

These minutes were approved at the March 10, 2015 meeting.

**TOWN OF DURHAM
ZONING BOARD OF ADJUSTMENT
January 13, 2015
Durham Public Library
MINUTES**

MEMBERS PRESENT: Chair Sean Starkey; Vice Chair Robbi Woodburn; Secretary Chris Sterndale; Tom Toye; Jim Lawson; alternate Ruth Davis; alternate Mike Hoffman

MEMBERS ABSENT:

OTHERS PRESENT: Victoria Parmele, Minutes taker

I. Call to Order

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

II. Roll Call

The roll call was taken.

III. Seating of Alternates

No alternates were seated.

IV. Approval of Agenda

Chair Starkey said Item V A had been postponed until the applicant heard back from Superior Court. He also said there was a request from the applicant for Item V B that the application be postponed until the February ZBA meeting.

Chair Starkey MOVED to approve the Agenda as amended. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

V. Public Hearings

A. The PUBLIC HEARINGS on the petitions submitted by Young Drive LLC, Francis Chase, Seabrook on a petition submitted by Vince Todd & Cheryle St.Onge, Durham, New Hampshire, for an, New Hampshire, for **APPLICATIONS FOR SPECIAL EXCEPTION AND VARIANCES** for the properties shown on Tax Map 4, Lots 42-9 thru 42-14, located on Young Drive, are currently on hold until a future Zoning Board meeting date to be determined by the Applicant after the Superior Court case decision is rendered.

B. PUBLIC HEARING APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from an approval of a building permit renewal with conditions on September 18, 2014 by Thomas Johnson, Building Inspector. The property involved is shown on Tax Map 14, Lot 18-0, is located at 225 Packers Falls Road; and is in the Rural Zoning District.

Postponed until February 10, 2015

C. PUBLIC HEARING on a petition submitted by Ari B. Pollack, Gallagher, Callahan & Gartrell, Concord, New Hampshire, on behalf of Colonial Durham Associates, New York, New York, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a December 4, 2014, administrative decision by Michael Behrendt, Director of Planning & Community Development regarding the application of Ordinance #2014-14 to the Mill Plaza Design Review Application. The property involved is shown on Tax Map 5, Lot 1-1, Mill Road Plaza; and is in the Central Business Zoning District.

Attorney Robert Dietel said he was representing the applicant in place of Attorney Pollock. He said the applicant was appealing Town Planner Michael Behrendt's Administrative decision, and said this decision was inconsistent with NH law in regard to the language of the statutes at issue and perhaps more important, the intent of the provisions. He said the series of facts that led to the Administrative decision spoke themselves and laid clear what actually went on.

He said the dialogue regarding the property had been extensive. He said in the first week of September, representatives from Colonial Durham Associates met with Mr. Behrendt, Code Officer Tom Johnson and Economic Development Director Mary Ellen Humphrey. He said during this meeting, there was discussion on the purpose and plans for the Mill Plaza site. He said shortly after this, the Planning Board met on September 10th, and raised the Zoning amendment at the end of the meeting under Other Business, at 10:30 pm, at the end of a long meeting, and he said the item wasn't on the Agenda.

Attorney Dietel said the timing of this was odd, and also said the presentation was odd in terms of the significance of the change proposed, which was a doubling of the density requirement. He noted that the Planning Board had considered some other Zoning amendments that night, and at that time Mr. Behrendt didn't mention that this item would be considered. He said two days later, the design review application was submitted, and said the Planning Department held onto it for approximately two weeks before sending out the notice, and used that time to post the notice of the proposed Zoning change.

He said in response to a letter sent by the applicant, Mr. Behrendt said it was the practice of his department to hold onto applications that came in and wait until the 10th day to send them out. He said this didn't hold up, and provided details on this. He said to hold onto an application until the last moment served no real purpose, and said the applicant had been penalized. He said the applicant had engaged in a good faith effort to make clear what his plans were, and then the timing was used against him. He said a reasonable person would find that the Planning Department and Planning Board threw up an intentional road block to sandbag his client's

application. He said this was precisely the kind of targeted action that the vesting laws of New Hampshire were intended to prevent.

