davis asked how the crawl space under the bump-out previously proposed had related to property ownership and snow storage, and Mr. Sievert provided details on this. He said it turned out that the Town didn't need the area for snow storage, so the bump-out wasn't needed. He said the applicants were therefore proposing to go down to the ground with the building.

Mr. Sievert said that on Sheet 1 of 1, there was a dumpster sitting on Town property, and said there was a longstanding agreement regarding the dumpster. He said with the redevelopment, it would be removed from the Town property. He also said the revised footprint would allow enhancement in parking, and would also allow the placement of an enclosed dumpster and recycling area in the back, which could be accessed from the inside by renters.

Ms. Davis said the biggest issue for her was that the open space under the bump-out with the previous proposal would somehow be good for the stream. She asked Mr. Sievert to clarify whether it was really more of an issue of snow storage.

Mr. Sievert said he had indicated to the Board that it was more of an issue of snow storage, and had also said it could be a reserve bio-retention area. But he said he had

found that he didn't need it for the bio-retention area. He also noted that the Board had thought having the open area didn't matter because it would be covered.

Mr. Gottsacker noted that what was now proposed to be a retention area would have remained impervious in the last design.

Mr. Sievert noted that the runoff calculations had been run. He said the soils weren't that great, which meant that the runoff numbers would be higher. He said what was proposed with the development would slightly increase the overall impervious area, but would decrease the amount of impervious area within the 75 ft wetland buffer area. He said with the bio-retention area, there would actually be a decrease in the volume of runoff getting to the brook, and said the peak runoff to the brook would also be reduced by 25%. He said treatment of the water would also increase with the removal of the pavement.

He said water hitting the site would either transpire from plants or infiltrate and move laterally, because of the restrictive soils underneath, and would go out through a berm and seep out into the vegetated area. He said there would be no direct runoff from pavement anymore, and also said the roof would have a gutter system that went to the bio-retention area. He said for large storms, there was a modified catch basin. He noted that the existing basin would be moved closer to the sewer easement, and said a new outlet structure would be installed.

Mr. Welsh asked how this catch basin was an advantage, Mr. Sievert said it would have to rain exorbitantly to get there, so runoff would only occasionally run to the brook. He also stressed that the water would be coming off the drainage system, not off of pavement.

Mr. Welsh noted that 17 units could be fit in without this variance, but they would be smaller.

Jennifer Ramsey, the architect for the project, said the previous building design didn't allow 17 units. She also said the units would have been smaller, with fewer tenants in them, and wouldn't have had natural light. She said the units proposed now would have more sizable units, with a generous amount of light, some common space and perhaps more than one bathroom. She said the design also allowed for a greater amount of landscaping, a concealed dumpster, and possible bike storage.

Mr. Welsh asked what would be done about mosquitoes from the rain garden.

Mr. Sievert said water would be stored at the subsurface level of the rain garden. He said one wouldn't see a pond there other than during a rain event.

Mr. Sievert next went through the variance criteria. He said there would be no decrease in the value of surrounding properties as a result of granting the variance. He noted that the property was surrounded by UNH and Town owned properties, and said the proposal would improve upon the existing mixed commercial/residential use of this property by

providing a new code-conforming building, with brick and clapboard exterior.

He also said the proposal sought to minimize the proximity of impervious footprint adjacent to nearby wetlands, and would reduce impervious coverage within the buffer as compared to the existing conditions.

He said granting the variance would not be contrary to the public interest because what was proposed would improve the separation between the proposed building and the edge of the wetlands, as compared to the existing situation, thus protecting the surface waters of the Town. He also said granting the variance would improve the quality of stormwater, because the bio-retention system would reduce the peak rate discharge by 25%, and would maintain the same volume of discharge.

Mr. Sievert said denial of the variance would be a hardship because there was no other feasible way to get the mixed used building with slightly larger units without the variance. He noted that 50% of the lot was covered by the 75 ft wetland buffer and wetlands.

He also said the benefits sought by the applicant could not be achieved by some other reasonably feasible method. He said these benefits included:

- the development of a mixed use commercial residential building that had 17 residential units;
- the creation of residential units that offered human comfort by exceeding the minimum habitable floor area/tenant standards; positioning of the building on the property with consideration of other factors such as street side landscaping;
- provision of a covered porch at the front and side of the building to greatly improve aesthetics;
- maximization of the taxable base of the property.

Mr. Sievert said substantial justice would be done in granting the variance because it would allow for a new updated code compliant building on the property while creating a lesser non-conformance relative to encroachment within the wetland buffer, which would improve water quality.

Mr. Sievert noted the six criteria under Section 175-58, A-E, regarding the Wetland Conservation Overlay district, and reviewed how approving the variance was not contrary to their spirit and intent.

- He said the redevelopment proposal incorporated a bio-retention system that would reduce the peak rate of runoff by 25%. He also said best management practices would be employed during construction.
- He said the development would not result in the fill of any wetlands, so would not affect the flood storage capacity of the wetlands.
- He said the redevelopment would reduce the impervious coverage within the wetland buffer by 4.2%, thus providing an increase in the habitat of wildlife and vegetation.
- He said the bio-retention system would provide groundwater recharge and maintain the same volume of stormwater discharge into Pettee Brook as compared to existing

conditions.

