MINUTES OF THE
BOARD OF ADJUSTMENT MEETING
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE

7:00 P.M. **October 25, 2022**

MEMBERS PRESENT: Jim Lee, Vice Chair; David MacDonald; Beth Margeson; Paul Mannle; Phyllis Eldridge; Thomas Rossi; Jeffrey Mattson, Alternate

MEMBERS EXCUSED: None.

ALSO PRESENT: Peter Stith, Planning Department

Vice-Chair Jim Lee was Acting-Chair.

I. NEW BUSINESS

A. Rehearing of the Appeal of **Duncan MacCallum, (Attorney for the Appellants)**, of the July 15, 2021 decision of the Planning Board for property located at **53 Green Street** which granted the following: a) a wetlands conditional use permit under Section 10.1017 of the Zoning Ordinance; b) preliminary and final subdivision approval; and c) site plan review approval. Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5).

SPEAKING TO THE PETITION

The appellant's attorney Duncan MacCallum stated that he represented 15 Portsmouth citizens who opposed the project. He said the rule of standing was that the complaining person must be directly affected by the decision of the land use board. He said the abutters automatically have standing but if anyone else is directly affected by the decision, then they have standing to appeal. In the case of the North Mill Pond, he said someone who lived far removed by the location might be offended but not directly affected by the land board's decision, but someone who lived in the immediate vicinity or was directly affected by it had standing to complain. He referred to a letter from an environmental expert who said everyone near the North Mill Pond has standing because the development was an insult to the wetlands buffer and its effects will be felt not only at 53 Green Street but by the entire North Mill Pond neighborhood due to the construction debris that will be carried in by the tide and will destroy plant and animal life around the pond. He said the people he represented had standing.

Attorney Michael Ramsdell was present on behalf of the respondent. He said it wasn't true that everyone on the North Mill Pond had standing. He said it was conceded that none of the appellants

were abutters. He said it was a four-part test comprising whether a person's property was in proximity to the development, the type of change and how the person's property would be affected, the immediacy of an injury, and whether the person participated in previous proceedings. He stated that none of the property owners were within 1500 feet of the development and none participated before the Planning Board; none had a definitive injury or an immediate impact to their property. He said the appellants were instead saying that if something went wrong during construction and the pond was harmed, then their property could be impacted. He said the appellants were not claiming that when the development was finished it would have an adverse impact on their property, which would give them standing. He noted that the definition of an abutter included property across a stream, not a body of water, lake, or pond, and just because someone lived on a pond didn't give them standing from a project 1500 feet away. He said the words from the New Hampshire Supreme Court were definitive, adverse, immediate, and direct. He said the appellants didn't have standing because they were being speculative. Attorney MacCallum said there was nothing speculative about it because it was a fact-based inquiry.

Ms. Margeson asked whether the definition of abutters included those that lived across from a stream, noting that there were two appellants who lived on the banks of the North Mill Pond. She also asked if the city noticed people who lived across water bodies for projects within wetland buffers or a similar body of water. Mr. Stith said for zoning applications, it was typically 300 feet from the subject property but if 300 feet went into the pond, the city wouldn't necessarily notify citizens who were further from that. Ms. Margeson said that, for a Planning Board appeal, one didn't have to be an abutter but just had to be directly impacted. For abutter notices, she said she thought it was 300 feet but a wider range for abutter notices was applied than for just direct abutters. Mr. Stith agreed and said it would include more than just direct abutters.

Assistant City Attorney Trevor McCourt said an abutter may be a person aggrieved, but a person aggrieved was a bit different and would probably include any abutter. Mr. Mannle asked if the issue of legal standing was brought up by the appellant. Attorney McCourt agreed. Mr. Mannle verified that the North Mill Pond is a tidal estuary and the applicant's building is on the North Mill Pond. Ms. Margeson said two of the appellants lived on North Mill Pond but one of the board's criteria was whether those people participated in TAC, Conservation Commission, or Planning Board sessions and she believed that they did not. Attorney MacCallum said participation in any of those meetings was not a requirement. He said one of his clients didn't get a notice and things got lost in the shuffle of the 105 Bartlett Street project. He said several of the appellants had been affected and had the right to appeal and contest the Planning Board's decision.