Attorney Dietel said it was clear that Planning Board member Bill McGowan said this was a bad way to do business, and Planning Board member Lorne Parnell questioned the way this was presented to the Board. He said Mr. Parnell said it appeared to be a euphemism for no more student housing, and that if this was what people wanted, they should say this. Attorney Dietel read from the September 10th Minutes, and also said other members of the Board raised the issue of timing and doing this under Other Business. He said the response to this was intriguing, and noted that Council Representative Julian Smith said if this was done now, the Planning Board was closing a gate.

He said it was clear that the intent was not a simple run of the mill zoning change, and was an intent to respond to specific plans that were discussed with the Town in good faith. He said these actions suggested that the goal was to prevent any realistic development of the property that included apartments for unrelated people. He said in contrast, his client's application was the result of a thoughtful and considerate approach to the Mill Plaza site that addressed community goals and accounted for many different voices. He said the procedural roadblock that was squeezed in was unprofessional and appeared to target the application.

Attorney Dietel said Mr. Behrendt had taken the position that the Planning Board didn't need to comply with the recent amendments to RSA 675:7, which required enhanced notice to individual property owners when there was a Zoning change involving a change in density or a change in a use. He said that was precisely the intent with the Zoning change in that it doubled the density requirement for these types of apartments. He requested that the ZBA reverse the Administrative Decision, and determine that his client's design review application was not subject to the increase in the density requirements. He said this was in keeping with NH law.

Chair Starkey quoted from RSA 675:7 and asked Attorney Dietel how it spoke about density. Attorney Dietel said this statute was very recent, so it was known that the intent was to provide an enhanced notice mechanism for circumstances where there was a meaningful increase in density. He said this was captured in lot sizes and permitted uses, and said while lot size wasn't apartment density, it was the kind of meaningful change the statute was intended to capture.

Mr. Lawson said density was something that towns and planning boards constantly considered, and he considered whether if the Legislature intended to address density, it would have explicitly said this. He said one couldn't read intent in because the RSA was so explicit in what it said.

Attorney Dietel said the Supreme Court had been clear that when it interpreted a statute, it looked at the result of the interpretation. He said the Court had said it wouldn't interpret a statute in order to reach an absurd result. He said the change in the statute to capture changes in use and lot size was trying to provide enhanced notice to individuals in a zoning district when property rights were going to be impacted in a meaningful way. He said a density requirement that was doubling from 300 to 600 sf was precisely the type of zoning change the legislation was trying to capture.

Chair Starkey said this interpretation was that the permitted uses were being changed by changing the density requirement, and said he respectfully disagreed with this.

Mr. Lawson said in the Appeal of Administrative Decision, Attorney Dietel cited no case law, so what he had presented was his intent but not the Court's intent. Attorney Dietel said that was incorrect. He said the statute talked about changes and vesting and the Court decision discussed this, and said this was because they didn't want planning boards to specifically target an application by putting through a zoning amendment.

Mr. Lawson said that was Attorney Dietel's interpretation of the intent, but said the only thing he could use was what he read, or case law. He said no case law had been cited. Attorney Dietel said this was not just his own interpretation of intent, and said the Court's interpretation of intent had clearly looked at this as intent to avoid targeted changes to a zoning ordinance. He said the circumstances described were clearly targeted to this project.

Mr. Lawson asked if there was anything illegal or in violation of the RSAs about taking up the Zoning change under Other Business. Attorney Dietel said whether one wanted to say this was technically correct, one had to look at what was going on. Mr. Lawson repeated his question.

Attorney Dietel said at a minimum, there was evidence of a lack of good faith on the part of the town officials involved in using information given to them and inserting a Zoning amendment under these circumstances. He said this wasn't an appropriate, professional way to respond to an application.

