

**MINUTES OF
WORK SESSION**

**PLANNING BOARD
PORTSMOUTH, NEW HAMPSHIRE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS
CITY HALL, MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

7:00 P.M.

APRIL 10, 2008

**PLANNING BOARD
MEMBERS PRESENT:**

John Ricci, Chairman; Jerry Hejtmanek, Vice-Chairman;
Donald Coker; Paige Roberts; Anthony Coviello; John
Rice; AND Cindy Hayden, Deputy City Manager

MEMBERS EXCUSED:

M. Christine Dwyer, City Council Representative; Richard
A. Hopley, Building Inspector; MaryLiz Geffert, Alternate
and Norman Patenaude, Alternate

**CONSERVATION
COMMISSION
MEMBERS PRESENT:**

Steven Miller, Chairman; Jim Horrigan, Vice Chairman;
Barbara McMillan; Brian Wazlaw; Skye Maher; and
MaryAnn Blanchard, Alternate

MEMBERS EXCUSED:

;Eva Powers; Allison Tanner and Richard Adams, Alternate

ALSO PRESENT:

David M. Holden, Planning Director;
Peter Britz, Environmental Planner
Robert Sullivan, City Attorney
Rick Taintor, City Zoning Ordinance Consultant

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Chairman Ricci stated that this was a continuation of last week's joint Work Session. Mr. Taintor handed out new exhibits.

I. WORK SESSION

A. Review and discussion of the Draft Revised Zoning Ordinance:

1) Article 8 - Environmental Protection Standards (in particular, Wetlands);

Mr. Taintor picked up on Page 138, which is where they left off last week. Mr. Taintor explained his handout was in response to their wetland discussion last week. It included a combination of page 138 thru the end of the Article on 142 is a reclassification of existing Article 8. What is unusual is that in the existing Article 8 they have the Earth Product Removal and Earth Products Placement. Removal is given a special permit by the Planning Board and Placement is given a special exception by the BOA. Otherwise most procedure and criteria are

pretty much the same. They didn't see why that distinction was made. There is also a state statute giving the Planning Board a permitting authority. The changes are to make these both as a permit from the Planning Board. There is very little in terms of substance for granting a permit. Since last week, Ms. Tillman reviewed it to see if they can be combined any further. His question is given that this is authorized in a separate state law and uses a permit, why does it have to be in zoning? What would the permit be? Attorney Sullivan indicated it is unusual in the Zoning Ordinance and he asked why not have it done by the BOA. It is a land use technique. He could think of a reason to have it done by the Planning Board because Zoning Boards only have the authority to grant variances and Special Exceptions so if they want a permit granted under any other criteria, then it would have to be the Planning Board. Mr. Holden explained that was the rationale that it came in. They did not have a system of tracking either placement or removal as it didn't require a building permit so this was away to make sure those activities got some review. Mr. Taintor asked how often does it come up? Mr. Holden stated it is used to stop a problem when people are doing something they shouldn't. They involved the City Engineer. It is for the applicant to show they are doing no harm. Attorney Sullivan asked if there is any active quarry operation in the City now? Mr. Holden did not think so. He added that the key way round that if they had gone to Site Review and had received a building permit and that included either one of these activities you didn't want to see if as it was covered.

Chairman Miller, page 141, 10.832.25, it stays "to the extent that all drainage will flow to a gutter, public surface drain system or existing natural drainage course". It may make sense from a drainage standpoint but it may not make sense from an environmental standpoint to have all drainage go to the public service drain system gutter. It would be nice to drain on site and infiltrate on site. He understands you can't always do that but to dictate that you have to send it to a gutter feels like a missed opportunity and it complicates things. Chairman Ricci thought they might add using means of Best Management Practices. Chairman Miller stated that would make him feel a little better. He felt they need to look for opportunities to decrease their run off. Chairman Ricci felt that brings up the manual again.

Mr. Holden referred to page 141, Section .5, He felt they could just refer to the Blasting Ordinance since this ordinance doesn't do too much with it, it would simplify it. He was working on the March 31st draft, rather than the April 1st draft.

