These minutes were approved at the April 24, 2013 meeting.

DURHAM PLANNING BOARD
Wednesday, March 27, 2013 at 7:00 p.m.
Town Council Chambers, Durham Town Hall
MINUTES

MEMBERS PRESENT: Peter Wolfe, Chair
Andrew Corrow, Secretary
Richard Ozenich
Lorne Parnell
Councilor Jim Lawson, Council Representative to the Planning Board
David Williams, alternate
Councilor Julian Smith, alternate Council Representative to the Planning Board

MEMBERS ABSENT: Richard Kelley, Vice Chair
Bill McGowan
Wayne Lewis, alternate

I. Call to Order

Chair Wolfe called the meeting to order at 7:03 pm.

II. Roll Call

The roll call was taken.

III. Seating of Alternates

Chair Wolfe said Mr. Williams would sit in for Mr. McGowan. He noted that Mr. Kelley and Mr. Lewis would not be at the meeting.

IV. Approval of Agenda

Councilor Lawson MOVED to approve the Agenda as submitted. Lorne Parnell SECONDED the motion, and it PASSED unanimously 6-0.

V. Town Planner Report

Mr. Behrendt said the proposed designs for the new Town Hall across the street had been received. He noted that architect Art Guadano had revised the floor plans and proposed elevations for all sides of the building, working with Town staff. He said there were two different designs, one that was more modern and one that was more traditional, and said they would be presented to the HDC next week. He said the designs would be available on the Town website.

VI. Public Comments

Councilor Robin Mower, Faculty Road, said she would like speak about the wetlands buffers along Pettee Brook and College Brook, in reference to the 17 Madbury Road site. She said the proposal to develop the site might be a once-in-a-lifetime opportunity to make significant improvements that would benefit the Town as a whole. She said many people were mindful of them, and she noted that Administrator Selig had enumerated a long list of them at a meeting earlier that day.

She said key among the actions the Board could make, from the standpoint of the Conservation Commission and Town Engineer was to take advantage of this opportunity to improve water quality in the Pettee Brook. She said water quality depended a great deal on the functioning of buffers that provided a free, natural function of filtering pollutants, but said both the College and the Pettee brooks had become seriously impaired through sedimentation and pollutants associated with development.

Councilor Mower suggested that the Town's stormwater regulations would make a huge difference in the water quality of Pettee and College brooks, but she noted that stormwater management was only part of the picture. She said it would help reduce and retard runoff, but would not *addr*ess the issue of nutrient loading.

She quoted from Town Engineer Dave Cedarholm in a Council Communication, "An overabundance of nutrients, principally nitrogen, has been identified as adversely impacting the water quality and natural habitat of the Great Bay Estuary to the point at which NHDES has listed the Great Bay as an impaired water body." Councilor Mower said it was this overabundance of nutrients that put the Town, along with other Seacoast communities, under the eye of the federal Environmental Protection Agency.

She said the Town was on the hook for this nutrient pollution, and said that meant everyone. She said College and Pettee brooks both lead to the Oyster River, which then mingled with the Great Bay. She said Durham and other Seacoast communities had to comply with EPA discharge permit requirements that could cost the Town millions of dollars if it were only to focus on improving the wastewater treatment facility.

Councilor Mower noted that the Town, in conjunction with UNH, which was its water/ wastewater system partner, had embarked upon a visionary plan to address this nutrient-loading problem through the Oyster River Integrated Watershed Management Plan. She said efforts to date had positioned the Town of Durham extremely well in the eyes of NHDES and EPA, but said this plan came at a cost.

She said to date, UNH and Durham had together committed approximately $210,000 to develop this plan, and would probably commit another $180,000 in mid-year. She said this was an indication that the Town had already made and would continue to make a significant investment in meeting its federal obligations through this Integrated Management Plan. She said it was important to note that the Plan focused on the College and Pettee brooks as direct contributors to the Oyster River.

Councilor Mower said the proposal for the 17 Madbury Road site raised questions worth careful

consideration, one of which was how these downtown brooks should be treated in the future. She said they could become assets, as scenic attractions rather than eyesores, and free water treatments rather than polluters that added to treatment costs and degraded the Great Bay.

She said another question was they could help buffers function as they were meant to. She noted that the stretch of Pettee Brook between Garrison Avenue and Madbury Road was the only portion of Pettee Brook that retained buffers. She said the rest of the brook had been confined and therefore did not offer the benefits of an intact stream. She said as the Connecticut River Joint Commission's brochure titled "Urban Buffers" noted, in arguing for wide and vegetated buffers, "the longer runoff is detained in the buffer before entering the stream, the better."

Councilor Mower asked who was going to foot the bill for continued degradation. She said there was now a chance to require that those who contributed to water quality impairment shared the cost with the Town, by taking the responsible step of protecting buffers that provided free water treatment.

She said the project at 10 Pettee Brook Lane provided a precedent for protecting the wetland buffers. She said as part of that project, a "structure" (in this case, a parking lot) was removed from within the buffer, and she said by the time the project was finished, there would be a rain garden in its place. She said that rain garden would enhance the functioning of the buffer, which a "structure" would not do.

Councilor Mower pointed out that the Town had a Wetland Conservation Overlay District ordinance that intended to protect the wetlands by setting limits on what could occur within its buffers. She said the purpose of the ordinance was multi-fold, but said in shorthand, its purpose was to protect water quality, preserve flood storage capacity, protect habitats and vegetation, maintain stream flow, and conserve natural beauty and scenic quality. She said except for the last purpose, these were functional values, not aesthetic, and said they translated into economic value to the community. She said they should not be given away.

Councilor Mower asked that the Planning Board require applicants who came before it with the potential to negatively impact the College or Pettee Brook to respect their wetland buffers. She said as part of the process, these applications should be subject to the Conditional Use Permit process in its entirety, including a formal review by the Conservation Commission.

She asked the Board to discourage applicants from seeking variances to the Wetland Conservation Protection Overlay regarding these buffers, stating that this hamstrung the Town in what was intended to be a constructive negotiation with property owners who sought to use assets that rightfully belonged to the community, and also hamstrung the Town in its costly efforts to comply with federal regulations.

Councilor Mower said most of all, disregarding the required wetland buffers on either of these two downtown brooks would disregard their benefit to the community for years to come. She said that would be a shame.

VII. Public Hearing Application for Subdivision and Conditional Use Permit. 13 Longmarsh Road. Two-lot subdivision and filling a portion of a wetland for a driveway. **Kelly Cullen** (applicant), Adam Fogg, Atlantic Survey (surveyor). Tax Map 15, Lot 23-0, Residence B

Zoning District.

Ms. Cullen said she proposed to subdivide her 3.77 acre lot into two lots, and also said she proposed to do a wetland crossing in order to be able to put in a driveway. She noted that the minimum lot size required for the RB district was 40,000 sf, and said both lots would be greater than this.
Chair Wolfe noted that there had been a site walk.

David Williams MOVED to open the Public Hearing. Andy Corrow SECONDED the motion, and it PASSED unanimously 6-0.

Councilor Robin Mower, Faculty Road, confirmed that the Conservation Commission had sent a notice regarding the application, stating that it was fine with what was proposed.

Ms. Cullen said DES as well as the Conservation Commission had approved the request for the wetland crossing.

Vince Macri, 9 Timberbrook Lane, said he was one of Ms. Cullen's closest neighbors, and said he had no objection at all to the proposed subdivision.

David Williams MOVED to close the Public Hearing. SECONDED the motion, and it PASSED unanimously 6-0.

Chair Wolfe noted the conditions recommended by Mr. Behrendt.

1) Plan modifications. The plan drawings are to be modified as follows:
   a) Add approval block of drawing for signature of Planning Department. It should read: "Final Approval by Durham Planning Board. Certified by _____ Date _____"

   b) Show details, including plan profile, and section, as appropriate, of wetland crossing for the driveway once approved by NHDES

   c) On wetland crossing details, add straw bales in front of the proposed silt fence to better control sediment runoff from the construction area during the construction phase of the driveway

   d) Change wetland buffer/setback for building to 75 feet (from 100 feet)

   e) Clarify the wetland boundary (Presently only poorly and very poorly drained soils are shown).

2) Plan notes. Add the following notes (or equivalent) to the plan drawings:
   a) "For more information about this subdivision, or to see the complete plan set, contact the Town of Durham Planning Department, 15 Newmarket Road, Durham, NH 03824. (603) 868-8064."

   b) "All utilities must be underground, including utilities extended onto the site from existing poles near the site."

   c) "Please minimize salt de-icer use on the driveway serving new lot 15-23-1 in order to minimize negative impacts on the adjacent wetlands."

3)# Driveway. Obtain driveway access permit from the Durham Department of Public Works.

4) Signature. Sign this notice at the bottom.

5) Boundary markers. Set boundary markers (actually physically set in place in the field) and note on plans ("marker set" or equivalent) and submit a monumentation certificate.

6) Other permits. All required state and federal permits - including State approval of the subdivision and the wetland crossing - must be obtained with copies of permits or confirmation of approvals delivered to the Planning Department.

7) Final drawings. The following complete sets of final approved drawings shall be submitted for signature (except the electronic version) by the Town: (a) one large set of mylars; (b) two large sets of black line drawings; (c) one set of 11"x17" drawings; plus (d) one electronic version by pdf or CD. Each individual sheet in every set of drawings must be stamped and signed by the land surveyor responsible for the plans.

Mr. Parnell noted condition 1.c concerning straw bales, and asked if these details would become part of the approval.

Mr. Behrendt said these details had been approved by DES, and there was discussion that the final plans should show the details of the wetland crossing. Mr. Behrendt said condition 1.b should cover this.

Mr. Parnell said condition 2.c concerning salt de-icer had to do with future events, and was not part of the application. He noted that there was no description of the driveway in the plans.