Mr. Lawson said Attorney Dietel was saying it wasn't necessarily illegal or in violation of an RSA for the Planning Board to take this item up under Other Business. Attorney Dietel said when one viewed the totality of circumstances, one could say the following: the Zoning change wasn't properly posted in relation to what went on; it was not in keeping with the Zoning Ordinance that this constituted the first legal notice; and was not in keeping with recently amendments to RSA 675:5.

Mr. Lawson said Attorney Dietel had said that this wasn't the first legal notice and that this only occurred under first reading, but in the first claim he was trying to get vesting under the idea that it was the first notice. Attorney Dietel said his client's position was that the first determination that this Zoning Ordinance should apply to this application was inaccurate, and that the Planning Board withheld the application intentionally to try to create a circumstance where legal notice would occur. He said they thought this was shown by the way the item was inserted in the September 10th meeting, the way the application was held, and the way the postings went out, ignoring RSA 675:5. He said he thought a NH Court would agree with this.

Attorney Dietel also said while the Planning Department said that was legal notice, his client's position was that legal notice couldn't occur under the Zoning Ordinance until posting occurred with the Town Council. He said the specific language in the Ordinance talked about the Planning Board making a recommendation concerning a zoning change, and said this didn't create any sort of binding action on the Town to be legal notice in this circumstance.

Mr. Lawson said when there was an appeal before the ZBA and someone cited case law, he felt the responsibility to read the case law. He said a case cited by the Town attorney was *Rallis vs Town of Hampton Planning Board*, and said it was clear that the Supreme Court made the decision in terms of whether there was jurisdiction, but also clearly stated that the applicant didn't have vesting rights because the planning board had noticed the amendment that was part of that case. Attorney Dietel said he wasn't interested in engaging in oral argument concerning the intent of those pronouncements by the Supreme Court. Mr. Lawson said Attorney Dietel was saying the Planning Board action wasn't the first legal notice, and said he was asking Attorney Dietel to reconcile that with the case he had cited.

Attorney Dietel said one could go through a lengthy history of Court decisions on zoning ordinances, etc., and find one that supported Mr. Lawson's interpretation. But he said when one looked at this in an overarching manner, there was a clear vein that the purpose of vesting rights was to prevent targeted action designed to single out individual applications. He said his position was that when one looked at the totality of the circumstances here, a reasonable person pulled off the street would see that this was intended to target his client's application. He said the ZBA could take whatever action it wanted, but said he and his client were prepared to challenge the decision.

Mr. Lawson noted that Mr. Behrendt had created a timeline, and asked Attorney Dietel if he agreed with it. Attorney Dietel said he wouldn't bind himself to that. He said he and his client had put forward what they believed the timeline was, and said to the extent it was set forth in the record tonight and their communications, this was their representation of the timeline. Attorney Laura Spector Morgan said she was present to represent Mr. Behrendt and his Administrative Decision. She first said she didn't believe the ZBA had jurisdiction over this appeal. Chair Starkey said he had wanted to ask a question concerning this earlier but had waited.

Attorney Spector Morgan said with this appeal, the ZBA wasn't being asked to interpret the Zoning Ordinance. She said instead the Board was being asked to interpret State law in being asked to decide if an application was vested, and that it was not Planning Board notice but instead was Town Council notice that was the first legal notice contemplated by RSA 676:12. She said the ZBA was being asked if RSA 675:7 required individualized notice in this case. But she said they were not lawyers, and noted that lawyers weren't going to agree on these questions. She said the ZBA had no jurisdiction over things that didn't involve an interpretation of the Zoning Ordinance, and said her position was that the Board didn't have jurisdiction over the Appeal of Administrative Decision.

