

These minutes were approved at the April 13, 2010 meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, FEBRUARY 16, 2010
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.
MINUTES**

MEMBERS PRESENT: Chair Jay Gooze; Vice Chair Robbi Woodburn; Ruth Davis; Carden Welsh; Sean Starkey; Chris Mulligan

MEMBERS ABSENT: Secretary Jerry Gottsacker; Edmund Harvey

OTHERS PRESENT Tom Johnson, Director of Zoning, Building Codes and Health

I. Approval of Agenda

Chair Gooze called the meeting to order at 7:04 pm. He noted that this was a continuation of the February 9, 2010 ZBA meeting.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Ralph Kleinmann, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIV, Section 175-74 and Article IX, Section 175-30(D) of the Zoning Ordinance to construct a first floor addition, a new attached one-car garage, a new screen porch and a second floor addition on a non-conforming building within the sideyard and shoreland setbacks. The property involved is shown on Tax Map 20, Lot 16-3, is located at 267 Durham Point Road, and is in the Residence C Zoning District.

Chair Gooze appointed Mr. Starkey as a voting member for this application.

Mr. Kleinmann spoke before the Board and provided them with a plot plan. He noted that the property was one of 5 lots in the Bay Corporation subdivision, which was created in the late 1950's. He explained that in addition to the 5 individual lots owned by 5 owners, there were 15 acres of land that these owners owned in common, as well as some right of ways and access points to the water. He said each lot had about 3.4 acres and frontage on Little Bay, and noted that small cottages were built on each lot in the 1960's. He said he didn't live at the property in question right now, but planned to live there with his wife.

He said his lot was the center lot, and said he also owned the property below it. He said that since 2000, there had been a lot of changes to some of these lots, which had transformed them into larger, year round homes. He noted his own

approved expansion on one of these other lots, which had come before the ZBA.

Mr. Kleinmann said that concerning the lot now under consideration, he had previously been before the ZBA in 2006 to get approval to tear down the existing house and build a year round home. He said he was now looking to expand the house. He read a letter from the President of the Bay Corporation, Marian Chase, which spoke in support of the current variance applications, stating that it would add to the value of the property and the 4 adjacent properties that constituted the Bay Corporation.

Chair Gooze confirmed that Mr. Kleinmann had in fact torn down the existing house and built a year round home there, based on the approval given in 2006.

Mr. Kleinmann explained that for this previous project, he had acted as the general contractor for the previous owner, Mr. Herriott. He said Mr. Herriott had not been in good health but had wanted to continue to live there, which was why the year round home was built. He said there had been a 5 year lease, and noted that Mr. Herriott had passed away about a year ago.

He spoke in detail about the expansion that was proposed. He said the first floor addition would come out 12 ft from the existing footprint, which was very narrow. He also described the second floor addition and the proposed screen porch that he said would replace an existing deck. In addition, he noted a shed on the property located at the water's edge, and said he proposed to take it down as part of the justification for being allowed to have the screened in porch.

Mr. Kleinmann noted that because of the narrowness of the lot, any expansion would not meet the side setback requirements, and also said the lot was already within the Shoreland District. He said he had chosen this design because he couldn't build toward the water, and he couldn't build toward the lot to the north because the setback was already just 10 ft from the property line. He also said he couldn't build out toward the west from the footprint because the angle of the lot line would cause him to bump into it; because the neighbor's driveway was right there; and because he would come up against the septic system.

He said he had therefore decided that the best and only option was to expand toward the lot to the south. He said the existing setback was 26 ft, and said with 12 ft taken off of that, the setback would be 14 ft at its closest point. He said this site design would result in the best spacing of the house relative to the houses on surrounding lots, and also said the proposed new attached garage would be further from the side setbacks and the water than the existing house footprint, would be centered on the lot, and wouldn't encroach on any of the neighbors.

Mr. Kleinmann said the proposed footprint expansion, in addition to converting the existing garage into living space, would result in an addition of approximately 1600 sf living space for the first floor, plus about 150 sf for the area that would

contain the utilities. He noted that the house was on slab rather than on a basement.

He said the proposed screened in porch would be located along the narrowest section of the house, noting that he would have liked to have been able to expand the house there, but couldn't. He said the screened in porch would add to the width of the house, and would also add to its livability in the warmer seasons. He said the porch square footage would be less than the sum of the existing deck and shed.

Chair Gooze asked if the distance from the end of the proposed porch to the water would be about 60-65 ft, and Mr. Kleinmann said it would be a bit further from the water than that. He noted that the current State setback was 50 ft, and the Town's setback was 125 ft.

Mr. Kleinmann said granting the variance would not be contrary to the spirit and intent of the Ordinance because every attempt had been made to be mindful and respectful of the Ordinance when considering how to transform the small house into an appropriately sized house that was no larger than the other houses in the subdivision.

He noted that when he appeared before the Board in 2005 for another property in the subdivision, he had done something similar, and said what he was proposing now was comparable to the other homes there.

Mr. Starkey asked how much livable square footage there was in the existing building, and Mr. Kleinmann said there was less than 900 sf. It was determined that about 520 sf would be added to the first floor, and about 1,050 sf would be added on the second floor.

Mr. Welsh determined that the floor of the porch would be planking, and it was noted that there would be a roof on the porch.

Mr. Starkey asked if the applicant was required to tear the shed down anyway, stating that it looked like there would be 4 structures on the property if this variance was approved and the garage was built.

Mr. Johnson said DES would probably require that the shed be removed when the applicant went for State approvals.

Mr. Kleinmann stated again that he was willing to sacrifice the shed in order to be able to widen the house a bit with the screened porch. He also said the shed hadn't come up when he got the DES approvals to take the house down.

Mr. Johnson noted that the State Shoreland Protection Act had changed since then.

Ms. Woodburn determined that the existing vegetation wouldn't be impacted by the proposed changes, and also determined that there was currently a one car garage as part of the existing footprint, as well as another garage further up the property.

Mr. Kleinmann said the second garage was actually a barn/garage. He said it needed a lot of work, and was something he'd have to look at when he moved in.

Ms. Woodburn asked when the 263 Durham Point Road property was converted, and determined that this was about 7 years ago.

Mr. Kleinmann noted that the house on that property was about 2 ft from the property line.