2) Article 11 - Performance Standards; and related provisions in (a) Article V of existing Zoning Ordinance and (b) City Ordinances, Chapter 3, Article IV (Noise Control);

Mr. Taintor indicated this is an area that is a little fluid. They are trying to decide what belongs in zoning and what belongs with police power. He handed out Article 11, Performance Standards and the existing City Noise Control Ordinance. Also, there also is a separate section that he didn't have with him which is a section they are considering to potentially merge with other sections of the Zoning Ordinance. The existing Performance Standards include noise and vibrations, drainage, fire explosions, odor, fires, gases, dust and smoke, heat and glare, vibration, radiation, waste disposal and toxic matter and electromagnetic interference that are more in the order of operational things. For example noise comes up because of HVCA equipment in a Site Review Application rather than a use regulation. Drainage issues are part of site review. Noise is in two different ordinances and the City Ordinance is more up to date. They want to make

sure they get as much protection from the Zoning Ordinance as we are from the City Ordinance. The issue is how much gets dealt with by the Planning Board in this area? Attorney Sullivan felt that regulating noise, odors, etc. are not traditionally enforced through zoning and they are not items that lend themselves to being enforced through zoning very well and they are more logically located in ordinances adopted under City police powers. A good example is under pre-existing non conforming uses. Because of how State statutes work, anything pre-existing has a constitutional status to continue. That concept is strictly zoning. If they adopted a police power, then it is not a defense to the person making the noise that they were doing it before the ordinance was adopted. As a practical matter, all Zoning Ordinance enforcement gets done as part of the building process, probably more than 85%. Only a tiny bit of enforcement going out to the community is to find violations of the Zoning Ordinance. Odors and noises are never going to be adequately enforced as by a Zoning Ordinance but police powers is a more consistent enforcement. He prefers the more logical enforcement mechanism by police powers. Noise bothers people at night but zoning officers don't work at night but Police officers do. Deputy City Manager Hayden asked if the Performance Standards should be merged with other City Ordinances or into something he might incorporate in some type of City Ordinance. Attorney Sullivan confirmed the only issue would be enabling legislation. There might be something that they have to put in the zoning ordinance. There might be the occasional case. They should replicate them in another ordinance and minimize them here. Mr. Taintor suggested they could refer to the City ordinance. Deputy City Manager agreed so they don't have two not quite parallel tracks going. Attorney Sullivan felt they should simply the ordinance so any place they can reference another ordinance or regulation would be good.

Mr. Coker believed he agreed in principle after fighting the noise battle for 13 years however he felt it was a good idea to retain some of it. The Planning Board is an educational process for an applicant and as they stand in front of the Planning Board they should be reminded of the noise, odor, etc. For example, the Portwalk was going to pick up their trash at 5:00 am and they were reminded that they can't do that before 7:00 a.m. He felt this serves a very important purpose for an applicant. Deputy City Manager Hayden confirmed they were going to leave noise and vibration in zoning, it was the other stuff they were debating moving. Mr. Horrigan agreed in principle as he has had issues about noise on the BOA in the past. Many special exceptions involved noise issues and that is a criteria for a special exception. In some districts, proposed issues should be dealt with before they become an issue and police power would not allow neighbors to attend a public hearing.

Mr. Holden also agreed with Attorney Sullivan on most items. The ones they have some authority with are noise, for example with air conditioners, and lighting prohibits glare. Vibration is very rare and he only remembers dealing that with the Speakeasy. Noise, glare and lighting they use enforcement from the Zoning Ordinance. Mr. Taintor indicated that lighting has been strengthened in another location and they are leaving noise in so it sounds like they should highlight those points. Mr. Coker asked if they will be leaving in noise decibel readings. Mr. Taintor thought there was a tendency to simplify but if he feels it is important he can leave it. Chairman Ricci felt that charts and pictures go a long way and people can read them easier. Mr. Coviello thought that the chart is such an extremely technical thing and there are very few companies that can do it. To him it should be in the City ordinance. Attorney Sullivan felt Mr. Sullivan was correct. The last time they had to test noise they had to go down to Massachusetts

to get the correct meter. Mr. Taintor referred to the glossary of technical terms and notes that 13 aren't even used in the ordinance. Five are used directly and three are used in connection with other definitions. Chairman Ricci asked Mr. Taintor to work on condensing and moving things to the City Ordinance. He would like to look at their current Performance Standards and take them out and just leave a reference to the City Ordinance.

