

These minutes were approved at the April 12, 2011 meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, MARCH 8, 2011
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
MINUTES**

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

MEMBERS ABSENT: alternate Edmund Harvey

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

I. Approval of Agenda

Chair Woodburn noted that at the previous meeting, there had not been 5 voting members for Ms. Barrett's application, and the Board had offered the applicant the opportunity to wait until the next meeting. She said at the present meeting, there were still not 5 voting members, so this would need to be discussed.

Chair Woodburn said she would like to roll II B and II C into one discussion, noting that both involved requests for rehearing concerning the Capstone application.

Carden Welsh MOVED to combine II B and II C into one discussion Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Chair Woodburn said she would need to recuse herself concerning Agenda Items III D and E.

Sean Starkey MOVED to approve the Agenda as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

There was discussion on the issue of not having enough voting members for applications over the past few months. Mr. Gottsacker said with fewer board members recently, this had become a serious problem, resulting in a backlog of cases. He noted a reference to RSA 674:33 in the *ZBA Handbook of Local Officials* that related to this issue:

"Under RSA 674:33 three votes are necessary to change any administrative decision or to decide in favor of any matter legally before the board. If there is not a full board, even with alternates serving, the chairman could give the applicant the option of postponing the hearing until all members are present. If the applicant chooses to proceed with the hearing, s/he should be advised that a hearing before a 3 or 4 member board will not be grounds for a rehearing in the event the application is denied. The vote should be made on a motion to approve or disapprove the appeal and should incorporate all of the reasons for the decision. If a motion to

approve does not receive three votes, the application is not automatically denied. A further motion, with reasons for the denial, should be offered and another vote taken. The applicant and others should be able to understand the reasons for the decision even though they may not agree with it.

He said looking down the road, and seeing how long some cases had been continued, this would be problematic unless the ZBA had more members. He said according to the ZBA Handbook, the applicant could request 5 voting members, but only 3 votes were actually necessary on an application.

Chair Woodburn noted that in the Barrett case, the applicant has explicitly asked for the 5 members.

Mr. Starkey said the ZBA currently had only one alternate and said Chair Woodburn sometimes needed to recuse herself. He said he thought the Board should therefore strongly consider the matter Mr. Gottsacker had raised.

Mr. Gottsacker also noted that the grounds for a request for rehearing were narrow, so perhaps it was less important to have 5 members for those applications.

There was further discussion on how to proceed. Chair Woodburn said having made the offer of 5 members for the Barrett application, and also considering the fact that the applicant wasn't present right now to represent herself, she thought that if the ZBA moved forward regarding the rehearing application, this would leave the Board wide open for appeal.

Mr. Welsh said he therefore agreed that the Board should stay with not hearing the Barrett application that evening. After further discussion, Mr. Starkey and Mr. Gottsacker agreed as well to postpone that application.

Board members agreed that the application would be heard at the next meeting if there was a quorum, and there didn't necessarily need to be 5 voting members present.

Mr. Gottsacker said the key thing for the Barrett case was that it wasn't fair for the applicant to get an indefinite postponement.

II. Board Correspondence and/or Discussion

- A. **REQUEST FOR REHEARING** on an October 5, 2010 denial of a petition submitted by Nancy Barrett, Durham, New Hampshire for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a July 8, 2010 letter of Zoning Administrator, Thomas Johnson, regarding the definition of a structure. The property involved is shown on Tax Map 12, Lot 18-0, is located at 38 Colony Cove Road, and is in the Residence C Zoning District.

Continued

- B. **DISCUSSION OF POSSIBLE REGIONAL IMPACT FOR THE CAPSTONE PROJECT** as per RSA 36:54-36:58. 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.
- C. **REQUEST FOR REHEARING** regarding the ZBA Decision of January 25, 2011 to approve a petition submitted by Capstone Development Corporation for an **APPLICATION FOR VARIANCE**. The request is being made by the Law Office of Scott E. Hogan representing a group of nine Durham property owners who are appealing this decision. 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 noted that Items II B and C contained two Requests for Rehearing, because there were two sets of grounds for requesting the rehearing. She said one was that the Board didn't specifically address the issue of regional impact, and said it would be addressed now.

She said the Board first of all needed to talk about the issue of standing. She said before possibly talking about the issue of regional impact, they also needed to talk about whether they had erred in the way they had treated the request to consider regional impact in the first place. She said she then wanted the Board to talk about whether they had addressed the five variance criteria, noting that the appellant had said the Board hadn't done this.

Mr. Gottsacker read from page IV-2 of the October 2010 *ZBA Handbook for Local Officials*, regarding the issue of standing:

"In order to submit a motion for rehearing, a person must have "standing," i.e., the legal right to challenge the board's decision. Abutters, persons who own property close enough to the land in question to demonstrate that they are affected directly by the board's action (i.e., a person aggrieved), and the Board of Selectmen all have standing to appeal a ZBA decision."

He said this went on to say that "The motion should not be granted if the person requesting the rehearing is not impacted differently than the public at large".

Mr. Gottsacker then read from page IV-3 of the ZBA Handbook:

"Standing exists only when relevant factors lead the trier of fact to conclude that the Plaintiff has a sufficient interest in the outcome of the proposed zoning decision. Where the only adverse impact that may be felt by the Plaintiffs is that of increased competition with their businesses, there is not sufficient harm to entitle Plaintiffs' standing to appeal."

He noted Attorney Loughlin's response to the motion filed for the Request for Rehearing, which said the sole basis for the landlords' involvement in this case was to delay or eliminate competition from Capstone Development Corporation. Mr. Gottsacker said that at the EDC on June 28th, 2010, there had been a long discussion on housing in Durham, and at that meeting, Paul Berton was there representing the Durham Landlords Association. He quoted from the Minutes of that meeting :

"Mr. Berton asked if the EDC was ready to recommend to the council that they take their foot off the Capstone accelerator. Told by Mr. Elliott that he did not think so, that the EDC had not been asked to comment on the zoning change, and that the zoning change did not come from the EDC, Mr. Berton said "he was not asking the EDC for a yeah or nay, but asked if the EDC would recommend taking a

deep breath. He said we had talked about studies and getting people into a room. He said he thought it would be devastating to the downtown redevelopment.”

Mr. Gottsacker said Mr. Berton, who was representing the Durham Landlords, clearly was saying that Capstone was an economic threat, and noted again the wording on page IV-3 of the ZBA Handbook. He said another troubling thing was that there was no board in Durham that had the right or ability to rig the free market in favor of one party or another.

Chair Woodburn said the Board had evidence that Appledore Engineering had presented in terms of indicating where the applicants were located, and said most of the applicants were more than a half mile away. She said there was one applicant within 300 ft, across the street, and said other than that applicant, the others didn't have standing because they were not impacted more than anyone else in Town. She said the question then was whether the one abutter was impacted any more than anyone else by the wetland changes.

Mr. Gottsacker said that was the key issue, stating that it wasn't whether the development would impact the abutter, which was the Planning Board's domain, but whether the abutter was impacted by the two variances granted by the ZBA. He said those variances represented 18,000 sf on a 41 acre parcel. He said he didn't see how the variances would affect the abutter across the street.

There was discussion on the definition of abutter. Mr. Johnson said for the ZBA, the definition of abutter was contiguous properties or those located across the street.
There was discussion on drawing #1.

Mr. Gottsacker said it was pretty clear that the applicants for the Requests for Rehearing didn't have standing.