Mr. Behrendt said the driveway would be put in substantially as shown, and said if it was moved a bit from what was shown in the plan, he didn't think this would need to come back to the Planning Board. He said the recommendation concerning salt de-icer should go on the plan, and said they would be relying in good faith that the applicant would follow the recommendation.

Mr. Williams noted that the applicant's property sloped down to the water body that paralleled Rte. 108, and said he wondered if the Planning Board should therefore be more explicit about the de-icing of the driveway.

After discussion about a possible way to stipulate this, Mr. Williams said he accepted the good faith efforts by the owner, but again suggested the need for clearer guidance on this.

Chair Wolfe confirmed that the recommended conditions were acceptable to the Board.

David Williams MOVED to approve an Application for Subdivision submitted by Kelly Cullen for a two-lot subdivision for the property located at 13 Longmarsh Road, Tax Map 15, Lot 23-0, in the Residence B Zoning District. Richard Ozenich SECONDED the motion, and it PASSED unanimously 6-0.

The Board went through the Conditional Use checklist, concerning the proposed driveway to be located within wetland buffer. They agreed that there were no issues, and that the conditions of approval were met.

David Williams MOVED to approve an Application for Conditional Use Permit submitted by Kelly Cullen for the filling a portion of a wetland for a driveway, for the property located at 13 Longmarsh Road, Tax Map 15, Lot 23-0, in the Residence B Zoning District. Councilor Jim Lawson SECONDED the motion, and it PASSED unanimously 6-0.

VIII. Application submitted by Michael Cleary to Construct a Dock per Article XIV, Section 175-71(B)(6&8) of the Durham Zoning Ordinance, for the property located at 26 Cedar Point Road, Tax Map 12, Lot 1-15 in the Residence C Zoning District.

Mr. Cleary said the construction project had been approved by DES and the Army Corps of Engineers, also noting that the Governor's office was required to sign off on it and had done so. He explained that he was applying for a building permit for the construction of the dock, and that Durham's Zoning Ordinance required the advice and consent of the Conservation Commission on what was proposed. He said the Commission had done this, and had submitted an email for the Planning Board.

He said the Ordinance also required a review by the Planning Board to determine if appropriate erosion control would be used and that disturbed soils would be restored.

Mr. Behrendt said the application was in order.

Mr. Parnell asked why this project was coming to the Planning Board to review, stating that they hadn't seen one like it for some time.

Mr. Behrendt said the Zoning Ordinance required an approval by the Planning Board prior to getting a building permit. He said it was a simple process, involving no fee or public hearing. He said the Conservation Commission had reviewed the project and said it met their criteria.

There was discussion. Chair Wolfe said he thought it was useful for the Conservation Commission to review a project like this, but said he wasn't sure what the Planning Board would have to add. Councilor Lawson agreed. Mr. Ozenich said the Planning Board had in fact previously reviewed some projects like this.

Mr. Behrendt said if the Planning Board thought the current process could be changed, it could add this to the list of possible Zoning changes to make.

Councilor Lawson recommended thinking this through to determine what process would work best.

Richard Ozenich MOVED to approve an Application submitted by Michael Cleary to Construct a Dock per Article XIV, Section 175-71(B)(6&8) of the Durham Zoning Ordinance, for the property located at 26 Cedar Point Road, Tax Map 12, Lot 1-15 in the Residence C Zoning District. Councilor Lawson SECONDED the motion, and it PASSED unanimously 6-0.

Mr. Cleary noted that some other towns in NH, such as Newcastle had considered the issue of

who had the authority to review a project like this. He spoke in some detail on this.

IX. Application for Site Plan Review and Conditional Use Permit submitted by Golden Goose Properties LLC c/o Barrett Billotta (applicant) for the creation of an additional 3-bedroom apartment within the basement of an apartment building at 56 Madbury Road, Tax Map 3, Lot 1-11A, in the Residence A Zoning District.

Mr. Behrendt said the application was complete, only noting that a sign about the applications needed to be put up on the property.

Mike Sievert of MJS Engineering said the application was submitted because a building permit was put in for an apartment unit in the basement that would contain 3 bedrooms. He said what was proposed didn't increase the number of units on the site, and provided details on this. He said Mr. Johnson said the applicant needed to come before the Planning Board. He said almost all of the construction would take place inside the building.

Mr. Williams asked how many occupants could be accommodated, and Mr. Sievert said there would be 101 occupants, and no more parking. Mr. Bilotta noted that 111 occupants were allowed.

Lorne Parnell MOVED to accept an Application for Site Plan Review and Conditional Use Permit submitted by Golden Goose Properties LLC c/o Barrett Bilotta (applicant) for the creation of an additional 3-bedroom apartment within the basement of an apartment building at 56 Madbury Road, Tax Map 3, Lot 1-11A, in the Residence A Zoning District. Councilor Lawson SECONDED the motion, and it PASSED unanimously 6-0.

There was discussion by the Board on whether a site walk was necessary. Councilor Lawson said it was a small project, but said because the property was surrounded by the RA district, he very much would like to do a site walk.

Lorne Parnell MOVED to hold a site walk on April 10, 2013 at 6 pm. Councilor Lawson SECONDED the motion, and it PASSED unanimously 6-0.

X. Request for modification to approved site plan. Mast Road, Change to five elements of the plan for a 142-unit/460 bed apartment-style housing development, all on-site changes – 1) changing sidewalks from concrete to asphalt, 2) changing crosswalks from brick to stamped asphalt, 3) changing curbing behind parking spaces from granite to rolled asphalt, 4) changing foundation/water table at the base of buildings from brick to Hardiboard© or another material, and 5) changing the raised roofs at the entries from metal to asphalt shingles. **Peak Campus Development, LLC**, c/o Jeff Githens and Dan Fitzpatrick (applicant); Chet Tecce Jr., John & Patricia McGinty, and UNH (landowners). Tax Map 13, Lots 6-1, 10-0, 3-0 UNH and 4-0 UNH. Office Research/Light Industry Zoning District.

Dan Fitzpatrick said 5 modifications were proposed. He explained that there had been a significant uptake in construction, which had led to price increases. He said the company was requesting these modifications to help offset the price increases. He provided details on these increases. He said they were confident the proposed changes would not be detrimental to the value and aesthetics of the project.

1. masonry, water table –.said they used this product in North Carolina and were very pleased with its performance. He said with this application because of the snow fall, behind all of this there would be a water proofing membrane, so they were confident about maintenance and longevity. He said there was a 40% price differential. He said the original plan was to use true bricks in front of a wood frame.

2. Replace the raised metal roofs on the entries with asphalt shingles. He said this would only be on building 200 and 300, and would not impact the cottages or the club house. He said metal roofs were almost 3 times as expensive as asphalt shingles and said the shingles would last longer. He said he was confident that there wouldn't be maintenance issues, and said this using a metal roof had been purely an aesthetic issue. Mr. Fitzpatrick said a limited area was involved, and said the roof lines and dormers would all stay the same.

3. replace concrete sidewalks with asphalt sidewalks throughout the project. Mr. Fitzpatrick said in the current market, the cost of concrete was double. He said this issue had been discussed at length. With snow removal vendors, and said they were comfortable with using asphalt. He said the company had walked the Cottages at Durham, was happy with the aesthetic, and would plan to do something similar to what they had. He noted that all of the sidewalks were above curb level.

4. Conversion from granite to rolled asphalt of the curbing behind parking spaces. He said this was proposed for less than 50% of the curbing, for areas where small machinery would be used to remove snow. He said the granite cost 2 ½ times what rolled asphalt cost.

5. Conversion of the brick cross walks. He said there were 8 crosswalks, and said 6 would be converted to stamped, painted asphalt. He noted that the two crosswalks by the front entrance would be brick. He noted that the snow removal people were concerned about brick crosswalks, but said this would be worked out. He said the cost differential was 4 times.

   Chair Wolfe asked if the project would go forward without these changes, and Mr. Fitzpatrick said he wouldn't say never, but said it was an impactful problem.

   The Board went through the five proposed changes.

   #1

   Councilor Lawson said what was proposed for #1 was common practice, workable, and didn't change the aesthetics of the project.

   Mr. Williams said the understanding was that the heavy duty back up membrane would be included with this change, and said it was important not to forget it.

   Mr. Fitzpatrick said the company would require that it be included.

   The Planning Board voting 6-0 to approve the change #1, including the heavy duty backup.

#2

Councilor Lawson said concerning #2, he didn't think a metal roof made sense at the entrance of a building because snow slid off of it, so there were other compelling reasons to rethink it. He said the asphalt shingles was probably a good change to make.

The Planning Board voted 6-0 to approve change #2.

#3

Mr. Behrendt asked if the edging of the sidewalks would have asphalt curbing, and Mr. Mr. Fitzpatrick provided details on this.

Councilor Lawson asked about the life span of asphalt compared to concrete, and Mr. Fitzpatrick said the key with asphalt was that the sub-base needed to be compacted. He said asphalt would also be much less expensive to replace in the future.

Chair Wolfe noted that Capstone did asphalt sidewalks.

Mr. Parnell said he didn't remember discussing these items when the Board approved the site plan, so it was difficult to discuss them now.

Councilor Smith asked whether concerning long range maintenance of the sidewalks, Peak was in it for the long haul.

Mr. Fitzpatrick said yes, and also said from a cost-benefit analysis, he believe it was the correct decision.

There was further discussion.

The Planning Board voted 6-0 to approve change #3.

#4

Chair Wolfe said he thought rolled asphalt made terrible curbing and would vote to keep the granite.

Mr. Ozenich noted that the area involved was limited to some of the parking space, where the snow plows wouldn't be.

Councilor Lawson confirmed that the Planning Board and Conservation Commission hadn't specifically asked for granite curbing.