Mr. Horrigan referred to Removal of Earth Products. What happens when someone starts earth remove and finds out they have a trash site with hazardous waste or toxic materials? Attorney Sullivan confirmed they would call DES and they would take control.

Mr. Taintor handed out Article 7 from the Site Review Regulations which was provided for informational purposes only.

Chairman Ricci indicated they would now go back to revised Article 8, Environmental Protection Standards, using the 4/10/08 revision.

Mr. Taintor confirmed that the current jurisdiction was ½ acre wetlands. A slide showed the different sizes of buffer areas. A 5,000 s.f. wetland has a 56,000 s.f. buffer, more than 10 times the size of the wetland. Under currently regulations with about half of the restrictions would include four times the size of the wetland. They were trying to demonstrate the impact of adding much smaller wetlands to the regulations.

Mr. Holden felt it is important to see when they shrink the wetland they increase the impact to the individual property owner. A small lot would be significantly impacted but there is a balancing act they need to work on. Mr. Coviello asked if this will be altered when they do the Prime Wetland Study? Deputy City Manager Hayden stated this is in the current ordinance and they are changing wetland size. Mr. Coviello was talking about the bigger wetlands having a bigger buffer and the smaller wetlands with a smaller buffer. She was discussing with Mr. Britz that just because a wetland is small you don't want to have a bigger buffer and protect it and a bigger wetland system might have the ability to absorb so it may not need a big buffer. Mr. Britz referred to the slide which showed Sagamore Creek wetland. There were two smaller wetlands that would be added to their jurisdiction if they decreased the size. There will be more small wetlands than they currently show on their maps. He felt the difficulty in this is trying to map all of the wetlands 5,000 or larger. The smaller wetlands have not been mapped and will be largely on private property and difficult to see on aerial photos. Not that they have to map them to make them jurisdictional but it will be difficult to evenly enforce. They know where the ½ acre wetlands are and they can enforce them. But it would be more difficult to catch the smaller ones.

Mr. Coker asked why use 5,000 feet? Mr. Taintor indicated the reason the Conservation Commission came up with that is because of the lot sizes in the city. Looking at NH Audubon guide book, they recommend 3,000 feet. A lot of the small wetlands are near the larger wetlands and will be caught in the 100 foot buffer. Of course, when they get to vernal pools they will have things much smaller.

Mr. Coviello asked that the recommendation was? Mr. Britz indicated that the Conservation Commission was interested in 5,000 s.f. Deputy City Manager Hayden felt that this was a key policy decision and this is a big decision.

Mr. Taintor explained that the next slide shows existing inter tidal wetlands, shoreline along Sagamore Creek, Little Harbour and South Mill Pond. There are two buffers – 100' and 250'. 100' is what they use now. The State shoreland buffer is down to 50' and the inland buffer is 20% of the 250' and it can be impervious surface. 250 is beyond their existing ordinance and 100' is what they have. They also showed yellow areas currently buffered. A lot of buffers are regulated by State ordinance so a question might be how often should they be referencing the State ordinance. This relates to the new shoreline protection.

The next slide was looking at the North Mill Pond, going from Bartlett Street to Market Street. All will be subject to the new State Shoreline Act.

The next slide showed the South Mill Pond. There is no regulation around the pond but they show the extent of the new State Shoreline Act. Mr. Coviello asked if it is in effect? Mr. Britz said they were going to vote to extend to July but he doesn't know the decision. Ms. McMillan confirmed it will be delayed but it won't go away.