Attorney Spector Morgan said if the ZBA wished to hear it, she would go through the points raised in the Administrative Appeal and why she believed they were incorrect. She noted the timeline Mr. Behrendt had created, and said it showed that while the timing was coincidental, there was nothing nefarious going on. She said Mr. Behrendt didn't know the Zoning amendment would be discussed at the September 10th meeting until 24 hours before the meeting, so there was not a grand conspiracy to get it in under the wire. She also said there was nothing illegal about discussing this item under Other Business. She said there was no law that required any board to have an agenda for any meeting, and no law that said if there was an agenda, a board couldn't

discuss something that wasn't on the agenda. She said the only requirement was that public hearing had to be noticed properly.

Attorney Spector Morgan said on September 11th, Karen Edwards, Administrative Assistant for the Planning Department contacted Fosters to place an ad for a public hearing on the Zoning amendment at the October 8th meeting. She said this ad appeared on Sept 16th, and Ms. Edwards posted the meeting notice around town on September 12th. She said the same day, Colonial Durham Associates dropped off the design review application, to be considered for the first time at the October 8th Planning Board meeting. She noted that it was standard practice to hold all applications received until closer in time to the meeting so they could all be sent out together and there was less chance of missing one. She also said this meant that abutters got notice of a public hearing closer in time to the meeting so wouldn't forget about it. She said Durham wasn't the only town where this policy was followed.

She said if the applicant had dropped off the application 11 days before the October 8th hearing, it wouldn't have been heard because it had to be submitted 3 weeks before the hearing in order to get on the agenda. She said the hypothetical that had been presented was therefore incorrect. She said the most important point was that even if on September 12th the Town contacted Fosters with another ad for an application for the October 8th meeting, the ad wouldn't have run until September 16th, the same day the ad for the Zoning amendment was posted. She said the application therefore still wouldn't have been protected because it wouldn't have been the subject of notice prior to the legal notice for the Zoning amendment. She said the entire argument was moot because even if the Planning Department did what the applicant said it should have done, the application still wouldn't be protected.

Regarding the applicability of RSA 675:7, Attorney Spector Morgan said they didn't get into the intent of a statute unless it was ambiguous. She said the plain wording of this statute was not ambiguous, and applied to changes to boundary lines of districts, changes to minimum lot sizes and changes in permitted uses. She said if the Legislature wanted it to apply to other things like density, it would have said that. She said one couldn't read a change in density so broadly that it became a change in permitted uses. She said the use involved in this situation was multifamily housing, which was still a permitted use, and said the density change was a dimensional regulation of that use. She said this was the same as changing setbacks or frontage, and was a dimensional change, so clearly was not covered by the statute.

Concerning the applicant's position that it was the Town Council notice that should be considered, Attorney Spector Morgan said one wouldn't find one case that said it was that notice date that should be looked at. She said in most towns, the planning board didn't adopt zoning amendments, and it was at Town Meeting where this happened. She said it was not the date the warrant article was published that was considered, and was the date of the planning board public hearing on a zoning amendment that applied. She said that was the same process in Durham, but noted that there was a Town Council instead of Town Meeting. She said the relevant date was still the date the Planning Board posted the notice of the public hearing.

Attorney Spector Morgan said it was for all of the reasons she'd provided that the ZBA should deny the Appeal of Administrative Decision, and should uphold this decision.

Mr. Lawson noted that multifamily housing was not a permitted use in the Zoning Ordinance, and asked what the applicable use was in this instance. Mr. Behrendt and Attorney Spector Morgan responded that the use was residence multi-unit, ie apartments.

Ms. Woodburn asked what constituted a posting, and Attorney Spector Morgan said the posting occurred when the notice appeared in the paper, or a paper copy was posted on the wall at the Town Hall, etc. Mr. Sterndale said the timing of this was beyond the control of an applicant. Ms. Spector Morgan said the moment an application became protected was the moment it was the subject of a legal notice. She said there was the notice date of the Zoning amendment and the notice date of the application. She said the applicant contended that the Planning Department gave notice of the Zoning amendment right away, but held the design review application and didn't give notice of it for a week so could make sure that all of the Zoning amendment notifications were proper. But she said this was not what happened.