Mr. Corrow confirmed that the area involved was less than 50% of the parking areas, and would be used at the head of parking spaces that snow plows couldn't get to.

Councilor Lawson said Board members had personal preferences regarding all of these proposed changes. He said in terms of the cost issue and where the rolled asphalt was proposed,

he didn't think there would be a negative impact on aesthetics from a community standpoint.

The Planning Board voted 5-1 to approve change #4, with Chair Wolfe voting against this change.

#5

There was discussion about the durability of stamped asphalt crosswalks, which re-created a brick pattern. Mr. Corrow noted that this was what the crosswalks downtown were. Mr. Behrendt confirmed that Peak would keep the two brick crosswalks at the entrance.

The Planning Board voted 6-0 to approve change #5.

XI. Public Hearing (continued) **– Application for Conditional Use and Amendment to approved site plan** to replace **dog daycare facility** with new building including indoor and outdoor play areas, parking, office and studio apartment at **27 & 35 Newmarket Road. Great Bay Kennel**, c/o Jaki and Geoff Sawyer (applicant), Christopher A. Wyskiel (attorney), Mike Sievert, MJS Engineering (engineer), Robin Wunderlich (building designer). Tax Map 6, Lot 11-7. Residence C Zoning District.

Chair Wolfe noted that the Planning Board had been in touch with Town counsel to determine how the Board would address this particular project. He said counsel had given him her standards of how this discussion would go. He said counsel had said that when considering CUP criteria, the Board did not compare the proposed use against a vacant piece of land, and instead compared the proposed use against any legally existing uses on the property.

Chair Wolfe explained that regarding this application, counsel had advised the Board that there was a legally existing doggy day care on the property, because doggy day care was not a separate use in the Ordinance, and instead fell within the definition of a kennel. He said the expansion of a doggy day care was therefore an expansion of a legally existing, nonconforming kennel use. He said counsel said when considering the conditional use permit criteria, the Board would be determining the impact of the expanded use, rather than considering it a completely new use on the property. Chair Wolfe reiterated in his own words the legal opinion from counsel, and said this was the purview of the Board.

He noted that there were some experts that the abutters had retained, who would do presentations to the Board.

Councilor Lawson noted that Council representative Julian Smith had been involved with reviewing this application, so would be a voting member on it. Councilor Lawson said he would participate as an alternate.

Richard Renner, 28 Newmarket Road, handed out copies of documentation he had put together, and said he would discuss one issue concerning the CUP. He noted a letter from Marcia Gloddy of the Masiello Group written on the neighbor's behalf. He also noted that Dick Gsottschneider would speak concerning the larger issues of the CUP application, and also said his son Jamie would speak regarding legal questions before the Board, and would lay the groundwork for the Board's thorough evaluation of their review of the CUP criteria, and would

explain how the application failed miserably to satisfy the criteria to pass the Board's approval.

He said he would provide a list of procedural deficiencies as they had pertained to the dog care matter. He said he would also leave a critique of Attorney Wyskiel's letter to Esther Tardy Wolfe, and he provided details on what the critique would include.

Mr. Renner referenced a letter written by Mr. Sawyer on May 16. 1995:

1. We instituted a “no outside barking” procedure by restricting which dogs were allowed unlimited access to their runs.
2. Selective admission of dogs with a history of excessive barking – and extra employees hire to ensure compliance with our “zero noise tolerance” policy.
3. We feel a genuine responsibility to our neighbors and are committed to the preservation of the unique character of Durham's historic area.”

As stated – before and promise anew – our goal is not only to provide the best of care for the area pets we enjoy having here so much, but to live in harmony with our neighbors. We have been friends with many of them for many years, and hope to remain so. Their concerns are ours, and we will not be satisfied until they are. As before, we wish to extend to them our apologizes for any inconvenience this may have put them to.

Mr. Renner said the language of this letter was in direct conflict with the current operation and the spirit of cooperation professed by Mr. Sawyer regarding the doggy day care over the past decade. He said it totally breached, in so many ways, the specific requirements of the CUP as relating to the “character of this development”; its obvious difference from the surrounding properties; and the lack of respect for a decade of causing neighborly harm – specifically noise nuisance-noise pollution and land desecration by improper composting.

He said there had been no attempt to reach a satisfactory resolution other than saying “this is how we are going to do it.” He said Mr. Sawyer had mentioned, so importantly, that he was committed to the preservation of this historic district and its uniqueness as the entryway to Durham. But he said his suggested policy of no outside barking and respect for neighbors had been a sham. He said Mr. Sawyer had sealed his own fate by his own words.

Mr. Renner said while Jackie Sawyer had appeared for the mediation sessions, she had been unaware of this letter written by her husband until provided with a copy of it. He also said Mr. Sawyer did not show up for any of the mediation sessions to answer or defend his prior commitments and promises to the neighborhood. He said Attorney Wyskiel might contend that this letter was in regard to the kennel, but he said the doggy day care was an extension of the kennel, and certainly must be held to the same standards, policies and procedures.

Mr. Renner asked how members of the Planning Board could look him in the eye now and say Mr. Sawyer had kept his word to his neighbors. He asked the Board to reject this application, and to not be dissuaded that Mr. Sawyer's vested rights theory trumped his own failure to honor his commitment to the Town of Durham.

Dick Gsottschneider, 280 Durham Point Road, said he was there to comment on the impact of noise on property values. He noted that he had spent 30 years as President of one of the largest economic consulting firms on the east coast. He said he did not study per se doggy day care facilities, but had a lot of experience concerning the impact of noise on property values. He

said he had looked at shopping centers, airports, and highway interchanges, and had testified in courts in the Northeast on noise, traffic and pollution issues specifically related to property values. He said he had also worked as a consultant to the Town of Durham, on fiscal impact and property value issues.

He said he didn't think there was a person sitting at the Planning Board table who didn't think the noise from this facility would be detrimental to property values. He said there was $4 million in assessed value that abutted this facility, and said walking around on these properties, one could hear these dogs. He said he had done this.

He said if 10% of their value was lost, which he said was a reasonable reduction to expect, this was $400,000 of assessed value, and said the proposed facility wouldn't put the money back on the tax rolls to make up for this. Concerning the CUP criteria, Mr. Gsottschneider said there was no way this project didn't have the potential to adversely impact real estate values, and in turn have a negative impact on the community.
He said there would be noise issues with an expanded facility. He said the noise consultant for the applicant stated that the noise situation, with mitigation, would be no worse than what existed now. Mr. Gsottschneider said embedded in that statement was an acknowledgment that the situation was bad now.

He said he didn't understand whether the existing facility was legal or not, but said that was separate from the issue of whether the new facility should be allowed. He said it was pure speculation that the new facility would improve the situation, and said there was a reasonable basis for doubting that this would be good. He suggested that the CUP criteria concerning impacts on property values and fiscal impacts were not met, so the Board should deny the application.

Chair Wolfe said the reason he had read the statement from Town counsel was that there was an existing doggy day care there now, and the property values had been established regarding it. He said the question the Planning Board had to look at was with the new facility, which the consultant had said wouldn't be worse, He said the worst there as going to be was the same as what was there now, but it could be better. He said the question the Board needed to address was whether the property values of the new facility would be lower than they were now, with the existing facility, which was there legally. He asked how they answered that question.

Mr. Gsottschneider said as he understood it, the noise consultant did the study based on 12 dogs, and then did a linear extraction, going from 12 dogs to 60 dogs. He asked if that was correct. He said someone 15 years ago did a linear forecast that the ORSD would be a lot bigger than it was now. He said he had spent his life doing forecasts, and said they were a guess. He asked where the fall back position was if they didn't work, and asked if they were willing to risk $4 million in assessed value to allow a business to expand. Regarding whether the risk was reasonable, he said it was not.

Chair Wolfe said the legal issue and criteria had to be that the proposed new doggy day care would diminish property values from what they currently were.

Mr. Gsottschneider said he believed they would, because there would be more dogs, more noise, more traffic, more activity, an incompatible building right near the road in the Historic District.

Chair Wolfe said the assumption that the value would go down hinged on the volume of dogs becoming greater than it currently was.

Mr. Gsottschneider said he was suggesting that there would be at least a 10% decline in property values.

Mr. Gsottschneider next read into the public record a letter from Marcia Gloddy, Managing Broker of Better Homes and Gardens/The Masiello Group.

Ms. Gloddy's letter said she supported Rick and Susie Renner's opposition to the approval of the Conditional Use Permit requested by Geoff Sawyer. It said she had been engaged in the practice of Real Estate in Durham for the last 30 years, and had an intimate knowledge of the Town's real estate market and property values.

The letter said as residential property owners, the Renners and their residential neighbors were entitled to the quite enjoyment of their property, without being subjected to noxious noise pollution that an expansion of Mr. Sawyer's business almost certainly cause to happen. The letter also said that if the CUP was approved and the expansion of the dog kennels was permitted, this could cause an adverse effect on the residential property values in the immediate area.

Ms. Gloddy's letter said a business of this type could potentially create a level of noise that would be unacceptable to may potential buyers for these residential properties. It said this would in turn have an adverse effect on the values of those properties that would be directly affected by the noise pollution caused by the expansion of the kennels.

Her letter said the less desirable the property, the less a potential buyer was willing to pay for it. It said for most individuals, their homes were their most valuable asset, and said this should definitely be taken into consideration in the decision making process as to whether or not to approve the CUP, for a business such as this in an area where residential property owners would almost certainly be affected.

Mr. Gsottschneider said Durham had a sensitivity to noise, noting the recent chicken ordinance, which recognized that noise could have a possible adverse effect on property values. He also noted efforts over the last ten years to get students out of residential areas, which reflected that noise impacted property values. He said the situation with this application was no different.