Mr. Starkey said the information Mr. Gottsacker had provided said it all, and said they clearly had noted that this was a concern of economic proportions to them, and that was why they were coming forward.

There was discussion about whether that assumption could be made, with Chair Woodburn stating that one member of the Durham Landlords Association had said something. But she said what the Board did know was that all but one landlord was physically removed from the property in question, and said this was a stronger footing to stand on.

Mr. Starkey said he had read the RSA concerning the issue of possible regional impact of a project of this size and said the issues addressed in the statute were water usage, transportation, etc. Chair Woodburn said the regional impact issue was a different question, which the Board could think about later. She said that regarding the issue of whether the applicants had standing, it didn't matter what the applicant was asking for with the request for rehearing.

There was further discussion on the standing question. Ms. Davis described a possible situation where a group of concerned citizens from all over Town were concerned about the wetlands being filled, etc, so filed a request for rehearing.

Chair Woodburn said they would need to have someone involved who was more impacted than

anyone else.

Ms. Davis noted that they all of the people in the group could be concerned about impacts to them because of impacts to the Town's water supply.

Mr. Gottsacker said if that impact was the same for everyone, then they would have no ground for standing because they would not be impacted differently than anybody else.

Mr. Welsh said there couldn't be continual requests for rehearing by the public.

Ms. Davis said she didn't think the Board could say the applicants couldn't do this, because they could be economically harmed by this.

Chair Woodburn said there was a court case that specifically addressed that kind of thing.

Mr. Welsh said they should stick with the standing issue, which had nothing to do with the economic issue.

Chair Woodburn said she thought they needed to vote on the standing issue. She also said if they wanted to, they could address one or two of the other issues.

She said she had done some homework on the regional impact issue. She said at the last meeting, it was brought up that the ZBA needed to consider this. She said the Board ended up saying that the reason they would consider the regional impact issue was so impacted parties could have proper notice. She said the reason the Board had gone forward as it had was that they felt that the parties already had proper notice because the Planning Board had already sent this notice, and they had also been noticed about the ZBA meeting last month. She said that was the Board's rationale for moving forward as it had. She said everyone was noticed.

Mr. Gottsacker said first there was the question of standing, then there was the issue of whether the Board made a legal mistake concerning the regional impact issue, and then there was the issue of whether there was new information. He said he didn't think there was any new information, and Chair Woodburn agreed.

He said the Strafford Regional Planning Commission got noticed, and chose not to respond. He said notice was provided by the Planning Board, and SRPC did respond to that. He said the Board also had a legal opinion from the Town attorney regarding this issue. He said he thought that issue therefore evaporated.

Mr. Starkey read the letter from the Town attorney into the public record.

"The purpose of the regional impact statute was to make sure that all parties who may be affected by a development receive notice of the proceedings regarding that development. In this case, both Lee and the Strafford County Regional Planning Commission were noticed regarding the variance application that the zoning board heard, because the planning board had earlier made a finding of regional impact. Since the purpose of the statute was fulfilled by that notice, the zoning board made no error in not again finding the project was one of regional impact.

Moreover, we question whether these landlords (only one of whom potentially has standing to object to the project at all and all of whom are doing so in an effort to prevent competition from moving into town) have any standing to argue about the regional impact issue.”

Chair Woodburn summarized again that there was the standing issue, the question of whether the Board erred in moving forward without declaring whether or not it was a project of regional impact, and the issue of how the Board addressed the five criteria.

Mr. Gottsacker said he had read what the attorney had said regarding how the Board addressed the five criteria, but said there was no new information on that.

Ms. Davis said she still felt the Board should agree that they believed there was or was not a regional impact from filling the wetland.

Mr. Starkey said he disagreed, based on the fact that the Town attorney had said that wasn't the ZBA's duty at that point.

Ms. Davis said she still thought there were reasons to get something on the record concerning that issue. There was discussion.

In reference to the question of possible regional impact, Chair Woodburn said the issues for the ZBA to look at were small areas of wetland fill in the middle of the site for wetlands that were not of high value, and buffer encroachments that were minor. She said neither of these decisions had any regional impact.

Ms. Davis said the Board had felt that granting the variances would not impact the Oyster River, and as such, would not have an impact on the region that drew water from the river.

Other Board members agreed, and also agreed that there was no need to vote on the regional impact issue. Mr. Gottsacker said there was also the letter from the Town attorney on this issue.

Chair Woodburn said from a variance standpoint, this project did not have regional impact. And she said that from a procedural aspect, they did not err in granting the variances.

There was further discussion, including about whether the Board even need to address whether they had erred in granting the variance.

Chair Woodburn said the record would show that the Board had considered everything. She stated again that they did not make a procedural error in not determining whether there was regional impact. She said the Board felt that the arguments made regarding the rehearing, in terms of whether the Board considered the five criteria correctly, showed no new information, and the Board felt that they did not err in that.

Mr. Gottsacker said there was no new information, and no legal errors.

Mr. Starkey MOVED that the ZBA deny the Request for Rehearing regarding the ZBA Decision

of January 25, 2011 to approve a petition submitted by Capstone Development Corporation for an Application for Variance. Mr. Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

III. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Metro PCS Massachusetts LLC, York, Maine, on behalf of Raymond Laroche, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XVIII, Section 175-103(A)(4) of the Zoning Ordinance to construct a ground-mounted personal wireless service facility to project higher than ten (10) feet above the average tree canopy height within a one hundred-fifty (150) foot perimeter of the mount. The property involved is shown on Tax Map 18, Lot 1-2, is located at 37-41 Bennett Road, and is in the Rural Zoning District.

Brian Grossman of Metro PSC spoke before the Board, along with other members of the project team. He explained that the company was continuing to build out its network, and with this application proposed to install a 120 ft mono-pine camouflage tower. He said the tower exceeded the average tree canopy by greater than 10 ft, so a variance from the height requirement was needed.

He provided some technical details on the project, and explained that having the tower would allow MetroPCS to provide enhanced 911 compliance. He noted that the tower facility would allow for collocation of transmission equipment on it, so it could be used by other carriers if the variance was approved. He said the project met all of the setback requirements.

Mr. Grossman reviewed how the variance criteria were met. He said there would be no diminution in property values as a result of granting the variance, stating that the setbacks were met, and that the tower would be camouflaged to look like a pine tree, would be located near existing overhead wires, and would utilize existing vegetation to screen it, so would blend into the area.

He said granting the variance would not be contrary to the public interest. He said the new tower would address a significant gap in current coverage, and would provide enhanced wireless services for both individuals and businesses, as well as enhanced 911 compliance. He said that regarding the overall impact of the project, the site would be **visited one or two times per month for maintenance**. He said there was a battery backup, but not a generator, and said there would be no noise pollution, fumes, trash, or water/wastewater issues at the site.

Mr. Grossman said there would be an unnecessary hardship if the variance was not granted, because of the significant gap in coverage in the area in question. He said without the variance, the applicant would be unable to address it. He said the proposed height was driven by terrain issues as well as the coverage gap, and said that based on MetroPCS's evaluation of the area, there were no other alternatives available that were feasible. He explained that other property owners were not interested in having a tower on their property, so without the currently proposed site, the company would be unable to address the gap in coverage.

He said the spirit of the Ordinance would be observed in granting the variance, stating that this would be a passive and not an invasive use. He noted again that the site would be visited infrequently, and would place a minimal burden on the environment and municipal services. He provided details on this. Mr. Grossman also explained that granting the variance would be consistent with the legislative goals of the federal Telecommunications Act of 1996.

