

These minutes were approved at the June 14, 2011 meeting.

**Durham Zoning Board
Tuesday April 12, 2011
Durham Town Hall - Council Chambers
7:00 P.M.
MINUTES**

MEMBERS PRESENT: Chair Robbi Woodburn; Vice Chair Ruth Davis; Secretary Sean Starkey; Jerry Gottsacker; Carden Welsh; alternate Edmund Harvey; alternate Kathy Bubar

MEMBERS ABSENT:

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

I. Approval of Agenda

Chair Woodburn called the meeting to order at 7:02 pm. She congratulated Mr. Harvey and Ms. Davis on being reappointed to the Board. She also noted that new alternate ZBA member Kathy Bubar had recently been appointed to her position by the Town Council and was present, but hadn't been sworn in yet. She explained that alternate members who were not voting members at a particular meeting didn't get to deliberate, but could participate in discussions at those meetings.

Chair Woodburn said Items III B and C had been removed from the Agenda.

Ms. Davis arrived at 7:05 pm.

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

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 was made at the March 8, 2011 meeting. The motion will be voted on by at least three board members at the April meeting. 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.

Chair Woodburn said she would recuse herself for this application, and said Mr. Harvey would serve as a voting member in her place.

Mr. Gottsacker said there were two standards that needed to be met concerning a request for rehearing, which was whether there was any new information, or if the ZBA had made a technical mistake in making its decision.

He noted that he had been sick when the original Appeal of Administrative Decision application was heard, but said he had watched the proceedings on TV and had read all of the materials. He said he did not see any new information now as compared to what was originally presented, and also said he didn't see that any technical errors had been made by the Board. He said the substance was whether the tent was a structure or not. He said Mr. Johnson had said it was a tent, and the Board had agreed.

Mr. Starkey said he had read through the material provided with the request for rehearing, and said he didn't see any new information that would lead him to believe that there should be a rehearing. He said the applicant was still saying there was an accessory shed, but he said when the tent was put up and permanently affixed, with no intent to move it, he believed it was a structure.

Chair Davis said an important part of the discussion at the original hearing on the appeal of administrative decision was separating the applicant's case from the Jackson's Landing tent application, based on the conditions at this site. She noted that Chair Woodburn had recused herself because she had been involved with the Jackson's Landing application. She said here, what the boats were being housed in were called structures. She said given the facts of this case, the boat enclosures fit the Zoning Ordinance definition of a structure.

Board members all agreed that no new information had been presented by the applicant, and no technical errors had been made by the Board in reaching their decision on the original Application of Administrative Decision.

Sean Starkey MOVED to deny the 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 was made at the March 8, 2011 meeting. The motion will be voted on by at least three board members at the April meeting. 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. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Harvey left the meeting at 7:14 pm.

III. Public Hearings

- A. **CONTINUED 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 was made at the March 8, 2011 meeting. 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.

Ricardo Sousa said he was present in place of Brian Grossman, who had made the first presentation to the ZBA on this application, and was unable to be present because of a medial emergency. He said the site acquisition agent and radio frequency engineer for MetroPCS were also present to answer questions.

He noted that the ZBA had requested a balloon test, and said this was done on April 8th and lasted about 2 hours. He reviewed in detail the pictures that were taken of the balloon from various locations during the balloon test, and said they almost represented a full radius of views around the proposed site.

There was discussion with the applicant about the specific design proposed for the mono-pine, and how many branches it would have. Mr. Johnson noted that the applicant had talked about five branch arms at the last meeting.

Mr. Sousa said there were actually more branches than that, and said the schematic provided to the Board didn't have as many branches as the one that would be there. He agreed that there were good and bad examples of mono-pines, and spoke further on this. It was noted that what was proposed was version five or six in terms of mono-pine technology.

Ms. Davis asked if it was known what the average canopy height was.

