

**Durham Zoning Board  
Tuesday January 25, 2011  
Durham Town Hall - Council Chambers  
7:00P.M.  
MINUTES**

**MEMBERS PRESENT:** Chair Robbi Woodburn; Vice Chair Ruth Davis; Secretary Sean Starkey; Carden Welsh; alternate Jerry Gottsacker

**MEMBERS ABSENT:** alternate Matthew Savage; alternate Edmund Harvey

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

**I. Approval of Agenda**

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

**II. Public Hearings**

- A. **PUBLIC HEARING** on a petition submitted by Capstone Development Corporation, c/o Appledore Engineering Inc., Portsmouth, New Hampshire on behalf of William & Edna Woodward Rev Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-60 of the Zoning Ordinance to fill 6,956 square feet of wetlands within the Wetlands Conservation Overlay District and to place 6,720 square feet of residential buildings within the wetland setback. The property involved is shown on Tax Map 9, Lot 10-3, is located on Main Street/Technology Drive, and is in the Office Research/Light Industry Zoning District.

Chair Woodburn opened the Public Hearing. She noted that the Planning Board had determined that the Capstone project could have regional consequences so the Town had notified Strafford Regional Planning Commission and the abutting town of Lee.

Attorney Peter Loughlin represented Capstone Development Corporation. He said Capstone had presented a cottage development concept to Town officials over a year ago, and said for students, the design was an attractive alternative to the existing apartments in downtown neighborhoods.

He noted that single family housing had been a permitted use for many years in the area that was now the ORLI district, but when that district was created, single family homes and duplexes were not permitted. He said in order for the concept of the cottages to work on the Woodward property, an Ordinance change had therefore been needed to allow single family homes and duplexes in the ORLI district. He described the process involved with the recent Zoning change to allow these uses in that district.

He said the applicants had been before the Conservation Commission on two occasions, and had also done a site walk with them and with the Planning Board. He noted that a detailed stormwater management plan had been submitted by Appledore Engineering, and said all of the officials who had commented on it had said it was one of the best stormwater proposals that had been submitted to the Town.

Attorney Loughlin said the applicants had submitted a great deal of material to the ZBA in order to allow a good understanding of the project. He also noted that he had submitted a second letter to the ZBA the previous week that dealt with the hardship elements of the variance application. He referred to the letter provided by the Police Department regarding Capstone cottage developments in other locations, and also noted the Fiscal Impact Analysis that had been done by Russ Thibeault of Applied Economic Research.

John Acken of Capstone spoke next before the ZBA, and explained the cottage design concept for the development. He provided information on a similarly designed Capstone development with 1300 beds that had just been completed in Baton Rouge, and noted how it provided the feel of a cottage community/neighborhood for students.

He provided some history on Capstone, noting among other things the awards the company had won for student housing projects it had done. He also spoke about the company's Creekside at Auburn development, where it had first used the cottage design approach.

Mr. Acken explained the reasoning behind using this type of design. He said in 2005, the company had taken a step back to consider where college students would want to live if they could live anywhere. He said it had been noted that kids often tended to move into residential neighborhoods because they provided security and privacy, a sense of having one's own house, and had a neighborhood feel and sense of community.

He said the company had therefore decided to create that type of community, in a way that was professionally managed. He provided additional examples of where the company had built this type of development over the past few years, and said they had gained a lot of experience.

Mr. Acken said it had been realized that Durham was embracing new concepts for student housing, and said the company therefore felt the cottage concept would apply well here. He spoke in some detail on this. He noted that this idea had been embraced by the Town to the point where it was willing to change the Zoning Ordinance. He said Capstone had noticed positive behavioral changes when students lived in these types of communities. He said it was thought that the ORLI district would be a good place for the development, because it was secluded but was on the Wildcat transit route.

Mr. Acken next spoke about the site. He said there were a number of wetlands there, and said their number one concern was making sure that the wetlands would be impacted as minimally as possible. He also noted that the importance of adequate stormwater

management for the site was a key concern, and said he was pleased with the Conservation Commission's comments on what was proposed to address this. He noted that after discussion with the Commission, buildings encroaching on the wetland on the northwest portion of the development had been pulled back, and also said others in the north-central portion of the development had been pulled back.

He spoke about the road that had been designed to run through the development, and said while it would be a private drive, it would look and feel like a public, neighborhood street, with street trees, and buildings that were pulled up to the street. He said one of the purposes of this was that the buildings would serve as a visual screen between the road and the internal parking lots. He noted that there needed to be at least 1.05 spaces per bed.

Mr. Acken said another goal with the site design was to ensure that there would be some good quality green space that was actually defined, and that residents would feel some sense of ownership of, and would therefore want to maintain. He noted that the porches of some cottages would face onto lineal green space in the heart of the development, and said there were also cottages on the periphery of the development that would face green space, with the trail running along the entire perimeter of the development.

He said cottages would either face a streetscape or green space, and said a lot of thought had been put into this design. He spoke further about the screening approach used in the design for the central portion of the development, and said the buildings there that were located close to the road in the setbacks would help to define the street as well as serve to block the view of the parking area.

Mr. Acken next provided details on the cottages themselves, and explained that the insides had been designed more as dormitories, although they would look like a house from the outside. He said every bedroom in a unit would have its one bathroom and walk-in closet, and said there would be 9 ft ceilings. Among other things, he also noted that there would be a security system for each house. He said the architecture had been designed to fit with the Town's New England heritage.

He said each cottage would have two stories, and said there would be a range of styles used so that no cottages would look the same. He noted that among the designs was the "manor house", which was two duplexes back to back. He also spoke about the design for the clubhouse.

Ms. Davis asked if someone would have to be a student in order to live there.

Mr. Acken said no. He also explained that there would be 5 full time employees working at the site, and explained that the level of density proposed for the development was needed in order to be able to afford to have the level of management Capstone felt was necessary to run a first class development like this one. He spoke briefly about how management of the site would be accomplished, largely through fines for noise and trash issues.

Mr. Acken read into the public record a letter from Forrest Cotton, the City of Auburn, Alabama's Planning Director, regarding the Creekside cottage development there. The letter stated that this development had proven to be a welcome addition to the City and the students of Auburn University, and provided details on this.

Mr. Cotten's letter said Capstone had unequivocally delivered the product that had been promised, and said the development was now a very aesthetically pleasing, active and thriving neighborhood. He said he had been equally impressed with the management of Creekside, and provided details on this.

Mr. Gottsacker asked how much of Capstone's portfolio since 1993 had been sold, and also asked if the company planned to sell the development in Durham once it filled up.

Mr. Acken first noted that the company still managed the developments that it had sold, with one exception. He said the company would own the development in Durham, and still owned several others. He spoke in detail about the various divisions of the company, and explained that there was one involved with development, and one involved with management. He also said there were two construction divisions, one of which was the cottage division.

He said there would be an on site superintendent, and said those working under him would be hired locally, including local subcontractors. He said it was expected that there would be over 110 employees hired to build the development.

Attorney Loughlin provided details on the site, noting that it was part of the Woodward Farm and was located on Technology Drive. He said the property contained 41 acres, 32.8 acres of which was upland, and 8.2 acres that were wetlands. He said approximately 14 acres were affected by the wetland buffer, which meant that about 22 acres were restricted, which represented about 54% of the site. He said 42% of the upland area was affected by the wetland buffer.