Ms. Woodburn spoke about the fact that there had been two variances granted for the property in question already, and she determined that Mr. Herriot had owned the property at the time they were granted.

Mr. Kleinmann said the variances granted had allowed Mr. Herriot to continue to live there in a home that wasn't so rustic.

Mr. Starkey determined that there was a 4 bedroom septic system on the property.

Ms. Woodburn asked if the property would be guttered, including the screen porch. She said the ZBA usually liked to see water coming off the roofs captured and discharged into the ground, where it couldn't cause erosion.

Mr. Kleinmann said the plan was to do a border of crushed stone. He said the land from the house down to the water was relatively flat.

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

Sean Starkey MOVED to close the Public Hearing. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

Chair Gooze determined that Board members had no problem with the hardship criterion being met, and also agreed that granting the variance would not decrease the value of surrounding properties.

He then spoke about the spirit and intent of the Ordinance criterion, noting that there were other properties in the shoreland area where the Board had been reluctant to allow a porch with a roof, and was strict about guttering. He said one such application involved a property that was about 10 ft from the Bay. He said in this instance, the land from the house down to the water was relatively flat, but

also pointed out that the Shoreland Protection Act was much stricter now. He asked Ms. Woodburn if she thought crushed stone would be enough to handle the runoff from the roof.

Ms. Woodburn said the area did look flat, and said she thought the crushed stone would be adequate.

Mr. Welsh asked what percentage of the lot would be impervious, and Ms. Woodburn and Chair Gooze said they didn't think the percentage allowed would be exceeded.

Mr. Johnson said 20% was the maximum allowed in the Residence C district, and he also noted the acreage that was in common ownership, which made this a situation that was similar to a cluster subdivision.

Mr. Starkey said passing it this way allowed leaving 4 structures there, the old garage/barn, the shed directly behind it, the house and the shed down by the water, - when they were allowed 3. There was discussion that there was also a pump house.

Chair Gooze spoke about the fact that Mr. Kleinmann had offered to remove the shed.

There was discussion about a pump house on the property, and Mr. Kleinmann said it would probably be removed.

Mr. Starkey said if the Board approved the application, he thought there should be a condition that the shed near the water would be removed.

Chair Gooze said he was ok with this application, given the other properties in the area, and the fact that what was proposed was pretty far back from the water in terms of the State guidelines.

Mr. Starkey said he thought the application met the public interest, noting that the property was part of the Bay Corporation, whose Chair was an abutter and was in favor of granting the variances. He said what was proposed would fit with the neighborhood, and said the hardship was there because of the lot. He said Mr. Kleinmann had done everything he could to design the expansion away from the Bay, and noted that among other things, the septic system limited where the expansion could go.

Chair Gooze determined that Board members were in agreement that there wouldn't be any real damage to the Bay.

There was discussion that weighing public and private rights, substantial justice would be done in granting the variances,

Mr. Starkey said 900 sf for a single family home was not a lot.

Ruth Davis MOVED to approve an APPLICATION FOR VARIANCES submitted by Ralph Kleinmann, Durham, New Hampshire, from Article XII, Section 175-54, Article XIV, Section 175-74 and Article IX, Section 175-30(D) of the Zoning Ordinance to construct a first floor addition, a new attached one-car garage, a new screen porch and a second floor addition on a non-conforming building within the sideyard and shoreland setbacks, per the plan submitted, and with the condition that the dilapidated shed at the waterfront will be removed and not replaced. The property involved is shown on Tax Map 20, Lot 16-3, is located at 267 Durham Point Road, and is in the Residence C Zoning District. Sean Starkey SECONDED the motion.

There was discussion that the plans provided to the Board were consistent with one another, and all contained the setbacks, etc.

The motion PASSED unanimously 5-0.

- B. **PUBLIC HEARING** on a petition submitted by CWC Properties LLC, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-41(F)(1,2&3), Article XII, Section 175-53, Article XIII, Section 175-62 and Article XIV, Section 175-74(A)(3) of the Zoning Ordinance to construct a mixed-use building with two accessible residential units on the first floor and the construction of a parking area within the building setbacks, the shoreland setback and the wetland setback. The property involved is shown on Tax Map 4, Lot 12-0, is located at 9-11 Madbury Road, and is in the Central Business Zoning District.

Chair Gooze appointed Mr. Mulligan to be a voting member for this application. He then noted that a letter had been received from Tom Christie that voiced his concerns and disapproval about any application that had employed the services of a Town Councilor and was to be voted on by an appointed ZBA member, who was appointed to that position by the person creating the work product. Chair Gooze said Mr. Christie's letter said it was unfair for the Board to be put in these kinds of situations, and said he had contacted the Board's attorney about this.

He said he was told by email that the question was whether any Board members felt any pressure regarding the fact that Mr. Sievert was one of nine Councilors who had power regarding his/her reappointment so that the member would question his/her ability to make an objective decision. Chair Gooze recommended that if any Board members felt this way, they should recuse themselves.

Chair Gooze said he personally did not feel such pressure, and the other Board members agreed.

Chris Mulligan also said that while he agreed, he had realized that an attorney from the law firm he worked for, Bosen and Springer, might have represented the applicant. He said based on this, he would like Mr. Starkey to sit in for him.

Chair Gooze appointed Mr. Starkey as a voting member for the application.

Mike Sievert of MJS Engineering spoke before the Board on behalf of the applicant. He provided details on the location of the property in question, and said it was surrounded by mixed commercial residential buildings. He said the proposal was to remove the current building on the site and in its place build a 3 story building. He provided details on the existing conditions in terms of the already developed areas of the site.

He also described the fact that Pettee Brook flowed between the property line and the edge of Pettee Brook Lane and the stone wall. He said the brook encroached on the western corner of the property and said a wetland came off of the brook in that area. He said there were several different flood hazard zones associated with the brook: Zone X which was outside the 100 year flood, and Zone AE, which was within the 50 year flood area, with a known elevation to where it flooded.

Mr. Sievert said there was also a municipal sewer easement in the southerly corner at the end of the lot. In addition, he said the parcel fell within the shoreland and wetland overlay districts. He said there was currently 6715 sf of impervious area within the 75 ft wetland buffer, and 653 sf of pavement within the 25 shoreland protection district. He said there was sewer, water, and other utilities serving the site.