Mr. Rossi asked for more clarification on the immediacy of the injury claimed. Attorney MacCallum said when the project is finished, it will intrude into the 100-ft wetlands buffer and affect the environment on an ongoing basis, including animal life and plant life. Mr. Rossi said the assertion that it would impact animal life in the North Mill Pond was a strong one and he struggled to find the evidence for that. Attorney MacCallum said he presented the board with a letter from an environmental expert and that other qualified people wrote letters to the board and said the project would affect plant life and animal life and have an adverse effect on the environment. Mr. Mattson asked how Attorney MacCallum would respond to the developers' engineer who said since there was currently no stormwater management, the project would improve the site and would replace

invasive species with native plant life. Attorney MacCallum said those things were not supposed to be a tradeoff of benefits vs tradeoffs and the developer was not supposed to build in the 100-ft buffer unless they qualified for a Conditional Use Permit (CUP). Mr. Mattson asked how it would relate to the grievance from the potential damage to the pond as opposed to the wetland buffer. Attorney MacCallum said stormwater runoff was just one aspect of it and that his environmental expert drew a distinction between the two by noting that in the 105 Bartlett Street case, there would still be damage to the environment if the project went forward, even with stormwater runoff.

Acting-Chair Lee opened the public hearing.

SPEAKING IN FAVOR OF THE STANDING

Bill Downey of 67 Bow Street said, as an owner of a kayak business, that making the argument that water had to be measured by a certain footage was not applicable because those were for traditional uses. He said the tides usually came it around nine feet and could affect anything beyond 300 feet. He said the city and anyone who was part of the water system would be affected.

Mark Brighton of South Mill Street said he believed there was no hardship to the land and that the project didn't have to intrude upon the wetlands.

Abigail Gindell of 229 Clinton Street said wildlife would be affected by the felled trees and construction as well as the noise and light pollution.

Esther Kennedy of 41 Pickering Avenue said she had a Masters' degree in environmental administration and that she was dependent on the waterway because she owned a marina. She said North Mill Pond was more of an estuary and everyone who paid taxes had standing because there was public land between the high and low tide zones. She said the Master Plan asked that developers not build in buffer zones because it would affect the ecosystem. She said the waterway went on for miles and there were eel and other grasses in the area.

Patricia Bagley of 213 Pleasant Street said she agreed with all the remarks. She said she project violated the purpose of buffer zones and what they were meant to keep out. She said she had standing because she was a resident and walked the North Mill Pond and that the pond was part of Portsmouth's fabric and had tremendous benefits for the residents.

Petra Huda of 280 South Street said it was a tidal estuary, not a pond or a creek, and affected everyone who lived by there. She said there was a reason that there were six criteria to be fully meet in order to get a CUP, and she urged the board to look at the Master Plan and save the estuary.

Dick Bagley of 213 Pleasant Street said the board had a difficult decision to make on standing because it was hard to define. He said the board had an obligation to the citizens by asking if there was an error made in the decision process.

Paige Trace of 27 Hancock Street said the city once had two estuaries but now it only had one that ebbed and flowed into a Class B impaired waterway that had a different set of rules. She said a precedent could be set for other developers until the estuary was entirely gone.

Beth Jefferson of 111 Sparhawk Street said she lived on the west side of the pond and was also an appellant for 105 Bartlett Street. She said she had to have permission to remove an overgrown arborvitae in her yard because it abutted the marshlands of the wetlands, and she expected the same procedure for a large commercial developer.

John Howard of 179 Burkitt Street said the Foundry Street Garage was like having a cruise ship at the end of the pond because it was ablaze ever night. He said light pollution affected everyone.