He said Capstone proposed to build approximately 100 single family or duplex buildings, and 149 units, and noted that the permitted density on the site was 298 units. He said the impervious lot coverage allowed was 50%, but said what was proposed was 27%.

Attorney Loughlin said the applicants were now before the ZBA for two reasons, one of which was because the company was seeking approval to fill 6,349 sf of wetlands. He said a variance was also being requested in order to put footprints of parts of seven buildings and one full building in the wetland buffer. He said the square footage of the wetland buffer impact was 6,720 sf. He noted that it was odd that nonresidential buildings were permitted within the wetland buffer with a Conditional Use permit, but the residential buildings were not allowed there, which was why the buffer variance was needed.

Attorney Loughlin said the problem from a design perspective was that the wetland area

proposed to be filled was right in the middle of the site, and said any road going through that central area would need to be built on fill. He said Capstone had gone through countless revisions to try to minimize the wetland impact, and said this was the only fill area being requested. He said it represented 1.8% of the wetlands on the site.

Adele Fiorillo, a wetland scientist from Normandeau Associates, explained that she had provided input to the design team as to how to design the development with the greatest environmental sensitivity. She said in the spring of 2010, the wetlands on the site were delineated and classified relative to vegetation type and hydrological scheme.

She said a functions and values assessment was also done using the Army Corps of Engineers methodology. She said once the wetlands were assessed under current conditions, this allowed the design team to look at the project and determine how, when there were unavoidable wetland impacts, to mitigate those impacts in terms of functions and values.

Ms. Fiorillo described how she had looked at the site from an overall perspective in terms of impacts and mitigation. She noted that the Oyster River was an important feature of the property, from a wetlands perspective, and she also noted the perennial tributary to the river in the northwest corner of the site. She said the entire site was forested except for a shrubby grass component to wetlands along the river. She noted the abutting properties of Goss International and Woodward Lumber.

Mr. Welsh asked how wide the river was in the northwest corner of the property, and Ms. Fiorillo said it varied, and providing details on this. She said in terms of assessment, she had delineated the wetlands by looking at vegetation, hydrology, and other features, and then broke them out into different complexes.

Wetland complexes:

A – bordering Technology Drive, a wetland area that was forested and was outside of the river watershed

B- same as A, but containing a small vernal pool within wetland, so has a unique feature

C. – wetlands that are hydrologically connected on the site to the river

D – 4 very small isolated wetland pockets, one of which is manmade. They are all on the other side of the watershed divide from wetland complex A, and have no surface or subsurface connection to the river

Ms. Davis asked what the elevation of wetland complex D was compared to the elevation of the river.

Ms. Fiorillo said it was quite a bit higher, and estimated about a 10 ft difference. She said these wetlands were shallow, and said there wasn't a big elevation break from non-wetland. She said those wetlands not associated with the river were perched wetlands, with tight, clay material that rainwater would sit on after a rainfall. She said they had no surface or subsurface connection to the river.

She next reviewed the principal wetland functions and their values, and noted that one of

the wetlands in wetland complex D was the one that Capstone wanted to fill.

Ms. Davis asked if frogs could survive in wetland D, and Ms. Fiorillo said no, because there simply wasn't enough water there. She noted they had seen some frog eggs in the vernal pool on the site in complex B, but said the wetland areas in complex D did not have sufficient hydrology for frogs and other species.

She noted that these wetlands were very shallow, transitional wetlands showing subtle vegetation changes such as a little more in the way of red maple trees than the area beyond them, and somewhat poorly drained soils. She explained that the wetland criteria indicated where to put the boundary, and included a dominance of hydrophytic vegetation, hydric soils and signs of hydrology. She spoke further on this.

Ms. Davis asked the rhetorical question of why people should care about whether the wetland area in D was filled in, and if it was filled in, whether it should be mitigated.

Ms. Fiorillo said she didn't think they should. She explained that the mitigation the applicants were proposing wasn't required by the State, because the wetland involved was too small. She said that according to the State, with under 10,000 sf of wetland impacts, one could overcome the presumption that there was a significant impact, so mitigation wasn't required. She said the design team was focused on mitigation in terms of Durham's regulations.

She said the wetlands in complex D had no principal wetland functions such as holding back floodwater, or filtration. She said the land there had clay soils, and said this land had been worked and compacted. She also said it wasn't big enough to be a wildlife habitat in and of itself.

Ms. Davis asked which wetlands on the property did provide important functions.

Ms. Fiorillo said wetland complex C was associated with the river, and provided a significant amount of wetland function, including groundwater recharge along with wildlife habitat from some forested canopy and grasses that provided cover for a variety of wildlife species associated with the river.

Mr. Gottsacker said he assumed the State came up with a number of 10,000 sf based on science, and Ms. Fiorillo said probably not. He asked where the number for the 3,000 sf limit had come from, and Ms. Fiorillo said it was probably that the Town wanted to be more restrictive than the State.

Chair Woodburn summarized that regarding wetland complex D, there were no principal functions or values for that wetland, which was the important point of the whole presentation.

Mr. Gottsacker asked what purpose the mitigation therefore served.

Chair Woodburn said it didn't serve a purpose, but said the issue was that the amount of filling being requested went over Durham's 3,000 sf. Limit. She also explained for the Board that if the applicants didn't fill the 6,349 sf of wetland so it was still there, it would also have a buffer associated with it that filled the middle of the site, so there would be a far greater impact on the development design. But she said because the applicant was proposing to fill this wetland area in complex D, the issue of that buffer impact disappeared, and was not included in the total buffer impact.

Ms. Fiorillo said because of the layout of wetlands on the site, it was challenging to minimize wetland impacts, especially with the wetland in the middle of the site. She said because the wetland in complex D was of low quality, it was felt that it could be sacrificed. She also said if the development had been designed around it, there would be this piece of land there that didn't really serve any function.

Chair Woodburn said if the 6,349 sf of wetland wasn't filled in, there would be a big wetland buffer that might be impacted by the development. She said by filling it, all of that buffer no longer existed, so was not considered a buffer impact.

Ms. Fiorillo said where the buffer would still exist, there would be some impacts, but said the Town would have jurisdiction over them. She noted that she had met with NHDES and received some good feedback, and said she thought Capstone would get the permit to fill the wetland.

Mr. Gottsacker asked for more details on the mitigation that would be done.

Ms. Fiorillo said they wouldn't be creating more wetlands, but said for the areas where the buffer had been reduced to a point where it was fairly narrow, wetland enhancement was proposed. She said shrubs and ferns would increase the vegetation layering there underneath the tree canopy.

She said there would also be some wetland restoration areas. She explained that there were buffer areas that would need to be impacted because of grading during construction, although there would be no structures in the buffer. She also noted that there would no longer be the encroachment once the construction work was complete. She said these restoration areas would grow into natural habitat.

Ms. Fiorillo explained that there was also a conservation easement plan proposed, that would protect all of the remaining wetlands and wetland buffer on the site, which totaled 17.9 acres. She said this land that was not developed would be put into protection for perpetuity, and said there could be either an easement or a deed restriction.

Ms. Fiorillo reviewed Table 2, which she said showed that the applicants had looked at the principal wetland functions, and had looked at the buffer correlation for these functions. She said by putting in gravel wetlands, enhancing the wetlands presently on the site, and restoring the buffer, they would have replaced the values and functions. She said the net impact was fully mitigated, and they were actually increasing some of the functions based on the mitigation package. She said there would be no net loss of wetland

function.