Mr. Sterndale asked if the point of protection was to give a property owner protection from such games. He said an applicant only had control over the moment the paperwork was submitted, and said a reasonable person would suspect that this should be the point of protection.

Attorney Spector Morgan said the statute said the application was protected from the moment the design review was noticed, and she explained how and why the Legislature had changed the timing on this. She said if the discussion on the Zoning amendment hadn't occurred on September 10th, she didn't think there would have been a design review application on September 12th, and said there were two sets of games going on here. She said this was an experienced developer represented by experienced counsel, and said they knew that the date of protection was the date notice went out on the application, and knew this was not going to happen on September 12th. Chair Starkey summarized what Attorney Spector Morgan had said.

Mr. Sterndale said he personally was out of his depth, and wanted to hear the applicant's attorney confirm when protection started. Attorney Spector Morgan said this was why the ZBA didn't have jurisdiction on this. Mr. Sterndale said he didn't necessarily agree, and said too often the ZBA hid behind not having jurisdiction, when an important role it played was to protect the rights of property owners. He said he didn't want to hide from that.

Chair Starkey asked Attorney Dietel why he felt the ZBA did have jurisdiction. Attorney Dietel said the Appeal asked the ZBA to interpret actions of the Planning Board in relation to the Zoning Ordinance and when an amendment to it was vested under the Ordinance. He said this was inherently tied to State statutes. He said in Durham, amending the Zoning Ordinance was a process that didn't come through the Planning Board, and said the Planning Board made a recommendation concerning a Zoning change. He said the ZBA's role was to interpret the Zoning Ordinance. He said the process in this instance was somewhat unique in that town meetings were a normal way to amend a zoning ordinance, but in Durham there could be a recommendation from the Planning Board. He said this recommendation had no binding authority on the Town. He said it was his client's position that the ZBA had jurisdiction.

Chair Starkey said the ZBA was being told by Attorney Dietel that it had jurisdiction in this instance, in that an amendment to the Zoning Ordinance was proposed. But he said the ZBA couldn't propose amendments, and asked how the ZBA ruled on an amendment being proposed. There was further discussion.

Attorney Dietel said Planning Board actions came through delegation under the Zoning Ordinance, through State statute, so their actions were inherently tied up with zoning provisions. Regarding the timing of the posting, Attorney Dietel said once an application was submitted to the Town, the ability to control how the Town mailed it out was no longer in the applicant's hands. He said it had been said that based on the publication deadlines of the newspaper, the earliest the notice of the application could go out was in keeping with the publishing of the Zoning amendment notice. He said if this was the case, it should have gone out.

He also said the idea expressed by Attorney Spector Morgan, that if both notices ran at the same time and in the same paper this wouldn't result in vesting, was not the case. He said the purpose of the provisions was to make sure that when an application was designed and the zoning ordinance was interpreted as part of this, an applicant wouldn't have the rug pulled from under him, and he was entitled to proceed under the ordinance until the point the application was submitted. He said this meant that if they ran on the same day, he still believed the applicant had vested rights.

Mr. Sterndale asked Attorney Dietel when he thought vesting protection began. Attorney Dietel said his position was that an application was vested upon submission, because of the purpose of the provision. He said his client didn't believe that posting occurred until the Town Council notice was posted. He also said there was an additional notice provision that wasn't brought into play. Chair Starkey asked if there was any case law that backed this up. Attorney Dietel said while Court decisions were not always on point, that didn't mean there wasn't case law. He said he believed that cumulative case law supported his client's position.

Mr. Lawson said Attorney Dietel made the point that the Planning Board notice wasn't the legal notice, but also said the application would have been vested even if it occurred on the same day. Attorney Dietel said the two weren't mutually exclusive. He said the Planning Department said noticing occurred when the notice was posted. He said his client's position was that if that was the case, he should still have vested rights. He said the position that went with this was that it wasn't the actual notice date for the purpose of the Zoning amendment under Durham's Zoning Ordinance, because the Planning Board could only make a recommendation concerning the amendment that had no binding legal effect one way or the other, and so was not the actual notice to confer vesting rights. Mr. Lawson asked how this could be reconciled with the case law Attorney Spector Morgan had cited in her letter. Attorney Dietel said his position on this was clear.

