

These minutes were approved at the November 9, 2010 meeting.

**Durham Zoning Board
Tuesday August 17, 2010
Durham Town Hall - Council Chambers
7:00P.M
MINUTES**

MEMBERS PRESENT: Chair Robbi Woodburn; Secretary Sean Starkey; Carden Welsh; Chris Mulligan; alternate Jerry Gottsacker; alternate Edmund Harvey

MEMBERS ABSENT: Vice Chair Ruth Davis; alternate Mathew Savage

OTHERS PRESENT Tom Johnson, Director of Zoning, Building Codes & Health; Victoria Parmele, Minutes taker

I. Approval of Agenda

Chair Woodburn called the meeting to order at 7:00 pm.

Sean Starkey MOVED to approve the Agenda. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

Chair Woodburn said Mr. Harvey would be a voting member for this motion.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Janet Mackie, Durham, New Hampshire on behalf of Michael C. Mullins, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIII, Section 175-59 and Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to construct a replacement septic system and an 8-foot stockade fence as well as to expand the existing one-car garage within the property, wetland and shoreland setbacks. The property involved is shown on Tax Map 12, Lot 2-7, is located at 3 Cedar Point Road, and is in the Residence C Zoning District.

Chair Woodburn said Mr. Gottsacker would be a voting member for this application.

David Vincent of Land Surveying Services provided plans to Board members.

Ms. Mackie said she was present representing the Mullins. She said the applicants had needed a new septic system and she noted that the design for the system had been approved by the State. She said there was also the issue of an existing stockade fence that was in bad condition, and said the Mullins wanted to replace it with a much higher quality tongue and groove fence that would be 10 ft high. She also noted that the fence would extend to the east an additional 4 ft, and at the other end would extend around the corner to block traffic noise.

She explained that there were currently two large sheds on the property, one of which was where the new septic system would be built. She said the other shed was located in back of the garage, and was partially within the State right of way for Route 4. She said the idea was to get rid of both of them, and to enlarge the existing one car garage to become a two car garage. She said this would involve an even trade in terms of square footage.

There was discussion that the septic system was located in front of the house, to the left of where the new system was proposed. Ms. Mackie said there was a small septic tank on its last legs that was put in the 1950's. She said there was a drywell and no leach field.

There was discussion that the public notice said there would be an 8 ft fence, but the applicants wanted a 10 ft fence.

Chair Woodburn determined that the new fence would be in the same location as the existing fence, and noted that the existing fence went over the property line.

Mr. Vincent acknowledged that the existing fence encroached onto Cedar Point Road.

Mr. Welsh asked if the new fence would still encroach onto Cedar Point Road, and also asked Mr. Johnson if the ZBA could approve such a fence. Mr. Johnson said no.

Ms. Mackie discussed the proposed configuration for the fence, and said it would not extend beyond the property line.

Chair Woodburn asked for more details about the proposed septic system.

Mr. Vincent said it would be an innovative Enviroseptic system, with a small septic tank and a pump chamber. He said the leach field would be 30 ft long and 8 ft wide. He noted that the existing house had two bedrooms, and said no more bedrooms were allowed.

He explained that wetlands covered more than half of the property, and said the lot, which was very small, was only 60 ft from the shoreline. He said while the system would not be disturbing land in putting in the septic system, a shoreland permit wasn't needed. He also said while the system would be mounded slightly, it would be landscaped so it would not be obtrusive. He noted that the tank would be pumped on a regular basis, and said there was an alarm in the house in case the pump failed.

Chair Woodburn said she had asked for more details on the septic system, and the expected quality of the effluent because it would be located really close to wetlands.

Mr. Vincent said there was a sufficient amount of soil above the water table to treat the effluent.

Mr. Gottsacker noted the existing white picket fence in front of the house, and Ms. Mackie said it would be removed because of the septic system. She also noted that there was a letter from the closest abutter, who lived across the street so would be the only one on the street to see the

replacement fence proposed. She said the fence would protect his house as well from traffic noise.

Chair Woodburn said she was uncomfortable with the idea of a 10 ft high fence along the property line. She said she understood the need for it on the Route 4 side, but not on the Cedar Point Road side.

Ms. Mackie explained that because of the orientation of the property, it was actually exposed to Route 4 on two sides.

Mr. Welsh asked where the gravel driveway to the right of the house went, and Ms. Mackie said it didn't go anywhere. She said the driveway by the garage was the only one that was used.

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

Mr. Starkey read the letter from the abutters, Steven and Alison Kalvelage, which said they wholeheartedly supported the variance request, without conditions.

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

Mr. Gottsacker asked how the issue of the fence going over the property line should be addressed.

Mr. Johnson recommended that a new plan be provided showing the fence going right up to the property line and turning, the sheds off the property, and the gravel driveway gone. He noted that this probably wasn't an approved driveway.

Chair Woodburn determined that there weren't plans to expand the driveway. She questioned the need to take the gravel driveway out, which would cause land disturbance. She noted that it was right next to the wetland.

There was discussion, with Mr. Johnson noting that the site would also have to be disturbed because of the septic system installation.

She also suggested that the amended site plan show where there would be any land disturbance.

Chair Woodburn and Mr. Johnson agreed that the gravel driveway should not be on the plan, and Mr. Johnson said they could let Mother Nature take its course with the gravel driveway, but also as part of the septic system work, could loam and seed the existing curb cut out of the wetland.

Chair Woodburn reopened the public hearing to allow Mr. Vincent to speak.