Mr. Sousa said the average height was approximately 60 ft, and said the top of the mono-pine was 120 ft. He said they needed that height to get the coverage that was needed. He explained that the structure and the site would accommodate four other installations, noting that the company had leased enough space so that at the base, there could be a fenced compound where there would be adequate space for everything. He said it was a prudent planning technique to accommodate more than one installation.

Mr. Johnson asked if antennas for police and fire emergency services would be accommodated on the structure, and Mr. Sousa said yes. Mr. Johnson noted that this would come up for Planning Board approval.

Ms. Davis asked if some communities chose to have a tower and not a mono-pole.

Mr. Sousa said yes, but said the decision to use a mono-pine was based on the aesthetic issues involved with this location. He noted that either a "mono-pine" or a flagpole design could be used to address aesthetic issues, but said the flagpole design was limiting in terms of how many facilities could be installed on it. He explained that the transmitting equipment was hidden inside the flagpole. He said it was more expensive to do a mono-pine, and also more difficult to maintain such a structure. But he said the company believed it had minimized visibility with this design..

Chair Woodburn reviewed the performance and design standards in the Zoning Ordinance for ground mounted facilities, and noted that the Ordinance said visual impacts were measured on the basis of: change in community scale, as exhibited in relative height,

mass or proportion of the personal wireless service facility within their proposed surroundings; new visible elements proposed on a contrasting background; different colors and textures proposed against a contrasting background; and use of materials that were foreign to the existing built environment. She also said the standards spoke about preservation of view corridors, vistas and setbacks, and eliminating or mitigating visual impacts.

Chair Woodburn said a question the Board would therefore need to discuss concerning this application was whether the mono-pine design would have a negative visual impact on the area. She also noted that the Ordinance said that in no case would a telecommunications structure be allowed in a designated conservation area. She said the proposed structure would be located next door to the Doe Farm, although not in it.

She said the Board had discussed the issue of possible environmental impacts from the structure at the previous meeting.

Mr. Sousa said there was a setback requirement in regard to the scenic road, and said the applicant met that requirement.

Ms. Davis asked what kind of coverage the applicant would get if the tower met the Ordinance requirement of a maximum of 10 ft above the tree canopy.

Mr. Sousa said in order to get the coverage needed, having a tower at that height could potentially result in needing more towers. He said most municipalities chose to have one tower in one location. He also said there were few towns that limited the height to being 10 ft above the tree line.

Mr. Gottsacker said perhaps this had been an arbitrary number put in the Ordinance, based on visual considerations and not the kind of technical issues Mr. Sousa has spoken about.

There was further discussion.

Chair Woodburn asked if there was anyone to speak in favor of the application.

Malcolm Chase, 260 Durham Point Road, said he had traveled many miles and seen many mono-pines, and said they could look very authentic. He also said his carrier was Sprint, which had a cell tower at the Transfer Station. He said there were currently still some dead spots in terms of coverage, and asked what having the new cell tower on the LaRoche property might mean in terms of improving his coverage.

Mr. Chase said he couldn't see any negatives with what the applicants proposed, and said he now didn't give the cell tower at the Transfer Station a second thought. He said he would like to speak in favor of this application on behalf of Mr. LaRoche, who had been a dedicated employee and citizen of the Town. He said if Mr. LaRoche gained from having the cell tower there, this was totally justified. Mr. Chase said that as a long time resident of Durham, he was in favor of granting the variance.

Mr. Sousa said this cell tower wouldn't immediately improve Sprint coverage, but said if it was built, all carriers including Sprint would be able to co-locate on it. He said this increased the likelihood that they would improve their coverage on his structure.

There were no members of the public who spoke against the application.

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

Mr. Starkey said visually, the mono-pine design that was proposed for the site was the best they were going to get. He said it wasn't viable to put in a shorter tower, if the goal was to get the maximum amount of coverage needed. He said he would not suggest using a flagpole on this site, or a regular tower, because it would be more intrusive upon the skyline. He also noted that over time, residents had forgotten about the flag pole type tower at the Transfer Station.