He said pending the variances being received there would be 75% commercial space on the first floor as well as 2 ADA compliant residential units. He said there would be residential units on the second and third floors.

Mr. Sievert said while the proposal encroached into the shoreland protection district, all the pavement currently in the 75 wetland buffer would be removed. But he said there would be a comparable amount of impervious area, which would be the roof area for the new building. He said this would result in the same quantity of runoff, but of a better quality. He said the impervious coverage within the wetland buffer would be approximately 7312 sf, which represented an increase of 597 sf.

He also said the impervious coverage within the 25 ft shoreland protection district would go from 653 sf down to 288 sf. He said the total impervious coverage at the end would be 10,339 sf, which represented an increase of 1500 sf, or about 10% more. He said the percentage of impervious cover would go from 57.8% to 67.7%.

Mr. Sievert said the applicant was requesting four variances. He said the first was

concerning encroachment into the wetland buffer. He said the second was regarding allowing two accessible residential units on the first floor, and noted that even with this, there would be three times the amount of commercial space on the site as there currently was.

He said the third variance being requested was to be allowed to have a corner of the building be within the 25 ft shoreland protection district. He noted that the impervious pavement within 8 ft of Pettee Brook would be removed.

Mr. Sievert said the fourth variance being requested was regarding the maximum 15 ft front setback from Pettee Brook Road and Madbury Road, which had to be addressed because this was a corner lot. He said the applicant could meet the requirement on Madbury Road but not on Pettee Brook Road.

Chair Gooze said it made sense to address the variances requested one at a time, but that they would vote on them all at once. Chair Gooze and Mr. Sievert also agreed that when variance criteria for each item were discussed, if the argument was the same as it had been for other variances requested, this could simply be stated.

Mr. Sievert first addressed the variance requested from Section 175-62 to permit the construction of the mixed use residential/commercial building within the 75 ft upland buffer strip. He said the plan now showed that 6715 sf of the buffer was currently encroached upon by pavement and buildings. He said the redevelopment would remove the pavement and change the impervious surfaces. He said the runoff quality would be improved because it would come from roofs rather than the pavement.

Ms. Woodburn asked where the guttered roof runoff would go to, and Mr. Sievert said it hopefully would go into a constructed rain garden that would be located near the sewer easement. He provide details on the rain garden design, noting among other things that the plants in the rain garden would take up some of the water, and also said some water would be allowed to infiltrate back into the ground.

Asked by Ms. Davis if there would be enough space for the rain garden, Mr. Sievert said it would be tight. He said some initial numbers had been run, and said he couldn't say for certain right now that it would work.

Chair Gooze noted that if the building size was reduced somewhat, there would be a better spot to put the runoff.

Mr. Sievert said he would try to decrease the quantity of runoff, but couldn't guarantee it.

Mr. Johnson noted that the project was conceptual at this point, and said if the

variances were approved, more detailed engineering could be done. He said if at that point it didn't get approved by the DPW, it would come back to the ZBA.

Mr. Sievert said there was really no other place to go other than a smaller building, if the variance wasn't approved.

Mr. Welsh said it was hard to conceptualize that the rain garden would be large enough, and Mr. Sievert provided further details. There was discussion.

Mr. Sievert said right now, there was sheet flow off the pavement into the wetland and then into the brook. He said with the development that was proposed, all of the pavement would come off the site, which would result in some improvement. He also said a different type of roof material, such as a green roof, could make a major change in the runoff. He said he wasn't sure whether all the roof runoff would go to the rain garden.

He said the regulations said he couldn't increase the quantity of flow from the site or degrade the quality, so the applicant would at least have to meet that. He said they were trying to reduce the quantity as a best case scenario but said he didn't have the full design in place yet.

Mr. Sievert went through how the variance criteria were met with this application. He said there would be no decrease in the value of surrounding properties. He said the property was completely surrounded by residential, student rental housing and mixed use commercial/ residential and commercial buildings and churches. He said the proposal would improve upon the existing mixed commercial/residential use of the property. He also noted the fact that the proposal sought to reduce the proximity of an impervious parking area that was currently adjacent to the wetlands.

He said granting the variance would not be contrary to the public interest because it would allow the improvement of the separation between the proposed impervious surface and the edge of the wetland as compared to the existing separation, which would result in less non-conformance of the setback. He also said removing all impervious pavement from the site and replacing that area with the impervious roof of the building would improve the quality of stormwater runoff generated from the property.

In addition, he said granting the variance would provide the opportunity to reduce the quantity of stormwater discharged, through the implementation of a surface stormwater treatment and temporary storage system that would be designed and approved in accordance with conditional use permit criteria.

Concerning the hardship criterion, Mr. Sievert said about 77% of the parcel was encumbered by the 75 ft wetland buffer, and he said the existing use currently encroached significantly into that buffer. He said the proposed development

would help improve the quality of the wetlands by changing the impervious area from pavement where vehicles parked to roof area. He said the property was the only one in the Central Business District that had this unique set of circumstances inhibiting its use under the current Zoning Ordinance and encumbrances, resulting in an unnecessary hardship.

He said the parcel was not developable under current Zoning laws and encumbrances due to the wetland setback, the shoreland setback, the flood zone boundary, the maximum front building setback because it was a corner lot, the Town sewer easement, and the fact that the triangular intersection of 2 Town roads disrupted the uniformity of the lot. He said the proposed use was reasonable because it could still improve the general purpose of the Zoning provision being considered.

Mr. Sievert said by granting the variance, substantial justice would be done because it would allow for a new updated code compliant building on the existing mixed use property, while creating a lesser non-conformity relative to encroachment within the wetland buffer.

He said granting the variance would not be contrary to the spirit and intent of the Ordinance because expanded commercial and residential use of the property would result in an improved depth of upland buffer from the edge of the wetland.

He also said it would comply with the spirit and intent of the Ordinance because construction would incorporate temporary controls at the limit of work to protect water quality, the redevelopment would incorporate a storm water treatment system that would improve the quality of runoff leaving the property, the project would have impact on flood storage capacity of wetlands, would have no impact on stream flow and groundwater recharge, and the existing buffer would be improved. He said all of these things would be satisfied while allowing for the redevelopment of the lot with the Central Business District, where fuller utilization of the limited downtown area was encouraged.