Attorney Ramsdell said standing was a matter of law and that the board took an oath to uphold the law. He said there was a test for standing and that none of the speakers offered a direct, immediate, or definitive adverse consequence of the project but instead the board was asked what would happen to the water. He said the project would do stormwater improvements to the pond and would not adversely affect anyone's property and that the buildings in the project would not be any closer to the water than the current building was. He said the building would in fact be further removed from the water, as would the paved portion of the roadway. He said his client was not asking to further intrude into the buffer, and he asked the board to decide the standing issue by law as required.

Bill Downey of 67 Bow Street said the attorney was being paid to make a good argument and asked how he would feel if it were his town. He said rules were rules and just because one thing was done to improve the situation didn't give an allowance to break the buffer.

Abigail Gindell said trading in a one-story building for a five-story one wasn't the same thing and when something was disturbed, something better had to be done as a matter of course.

Attorney MacCallum said he wasn't aware of a case where participation in a land use meeting was required for standing. He said those meetings moved at a fast pace and word didn't get around. He said anyone adversely affected should be able to have standing to bring an appeal, whether they participated in the prior proceeding before the Planning Board or not.

No one else spoke. Acting-Chair Lee closed the public hearing.

DISCUSSION OF THE BOARD REGARDING STANDING

Mr. Mattson said even though the direct abutters weren't present at the previous meeting, they could still have standing. He said a lot of the arguments seemed to relate to hypothetical harm to the water instead of a definitive, immediate, and direct impact to the water. Mr. Rossi said the letter Attorney McCourt submitted to the board stated non-inclusive factors when considering if a party is aggrieved, and he asked how the word non-inclusive applied. Attorney McCourt said the term 'person aggrieved' didn't provide a lot of guidance to local land use boards but was a factual inquiry that varied from case to case. Mr. Rossi asked if other factors other than the four stated ones could be considered. Attorney McCourt said there could be but that the new Statute required

specific written factual findings to be made, and he wasn't sure if that applied to a case of an appeal from the Planning Board to the BOA but recommended that the board make specific factual findings on the issue of standing. Mr. Rossi said the project hadn't been done yet, so when it came to injury claimed and people didn't have standing to make their case, it was like a Catch-22 because they couldn't prove the injury because they didn't have standing, and they didn't have standing because they couldn't prove the injury. Attorney McCourt said there was a difference between an injury that the community or individual may suffer as a result of some tortuous act. He said an injury in this case was an injury to a person's property rights.

Mr. Mannle asked if all the property owners on the North Mill Pond received abutters' notices. Mr. Stith said they did not. Mr. Rossi said therefore failure to meet one or more of the four criteria would not disqualify the appellants from having standing. Attorney McCourt agreed and said they were factors that the court provided to guide the board as they determined who might be a person aggrieved. Mr. Margeson said those were the factors that the Supreme Court laid down in terms of Superior Court appeal, and she asked if those four factors were in play from a Planning Board to a Zoning Board of Adjustment (ZBA) appeal. Attorney McCourt said those factors were specific to appeals from the Planning Board or the decision of an administrative official such as the Planning Board to the ZBA and was a different standard. It was further discussed. Ms. Margeson asked if the four criteria applied to the Superior Court or the appeal from the Planning Board to the ZBA. Attorney McCourt said it was the latter appeal. Ms. Margeson said the Superior Court would apply its own analysis as to standing and would not accept the ZBA's findings. Attorney McCourt said a person might have the right to appeal a decision of the Planning Board to the ZBA but not the right to appeal from the ZBA to Superior Court.