Mr. Vincent said the gravel driveway being discussed would get beat up as part of the removal of the old septic system, and said the plan was to take that driveway out, and loam and seed that

area.

Chair Woodburn asked that the amended site plan show all of this and what the site would be like in the end.

Mr. Vincent agreed, and said the disturbed areas, silt fences, loaming and seeding, etc. would be shown on the plan.

Chair Woodburn closed the public hearing. She then asked if any other Board members were uncomfortable with the idea of a 10 ft high fence.

Mr. Starkey said this didn't bother him because of Route 4, and also noted that the abutters on Cedar Point Road didn't seem to mind.

Mr. Gottsacker agreed, and said he thought the fence would do a lot to impact noise.

Mr. Welsh expressed concern about how the fence would look from Route 4.

Chair Woodburn reopened the public hearing. She determined from Ms. Mackie that the fence on Route 4 was in somewhat of a depression, so the view from that road wasn't as large. But she said she took some exception to the portion of the fence on Cedar Point Road. She closed the public hearing.

There was discussion about how to handle the fact that the advertisement for the meeting said an 8 ft fence was proposed, but the application said it was to be a 10 ft fence, and whether they could approve the application that evening.

There was further discussion on the proposed height of the fence. There was also further discussion on the proposed septic system. Mr. Welsh noted how careful the Board had been in terms of approving innovative septic systems in wetland/shoreland areas. He said this system seemed to be more of a standard septic system.

Chair Woodburn said what was proposed was still considered to be an innovative system, and Mr. Gottsacker said it met all the State standards.

Chair Woodburn reopened the public hearing, and noted to Mr. Vincent that most people putting new septic systems in on Cedar Point Road had done pretreatment systems because of the site issues.

Mr. Gottsacker asked how clean the effluent would be.

Mr. Vincent explained that this was an innovative system that the State had approved for tiny lots. He noted that the leach field could be curved to fit into the existing site as well as possible, without making it obtrusive and putting it closer to the wetland. He said a Clean Solutions system would have been closer to the wetland, because of the required shape for the leach field. He also said with that system, while there would have been pretreatment of bacteria, the nitrogen

loading would be the same. In addition, he said the cost of a Clean Solutions system was greater.

Chair Woodburn closed the public hearing.

There was brief discussion on the variance requested for the garage, and the fact that if the shed was gone, there would be an improvement in terms of the amount of impervious area.

Chair Woodburn asked the Board to go through the variance criteria for the septic variance request.

Concerning the public interest and spirit and intent of the Ordinance criteria, Mr. Gottsacker said the septic system proposed was an improvement over the existing system.

Mr. Starkey agreed, and said Mr. Vincent had explained the site and cost reasons for not using the Clean Solutions system.

Chair Woodburn said the septic system was being placed as far away from the wetland as possible, unless it was done under the driveway, in which case more disturbance of the site would be involved.

Mr. Starkey said based on the Ordinance, the applicant was keeping the system as far from the wetland as possible. He noted that the wetland took up half of the property.

Board members agreed that granting the variance would not result in a decrease in the value of surrounding properties, and would provide substantial justice. They agreed that there was hardship because of the special conditions of the property, which were its size and the various setback limitations. It was noted that the applicant was trying to work with the site in putting some curvature into the leach field.

The Board agreed that all 5 variance criteria were met.

Jerry Gottsacker MOVED to approve the Application for Variances submitted by Janet Mackie, Durham, New Hampshire on behalf of Michael C. Mullins, Durham, New Hampshire from Article XII, Section 175-54, Article XIII, Section 175-59 and Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to construct a replacement septic within the property, wetland and shoreland setbacks, as shown on the plan dated July 15, 2010, updated to reflect the proposed limit of work, the shed at the wetland being removed, and a statement that all disturbed areas will be loamed and seeded, because we feel it meets all 5 variance criteria. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

There was next discussion on the proposed garage expansion, including where runoff would go.

Chair Woodburn re-opened the public hearing, and noted that roof runoff in wetland and shoreland areas was always a concern.

Ms. Mackie said the plan was to have gutters for the new garage, which would drain into a

drywell.

Mr. Johnson said the Building Code would address this issue and would require either drip strips or guttering.

Chair Woodburn determined from the applicant that the driveway would not be repaved and that the existing walkway to the shed would be removed. She closed the public hearing.

Chair Woodburn noted that the proposed garage expansion, although larger, would be farther from Route 4 than the existing shed that would be removed.

Mr. Johnson said there would probably be more impact to the wetland in back from Route 4 runoff than from roof runoff.

Mr. Starkey noted that the two sheds would be removed, and said this almost evened things out in terms of impervious surface and roof runoff.

The Board went through the variance criteria for the garage expansion.

Mr. Starkey said there was hardship due to the special nature of the property. He said the expanded garage would not be put in closer to the wetland, and also said the applicant would be removing structures that shouldn't be there in the first place.

Mr. Welsh said he wasn't sure he was ok with that.

Mr. Starkey said it was hard to say that there was evidence one way or another as to whether having an expanded garage would impact property values.

Mr. Mulligan said he didn't think this would diminish property values, and said taking down the two sheds and expanding the garage would be an improvement to the property.

Mr. Mulligan said there would be substantial justice in granting the variance.

Mr. Gottsacker said for the many reasons stated, granting the variance would meet the spirit and intent of the Ordinance and the public interest.