Chair Starkey open the public hearing and asked if there were any members of the public who wished to speak for or against the application.

(Councilor) Julian Smith, Packers Falls Road, said he was the Town Council representative to the Planning Board who had started this. He said Attorney Dietel had asked the ZBA to interpret

the actions of the Planning Board, and had said the Zoning amendment was purely targeted at the applicant's site. Mr. Smith said it was targeted at all sites under the potential of development in the Central Business District. He said Attorney Dietel said the intent was to close the gate, and he agreed that it was.

Councilor Smith said he had made the suggestion and the Planning Board agreed that there was a herd of developers trampling through the downtown, followed by a herd of student tenants that would bring in tax revenues, but the Board didn't want a stampede. He said in the last year or so, new developments had changed the fabric and the ambience of the downtown. He said the Orion, Madbury Commons, Henderson and Eja projects were resulting in significant infill development, and also noted some other current opportunities for development in the district, including the former ATO site. He said the Council and the Planning Board believed it was time to slow this stampede down a bit.

Councilor Smith said he brought up the Zoning amendment under Other Business although he should have brought it up earlier. But he said he was old and forgetful, and also said he'd been away for most of August. He said when he got back, the September 10th meeting was the first opportunity to bring the proposal to the Planning Board. He said he did this at the end of the meeting, but might very well have waited until the next meeting if there wasn't time. He said former Planning Board chairs McGowan and Parnell had objected to how he was doing things, and he noted that he wasn't generally attentive to procedure, and hoped that wouldn't hurt the Town. He said his intention was to close a gate, and was not to target this specific site. He said he wasn't speaking against the overriding application to develop the Plaza, and would like to see it redeveloped in an appropriate, sensible way that benefited the entire community.

Jim Lawson MOVED to close the Public Hearing. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

Concerning the issue of whether the ZBA had jurisdiction, Mr. Lawson said he realized that there were complexities in this situation, and that expertise was needed to address them. But he said his understanding was that the first place to appeal an Administrative Decision was with the ZBA. He said he didn't know how the Board could say it didn't have jurisdiction when this was where someone who wanted to appeal an administrative decision went. He said he thought they had the responsibility to make the best decision they could.

Chair Starkey said his understanding was that what was being called into question was whether the Zoning amendment was proposed at the proper time, and that the timing issue was not an issue of wanting relief from the Zoning Ordinance, or that the Code Officer erred in a decision or that the Planner erred in his decision. He said he agreed with Attorney Spector Morgan and said the ZBA was quasi-judicial but was not judicial. He said this appeal seemed to be a further question of law than a question for the ZBA. He said the applicant had the right to come here, but said he didn't know that it was the right place to be.

Mr. Sterndale asked if there was something in the Planning Board process concerning an administrative decision made early in the process that became the point of an appeal to the ZBA. Mr. Lawson said often this would have to do with a smaller aspect of a project that involved an

administrative decision, and he spoke further on this. He said if it was regarding a Zoning provision that had been in place for some time, Mr. Behrendt would issue an administrative decision that an aspect of a project wasn't in compliance with the Zoning Ordinance and this would then come to the ZBA.

Mr. Lawson said there was a unique nuance in this current situation. Chair Starkey said he thought that nuance went to the question of law, not to the Zoning Ordinance, and said it wasn't about the Zoning change itself but when the change took place. There was further discussion. Chair Starkey said the applicant didn't have to come to the ZBA, and could go to the Town Council. He also said not everything that was appealed to the ZBA was something that the Board was there to make a determination on. He said the ZBA's job was to determine if the Planner erred when it came to the Zoning Ordinance. He said the applicant said the Planner erred concerning the noticing process. Mr. Lawson said he understood this, but said the ZBA was the first place to go if someone had an appeal, and said if that was the case, he didn't think they could say they didn't have jurisdiction.