Ms. Davis said she personally was not a fan of mono-pine cell towers, and would rather see a metal tower. She said her understanding was that the Board was just addressing the height issue, but Chair Woodburn said the Ordinance also addressed aesthetic issues, possible visual impacts involved with telecommunication towers, and mitigation.

Mr. Gottsacker said the Ordinance called for the kind of tower the applicant had proposed.

Chair Woodburn said the Board needed to decide if what was proposed did or did not mesh in and was or was not artificial looking, and if the extent to which the applicant had gone to camouflage the tower balanced with the benefits to the community of having the tower.

Ms. Davis said she didn't mind the idea of a tower, but didn't like the mono-pine design. But she noted that the Ordinance did call for mitigation, and not just providing a plain tower. She discussed how the fact that the tower would stick up so high played into her concerns about the design itself.

Mr. Welsh said if the neighbors objected to what was proposed, they would be at the meeting. He said he agreed that mono-pine cell towers could be a bit bizarre looking, but said people seemed to get used to them.

Mr. Gottsacker said the design was perhaps a little unnatural, but was better than a pole. He said he hated the tower on Route 4.

Mr. Starkey said the applicant was trying to meet the Town's requirement that the facility be camouflaged.

Chair Woodburn said she was glad that the applicant had done the photos. She said the only photo where the mono-pine tower really showed up was #3, where there was an outline of deciduous trees with an evergreen tree sticking up above them. She said she realized it could be thought of as a bull pine. She said in the other photos, one could see the pine was in context with the others around it. She also said the design shown was better than others she had seen.

Mr. Starkey said he had seen mono-pines that looked worse than the design that was proposed.

Chair Woodburn said the vistas from Route 108 were pretty important.

Mr. Gottsacker said the tradeoff was having one tower or several shorter towers, and said he would rather have what the applicant proposed than several more towers.

There was further discussion on the photos.

Ms. Davis asked what kind of coverage there would be if the proposed mono-pine was 20 ft above the tree line.

Chair Woodburn re-opened the public hearing in order to speak further with Mr. Sousa.

Mr. Sousa said if the tower was only 20 ft above the tree line, there would have to be additional coverage, and he provided details on this. He also said there wouldn't be room for more than one additional carrier on a shorter tower.

Ms. Davis said in other words, if the Town wanted other carriers, there would need to be many more towers.

Mr. Sousa explained that telecommunications technology was migrating from providing just voice coverage to also providing wireless data coverage, and said MetroPCS and other carriers wanted to be able to accommodate these new technologies.

Mr. Gottsacker noted that these new technologies meant that COMCAST would have some competition, which was a good thing.

Ms. Davis said the people who wrote the telecommunications provisions in the Zoning Ordinance were concerned with height impacts from cell towers, but said by going shorter, more towers were needed. She also noted that there was a demand for more telecommunications facilities.

Mr. Sousa said MetroPCS's competitors were constantly improving their coverage.

Mr. Gottsacker spoke about wireless services currently being marketed, and said there would be a lot more in the future. He said the higher the tower was, the better the Town could support the carriers.

Mr. Sousa said in cities, there were existing tall structures that telecommunication facilities could be put on. But he said that wasn't the case in Durham for the most part, so new poles had to be built to accommodate the new wireless services.

Chair Woodburn closed the public hearing.

Board members next went through the variance criteria.

Mr. Gottsacker said there was no testimony one way or the other that granting the variance would reduce the value of surrounding properties.

He said granting the variance would be in the public interest, because it would improve the services provided by Metro PCS, would probably result in other carriers wanting to locate their facilities on the tower, would prepare the Town for the future of wireless internet access, and would limit the proliferation of towers in Town.

Ms. Davis said from what she had heard, going down in height would mean there would need to be more towers, so visually speaking, what was proposed was the lesser of two evils concerning the public interest.