Ms. McMillan confirmed that the City did already vote for urban exemption, which is an option for the City. So, when they talk about the Shoreline Protection Act being a safety net, that may not be the case. Deputy City Manager Hayden added that the way that would work is that a property owner would have to request an exemption from the City Council. Mr. Holden indicated the original rationale last time was because the City owned a lot of property and there aren't many vacant lots that could be developed. Mr. Taintor's question, going back to the downtown area and the South end that is all very developed, is there a reason why they would not exempt? Chairman Miller felt it wouldn't be retroactive toward what is already there but they do grapple with ever increasing amounts of impervious cover. The new act is something for them to fall back on and being smarter on where they have impervious area. Mr. Taintor indicated they have tried to address discrepancies between State and City standards and they look to the State. If someone comes in for expansion that is not non-conforming, that will require more people to go to BOA for variances. Mr. Rice was looking at the 250 buffer, if someone has a driveway and wants to add a strip for a turn around, that would have to come to BOA? Attorney Sullivan answered it would be a State permit. Anything within 100' would be City. Mr. Britz explained that the distinction is that the State has a 250' area that regulates impervious surface but they have a 50' high water building mark. The City has a 100' area in some parts of the City and a 100' building setback. It is stricter where you can put a building but not as strict for impervious surface.

Deputy City Manager Hayden clarified that what they are trying to sort out is that the new 250' shoreline buffer is going to happen and they will see how that evolves. There is no move afoot locally to have everything exempted. But what they are trying to talk about tonight is more about the fact that there is currently no 100' buffer around the South Mill Pond and do they want there to be? Mr. Taintor indicated that was asked last week. Why wouldn't they do that? Mr. Holden stated that the northern section is an area where fishermen store their lobster traps and it

is navigable waters and is not like any of the other mill ponds where they don't have that activity. On the last set of Ordinances, that is why that area was not regulated. On the Mill Pond side there were two separate sections that came in. One was to deal with the residential side that they wanted to control and the other was the realization that whatever you did you were dealing with the B&M and that was not viewed as a positive development. The outer basin ("Inner Cutts Cove") is a different creature as it is regulated by the State with mooring permits. Deputy City Manager Hayden thought maybe they should keep going and come back to these issues but that is another key issue of whether they want to add the 100' buffer around the other parts of North Mill Pond and South Mill Pond.

Mr. Taintor displayed the last slide of Sagamore Creek where they already have control with a 100' setback. They also showed 250' on the slide. Mr. Britz pointed out on page 138 the table. They asked what if their vegetative buffer differs from the State vegetative buffer so they have made them the same. They keep track of cut trees better and it is a better woodland buffer ordinance.

Mr. Taintor referred to the revised Article 8, Environmental Protection Standards, which was handed out and indicated that the shaded areas were in response to comments last week. In the very beginning the Conservation Commission wanted to add "improving" the quality of wetlands so they added "and where possible improve" to the purpose section. On 132 somebody talked about adding Piscataqua River so they inserted "non-tidal" to perennial river or stream. On 133 it was asked to have vernal pool specifically included which they added to 10.814.21. The bottom of the page is the first substantive item. There was a suggestion with respect to utilities, to have a statement for a notification process of when things happen in the wetlands that is not connected to a permit. Mr. Coker asked what would happen if they don't provide a notice? Mr. Taintor didn't know but at least it is added. Attorney Sullivan confirmed it was a violation but this would be an extremely difficult section to enforce. Mr. Britz indicated that the intention was to catch utility cutting. Mr. Coker asked if the City would be able to seek a cease and desist. Attorney Sullivan confirmed they could but this applies to everything, including someone mowing their lawn in the buffer. Maybe they should limit it. Ms. Blanchette explained that this came up with PSNH cutting under the powerlines. They just want to know when they will be out there. She felt they need to work on the language. Mr. Taintor and Mr. Britz wanted notification to be broader than that narrow area but they can make it just utilities. Chairman Ricci didn't think there was any teeth in it. Deputy City Manager Hayden thought what they are saying is they are concerned about the big stuff or do they want it broader? Mr. Coviello thought this was to capture something at a vehicle sales location. Mr. Holden stated that was more of a use so he wouldn't be as overly concerned about that. Mr. Coker thought they could add the word "significant". Attorney Sullivan did not believe that was much of a help. Mr. Taintor felt they could say something like exempt any one or two family home lots. Chairman Ricci reiterated that they need something with some teeth to it and this is just too overly broad. Mr. Taintor thought this was just a notification requirement so teeth would be something completely different. Deputy City Manager Hayden suggested that they continue to work on it.