Chair Gooze said he needed to know that there would be adequate provisions for getting rid of the stormwater in a proper manner.

Mr. Johnson said as part of the conditional use application, more engineering would have to be done to satisfy all the requirements. He said this would include a review by the DPW as part of the pre-application, as well as review by the Conservation Commission.

Chair Gooze said if this variance was granted, this didn't mean the applicants could go for the project as presented now.

Mr. Sievert said he was ok with this, and said it was understood that the applicant would have to meet the regulations. In answer to a question from Ms. Woodburn,

he said the quantity of flow from the site could not increase as a result of the development. He noted that the increase in impervious surface that would occur with the development would result in more flow, so at a minimum, he would have to infiltrate enough water to make sure there was no increase in flow off the site.

Mr. Johnson noted that 100% impervious cover was allowed in the Central Business district, but that the impervious cover itself wasn't allowed within the shoreland and wetland districts.

Mr. Welsh said it looked like with what was proposed, the parking was being taken off the land and being put on the street.

Mr. Sievert noted that parking wasn't imperative in the Central Business district, but said he thought some parking was needed because of the commercial space proposed, and to provide a loading area. He said the only way to do that would be to put the sidewalk onto the property, and not in the right of way on Madbury Road. He said the spaces could then be put in that area.

Mr. Welsh asked if the sidewalk would be pushed back the full width of the cars so none of Madbury Road would be encroached.

Mr. Sievert said he wasn't sure, but said it would have to be pushed back enough to make the 9 ft space not encroach into the travel lane.

Chair Gooze asked if there would have to be handicap parking spaces, and Mr. Starkey noted there were handicap spaces right in front of the hair salon. There was discussion about whether the parking had anything to do with this variance.

Mr. Welsh asked where water from the parking spaces would drain, and Mr. Sievert said it would drain into a catch basin, and would then go into the brook. Mr. Welsh questioned whether the runoff would therefore be improved, in moving the parking from one area to another. He said 6 parking spaces would be added that weren't there right now.

Mr. Sievert said these parking spaces would be added to an area that was already paved, and also said that technically he was adding 4 spaces because there were already 2 spaces there. He noted that this impervious area had been included in the calculations, and also said it was the only such area on the site that wouldn't be roof surface. He said the water hitting it would go directly to the wetland and the brook, or out to the road.

Mr. Welsh said the road would be bigger now, so it would be incremental impervious surface. There was discussion about this.

Ms. Woodburn noted that 3 of the parking spaces would be within the 75 ft wetland buffer, and 3 would not.

Mr. Sievert next addressed the variance requested from Section 175-53, Table of Uses, Part VII.A, to allow 2 accessible residential units on the first floor of the proposed 3 story mixed use commercial/residential building. He said these units would be larger than normal units, and said because there was student housing already in this area and on surrounding streets, he didn't feel granting the variance would diminish the value of surrounding properties.

He said granting the variance would not be contrary to the public interest because the proposed building would add 16 residential units and provide additional student housing in the downtown and campus area. He said these additional units would reduce the encroachment of student housing into the residential neighborhoods, thereby benefiting the general public interest.

He also said inclusion of the ADA accessible residential units on the first floor would meet the most stringent general standards of the Fair Housing Act, and enable this service to be provided in the community that currently had no supply of these types of units. He said again that there were similar residential uses surrounding this property, and that the property was zoned for mixed use buildings.

Mr. Sievert said that concerning the hardship criterion, there was no fair and substantial relationship between the general purposes of the Zoning Ordinance as stated in Section 175-3 and the specific restriction of requiring office/retail on the first floor, as per Section 175-41.F.8. He said the proposed building would protect the public health, safety, convenience and general welfare of residents by drawing residents into the downtown from outlying residential neighborhoods, while achieving the Town's economic development goals of providing quality residential ADA units downtown.

He reviewed again the ways in which this parcel had a unique set of circumstances inhibiting its use under the current Zoning laws and encumbrances, resulting in unnecessary hardship.

Chair Gooze questioned why the property in question was unique in regard to this variance request. He said the Zoning Ordinance didn't have anything in it that said there should be accessible residential units on the first floor of buildings in the CB district. He said the Ordinance didn't want there to be residential uses on the first floor in this district.

He asked why what was proposed was different than any other mixed use building in the district.

Mr. Sievert said they felt that with all the encumbrances on the site, they couldn't have a larger footprint which would allow larger ADA units on the upper floor. He explained that this larger footprint would be needed because there would have

to be an elevator if the units were not on the first floor.

Asked if there was no room for an elevator, Mr. Sievert said no. He said what he was saying was that with the restrictions on the lot, having to put the ADA units on the second floor didn't allow them to get 16 units.

Chair Gooze said he didn't see any difference between this and other properties in terms of the impacts of the Zoning Ordinance itself.

Ms. Woodburn said there were no conceptual floor plans for the Board to be able to see these impacts. She asked if any conceptual design had been done yet.

Mr. Sievert said there was no conceptual building design yet, and said what they had done so far was the space planning. He explained again the idea of having the ADA units on the first floor.

Ms. Woodburn said she understood the concept, but said she wasn't quite sure she believed it without seeing proof.

Ms. Davis asked if 16 units were needed in order for the project to be financially viable.

Mr. Sievert said he didn't think so, but said the owner was trying to get 16 units. He spoke in some detail on this, and said it would be a number that was needed.

Ms. Davis determined that there could be 16 units on the second and third floor but they would just have to be smaller.

Mr. Sievert said there would need to be an elevator with that design.

Ms. Davis asked if there had to be ADA compliant units in the building.

Mr. Johnson explained that currently there was hardly any of them in Town. He said this was now a requirement for multi-unit buildings, and said the ADA units had to be provided on the first residential floor of a building. He said if the first residential floor was the second floor, an elevator had to be put in.

Chair Gooze said this explanation had helped a lot, but said he didn't see any plans relating to this.

Mr. Johnson said because the limitations on the site that were unique to the property reduced the footprint available on the site, the applicants wanted to put the ADA units on the first floor and eliminate the elevator.