Mr. Gottsacker said he had thought there were federal laws that prevented municipalities from legislating against towers.

Mr. Grossman said that was correct, but said the federal laws did allow local control in the application of appropriate siting guidelines. He said federal law would step in if these local controls effectively prohibited the provision of services, and spoke further on this. He also said the federal regulations said that as part of the ZBA's consideration, possible health effects could be discussed, but couldn't be used as a basis for the Board's decision.

Mr. Welsh asked for further details in the current gap in coverage, and Mr. Gottsacker asked for details on other towers MetroPCS had in the area.

The applicant's engineer showed the Board a graphic of the present coverage gap, and told Board members that MetroPCS had a facility on the UNH tower on Route 4, as well as another facility on a Town property.

Mr. Gottsacker noted that even with the proposed tower in place, there would still be some gap in coverage. There was discussion.

Chair Woodburn noted regarding the purpose and intent of the Personal Wireless Overlay provisions was that the Town wanted cell towers, but also wanted to eliminate or at least mitigate visual and environmental impacts. She said she was concerned that the proposed tower at that height might be visible on Bennett Road, over the tree canopy. She said she knew that area, and asked if any three dimensional studies had been done.

Mr. Grossman said areas of concern could be pointed out to them and they could have photographic simulations done. He said the applicant's information could then be resubmitted.

Chair Woodburn said one of the things that the Board needed to be assured of was that to the extent possible, they wouldn't be seeing the tower. She asked if other Board members thought this was a consideration.

Ms. Davis noted that Durham's zoning standards were pretty high in regard to visual development on the ground. She said it would be nice to know what this tower would look like.

Mr. Gottsacker noted Section 175-103 (A)(1)(a) and said what was proposed was double the average tree canopy.

Chair Woodburn noted that Bennett Road curved around, so there would be areas where the

tower would be seen. She said this begged the question of what the views would actually be. She said she realized that the tower would be located far from the road, but said there were some long views that looked that way.

Ms. Davis suggested that the Board could locate on a map where these views were.

Chair Woodburn asked what the potential environmental impacts were from the facility.

Mr. Grossman said the impacts would be minimal, noting that the back up batteries would be located in a heavy duty steel cabinet, behind a chain link fence in order to prevent access. He said the batteries were classified as non-hazardous, and provided details on this. He said there would be no smoke or pollution of any kind from the facility, and said it would not be located near a wetland.

He explained that as part of the overall siting of the facility, the applicant needed to meet national NEPA (National Environmental Policy Act) requirements, so typically a NEPA screening was done concerning possible endangered habitats, migratory birds, etc. He said a screening of historical resources was also done as part of the siting of the facility.

Mr. Welsh asked about possible noise issues, and was told there was no generator, and that it would be surprising if anyone would be able to hear anything from the facility. Mr. Grossman said MetroPCS typically didn't install generators and said, if needed, a portable generator would be brought to a site.

Mr. Johnson noted that the application indicated that there would be several other carriers on the tower in the future, and he said they might have generators. Mr. Grossman acknowledged this, and there was discussion.

Ms. Davis asked if it was the case that there were no other sites available that could accomplish what the applicant wanted, and that the tower couldn't go lower than 120 ft.

The applicant's representatives said that was correct, and provided details on how the coverage would be limited.

Chair Woodburn said that at a minimum, she would want the applicant to submit information on what people might see when the tower was up.

There was discussion about putting dots on the map to indicate the areas where the tower could be seen, and having the applicant put up balloons where the tower would be located so ZBA members would have a better idea of how visible the tower would be. There was discussion on whether there should be a site walk. It was suggested that something could be put in the Friday Update to indicate the balloon test was being done, so residents could drive through the corridor and observe where the tower would be.

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

Julian Smith, Packers Falls Road, said he didn't have a cell phone, but wished to speak in favor of the variance application. He said he realized that many citizens did have cell phones, and said he was speaking in favor of the application because of his regard for the La Roche family, and what they had done over many generations, protecting that farm and viewshed. He said he was also there to read an email from James Horrigan and Mary Clifton Horrigan, owners of a 90 acre parcel on Bennett Road they had owned since 1966, who said they had no objections to the cell tower.

Mr. Smith said he didn't think there would be much of a visual impact, noting that the nearest neighbors, on Cold Spring Road, wouldn't be able to see the cell tower because of the tree canopy. He said he had looked at the material in the packet, and also said he drove on Bennett Road often. He said the only place where one would be able to see this tower clearly would be from the top of the railroad bridge.

He said he thought the tower could provide coverage, and said he didn't think it would have much of an impact. He said he would mention the balloon test idea at the upcoming Planning Board meeting.

Mr. Starkey noted correspondence from **Neil Niman, 10 Cold Spring Road**, who said he was very much in favor of this variance. Mr. Niman said he had heard for years that the Town needed to do more to support family farms, and said if the LaRoches could lease some of their land so they could keep it as a working farm, this was in the public interest. Mr. Niman also said as wireless communications continued to be more and more important, it would be nice to have the problem of a living dead zone solved.

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

It was agreed that the balloon test would be done, and that the discussion on the application would continue at the next ZBA meeting.

- B. **PUBLIC HEARING** on a petition submitted by Denis O. Robinson, P.C., Portsmouth, New Hampshire, on behalf of Baytree Realty LLC, Durham, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a January 6, 2011, letter of Zoning Administrator, Thomas Johnson, regarding the construction of an additional parking area within the front yard setback without appropriate Site Plan and Conditional Use Permit approval through the Durham Planning Board. The property involved is shown on Tax Map 5, Lot 6-1, is located at 4 Old Landing Road, and is in the Courthouse Zoning District.

Denis Robinson spoke before the Board, and explained that the building on the property was currently an 8-unit multifamily dwelling, located in a multifamily dwelling and single family dwelling area, within the Courthouse district. He said the applicant was asking to be allowed an additional 10 parking spaces, and noted that there were currently 18 spaces there.

He said there were currently 21 residents who lived in the building, and said the maximum

number the Ordinance would allow was up to 29 spaces. But he said from a practical perspective, 24 spaces were the most one would see there. He reviewed the existing parking shown on the drawing that had been provided, as well as what was proposed.

Mr. Robinson said one reason Mr. Johnson had denied the application for a building permit to expand the parking area was that he had said that parking was not permitted within the frontyard setback. Mr. Robinson noted the wording in Section 175-45 (F) 2 of the Zoning Ordinance: "new parking shall be located to the side or rear of the building unless the PB allows parking between the front wall of the principal building and the front property line, as part of a site plan review application or conditional use application."

He said the key language there was "between the front wall of the principal building and the front property line", and said the question was whether the front wall of the building could be extended to the property lines on the side, or if one was just talking about the area in front of the building between the front of the building and the street itself. He said Mr. Johnson had interpreted this as being the area that extended to the property lines.

Mr. Robinson said he didn't think that was what the Ordinance intended to say, because when the Ordinance wanted to say it was extended to the width of the lot, it stated that, as could be seen in the parking provision for the Coe's Corner district, which included the wording "this restriction shall apply to the full width of the lot. He also said there was identical language to this in the parking provisions for the Central Business district and Professional Office district.