Mr. Taintor continued on with Page 134, #6 at the bottom was removed and it takes detention ponds out of the 100' buffer. At top of page 135 there is a new provision, 10.816.20, where they added that any use not specifically permitted is prohibited. The shaded part of the second half of

page 135 is looking at the existing Conditional Use Permit application form and specifically some requirements in the Zoning Ordinance. Some is paraphrasing. Mr. Wazlaw referred to page 136 where he thought they should they combine page 135 with the four conditions for a Conditional Use permit. Mr. Taintor agreed that he was correct.

At the top of page 136, Mr. Taintor will combine that with the previous page. What he wanted to do by breaking out the application requirements, he wanted to be able to state clearly the criteria. Mr. Taintor will put in section 23 that the applicant will provide sufficient evidence to show that they met the five criteria.

Mr. Taintor confirmed that the Review and Approval procedure is re-formatted. The application is going to the Planning Director so that it doesn't go to the Planning Board before it goes to the Conservation Commission. In section 32 they removed the exemption for parking lots. In Section 33, they are saying that the Planning Board may request additional studies. There was a change in timelines in section 34. Attorney Sullivan was very leery of that. With three day weekends, they may inadvertently miss that deadline. Mr. Taintor explained that 144 hours is the State Law. Attorney Sullivan disagreed and thought it was when they had to produce the public record. Chairman Ricci stated they will look at that at the staff level. Attorney Sullivan felt that the public record requirement is that once the decision is made, then they have to produce minutes within 144 hours, it is not that you have to produce your decision within 144 hours.

Mr. Coker asked if section 32 means the Planning Board shall require the finding of an independent NH certified wetland scientist for all proposals, regardless of size. He asked if this would apply to little wetlands on family lots? Mr. Taintor confirmed that the only exemption they have is a place where they have 50% or more already filled in. Deputy City Manager felt that is why size is so critical.

Page 136, Section 10.818, Findings Required for Approval. Mr. Taintor felt there were some repetitions so he moved some up to the front and pulled it all together. For those permits that are not utilities, they suggest adding another provision that there is no alternate location outside the buffer. He noted that Mr. Peter suggested adding the word "functional" on #3, regarding wetland values.

On page 138 Mr. Taintor indicated they had the vegetative strip been moved back. The last section trying to put some restrictive language in rather than permissive language. He is saying the things that they cannot do. They are not so much uses as how they handle their land. Non-chemical control of invasive non-native species is permitted in all areas of a wetland or wetland buffer, the removal or cutting of vegetation other than invasives is prohibited in a wetland or vegetated buffer strip, the removal of more than 50% of trees greater than 6" diameter at breast height (dbh) is prohibited in the limited cut area, the use of fertilizers other than low phosphate and slow release nitrogen fertilizers is prohibited in a wetland or wetland buffer, the use of any fertilizer is prohibited in a vegetated buffer strip or limited cut area, the use of pesticides or herbicides is prohibited in a wetland or wetland buffer, except that application of pesticides by a public agency for public health purposes is permitted, and the use of gasoline or other petroleum products is prohibited in a wetland or wetland buffer.

Mr. Wazlaw noted on the last page, a better term than hazardous material because they may think they can use other hazardous materials except for gasoline. Mr. Taintor asked what they are they trying to get at with this provision? Mr. Britz stated they wouldn't be able to use a chain saw. Mr. Holden didn't recall it being this strong. Mr. Taintor wanted to know what it was people were asking for? He is happy to take gasoline out and there was no objection from the group.

Attorney Sullivan referred to the Vegetative Management section, where it says "As required by the comprehensive shoreline protection act", they should add "as amended".

Mr. Coker assumed there is a clear definition of invasive species? Mr. Taintor felt they should say as defined by NHDES. Deputy City Manager Hayden suggested adding it to the wetland definitions. It is the State's list. Chairman Ricci asked what is the harm in defining it? It seems to be a term that is used a lot. Mr. Taintor wasn't saying he is not defining it but he would define it in the text rather than having a separate section as it is only used once.

Chairman Miller referred to 10.818.23, page 138. Non chemical control. He immediately thinks of a back hoe, which is non-chemical. Mr. Wazlaw suggested using the opposite and say that chemical control non invasive species are not permitted. Mr. Taintor will try that.

Attorney Sullivan stated that a permissive use ordinance works better when they are talking about the table of use regulations than it does when you get into items like these. You have to carefully word each provision.

Mr. Britz went back to Mr. Coker's point about an independent scientist on page 136. He talked about being reasonable to the homeowner. Just getting a wetland scientist out there for a homeowner for a small wetland is a burden and to have them have to get another wetland scientist to say that the little wetland is a wetland doesn't seem right. He doesn't know how to put an exemption in there but he felt it was important to consider as it will be a headache for administration to enforce. Sometimes Mr. Britz can identify the boundary because it's so obvious. Attorney Sullivan felt this is an administrative issue and people will be unhappy that they have to spend thousands of dollars. Chairman Ricci asked if it would it be possible to have a City representative walk the site first to determine if an independent report is required. Mr. Britz stated, in practice, that is what happens now. Deputy City Manager Hayden thought maybe the issue is size and does it really make sense to go from a half acre down to 5,000 s.f ?

Chairman Ricci wanted to concentrate on finish their review of Article 8.

Section 10.18.32. Mr. Coker asked why not say something like if the Planning Department determines that an independent is necessary, then the Planning Department shall require one. Attorney Sullivan felt as a matter of ordinance drafting it is an extremely slippery slope to give an individual the discretion to make decisions. With significant financial implications, it is not a good practice to have an individual make a decision. Ms. Blanchette asked if it changed the problem if they change "shall" to "may"? Mr. Holden confirmed that the applicant has to submit and they are maintaining what they think they need and this is the Board's ability to verify that. Deputy City Manager Hayden referred to the top of page 133 where it is called out that they have

to have a wetland scientist report. She felt that what they should be talking about is the top of Page 133, where they need to decide whether to send Mr. Britz out or not. Mr. Taintor felt if they have a 20,000 s.f. wetland and a tiny portion was in their lot, they would have to hire two wetland scientists. So, it is not the size of the wetland but rather where the lot is in relationship to the wetland. Vice Chairman Hejtmanek was confused. Currently they require a wetland scientist for ½ acre. He asked why not keep the 100' buffer on smaller wetlands? Mr. Taintor agreed that a half acre could have 100 s.f. of that half acre on somebody's lot or not even on their lot so a half acre doesn't really effect the homeowner. Mr. Coveillo was really confused. He did not understand why there were two wetland scientists. He felt there should only be one with the applicant. He asked if there is that much discrepancy between a wetland scientist that they need to have verification? Deputy City Manager Hayden felt that in practice, they don't carry out on Page 136, .33. They don't "shall" but rather they "may". Mr. Britz added that they have the exemption and it is not just for parking lots, it's even for grass. Deputy City Manager felt they should say "may". Mr. Britz felt the Planning Board will typically require it so rather than wait until they get to the Planning Board, they head them off at the pass. At the top of page 136, they should change it to "may" and there was general concurrence. Mr. Holden stated this has not been a major problem. Deputy City Manager Hayden felt they should just clean it up.

Mr. Coker was troubled by Attorney Sullivan's earlier remark about the word "may" makes it even worse. Attorney Sullivan explained that a fundamental underlying principal of good government is that people in similar situations should be treated the same way by the government. One way you accomplish that is drafting objective criteria that is understood by everyone. Words like "may", concepts like if the Planning Director "thinks" aren't clear. Mr. Taintor continued on to the next paragraph that currently says the Planning Director may assess additional fees and why don't they say the Planning Director "shall". Chairman Ricci asked Attorney Sullivan if it makes a difference. He is seeing two different scenarios. The first is with discretion by Mr. Britz and the other is the discretion of 9 people in a public setting. Attorney Sullivan was much more comfortable with the 7 people sitting in a public setting. Chairman Ricci agreed. He doesn't have a problem with "may" because the big projects know who they are and that it will be requested of them. Mr. Holden added that the reason they get into this is when they doubt the information presented to them is accurate. Ms. Blanchette then thought they would have dueling authorities. The whole wetland delineation issue was tricky so she was comfortable with "may" to the Board.