Mr. Rossi said the estuary was an interlinked ecological system, so proximity might take on a different meaning in terms of the potential for harm, and it was further discussed. Ms. Eldridge said she didn't think there was standing in this case because if every taxpayer had standing, then no one had standing. She said all the letters she read from people with standing who felt aggrieved used the word 'if' to describe a potential harm. Mr. Mannle said anyone on the pond would have standing because it was a tidal estuary and it was the city's responsibility to inform the public. It was further discussed. Acting-Chair Lee said the memo from the Legal Department stated that standing is a factual issue for the board to decide on a case-by-case basis and that it quoted the RSA as follows: "The court advises that the ZBA weigh in on the following non-inclusive factors when considering if a part is aggrieved." He said that meant that Points 1 through 4 didn't have to be met but were just factors to consider. He said no one was aggrieved because nothing had happened yet, and the cumulative effect was taken into consideration. Ms. Margeson said the board's job was to use the four tests to see if the people had standing. Acting-Chair Lee said that was a factor to consider, and Mr. Rossi agreed. After further discussion, Ms. Margeson said the aggrieved term came from the legislature and the court set out the criteria to figure out what aggrieved means to land use boards. She said it was up to the board to figure out what constituted grievance.

DECISION OF THE BOARD

Mr. Rossi **moved** that the board find that the appealing parties meet the statuary requirements for standing provided under RSA Section 676.5 for the following reasons: some of the appellants have

properties that border on the same estuary as the project borders on; estuaries are complex and delicate ecosystems, and this project involves activity within the 100-ft wetland setback, so it has the potential to damage or alter the state of the estuary, and because of this potential, the appellants have standing to make the case of whether or not that will be the case and whether or not the issues as part of the appeal have merit.

Mr. MacDonald concurred and had nothing to add.

The motion **passed** by a vote of 4-3, with Ms. Margeson, Ms. Eldridge, and Mr. Mattson voting in opposition.

SPEAKING TO THE APPEAL

Attorney MacCallum said he represented 15 residents who were opposed to the project and were appealing a decision from the Planning Board that granted final site approval to the project. He said the standard of review of the Planning Board's decision was de novo, meaning that the ZBA considered it anew and wasn't required or expected to refer to any of the findings of fact made by the Planning Board in its decision but had the right and the power to substitute their opinion of the facts found by the Planning board and set them aside. He said the zoning ordinance required in this particular zoning district that if the building exceeded 20,000 square feet, a building footprint CUP was required. He said the Planning Board did not do that and did not insist that the developers meet the criteria and obtain a CUP, so the granting of site plan approval was illegal. For that reason, he said the ZBA had to reverse the Planning Board's decision and ask them to do it over. He said the decision to allow more than two stories was the same thing because portions of the building would be within 100 feet of the water line and no more than two stories were allowed in that circumstance. He said the developer claimed that the community space they were giving to the city entitled them to two stories, but it was an overlay district and there was no overlap between the 100-ft water line and the overlay district. He said it was cut and dry that the building wasn't allowed to have more than two stories if the project intrudes into the 100-ft margin. He said when the zoning ordinance provisions are in conflict, the introductory provisions or the ordinance provide that the more restrictive provision is to be followed. He said the more restrictive provision was that there be only two stories. He said the zoning ordinance also had a strong policy of wetland and environmental protections and that the wetlands ordinance is to prevail in the case of a conflict. He said the 100-ft buffer trumped the overlay district and other provisions of the ordinance, but in this case there is no conflict because the 100-ft buffer stops at the borderline of the overlay district, so there is no excuse for allowing more than two stories on the building. He said after his original appeal, it came to light that there was an ineligible Planning Board member sitting on the board, Ray Pezzullo, who voted to approve the project. Under case law, he said it voided the entire vote to approve the project. He said Mr. Pezzullo was ineligible because he was an ex officio member of the board who worked for the City Manager, who was also an ex officio member of the board, and it was a conflict of interest. He said it was also a conflict of the administrative code and the Statute and the administrative code had to yield. He said for those reasons the Planning Board's decision was illegal. He cited the case of Winslow vs the Town of Holderness Planning Board and said it was impossible to assess the impact that the ineligible member's decision may have had on the Planning Board's decision.