Mr. Welsh asked if this meant there would be no net impact beyond the wetlands after the project was complete.

Ms. Fiorillo said yes. She noted that the site was the most vulnerable during construction, and said best management practices would be used to address erosion and sedimentation during construction.

Mr. Welsh asked Ms. Fiorillo if despite all the cars that would be parked on the site, with possible dripping oil, etc, she was convinced that with this plan, there would not be an impact beyond the wetland.

Ms. Fiorillo said yes.

Attorney Loughlin said the Oyster River was the main feature for this site, which was why the stormwater plan was so important.

Engineer Joe Persechino from Appledore Engineering spoke to the Board regarding the stormwater management plan for the development. He noted on a large map that the existing conditions on the site included four subwatersheds. He said with the proposed conditions, they had tried to match those areas as much as possible so that their size, elevation and drainage would change as little as possible. He provided details on this.

He said within each of the four colored subwatershed areas, the proposed impervious areas would drain to low impact development BMPs, and noted that they had been described by Conservation Commission Chair Jamie Houle as some of the best out there.

Ms. Davis received clarification that the four colored subwatersheds that were shown represented only surface water flow. She determined that the wetland under discussion in complex D was located within the green subwatershed, and that most of the water falling on the land surface there eventually flowed to a perennial stream and then to the Oyster River.

Mr. Persechino said that in the proposed conditions, runoff from impervious surfaces would be treated by BMPs, and could then be infiltrated as much as possible. He said with larger storms, after the runoff was treated, it would flow toward points of discharge. He said the central portions of the site would travel to a large gravel wetland, because there was no room to infiltrate the soil there because of tight soils and a high water table. He said a BMP that could function with the groundwater there was needed. He explained that the conditions there would actually help the gravel wetland to function, noting that the vegetation would help to treat the pollutants, and would also provide quantity control by taking up water from larger storms.

Mr. Persechino explained that a gravel wetland functioned much like wetland, where the top soils were tighter and were planted with facultative wetlands. He said the stormwater



would flow in and sit there, and said pipes as part of the design would lead to an underground reservoir. He said this allowed the longest sitting time possible of the water, and resulted in exceptional pollutant removal by the vegetation. He said removal of nitrogen and phosphorus was in the high 90's percentile.

Mr. Persechino also explained that there were areas at the outside of the development where there would be enough depth from the water table to allow the use of porous asphalt, and said it was therefore proposed for those locations.

Mr. Gottsacker noted that ZBA members had seen projects where porous pavement was proposed for all of the asphalt. He asked why it appeared that with this project, it was only proposed for the shoulders.

Mr. Persechino said it had been found that in the main travel ways, the porous asphalt could get beat up. He said with the new standards from NHDES, there could be a 5 to 1 contribution ratio to the porous asphalt surface and still receive the same amount of treatment. He said the applicants were using a 4 to 1 ratio, and said below that, they had increased the size of the reservoir to attenuate any larger storms.

Mr. Gottsacker noted that no porous asphalt was proposed for the main drive.

Mr. Persechino said this was because of the seasonable high water table there, and said runoff would go to a gravel wetland.

Ms. Davis asked if all of the paved or other impermeable surfaces were accounted for one way or the other.

Mr. Persechino said yes, with the exception of a few rear areas from residential roofs. He said the effective impervious area for the site, based on Durham's stormwater regulations, was about a half acre, which was the residential roofs. He said the runoff from the roofs would be captured, treated, and attenuated.

Mr. Gottsacker noted the letter from the Conservation Commission, which said that with respect to the issue of the proposed wetland fill in the eastern center of the site, there was concern that the plan did not reflect the wetland and the associated 75 ft buffer as an infringement of the Wetland Conservation Overlay district. The letter said that it was clear to the Commission that the Town Zoning Ordinance stated that the wetland should be protected or that any proposed disturbance in this area should be included in the CUP process.

Chair Woodburn noted that the applicants would be going to the Planning Board for the Conditional Use process. There was discussion by Chair Woodburn and Mr. Gottsacker that the issue raised by the Conservation Commission had more to do with the Planning Board, and Mr. Johnson agreed.

Break 8:30- to 8:37

Ms. Fiorillo provided details on the actual numbers involved in terms wetland impacts as well as the mitigation that was proposed. She said 6,349 sf of wetland complex D would be impacted, plus another 607 sf. She said there would be enhancement of 19,050 sf of wetlands. It was noted that the net gain would be about 12,000 sf.

She said that in terms of the wetland buffer impacts, for the whole project there would be an impact of 6,720 sf. She said they would be restoring about 1.75 acres, or about 76,000 sf. She said there would also be the construction of the gravel wetlands, which would comprise about 28,000 sf. She noted that there was also the 17.9 acres proposed for a conservation easement. Ms. Fiorillo said the applicants could confidently say that there would be no net loss, and a gain.

Attorney Loughlin said that regarding the Conservation Commission's comments, the applicants' position was that if the ZBA granted the variance to allow the filling of the wetland, the associated buffer would go away. He noted that the a Commission member had said that when looking at the overall project, this needed to be kept in mind. But Attorney Loughlin said in terms of requirements, the Conditional Use permit would not be needed because the wetland wouldn't be there.

Regarding the buffer around this 6,349 sf wetland section, he said many towns had regulations where a wetland area had to be larger before the buffer came into play. He said he thought the reason for this was that with situations like this present one, the wetland had a buffer that was disproportionate to the wetland area itself. He said this got into the issue of whether there was a taking, when there was a little wetland and a large buffer around it.

Attorney Loughlin next reviewed the variance criteria and how they were met. He first quoted the Simplex case regarding the spirit and purpose of a variance. He said the applicants felt the relief being requested was a waiver from strict wording of the Ordinance, but would not sacrifice the spirit and purpose of the Ordinance.

#### Public Interest

He noted that the Chester case pointed out that any variance was contrary to the Ordinance. But he said to be to be contrary to the public interest or injurious to the public rights of others, the variance must unduly and in a marked degree conflict with the ordinance, such that it violates the ordinance's basic zoning objectives. He said the proposed project would not violate basic zoning objectives.

He reviewed the purpose of the Wetland Conservation Overlay district, and said what the applicants were proposing was consistent with the management of the wetland buffer. He said it was consistent because of the superlative stormwater management plan, a 17.9 acre conservation easement, the enhancement of 0.44 acres of existing wetland to increase their functionality, and the re-vegetation of 1.75 acres of buffer with native species. He said these things represented a managing of the wetlands and wetland buffer in a manner that was consistent with the goals and purposes of the Ordinance.

Attorney Loughlin also said the applicants believed that the variance relief would facilitate the building of cottages that were believed to be, based on comments made as part of the Planning Board and Town Council processes, in the public interest of the community.

#### Spirit and intent of the Ordinance.

Attorney Loughlin reviewed the provisions in the Purpose section of the Wetlands Conservation Overlay District. He said the applicants would be protecting water quality of wetlands by managing stormwater runoff with the system that had been described, and which the Conservation Commission had spoken highly of. He also said what the applicant proposed would also minimize flooding and flood damage by preserving the flood storage capacity of the wetlands.

He said nothing would be done to damage wildlife or fisheries habitat. He noted that the issue wasn't whether this property would be developed, but whether a small amount of wetland should be allowed to be filled.