Mr. Sterndale said if the ZBA erred in the decision of jurisdiction, there were two attorneys and a judge who could figure this out later. But he said he would err on the side of what Mr. Lawson had said. There was further discussion. Chair Starkey said he didn't think they had jurisdiction, but suggested that he could ask Administrator Selig to contract out to get a legal opinion on this. Mr. Toye asked what the implication was of the ZBA taking a vote on this if the Board didn't have jurisdiction. There was detailed discussion. Mr. Toyed said he agreed with Mr. Lawson that this should come to the ZBA, and the other Board members except Chair Starkey agreed.

Chair Starkey said the Board should consider whether the applicant brought forth any information that showed that the Planner erred in the decision or how he came to the decision. Mr. Lawson said they needed to look at the three claims. He said one claim was that the Town acted deliberately to delay the application. He said he rejected this and said based on the testimony of Attorney Spector Morgan, the Planning Department followed normal procedures and there was good reason for them. He said the RSA required 10 days' notice prior to the meeting, and said this was more for the abutter and less for the applicant. He said he therefore didn't believe the application was grandfathered under RSA 675:12.

Mr. Lawson said regarding the claim that the Planning Board didn't have the authority to make the Zoning change and thus the first legal notice was with the legislative body, which was the Town Council first notice, he said after testimony and after reading the case law of Rallis vs the Town of Hampton Planning Board, he thought the Supreme Court delivered a clear message that the Planning Board notice was a legal notice. He said it was interesting that the Court was explicit about this in a case that was about jurisdiction. He said he therefore rejected the second claim.

Mr. Lawson said the third claim was the requirement of notice to landowners in a zoning district that included 100 or fewer properties. He said 674:7 was very clear and said he didn't think the ZBA was in a position to interpret the RSAs. He said he rejected this claim based on what was presented to the ZBA in writing and testimony this evening.

Ms. Woodburn said she agreed with Mr. Lawson's summary. She said she was very concerned about the timeline and said it was obviously a close situation. She also said she appreciated Councilor Smith's description of his motivation, and said they all lived in Durham and could see the development in Town. She said even though the timing was close and could be construed as nefarious, she didn't believe that was the case.

Mr. Toye said property owners in Town should all be concerned about the Town Council and Planning Board changing the Zoning Ordinance in a radical way. He said it was easy for residential homeowners to think these things that would affect the value of their properties wouldn't happen. But he said the commercial property owners had a serious vested interest, and said the change of this magnitude that had occurred had a drastic impact on the value of that particular property or any property in that zone for development purposes. He said that concerned him as a resident of the Town, and was a concern of the Board.

He said the applicant made a good faith effort to hit the timeline, and the only thing he could control was the submission of the application, which got date stamped. Mr. Toye said he was therefore inclined to vote in favor of the Appeal, based on the fact that they made their submission on that date. He asked how one could expect people to do business in Town if they would be subject to radical changes.

Mr. Lawson said in the past two years, even in the Central Business district, the Planning Board and the Town Council had regularly been ratcheting up the density or space requirements for occupants, from 150 sf up to 300 sf. He said the recent Zoning change therefore wasn't radical and was part of something the Planning Board and Town Council had been very diligent about monitoring over the past two years. He noted that there was a change to the density a year ago.

He said the Planning Board and Town Council regularly looked at multiunit development and its impact on the community, and adjusted the Zoning Ordinance. He noted that this had been seen in the ORLI and MUDOR districts. He said he didn't view the recent Zoning change as radical and saw that it was a part of a trend in the community that had been very thoughtful. He also said he had to go back to what the RSA said and what Durham's process was, which was that vesting occurred when an application was noticed and not when it was submitted.