Ms. Margeson said the issue was raised in the appeal of the workforce housing for the Portsmouth Housing Authority and the Superior Court did not give the fact that Portsmouth had too many ex officio members on the Planning Board that much merit. Attorney MacCallum said if it wasn't raised, then there was no reason for the court to rule on it. Ms. Margeson said the board's members had changed since February and the information they received about Mr. Pezzullo didn't come to them until later that day. Attorney MacCallum said he sent the information back in April but that he forwarded Planning Board Chairman Chellman's letter to them that day. It was further discussed. Ms. Margeson verified that Attorney MacCallum was only appealing on Counts One and Three. Mr. MacDonald asked about the proposal for trading floor space for height. Attorney MacCallum said the developer's argument had been that the site was going to be better because they would improve the overall project, so they should be entitled to invade the 100-ft buffer. He said detriments should not be traded for benefits but that the zoning ordinance's criteria for a wetlands CUP and the number of stories involved should be followed.

Attorney Ramsdell asked the board to vote on the standing issue again because none of the concerns raised by any board member had anything to do with the two issues that the appellants were pursuing under the appeal but only with the issue related to the wetlands and the buffer. He said it was conceded before the New Hampshire Supreme Court that the ZBA did not have jurisdiction over the Planning Board decision on a CUP. He asked that the board revote on standing with only the two issues of the appeal before the board.

Attorney McCourt said it was within the ZBA's power to vote that the appellants had standing because the entire process of the rehearing set up by the legislature was intended to give the ZBA first crack at correcting any mistakes they may have made. He said if the board believed that the reasons they used to support their decision in the first instance for standing were correct, then they would vote in the same way.

Ms. Margeson said she was disinclined to revisit the issue of standing because she thought that Count one included information about the lot being within 100 feet of the North Mill Pond and did relate to the reasons upon which the board gave standing. Mr. Rossi and Mr. Mattson agreed. Ms. Margeson said the CUP was before the Superior Court but there was a lot of case law stating that the ZBA still had to do the analysis of the zoning ordinances that do not pertain to CUPs before all the administrative remedies had been exhausted prior to going to Superior Court. She said it made sense to continue. Acting-Chair Lee agreed and said the revote would not change anything.

Attorney Ramsdell said he already submitted his position on the two issues before the board and would address the analysis of the ordinance. He said it was plain that the board didn't have jurisdiction over the Chellman issue because it wasn't raised before the Planning Board or the appellant's appeal to the board but was instead raised in the motion for rehearing to the board. He said the board also had appellate jurisdiction by Statute and over what the legislature provided it for jurisdiction. He said the letter from Planning Board Chairman Chellman did not ask for interpretation of the zoning ordinance but involved the composition of the Planning Board, which in no way was determined by the ZBA. He said their jurisdiction did not extend to the issues raised in the Chellman letter or by Attorney MacCallum and wouldn't be part of the rehearing procedure.