He said the first order of business was to address this, before addressing other issues raised in Mr. Johnson's letter, because how those other issues were framed was in the context of the interpretation of Section 175-45 (D) 2. He said it was important to understand the Board's interpretation of the Ordinance in light of the information he had presented.

There was discussion about what the front of the property was. Chair Woodburn noted that the building faced Old Landing Road. It was also noted that there was a driveway off of Old Landing Road as well as one off of Route 108. Mr. Johnson pointed out that the use of the lot was nonconforming.

Mr. Gottsacker said it would have helped if the Board had a site plan to look at.

Chair Woodburn agreed, and said not having a surveyed site plan to look at made things confusing for the Board. She said she could see the edge of the road but didn't know where the property line was, so therefore didn't know where the setbacks were. She said they were talking about where parking could go in relation to the front of the building, and said as part of this they needed to establish where the true front of the building was.

Mr. Gottsacker said it would be different if there was a lot of room on the site and surrounding area, in which case being off by a few feet wouldn't matter. He said it was almost like a survey was needed in this situation.

Chair Woodburn said she believed that what Mr. Robinson was saying was that the Ordinance

said parking had to be to the side or rear of the building, but even though the parking proposed was in front, he felt that the front area didn't extend to the side property lines because of the way the Ordinance provision was worded.

Mr. Robinson said the applicant wasn't proposing anything in the front, and was proposing the parking on the side, because that was where it was. He said he had discussed this with Mr. Johnson, after getting his letter.

Chair Woodburn said perhaps this was a moot point, if the ZBA discussed the issue of any enlargement of a nonconforming use needing a conditional use permit. She then explained that it was very helpful for Board members to get the information on an application prior to the meeting, so they could do their homework before hand and not get confused at the meeting.

Mr. Johnson noted that he had just received the packet that evening as well. He said the original drawing came in from the paving contractor, and said he had written a letter to the applicant assuming they would get a surveyed plot plan and would go to the Planning Board. But he said they had chosen instead to appeal his decision and submit a variance application.

In answer to a question from Mr. Starkey, Mr. Johnson said the front yard went all the way along Old Landing Road, or along Route 108. He said there possibly was parking proposed within one of the setbacks. He said there was also the parking lot and building nonconformance issue, and said he had thought this would have been settled by the Planning Board.

Mr. Robinson said this hadn't been scheduled yet before that Planning Board, and explained that he had come to the ZBA first because he needed clarification on what the Ordinance said.

Chair Woodburn said what was known was that parking was not allowed in the setback, and said the Board didn't have an accurate map to show whether or not the parking was actually in the setback. She also said that even though the Ordinance didn't seem to be consistent regarding the definition of the front versus the side, to her, the plane of the front of the building, extended out, described the front of the lot, and the side of the building was behind the front face of the building, on the side.

Mr. Welsh said the negative inference from the wording in the provision was interesting, but said he didn't think it was definitive. He noted that the Board had seen drafting errors in the Ordinance before. He said that was why it would be good to see the property, because he knew a front yard when he saw it.

Mr. Gottsacker agreed that he wanted to see the property, and also wanted to see a survey of it.

Chair Woodburn said by driving past the site, one could see how the building was oriented, and said having a plot plan would help everyone determine what the front was.

Mr. Starkey said he knew this building, and said the front door was to the side of Old Landing Road. But he said in terms of being able to define that the current parking area was dead even with the front of the building, he didn't know if that was necessarily the case. He said a site plan

would definitely help define things.

Mr. Gottsacker said the application should be continued so there could be a surveyed plan that contained meaningful numbers.

Mr. Robinson said that was a good idea, but said he would like to know what other Board members thought, regarding where the side of the building was.

Mr. Starkey said he agreed with Chair Woodburn regarding what was generally defined as the front yard.

Mr. Gottsacker said side yards didn't go out to the street, and Ms. Davis said that was how she envisioned this as well.

Chair Woodburn said it appeared that the issue in the second portion of the letter was quite clear, in that if the nonconforming use was being enlarged, the applicant needed to get approval from the Planning Board.

Mr. Robinson said he disagreed, stating that the non-conforming use would not be enlarged, because they weren't asking for additional units or residents, and were just asking to have additional parking. He said they weren't increasing the intensity of the use of the site.

There was discussion that the parking lot was considered to be a structure. Mr. Gottsacker read the definition of structure in the Zoning Ordinance.

Chair Woodburn said the parking area was expanding, so had to meet the setbacks, lot coverage standards, and other things that would put it in or out of conformance.

Mr. Johnson said a surface parking lot was considered by the Ordinance to be a use, although it was an accessory use. He said it would probably be nonconforming on this site in terms of setbacks, buffers, screening, etc.

Chair Woodburn said if the applicant went to the Planning Board, they would ensure that the property was in compliance concerning these things.

Mr. Robinson asked whether if the new parking spaces complied with all of these things, they would not be considered an expansion.

He was told that the additional parking spaces would still be considered an expansion. There was further discussion, and Mr. Robinson received clarification that a site plan application would need to be submitted to the Planning Board, and a variance from the ZBA might or might not be needed, depending on what the surveyed site plan showed.

There was further discussion.

Chair Woodburn said the Board couldn't vote on the Appeal of Administrative Decision because

they didn't have enough information.

Board members agreed to continue the application as well as the subsequent variance application to the next meeting.

Sean Starkey MOVED to continue the Public Hearing on a petition submitted by Denis O. Robinson, P.C., Portsmouth, New Hampshire, on behalf of Baytree Realty LLC, Durham, New Hampshire, for an Application for Appeal of Administrative Decision from a January 6, 2011, letter of Zoning Administrator Tom Johnson. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

- C. **PUBLIC HEARING** on a petition submitted by Denis O. Robinson, P.C., Portsmouth, New Hampshire, on behalf of Baytree Realty LLC, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-45, Article IX, Section 175-30(A&C) and Article IX, Section 175-28(D) of the Zoning Ordinance to construct an additional parking area within the front yard setback without appropriate Site Plan and Conditional Use Permit approval through the Durham Planning Board. The property involved is shown on Tax Map 5, Lot 6-1, is located at 4 Old Landing Road, and is in the Courthouse Zoning District.

Sean Starkey MOVED to continue the Public Hearing on a petition submitted by Denis O. Robinson, P.C., Portsmouth, New Hampshire, on behalf of Baytree Realty LLC, Durham, New Hampshire, for an Application for Variances from Article XII, Section 175-45, Article IX, Section 175-30(A&C) and Article IX, Section 175-28(D) of the Zoning Ordinance to construct an additional parking area within the front yard setback without appropriate Site Plan and Conditional Use Permit approval through the Durham Planning Board. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Break from 8:56 to 9:05 pm

- D. **PUBLIC HEARING** on a petition submitted by MJS Engineering, PC, Newmarket, New Hampshire, on behalf of Ionian Properties, LLC, Dover, New Hampshire, for an **APPLICATION FOR VARIANCE** from the Article XII, Section 175-41 F.7 of the Zoning Ordinance to permit the maximum height of a mixed use building to five stories. The property involved is shown on Tax Map 2, Lot 112-11, is located at 10 Pettee Brook Lane, and is in the Central Business District.

Ms. Davis served as Chair in place of Chair Woodburn, who had recused herself for this application.

Mr. Starkey noted that since Chair Woodburn had recused herself, there would be 4 people voting on this application. He said the Board was required to have at least 3 people for an application.