Ms. Woodburn said the bigger the footprint, the more impact on the wetland, and she said it would be a good graphic exercise to see some conceptual layouts.

Mr. Sievert said the proposed use was a reasonable one because providing ADA accessible units on the first floor was a benefit to the general public and mixed use buildings were allowed in the CB district. He also said having residential uses on the first floor was similar to many of the surrounding properties.

He said by granting the variance substantial justice would be done because it would provide two new updated code compliant ADA accessible housing units on the first floor, which would be a greater benefit to the general public in addition to updated code compliant commercial space that was also accessible. He noted that a benefit was that having the units on the first floor would mean there would be less impact on emergency responders.

There was discussion on how the 16 unit number was developed, and the role of the setbacks in determining the present layout.

Chair Gooze asked if there was some minimum footprint which required an elevator.

Mr. Sievert said 4 or more units required an elevator.

Chair Gooze noted that the Ordinance didn't have a provision that required ADA accessible units on the first floor, and said if it did have such a provision, a variance wouldn't be needed. He stated again that he had to decide what was different about this property.

Mr. Sievert spoke next about the variance requested from Section 175-74.A.3 to allow a portion of the new building to be constructed within the 25 ft setback from Pettee Brook.

He noted that there was already more impervious pavement closer to the Brook than what was proposed with the new building.

His reasons for saying there would be no decrease in the value of surrounding properties by granting this variance were the same as had been stated concerning the variance requested from Section 175-62 concerning the wetland buffer. In addition, he said an additional benefit to property values was that the proposal would decrease the impervious surface area within the 25 ft shoreland protection buffer by 56%.

Mr. Sievert said granting the variance would not be contrary to the public interest because it would improve the separation between the proposed impervious surface and the edge of Pettee Brook as compared to what there was now, resulting in a lesser non-conformance of the setback. He also said that by removing all impervious pavement from the 25 ft setback and only encroaching with the building footprint by a maximum of 12 ft, this would greatly improve the quality

of stormwater runoff generated from the property.

In addition, he said there was the opportunity to reduce the quantity of stormwater runoff discharged, through the implementation of a surface stormwater treatment and temporary storage system that would be designed and approved in accordance with the conditional use permit criteria.

Mr. Sievert said a fair and substantial relationship could not be made between the general purpose of Section 175-69 and the specific restriction of requiring a 25 ft forested buffer to protect the Town surface waters. He noted that the existing intensive development regulations allowed in the CB district had resulted in encroachment and removal of most of the forested buffers on this lot and others in the district. He said the proposed building there would help improve the quality of runoff . He noted again the unique set of circumstances inhibiting the property's use under the current Zoning laws and encumbrances, resulting in unnecessary hardship.

He said the proposed use was a reasonable one because it could still improve upon the general purpose of the Zoning provision under consideration. He also noted again that the lot was currently developed with a larger encroachment into the 25 ft shoreland buffer than the current proposal.

Mr. Sievert said granting the variance would mean substantial justice would be done because it would allow a new code compliant building to be built on the existing developed property, while creating lesser non-conformance relative to encroachment within the 25 ft shoreland buffer.

He said granting the variance would not be contrary to the spirit and intent of the Ordinance because the development proposed would result in a reduction of encroachment into the 25 ft shoreland buffer. He also said it would comply with the spirit and intent of the Ordinance for the reasons already stated regarding the variance requested from Section 175-62.

Mr. Sievert noted that part of the final proposal could be to remove the existing pedestrian walkway, which would be a benefit because the culvert in that area would be removed. He said this would decrease flooding somewhat, and would make small improvements in terms of impacts on the Brook. He said it would also help in terms of being able to develop a design that would provide safer pedestrian access.

Mr. Welsh asked of the impervious cover percentages included moving the sidewalk into the setback area, and Mr. Sievert said yes.

Mr. Sievert addressed the fourth variance being requested, from Section 175-41.F.3 to allow the building to be set back more than 15 ft from the property line adjacent to Pettie Brook Lane. He said the brook, wetlands, associated setbacks

and the location of the sewer easement precluded the building from being placed within 15 ft of the front property line on Pettee Brook Lane.

His reasons why there would be no decrease in the value of surrounding properties as a result of granting the variance were much the same as had been stated concerning the other variances.

He said granting the variance would not be contrary to the public interest because it would allow redevelopment of the property in accordance with the current Zoning provisions for the Central Business District. He noted that the front of the building, on Madbury Road, would meet the 15 ft maximum setback, and said this was where the main access to the building and property would be.

Mr. Sievert said that concerning the hardship criterion, there was a fair and substantial relationship between the general purposes of Section 175-41.F.3 and the specific application of this provision to the property. He said the proposed building would still provide downtown character and pedestrian friendly access by having the building set close to the front property line adjacent to Madbury Road., which was the primary vehicular and pedestrian access point to the property.

He noted that the frontage along Pettee Brook Lane was encumbered by wetlands, surface water, associated setbacks and an existing sewer easement, all of which precluded the building from being set within 15 ft of the frontage. He said setting the building back greater than 15 ft would better protect the natural resources there. He repeated what he had said earlier about how the parcel was the only parcel in the CB district with a unique set of circumstances inhibiting its use under the current Zoning Ordinance.

He said the proposed use was reasonable because by having frontage on Madbury Road, it would still meet general development, character and community goals, while protecting natural resources and eliminating the building from restricted areas that didn't allow buildings.

Mr. Sievert said granting the variance would mean substantial justice would be done because it would allow for a new code compliant building while maintaining the imposed setback restrictions that encumbered the property.

He said granting the variance would not be contrary to the spirit and intent of the Ordinance because the proposed development met key aspects of the purpose of the Central Business district, by allowing fuller utilization of the property and providing the desirable façade along the primary vehicular and pedestrian access point at Madbury Road.

Ms. Davis asked if the intent of this Ordinance provision was that when there was a corner property, the goal was to have a building that looked nice on both sides.

Mr. Johnson said the idea was to have storefronts in the Central Business District on both frontages.

There was discussion about the fact that there were site limitations, including the wetland setback requirements and the sewer easement, which precluded the building from being placed within 15 ft of the property line adjacent to Pettee Brook Lane.