Councilor Smith said Mr. Gsottschneider had said the facility would be in operation 6 days/week, from 7am to 7 pm, but said the operations plan said it would be 5 days/week, from 7 am to 6 pm.

Mr. Behrendt said it was his understanding that the schedule was 5 days/week, from 7-6, with some flexibility that the facility could close up to 7 pm if someone was late in picking up a dog.

Attorney Jamie Renner, son of Richard and Susan Renner, said he was present to support their objection to the proposal. He noted that he grew up in Durham but now lived in Vermont. He said he had come to talk about concerns he had about the criteria being used to analyze the

proposal. He noted that he was a lawyer who practiced in New York, but said he was not representing anyone at the meeting in a professional capacity.

He said much to his surprise, the meeting had started off with an eleventh hour shift in the legal strategy of the Town. He said now for the first time since the beginning of this matter and perhaps in the history of Durham, the doggy daycare was a kennel. He said there had been a metaphysical alteration by a Town official, who appeared to be behind the curtain right now. He said he would love to have the opportunity to speak with this attorney.

Jamie Renner said because the Town lawyer said the Board was to weigh the CUP criteria against the baseline legal use, which he appreciated, it was to weigh the criteria in the application against the kennel. He said he entirely rejected this shift in the Town's position, and said at best it entirely ignored the realty of how all parties, including the Town, had characterized the structures in question since their establishment and since the beginning of this matter. He said at worst, it was a disingenuous strategy to smooth over the approval of the application, and to avoid future legal conflict with the Sawyers.
He said he would explain why Mr. Sawyer, as far as he understood it, had no vested rights or acquired rights or other rights to his current doggy day care, or at best how those rights could only be construed as extremely questionable. He said he would speak in terms that the parties involved and the Town itself had been using, because those were the only terms that had any basis in the record. He said in doing so, he would demonstrate that the last minute shift was totally moot, and would be viewed as a totally arbitrary and capricious decision by any court reviewing the record of this matter.

He said as the Planning Board knew, the code set out 8 criteria for a CUP. He reviewed these criteria, and said initially the reason he had come to the meeting was because the Town Director of Planning had directed the Planning Board to include what seemed to be a 9th criterion in their deliberations, a criterion that was not in the Town Code, was not supported by the code and that would drastically alter the landscape of their deliberations.

Jamie Renner said specifically, in Mr. Behrendt's written recommendation to the Planning Board on how to evaluate this matter, he said “most importantly, the choice for the Planning Board and the community is not between having this proposed facility and the site reverting back to undeveloped land. The choice is between having this proposed facility or continuing the existing situation.”

Jamie Renner said at that time, Mr. Behrendt referenced that the Town had received a legal opinion, - that certain rights had been established for the applicant in that regard, and noted that the proposed facility in his opinion was superior to the existing situation. Jamie Renner said in a separate email to the Planning Board, Mr. Behrendt reiterated that for the CUP, the baseline for reviewing the criteria was not an undeveloped site, and rather was comparing the proposal to the existing conditions.

He said the Town Director of Planning prior to this evening had directed the Planning Board that according to a legal opinion – and it was just a legal opinion – that the Town believed that Mr. Sawyer was somehow entitled to continue his doggy day care operations because of some very vague, established rights, and that the Board must therefore treat the existing doggy day care as the baseline for reviewing the Code's criteria.

Jamie Renner said in completing this thought by stating that the proposed facility was clearly superior to the existing facility, Mr. Behrendt's obvious implication was that the Board should approve the application. He said the problem with this directive was that first, he didn't know that it was right. He said it appeared that the applicant did not in fact have any established rights to the current day care, and said at best the rights were very questionable.

He said there was a significant question as to whether today it complied with the code. He noted that the Code Officer had issued a final determination last year that the current doggy day care "was established and installed illegally, and had been a continued violation for 11 years". Jamie Renner said he appreciated that the applicant had appealed this determination, but said it hadn't yet been reversed.

He noted that the Code Officer wasn't the only Town official who had expressed the view that the day care had never really been approved by the Town. He said in an email to his father and the Code Officer, Town Administrator Todd Selig said Mr. Sawyer "never received final approval to allow the trailer building of the doggy day care to be permanent; the Town has taken actions in the past to address the situation, but the property owners land use efforts have been slow in seeking the approvals needed."

Jamie Renner said now, despite the fact that the doggy day care was never fully approved by the Town, and apparently was not code compliant, the Town attorney had taken the position that there were these established rights, - and conspicuously at that time, there was no rationale behind what these established rights were; the kennel strategy hadn't developed.

He said in all likelihood, the only other vested rights Mr. Sawyer could have didn't derive from the notion that it was a kennel. He said it couldn't be a kennel and the record established that it wasn't a kennel, and could only come from the Superior Court decision in DuBois v. Sawyer, or the legal concept of municipal estoppel. But he said neither of these gave Mr. Sawyer any rights to the current doggy day care.

Jamie Renner said first, no court had ever ruled that the current doggy day care was code compliant. He said in DuBois v. Sawyer, the Court in Strafford only address the question of whether the doggy day care was a nuisance to the plaintiff. He said that was a common law question, where the criteria were different from the Town code. He said the question wasn't whether the doggy day care was in full compliance with the code.

He said the parties didn't argue about the code, and the ruling didn't regard the code. He said this was all to say that nothing from that opinion bound the Town to any particular position when it came to enforcing code requirements against the applicant.

Jamie Renner said finally, there was the legal concept of estoppel, which he said he had thought maybe was where the Town was coming from when it said there were these established rights. He noted that in NH, a party could assert municipal estoppel where a town knowingly made a misrepresentation or concealed a material fact from a citizen, in order to cause that citizen to rely upon whatever that misrepresentation was.

He said the citizen had to have been unaware of the truth of what that lie was about, and

therefore reasonably relied on that representation to their own detriment. He said municipal estoppel said, in that case and that case alone, the town couldn't turn face and hold that person liable for having relied in any way on the town's lie.

Jamie Renner said these weren't the facts here. He said there were no allegations in this proceeding that the Town made an intentional misrepresentation to the applicant to induce him to construct a doggie day care. He said as Mr. Johnson's letter indicated and as Mr. Selig's letter to his father Richard Renner had explained, the Town had repeatedly informed Mr. Sawyer that his daycare was in violation of the code, and the Planning Board didn't have the power to decide in the face of noncompliance with the code that the applicant could have other established rights. Jamie Renner said only a court could decide that, not a town attorney, and said a court hadn't decided that.

He said as a result, the applicant appeared to have no, or at best incredibly questionable rights under the code; or no or questionable rights under the case law; or no or possibly questionable rights under the concept of estoppel. He said as a result of these things, the Board couldn't assume that the applicant had established rights to the existing condition, and the current doggy day care couldn't be taken as the baseline for reviewing the criteria. He said the Planning Board had to review the criteria against only legally existing uses.

Jamie Renner said this all mattered significantly because when the Board considered the code criteria, like external impacts including the character of buildings and the preservation of historic resources, if they were to assume that all these criteria already allowed for a kennel, albeit illegally, it skewed the entire analysis. He said looking at the code and reading that for this district, history had to be preserved, and one's hands were tied to an illegal structure that was there, which had to be considered as existing, then the Historic District must start to incorporate illegal structures.

Jamie Renner said leading up until that night, he couldn't find a single way that Mr. Sawyer had any right to his existing structures and the existing doggy day care. He said he had planned to explain that when the Board did its analysis, like the Town attorney said, it had to compare the criteria against legal uses on the property. He said in that respect, he was going to urge the Board to consider that today, there really weren't any legal structures on the property, so in considering the criteria, the Board was considering the criteria against a vacant lot.

He said he had planned to state that this evening, and then learned that the established rights analysis was gone. He said it used to be the baseline, but no more, because the doggy day care was a kennel and the kennel was legal so the doggy day care had to be legal. He said that was disingenuous, and was not supported by the record.

Jamie Renner said if the Board went forward on that basis, the decision would be appealed to the decision to the Superior Court, which would look at the record, look at the Town attorney's opinion and find that it didn't pass the sniff test.

He said the Board needed to have a conversation about the real legal status of the existing uses on the current property. He said if it was true that the real uses on the property hadn't really been approved, when they looked at whether the criteria were met, and the code said look for a baseline to what was on the property now, and they considered what was legal, - it wasn't really

much.

Jamie Renner said he was very disappointed in the lack of transparency from the Town attorney. He said this matter was far too important to toss to the dust bin. He asked the Board to have a conversation with the attorney about the legality today of the structures on the property. He said he agreed with her that this was the baseline for the analysis, under the code.

He said if something on the property was fairly legal and the code said when you consider some existing use in the district as to what was appropriate for a district, he wouldn't argue with that. But he said if what was on the property wasn't legal, it changed the analysis entirely. He said initially, he thought Mr. Behrendt was pushing the Board away from that, and said now he thought the attorney was pushing the Board away from that in a different direction. He said it didn't feel good to him, and said he hoped the Planning Board would do the appropriate analysis and wouldn't get pushed around.

Councilor Smith asked what the facility was if it wasn't a kennel.

Jamie Renner said he had no idea what it was. He said the issue with the doggy day care was that it never appropriately defined itself with respect to the Town code, and never got the appropriate approvals it needed under the code. He said there were a lot of barking dogs out there, and said he didn't know if the applicant got the proper approvals to do this.

Councilor Smith read the definition for kennel in the Durham Zoning Ordinance:

> "Any lot or premises on which four (4) or more dogs, cats or similar animals, or a combination thereof, which are in excess of four (4) months of age, are boarded for compensation or bred for sale. A kennel shall not include licensed veterinary medical facilities."