Mr. Sievert said he had set up the variance request with two parts to it. He said the first part was to review the design changes with respect to the previous variances that had been granted, noting there were 3 granted on May 12th 2010 and another granted on July 28th 2010. He said because some changes had been made since then, he wanted to know if the Board wanted to review them to see if

the project was still in compliance with the variances. He said perhaps he could instead go speak with Mr. Johnson about this.

Mr. Gottsacker suggested skipping this first part, and said if it came up in the discussion, the Board could talk about it.

Mr. Welsh said he was fine with Mr. Johnson speaking with Mr. Sievert about it.

Mr. Sievert briefly reviewed what had been approved previously by the ZBA. He said the current request was in regard to Article XII, Section 175:41(F)7 and was to add an additional story to the building. He said it was also in regard to the use within that story.

Mr. Gottsacker asked if the footprint had changed, and Mr. Sievert said it had and provided details on this, but said they were dealing more with a height change. He said throughout the architectural and structural design process, they had gone back and made some changes to the building, and had started to develop the plan. He said they had come up with an alternative for the upper level, and were going for creating a two story townhouse option out of the upper story. He said there was no definition of a story in the Zoning Ordinance.

He said they were before the ZBA because in adding the second level of the two story townhouse, this essentially added another story, according to the definition from the International Building Code, which measured it from the floor to the ceiling of a space.

He said the applicants were also before the ZBA for the use of that space.

He said there was also the issue involved that for a 4 story building, there needed to be two residential floors and two commercial floors.

He showed the Board the architectural renderings of the building, and said among other things they showed that what was proposed did not change the actual height of the building. He said the roof lines would be different, and would include more dormers, but the height would not be different, noting that the height was defined as the average grade to the middle of the roof.

There was discussion about the revised design. Mr. Gottsacker said the applicant was basically turning unproductive space on the top floor into productive space, without a change in height.

Mr. Johnson noted that the entrance to the two story units was on the fourth floor, with an interior stairway.

Mr. Sievert said the average height of the building was about 47.8-48 ft, and said the dormers didn't change the average height.

There was discussion on the ceiling heights of the various floors, with architect Nick Isaak noting that 7.6 ft was the minimum ceiling height. He said the living rooms in the two story units would have cathedral ceilings, and said the bedroom would look down into the space. He and Mr. Sievert explained that part of the idea with these units was to get more value out of the building structure, by inhabiting some of the volume up on the roof, and creating more dynamic

units.

It was noted that the largest size unit would have 5 bedrooms, allowing 5 people per unit, and there would be two bathrooms in each unit. It was noted that the most recent iteration was that the upper floor would have larger bedrooms, because potentially down the road they could become condominiums.

Mr. Welsh asked why these units were sometimes called townhouses in the application, and sometimes called condominiums.

Mr. Sievert said these units could possibly end up being units that were purchased by families or students.

Mr. Welsh said it was hard for him to believe that a family would want to live on the 4th floor of a student occupied building with stories down below. He asked if it was a concern that this building would be jammed full of students in a few years.

Mr. Sievert said it was a concern. But he said the Town had talked about getting more adults in the downtown area, and he said this building lent itself to this because it had parking on site. He said to even suggest that this potentially could be housing for a family, a professional couple, or an individual, there would have to be parking. He spoke further on possible designs for the units.

Mr. Gottsacker said what was proposed here was a more upgraded level of housing, with the cathedral ceilings and lofts.

Mr. Sievert agreed, and said the design change provided the ability to have more grand space in a unit to hopefully attract more of the adult population downtown. He said there was also the hope that there would be more retail stores downtown, and said they had to start somewhere. He said they were saying that this could be student housing or a combination of student and adult housing, but he said there was no restriction on this. He said condos would be available for rent or purchase, and said this would be dictated by the market.

He next reviewed the variance criteria and how they were met. He said there would be no decrease in the value of surrounding properties as a result of granting the variance. He said the purpose of the regulations of concern was to encourage new developments in the downtown area, and said this proposal to construct a mixed use building with onsite parking, commercial uses and residential uses met that goal.

Mr. Sievert said granting the variance would most likely increase the value of surrounding properties by establishing the potential development options for other properties in the Central Business district. He provided details on this in answer to a question from Mr. Welsh.

Mr. Sievert said granting the variance would not be contrary to the public interest, noting that the purpose of the CB district was to maintain the mixed use, pedestrian oriented character there while accommodating new development, redevelopment and enlargement of existing buildings. He also said that allowing the upper floor to offer a 2 story townhouse style option, and possible

condominium ownership of such a unit could encourage an alternative to student housing.

He said there would be a hardship if the variance was not granted, because no fair and substantial relationship existed between the general public purpose of the Ordinance provisions and the specific application of that provision to the property. He said the general public purpose was to encourage redevelopment of existing properties with increase density, etc. He said the stated general goals of the Town's regulations and redevelopment plan was to enhance retail and office space in order to generate a vibrant downtown, and included residential living opportunities whereby a mixture of students and families could live in order to provide a diverse audience to use the downtown.

Mr. Sievert said relief could be granted to this property without frustrating the purpose of the Ordinance because allowing the two story townhouse style units on the upper floor provided diversity in residential occupancy, as desired by the Town's development goals. He said the uniqueness of this property was that it had all of those aspects to it.

Mr. Welsh said he thought the reference to "ordinance" in the hardship criterion language referred to not allowing 5 stories, and not to whether redevelopment should be encouraged.

Mr. Sievert said he had been addressing the general purpose of the Central Business district.

Mr. Welsh said the general purpose of the Ordinance wasn't to encourage the redevelopment of existing properties, and Mr. Sievert said he thought it was. There was discussion.

Mr. Gottsaker said a general purpose of the Zoning Ordinance for that district was to encourage redevelopment.

Mr. Welsh said he thought that with the variance criteria, they were supposed to address the Zoning provision that the variance application was requesting relief from.

Mr. Sievert said what he was saying was that the Ordinance said 4 stories was allowed, in order to encourage the redevelopment of buildings downtown. He said the increased density played into that. He said the Ordinance didn't really address the use on that additional story being asked for because it didn't allow it.

Chair Davis asked Mr. Sievert if he thought the Ordinance restricted the buildings to 4 stories so the Town wouldn't get buildings that were too tall, and Mr. Sievert said yes. He said it was set up to provide the ability to redevelop, and said 4 stories was allowed as a bonus if a developer was willing to provide two levels of commercial space. He said the Ordinance also restricted that height of buildings to the north side of Main St.

Mr. Gottsacker said the applicant had figured out a way to create a 5th story within the same physical structure of the building, which was something that was not addressed in this Ordinance. He said to be safe, the applicant wanted to get a variance.

Mr. Starkey said the applicants wouldn't even need the variance if they stayed with the

mezzanine design, and said they were coming forth in order to have the option when they made their decision.

Mr. Gottsacker said the Zoning Ordinance talked about external height, not internal height.

Mr. Sievert spoke further on the hardship criterion and how it was met. He said the uniqueness of the property was the grade change, which made this building appear from one viewscape as a three story building, even with the expanded use into the attic. He also said the additional enhanced value of the property that made it unique was that it provided parking on site, which made the condo ownership of the upper residential units a greater possibility.