Attorney Ramsdell said a CUP was not required for a building greater than 20,000 square feet because it was located in the north end incentive overlay and according to ordinance Section 10.5A46.0, a building over 20,000 square feet is allowed without a CUP if community space requirements are met. He said the appellants were citing the wrong provision and relying on Section 10.5A43.43 that wasn't the proper standard because it dealt with an increased building footprint based on parking requirements. He said his client was not proceeding under that but that the basis of their request was Section 10.5A46.10, the same issue regarding the building height. He said they were entitled to an additional story in height if the development provides community space. He said Sections 10.5A46.10 and .20 governed the proposed development at 53 Green Street because overlay districts apply special rules to manage land use and specific areas that may be portions of a single zoning district or that may overlap two or more zoning districts. Except as specifically provided in the regulations for an overlay district, he said all regulations of the underlying zoning district shall apply. He said when there is a conflict between the regulations of an overlay district and those of the underlying district, the overlay district regulations control. He noted that the word 'trump' was used, and it meant that the overlay districts control or trump the rules for individual districts like 4 and 5. He said that Section 120.5A46 states that in the incentive overlay districts, certain specified development standards may be modified as set forth in Section 10.5A46.10. He said if the development provides community space, then the building structure may be increased to 35 square feet and the building height increased by one story. He said there was a critical difference when a lot was located, adjacent to, or within 200 feet of North Mill Pond. He said the sections of the ordinance didn't conflict but just talked about different lots. He referred to the various sections of the ordinance and concluded that as long as the project is in the overlay district and if it provides a lot adjacent to or within 100 feet of North Mill Pond, the development isn't eligible for the building height and footprint incentives. He said it couldn't be argued that the zoning map controlled. He said the map became part of the zoning ordinance in April 2014 and had been amended several times but none of the amendments impacted the north end overlay district, compared to the amendments made to sections 10.5A46.21 and .22 that became part of the ordinance in August 2018. He said the intent of the 2018 amendment was to provide public access to the North Mill Pond via the greenway/open space and to have the building step down toward the water. He said his client's building was not stepping down to the water but was stepping back and was still within 100 feet of the water mark. He said the development achieved the goals of the zoning amendment. He said the appellants' argument was based on a misinterpretation of Section 10.141, the same as their argument on Section 10.511, and that the conflict argument was irrelevant to the proposed development. He said there was no conflict among the ordinance provisions and his clients had satisfied the criteria for additional square footage and floor height. He said the appeal should be denied. (See recording stamp time 1:45 for further detail).

Ms. Margeson said the board received the Staff Memo about the Planning Board decision the day before and it seemed that the Planning Board may have failed to cite the appropriate zoning ordinances. She said the lot was mostly within the 100 feet of the North Mill Pond and the smaller part of was within the north end incentive overlay district, so under Section 10.611, because it is an overlay, it applies to both portions of the lot, which was Attorney Ramsdell's argument. She said the other argument was that under Section 10.5A46.2, the portion of the lot that lies within 100 feet of the North Mill Pond is eligible to receive incentives to the development standards.

Mr. Rossi referred to the zoning map and said there were parts of the north end incentive overlay district that border directly on the North Mill Pond or Hodgson's Creek, and not every part of the north end overlay incentive district was set 100 feet or more back from the North Mill Pond. Attorney Ramsdell said he was sure that was correct, and if not, there would be no reason to have the separate provisions of 10.5A46.21 and .22 for lots located adjacent to or within 200 feet or for lots more than 100 feet. Mr. Rossi asked why therefore Section 10.5A46.20 would apply to the portion of the lot that's not in the overlay district. Attorney Ramsdell said he thought they were all within the north end overlay incentive overlay district. Mr. Rossi said the lot of the project is partially within the north end incentive overlay district and partially within 100 feet of the North Mill Pond, and those two areas don't overlap, unlike some other areas where there is an overlap. Attorney Ramsdell said he believed the entire project is within the north end overlay district because it's a development that includes the lot and the building, so the rules for within 100 feet of North Mill Pond apply to the entire development because of the way it's defined in the zoning ordinance. He said the 2018 amendments regarding the north end overlay district including Sections .21 and .22 render the zoning map itself inaccurate. Mr. Rossi said he would agree with that if there were not areas where the incentive overlay district was not set back 100 feet from North Mill Pond.