There was discussion that concerning the hardship criterion, the special conditions here were the location needed for the cell tower, and the existing tree line. Mr. Starkey said what was proposed was reasonable because there was no other structure in the area that was tall enough to provide a place to put the telecommunication services.

Chair Woodburn said substantial justice would be done in granting the variance, based on what the Board had already discussed.

Mr. Starkey said granting the variance would not be contrary to the spirit and intent of the Ordinance because the Ordinance asked that if the telecommunication structure was taller than 10 ft above the tree line, it would be properly camouflaged so it didn't stick out as much as it could. He said the applicant was utilizing what was available to minimize the impact of the structure.

Chair Woodburn said there was a fine line involved here, because of the existing vista across an open field, and the fact that there were not many views of this type in the area.

Mr. Starkey pointed out that there weren't any members of the public who had spoken against the application, and said this could be a sign of the times.

Mr. Gottsacker said everyone who spoke at the public hearing had spoken in favor of the application.

Chair Woodburn said the spirit and intent of the Ordinance in this instance was in regard to the possible environmental impact and visual impact, and she said there was a visual impact.

Mr. Gottsacker said the balloon test had provided people with the opportunity to see what the tower would look like, and said even with this, no one came to speak in opposition.

Ms. Davis said there was only one photo that showed there would be a visual impact.

Chair Woodburn said this was a close one for her, but said she felt the benefits did outweigh the impact.

Mr. Johnson noted that the Planning Board would be reviewing a site plan application on the proposed tower, and said the visual impact issue would come up at that time as well.

Sean Starkey MOVED to approve 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, as shown on the submitted plan drawing A-1A, and dated 11/05/10 and using a visual design such as the one shown in the photographs submitted as part of the balloon test. 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. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

- B. CONTINUED 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.

Withdrawn

- C. CONTINUED 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.

Withdrawn

- D. PUBLIC HEARING** on a petition submitted by Richard Gsottschneider, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIII, Section 175-59 of the Zoning Ordinance for a wetland setback and a town road setback to construct a one-story, two bedroom apartment addition to an existing duplex, thus creating a multi-unit building. The property involved is shown on Tax Map 9, Lot 20-1, is located at 279 Mast Road, and is in the MUDOR Zoning District.

Mr. Gsottschneider said the proposed location for the addition was the only place it could be put, when also considering keeping the roof alignment the same, and allowing a tie in with the existing heating and water systems. He said the plan when the original building was built was to put the future addition here. He said the property was located in the MUDOR zone, and was on Town sewer but was not on Town water.

Concerning the wetland setback variance being requested, Mr. Gsottschneider noted that at the time the two unit building was constructed about 10 years ago, the wetland setback was 25 ft. He explained that he had made the building as narrow as possible, and said what was proposed was

barely over the front setback line and the wetland line, so there would be a minor impact.

He noted that he had been before the Board previously concerning the definition of a duplex, and Mr. Johnson had suggested that he get some clarification on this. He also said he was scheduled to go before the Planning Board the following day.

Ms. Davis asked if the land for the proposed addition sloped up to the wetland, or down to it.

Mr. Gsottschneider said it sloped slightly down. Asked by Ms. Davis if he would be putting a gutter on the roof to catch runoff, he said there would be a gravel strip underneath. He said the site had been re-graded three years ago, and said water ran down the driveway to the street, where there was a catch basin. He provided further details on this.

There was brief discussion about the fact that there was 90 sf of wetland encroachment proposed. Gsottschneider said he could move it away from the town setback, but said that would mean there would be more wetland encroachment. He said he had tried to locate the addition in the optimal spot for roof alignment, utility alignment, etc.

Malcolm Chase, Durham Point Road, noted that he was a septic installer and site contractor, and he emphasized the fact that the encroachments the applicant proposed were very small. He also said wetlands delineation was not a perfect science.