He said there would be 19-22 parking spaces, depending on the final design, and said this parking would be available for commercial and residential users. He said the building would hold about 68 residents, and noted that with the new design, that number could go down depending on who it was rented to, and whether units were purchased or rented. He said right now, 17 units were proposed

Mr. Johnson said there would also be 4 accessible surface parking spaces on Rosemary Lane. Mr. Sievert noted that there would be an additional space in that area. He explained how some of the handicap spaces had been moved, and noted that there would be an elevator in the building, which hadn't been the case before.

Mr. Sievert said the proposed use was a reasonable one, and he spoke further on this.

He said substantial justice would be done in granting the variance because condominium townhouse units created within the existing shell of the building could be available to the public, without substantially changing the look of the building envelope. He spoke further on how the revised design would fit with the goal of having a more diverse population downtown, which was where the Town was headed.

Mr. Sievert said granting the variance was not contrary to the spirit and intent of the Ordinance. He said the Ionian Properties proposal created the opportunity to provide what residents would like to see downtown, which included more residential diversity. He said the question was what the timing of that was, and also that if there wasn't a restriction on this, there wasn't a lot of control.

Mr. Welsh asked how the height of this building compared to the height of the MUB.

Mr. Sievert said he could get the answer on this, but said visually, it was quite a bit lower. He said the building would be about the same height as Matt Crape's building on Jenkin's Court, and noted that the full 8-9 ft of area on the 4th floor of that building was usable space.

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

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

and it PASSED unanimously 4-0.

Mr. Gottsacker said the Zoning Ordinance couldn't anticipate every possibility. He said he thought the provision was written to mean external height, so there weren't odd buildings of different heights. He said what the applicant had done was to take a novel approach, providing extra space within the existing height, and upgrading the housing stock downtown. He noted that the application said this would all be done within the existing shell, utilizing available space, and said he thought that summed it up well.

Mr. Welsh said from a visual perspective, he didn't think it was just the height of the building, and said it was also about architectural unity downtown. He said the design proposed didn't look like it fit in as well as the previous design. But he said he understood what Mr. Gottsacker was saying, in that the applicants had found a way to use the attic as something more than an attic.

He said the only thing he was grappling with was the Board saying it was ok to do 5 stories as long as it fit within a certain height, and as long as the 5th story was dormered, which he said looked worse than a 5story building without a dormer. But he said he wasn't an architect.

Mr. Gottsacker said he thought the look of a building was completely outside the domain of the ZBA.

Mr. Welsh said the ZBA dealt with things that might have been put in the Ordinance for architectural reasons. He said the Ordinance said 4 stories, and not 50 ft, and said he thought this was for architectural reasons.

Ms. Davis said what was proposed was reasonable.

Mr. Welsh asked what the Board would say if a 5 story building with a flat roof was proposed.

Mr. Starkey said the applicant was talking about existing architectural space, so the scenario Mr. Welsh had described was a different situation.

Mr. Gottsacker said the Board shouldn't be deciding based on future hypothetical situations

Mr. Starkey said the applicant might not be within the height limit with that 5 story scenario. He said based on what the applicants were asking for, they wanted to build into their existing attic space, but didn't want to add an additional, fifth floor. He said the applicants were saying they had the space, and wanted to use it.

Ms. Davis said it was the look and not just the height that needed to be considered.

Mr. Welsh said that was his point.

Ms. Davis said both designs were nice looking buildings.

There was discussion about what people were thinking when they created the height provisions

for the Central Business district.

Mr. Gottsacker asked if the Zoning Ordinance dictated architectural standards for facades. There was discussion, and he said that was the domain of the Planning Board.

Chair Davis reopened the public hearing.

Robbi Woodburn said the ordinance discussed massing, scale and character of buildings, and said that was what the heights were for. She said there had also been some public health reasons behind certain provisions. She said the height limit was 50 ft, for 4 stories, and said there were also certain setbacks for buildings.

She said in this instance, the applicants had made the suggestion that they could get more density within the context of the height, and that the massing and character would blend in with the other buildings around, but that this would entail calling it another story. She said the massing of the building was similar to that of other new buildings in Town, and said the applicants hadn't violated the height limit. She also said the 5th story was hidden in what would already have been there.

Mr. Gottsacker noted that Ms. Woodburn had been involved with the previous Master Plan process and the Zoning recommendations that came out of that.

Ms. Woodburn said the struggle at the time was that there were one story buildings downtown, and they realized it was hard to grow the tax base when there wasn't any footprint available there. She said the first step was Libby's after the previous building on that site burned down, and said what was built there looked better than what had been there before.

She said for a New England town, a 3-4 story building was fine, but said it was the way the building was modulated and massed that determined the character of the space being designed.

Mr. Sievert spoke further on the design, and noted that a previous building design was quite a bit bigger than this one.

Mr. Campbell asked Mr. Sievert if he anticipated going back to the Planning Board with the changes.

Mr. Sievert said he didn't know, but said he had told the Planning Board that if the applicants made some pretty major changes to the architectural design, they would return to show this to the Board.

Ms. Davis closed the public hearing.

Mr. Johnson noted that under Section 175-23 there were the criteria the Planning Board looked at. He said under C 2, external impacts for a Conditional Use Permit, that board would consider some of the things ZBA members had been talking about. He said they would also look at it in relationship to existing buildings and allowed uses nearby.

He noted that the new 4-5 story UNH Business School would be constructed across from this building, and said there also might be a hotel/conference center located across the other street. He said professionals and families might be involved with both of those structures, which related to the marketing of the 4th floor of the applicant's building.

Mr. Gottsacker said the Planning Board spoke at great length about the things the ZBA shouldn't be talking about.

Mr. Starkey went through the variance criteria. He said that concerning whether there would be a decrease in the value of surrounding properties as a result of granting the variance, the ZBA didn't know either way, but said the idea was to help increase the value of the downtown, based on the Zoning changes and bringing in a new building.

Mr. Gottsacker asked how one could say there wouldn't be a better building than what was there now.

Mr. Starkey said granting the variance would not be contrary to the public interest. He said the goal with the provisions in the Central Business district was to bring more density to the downtown area, and said what the applicants were asking for would increase the density inside the building.

There was discussion as to whether the applicants would plan to increase the density with this design.

Mr. Gottsacker said what was in the public interest was upgrading the housing stock by doing the building, and by providing some fairly high quality units with this revised design. He said he thought that was great.

Mr. Welsh said he agreed that what was proposed would create better housing than the student housing below.

Mr. Starkey said the Ordinance encouraged the redevelopment of the downtown, with both commercial and living space. He said the applicants were trying to use as much as they could of the building in order to bring more people to live downtown.

Ms. Davis said she favored this variance because the 5th story was only partial and was hidden within the attic.

Mr. Welsh asked what the special condition of the property was, and Mr. Gottsacker said the topography was one thing. Mr. Starkey agreed, and said it was also the size of the lot.

Mr. Gottsacker said the applicants had found a unique way to take advantage of space that would otherwise be dead space.

Mr. Starkey said the proposed use was a reasonable one, because the applicants were trying to

take existing space in the attic and make it more usable, and in a way that related to the purpose of the Ordinance.

He said in granting the variance, substantial justice would be done. He said they were doing all of this within the existing footprint and existing shell of the building. He said it was a creative design, and said there was very little difference between the two designs other than what was inside.

Mr. Welsh said substantial justice would be done in granting the variance because the design didn't look like a lot of extra mass. He said the character of the second design wasn't as nice, but said there were other benefits, in providing different kinds of living space.

Ms. Davis said a public benefit was creating a different kind of housing stock.