- He said the reduction in pervious coverage within the buffer and the establishment of vegetation as shown on the Landscape Plan would augment the beauty and quality of the wetland buffer, as compared to the existing conditions.

Chair Gooze said given what had happened with the previous application that evening, there was a question as to whether variances would be required for the driveway going into Pettee Brook Road, and the buffer needed because of the parking lot.

Chair Gooze also said he thought this was a use variance. He provided details on this, and said he would appreciate it if Mr. Sievert could address this.

Mr. Sievert said he believed that everything he had said regarding the criteria for an area variance applied to the use variance. But he agreed to go through the various aspects of the hardship criterion for a use variance. He said the special conditions of the land were still the same as he had previously indicated.

He said the unique setting was that there was a large municipal lot to the left, two street frontages, and a 75 ft wetland buffer that encompassed 40% of the property. He said there was also the fact that the existing property was already developed well within the wetland buffer area. He noted that the applicants proposed to decrease the impervious area.

Mr. Sievert said there was no fair and substantial relationship between the general purposes of the Zoning Ordinance and the specific restriction on the property. He said if mixed use buildings were allowed in the Central Business District, there was no reason why they shouldn't be allowed in the Wetland Conservation Overlay district. He also said it didn't make sense that parking lots and commercial buildings were allowed, but mixed use buildings were not.

He said granting the variance would not injure the public rights of others. He noted the current access across the property for students from the Madbury Road area, and said the Costas would honor this. He said they would construct a trail near the rain garden to allow the pedestrian traffic.

Mr. Gottsacker said he thought Mr. Sievert had covered all the criteria for both a use variance and an area variance.

Mr. Welsh asked what the average runoff from the site would be, as proposed.

Mr. Sievert said there would be a reduction, and said an estimate right now was that it would be about 15%. But he said he didn't have the exact number yet.

Mr. Welsh asked how the Board could be sure that the pedestrian path would be there, stating that he didn't see it on the plan.

Mr. Sievert said the path was on the plan, and said an agreement would be signed with

the Town that there would be an easement for the path, and that the path would be maintained.

Chair Gooze asked whether there were any properties in that general area of the Central Business district that was right up against the brook with impervious pavement.

Mr. Sievert said the Town property came very close, and there was discussion.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application. There was no response. Chair Gooze then stated that the ZBA would be deciding on the mixed use aspect of the plan, and he said any further variances the applicants needed would come before the Board in the future.

Carden Welsh MOVED to close the Public Hearing. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Harvey said he thought the issues that were outstanding for the previous application had now been covered. He said he thought the reality was that the area at present was lacking in good drainage, and that this plan would address that. He said he appreciated this.

Mr. Welsh said he was a little troubled as to whether the public interest criterion was met. He said the wetland buffer existed for a reason, and said every time it was invaded, it became easier to do this next time. He spoke about the aesthetics of building closer to the river, but noted that there would be an improvement in the drainage, which was a positive element.

Mr. Gottsacker said what was proposed would be a big improvement over what existed there now, and over what had been proposed with the previous application. He said he thought this application met all the variance criteria.

Chair Gooze said he had voted against the bump-out last time, but said now that the applicants would have the additional piece of property, and because of what they would be doing with it, he thought what was proposed was tremendous, and met the variance criteria.

Mr. Harvey said regarding the issue of a precedent being set by approving this variance that it took two attempts before the ZBA, and there was now a significantly improved plan.

Chair Gooze said he was comfortable that what was proposed now was better than what had been proposed previously.

Ms. Davis said she believed that the biggest concern was about the wetland and the brook. She noted that the city of Dover allowed for a small wetland buffer because of the reality that there were already old buildings there. She said there was a lot of

development pressed up against Pettee Brook, and said the purpose of the wetland buffer was to filter runoff and prevent erosion.

She said right now, there was the opposite of a buffer on the site, and there was point source pollution going into the brook. She said what the applicants had proposed with their plan would result in an improvement to this area, which supported the Ordinance. She also said that from an aesthetic perspective, she liked the way the applicants had re-situated the building. She said she didn't think the plan was contrary to the spirit and intent of the Ordinance, or contrary to the other variance criteria.

There was discussion about whether there should be wording in the approval that said the applicants would have to come back regarding other possible variance issues.

Mr. Johnson said the ZBA was approving what the applicants had asked for. He said Town staff would let them know if they needed other variances, and said the applicants would come before the ZBA before going before the Planning Board with a site plan application. He noted that the motion should include a condition regarding the purchase and sale agreement.

Ruth Davis MOVED to approve an Application for Variance submitted by Ionian Properties LLC, Dover, New Hampshire from Article XIII, Section 175-62 of the Zoning Ordinance for the redevelopment of the parcel with a new 4-story, mixed use, commercial/residential building within the wetland setbacks, for the property shown on Tax Map 2, Lot 12-11, located at 10 Pettee Brook Lane in the Central Business Zoning District, with the condition that the purchase and sale agreement presented to the Board be finalized, and as per the submitted plan. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Sievert asked if the Board wanted to discuss with the applicants the decision on the other application that evening as it related to them.

Board members agreed that this should not be done at the present meeting.

III. Adjournment

Carden Welsh MOVED to adjourn the meeting. Ed Harvey SECONDED the motion and it PASSED unanimously 5-0.

Adjournment at 9:50 pm

Victoria Parmele, Minutes taker