Sean Starkey MOVED to approve the Application for Variances submitted by Janet Mackie, Durham, New Hampshire on behalf of Michael C. Mullins, Durham, New Hampshire from Article XII, Section 175-54, Article XIII, Section 175-59 and Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to expand the existing one-car garage within the property, wetland and shoreland setbacks, as shown on the plan dated August 2, 2010, because it meets all 5 variance criteria. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

There was further discussion on the issue of the proposed 10 ft fence.

Chair Woodburn said most towns allowed 6 ft fences, and some allowed 8 ft fences, with

permission, but said she couldn't remember an ordinance that allowed for a 10 fence. She stated again that she was concerned about the portion of the fence that would wrap around the front property line, along Cedar Point Road. She reopened the public hearing to speak further with Ms. Mackie.

Ms. Mackie said besides blocking noise, the fence would look better if the height was continued on Cedar Point Road. She provided details on this, and also said the fence wouldn't block anything the abutter would want to be able to see.

There was further detailed discussion with Ms. Mackie about this.

Marty Gooze, 9 Meadow Road, suggested that the Board could require that the top of the fence would be the same all around, regardless of the actual height.

There was discussion that the abutters had said they were in favor of granting the variance, but were told it would be an 8 ft fence.

Chair Woodburn closed the public hearing.

Mr. Johnson recommended continuing this last portion of the application to the September meeting, and in the mean time doing a site walk where the proposed 10 ft fence could be approximated with strapping. He said the abutters could be noticed on this.

Board members agreed that this was an excellent idea.

Chair Woodburn re-opened the public hearing, and determined that Ms. Mackie was fine with what Mr. Johnson had proposed. Chair Woodburn close the public hearing.

Jerry Gottsacker MOVED to continue the application for the third variance application, for the fence, and said the mockup, etc would be Mr. Johnson's responsibility . Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Vincent said he would have revised plans for the September meeting.

- B. **PUBLIC HEARING** on a petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an **APPLICATION FOR VARIANCES** from Article XIII, Section 175-59 and Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to continue with the use of a structure within the wetland and shoreland setbacks. The property involved is shown on Tax Map 11, Lot 11-4, is located at 8 Old Piscataqua Road, and is in the Residence A Zoning District.

Chair Woodburn said she would recuse herself, and said Mr. Starkey would serve as Chair in her place. She said Mr. Gottsacker and Mr. Harvey would be voting members. Mr. Starkey opened the public hearing.

Bill McGowan, 135 Packers Falls Road, said he was on the Board of Directors of Great

Bay Rowing. He noted that the organization had grown over the past 10-15 years, and had started running out of space in 2004. He explained that they had received a variance from the Town that year to put up a temporary tent to accommodate storage of canoes, and also explained that at that time, they had hoped to be able to build a larger boathouse within a couple of years.

But he said because of changing economic conditions, this hadn't happened, and said the variance was now expired. He said they wanted to extend the usage of the temporary tent, and explained that without it, the club would be very limited in terms of its work in the community. He noted that after the 2006 flood, they had replaced part of the dock, and had also painted the UNH boathouse in conjunction with the Jackson's Landing improvements. He also said the doors at the front of the tent had recently been replaced.

Mr. McGowan said the two aspects of development within both the shoreland and wetland districts that the ZBA must limit were the unreasonable increase in permeable surfaces and the erosion of soils into the resource due to construction or the introduction of additional impermeable surfaces.

He said the tent had been there for the last 5-6 years, and since that time, there had been major improvements to the Jackson's Landing area, including regarding the parking area and putting in more green space. He said there definitely would not be an increase in regard to impervious surfaces.

Mr. McGowan noted that the application provided to the Board outlined how the 5 variance criteria were met. He also noted the letter from Town Administrator Selig that supported the variance request.

There was discussion that the variance had expired a year ago, but the tent was still being used. It was noted that the tent was still in good shape, and was well sheltered and hidden by the woods.

Mr. Johnson explained that the Town (Administrator Selig and the Town Council) had given their approval to allow the use on a year to year basis. He said the approval was the continued use, per the property owner's conditions. He said if the ZBA put a time limit on this, it would come back to the Board at that time, assuming the Town approval was still in effect.

Mr. Gottsacker noted that Town didn't have to conform to the Zoning Ordinance, and asked why the applicants were there.

Mr. Johnson said the variance was being requested by a tenant on Town property.

Mr. Welsh said the existing arrangement was weird, and asked what sense it made to put a five year cap on the use if the Town could do whatever it wanted with the property.

Mr. Gottsacker noted that the variance traveled with the land, and not the tenants.

Mr. Welsh asked whether if the Town sold the land, the variance would stay with the land.

Mr. Gottsacker noted that the application was filed by Great Bay Rowing on behalf of the Town of Durham, yet the Town didn't need a variance.

There was further discussion.

Mr. Starkey asked if there were any members of the public who wished to speak for or against the application.

Robbi Woodburn, said when the variance expired, there was a discussion with the Town Attorney. She explained that the Town didn't need to ask for a variance for uses on its property, but because the tent was not a governmental use, the variance was needed. She said the original variance request in 2004 didn't ask for a limited time variance, but said it was approved with the time limit. She said Great Bay Rowing had been fine with this because it had thought the boathouse would be done by that time.

She said she thought what Administrator Selig's letter was saying was that the variance should be extended, that the Town would handle it on a year by year basis, and that the applicants wouldn't have to come back to the ZBA every time. She noted that there had been some discussion about the legality of a time limited variance, but said there was no case law on this.