Acting-Chair Lee said Attorney Ramsdell quoted Section 10.611, the underlying zoning issues where there's a conflict between regulations of an overlay district and the underlying district and the overlay district regulations control. He said he read Article One of the zoning ordinance about purpose and applicability. He said Section 10.141 stated that whenever the provision is more restrictive or imposes a higher standard or requirement on the use or dimensions of a lot, building, or structure that is imposed or required by another ordinance, regulation or permit, the provisions of this ordinance shall conflict. He said it seemed to him that they were in conflict. Attorney Ramsdell said there was only one zoning ordinance but several sections, chapters and so on. He said Section 10.661 talked about districts and rules for districts but they're all within the singular zoning ordinance. He said Section 10.141 says that when a provision of this ordinance is more restrictive than is imposed or required by another ordinance, he said it meant another ordinance, not 'this' ordinance, and that was why there was no conflict. He said 10.611 dealt with districts within 'this' ordinance whereas 10.141 dealt with a conflict within 'this' ordinance and something else. He said the plain language of them eliminates the conflict. He further expounded on whether the word ordinance was capitalized and whether it was 'the' ordinance or 'this' ordinance. (See recording time stamp 2:10).

Acting-Chair Lee opened the public comment.

Esther Kennedy of 41 Pickering Avenue said she questioned the weight of a facility like that on the tidal zones, as well as the impervious layer. She said the CUP process had to be re-evaluated and that the board should send it back to the Planning Board.

Abigail Gindell of 229 Clinton Street said the tall trees would be taken down, which would change the habitat for the birds and damage the whole ecosystem.

Petra Huda of 280 South Street urged the board to look at it from the perspective of the original CUP. She said the Planning Board didn't look at the site's limit of 20,000 square feet and the fact that a CUP was needed to go up to 29,000 square feet, so they should review it again and clarify it.

Paige Trace of 27 Hancock Street said the developer could go a story higher, and the higher up they go, the more money the city makes because there'll be more people paying taxes. She said workforce housing wasn't proposed, and even if harming the ecosystem could be justified, the building wasn't for residents who could afford it or for those people who worked in the city.

Attorney MacCallum explained that the ineligible Planning Board member was part of their appeal. He said he traced the whole history of the event and the law and didn't raise it in his original appeal because at that time he didn't know about it. He said the document was attached to the objection to Stone Creek Realty's motion to reconsider the ZBA's decision on the appellants' motion for rehearing. He said the ineligible member was appointed pursuant to an administrative code provision that conflicted with the Statute, so the case should be voided and returned to the Planning Department. He said Attorney Ramsdell's use of the word 'this' and the capitalization for the word 'ordinance' made the ordinance seem more difficult than it was. He said the more restrictive interpretation in this instance says that if any portion of a building is within 100 feet of the water line, only two stories can be built. He asked the board to overturn the Planning Board's decision. (Recording time stamp 2:33:48).

Ms. Eldridge asked why there should be an overlay district if it's never going to rule, noting that when it's in conflict with anything more restrictive, it won't have its way. Attorney MacCallum said the Wetlands Protection ordinance said the same thing and that the zoning ordinance resolved it by saying that the most restrictive interpretation will control. Ms. Margeson remarked that Attorney MacCallum cited Sections10.141 and 10.511 which were not in the character zone district. Attorney MacCallum said they were general provisions that cut across the entire zoning ordinance. Ms. Margeson said the ordinance says that for incentive overlay districts, the overlay takes precedence over the other sections of the ordinance. Attorney MacCallum said the Wetlands Protection Ordinance says that in the case of a conflict, it controls the other provisions or the ordinance. Ms. Margeson said they weren't dealing with the wetlands, and the two remaining counts were whether the Planning Board erred by applying Sections 10.5A43.43 vs 46.10. Attorney MacCallum said Sections 10.5A21.10 and .20 of the ordinance were more restrictive and more overt because Section 10.5A21.22B is intended to address the situation where a new structure is erected in the wetlands buffer zone or where the height of the existing structure is increased. He said Sections10.5A21.10 and .20 prevailed over Section 10.5AS46.10, and no building exceeding two stories is allowed. Mr. Mattson said the nuance was important. He said the flood plain district referred to the section where he thought one of the statements of what overrides what referred to an article, and then Section10.141 referred to the ordinance. He said they may be in conflict but questioned the nuance of section vs article or ordinance. Attorney MacCallum said he didn't know what the ordinance drafters meant when they incorporated other sections by reference.