He asked Mr. Behrendt if he believed that the doggy day care facility was a lot or premise in which animals were boarded for compensation. Mr. Behrendt said he would defer to the Town attorney on this. Councilor Smith said they might need to have a definition for "boarding", when dogs were not being fed there and it wasn't an overnight facility, which boarding tended to suggest.

Jamie Renner said another concern he had had to do with the sort of last minute switch. He said he would be curious to see in the record of all of applicant's applications to the Town for any kinds of approvals, how Mr. Sawyer had characterized what he was doing, and how the Town treated this. He said in light of all of these past representations by the applicant and the Town, the question was whether it was legal, fair or equitable or anything but arbitrary to switch names for the purpose of avoiding the fact that the structures on the property were no doubt not compliant with the Town code. He said he didn't think the Town should go down that road.

Councilor Smith said there were structures on the property that were compliant, noting that the residence was on the lot.

Jamie Renner said he was only speaking about the property to the extent that the structures on it were not code compliant.

Councilor Smith asked if there was a kennel on the property, and Jamie Renner said his understanding was that there was. Councilor Smith asked if the daycare would not be an accessory use to that.

Jamie Renner said he didn't know and said he would have questions about the kennel itself regarding how it was approved, if it was approved, the approval process itself, what limitations were put on it in terms of defining what it was, whether it fair under law to characterize what currently existed as a part of the kennel or not a part of the kennel. He said that was what the Planning Board should be asking.

Councilor Smith said that was why he was asking these questions, and said he hoped there would be clarification on them. He asked if the kennel that was approved 19-20 years ago was on the same lot as the daycare facility or was on the lot the vet clinic was on.

Mr. Behrendt said the proposed daycare facility was on the same lot as the kennel.

Jamie Renner said his questions were regarding the kennel itself. He said some new wrinkles arose in analyzing the current doggy day care as a kennel, in that this wasn't just in a residential coastal zone and was also in the Historic District, as well as in the protective shoreland area. He said the question for the Board was whether it was appropriate given those constraints to approve even an expansion of the current kennel, assuming it was legal, and he noted he didn't know that it was.

Steve Burns, 20 Madbury Road, said he wanted to talk about plans and promises. He said in response to a question by Councilor Robin Mower, Attorney Wyskiel had replied: "The whole point of addition and improvements (approved w/ Jan by site plan) and operational controls refined by CUP request, is to allow an even greater number of dogs." Mr. Burns said so what they were after was more dogs.

He said Attorney Wyskiel went on to discuss the limitation imposed by the DuBois lawsuit: "The court limitation is no more than 30 dogs outside within dog day care "pen" between 7am to 6pm weekdays."

Mr. Burns said barking dogs at the Great Bay Kennels had been a problem since they opened in 1993. He said in 1994 35 Durham residents signed an "Offensive Use" petition complaining about dogs barking excessively during the hours of 7AM to 6PM. He said in 1995, Mr. Sawyer responded in a letter stating that he would cover the runs, provide sound-insulation for the buildings and keep the dogs inside. He further pledged a policy of "zero noise tolerance". Mr. Burns said this promise addressed barking during the day. . . not barking at night. He said the reason he brought this up now and in the past was that it was a promise not kept. He said critical elements in the CUP proposal now was promises and plans.

He said in 2000, Mr. Sawyer established a dog daycare activity which, by design, had dogs barking outside. He said Paul Dubois, an abutter, sued, and said the court decided to allow the activity but restricted the activity to weekdays, and restricted the hours and the number of dogs permitted outside. He said the court recognized the possibility that the activity would become a nuisance, and said it had.

Mr. Burns said in 2004, the ZBA denied a variance for the kennel to build a daycare building.

He said the application for a Conditional Use Permit which the Board was hearing now, and what the Board had been hearing for the last several years illustrated the applicant's plans and promises. He said the building and site plans were relatively certain. He said the Board might not know why the applicant was building what they are building but could see what they did build and could deny occupancy if it deviated from the plans.

But he said a Conditional Use Permit granted a "use" He said the Board must accept that the plans would work and the promises would be kept, and said there wasn't much the Town or anyone else could do about it if they didn't. He said they were relying on promises and plans.

He said the neighbors had subjected the operational plans of the Great Bay Kennels to careful examination, and discovered that their pet-waste management had been a potential health hazard for years. He said when they questioned the pet waste, the stormwater plan as redesigned. Mr. Burns said Mr. Behrendt saw these acts as being responsive to neighborhood needs, but said he personally saw this as economic considerations and limited understanding but good public relations when bad behavior was discovered.

Mr. Burns said that regarding the sound mitigation, protecting the neighbors from hearing barking dogs was a promise not kept. He said establishing an outside dog daycare flew in the face of a promise of a "zero noise policy". He said the Sawyer's response to noise mitigation was a plan that might make the barking about half as loud and perhaps provide no reduction at all.

He said they then proposed to double the number of dogs and evade the court-determined limitation of no more than 30 dogs outside, by getting the Planning Board to state that another 30 dogs in a half-open pole barn were "inside" . He said to heap more injury on this insult, they proposed to extend the daycare facilities hours and allow Saturday operation.

Mr. Burns said Mr. Behrendt had enthusiastically endorsed these plans, saying that they were better than doing nothing. He said doing nothing would not increase traffic congestion, would not create a massive building and fencing that was more like a junkyard than a residence. He said doing nothing wouldn't double the number of cars contributing to congestion on Route 108 and it wouldn't double the number of barking dogs. He noted that according to Attorney Wyskiel "Dogs typically don't just bark". Mr. Burns said the Planning Board was relying on promises and plans.

Jamie Renner said that regarding the question of what issues might potentially arise if it was a kennel, the problem was that the doggy daycare as proposed acted totally differently than the kennel as it currently existed, where the dogs and barking were inside. He said if that was what was approved, then the baseline criteria of what was appropriate in this district was dogs inside. He said if the doggy day care was outside, it wasn't appropriate to construe it as being the same kennel as what currently existed.

Attorney Chris Wyskiel, representing the applicants, first noted that he hadn't appeared at the podium recently, as the public hearing process had gone on and there had been repeated presentations by abutters and testimony in opposition. He noted that in the meantime he had

found some additional evidence to submit into the public record.

He said it was appropriate to go back to when the review process for the application had started, on October 10, 2012. He noted that his September 19th cover letter with the application included some very detailed submissions, which were relevant to the Planning Board.

He said that regarding the legality of the existing use, it was a kennel. He said if one sliced up what a kennel did, one could say that when a dog was groomed, it might not fit the precise, terse definition Councilor Smith had read, but certainly it was part and parcel of what it did, as was the doggy daycare. He said that came before the permitting standards, primarily when they built it. He said the fencing was established and the neighbors challenged it. He said there was an appeal of the administrative decision by Code Officer Edney, and the ZBA said it was an appropriate partial use of the kennel. He said the use was established decades ago, and had been ongoing for decades.

Attorney Wyskiel said current Code Officer Tom Johnson wrote a letter that the abutters had repeatedly brought up, which Jamie Renner had characterized as a final determination that the use was not legal, and said this had never been differently adjudicated by the court. Attorney Wyskiel said this didn't mean that he was right. He said the conflict with his decisions was highlighted in his own appeal of the decision the ZBA, which had never been heard and had been continuously delayed, pending the Planning Board dealing with this CUP application.

He noted his 6 page April 20, 2012 letter to the ZBA, which responded to Mr. Johnson's March 23, 2012 Administrative ruling, and said it was a complete response to Mr. Johnson's positions. He said his own letter provided a brief summary as to why the use currently there was legal. He said he agreed with Mr. Johnson that to the extent the new structure was larger and expanded the use, in terms of having additional dogs internally, the Sawyers did have to come to the Planning Board for site plan approval and also for a conditional use permit.

Attorney Wyskiel said at his first presentation concerning this application, he had anticipated that very issue and the abutter arguments, and had written to Mr. Johnson and presented a copy of the letter and his email response to the Planning Board. He said his letter of October 9, 2012 letter spoke of representations he had made with Mr. Johnson present to the Technical Review Committee, preliminary to the Planning Board hearing the application.

He said in his letter, he characterized that if the applicant proceeded, obtained approvals and properly referenced the variance previously granted by the ZBA in 2004 for an additional caretaker apartment (proposed at the time in a structure at the top of the hill but now proposed at the bottom of the hill) the variance ran with the land, so there was authority for that.

Attorney Wyskiel said the understanding with Mr. Johnson was that as long as the HDC had approved the 8 ft high ship lap fencing, which was a structure, and as long as the applicants got approval for the Site plan application and Conditional use permit application, there would be no more conflict regarding the legality of the proposed changes and the existing legal use. He said Mr. Johnson had agreed, in his letter of October 9, 2012. Attorney Wyskiel read from the letter.

He said if the Planning Board approved the applications, the applicants would have no more dispute with the Town. He said the illegality issue Mr. Johnson primarily had with the applicant

wasn't over the use. He said in the appeal filed to the ZBA, the point made was that the use was perfectly legal, but he said he didn't contest Mr. Johnson's point that the current structure might not be compliant with the life safety code. He said it wasn't, under the current code

Attorney Wyskiel said his contention in response to Mr. Johnson's letter was that the structure was finally approved. He said the Renners pointed out in an email from Administrator Todd Selig that it was his understanding that there was never any final approval. Attorney Wyskiel noted that he had explained before that former Code officer Edney, when the modular structure was moved decades ago for its intended use, felt he had signed off and granted a temporary certificate of occupancy. He said that report card existed in the file. He said Mr. Edney came back, and the testimony of the Sawyers was that he granted final approval, but never granted that. He said that had to be adjudicated too.

He said notwithstanding, that issue didn't need to be adjudicated because it was rendered moot by these proposed improvements, or if the Planning Board didn't approve the amended site plan and CUP, they went back to the legal use of the doggy day care.

Attorney Wyskiel said there was no disagreement with Town counsel as to whether this was a switch at the last minute. He said he would contend that for decades, this use had existed, but said there was a problem with the legality of the current structure. He said he believed Mr. Johnson had confirmed in an email that he would be willing to grant a building permit to replace the structure where it presently existed with a code complaint structure of the same footprint.

He said the use was legal, and was part of the kennel use, and had enjoyed decades of established use. He said it went through a permitting and challenge process by Town boards years ago. He said if there was an issue with the legality of the structure, it could be replaced as a matter of right with a building permit pulled without any other board approval. But he said the Sawyers wished to do better and more, and build a bigger structure.

Attorney Wyskiel said a bigger structure internalized many of the operations for drop off and pickup, created many permutations of alternative operating procedures that would enable the business operator, whether it was the Sawyers or a future owner of the property, to control the dogs, keep them inside, keep them in limited areas, with sound attenuation barriers, which were the structures themselves and the 8 ft fencing.

He said the fencing had been approved by the HDC, and said the applicants asked that the Planning Board embrace the HDC approval as part of this current process. He said if the dogs were constricted inside or well within certain areas, there was every reason to believe scientifically from Mr. Reuter's reports that the sound would not transfer out to other areas, would be contained, and would be made better.

Attorney Wyskiel said the other fencing areas allowed dogs to be trained, go out into other areas, and not exceed the limitations of the court order. He said the applicants proposed to be limited to even more constrained hours of the day, so that the dogs were kept completely within the brown or gray area, which was designed to maximize the sound attenuation achieved, consistent with Mr. Reuter's testimony.

He said all of this was appropriate for the site, and made the current condition much better. But he said if the application was not approved, the existing use was legal. He said if Mr. Johnson had a problem with the non-safety code compliant structure, it could be removed, and the day care could still exist. He said in that case day care and drop off might be even more confusingly handled, with the office in the kennel building or at the exterior, where the fencing existed; or, a new code compliant structure could be rebuilt on the same footprint.

Attorney Wyskiel said the alternative was for the applicant to do much better, build this better plan and implement sooner rather than later improvements that would make the situation better. He said the use was legal, but the structure had code compliance issues. He said Mr. Johnson had confirmed that he had no problems with it.

He said it was appropriate for the Planning Board to move forward, and compare the new structure to the existing use. He said in doing this, working with the CUP checklist, it would be very easy for the Board to check the yes boxes, and see that the proposal would make an existing legal use even better.

Attorney Wyskiel noted that Mr. Gsottschneider, had characterized that there would be an adverse impact on property values. He said there was no factual basis for the 10% decrease he had predicted, and said this was simply Mr. Gsottschneider's professional opinion. He said it was important to understand the legal standard to be addressed. He said the CUP checklist asked if the proposed use would cause or contribute to a decline in property values of adjacent properties, and said based on the wealth of information the Board had heard over the past 5 months, the answer was no.

Attorney Wyskiel said in the Zoning Ordinance, which he had quoted from in addressing the CUP criteria in his cover letter with the application, the standard was that a proposed use must not cause or contribute to a “significant decline in property values of adjacent properties”. He said he contended that the barriers created for sound attenuation, the movement of the building to the base of the hill, the internal permutations of new operation controls, and conditions the Planning Board could impose and that the applicants had proposed, were the tools to make this a better and enforceable situation for the Town.

Concerning the noise issue, he said Mr. Reuter's conclusion was not that at best, the noise would be no worse. He said that was the conclusion of the independent sound consultant the Town had hired, which was paid for by the applicant. He noted that Mr. Reuter was before the Planning Board twice, and also attended mediation sessions. He said Mr. Reuter scientifically characterized the reduction in sound that should be expected, under worst case scenarios. Attorney Wyskiel said in best case scenarios, it would be better.

He noted the sound demonstration by Mr. Burns at a previous meeting, and the high, shrill pitch he had created at a certain decibel level. Attorney Wyskiel said he remembered experiencing relief when this noise was decreased. He said as a human being, that sound was constant, irritating, and was not something like a dog barking, which was a natural occurrence, was intermittent and was something people accepted. He also said not every barking dog in the area was associated with this doggy day care use.

Attorney Wyskiel said regarding the issue of land values, he had previously submitted to the

Board as part of the record the professional opinions of realtor John Rice, and had also submitted the professional opinion of realtor Susan Fuller, which was germane to the property located at the base of the hill.

He said he didn't believe he had previously submitted a second opinion from Ms. Fuller speaking specifically in regard to Mr. Renner's property. He read this second letter, which indicated that the property sold quickly, within 70 days, which was well under the 139 days for properties on the market at the time. The letter said the list price ratio was about 90%, and the Renner property sold at a ratio of 89%, which indicated that Great Bay Kennel had no impact on this sale.

Attorney Wyskiel said Mr. Renner had repeatedly said his property values were going down. But he said it was disingenuous to say this. He said he bought the property, having been an established customer of Great Bay Kennel so knew of its existence, paid market price and bought it well within the time frame. He said Mr. Renner's own property was not impacted.

Attorney Wyskiel noted that Mr. Gsottschneider had submitted a letter, and said he addressed this letter in his March 22, 2013 letter to Mr. Behrendt. He said the letter conceded that he was not an expert on the issues, and attributed the decline in maintenance of the property at the base of the hill, which sold at a depressed price, to the existence of the doggy day care. Attorney Wyskiel said that was speculation, and said the only thing they knew for certain was that if a property was not maintained, the reason was because the owner didn't do it. He said it was too convenient an argument to blame the day care/kennel operations.
Attorney Wyskiel said the realtor information he had provided indicated that the values would not be impacted, and if the Board approved the improvements, this would enhance the property, and would encourage the neighbors to maintain their properties. He said a better condition should raise all boats in the neighborhood.

He said Mr. Gsottschneider had suggested that having an incompatible building in the Historic District would lead to a decline in property values. He said this made no sense, noting that the structures to be built had been specifically approved by the HDC. He asked who would know better if it was an appropriate structure for that zone. He said the HDC did not reject the proposal, and said it therefore made more sense to say it was an appropriate structure for the zone, as was the 8 ft sound attenuating fencing. He reviewed the history of the approvals by the HDC.

Attorney Wyskiel said if the CUP application was approved, the construction cost would exceed the $400,000 threshold Mr. Gsottschneider had talked about, so there was an enhancement of property values just by building it.

Regarding the issue of boarding dogs in the kennel definition, and whether it required an overnight stay, Attorney Wyskiel said he didn't know. He said the definition didn't say the stay had to be overnight. He stated again that his contention with Mr. Johnson was that it was a legal use, and said he thought they should get over that hurdle.

He said the irony of the abutter issue was that if the application was defeated, the abutters got the status quo. He said there wouldn't be the permutations of operations control, or the opportunity to propose conditions of approval. He said they also wouldn't get the stormwater

management improvements. He said there was no health standard for the Town to come into the property or any other property in Durham to deal with stormwater runoff.

He noted that as a byproduct of Dr. Ballestero's report, the applicant had agreed to get rid of the composting operation, including getting rid of the existing composting piles. He also noted the proposed swale and rain garden, including improvements to the design suggested by Dr. Ballestero, which the applicant had embraced.

Attorney Wyskiel said none of this would get done if the application was defeated and the status quo was maintained. He said the applicants could voluntarily do this, but said they didn't have to. He said this was something for the Planning Board to consider in looking at the checklist in terms of external impacts. He said by approving this application, the Board would take care of this property in a state of the art manner.

He also said Dr. Ballestero had conceded that for abutters on the other side of the road, the most likely adverse impacts from runoff were from Route 108. But he said the handling of stormwater runoff on the applicant's site was still a good thing.

Attorney Wyskiel said the hours of operation proposed were for the expanded use for the day care portion of the operation. He said the kennel boarded dogs on the weekend, and said those hours would not change. He said the hours of operation for the day care were constrained by the court, for the outdoor penned in area. He said the elasticity he had proposed for people picking up their dogs late assumed that the dogs would be kept inside the building during that time. He said this would not violate the court order, and was not an unreasonable condition to suggest.

Attorney Wyskiel said Jamie Renner had made it clear that there was a threat, that if the Planning Board did not reject the application, they would appeal. He said he had been welcoming the ongoing hearings, and all that they involved, but said if an appeal came, so be it. He said the Planning Board couldn't control that, but said they should not act on the threat. He said he hadn't threatened the Board in this way, and said it wasn't the way things should work. He said he thought the Planning Board had a wealth of information, and could embrace better conditions as a result of approving this application.

He said the comparison standard that counsel had advised was appropriate. He said Jamie Renner said the proposed use should be compared to whatever legal uses were there now, and didn't know what they were. Attorney Wyskiel said it was a fenced in penned area, maybe with a code complaint structure and maybe without. He said he didn't say this as a threat, and said it was common sense.

Attorney Wyskiel said he had never argued the issue of legal estoppel here, and said it was an issue that was hard to understand and didn't come into being. But he said that regarding the latches issue, the neighbors had lived with the situation for 20 years and now had the opportunity to argue against it. He said to argue in the vein of saying that the present condition was bad, so defeat this application so it wouldn't be improved had never made sense to him. He said it was the great irony of the argument.

He said the Planning Board should consider and work through the proposed findings and

conditions he and Mr. Behrendt had offered. He encouraged the closing of the public hearing, and said he could answer further questions the Board might have.

Mr. Williams asked for the date of the Purchase and Sale agreement regarding Mr. Renner's purchase of his property, and was told the deed was dated November 4, 2010.

Mr. Gsottschneider said he was asking the Planning Board to go by their guts. He said they knew Durham, and knew this proposed facility would have a negative impact on property values. He said no one would knowingly buy a property next to the applicant's property, and also said the notion that what was proposed would be better than the status quo was the wrong reason to allow this to expand. He said it might be that a facility of this size didn't meet the economies of scale needed in order to survive over the long haul.