Mr. Gsottschneider said the so called wetland was a drainage ditch, and was dry as a bone most of the year.

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

The Board reviewed the variance criteria.

Chair Woodburn said there was no testimony one way or the other concerning a decrease in the value of surrounding properties as a result of granting the variances.

Mr. Gottsacker said granting the variances would not be contrary to the public interest because considering the margin or error, the proposed addition might not even be in the wetland setback. He said there would be an insignificant impact on the public interest

Mr. Welsh said there wouldn't be much visual impact, and said he didn't think the fact that it was being built within the front yard setback would bother anyone.

Chair Woodburn said the frontyard setback encroachment was extremely minimal.

The Board agreed that concerning the hardship criterion, 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. She also said the proposed use was a reasonable one.

Chair Woodburn said substantial justice would be done in granting the variance, stating that the proposal allowed the most energy efficient option to the built, and that the applicant would get the project he wanted with minimal impact on the rest of the community.

Mr. Welsh also said that the wetland impact was minimal, given the type of wetland, and the fact that drainage was away from it.

Board members said granting the variances would not be contrary to the spirit and intent of the Ordinance. Mr. Gottsacker said it came back to the size of the wetland encroachment, which was only 30 square feet.

Mr. Starkey said the 10 square foot frontyard setback exceedance hardly encroached on the road. He also said that given the standard deviation in measurement, the expansion might not even be in the wetland buffer.

Ms. Davis said the site had been graded to take water away from the wetlands. Mr. Welsh also noted that the wetland involved was not near a river.

Sean Starkey MOVED to approve a petition submitted by Richard Gsottschneider, Durham, New Hampshire for an Application for Variances from Article XII, Section 175-54 and Article XIII, Section 175-59 of the Zoning Ordinance for a wetland setback and a town road setback to construct a one-story, two bedroom apartment addition to an existing duplex, thus creating a multi-unit building, as per the plans submitted and dated March 7, 2011. The property involved is shown on Tax Map 9, Lot 20-1, is located at 279 Mast Road, and is in the MUDOR Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

III. Approval of Minutes

February 8, 2011

Page 1, remove Matt Savage from first page

Sean Starkey MOVED to approve the February 8, 2011 Minutes as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0-1, with Chair Woodburn abstaining because she has not been at the meeting.

March 8, 2011

Remove DRAFT from top of Minutes

Page 28, mid page, should say December 14, 2010.

Sean Starkey MOVED to approve the March 8, 2011 Minutes as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

The Board discussed whether to modify the system for reviewing Minutes.

Chair Woodburn said it was important to read the Minutes because this was a legal record that went into the defense of the Board's decisions.

Mr. Johnson provided a recent example of a court case where the Board's legal record had come into play.

Chair Woodburn said the Minutes had to be vetted by everyone, in order to be sure that the Minutes were as correct as possible.

Mr. Gottsacker noted that the ZBA was a quasi-judicial board.

There was further discussion, including whether the Minutes could be sent electronically to all Board members before getting them in their packets. It was agreed to keep the system as it was.

V. Other Business

- A. There was discussion on the upcoming NH OEP conference.

There was discussion on the Superior Court Case involving Pine Ledge Holdings. Chair Woodburn noted that the applicant had gone to the Planning Board, and gotten a Conditional Use Permit for 8 parking spaces, but then continued with his legal action against the ZBA. She said because of that, the ZBA's attorney felt, after reviewing the record, that it was advisable to ask the judge to find in favor of the Town, but also to request that the applicant pay the legal fees.

Mr. Johnson said there was no decision yet.

Chair Woodburn said it was a very interesting development, because the ZBA had never asked for this before. She and Mr. Gottsacker spoke highly of the legal work done by the Board's attorney.

- B. Next Regular Meeting of the Board: **May 10, 2011

VI. Adjournment

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

Adjournment 8:53 pm.

Victoria Parmele, Minutes taker

Sean Starkey, Secretary