Attorney Loughlin said what was proposed would not impact stream flow and groundwater recharge. He noted that there was very little recharge for the wetland in complex D. He also said the natural beauty and scenic qualities would be preserved with this proposal. He said what was proposed would limit the uses of the wetland and upland buffer to those that were consistent with the purpose of the WCO district.

#### Substantial justice.

Attorney Loughlin said this criterion involved a balancing test. He noted that the NH Supreme Court had held that "the only guiding rule [in determining whether the requirement for substantial justice was satisfied was that any loss to the individual that was not outweighed by a gain to the general public was an injustice. He said there would be a very clear loss if in this case the developer or the Woodward family could not obtain this relief. He said this would cause a reduction of 10% of the project, which got into the fiscal impact also. He also said there would be no real loss in the function of the wetlands, so there would be a loss to the developer but no gain to the community if the variance wasn't granted.

#### No decrease in the value of surrounding properties would be suffered

Attorney Loughlin referred to the report from Applied Economic Research, and said Mr. Thibeault was present to answer any questions on it. He said he didn't think this was an area where there was a lot of dispute, and said the wetland area the applicants wanted to fill was not near abutting properties, so he didn't see that there would be an impact on surrounding properties.

#### Hardship

Attorney Loughlin noted that the Legislature had now more or less codified the Simplex test in 2010. He then referred to the ZBA Handbook, which said what should be

considered regarding the hardship issue was whether the restriction on the property was necessary in order to give full effect to the purpose of the ordinance; if relief could be granted to the property without frustrating the purpose of the ordinance; and if the full application of the ordinance to the particular property was necessary in order to promote a valid public purpose.

He said the answer in this case was no, it was not necessary to promote a valid public purpose. He said the Ordinance had served its purpose here because it had caused the development to be designed so that it honored the purposes of the Ordinance. He said the design would make sure there were no stormwater runoff effects that could impact the Oyster River.

He said the applicant's property was unique in that there were 8 acres of wetlands, noting that less than 2% of them would be impacted. He said the uniqueness was that the wetland in complex D would create some significant issues. He also said trying to pull the buildings in and trying to create the appropriate screening was a special condition that required relief.

He noted *St. Onge v City of Concord*, that "the hardship created by application of the Ordinance to this property is unnecessary because it is not required to give full effect to the purposes of the Ordinance." He said the Board didn't need to apply the full effect of the Ordinance to this property for the ordinance to have an effect, so the relief could be granted. He said the application of the Ordinance to this property was an unnecessary hardship.

Attorney Loughlin noted the letter he had sent on Friday, which discussed a test developed in a concurring opinion, where the validity of considering the financial impact of an ordinance on property was considered. He said the Court had said this was a legitimate concern. He said it was a hard test to apply and he usually avoided it, but said in this case, the financial impact was very clear in that if the variances were not granted, the development would lose 10% of the proposed beds.

He said 619 beds were needed in order to allow Capstone to provide robust management of the property. He noted that after Auburn won the recent football championship, there wasn't a single incident at Capstone's Auburn development.

Attorney Loughlin referred to the *Malachy Glenn vs. Chester* case, which he said was close to the facts in this case. He read from the Court's decision, which among other things said that the fact that the project encroached in the buffer, which was the reason for the variance request, could not be used by the ZBA to deny the variance. He said the Court in this case noted that 65% of the site was made up of wetlands, and said their configuration further reduced the buildable area, so held that special conditions existed, and a variance was required to allow the applicant's proposed use of the property. He said the Court had also pointed out that denial of the variance would have required a drastic reduction in the project, and would have had a financial impact.

He said the question was whether it was a reasonable request to fill 6,349 sf of wetlands

and impact 6,720 sf of buffer, when 98% of the wetlands on the site would not be disturbed and the function would be enhanced; when a superlative stormwater management plan was included; and when a permanent conservation easement was proposed to protect almost 18 acres or approximately 44% acres of the site. He said the question was also whether it was a reasonable request that balanced the interests of the landowner to develop his property in a reasonable manner with the interests of the community in protecting the quality of its wetlands.

Attorney Loughlin said the applicants realized there was an arduous path ahead, and said this was the first land use hurdle to face. But he said regarding the issue of the reasonableness of what was being requested, the answers were yes, and said Capstone had satisfied the test for the rather narrow relief that had been requested.

Mr. Gottsacker said it seemed that if the variance wasn't received and the buffer square footage was included, the impact on the number of beds would be more than 10%. He asked if the buffer amount had been included.

Attorney Loughlin said the number did include the buffer, and said 10% was a conservative number.

Chair Woodburn said her impression had also been that the impact would be more than 10%.

There was discussion.

Mr. Gottsacker noted that the Table on page 19 of the Fiscal Impact Analysis report said the additional property tax revenues would be \$494,000 and the costs to the Town would be \$295,000. He said the most interesting and important number for him was the estimated net impact, of about \$200,000 in property tax relief.

Mr. Thiebault said that was correct.

Regarding Mr. Gottsacker's question, Mr. Acken said 68 beds would be impacted. He said at the development level proposed right now, they were at the low threshold for being able to provide property management for the property. He said if the land at the heart of the site was cut out, it would affect the project to the point where it would change the project completely, and it would no longer be viable.

Chair Woodburn asked if there were any members of the public who wished to speak in favor of the application. There was no response, and she asked if anyone wished to speak against the application.

Attorney Scott Hogan provided some background on who he generally represented as an attorney. He said he had gone to the site walk, as had environmental scientist Mark West, who would also speak to the Board.

He said as had been noted, notice of these applications had been sent to the Town of Lee, and the Strafford Regional Planning Commission. But he said for the record that the Statute required that the Board at its first hearing had to decide if there was the potential for regional impact, and if it did, it had to treat both entities as abutters, and had to send them notice, the Minutes for the meeting where it was decided if there were regional impacts, and the plans for the project. He said the Statute spoke to any land use board when it received the application, and defined the Planning Board and the ZBA on the same terms. He said this was the threshold procedural issue the Board needed to go through.

Mr. Gottsacker asked who Attorney Hogan represented in this instance, and Attorney Hoham said he represented nine Durham property owners, including an abutter.

Chair Woodburn said Lee and the SRPC had been noticed, and had been noticed that the Planning Board thought this was a project of regional impact.

Attorney Hogan reviewed the notification process at the Planning Board level.

Chair Woodburn said the abutters had been noticed that this ZBA meeting was happening.

Attorney Hogan asked if the ZBA had sent the plans to the regional planning commission. He said the Statute specified that SPRC and the Town of Lee, as abutters had to get the items he had listed.

Chair Woodburn said these things would be sent along.

Attorney Hogan said when the applicant first came to Town, there were meetings with the Conservation Commission. He said it was clear that the company did housing in a variety of states, and said the initial application documents said that when space was available, Capstone determined that the village design was the best product.

He said the applicant was clear at the Conservation Commission meeting that it had determined that this product, as a matter of business feasibility, was the easiest to market and get financing for. He said the applicants were clear that they had determined that 620 beds was what made this project feasible, including allowing them to have a certain amount of management. He said those considerations were not relevant to whether each of the five variance requirements was met.

Attorney Hogan said the applicants had the right to propose a residential development, but he said the reason they were before the ZBA, and the reason they would need a Conditional Use Permit from the Planning Board was that they were asking for a lot more than was permitted by right. He said they had designed 619 beds, and a village concept, and said this was why there was such a large footprint. He said at the Conservation Commission meetings, there was discussion about different possible designs involving taller, smaller buildings that would eliminate the amount of intrusion into the wetland

buffers.