He said to allow it to go forward was incredibly risky. He said even a 1% decline in property values was significant, although Attorney Wyskiel had suggested that it was not. He said embedded in this thinking was an acknowledgment that the property values would decline.

Councilor Lawson said the engineering report said that the noise would be reduced, and said the proposed facility looked extremely different than what was there now. He said if the plan unfolded as the data suggested, there could be an appreciation of value.

Mr. Gsottschneider said that was spurious, stating that this was a residential neighborhood, and a commercial use that was noisy was being added.

Councilor Lawson said that use was there, and said Mr. Gsottschneider had said originally that regardless of this new use, the values would decrease 10%.

Mr. Gsottschneider said he thought that concerning the expansion, but said he also thought the property values had decreased with what was there now.

Chair Wolfe said what Councilor Lawson was asking was if there was evidence that with a better facility, with less noise, etc., there would be a continuation of the trend Mr. Gsottschneider had described of decreased property values. Chair Wolfe said if there was supporting evidence for this, the Board would like to hear it.

Mr. Gsottschneider said he didn't have such evidence, but said he had a lot of experience evaluating a lot of different situations of noise, traffic and lighting. He said in every instance he had looked at, there had been declines, and said he believed there would also be a decline in this instance. He said Marcia Gloddy of the Masiello Group had sold property for 30 years, and agreed with him.

Councilor Lawson asked Mr. Gsottschneider if he had experience with redevelopment of a property that resulted in an improvement to the property, where noise declined and property values also declined as a result.

Mr. Gsottschneider said no, but said the type of forecasts made by the noise consultant and traffic consultant, as well as his own forecasts, were subject to being questioned. He noted the inaccurate forecast that had been made concerning the number of students there would be in the

Oyster River School District several years ago.

Councilor Lawson said that was a statistical analysis. He said what he had reviewed for this application was an engineering analysis, which used modeling software to make predictions, and said that was not a statistical analysis. Mr. Gsottschneider said both were statistical analyses, and Councilor Lawson said he disagreed.

Mr. Gsottschneider said no one there would knowingly buy a house next to the existing or the proposed facility. He said the risk was real, and suggested that the Planning Board needed to weigh that in evaluating the conditional use permit criteria.

Mr. Richard Renner explained that when his house in Kittery had sold quickly, he and his wife then had two weeks to buy a house. He said the property he now owned had been on the market for $100,000 more than the asking price, was taken off the market, and was then put back on the market at about the time he and his wife were looking for a house. He said they then made an offer and purchased it at that time.

He said the sellers did not come to the closing, and noted that they were so furious about the hardship they had gone through. Mr. Renner said he and his wife hadn't appreciated this at the time because they had seen the property on the weekends, when there were no dogs there. He said they knew there was a kennel there, but noted again that they had two weeks to find a house.

Mr. Renner said Attorney Wyskiel had said Mr. Reuter did not say that the noise would be any better. He said the documents he had provided disagreed with this. He also said Mr. Reuter had said, in answering questions that the fencing wouldn't do anything, that there was a word called defraction, which meant that noise came to the sound barrier and went out and over it. Mr. Renner said there was virtually no sound attenuation at all from the sound barrier.

Attorney Jamie Renner said he hadn't threatened the Planning Board, and said simply stating that an arbitrary decision deserved appeal, and how a court would review a decision like that wasn't a threat. He said the threat he had heard was that if the Planning Board didn't approve the application, the applicant would bleed more stormwater and excrement over the Town.

He said if the application failed, the Renners would continue to challenge what was illegal, and would expect that the Town would enforce against it. He asked the Board to be careful to make sure that it couldn't use what needed approving as the baseline for what was appropriate to be approved. He said he had found confusing Attorney Wyskiel's discussion of what was on the plan; what was compliant and what wasn't; and what Mr. Johnson was willing to do and wasn't willing to do.

Jamie Renner said what still needed approval hadn't been approved, so it couldn't be used as the baseline for what was appropriate in that district. He said if the kennel was what was approved, he would look back at what it was approved at. He said if it was approved as an indoor facility, - noting Mr. Sawyer's 1995 letter about wanting to be sensitive to the community, and stating that there wouldn't be any outside barking with the kennel, - it even had seemed to Mr. Sawyer that a kennel was an indoor facility.

He asked the Board to separate out what was a kennel and what was expanded into the doggy day care, and if what was kennel was inside and the kennel was what was appropriate in that area, the Board should use inside barking as what was appropriate.

Councilor Diana Carroll read into the public record a letter from **Beth Olshansky. Packers Falls Road.** Ms. Olshansky said she had followed the doggy daycare hearings throughout the year, but said this was the first time she had chosen to comment. She said she realized that the Great Bay Kennel provided a much-appreciated service for residents' pets, but said on the other hand, it had resulted in much aggravation, frustration, and loss of property values for the neighbors.

She said surely with the expansion of use, with more dogs on site and more barking, the more property values would decline. She said if the impacted properties in the area ultimately reverted to student housing because no families wanted to live near the doggy daycare, it could lead to the Historic District devolving into disrepair, which would be a shame. She said she hoped the applicants would do their best to reasonably honor the neighbors' concerns and protect residents' interests as a community in maintaining their Historic District.

Ms. Olshansky's letter next provided some more specific comments:

Number of Dogs: Does the Planning Board really believe that allowing up to 60 dogs on site will be an improvement over what appears to be a current limit of 30? I see Attorney Wyskiel argues that only 30 dogs will be outside at one time, however, may I remind you that the barn is not enclosed, and thus I am not clear what the terms "inside" and "outside" mean when the structure has its longest length open to the air. Attorney Wyskiel seems to define "inside" as "under cover within the barn structure" (item 5).

To me, as far as sound travels, "under cover" does not mean "inside." Per the neighbors' request, given the graveness of this issue and its potential to continue to wreak havoc in the neighborhood, why aren't we asking the applicant to enclose the barn? This would make the most sense given the interest in GBK expanding its Doggie Daycare business. If not, the number of dogs should be further limited to 30 either outside or "under cover" (which is my mind, is still outside) at one time.

Vegetative Buffer: I see Mr. Wyskiel has convinced the Town Planner that the vegetative buffer should be maintained only while the Daycare is in operation. I beg to differ. This buffer serves not only to muffle sound but also to diminish the mass of that enormous structure right along the road in our Historic District. I urge you to require that the buffer be maintained in perpetuity as our original conditions stated.

Dog Waste: At the last Public Hearing, Attorney Wyskiel stated that he did not imagine that a few piles of manure left on the site would be of concern. I beg to differ for that is the very reason the town is insisting that the manure be collected and appropriately disposed of. Please make sure the removal of all existing piles of manure is maintained as a Condition of Approval.

Finally, what measures are in place should this grand experiment not be as corrective as promised by the applicant and his lawyer? As you review this application, I urge members of the Planning Board to seriously consider the issues as if it were <u>your house, your property values, and your neighborhood</u> that will be impacted for years to come. Please offer these neighbors some peace of mind by creating reasonable limits and a stated mechanism for review and remedy should the promised outcome not occur.

Ms. Olshansky's letter thanked the Planning Board for its thoughtful and sensitive deliberation regarding this very challenging issue.

Attorney Wyskiel explained the reasons Mr. Sawyer could not be present. He stated again that the use was legal, and had been in existence for 20 years.

Councilor Smith MOVED to close the Public Hearing. Richard Ozenich SECONDED the motion, and it PASSED 6-0.

Mr. Parnell suggested that the Board should start its deliberations at the next meeting, and other Board members agreed.

Chair Wolfe asked if Board members wanted anything else from Town counsel regarding the application.

Mr. Williams said it would be well worth the Board's time to speak with counsel regarding these competing perceptions and claims.

Councilor Lawson suggested that it would be to the Planning Board's benefit to get an opinion from Town counsel on some of the things brought forward by Jamie Renner.

Chair Wolfe said he had planned to forward Jamie Renner's comments to Town counsel.

There was discussion about whether having a session with counsel was needed, or if a letter would be sufficient. Councilor Lawson suggested that this could be decided after receiving correspondence from counsel, and Chair Wolfe agreed.

XII. Preliminary Conceptual Review for a Site Plan and Conditional Use Application. 17 & 21 Madbury Road. Complete redevelopment of multifamily site known as "The Greens" for mixed use project with multifamily housing for 460 +/- residents, office/retail, and parking for 57 to 100 cars, to be called "Madbury Commons." **Golden Goose Properties** c/o Barrett Bilotta and Ken Rubin (applicant); Rose Lawn Properties c/o Laura Gangwer (owner of 17 Madbury); GP Madbury 17 c/o Barrett Bilotta (owner of 21 Madbury); Michael Sievert PE, MJS Engineering (engineer); Shannon Alther, TMS Architects (Architect). Tax Map 2, Lots 12-3 & 12-4. Central Business Zoning District.

Mr. Rubin said there were a few critical, fundamental issues that the design team had heard at the March 13th meeting, and had focused on:

He said one was the Madbury Road street experience. He said they had heard from the public and others about not having a large, imposing, monolithic building that was out of style with the Town. He said another was that there was not enough commercial office/retail mix in the overall concept. He said the design team had focused on these issues.

Mr. Rubin said concerning the first issue, they had conceded to put in a 15 ft setback, in combination with an 8 ft sidewalk, for a total of 23 ft, which created a gorgeous street experience. He said the building along Madbury Road would have 2 ½ floors, at 30 ft, so would be a modest height from the street perspective. He said in terms of design features**, a** pedestrian archway/walkway as added. He also and said there was also now a more refined rendering of the architecture, with discrete articulation, so the wall effect was broken up and the rear of the courtyard was concealed.