Mr. Gottsacker said he had a concern about what happened if the property was sold and the variance traveled with the land. He asked whether the Board could perhaps grant the variance for as long as the Town owned the land.

There was discussion.

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

Mr. Gottsacker read from the letter from Administrator Selig, which said granting the variance would uphold the public interest by encouraging and enabling recreational use of the Oyster River, which was a cherished Durham amenity. The letter said the Town would revisit this on a year by year basis, in terms of the efficacy of this use in promoting the Town's overall interests.

The letter said that at such time that the Town's goals for this location changed and the structure was no longer needed, or at such time that a new and/or enhanced boat house was constructed on the property, they would ensure the tent was appropriately taken down and removed.

The Board went through the variance criteria. Mr. Welsh said the tent was tucked away and was well hidden, and said he didn't think granting the variance would decrease the

value of surrounding properties.

Mr. Gottsacker said the letter from Administrator Selig indicated that granting the variance would not be contrary to the public interest.

Chair Starkey said the tent would be tucked away and would not impact the neighborhood. He said the hardship was that there was no storage space, close to the water.

Mr. Mulligan said the application clearly met the substantial justice criterion, noting that rowing activities encouraged stewardship of natural resources. He said the club had done a great job.

Mr. Gottsacker said granting the variance met the spirit and intent of the Ordinance in encouraging the recreational use of natural resources.

Mr. Welsh said the efforts of Great Bay Rowing helped make people more determined to protect the natural resources that the Ordinance was designed to protect.

Mr. Harvey agreed that having the rowing club there got people more involved with Great Bay.

Mr. Starkey said the tent was well designed and was set back into the woods.

Chris Mulligan MOVED to grant the Application for Variances from Article XIII, Section 175-59 and Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to continue with the use of a structure within the wetland and shoreland setbacks, for the property located at 8 Old Piscataqua Road, in the Residence A Zoning District, because it meets all 5 variance criteria, and, until such time as the Town of Durham no longer owns the subject property. Carden Welsh SECONDED the motion, and it PASSED 5-0.

Break from 8:31 – 8:35 pm

- C. **CONTINUED PUBLIC HEARING** on a petition submitted by Pine Ledge Holdings Inc., Hooksett, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a letter written on February 5, 2010, by Zoning Administrator, Thomas Johnson, regarding a violation of parking on a property. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue, and is in the Professional Office Zoning District.

Chair Woodburn noted that Mr. Welsh was not at the August 10th meeting, and said Mr. Harvey, who had been at the meeting, would be a voting member in his place. She also said Mr. Gottsacker would continue as a voting member for this application.

Attorney Sharon Somers noted that at the last meeting, the Board had asked for additional information, including the DVDs for the meeting. She said to assist their analysis, she

had put together a packet for Board members of the 2009 and 2010 documents, sequentially. She said she would also submit into the record the Minutes of the Planning Board proceedings of April, May and June of 2010. She said the Minutes of the May 3rd Town Council meeting, where there was related discussion on parking, would also be submitted into the record.

She said a report from the Police Department on responses to rental properties was also submitted, and she noted that there was a lack of comments in it about the applicant's property. She also said a letter from Mr. Johnson in September of 2009, which contained a photo of some of the vehicles parked in the front portion, was submitted for the public record.

She noted that the plan presented as part of the 2009 proceedings before the Planning Board, with hand drawn scratchings on it denoting the driveway, had been submitted into the public record the previous week.

Attorney Somers said it was good that there had been an additional week to gather more information. She said she had looked at the DVDs of the April and June 2010 Planning Board meetings, and said they provided a lot more detail than the Minutes did. She said in 2009, when the CUP application was before the Planning Board, it did not ask the applicant how many parking spaces were sought, and there was no further discussion on the parking other than to say there was adequate parking on site. She said no Zoning review was done, and said certain assumptions were made based on the information that was available.

She said it was clear in the comments made by Mr. Campbell at the Planning Board meetings this spring, which she didn't see was contradicted by the Planning Board, that the Board did not conduct a thorough exam of the parking issue. She said there was just a determination that there was adequate parking on site, and no discussion as to the actual number of spaces.

She said unfortunately, this had led to some assumptions on everyone's part. She said a few months later in 2009, when the building permit was applied for, the applicant relied on the conclusions of the Planning Board, and based the building permit on these assumptions. She said he got the building permit, and there were no appeals from abutters.

Attorney Somers said one of the grounds upon which the applicant was presenting this appeal was the defective nature of the notice of violation. She said she had discovered that there was an April 2010 memo from Mr. Johnson advising the Planning Board, and said this was included in the ZBA packet that had just been provided. She said the issue of concern was that the memo contained details as to the nature of the violation and perhaps what needed to be done as part of it. She said this level of detail should have been part of the original notice in February from Mr. Johnson.

She said no Zoning review was conducted in 2009. She also said based on the DVD she'd

viewed of the June 2010 Planning Board meeting, she'd determined that the Board had a lengthy discussion and at the end, wanted to continue the matter, but internally had reached preliminary consensus that 7 parking spaces could be allowed, 3 in front and 3 in back, which was 6 plus a 10% increase. She said they did not make a formal decision on this. She said the applicant withdrew his application because he wanted to come before the ZBA and squarely present the grandfathering issue. She said it wasn't squarely presented to the Planning Board because it wasn't necessarily their domain.