Attorney Hogan said this was a site that had wetlands throughout, and was bounded by the Oyster River. He noted that the property had been identified as having some of highest wildlife values in the State. He said the applicants had said they would at least match the wetland functions and values, and would increase the water quality function and wildlife habitat function. He said the applicants had to submit actual evidence to prove that they would improve these things. He said this was a high bar, and said the representations that had been made needed to be vetted specifically,

He said the applicants had a business plan of what was financially feasible. But he said there were a whole variety of reasonable uses that could be made of this property that didn't impact wetlands and wetland buffers.

Attorney Hogan said the applicant also had to go to the Planning Board regarding impacts from some other things on the buffers, so the impacts the ZBA was looking at weren't the only impacts to the site. He said it was important to think about this when looking at the variance criteria.

He reviewed the variance criteria:

#### Public interest

He said the applicant had said these wetlands had low or no function, and that when the project was done, there would be better function in terms of water quality. He noted again the wildlife habitat near the Oyster River, and said when the applicants said they would improve the wildlife habitat, they needed actual evidence to point to, so one could see if they had met their burden of proof.

#### Spirit of ordinance

He reviewed the purpose of Durham's Ordinance, in Section 175-58 A-F, and said it was hard to reconcile many of them with filling the wetland, eliminating the buffer and putting structures on top of them. He said in terms of the spirit and intent of the Ordinance, the Town had a consistent history of applying these provisions. He said the Conservation Commission had noted that these impacts were throughout the site, because of the large footprint and the design of the project. He said it had been said that the central wetland proposed to be eliminated was said to be the most intuitive wetland to eliminate. He said from a design perspective, that made sense.

He said the representation made was that it had low value, and whatever value it had would be improved, in terms of water quality and wildlife habitat. He stated again that the ZBA needed to determine if the applicant had met their burden of proof on this issue.

#### Substantial Justice

Attorney Hogan said it was in regard to this variance criterion that the applicants had said if the relief wasn't granted, this would have a serious practical and financial impact on Capstone, the Woodwards, any other potential developer of the site. He said the amount

of financial return was not a relevant consideration for these variance requirements.

He noted regarding the hardship criterion that financial circumstances were not relevant, and said what was relevant was the uniqueness of a property and special conditions there, and whether there was a reasonable relationship between the Zoning restriction and what the applicants were trying to achieve. He said there was a business plan in front of the Board, and the applicants had said what was needed in order to do a feasible project. He said this didn't mean that there were not any number of design options that could be pursued that didn't require the impacts that were proposed.

#### Hardship analysis

Attorney Hogan spoke in some detail about how this was a classic self-created hardship. He said the applicant had come up with a business plan, but he said that didn't relate to the variance requirements that the ZBA needed to make its decision on. He said the Board had been told that the Ordinance had already done its work, and had caused the applicants to create a plan that was protective of wetlands and wetland buffers. He noted that when the applicants came back to the Conservation Commission for a second meeting, they had been able to reduce the wetland impacts by 61%.

He said the 650 parking spaces were questioned at the time, and the applicants said that was what they needed for marketing and to get financing. He said this was not relevant to the five variance requirements. He said the ZBA needed to look at what alternatives there were, such as fewer units, taller units, and shrinking recreational amenities, and said it was the applicants' burden to show that these were not feasible. He said they had needed a Zoning change in order to propose the design concept, and this had happened. He said they had then proposed a project that required variance relief as well as Conditional Use Permit relief.

Attorney Hogan said the parking proposed was one of the intrusions into the wetlands and buffers, and said the applicant had described this as an unavoidable impact. He said it was only unavoidable if it was accepted that 619 beds were needed in the design that had been presented. He said this didn't mean that the requirements had been met to get the relief that was being requested

He said Mr. West would speak to the representations that there were no principal functions of the wetlands the applicants wanted to fill and eliminate the buffers for. He said these issues needed to be vetted by the Board, consulting with professionals.

Attorney Hogan noted again that the applicants had said it was intuitive that the wetland proposed to be filled was the one that would be filled. He said it was the biggest design constraint the applicants had, but said that was not the relevant standard of review.

He said Mr. West would also discuss the claim that there would be restoration of more buffer, and that the buffers on the site were disproportionate. He noted that there had been a presentation that the buffer for the 6,349 sf of wetland was disproportionate compared to the size of the wetland, but said this was what the Town had adopted. He



said this couldn't be revisited during the applicant review process.

He said the site in question was a typical piece of property in Durham, and said there was no special condition there that was unique and set it apart from other properties. He said what was unique was that the applicants were trying to put in 619 beds as part of a village design that required a large footprint, but said this was not a unique aspect of the property itself. He said it seemed that if there were fewer beds, less management would be needed there. He said the applicants had said they had to have this level of density, but said this was not relevant to what the ZBA needed to consider.

Mr. Starkey asked which abutters Attorney Hogan represented, and he provided a memo to the Board on this.

Mr. Starkey said that regarding the piece of land the applicants proposed to fill, regardless of the scale of the project they were trying to do, that land split the property in two, so the property was useless if it wasn't filled.

Attorney Hogan said many properties were that way, and would allow a corridor through a wetland to access land on the other side. But he said the idea here that was unique was filling the wetland and allowing construction on top of it. He said there was no question that the wetland proposed to be filled, as a design matter was in the middle of what they wanted to do. But he said that didn't mean there was a special condition of the land that justified a hardship.

Mr. Starkey said he agreed, but said if a corridor was created, this would also disrupt the wetland and there would be no way to go around it given the buffer, so the property would still be split in half. He said beyond the wetlands, the concern was that this property could be used in whole rather than in parts.

Attorney Hogan said those were the concerns that a property owner would sometimes have, and that would lead to a different density that could get approval. He said there were a number of reasonable design alternatives for this property that would allow a financial return. He said they wanted to go beyond what the regulations allowed in terms of the footprint and density, as a matter of their own business pursuit. He said that regarding the idea of putting a corridor through this central wetland, that wasn't what they were all talking about here.

Mr. Gottsacker said he thought he had heard Attorney Hogan say that the ZBA would need to hear what the Planning Board would be saying the following day.

Attorney Hogan said the Zoning Ordinance said residential structures could not be put in wetland buffers, which was why the applicants had come to the ZBA. He said because of the way the Ordinance was written, the issue of the nonresidential structures for the development had to go to the Planning Board for Conditional Use review. He said the ZBA needed to consider that in looking at the public interest and in terms of substantial

justice that there were a whole variety of wetland and buffer impacts proposed on this site, some of which were to be reviewed by the Planning Board. He said what the ZBA and the Planning Board were reviewing was related, and said it was only because of the way the Ordinance was written that they were separated.

Mr. Gottsacker said the ZBA had five criteria that it measured an application against, and that was it.

Attorney Hogan said being aware of what each Board was doing, when there was a similar issue of the wetlands and wetland buffer impacts, seemed to be an inherent part of a reasonable decision.

Ms. Davis asked Attorney Hogan if he was saying that there were more wetland buffer impacts than the ZBA was seeing.

Attorney Hogan reviewed in detail the wetland buffer issues that were a part of the Conditional Use permit before the Planning Board.