Chair Gooze noted that there was no one in the audience to speak for or against the four variances being requested. He then read into the record a letter from Tom Christie, Slania Enterprises. In his letter, Mr. Christie said that if the applicant wanted residential on the first floor, then a change in the Zoning Ordinance would be needed, and would apply to all property owners. He noted that the Master Plan specifically stated that the first floor must be for commercial purposes.

Mr. Christie's letter said the threshold for granting the variance would require that the property had a specific hardship, and he also said the spirit and intent of the Ordinance was clearly to have commercial uses on the first floor in the CB district. He said he could not think of an instance that would allow the Board to approve this variance request.

Mr. Christie's letter also said the variances concerning the shoreline and wetland setbacks should not be granted. He said the lot in question had historically experienced extensive flooding during significant rainfall events, and said further intrusion into these sensitive areas could only exacerbate this condition. He noted that the applications would have to meet all the variance criteria, and said the hardship threshold would have to be met. He also said the Zoning Ordinance and Master Plan specifically spelled out the need to protect shoreland and wetland setbacks, and he said in the limited areas left in the CB district, these areas were even more critical.

Concerning the variance requested for parking within the building setbacks, Mr. Christie said there was a need for a 10 ft landscaped buffer, and for the current access to remain unchanged. He questioned what the hardship was, and also said parking within the building setback seemed to be contrary to the spirit and intent of the Ordinance.

In rebuttal, Mr. Sievert said there would not be an impact in terms of flooding. He also said removing the culvert would be an improvement. He said there would not be greater encroachment, noting that development on the site was already within 8 ft of Pettee Brook, and that the development would be 12 ft from the brook. He also said while the building corner would be within 25 ft of the shoreland setback, they would be removing a few hundred square feet of pavement from this area.

Carden Welsh MOVED to close the Public Hearing. Sean Starkey SECONDED

the motion, and it PASSED unanimously 5-0.

Chair Gooze asked if any Board members had a problem with the first variance request, concerning the 75 ft wetland buffer.

Mr. Starkey said he had no problem with this, stating that if it wasn't allowed, the lot would be completely unusable.

Ms. Woodburn said the question was how much of something would be allowed there.

Mr. Starkey said if one looked at what was there now, the site was being used, and was filled with a building and pavement.

Ms. Woodburn said she had highlighted on her copy of the current plans the area within the setback that was impermeable, and tried to balance that with the amount of impermeable area that was being taken away with this development. She said the two were fairly close. She said an important consideration was what the added benefit was to what was being put in, such as a rain garden, versus the amount of intrusion.

She agreed there was currently a lot of impervious surface from the parking, but said what was proposed was a lot of building. She said she realized it was early in the design process to be assured that the rain garden would work, but said it was something the Board needed to know. She said if the variance was granted, the Board would need to ask for this assurance that the roof drainage would be handled in a way that was better than how drainage from the site was handled now.

Chair Gooze said in the past with some applications, the Board made the statement to the Planning Board that what was proposed concerning drainage would have to meet the specifications of the Town Engineer. He spoke further on this, and said he was comfortable enough with this variance request, as long as he was sure that the Planning Board and the Town Engineer would do their due diligence on this.

Ms. Woodburn said there was also the issue of whether the applicants needed the footprint they had. She said because the ZBA hadn't seen conceptual floor plans, they couldn't make a judgment on this.

Chair Gooze said the variance request met the hardship criterion, because this was what the applicants wanted to do with the building. But he said the question Ms. Woodburn was asking was whether it met the public interest and spirit and intent of the Ordinance.

Mr. Welsh said it tended to happen that applicants came in to the ZBA to see how

much development they could get on their site. He asked if the Board could ask for something that was more defined.

Ms. Woodburn said in all fairness, it was better to ask for something conceptual in nature, and say why a particular footprint was needed, rather than having a final design and engineering calculations. But she said from an architectural standpoint, the proposed building was pretty big, and said it would be good to have some conceptual work done to show why it had to be that much of an encroachment into the 75 ft setback.

Chair Gooze and Ms. Woodburn noted that if the applicants went to the Planning Board first with their plan and then had to come back to the ZBA, that could be a real waste of money.

Mr. Starkey agreed that the applicants were coming to the ZBA to see how much they could get, and said he understood why they were doing this, which was to find out what they could do, which would determine what, engineering wise, they could do.

Ms. Woodburn said the Board didn't know from what they had been given whether the applicants couldn't do a reasonable footprint without the variances.

Mr. Starkey said with this case, he was looking at a lot where only one fifth of it was outside of the setbacks. He said he saw hardship on this lot, including the fact that it was located on a corner.

Chair Gooze said he wasn't having a problem with the hardship criterion on this variance request, and was thinking more in terms of how the public interest and spirit and intent of the Ordinance criteria were met. He said the Board members wanted to know how much these would be protected; were thinking about the rain garden idea; and were also thinking about whether or not they wanted to let the Planning Board deal with this, or instead perhaps wanted to ask the applicant to come back with a little more precision.

Mr. Starkey asked if Pettee Brook was a naturally forming waterway, and Ms. Woodburn said it was, but had been altered, channeled, etc. There was discussion about where upstream the brook began.

Chair Gooze restated what the ZBA's options were in terms of making a decision on this variance application.

Ms. Woodburn said the Planning Board would need to ensure that the quantity of stormwater from this design would not be greater than the existing quantity. She agreed that it would be nice if there was a decrease in the quantity, and that the ZBA would be willing to allow a bigger building if it actually provided some improvement concerning this. She spoke further on this.

Chair Gooze asked Mr. Sievert if they could come back with more information.

Mr. Sievert said he and his engineer would look at the increase in impervious area, and if something could be fit into the site that could handle this increase.

Asked where the roof runoff would go, Mr. Sievert said it would go into a gutter system that would dispersed water around the property and then into the Brook. He also noted that the runoff would change from pavement runoff to roof runoff, which inherently would improve it quality wise. He said that only went so far, noting there would be other factors like temperature increases. He also said he wasn't sure that the quantity could be reduced.

Asked whether there would be room to deal with roof gutters, swales, etc, given the setbacks, Mr. Sievert said yes, and said it could be done because there were roofs involved, so the runoff could be collected. He noted that this was done on the Jenkins Court project with the same setbacks.