Mr. Toye said it was clear that the trend had been toward decreasing density, but said as a multifamily project developer, he thought doubling the requirement was a big, radical change. He also said for a development of the magnitude of the Mill Plaza project, there could be \$50,000 to 100,000 in soft costs in order to make the submission. He said he therefore thought the timeline that the application wasn't noticed until it was posted wasn't a very good way to conduct business.

Mr. Sterndale said he agreed with Mr. Lawson's summary concerning the second and third claims made by Attorney Dietel. He said he thought the third claim regarding the change to RSA 675:7 was completely apples and oranges. He said he thought the second claim, that it was a Town Council issue instead of a Planning Board issue, was reaching too far. He said if the Administrative Appeal had legs, it was regarding the first claim, which was that the submission was timely. He said his heart was with Mr. Toye on this but said from what was presented, his

head was with the Planning office. He said from what the ZBA had seen, submission of the application was not timely.

He also said if this issue was discussed in other venues, it would be a healthy thing. He said if he was trying to do business in this town, he would have considerable pause. He said it was not an unreasonable perception for some people that this was a display of bad faith. He said a lot had gone on in Town in the last few years, but said if he was the appellant, he would feel the same way. He said he would vote one way but hoped the decision would be appealed. He said this wasn't the first time as a ZBA member he thought the Town had better tacticians than people trying to do business in Town. He said he wasn't sure the letter of the law was followed and said the ends didn't justify the means. But he said he would vote to deny the appeal.

Mr. Lawson said based on his experience on the Planning Board where big applications came forward, he took comfort in the fact that the process applied here was the same process that everyone went through. He provided details on this. He said what happened here from his experience was very consistent with the process that everyone expected when they went through the Planning Office. He said he would be more concerned if an exception was made. Mr. Sterndale said he also heard that there was informal discussion on September 8th and then something appeared at a meeting on the 10th. He said if they didn't hear that they were deaf.

Ms. Woodburn said developers read the regulations and developed ideas, and then floated them to the Town. She said the timing of this didn't look good, but for the ZBA, the timing was what it was. She said in Durham, they needed to be aware that enormous effort and money went into initial ideas that were brought to the Town based on what was in the Zoning Ordinance online. She said the timing on this was tight. Mr. Lawson said he tended to review the design review as the place to float the idea without going through the complete site plan development. Ms. Woodburn said this process was still expensive.

Robbi Woodburn MOVED to deny a petition submitted by Ari B. Pollack, Gallagher, Callahan & Gartrell, Concord, New Hampshire, on behalf of Colonial Durham Associates, New York, New York, for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a December 4, 2014, administrative decision by Michael Behrendt, Director of Planning & Community Development regarding the application of Ordinance #2014-14 to the Mill Plaza Design Review Application. The property involved is shown on Tax Map 5, Lot 1-1, Mill Road Plaza; and is in the Central Business Zoning District. Chris Sterndale SECONDED the motion, and it PASSED 3-1-1, with Tom Toye voting against it and Chair Starkey abstaining.

VI. Approval of Minutes

No Minutes

VII. Other Business

Chair Starkey said the BAA case had been dismissed with prejudice. There was discussion.

A. Discussion of Zoning Board portion of Town website as per Councilor Robin Mower's e-mail.

The Board discussed the email from Councilor Mower. Mr. Lawson said he disagreed with Councilor Mower, and said he thought the website currently provided the right information. Chair Starkey said he had looked at the Jackson, NH website, which Councilor Mower had noted, and also looked at other ZBA websites for towns in Strafford County. He said he thought Durham had a pretty informative site, but he suggested that perhaps the layout, links, etc. could be improved so the information could be accessed more easily. He said the majority of towns didn't have the information that the Durham ZBA site had. There was further discussion.

VIII. Adjournment

Chris Sterndale MOVED to adjourn the meeting. Chair Starkey SECONDED the motion, and it PASSED unanimously 5-0.

Adjournment at 8:19 pm

Victoria Parmele, Minutes taker

Chris Sterndale, Secretary