Attorney Ramsdell said he had forgotten that Attorney MacCallum sent in the prior letter about the ineligible Planning Board member, but it still didn't change the fact that the board had no jurisdiction over that issue. He said Section 10.141 wasn't just about the fact that the letter 'o' was

capitalized in one place and not the other or the word ‘this’ was referred to in some cases. He said when put together, the specific language was a provision of THIS ordinance vs what’s required by another ordinance. He pointed out that there were six or more other ordinances and that the use of the word ‘this’ or capitalization was because the drafters were making a point and knew what they were doing. He said it was the way a court will decide it and the way the board should decide it.

Mr. Rossi noted that there was no portion of the north end overlay incentive district that bordered directly on the North Mill Pond and that he was thinking of the west end.

No one else spoke. Acting-Chair lee closed the public comment.

DISCUSSION OF THE BOARD

Ms. Margeson said she would not support the appeal because she didn’t believe that the Planning Board erred in applying Sections 10.5A46.10 and 10.5A46.20. She said it was clear that the zoning ordinance allows for the overlay district to apply to the entire lot by virtue of Section 105A46.21, so by right, in Counts One and Two, the appellee was entitled to build the building they did. She said she didn’t like the project and that kind of building on the North Mill Pond bothered her, but she had to concede that it what the zoning ordinance allowed for. Mr. Rossi said he didn’t think the board was making any kind of a judgment about the merits of the project but that it was a judgment of whether the Planning Board acted in error or in compliance with the zoning ordinance. He said he kept coming back to the map because in Section 10.5A46, the incentive overlay districts are designated on Map 10.5A21b, and in examining that map, it was clear that the west end incentive overlay district bordered directly on the North Mill Pond, so he therefore did not interpret the wording in Sections 10.5A46.21 and .22 to mean that in this particular lot, the area that’s not within the incentive overlay district but is within the 100-ft setback is governed by the rules of the incentive overlay district. He said he thought it was governed by the rules of either the wetlands setback or the Character District 5, so he did not believe that the incentive overlay district ordinance really applied to that area of the lot. He said he was in favor of the appellant’s position. Acting-Chair Lee said he would support the appeal because there was a reason that Section 120.141 is at the beginning of the zoning ordinance at the part labeled ‘purpose and applicability’. He said that section had to do with the purpose and applicability of the whole zoning ordinance. He said the little ‘o’ in the word ordinance came from when someone was talking about another ordinance further inside the ordinance, so that was saying that if there’s another ordinance inside, the provision of Section 10.141 is the prevailing ordinance and shall govern. He said he also thought that 100 feet was 100 feet and there was no gray area, so the development was inside the 100 feet. For those reasons, he said the appeal should go back to the Planning Board for another hearing.

Mr. Rossi said he would make a motion and handle Counts One and Three together because, according to Section 10.5A46 describing the incentive overlay districts, the districts are designated on Map 10.5A21B, and in that map, it’s clear that the north end overlay district does not extend into the 100-ft setback from North Mill Pond. Therefore, the specifics of the project would require some additional activity that was not taken, such as a CUP or other exceptions, to allow the building coverage as well as the exceptions to the height restrictions in Character District 5.

Mr. Rossi **moved** that the board finds an error in the enforcement of the zoning ordinance in the July 15 decision of the Planning Board for the following reasons: the north end overlay incentive district does not extend into the 100-ft setback and therefore does not provide for the increased building lot coverage, size, square footage, and height.

Mr. MacDonald concurred and had nothing to add.

The motion to grant the appeal for Counts One and Three **failed** by a vote of 4-3, with Mr. Mannle, Ms. Margeson, Ms. Eldridge, and Mr. Mattson voting in opposition.

II. OTHER BUSINESS

There was no other business.

III. ADJOURNMENT

The meeting adjourned at 10:05 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary