

**Kingston Planning Board  
Public Hearing  
January 26, 2010**

Mr. Hurley called the meeting to order at 7:00 PM. The meeting was posted in two places; no one challenged the validity of the meeting.

Board members present this evening:

Norm Hurley, Chairman	Jay Alberts
Richard Wilson, Vice Chairman	Ernie Landry
Glenn Coppelman	Marilyn Bartlett, alternate
Mark Heitz, BOS representative	
Scott Ouellette (arrived with the meeting in progress)	

Also present: Glenn Greenwood, Circuit Rider Planner  
Board Members Absent: Rich St. Hilaire, alternate

Mr. Hurley stated that Ms. Bartlett would be a voting member pending Mr. Ouellette's arrival. He reviewed the agenda.

**Critical Correspondence:**

- Northeast Atlantic properties requested the release of a bond; Mr. Hurley signed.
- Information packet and letter from Charlotte Boutin; includes memo from Ms. Faulconer; Mr. Heitz explained that the BOS had sent a letter to the Boutins regarding the expansion of the previously approved site plan approval. Mr. Greenwood said that he had had a discussion with an engineer about this proposal months ago and was under the impression that a revised site plan was going to be submitted to the Board. Mr. Wilson suggested that the applicant needed to come in to talk with the Board. Mr. Heitz confirmed that there had been issues with this site in the past; he said it appeared that a site plan had been approved but that this was not the same plan that had been reviewed in the past. Mr. Greenwood agreed with Mr. Heitz.

**ACTION ITEM: Mr. Greenwood and Ms. Faulconer to review Boutin file prior to them coming in to meet with the Board.**

- NHDES notification re: permits regarding asbestos abatement.

<Board note: Mr. Ouellette arrived at this time.>

- Letter dated Jan. 21, 2010 to Town Clerk from Ms. Faulconer re: vehicle registration
- Letter dated January 15, 2010 from Kingston Foreign Auto re: name change.

## **Board Business**

**Carl Goodwin**, 56 Marshall Road (Rte. 107), had been invited by the Board to discuss his Dealer Desk Application for Motorcycle Inspection. He said that he had a small “bike” business on his property since 1989. He explained that he had been doing the inspections in Plaistow but now had moved the business totally back to Kingston. Mr. Goodwin stated that he had appeared before the Planning Board in 1989 about getting the approval to work out of his house; as a home occupation. He explained that the business entails mostly painting and customizing motorcycles; it is not a repair shop. Mr. Goodwin clarified that the business is still under the home occupation ordinance; he is only expanding as far as the “stickers” at this address; he has a sign on his mailbox, roughly a foot by eight inches and a small sign on the door itself. Mr. Coppelman said that since Mr. Goodwin was certifying that he met the Home Occupation Ordinance and the Inspection activity did not change the threshold of qualifying for Home Occupation then he had no issue with this; Mr. Alberts agreed. The Invisible Business Policy that was in effect prior to 1999 was reviewed as Mr. Ouellette noted that the Home Occupation Ordinance does not allow for vehicle painting without a site plan but this would be a grandfathered use. Mr. Coppelman explained that if the Board was considering this to be a grandfathered use then it needed to determine if adding the Inspection capacity was an expansion of the non-conforming use. Mr. Goodwin explained that there was no additional equipment, nothing additional needed to comply with the State and the “sticker” rules, that was not already on the site. Mr. Ouellette confirmed with Mr. Goodwin that by the Board granting this, there would be no expansion in traffic or customer base. Mr. Goodwin stated that the impact on the neighborhood would be “nil”; he said that he would have to put up an “Official Inspection Station” sign but it would be inside the building; he didn’t think it had to be outside but he wasn’t sure; it was in the window of the last place. Mr. Coppelman explained that the Home Occupation Ordinance had sign restrictions that Mr. Goodwin had to comply with. Mr. Hurley noted that the question was not whether Mr. Goodwin’s previous activity was grandfathered but whether this was an expansion; he felt that without further activity he didn’t think it was. Mr. Landry asked Mr. Goodwin about the number of inspections that he expected; he said over the past decade, he usually did about 150 inspections from April to September. Mr. Coppelman suggested that Mr. Goodwin do whatever possible to minimize the sign effect on the property; Mr. Goodwin agreed. Mr. Hurley said that the Board consensus was that Mr. Goodwin didn’t have to come to the Board for any further review. Mr. Hurley will sign the DES form and forward to the BOS.

- State of the Exeter River information was brought by Mr. Greenwood and distributed to the Board; Mr. Greenwood said that he didn’t think that anyone was currently representing Kingston; anyone interested could contact Theresa Walker at RPC; he added that it would be beneficial for Kingston to have representation. Mr. Landry asked Mr. Heitz if the BOS would be looking for someone to be the Town’s representative; Mr. Heitz suggested that if

anyone knew anyone who was interested to have them contact the Board of Selectmen. Mr. Coppelman suggested adding it to the Cable announcements.