Chair Gooze stated again that he thought the wetland buffer variance request met the hardship criterion, and said the question was whether it met the public interest and spirit and intent of the Ordinance criteria, the way the project was laid out right now.

Mr. Starkey said it could meet the public interest criterion because the water runoff from roofs could be better managed. He said there was nothing there now collecting runoff, and said if the building footprint simply got smaller and the parking lot was left there, the water would still be unmanageable. He spoke further on this.

Ms. Woodburn said it was kind of a wash, in terms of how much impervious surface would be added and how much would be removed. But she said what was boggling her mind was the size of the roof, noting that water came off a roof fast, and could be warm although it would be cleaner water.

She spoke about the idea of gutters emptying water onto the site and that water then flowing to the brook, and questioned how much better this would be than runoff coming off of a parking area. She noted that this was something new being built, and also said the Board could ask that this be held to a higher standard because a variance was being requested.

She said a conceptual footprint would give her greater confidence that the footprint they were asking for was actually needed, and that the applicant didn't need any more room for buffering. She said she didn't have enough information on how much buffering the new building was using.

Ms. Davis said sometimes the Board saw plans that showed all of these things

more, and what the tradeoffs were. She said she realized it was expensive for the applicant to go back and forth.

Mr. Welsh said he had concerns about the public interest criterion being met. He said he understood that the runoff off the roof might be cleaner than from a parking lot, but noted that more parking was proposed on the street, where right now there was green space. He said with this development, the 6 parking spaces would always be full. He said he thought the overall impact would therefore be worse, not better, and said he would therefore like to know more.

Ms. Woodburn said there were 10 spaces in the existing parking lot, and 8 were in the wetland buffer. She said with the proposed plan, 3 parking spaces would be in the buffer, which was better.

Mr. Welsh restated his previous comment.

Mr. Johnson noted that the 6 parking spaces proposed would be on Town property, so would probably produce income for the Town.

There was discussion that this probably wouldn't be resident parking, and that the spaces might not always be taken.

Chair Gooze said he understood what people were saying concerning the public interest criterion. He said an aspect of this was that infill in the CB district and tax money for the Town was important, as long as what was there wasn't hurt. He said the ZBA had done pretty well with other applications in terms of providing as much protection as possible for the little brooks in Town. He said he was comfortable enough with the idea of letting the Planning Board doing its job, working with the Town Engineer. He said he was willing to take a vote on this.

Sean Starkey MOVED to approve an Application for Variance submitted by CWC Properties LLC, Durham, New Hampshire from Article XIII, Section 175-62 of the Zoning Ordinance to allow construction of a parking area within the wetland setback. The property involved is shown on Tax Map 4, Lot 12-0, is located at 9-11 Madbury Road, and is in the Central Business Zoning District.

Mr. Welsh asked what should be included in the motion concerning what plans were being referenced, for things such as guttering, a rain garden, etc.

There was discussion. Chair Gooze and Mr. Starkey said they trusted the Planning Board to look at these things.

Mr. Welsh questioned this.

Chair Gooze also noted that there were times that the ZBA didn't allow something, even though it could have deferred the issue to the Planning Board.

Mr. Starkey said he thought that if the ZBA wasn't going to approve something within the 75 ft setback, there was nothing to be redeveloped on this property.

Ms. Woodburn said she wasn't sure that the footprint needed to be that big, and said if there was more of a buffer, the ZBA might be more inclined to give the variance. But she said they didn't know these things. She said in this instance, when the development would take up so much of the buffer, it would be nice to see more specifics about that footprint.

Chair Gooze asked if Ms. Woodburn was saying that the project could be smaller and still get the 16 apartments in it, and Ms. Woodburn said she didn't know because she hadn't been shown this.

There was further discussion.

Ms. Woodburn said the proposed footprint basically used every inch of usable space above the flood line. She said she thought that footprint was more than they would need, but said she could be proven wrong.

Chair Gooze suggested that the Board could ask the applicant if he could come up with something that would make the ZBA more comfortable.

Mr. Sievert said he could ask the applicant about this.

Mr. Starkey said if that was the case, the Board really had only had one thing to vote on, which was the variance request concerning ADA accessible apartments on the first floor.

Ms. Woodburn said she thought the Board could also vote on the 15 ft setback variance, and Mr. Starkey agreed.

Mr. Starkey withdrew his motion concerning the variance requested from Section 175-62. Board members agreed to continue this variance request, as well as the variance request concerning 75-74.A.3, regarding the 25 ft shoreland setback, in order to get more information.

Chair Gooze determined that the applicant would have enough time to address this in time for the March 9th meeting. It was clarified that the application wouldn't have to be resubmitted, and would simply be coming back with additional information.

Ms. Davis said she wasn't sure that the Board could vote on the variance request concerning the ADA accessible residential units on the first floor. She said a question was whether the site restrictions made it necessary to put the accessible units on the first floor in order to have 16 units.

Ms. Woodburn said there was also the argument that the footprint didn't allow an elevator.

There was detailed discussion.

Mr. Sievert said a variance to put the ADA units on the first floor would allow more flexibility in the footprint, because the elevator could be taken out of the picture. He said he wasn't saying they couldn't fit an elevator, but said he was saying it was a burden to fit an elevator, and also said putting ADA residents on the first floor would be better.

Board members agreed that they therefore could vote on this variance request.

Chair Gooze suggested that the Board deliberate on the 15 ft building setback variance. He said no matter what development was proposed, there wouldn't be access because of the sewer easement, brook, etc.

Ms. Woodburn said there would be no decrease in the value of surrounding properties as a result of granting the variance. She also said doing so would not be contrary to the public interest, and said denial of the variance would be a hardship. In addition, she said there would be substantial justice in granting the variance because the applicant would still meet the Master Plan.

Mr. Starkey said the intent was to have the buildings up front if this could be done, and said the reason it couldn't be done was because of the location of the brook.

Other Board members agreed with what Ms Woodburn and Mr. Starkey had said.

Robbi Woodburn MOVED to approve an Application for Variance submitted by CWC Properties LLC, Durham, New Hampshire from Article XIII, Section 175-62 of the Zoning Ordinance to allow the building to be set back more than 15 ft from the property line adjacent to Pettee Brook Lane. The property involved is shown on Tax Map 4, Lot 12-0, is located at 9-11 Madbury Road, and is in the Central Business Zoning District.
Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

There was next discussion on the variance requested to allow the 2 ADA accessible units on the first floor of the new building.