Mr. Starkey said granting the variance would not be contrary to the spirit and intent of the Ordinance, which was to bring more housing to the downtown area. He said the applicants were taking an already proposed building and trying to make better use of the space in it.

Mr. Gottsacker said the building was walkable to campus, and was doing exactly what the Town wanted.

Sean Starkey MOVED to approve a petition submitted by MJS Engineering, PC, Newmarket, New Hampshire, on behalf of Ionian Properties, LLC, Dover, New Hampshire, for an APPLICATION FOR VARIANCE from the Article XII, Section 175-41 F.7 of the Zoning Ordinance to permit the maximum height of a mixed use building to five stories, substantially as shown in the plans and depictions submitted with the application. The property involved is shown on Tax Map 2, Lot 112-11, is located at 10 Pettee Brook Lane, and is in the Central Business District. Carden Welsh SECONDED the motion, and it PASSED 4-0.

- E. PUBLIC HEARING** on a petition submitted by MJS Engineering, PC, Newmarket, New Hampshire, on behalf of Benjamin Bulkley, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IX and XII, Section 175-30 D.3C&D and Section 175-54 of the Zoning Ordinance to permit greater than a 15% footprint expansion and 30% volume expansion to a non-conforming structure and a reduction in the side setback of 50' to allow a setback of 41' (+/-). The property involved is shown on Tax Map 20, Lot 3-4, is located at 569 Bay Road, and is in the Residence Coastal District.

Chair Davis noted that Ms. Woodburn had recused herself from this application.

Mike Sievert of MJS Engineering spoke before the Board, and said the purpose of the project was to reconstruct the existing house, enhance it environmentally and drastically increase the efficiency of the building. He said it was built in the 1960s-1970s, and said the project would improve upon the overall nonconformity of the house.

He described the existing conditions on the site, noting that there was a 500 ft access road in, which was shared with other lots in the subdivision. He said the parcel contained about 2.9 acres,

and had about 517 ft of shoreline frontage on Great Bay. He noted that the entire lot with the exception of the beginning of the 50 ft wide access area was within the Shoreland Protection Overlay District. He said there was also a small freshwater wetland on the westerly boundary of the lot next to the shoreline.

Mr. Sievert said the property was developed as part of what was essentially a pork chop subdivision, and noted that there was a clubhouse that some of the properties off of the access way were able to use. He provided details on this. He said the property itself had a 4 bedroom single family residence, with a total footprint of approximately 2360 sf. He noted that there was a pool and deck area, and two small outbuildings on the property.

He said all of the existing improvements to the parcel violated the Shoreland Protection Overlay District setbacks, and said the only useable area free of setbacks on the parcel totaled approximately 4000 sf. He said this area was not contiguous, as shown in the site plan.

Mr. Sievert said the applicant proposed to demolish the existing house down to the foundation, and said the house would be rebuilt on the foundation walls, with the exception of the new garage. He said the basement floor would be replaced in order to eliminate a water problem, noting that there was currently a drainage issue because of problems with a retaining wall.

He said the house would be built beyond the minimum energy requirements, and noted that the architect was LEED certified.

He reviewed the variances being requested concerning the expansion in the footprint and the expansion in volume, also noting that as part of the project, everything shown in red on the plan would be removed. He said these structures were all located between the existing nonconforming structure and the reference line. He noted that the pool and deck were existing nonconforming structures on the property.

Mr. Sievert said the redevelopment would improve significantly upon the current structure encroachment into the Shoreland buffer. He said the proposal would also be an improvement to the property in providing the following improvements: additional buffer protection for the surface water; an improved highly efficient structure; removal of a mold condition in the existing structure; and a more usable and architecturally aesthetic structure

He provided details on the calculations of volume for the application, explaining among other things that an area on the lower level had been considered storage space and not habitable space by the architect. He said the Board could consider it as habitable space as part of the volume calculations, if it wanted. He said either way, the total volume numbers were close.

Mr. Sievert also explained that a building a code compliant structure as compared to the existing building would result in some volume changes, noting as an example that the height of the existing lower level didn't meet the code.

He went through the proposed floor plans to explain the volume and footprint increase. He noted that the new garage and its connection to the house explained all of the footprint increase, and

said this area would be placed away from the reference line. He said 250 sf of it went into a small 3000 sf of usable area on the lot. He noted that there was no way to fit the existing house into the usable area on the lot.

Mr. Sievert said the largest volume increase would come from the new upper level that would be created.

Mr. Starkey summarized that the volume increase would come from three things: the new upper level; the garage; and the increase in height of the first floor and lower level. He said the increase in footprint would come from the garage and the connection between it and the house.

Mr. Sievert provided details on how some ceiling heights had been adjusted to provide cathedral ceilings but said the overall height of the building had been kept down.

He said the structures to be removed included an above ground propane tank, a small accessory structure, a pool house to the south and the pool and deck. He said that total area, excluding the tank, was 2007 sf, while the proposed additional footprint square footage was 915 sf.

Mr. Sievert reviewed the variances being requested. He then went through how the criteria concerning the footprint and volume variance requests were met.

He said no decrease in the value of surrounding properties would be suffered as a result of granting the variance because the proposal included an improvement of the structure that brought it up to today's codes. He said the house and foundation would be built to today's green building standards, and he provided details on this. He said this structure would be built without further intrusion on the shoreline, and noted again that some existing structures near the shoreline would be removed. He said the upgrades would have a positive effect on surrounding property values.

Mr. Sievert said granting the variance would not be contrary to the public interest. He reviewed the purpose of the SPO district and said by removing the existing structures they were bettering the existing conditions on that district. He said the footprint increase would be away from the reference and toward the only small usable area on the lot.

He said granting the variance would not unduly conflict with the Ordinance's basis objectives, and would not threaten the public health, safety and welfare, because what was proposed would increase the buffer from the shoreland.

He said there would be a hardship in not granting the variance owing to special conditions of the property. He said this particular property couldn't be reasonably used in strict conformance with the Ordinance because the amount of usable area was so small, given the new Zoning laws. He provided details on this, and said the special condition of the property required that there be a variance granted in order to even reasonably use the property.

Mr. Sievert said the existing house was completely outside of the usable area, and said the septic system was the only structure that was mostly in the usable area, and in fact took up most of it. He said the proposal intended to use the existing building footprint to the maximum extent

possible while constructing an expansion away from the reference line and toward the small usable area on the lot. He said the proposal included the removal of all of the other structures. He said the variance requests more than met the hardship criteria.

Mr. Sievert said substantial justice would be done in granting the variances. He said the proposal provided a greater buffer between the developed area and the reference line than had been present for many years, and he noted the plan to remove the pool and its associate deck/patios and out buildings.

He also said granting the variance would allow the owner to rebuild an improved and substantially superior energy efficient house. He said granting the variance provided a benefit to the public in that that the proposal enhanced the purposes of the SPO district by improving the buffer and allowing reasonable use of the property, including a more energy efficient building. He noted that the deck along the front of the existing building would be removed, as part of the redevelopment.

Mr. Sievert said granting the variance would not be contrary to the spirit and intent of the Ordinance, which was to protect the public health, safety and welfare, and to conserve and protect the shoreline and upland resources. He said the property had been developed in its current state for many years, and said the proposal would actually lessen the encroachment into the shoreland buffer.