**ACTION ITEM: Ms. Faulconer to coordinate with Mr. Middlemiss to get the request for a volunteer posted.**

**Konover Development Corporation  
Main Street and Route 125  
Tax Map R34 Lot 71B  
Amended Site Review  
Public Hearing**

Prior to the start of the hearing, Mr. Ouellette and Mr. Alberts recused themselves from the discussion.

Mr. Hurley read a letter received from Virginia Morse re: Memorandum of Agreement; outcome of Section 106 review process. In her letter, Ms. Morse expressed concerns about the agreement and design aspects of the project being accurately completed and asked the Board to clarify who would be responsible in reviewing compliance with the numerous details as the project got built.

Mr. Hurley read written comments from the Historic District Commission; at their January meeting, they voted to support the amended landscape plans with the exception of the fencing around the detention pond and lack of plantings at that location; they encourage the applicant to negotiate with abutters as the slope of the land means that a six-foot fence doesn't actually give six-foot protection from light from the cars in the parking lot but would support trees that would give added and improved protection as they grew from year-to-year.

Mr. Greenwood had prepared a memo that had outlined the proposed amendments that are part of the negotiated process that took place with the Army Corps 106 permitting review; he added that it was his understanding that the agreement had not been finalized yet and suggested that the Board may want to hold off on final opinion until all issues are addressed. He added that he looks at this as a fairly simple process for the Board's perspective as it is an evaluation by the Board of a negotiation that has already taken place. Mr. Wilson asked if the only reason the applicant was here was because it was an amendment to the approved plan; Mr. Greenwood explained that during the negotiated process, changes were required that are different than what the final approval was so, in order for the process to continue, there needs to be approval from the Planning Board for those negotiated changes. Mr. Greenwood confirmed Mr. Wilson's statement that this process did not open up a full site plan review process.

Philip Hastings, from Cleveland, Waters and Bass, introduced himself as representing Konover as well as Jay Lord from Hannaford and Brian Roy from

Cuoco and Cormier. He also introduced Richard Roach who has been overseeing the Section 106 process for the Army Corps. of Engineers. Attorney Hastings summarized the Section 106 process beginning with the conditional approval granted by the Planning Board in 2008. He explained that due to the filling of a certain amount of wetlands, the applicant was required to obtain a wetland permit from the Army Corps. of Engineers; the federal permit triggered a review of the project of Section 106 from the National Historic Preservation Act which includes a potential impact of the project on the area with historic significance for Section 106 purposes. He said that since August, a lot of time has been spent with the Army Corps. of Engineers, the NH State Department of Historical Resources and the American Council for Historic Protection (ACHP) which is a federal body that regulates Section 106. He added that there were other consulting bodies involved including the Historic District Commission, neighbors to the property, and State and Regional Historic Preservation organizations. He said that he was hopeful that the MOA would have been signed by this meeting but that was not the case and stated that he felt that they were close to the agreement with very few issues left to be addressed.

The audio CD's of the meetings were provided to the Board; the most recent version of the draft of the agreement was given to the Board. Attorney Hastings told the Board that for tonight's purposes, the important part began on page 3, architectural design, landscaping and screening changes. Konover is asking for approval of those changes agreed to during the Section 106 review even though the MOA has not been finalized. Attorney Hastings expressed his belief that if the Board is concerned that the MOA hasn't been signed that the Board could approve the modifications subject to the condition that the MOA be signed in section 1.B.1 as written.

Jay Lord from Hannaford Bros. spoke to the architectural changes proposed; showing the original view of the building and the amended view. He pointed out the changes on the building including the lower height of the building, changes to the roofline, dormers, a cupola; signage changes were shown; material changes were discussed as there is now a completely "clapboarded" building; color and trim were pointed out; vertical and horizontal planes have been visually addressed. There were no questions from the Board.

Attorney Hastings explained that the other substantial change to the approved site plan was landscaping; there was a great deal of discussion focused on what could be done to the front of the site and the "meadow" area. The other aspect discussed was the buffering on the "western" part of the site; the Board had originally approved a six-foot high chain link fence with vinyl slats that only ran in back of the detention basin, not the length of the parking lot; there was concern during the 106 review process that this was insufficient.

Brian Roy with Cuoco and Cormier explained that there were modifications to the existing plan; most were revisions to the original landscaping plan with one addition.