Wetland Scientist Mark West said he had reviewed the wetland function and wetland value assessments done by the applicants, as well as the dredge and fill application to NHDES. He also said he had read the Conservation Commission's findings, and had been at the site walk. He noted that fill for lot development was sometimes treated differently than driveway fill, because usable land was being created.

He noted that in the application, there wasn't a lot said about the 620 beds that were needed. He said two alternative layouts were provided, and he provided details on this. He said DES might ask for more information, and said some more mitigation might be needed.

Mr. West said one concern he had was impacts of density on the wetland buffer along the river and the wetlands associated with it, which were near steep slopes. He noted that there were two rare fish species in the river.

He said the three isolated wetlands were part of a property that had high strength habitat on a good portion of it, so he might look at these isolated wetlands as being a part of this, so that they needed to be looked at in the context of the forested landscape they were in. He noted that one of the isolated wetlands was avoided and the development was designed around it, although it still encroached on the buffer. He said that could be done with the wetland proposed to be filled.

Mr. West noted the issue raised of whether this one isolated wetland eliminated the development possibility because it separated the areas on either side. He said there perhaps could be a connection road, rather than development in that area, so that there could possibly be movement from one wildlife habitat to another. He spoke about secondary impacts to natural resources as a result of the development that was proposed, given the amount of clearing of land that would be done.

Mr. West said that regarding the mitigation proposed, there would not be a net gain of wetlands when the enhancement was done, as the applicants had claimed. He said while the enhancement would be aesthetically pleasing, the wetland function would not be dramatically increased by planting a few shrubs, etc. He said they wouldn't be gaining new wetland.

Regarding the proposed restoration of buffer, he said the applicants would be doing this by seeding and letting the areas restore themselves, but he said they were not planting trees. He also said the amount being restored was less than the amount being impacted.

Mr. West said that regarding the 17.9 acres of conservation land that was proposed, NHDES would only consider this to be mitigation if the land was a conservation easement. He said deed restrictions were treated differently, and he provided details on this.

He said stormwater was not considered by the NHDES Wetland Bureau to be a replacing function of a wetland, and he provided details on this. He said right now this was a forested property, and said the man-made system that was proposed would mimic the natural systems on the site but would not replace them.

Mr. Welsh asked Mr. West if he agreed that the wetland in question was only full of water from time to time.

Mr. West said it was a low functioning wetland, but had some wildlife habitat because the State had ranked the entire site so high because of the Oyster River and the undeveloped forest and wetland on it.

Mr. Welsh said that regarding the wildlife habitat issue, if the wetland was right in the middle and the site was developed, it didn't seem like it would provide much benefit to wildlife

Mr. West agreed.

Mr. Welsh said if it was surrounded by houses, the question was whether the Board should even consider that there was a wildlife habitat benefit.

Mr. West said this should still be considered, when considering the whole site.

Mr. Welsh asked Mr. West to speak about the fact that there were always secondary effects from a development.

Mr. West said in this case, there was the amount of forest canopy that would be removed. He said there were questions about possible introduction of invasive species, and whether they might impact the Oyster River. He also said discharge points from infiltration systems on steep slopes could create erosion. He said over time, these impacts could

affect the higher functioning wetlands.

Mr. Welsh said over time, land changed, and said a question was with the development, including the parking lots, whether stormwater flow would work as well as it did now on the site.

Mr. West spoke in some detail on this. He also said a question was whether there would be enough of a buffer with the intensity of development that was proposed to protect wildlife habitat on the site. He said it would change from a forested landscape to a site where there were patches of forest.

Mr. Welsh noted the Board was looking at these variances specifically.

There was discussion by Mr. Welsh about whether ZBA's decision in part was dependent on NHDES's decision regarding filling the wetland. Chair Woodburn noted that Durham's regulations were stricter than the State's regulations.

Mr. Welsh asked about the issue of a deed restriction vs. a conservation easement, and Mr. West said enforcement was not the same with a deed restriction. There was discussion.

Mr. Gottsacker said the site by right could be developed, so it wasn't fair to describe the site as it existed compared to building something on it.

Mr. West said he was comparing what was proposed to other uses that might not involve as much clearing.

Ms. Davis asked Mr. West if he believed that the wetland under discussion in complex D was a low functioning wetland, and that the only component he might question was the wildlife habitat function.

Mr. West said yes, because of the State designation. He said it was a low functioning wetland, noting that the soils had a perched water table.

Ms. Davis received clarification that Mr. West was saying that by filling this wetland, wildlife habitat was being impacted, and the development itself had impacts on the resources around it.

Chair Woodburn asked if there were any other members of the public who wished to speak against the application.

**Charles Cox, President of the Oyster River Watershed Association (ORWA)**, said he felt that the development would impact the water equality and quantity of the Oyster River, as well as wildlife habitat. Regarding the issue of secondary impacts, he said when there were 600-800 people out there, there would be a drastic effect.

He said he wasn't sure if this would be the best public good for the Town. He noted that the development would be only a few miles from the intake for the Town water supply. He said when the ORWA was first formed 10 years ago, this was certainly one of properties it was concerned about being developed.

Mr. Cox said the design that was proposed involved some sensitive planning along the river, but he said the ORWA questioned the size of the development, given the location. He said he couldn't believe that even with the best stormwater management plan, that when there were 100 year floods, the stormwater wouldn't go into the river and into the Town's water supply.

Mr. Welsh asked if the ORWA had seen a degradation in the water quality of the river over the last 10 years.

Mr. Cox said it was generally good, although noting that there were some tributaries in the watershed like Pettee Brook and College Brook that were very impacted. He said the more impervious surfaces there were, the more that water quality went down. He noted that the Association monitored water quality just below the Capstone site.

Chair Woodburn asked if there was anyone else to speak against the application, and there was no response. She then asked if the applicants would like to rebut.

Ms. Fiorillo said that in the State's Wildlife Action Plan, it had indicated that the larger area this property was a part of had a lot of forested habitat with a large river running through it. But she said when one focused down to the Capstone property itself, it didn't have a high habitat quality to it. She said a lot of the high habitat was associated with the river, and noted that the Natural Heritage Bureau and NH Fish and Game had identified some fish species that were threatened or of State concern. But she said fisheries biologists had looked at the project relative to those species, and concluded that because of the stormwater management plan, the river and the fish wouldn't be impacted.

She also noted the 250 ft shoreland buffer requirement from the State Shoreland Protection Act, as well as the performance standards in that act to protect water quality. She said the project would meet these performances standards.

Regarding the issue of buffer restoration plan, Ms. Fiorillo said the applicants did have a planting plan. She said there would be seeding, and provided details that the seeds were specific to wildlife habitat and conservation needs. She said no tree species were proposed because they were not always successful, but said these could be added if other boards felt this was appropriate.

Chair Woodburn and Ms. Fiorillo discussed the fact that the wetland buffer restoration would involve seeding and planting, and what the proportion of seeding to plantings would be. Chair Woodburn asked if there would be seeding underneath, and Ms. Fiorillo said yes. Chair Woodburn noted that the seeding would establish itself in the first year, and would then transition to scrub over time. She asked how long this would probably

take.

Ms. Fiorillo said there should be woody shrubs within 5-8 years.

Chair Woodburn asked what the grade of the slopes was.

Mr. Persechino said there would be erosion control matting on 2 to 1 slopes. He said the rationale was to limit the amount of disturbance in the buffer, to grade as far back as possible, and then to provide the erosion control. He said these would be key components of the construction process.