Mr. Rubin said that concerning the second issue, they had decided to add a second story of office space along Madbury Road beyond the first story of retail. He said they were prepared to subsidize this for a number of years before the Town could grow into it. He also said in order to support the new office space on the front, they had added additional residential capacity in the back of the courtyard.

Architect Shannon Alther spoke in detail about how the streetscape had been broken up into 5 components, with varying styles regarding windowscapes, the fabric of the building, landscaping, etc. He showed how a 23 ft setback would look, and said this would allow for landscaping, areas to put tables in, and other elements for people to see as they walked down Madbury road. He noted that the proposed pedestrian tunnel could have glass inside, so some of the commercial spaces could front on it.

Mr. Rubin said this design struck a balance between residential and commercial, and took advantage of the natural grade of the property in that some added height could be added for residential space in the back. He provided details on this, and said the design would conceal most of the courtyard from Madbury Road, so it would not be intrusive on the street experience.

Mr. Rubin said they would like to get feedback from the Planning Board, and then get into the next phase of the project. He said they would also like to do a site tour.

Mr. Corrow said he liked the streetscape and how things now were broken up. He said he was a bit concerned about the structure at the back of the building, despite the grade change.

Mr. Rubin said the average height was less than 50 ft.

Councilor Lawson asked how many sf the complex would be, and Mr. Rubin said it would be about 175,000 sf. Councilor Lawson said he liked it that the design team was thinking about mixed use in the context of the project, which had allowed them to do some things that were beneficial, like moving the commercial space out toward Madbury Road, where it was most viable, and buffering the student housing.

But he said in 2008, there were some Zoning changes, including those regarding density requirements, to allow a project like this. He said he thought the objective of this was to create the opportunity for redevelopment, improve student behavior, and create commercial space in the downtown.

Councilor Lawson said with the current zoning, one would expect that for something of this size, there would be 3 times as much commercial space as what was proposed. He said he didn't think Durham wanted to put in student housing at this scale, and when this compromised something that was most important in creating the Zoning.

He said the company would need to reconsider the commercial aspects of this project, stating that he didn't think the community should compromise on this. He said a design was needed that was less focused on student housing and more focused on what the Town's objectives were when it changed the Zoning.

Chair Wolfe said the architect did a great job of breaking up the front of the building on

Madbury Road. He said the basement apartments were a concern, stating that they created a barrier if there was going to be a commercial entry. He also said the height of the back side archway concerned him, and questioned whether it was high enough for fire trucks. Mr. Rubin noted the second egress would address the issue of access outside the courtyard.

Chair Wolfe also said there was a huge massing on the site with the proposed building, and said he needed to do a site walk to see what it would look like, and how this would relate to the rest of Durham. He said what was proposed was much larger than the 9-11 Madbury Road and Kostis developments.

Mr. Rubin noted that the property contained 2.6 acres, and said the building would occupy 37% of it, and would be at 70% of maximum capacity concerning the number of units allowed. He said it was a large property that could support a large building.

Chair Wolfe said he wanted to see the site, and how the development would look in the context of the whole block. He also said he supported what Councilor Lawson had said, that the Town needed commercial development downtown. He said Durham had made a decision that it didn't want to be just a town of student housing.

Mr. Rubin said the applicant had heard the message loud and clear, and said while 20,000 sf of commercial space was not viable in the near to mid-term, it had to be carried somehow. He said he didn't believe the company could reconsider the balance of commercial and residential beyond what it had provided now. He said he didn't think they could get such a project financed, and said he didn't think another party could put in 60,000 sf of commercial space on that property and make it viable. He said they were putting as much commercial space as possible on Madbury Road, and said they didn't believe that putting it elsewhere on the site was viable.

Chair Wolfe said he appreciated the efforts the company was making, and said he liked the current design better than the last one.

Councilor Lawson asked if the company had looked at the marketing study, and Mr. Rubin said yes. He quoted numbers from it, as he had done at the March 13th meeting, and said that study was the north star in developing the project. Councilor Lawson said that study also talked about University commercialization, opportunities regarding medical services, etc.

He said one of the things Durham did in 2008, which he saw evidence of today, was that by coming up with the mix of allowed uses they did, pro-formas and financing plans could be developed that carried commercial space because of the square footage value of student housing. He spoke further on this with Mr. Rubin, and said the Town had seen evidence that student housing could subsidize the commercial market, and at higher levels than what the company proposed here.

Mr. Parnell said taking out the building along Madbury Road, which would look fine as a stand-alone building, what was proposed was a huge building of 5 stories that was 500 ft long. He said it was a massive structure, and said based on the reaction the Planning Board had had regarding other projects that were much smaller than this one, this project would be a very difficult sell to residents. He said it would take up a lot of space in downtown Durham. He noted that with the other projects, the developers were able to put a plan together that had a

higher percentage of commercial.

Mr. Rubin said with most of the property off the street, it was not as conducive to commercial uses as other properties that were smaller and more street oriented. He said there wasn't much calling for commercial space off the street, and said it couldn't get financed. He said he realized it wasn't within the total vision of the Town to have this balance of uses, but said the alternative was to leave the Greens as it was. He said the only way to get the gorgeous streetscape experience on this property was to fund it from a difference source. He said they had tried to do this in the most responsible, least intrusive way possible, and said from their perspective it was a win-win situation.

Councilor Lawson said the Planning Board and residents would have to live with this development forever. He said if this project meant the loss of commercial space, he would rather leave the Greens as it was until the market could sustain the commercial space that created the downtown that was more consistent with the vision of the community. He said he would not acquiesce on the things that were important to the community based on the threat that the Greens would remain as it was.

Mr. Ozenich said he liked the design, including the pentagon shape. He said a problem with the Zoning was that it penalized creativity, and said that was what was happening here. He said the Zoning was predicated on building boxes downtown.

Mr. Williams said this was a massive building, and said he wasn't convinced that the proposed façade on Madbury Road would absorb the huge size, with 5 stories and a pentagon shape. He said a major thread of Durham's vision was to preserve the New England experience, and said he was afraid that once the project was built, it would be here for decades, and the Town's sense of place would be altered. He also said he was concerned about the impact of the project on Pettee Brook and College Brook.

Mr. Williams said he was also not convinced that there would be enough college students to support this project over time.

Councilor Smith said his initial reaction to the project was more positive than what his reaction was now. He said he thought student housing was being overbuilt. He said he agreed that it was not commercially viable to have 1/3 of the project be commercial space, and have this subsidized by the tenants, who were students getting themselves deeply into debt. He said it made more sense to have a smaller student housing development downtown, and not one on this huge a scale. He said he was afraid that if this got built, there would be a lot of empty apartment space.

Mr. Rubin said the company had done a lot of homework on supply and demand, and felt very comfortable that there was ample demand student housing within walking distance to the University at this location.

Councilor Smith said he would like to believe this, stating that he would like to see student housing within walking distance to the University.

Chair Wolfe said as a frame of reference, the Planning Board had just approved 460 beds on 20 acres. He said taking that same number and putting it on 1/10 as much acreage, the question for the Planning Board was how this would look, and how it would impact downtown Durham.

Mr. Alther noted that such a development, on a smaller footprint, could be more respectful of the environment. He also people seemed to like the massing along Madbury Road, and that if there was a lower height in the front, there might be able to be some more height in the back. He noted that there was a 7ft distance in height going from the north side to the south side along Madbury Road, and said from the front to the back of the site, there was a 10 ft difference in height.

He said the building wouldn't necessarily be flat across the site, and said they were working with some scale models so they could play with this. He said they had wanted to see if people liked the Madbury Road side first, because that would inform the massing, scale and materials for the back side. He said they were at 48 ft for the mean height of the roof in the back, and were at 30 ft along Madbury Road.

Mr. Rubin said with this revised design, they had hoped they had addressed enough of the issues to be able leave schedule a site tour, and move on from the conceptual stage. But he said the company didn't want to go on a fool's errand.

Chair Wolfe said a site tour would be helpful. There was discussion that balloons should be provided. Mr. Ozenich said given the changes in height, going from north to south and back to front on the site, it was hard to conceptualize a building sitting on it without doing a site walk.

Mr. Rubin said they could also consider doing a virtual tour with computer modeling. He said this could perhaps supplement the site tour.

He said they could pursue some version of what had been proposed; could bail out; or could pursue the original concept that they inherited, which satisfied the Zoning requirements and was essentially the project that Mr. Ozenich had described. He said it would be a big box in the middle of the property, 75 feet or greater away from the brook, with parking on the first floor, and 6-bed units, as a by right project. He said the company didn't like that option, which was why they were pursuing this option.

It was agreed that there would be a site walk the following Wednesday at 5 pm, and that other boards would be invited to attend.

Mr. Behrendt said he had gotten an opinion from the Town attorney regarding the wetland buffer. He said with a new building, the 75 buffer was not grandfathered.

XIII. Other Business

There was discussion that if Planning Board members get further emails on the Great Bay kennel application, they should send them back because the public hearing had been closed.

Chair Wolfe said he would like Attorney Spector to review the Great Bay Kennel discussion at

this meeting, and said this would impact the outcome. There was discussion.

There was discussion on scheduling of special Planning Board meetings where the Board could do actual planning. Mr. Behrendt said he would come up with a proposal for scheduling this. He also said he would follow up concerning the Planning Board procedural issues that were discussed at the March 20th meeting.

XIV. **Review of Minutes:** No Minutes

XV. **Adjournment**

Richard Ozenich MOVED to adjourn the meeting. Lorne Parnell SECONDED the motion, and it PASSED unanimously 6-0.

Adjournment at 10:51 pm

Victoria Parmele, Minutes taker

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Andrew Corrow, Secretary