Mr. Sievert next reviewed how the criteria were met concerning the sideyard setback variance being requested, which related to the proposed location of the garage. He said there would be no decrease in the value of surrounding properties as a result of granting the variance because there would be a better house and it would be expanded away from the reference line.

He said granting the variance would not be contrary to the public interest. He said the subject parcel was developed prior to the current SPO district regulations, and said this proposal would be improving the setback distances between the reference line of Great Bay and the disturbed lot area, with the removal of the pool and associated patio, and the outbuildings.

Mr. Sievert said there would be a hardship in not granting the variance because given the purposes of the Zoning district and dimensional table, no fair and substantial relationship existed between the general public purpose of the Ordinance provision and the specific application of that provision to the property. He said granting the variance would still provide the full effect of the Ordinance provision by maintaining over 100 ft of separation distance between adjacent buildings.

He said the proposed use was reasonable because residential uses were allowed in this district, and the parcel was currently developed. He said the proposal provided flexibility to the owner, and was not establishing a greater, more intense use than any other neighboring property, while advancing the purposes of the Zoning District.

Mr. Sievert said substantial justice would be done in granting the variance because the proposal provided a greater buffer between the developed area and the reference line than had been

present for many years, as a result of the removal of the pool and associated buildings. He said it maintained an adequate separation distance between the adjacent structures, and allowed the owner to rebuild an improved and substantially superior energy efficient house.

He said granting the variance would therefore provide a benefit to the public in that the proposal enhanced the purpose of the Zoning Ordinance by improving the buffer, maintaining rural character, and allowing reasonable use of the property, including a more energy efficient building.

Mr. Sievert said granting the variance would not be contrary to the spirit and intent of the Ordinance. He said even with the variance granted to reduce the side setback, the development would protect water quality, preserve rural character and the scenic beauty of the coastal area, and would maintain a significant amount of open space, because there was still adequate separation distance between adjacent buildings. He said they weren't really changing the existing conditions that were out there except for the garage on the side.

Mr. Starkey said the way the proposed garage was set was aesthetically pleasing, but said he was having a hard time seeing why the garage couldn't be brought in to be within the 50 ft setback.

Mr. Sievert said the applicants were trying to utilize as much of the existing driveway as possible, and also didn't want to encroach further toward the reference line. He said it was a balancing act.

Mr. Johnson noted that if this were to be a detached garage, the applicant could go another 6 ft toward the property line.

Mr. Welsh said a key thing was the amount of impervious/pervious footprint. He said it would go from about 2400 sf to 3300 sf, but said some structures would also be removed from the property. He noted that some of those structures to be removed weren't impervious, and asked for details on the amount.

Mr. Sievert went through some of these details.

Mr. Carden asked if anything would be done with vegetation to mitigate runoff resulting from the larger amount of impervious surface.

Mr. Sievert said there wasn't anything specific other than the re-vegetation of portions of the lot. He provided details on this.

There was discussion. Mr. Johnson said including everything that was proposed on the site, the applicant would probably be at about 7-8% imperviousness, and noted that the maximum allowed was 20%.

Mr. Welsh said it looked like everything was moving away from the Bay.

Mr. Johnson noted that there would be review by DES of shoreland and wetland issues.

Mr. Sievert said the adjacent properties had larger footprints than the applicant's property, and provided details on this. He said the reason for the large volume % increase requested by the applicants was that the existing house was small and short. He said they also wanted to utilize attic space.

Ms. Davis asked how this new house would look from the water compared to other houses around that area.

Mr. Sievert provided details on this, and on the house itself.

Chair Davis asked if there would be gutters for the proposed house, and Mr. Sievert said yes.

Chair Davis asked if there were any members of the public who wished to speak in favor of the variance requests.

Mr. Starkey read two emails, one from **Tom Haas, 583 Bay Road**, said he had reviewed the plans and thought what was proposed would be a great improvement for the house and also the neighborhood.

Mr. Starkey He said the second email was from **Francois and Jochen Meissner, 571 Bay Road**, who spoke in favor of the variance requests, and noted that they preferred the attached garage to a separate one.

Jerry Gottsacker MOVED to close the public hearing. Carden Welsh SECONDED the motion, and it PASSED unanimously 4-0.

Mr. Starkey suggested that the Board address the footprint expansion and volume expansion together, and address the side setback variance separately. Board members agreed to do this.

There was discussion about whether Board members had any problems with the criteria concerning the footprint and volume variance requests. No problems were noted.

Mr. Welsh said there was a good tradeoff regarding the footprint expansion because other things that were impervious or semi-pervious were being removed from the site. He said this seemed to be acceptable. He said that in terms of the increase in mass/volume, the Board had heard from the neighbor next door and another neighbor that what was proposed would fit in well.

Chair Davis noted that this was already one of the smaller homes in the area, and said the expansion wouldn't make the home overwhelming compared to other houses around.

Mr. Welsh said the special conditions of the property were the closeness to the water.

Sean Starkey MOVED to approve a petition submitted by MJS Engineering, PC, Newmarket, New Hampshire, on behalf of Benjamin Bulkley, Durham, New Hampshire for an Application for Variance from Article IX and XII, Section 175-30 D.3C&D to permit greater than a 15%

footprint expansion and 30% volume expansion to a non-conforming structure, per the plans submitted with the application. The property involved is shown on Tax Map 20, Lot 3-4, is located at 569 Bay Road, and is in the Residence Coastal District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

There was next discussion on the third variance request, concerning the reduction in the sideyard setback.

Mr. Starkey said the variance request concerning the sideyard setback met all of the criteria. He said his one concern had been tempered by the fact that if the applicant had done a garage as an accessory structure, this could be within 35 ft of the setback.

Mr. Welsh said the frosting on the cake was that the neighbors welcomed the applicants' proposed expansion.

Sean Starkey MOVED to approve a petition submitted by MJS Engineering, PC, Newmarket, New Hampshire, on behalf of Benjamin Bulkley, Durham, New Hampshire for an Application for Variance from Article XII Section 175-54 of the Zoning Ordinance to permit a reduction in the side setback of 50' to allow a setback of 41' (+/-) as per the plans submitted with the application. The property involved is shown on Tax Map 20, Lot 3-4, is located at 569 Bay Road, and is in the Residence Coastal District. Jerry Gottsacker SECONDED and PASSED unanimously 5-0.

IV. Approval of Minutes –

December 14, 2010

Sean Starkey MOVED to approve the December 14, 2010 as submitted. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

January 25, 2011

Need page numbers on Minutes

Page 1, 3rd paragraph from bottom should read, "...Capstone project could have...."

Page 4, 5 paragraphs from bottom, "...110 employees hired to build the development..."

Page 5, 2nd paragraph from bottom, "Ms. Fiorello said it was quite a bit higher."

Page 8, bottom of page, last sentence, "...were planted with facultative wetland plants."

Page 10, Ms. Fiorello provided details on the actual numbers involved in terms of ..."

3rd paragraph from top, should read "He noted that a Commission member had..."

Page 11, under Substantial Justice, need to close the brackets.

Page 13, 1st paragraph, should read "...or approximately 44 % of the site."

Page 20, last paragraph, second line "...would impact the water quality and quantity..."

Sean Starkey MOVED to approve the January 25th 2011 Minutes as amended. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

V. Other Business

A. Need to new members

B. Next Regular Meeting of the Board: ****April 12, 2011**

VI. Adjournment

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

Adjournment at 11:22 pm

Victoria Parmele, Minutes taker

Jerry Gottsacker, Secretary