Attorney Somers said both the ZBA and the Planning Board had struggled with the question they were supposed to be determining, and said she thought two questions had been intermingled. She said the first question was how many spaces the applicant was legally allowed to have, and said this question was properly before the ZBA.

She said the second question was if the applicant was asking for more spaces than he was legally allowed, who decided this, and how this got worked out. She said that was something that went to the Planning Board.

But she said a matter of concern was that she had noticed a thread of discussion by the ZBA and the Planning Board about potentially denying parking spaces based on their potential for rental. She said that was dangerous territory, because it could constitute selective enforcement, which would be challenged on an appeal.

Attorney Somers also said something touched upon before the ZBA but discussed in more detail in front of the Planning Board was possible denial of the number of spaces based on the lack of a perceived need for spaces. She said if that was a basis of a denial, it would raise serious questions about whether the parking cap ordinance was constitutional as applied. She said the applicant reserved the right to challenge any decision made on that basis, on substantive due process grounds.

Attorney Somers said the need for the parking other than for the tenants was based upon Mr. Kimball keeping one reserved for himself, as a deterrent so tenants would keep their house in order and not violate their lease. She also said in the past, there had been a person who parked there and reported to Mr. Kimball on what was going on at the property.

She said this had resulted in a property where there were no problems, and she noted that the abutters had complemented the applicant on this. She also referred to the document from the Police Department indicating no incidents at the property. She said the Board had to look closely at what constituted need in the larger sense of the picture.

Attorney Somers said the grandfathering issue was the basis of the contention that the Administrative Appeal should be overturned. She said there had been discussion before the Planning Board and the ZBA on 6 spaces historically used, and some number of spaces in the back. She said what was clear from the applicant's testimony along with evidence back to the 1940's was that there was parking in front. She said there seemed to be some level of consensus on both boards regarding this, and said the only evidence to

the contrary was from the abutters, who said they only saw one or two cars parking in front, and not 6 continually.

She said the ZBA was entitled to give weight to that, but said Mr. Kimball had memories of this property over his lifetime, including when he lived there in the 1980's, so more weight should be given to this than the abutters, who were less in a position to observe.

Regarding the spaces to the rear, Attorney Somers said there didn't seem to be any disagreement, even with the abutters, that 2 spaces were used historically. She said the Planning Board didn't seem to have a dispute with this. She said she believed there was at least a core agreement among the two boards and the people testifying that there were at least 2 in the back and 6 in the front.

She said given all of this information, she believed the applicant was entitled to the 11 spaces requested. But she said if the ZBA felt this was not supported by the evidence, the applicant would request acknowledgement that at least 8 spaces were grandfathered, with the exact determination of those to be worked out.

Chair Woodburn said she understood the logic of 6 spaces in the front and 2 in the back as grandfathered spaces, but asked how the applicant got to 11 spaces.

Attorney Somers said the argument for 11 spaces was not necessarily based on the grandfathering argument, and was based on other positions they had set forth. She said she couldn't state without a doubt that there was evidence to support 11 spaces, and said there was cause for some disagreement on this. She said the applicant had said there was parking in the rear in excess of 2 spaces, but differing testimony had been heard concerning this.

She said if the ZBA was concerned about the level of evidence presented on that number, and was not persuaded by the other evidence presented, Mr. Kimball would accept an alternative form of relief.

Mr. Gottsacker said he had read the Minutes and watched the DVD of the June 23rd Planning Board meeting, when there was a substantial discussion on parking. He said 90-95% of the approximately one hour discussion was on parking. He said the first problem he had was that it sounded like Attorney Somers was saying it was the Planning Board's or Mr. Johnson's fault that there was a misunderstanding concerning 11 vs. 6 spaces, and that they should have done the Zoning review.

Attorney Somers said it was incumbent on the Town when an application was presented to work with the applicant and conduct a Zoning review. She said it was curious that the Planning Board didn't get to the heart of how many spaces Mr. Kimball was proposing. She said the Town should have taken the lead on getting to the bottom of that question.

She said it had been her experience, representing a number of towns, that the Planning Board or the Planner was charged with looking at those fundamental questions. She said

if the applicant didn't offer the information when he perhaps should have, at the end of the day it was the responsibility of the planning people to get the answer.

Mr. Gottsacker said the Zoning Ordinance stated how much parking was allowed and said it was very clear. He quoted from the Ordinance on this. He said with two houses and 3 unrelated people in each, 6 parking spaces were allowed. He said in the Planning Board's discussion on June 23rd, they were clear, and were focused on 6-7 spaces.

He also noted wording on the building permit that said an applicant shall remain fully responsible for complying with all applicable laws, ordinances and conditions. He said he didn't understand why it was the Town that should make sure the applicant was in conformance with all the Zoning regulations. He stated again that the Zoning was very clear that there were 6 spaces and possibly 7 with a Conditional Use permit. He said the building permit said it was the applicant who was responsible for conforming to the Zoning Ordinance.

Ms. Woodburn said there was the grandfathering issue. She said the original review of the project was done in 2009, and the building permit was issued in July of 2009. She said the applicant had given the Planning Board a plan that didn't specifically say things about parking, but showed areas that illustrated where there might be parking. She said she believed that same plan was given for the building permit, then there was the violation, and then it went to Planning Board to talk about amending the Conditional Use permit and pinning down the parking spaces. She said the applicant had discovered that the Planning Board wasn't talking about what he considered to be the number of grandfathered spaces.