Mr. Taintor was looking at pages 132 & 133 together and felt they should consolidate. Mr. Holden felt, since it gets vetted by the Conservation Commission, they also would give an early warning of a problem that would have to be addressed. Quite often, that is where it originates from.

Page 133. Mr. Coveillo felt that they have an ideal situation of 5,000 s.f. in an ideal world but that would be a huge workload on staff. Deputy City Manager Hayden felt it was more than that, potentially it was more regulating people to death. Somewhere in the middle would be good. They have the new Shoreland regs coming and they hopefully have prime wetlands coming. Therefore do they want to reduce in size the jurisdiction of the wetlands ordinance. She felt they have to work a careful line before they get hit with the backlash and people say they want to protect the environment but the City is killing them. Deputy City Manager Hayden felt they

needed to address the size question first. Mr. Taintor disagreed and did not feel that it had anything to do with size because it could have a 5,000 s.f. lot of which 100 s.f. is in the wetland. Mr. Britz explained that the first certified scientist and their delineation is not the problem. Going down to 5,000 s.f. it might be but he doesn't know how else they would know that they have a 5,000 s.f. wetland if they didn't have a certified wetland scientist to be balanced and treat people fairly. It's not uncommon for people to have no wetland on their property and sometimes the wetland is across the street and they are in the buffer and they have to get a wetland scientist. You can't measure 100' from the edge of the wetland if you don't know where the wetland is. Mr. Taintor confirmed they will require a wetland scientist report from everyone. Mr. Britz added that sometimes he will go out to look at it to make a judgment and he sometimes asks them to get a wetland scientist to write a letter saying they are not in the buffer.

Mr. Coker asked to address the 5,000 s.f. issue. He would be very comfortable saying 5,000 s.f. was perfect provided there was a scientific basis for doing so. He recalls many years ago when the wetland buffer went from 50' to 100' when the entire logic behind moving that buffer had to be grounded in legalese and scientific fact. He thought back to the Woodland's Project where there was a house lot which once the 100' buffer was put there, the entire house lot was in the buffer zone. The applicant proposed a home and septic system and the entire area was in the buffer zone. The city crafted a very eloquent solution to it. His charge was that the City has charged him as a building lot for 37 years and he paid taxes and then suddenly he was told he was in a wetland buffer and he couldn't build. He felt it was really important that they look at the 5,000 s.f.. Is there a scientific basis and if so, he felt they were on solid ground for doing that. Chairman Ricci felt that the areas keep getting smaller. The buffers have grown from 25'. He asked what are they trying to do with a 5,000 s.f. buffer. Do they want to exclude residential so they can do oil tanks, propane tanks, etc.? Mr. Coker felt the process should apply to everyone the same. Mr. Holden stated that Portsmouth is an urban area and is also easily 40% wet. The Audubon regulations are for more of a rural area. Most of the City is developed. What will they gain by having so much control? Mr. Britz felt the studies go across the board.

Chairman Miller felt that the size is one item. He doesn't think they have any scientific basis for a 5,000 s.f. wetland. Mr. Horrigan worked very hard on that to come up with something that made sense and that is where they started. They are trying to get at the water quality issue. When working with the PDA on their proposed wetland buffers, they had done the study that looked at the value of the wetlands and they increased buffers based on the value of the wetland. One thing that does is it dooms the lower value wetlands. They have been trying to find a way to improve water quality and that is the underlying basis where they started. If they can find a way to improve the water quality, and maybe 5,000 is not the place to start due to some of the constraints. But, if they can find a way to address the quality issues, that would be important to him. If they are going to doom the small wetland, they are also going to increase the likelihood of health problems coming out of that little mud hole. If they want wildlife then they want 300' buffers. Water quality buffers are 150' buffers. To protect stormwater and infrastructure then 175' would be good. Portsmouth is not on the upper end so they tried to do a combination of the two. He would hate to see a distinction between business and residential as the City is mostly residential. Chairman Ricci indicated that he used to do a lot of stormwater design and worked in Lexington. They had a simple ordinance. A residential addition would require that every

ounce of runoff needed to be collected in the drywell. They required zero additional increase in runoff. It doesn't cost a lot and it really worked.