Chair Gooze said granting the variance would not decrease the value of surrounding properties.

Ms. Woodburn said doing so would not be contrary to the public interest, and said there was definitely a hardship.

Chair Gooze said he didn't agree concerning the hardship criterion being met.

Concerning the public interest criterion, Mr. Welsh asked Ms. Woodburn what the purpose of the Zoning Ordinance was regarding requiring commercial uses on the first floor.

Ms. Woodburn said she thought it was written to provide as much commercial space as possible on the first floor, and said she wasn't sure it was written specifically to keep accessible residential units out of there.

Mr. Welsh asked Ms. Woodburn if she would feel different about this if the property was located right in the middle of the downtown.

Ms. Woodburn said that was a good question.

Chair Gooze said a purpose of having commercial uses on the first floor was to help control activity on the upper floors, and make it more likely that the owner of the building would want to manage it well.

Ms. Woodburn said looking at this footprint, she could imagine having accessible units on the first floor in areas of the building that wouldn't be viable anyway as commercial space.

Mr. Welsh said he thought it made more sense in this location because the property was closer to residences, as compared to properties that were directly downtown.

Chair Gooze noted that residences downstairs had been allowed on Rosemary Lane, because there wasn't commercial activity in that area.

Mr. Starkey said if the ZBA approved allowing the residential units on the first floor, and the space the applicant ended up being allowed to use on the property only allowed them to put two apartments on the first floor, then there would be no commercial space at all.

Ms. Woodburn said it was a huge footprint, but Mr. Starkey said the Board didn't know that yet. There was discussion.

Chair Gooze spoke about the size of other properties in this area, and said the question was what was different about this property that drove the use change. He said perhaps the Town wanted to allow accessible housing on the first floor of all these buildings, which made it easier not having to put an elevator in. But he said he was afraid of the ZBA doing the zoning for the Town. He asked what was different about this property compared to other properties that meant there was hardship.

Ms. Woodburn said there was nothing.

Chair Gooze said that was the problem he was having with this. He said if the Town wanted to allow accessible units on the first floor in this district, perhaps it was a Planning Board issue. He said that overall it was a nice project, but said he wanted to be fair in terms of what the Ordinance allowed.

Ms. Davis asked Mr. Johnson if it this perhaps had been an oversight when the Ordinance was written.

Mr. Johnson said ADA had been around for about 16 years, and said it had only been since 2002 that the State had a building code that addressed accessibility. He said the chances were that this issue had hardly come up at all when the Zoning Ordinance was updated.

Chair Gooze said he was sure the Master Plan talked about accessibility, but said this wasn't actually put in the Zoning Ordinance, so the question was whether the ZBA wanted to address it.

Ms. Woodburn said if the Zoning Ordinance didn't allow something, that was what the ZBA was for.

Chair Gooze said there then had to be something specific about a particular property that made it not meet the particular provision of the Ordinance.

Mr. Starkey noted that in the case of the Rosemary Lane development, it would have been unfair to force commercial use on the first floor in that area, when there was no particular commercial traffic there.

Chair Gooze also noted that a special condition on the Kostis property made it simple to get an accessible unit there on the second level.

Mr. Johnson said that second level came off of Rosemary Lane, which had residential and office space. He said in this case, there were two ADA units proposed on the back of the building, 900 sf each, with residential properties behind and next to them, and three churches and a fraternity house across the street. He said the property was on the fringe of the downtown, and said there would be an L shaped commercial space fronting on Madbury Road and Pettee Brook Lane.

Chair Gooze said he wanted to be sure that with the next project that came in for multi-use, the Board could say it was different than this situation was. He also said if the Board said this property wasn't in the core of the downtown, so was different, he could accept that.

Mr. Starkey said the property fringed upon a residential area, which made it different.

Mr. Welsh said they had to be careful with this line of thinking, noting that someone could say a property was right next to another Zoning district so could be treated as if it was in that district.

Mr. Starkey said he was talking about this property being close to other residential properties within the same Zoning district.

There was discussion about where the CB district boundary was, and what saying there was hardship in this instance would mean in terms of other properties in the district asking for the same thing.

Mr. Welsh asked if the ZBA knew specifically where the accessible units would be located on the first floor.

There was discussion that this application should be continued so the Board could get more information on this.

Chair Gooze said Mr. Starkey was right that the Board didn't even know how many apartments the applicants could get in the building.

Mr. Starkey said this was what he had been trying to say earlier. He said they still didn't know what conceptually could go there.

Mr. Johnson said at some point, the owner had talked about putting the ADA units on the ground floor behind the commercial spaces. He suggested that this could be made a condition of approval.

Ms. Woodburn said the Board should see this layout, and Chair Gooze agreed that this variance request should be continued so the Board could see something more specific about the project. Other Board members agreed.

Mr. Sievert said he had been hoping to get this variance request decided on, but he agreed to come back to the next ZBA meeting to address it.

Ms. Woodburn said if the Board had a better idea of how the two ADA units would fit in the footprint, they might find a better way to argue the uniqueness of the site.

Mr. Johnson asked if the Board potentially wanted to discuss having a condition that the residential units on the first floor would be more than 900 sf and located in the back, so they didn't front on Madbury Road and Pettee Brook Lane.

Board members said they would keep this in mind, but wanted to continue this

application and see what the layout would look like.

Sean Starkey MOVED to continue the Applications concerning the 75 ft wetland setback, the 25 ft shoreland setback, and residential use on the first floor. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

III. Approval of Minutes

December 8, 2009

Mr. Welsh left the meeting after it was noted that he had not been at the December 8, 2009 ZBA meeting.

Robbi Woodburn MOVED to approve the December 8, 2009 Minutes as written. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

IV. Other Business

Chair Gooze said the Seacoast Repertory Theatre court case was still on, because they had not come to an agreement with the abutter.

V. Adjournment

Sean Starkey MOVED to adjourn the meeting, Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

Adjournment at 9:52 pm

Victoria Parmele, Minutes taker

Sean Starkey, Secretary