Regarding the 250 ft State shoreland setback, Ms. Fiorillo said it had been made clear that the project was in that zone. She said the performance standards for this had been met.

Mr. Starkely asked that the ZBA get a letter of representation from Attorney Hogan for the record.

Attorney Loughlin first noted that there had been a split vote on the Conservation Commission regarding the issue of filling the wetland. He then said that regarding the issue of a conservation easement, the applicants would find an independent organization to hold the easement. He also said that regarding Attorney Hogan's "sky is falling" scenario, they were all talking about 6,349 sf, which seemed like a pretty reasonable suggestion.

He suggested that Attorney Hogan should have practiced law before the Simplex case, when his arguments were the law, and it was much more difficult to obtain a variance because of the hardship criterion. He spoke in some detail on this, and read from the language from the ruling on the Simplex case. He said the test outlined there should be the test for this present application, and said under the test Attorney Hogan had put forward, he didn't know if anyone could ever do anything with a wetland. He said he didn't believe that was what the intent of the law was.

Attorney Hogan noted the written materials he would be submitting, and said it included a long list of case law on the value of wetlands, and the vital purposes they served. He said some aspect of the hardship test was whether there was something about this piece of land that was unique, so caused the Ordinance in this instance to be unreasonable. But he said it was only because of the vast scale, density and footprint of the development that the variance was needed.

Mr. Welsh asked Ms. Fiorillo what the likely secondary impacts would be.

Ms. Fiorillo first noted the court case that had determined that the NHDES Wetland Bureau could only look at the wetland impact with a dredge and fill permit, and not the upland impacts associated with the wetland footprint. She said the federal government, in order to be more in keeping with the Army Corps of Engineers, had developed the

secondary impacts checklist.

She said she wasn't sure how the secondary impacts checklist was presented by Mike Sievert of MJS Engineering, who had filed the dredge and fill permit with NHDES. But she said there were secondary impacts with all developments.

Mr. Welsh asked about impacts on the river.

Ms. Fiorillo said her professional opinion was that there would not be impacts on the river. She said they would not be impacting wetlands adjacent to the river, and noted that NH Fish and Game didn't think there would be impacts there. She said according to the performance standards of the Shoreland Protection Act, there would be no water quality impacts.

In answer to a question from Mr. Welsh, Ms. Fiorillo said there would be no impacts as long as things worked as planned. She also said society was approaching wetlands more and more with a hands off attitude, but said if people walked around them on trails and could enjoy them, they were more likely to appreciate them.

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

After brief discussion, Board members agreed to deliberate that evening.

Mr. Starkey read the names of those people that Attorney Hogan represented, and said none of them as far as he could see were abutters. It was noted that these people still had a right to be heard.

The Board agreed that the two variance issues would be looked at separately.

#### Filling of 6,956 square feet of wetlands within Wetlands Conservation Overlay District

Mr. Starkey said both sides had made very compelling arguments, but said that regarding the five variance criteria, his biggest concern wasn't the whole project, and was the use of the property when taking into account the wetland in the middle of the site. He said he wasn't looking at whether one wetland was more important than another.

He said from a use standpoint, any way that one tried to use this property would disturb wetland or wetland buffers, whether the whole piece was used or pockets of it were used. He said the only place where this might not happen was an area near Technology Drive. He said filling the wetland area in question made the property more usable for any development. Regarding adverse affects to wildlife from the development, he said any development of the property would impact that in some way, and said the only way to avoid this was not to develop it.

Mr. Welsh said the Statute in question was relative to wetlands, and there was a criterion

in it regarding wildlife habitat.

There was discussion.

Mr. Starkey said it was hard to see how one wouldn't disturb the wetland buffer in some way in developing this property. He said in general, he felt it would not be detrimental to the property to fill that one piece.

Ms. Davis said both lawyers had raised good points. She noted that Attorney Hogan had said there were alternative development options for the property that would result in fewer wetland impacts. But she said the ZBA was supposed to be evaluating the proposed project the applicants wanted, and the variance they wanted.

She said she felt the Board had information about wetland D, and whether there would be adverse impacts from removing it. She said she was keeping it simple in her mind that the question for the Board was whether it was ok to fill the wetland. She said she felt that because it was such a low functioning wetland, as both scientists had essentially agreed on, and it was not a groundwater recharge area, it could be sacrificed without having a negative impact on the watershed.

Mr. Gottsacker said Ms. Davis had made some excellent points. He also said he agreed with Chair Woodburn that the ZBA was not the Planning Board, so it was not its job to design the project.

Mr. Welsh said he was inclined to say the variance being requested was ok.

Chair Woodburn said the wetland in complex D was a low functioning wetland of approximately 6300 sf, which was a miniscule percentage of the wetlands on the property. She said this was what made the site different from other sites.

Mr. Welsh said the wetland in complex D was also unique in that it cut the site in half.

Chair Woodburn noted, regarding Attorney Hogan's comments on the oddness in the Town's regulations, that they were what they were.

Mr. Starkey said that in a lot of circumstances, the issue of whether granting a variance would decrease the value of surrounding properties was not something the Board could definitely determine. But he said he didn't think that filling the wetland in complex D would decrease the value of surrounding properties.

Regarding the public interest criterion, Mr. Starkey said this was a low functioning wetland, and said he didn't believe that removing trees and filling it would cause a disturbance.

Mr. Gottsacker said there would also be a net benefit, because they would be enhancing wetlands, and drainage in other areas on the property would be enhanced.



Mr. Starkey said there could be opposing arguments on this, and said he was just saying that filling this wetland would not be contrary to the public interest.

Ms. Davis noted that the applicant would be doing a good job of treating stormwater.

Chair Woodburn said the loss of that wetland would not be injurious to the public rights of others.

Regarding the spirit and intent of the Ordinance, Mr. Welsh said he had a bit of concern about this criterion. He noted that Mr. West had said the wetland did provide some wildlife habitat. But he said looking at the whole project, one could say the loss of this wetland would have a marginal impact on wildlife habitat given the overall plan, which included the land that would be protected in perpetuity.

Chair Woodburn noted concerning the land to be protected that much of it was undevelopable land anyway. There was discussion.

Mr. Gottsacker said a benefit of the protection was also that there would be a plan that went along with it, unless it was only a deed restriction.

There was discussion about whether the applicants would be able to find someone to do a conservation easement on that land.

Regarding the spirit and intent of the Ordinance criterion, Mr. Starkey said he thought it was to make sure that in disturbing the wetland, everything wouldn't go awry. He said it was a low functioning wetland, and didn't necessarily spread to other areas of the site.

There was discussion about whether the natural beauty and scenic qualities would be impacted by filling the wetland.

Mr. Welsh said if one was considering that criterion, or protection of wildlife habitat, the spirit and intent was not really met in filling the wetland.

Chair Woodburn said she thought filling the wetland had to be looked at in the context of the whole project, and Mr. Welsh agreed. Chair Woodburn said by designing the development the way they had, the applicants needed to take this one piece of wetland. She said they had done everything else they could to fit the design with the Ordinance, and in doing so had protected the natural beauty and wildlife on the site. She said that had to be balanced against filling that small piece of land.

Mr. Gottsacker read the language in the substantial justice criterion, and said it was met.

Other Board members agreed.

In regard to the hardship criterion, Chair Woodburn said the special conditions of the property were that there was a sliver of wetland in the middle of the property, which was

different than other properties, and which significantly limited the project.