Mr. Coviello felt that the Audubon Society is written for more rural areas. They have a luxury in Portsmouth which allows them to put more regulations on as people want to stay here. He was in favor of the 5,000 s.f.

Mr. Horrigan stated that most Conservation Commission members felt ½ acre seemed too large. The trouble is when dealing with a zoning code, it is based on rock bottom geometric dimensions. He wrestled with this and he was not aware of any scientific research which he thinks is too high of a standard. All he could come up with was the smallest lot size was 5,000 s.f. and if they have a lot that is entirely a wetland then they have problems. Also you have to keep in mind that most areas are interconnected with each other. He felt the smallest lot size they allow makes sense. He agrees that it is unfortunate to hit individual homeowners with this but he's wondering how large that problem really is. There is no magic to the 5,000 s.f. lot size. If the minimum lot size was 10,000 s.f. then that is what he would have recommended.

Deputy City Manager Hayden indicated that they are not going to decide this tonight. This has been a great discussion. If it is about water quality and resource protection, she felt they need to investigate further. She handed out items from the City's website showing things the City is already doing for stormwater. The new City Stormwater Ordinance was really appropriate to help figure out what is the best "bang for our buck" without killing people. How do they get at this issue in the most productive way and the best environmental way.

Mr. Coker was not as concerned about getting to a specific number but the bottom line is that it must be grounded in scientific fact which will make it withstand a legal standard. 5,000 would put them in a greater position of being challenged unless they have a scientific basis. Mr. Holden added that he thinks they are sophisticated enough in how they approach their ordinance. They have the tools to challenge that and they have some projects that have been here for two years. The process is working and is not being rolled over. The idea is you have to have strong tools. The ½ acre has worked and they have a lot of good precedents to keep it going and he thinks we are sophisticated enough to handle this. The Supreme Court is very protective of property rights and we are not doing very well when we say we are taking a homeowners right to use their property. They are not going to do anyone any good if they go too far and lose everything.

Ms. McMillan had not seen the Stormwater ordinance. There is an opportunity under ordinances so that these particular situations provide an alternative such as pervious cover on a residential or business property. As far as water quality they could come up with alternate methods for treating the water on their property other than having the buffer. There are other regulatory ways to accomplish this. Deputy City Manager agreed that would get at the non-residential piece or multi family that kicks in Site Review.

Chairman Miller commented on Page 139. Section 10.818.24, Fertilizers. The first item lists out the use of fertilizers other than low phosphate and slow release nitrogen fertilizers is prohibited in a wetland or wetland buffer. He didn't think they could use it in the wetland. The fertilizer

really applies to the buffer. Mr. Taintor felt they could just move wetlands down to #2, below that paragraph.

Chairman Ricci asked for closing comments. He made everyone aware that they will have a follow up on everything they have talked about tonight. There are still some items that will take significant amount of time such as 5,000 s.f., buffer from vernal pools, the North Mill Pond Buffers and other matters. He also reminded the members that Article 7 was handed out and they may find it interesting.

Deputy City Manager Hayden indicated that on the past Monday they had a work session with City Council with Mark West and Peter Britz. That was a really good work session and the public hearing is scheduled for April 21st. It is not on the agenda for Council to ask the State to designate wetlands but the progression would be one public hearing, general input and assuming the Conservation Commission and the City Council would recommend the additional funding for the additional level of mapping and then at a later date the City Council would schedule a public hearing and vote whether they want to ask the State to designate the prime wetlands. Mr. Peter added that they are mapping vernal pools in the next couple of weeks so they will have a vernal pool map very soon. Mark West is under contract by the City to do that work and it is a grant from the NH Estuaries Project. If people would like to go out with Mr. Britz and Mark West, they should let Mr. Britz know.

Chairman Ricci asked Mr. Taintor to get the changes incorporated. The Conservation Commission could meet on their own to discuss the issues and then they could meet one more time together.

Chairman Ricci felt that both meetings were very informative and he thanked the Conservation Commission for their participation.

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I. ADJOURNMENT

A motion to adjourn at 9:00 pm was made and seconded and passed unanimously.

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Respectfully submitted,

Jane M. Shouse
Acting Secretary for the Planning Board

These minutes were approved by the Planning Board on May 15, 2008.