She said the initial package showed the existing and proposed things on the plan. She said at last week's meeting, there was discussion that there was a hand sketch that had been presented to the Planning Board, and not the previously referred to plan. She said the packet just received showed plans as well.

Attorney Somers said one was a standard boundary survey that showed no parking at all, and a gravel drive in the front.

Chair Woodburn said what had been received seemed to show areas in the driveway where parking could happen, and was happening at the time, as existing conditions.

Mr. Gottsacker noted the letter from Attorney Somers, dated August 17, 2010, which said that "...despite not being squarely presented with the issue of grandfathering, the DVDs suggest that the Board members reached substantial agreement that the front parking area had historically been used for 6 spaces". He said he saw nothing like that on the DVD, and said what he did see was that 6 spaces were allocated on the site. He said this was discussed a lot.

Attorney Somers said in 2009, what was presented to the Planning Board with the Conditional Use permit application was the standard boundary survey, and something

called “Kimball property”, and both were dated 2007. She said in addition, during the 2009 proceedings, the Planning Board was also presented with the plan with the handwritten notations. She said those were the plans that formed the basis of the 2009 Planning Board decision. She said there was no depiction of parking on the 2009 plans, and only general concepts proposed.

She said in 2010, in an effort to resolve the Zoning violations, the applicant presented an application to the Planning Board. She said there was discussion at the Planning Board proceedings on the grandfathering of the front property. She said there was no vote, but said there was nothing suggested that said it was not grandfathered. She said the Board had discussed this issue, and she suggested that there was at least implicit acknowledgement that the 6 spaces were grandfathered. She said in contrast, in 2009 there was no discussion on grandfathering, and no discussion on numbers.

Attorney Somers said there was an obligation on the part of the applicant to know what he was doing, but said the obligation was primarily with the Planning Board and Town staff to assist the applicant. She said when the Planning Board and the planning staff got a plan showing nothing, common sense would indicate that it was a good idea to ask what the applicant was thinking about in terms of where and how much parking was proposed.

Chair Woodburn said the appeal of Administrative Decision was in regard to the violation letter and whether a mistake had been made. She said the other things were not appealable at this point. She said the only mistake that might have been made was whether the parking spaces were grandfathered.

Mr. Gottsacker agreed.

Attorney Somers said she agreed, and said the grandfathering issue was the primary thing to focus on regarding whether the Administrative Decision was correct or not. She also said one of the grounds for the appeal was the reliance by the applicant on the grant of the Conditional Use permit in 2009 without any statements on the number or location of spaces, together with the issuance of the building permit. She said to the extent that the prior proceedings formed the basis of the applicant’s reliance, they were a relevant factor in the ZBA’s analysis.

Mr. Gottsacker said the ZBA was not there to agree to any variance request concerning a number of parking spaces, and said this application was simply an appeal of Administrative Decision.

Attorney Somers said that was correct, but said she didn’t agree in terms of what the ZBA’s job was in reviewing the Appeal. She said the applicant’s argument was that these spaces were grandfathered. She said if the ZBA determined that there was insufficient evidence to support a contention that there were 11 grandfathered spaces, there was still not much dispute that there were 6 grandfathered spaces in front, and 2 such spaces in the back. She said that would be the basis for the ZBA modifying the Administrative Decision.

She said the full scope of the grandfathering information might not have been available to Mr. Johnson and the Planning Board before the violation occurred. But she said the ZBA had the authority to, and had to make a decision on the grounds for the appeal by the applicant. She said it went to the heart of whether Mr. Johnson's decision was correct or not. She said the applicant's position was that it was incorrect, because a number of the spaces on the site were grandfathered.

Lorne Parnell, Planning Board Chair, said he represented the Planning Board. He said the applicant was right that there was very little discussion on parking with the 2009 Conditional Use application. He said it was assumed, as stated, that there were 6 spaces, given that there were 3 people in each of two houses. He said the discussion was concerned more with the fact that part of the new parking lot proposed would be within the wetland setback. He said there was no discussion on parking spots, and said it was assumed that it was a normal application.

Regarding the issue of grandfathering with the more recent application, Mr. Parnell said he thought Mr. Kimball had discussed this, but said he didn't think the Planning Board had rejected or accepted that. He said the information was provided, and the Board was in the process of deliberating when the application was withdrawn, so they never got to that issue. He said the Planning Board was discussing 6 or 7 spaces, but said there was no unanimity on what they were going to propose. He said they were just proposals, and said the Board could very well have discussed something else when they got around to voting, and got into the actual conditions for the application.

Mr. Gottsacker noted that there was a statement in the information the applicant had provided that Board members had reached substantial agreement that the front area had historically been used for 6 spaces.

Chair Parnell said the Board received information from Mr. Kimball on this, and didn't dispute it. But he said he would have no way to know if the Board agreed with it.

Attorney Somers said it was the ZBA's job to determine what the grandfathering issue was, and how it related to the accuracy or inaccuracy of Mr. Johnson's Administrative Decision.

Mr. Mulligan said in the packet the ZBA originally received, there was a memo from Planning Board member Steven Roberts about a site walk done in May of 2009. He said there was also a memo on the other side of the page, regarding 20 Strafford Ave proposed improvements.

Attorney Somers said the memo was the narrative for the proposal by the applicant that accompanied his 2009 Conditional Use permit application.

Mr. Mulligan said the third paragraph of that memo said "...adjustment will be made to the driveway and parking along with paving the drive and parking areas". He asked what

Mr. Kimball meant by this.

Attorney Somers said it meant that Mr. Kimball would reconfigure the driveway somewhat, and configure the parking in the rear. But she said nothing more definitive got asked or answered beyond that sentence. She said the issue there was whether the driveways would be paved. She said everyone wanted gravel, so the result was a hand drawn sketch showing where the driveway might be located, and the general location where he would reconfigure parking to make emergency access more viable.

She said the 2 parking spaces at the tale end of the driveway at the rear of the site were dumped there. She said part of the effort in 2009 was therefore to come up with a more rational basis for where parking should be located, so there would be no issue of a fire truck being able to get past those two spaces.

She noted that the memo also referred to the front of the property and that the driveways and paving would be as required to access the building.

Marty Gooze, 9 Meadow Road, said she was an abutter. She asked that the Administrative Decision be read out loud, and Mr. Starkey did so.

Ms. Gooze said that regarding the grandfathering issue, she believed that the Planning Board said the views of the applicant and the abutters were so different that they negated each other. She said there was no documentation of grandfathering. She said since 1977, she couldn't recall that there were more than 2 cars in the front and 2 in the back. She also said with 6 cars in the front, Ms. Stevens wouldn't have been able to get out of the garage.

She said at the Planning Board meeting this year, Mr. Kimball had said it wasn't unreasonable to have 11 spaces, but said 7 spaces were typically used, and that he had monitored this over time. She said if 7 spaces were typically used, the assumption would be that this was what was needed. She said many people had lot sizes that could fit many cars in, but she said the rules of the Town were one space per occupant in rental housing.

Ms. Gooze noted that the June 2010 Planning Board Minutes indicated that Councilor Smith had said that on the old site plan, there was no parking configuration as compared to the current plan. She said her assumption would be that when plans were submitted, they should be complete. She said at no time in the early plans were parking spaces delineated, and said that also showed that they weren't necessarily grandfathered.

She said right now with 6 spaces, and having one more available for Mr. Kimball or a person looking after the property, this would mean there would be 7 spaces. She also said if there was an event, permission could be obtained to allow more parking.

She said the compliments regarding how the property was managed had nothing to do with the parking spaces. She said she had seen many times that as the parking spaces increased noise and other issues multiplied. She said 6-7 months out of the year, the

sound came right through to her property.

Ms. Gooze said the Administrative Decision was valid. She said even if 7 spaces were allowed, that would be fine.

Attorney Somers said that regarding the grandfathering issue, it wasn't their contention that there were historically 6 spaces in front 24/7. But she said Mr. Kimball did represent that his grandmother allowed people to use those spaces to park. She provided details on this, and said Mr. Kimball's memories of this were the best evidence available. She said he was in a better position to indicate precisely what had happened on that property.

She said that regarding the notion that somehow documentation wasn't provided as to the nature of the grandfathering, the Town didn't adopt minimum parking standards until the mid 1970's. She said it was unrealistic to expect that the property owner would keep documentation in anticipation of a 2008 Zoning Ordinance that would create a maximum parking allowance. She said the anecdotal information and 1942 plan should suffice.

Mr. Starkey asked if Mr. Kimball's grandmother had rented the spaces.

Mr. Kimball said he didn't know the particular arrangement his grandmother had had. He said in the early 1990's, when he became responsible for property management there, people were under the assumption that they could park there if they helped her with carrying groceries or shoveled the walkway. He also said people used to park all over the place there, and said he had put an end to that. He also noted that he had worked with Chief Kurz in 2005 to establish permit parking only at the end of Strafford Ave, so people wouldn't block his driveway.

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

Mr. Gottsacker noted page 9 of the ZBA Handbook, regarding addressing an Appeal of Administrative Decision. He said the question was whether Mr. Johnson had made a mistake in interpreting the Zoning Ordinance.

He said the Zoning Ordinance indicated in Section 175-113 that there could be 6 parking spaces, plus an additional space if the applicant went to the Planning Board for a Conditional Use permit, and not through the ZBA and not through an appeal of Administrative Decision.

He said the grandfathering issue might be relevant to a variance request, and might be relevant to the Planning Board, but was not relevant to this. He also said he didn't think Mr. Johnson had made a mistake.

Mr. Mulligan said to play devil's advocate, and looking at the language in the ZBA Handbook, if there was a preexisting nonconforming grandfathered use, the applicant didn't need a variance. He said if the Board found that he had established the

grandfathered parking, the application of the Ordinance was in error, because it didn't apply to them in this circumstance.

Chair Woodburn said there was no discussion of grandfathering at any of the Planning Board meetings, even by the applicant when the Conditional Use permit was granted. She said the Board couldn't know what everyone had assumed. She said the 1942 drawing showed some parking, but said they knew nothing more than this. She also said one would assume that if one wanted to protect grandfathered parking on a nonconforming lot, the person would make sure this was established before going any further.

Mr. Gottsacker said it wasn't as if there was no opportunity to establish this, with all of the Planning Board meetings. He said it was not established. He also said if Mr. Johnson had to ask himself if something was grandfathered every time there was a violation of the Zoning Ordinance, he couldn't do his job.

There was further discussion.

Mr. Mulligan said just pointing to the Zoning Ordinance and saying Mr. Johnson did his job was too simplistic. He said if Mr. Johnson didn't appreciate that there was a grandfathered use, he had made a mistake, and it was up to the ZBA to rectify that. He said the Board couldn't just say to come back and get a variance, because the applicant didn't need one if the grandfathering existed.

Mr. Harvey said they needed to put the grandfathering issue to bed before deciding on whether Mr. Johnson had made a mistake.

Mr. Mulligan said the applicant had some reliance argument that he wasn't sure the Board could resolve. He said it could have been addressed when the Conditional Use permit was approved. But he said the ZBA's job wasn't to second guess the Planning Board, and was to make a determination on Mr. Johnson's decision. He agreed that if they got beyond the grandfathering issue, it came down to whether Mr. Johnson followed the Ordinance.

Chair Woodburn said the issue then was whether there was enough evidence to support the fact that there were grandfathered spaces, and if so, how many there were. She said if they had 7 grandfathered spaces, the issue was moot.

Mr. Gottsacker said the Board had heard 11 spaces and 8 spaces as well.

There was discussion about the contradictory comments made by the applicant and the abutter.

Mr. Harvey said a lot of Planning Board meetings had happened, and said if an applicant was coming back time and time again and was that far outside the Ordinance, he had to bring this up at some point.

Chair Woodburn said if the Planning Board was addressing that there were more than 7 spaces, it would have been in the plans. She noted the applicant's statements about reliance on previous approvals, and then spoke in detail about the fact that ultimately it was the applicant's responsibility to understand the law, and to know where he was within the context of it.

Mr. Harvey said that was his point. He said going from 6 to 11 spaces was a huge increase.

Mr. Starkey asked Mr. Johnson if he remembered how many more vehicles than 6 were parked on the property when the violation was issued.

Mr. Johnson said he would have to check the photos, but said he was sure that there were multiple mornings when there were more than 6 cars there. He said that consistently, there were 5-6 in the front area, and the tenant parking in the back area.

Mr. Gottsacker agreed that if Mr. Kimball was passionate about believing he had substantially over 6 grandfathered spaces, there had been many opportunities to establish that.

Mr. Harvey said he agreed, especially before moving forward with a substantial project. He said that was really where the issue was. He said one couldn't get half way through a project and then have to deal with this.

Mr. Gottsacker said this was the case particularly when it wasn't delineated on any of the plans.

Mr. Starkey noted that the Board had heard testimony about the changes to the Zoning Ordinance over time concerning parking. He said once someone decided to structurally change something on the property, the new Zoning provisions came into play.

Mr. Gottsacker said Councilor representative to the Planning Board Bill Cote had asked how Mr. Johnson had issued the building permit with all the spaces. He said Mr. Johnson didn't, and issued the permit with a maximum of 6 spaces because that was what was shown.

Chair Woodburn said she didn't feel the grandfathering was established, even with the evidence provided. She said the 1942 plan was unscalable. She said she didn't think any of the plans showed that, to protect that right.

There was discussion that the applicant was changing a nonconforming use, and by not protecting the right of the grandfathered spaces, lost that right.

Mr. Mulligan said he didn't necessarily agree as a general statement that by not drawing lines on a plan, an applicant lost the grandfathered rights. He said in the context of this discussion however, the question was what established the grandfathered right for 11 spaces.

There was discussion that one could make some assumptions about how many spaces could actually be fit onto the property. Chair Woodburn said unless it was protected and called out, the question was how one could know.

Mr. Johnson said that with all due respect, he thought most of the testimony and documentation was for a variance request or a Conditional Use request. He said his February 15th letter told the property owner that there was a suspected violation that there were more than three unrelated people on the property.

He said on multiple mornings, between 6-8 am, there were 6-11 cars on the property. He explained that the allowed number of cars was based on occupancy. He said they were allowed 2 per dwelling unit, or one per resident if there were 3 unrelated living in the dwelling unit.. He said he gave them the benefit of the doubt, and used 6.

Mr. Johnson said the violation notice discussed the enforcement effort in Town, and the reasons why properties were being monitored. He said the 3rd paragraph explained the violation in that he had seen more than 4 cars and even more than 6 cars, and that a Conditional Use permit was needed.

He said the last paragraph outlined what the potential penalties were. He said at no time did he make any decisions about grandfathering, and said this was a decision for the ZBA, or the Planning Board under a conditional use permit. He noted that upon inspection, 4 beds were found in the 3 bedroom house.

Chair Woodburn said it wasn't Mr. Johnson's job to tell the applicant what needed to be done.

Mr. Mulligan noted that the applicant had deferred this appeal and went to the Planning Board to update his Conditional Use permit. He said at this point, any prejudice to the applicant that the specific violation wasn't spelled out with all the bells and whistles was moot. He said there was no harm to the applicant at this point.

Chair Woodburn summarized that the majority of Board members did not think that grandfathering was established.

Jerry Gottsacker MOVED to deny an Appeal of Administrative Decision submitted by Pine Ledge Holdings Inc., Hooksett, New Hampshire, from a letter written on February 5, 2010, by Zoning Administrator, Thomas Johnson, regarding a violation of parking on a property. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue, and is in the Professional Office Zoning District. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

III. Approval of Minutes – No Minutes

IV. Other Business

There was brief discussion on the upcoming site walk, scheduled for September 14th at 5:45 pm, concerning the proposed 10 ft fence as part of the Cedar Point Road variance application. Mr. Johnson provided details on how he would mark out the proposed fence, and also said the public notice would be corrected to reflect the fact that it was 10 ft in length, not 8 ft.

V. Adjournment

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

Adjournment at 10:01 pm

Victoria Parmele, Minutes taker

Sean Starkey, Secretary