Mr. Welsh said this was particularly so given the fact that there were wetlands on each side beyond this sliver of wetland,. He said if it was there by itself, it might not be the problem it was considered to be now.

Chair Woodburn said she definitely thought that relief could be granted without frustrating the purpose of the Ordinance.

Mr. Gottsacker said there was either a net gain, or no change.

Chair Woodburn summarized that all five variance criteria were met.

#### Wetland Buffer Variance

Mr. Gottsacker said other than the one building that was in the buffer, the other buildings just nicked the buffer. He said it was therefore hard to see that there would be much impact from this.

Ms. Davis noted that the Conservation Commission had already asked for concessions regarding some other residential buildings that were previously within the wetland buffer, and these were then moved.

Mr. Gottsacker said from a wetlands and buffering standpoint, the Conservation Commission probably took a closer look at things than the ZBA did, and had more expertise in this area. He said their letter was pretty clear in supporting the applicant, with one exception.

Chair Woodburn said she appreciated why the buildings had been placed where they were from an aesthetic point of view. She said it made total sense that they provided screening of the parking lots.

Mr. Gottsacker said some people who had spoken against the application had said the design was based on the applicants' business model. He said he thought this was simply background information the applicants had provided, which he had found it to be valuable.

Chair Woodburn said the ZBA's job was to discuss what was presented, and not to think about alternatives, and certainly not to think about possible different uses. She said the Board needed to judge the application on the merits of what had been presented.

There was discussion of the issue of the possible need for the Board to get vetting and more peer review of the application by experts. Chair Woodburn said while the Board did have the right to ask for this, she did not think the Board would be neglecting its job by not doing so.

Mr. Gottsacker said this was one of the best applications the Board had seen in terms of its completeness and the expertise behind it. He said this spoke to the quality of the effort going into the project.

Chair Woodburn said the rationale behind the incursion of the buildings into the wetland buffers made sense to her. She also said the incursion was small.

Ms. Davis said that regarding possible impacts on the Oyster River from pollutants, there would be a long travel path for stormwater traveling from the areas where the buffer incursions were. She provided details on this.

Mr. Gottsacker said he thought the basic problem was in terms of stormwater impacts from the rooftops.

Chair Woodburn said it was the basic disturbance of the land itself, and the removal of the forest canopy.

Mr. Gottsacker said he thought the biggest problem was from the roofs, but said that had been dealt with.

Mr. Starkey said a key concern was the one building completely in the buffer that was very close the edge of the wetland. But he said given the breadth of the project, there would be a minimal impact from these incursions into the wetland buffer. He also said the applicant had tried to stay away from the wetland that directly accessed the river.

Mr. Gottsacker suggested that the ZBA could point out its concern about that one building to the Planning Board.

There was discussion about whether that wetland would actually be disturbed.

Mr. Welsh said he was having trouble with the hardship criterion. He said with all the land on the site, the question was whether the applicant had to nick the wetland buffer borders with the development.

Mr. Gottsacker said it looked like the applicant had essentially designed the project around the wetland buffers

Chair Woodburn said she could see Mr. Welsh's point.

Mr. Gottsacker said he wasn't concerned about the nicks in the buffer. He said if there was a concern, it would be about that one building that was completely in the buffer, but noted that he wasn't personally concerned about it.

Mr. Starkey said it was explained that this building was put in to provide screening of the parking area.

Chair Woodburn read the hardship criterion language.

Mr. Welsh asked what the special condition was that created hardship. He said there was a property with wetlands, but said every property in Durham had wetlands.

Ms. Davis asked Mr. Welsh if he would be happy if there were some engineered protections for these buffered areas where the incursions were.

There was discussion that the ZBA had to look at this piece of property, and no others.

Mr. Welsh said that concerning the hardship criterion, it had to be determined that the property was special. He said having wetlands and wetland buffers was not so special.

Ms. Davis said because there were so many wetlands on the property, the applicant had created a compact design to accommodate the number of beds they wanted. She said it still came down to one cottage right on the edge of wetland complex A.

Mr. Welsh said that got into the issue of the number of beds the applicant wanted. He noted other applications where an applicant wanted something, and impacted a setback. Mr. Starkey said beyond a number of rooms the applicants wanted, there was a design concept here where they had tried to hide parking, and provide green space. He said this pointed to why the buildings were located where they were.

Chair Woodburn said this was the design concept the applicants had tried, in order to hide the parking, and keep units in an area where there was green space to look out on. She said this did tend to point to why the units that cut into the buffer were placed where they were.

Mr. Gottsacker said he was in favor of approving both variance requests, and calling out to the Planning Board to take a look at that building that was totally in the wetland buffer.

Mr. Welsh asked whether there was a way to say this was special because of the design concept.

Chair Woodburn said the Board couldn't say that it was special because of the design concept. She said the site either had special characteristics or didn't. But she noted the OEP handbook guidance on the hardship criterion. She said the one building was totally within the buffer, but asked whether if it wasn't there, and there were just the other small incursions and the applicant was trying to work with the land, Mr. Welsh would be inclined to say there was a hardship.

Ms. Davis said she was inclined to grant the variance despite those incursions because it looked like they were trying to squeeze them away from the buffer.

There was further discussion about the square footage of incursion being requested, and

the role the Planning Board could play concerning this.

Chair Woodburn read the definition of the hardship criterion again.

Mr. Gottsacker said in terms of the general purpose of the Ordinance, generally what the applicant was requesting met the Ordinance, although the one building perhaps didn't.

Ms. Davis noted that the Board had sometimes requested that care be taken when near a wetland.

Chair Woodburn said this had been done by the applicant for this project, with the stormwater management plan, re-vegetation, etc..

There was further discussion on the wording of the OEP document concerning hardship.

Chair Woodburn noted other projects the Board had heard where there were wetland buffer issues, and said it wasn't that they had not allowed a variance for some properties.

Mr. Welsh asked again how the Board got around the issue of the special conditions of the property, in terms of the hardship criterion.

Chair Woodburn said there was no fair and substantial relationship between the general purpose of the Ordinance and the specific restriction on the property.

Mr. Welsh agreed there was no relationship, but asked what the special conditions of the property were.

Chair Woodburn said it was the irregular shape of the wetland buffers on the site.

Mr. Starkey said it was the way the wetland buffers made it such an odd shaped area to be used on this particular property. There was further discussion on this.

***Sean Starkey MOVED to approve the petition submitted by Capstone Development Corporation, c/o Appledore Engineering Inc., Portsmouth, New Hampshire on behalf of William & Edna Woodward Rev Trust, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article XIII, Section 175-60 of the Zoning Ordinance to fill 6,956 square feet of wetlands within the Wetlands Conservation Overlay District and to place 6,720 square feet of residential buildings within the wetland setback. The property involved is shown on Tax Map 9, Lot 10-3, is located on Main Street/Technology Drive, and is in the Office Research/Light Industry Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED 4-1, with Carden Welsh voting against it.***

**III. Approval of Minutes – October 12, 2010 November 9, 2010**

The Board agreed to do the Minutes at the next meeting

**IV. Other Business**

A.

Chair Woodburn noted the Master Plan Visioning Forum that would be held on Friday.

She also noted that the ZBA needed another member.

B. Next Regular Meeting of the Board: **\*\*February 8, 2011**

**V. Adjournment**

*Sean Starkey MOVED to adjourn. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.*

Adjournment at 11:15 pm

Victoria Parmele, Minutes taer