He noted that the original was sheet 7 of the site plan set; they have taken that plan and “blown-up” the front to show the detail. He continued that the revisions were adding more screening through evergreens and replacing some of the deciduous trees on the plan; along the emergency access, white crabapple have been changed to Austrian pine; three crabapples screening the septic systems and vents have been changed to Austrian pine; through the middle, in addition to the existing trees that are remaining, four more Austrian pines have been added for additional screening; along the driveway, ash trees have been replaced with beech trees which are more historic in nature, not changed for screening; the “meadow” area originally had loam and seed, the change will use a road-side matrix which is a combination of wild grasses and wildflowers for a more natural look; this area would only be mowed a couple of times a year for maintenance purposes, the rest of the time it would be allowed to grow to 18 to 24 inches; some areas will be mowed for site distance. He added that originally the fence was 240 feet of chain-link fence which will now be 440 feet to meet up with the retaining wall in front of the building; it will be a composite wood fence made up of cedar and polymers, solid panels, six-feet in height, natural color; the notes say that the fence elevation will be at least four-feet above the edge of the parking lot to capture the headlights. There were no questions from the Board.

Attorney Hastings referred to Mr. Wilson’s previous comments about the affect on the existing approved plan; he said that tonight’s proposal does not affect the approval, other than making it better; they view the changes as substantial and make the building more compatible with the historic area to make a product that Konover, Hannaford and the Town can be proud of as a quality development consistent with the Historic District. Attorney Hastings stated that due to the possibility of an approval being appealed, Konover/Hannaford reserves the right to return to the original approval and eliminate tonight’s proposed changes; he added that this was not to disparage anyone’s right to appeal but Konover needs to protect themselves in the process to be able to go forward.

Attorney Hastings asked to review another point concerning a condition placed in the January approval; condition number 6 that required that prior to the signing of the mylar, the developer would need to post a performance bond or letter of credit in an amount that would cover the cost of inspections and on-site and off-site improvements. Attorney Hastings said that his understanding as originally envisioned was that Konover would develop a bond estimate and submit to the Town Engineer to approve the estimate and then once the mylar was signed, the security would be physically posted, which is a fairly substantial expense. He continued that, in speaking with Hannaford, he believes that the mylar will be signed prior to Hannaford being in a position to pull a building permit and begin construction; he said Condition 6 staying in place would mean an expenditure of funds that could be well in advance of construction actually taking place; they are asking that condition #6 be modified to say “that prior to the site plan being signed, we need a bond estimate approved by the Town Engineer and that before construction can commence or apply for a building permit, then the bond or letter of

credit must be posted". Mr. Wilson clarified that the request includes that before any work begins, the performance bond must be posted; Attorney Hastings agreed. Mr. Wilson stated that this proposal still does protect the Town and that as long as the bond is placed prior to any work taking place, including things like "mowing", any site work, he does not see a problem with amending the condition; he thought this was common practice. Mr. Greenwood said that typically, the engineering bond is in place, as a requirement, prior to the recording of the mylar; it is the Town's standard protocol. Mr. Wilson asked Mr. Hastings why there would be a delay. Mr. Hastings explained that there is a separation between the developer's process and the builder's process; the developer is Konover, the builder is Hannaford and they may not send the project out to bid to its contractors until they know the site plan is signed and recorded. Mr. Lord said that it might take five to eight months. Mr. Heitz said he understood the rationale although he is a little hard-pressed, dealing with a major corporation, that they are being overly concerned with putting the bond up front when, in the past, the Town has required of smaller developers that they put their bond up front. He doesn't think that this puts the Town at risk; he stated that it might delay things a day or two in the Building Department as they won't issue anything without something from the Planning Board saying that the bond has been posted but he said that the Board is going to have to make the determination as to whether or not they want to get in the practice of altering the Board's standard procedure. Mr. Coppelman understood the reason for asking but asked the Board why they would be holding this applicant to a different standard than other, smaller businesses. Mr. Wilson asked if a split bond of 50% at the time of signing the mylar and 50% prior to construction was feasible; due to the significant amount of the bond due to the size of the proposal. Mr. Hurley was not opposed to a split; he was not opposed to 10% with the balance due before any work began.

Randy Kezar from the HDC explained that he was designated as representing the Commission as the Chairman was unavailable this evening. He wished to comment about the six-foot fence. Mr. Hurley asked Mr. Kezar to allow the Board to address the bond issue and he would let him speak about the fence shortly.

**MM&S to require 25% of the bond at the time of the signing of the mylar with the other 75% due prior to any work starting on the site.** (Motion by Mr. Wilson, seconded by Mr. Heitz for discussion purposes)

Discussion of the motion: Mr. Heitz said that he would tie the additional 75% to being required prior to a building permit being issued. Mr. Wilson agreed to amend his motion.

Revised motion: **MM&S to require 25% of the bond due at the time of the signing of the mylar with the other 75% due prior to a building permit being issued.** (Motion by Mr. Wilson, second by Mr. Heitz) Mr. Coppelman stated that he was inclined to support the first option mentioned by Mr. Wilson which had it split, 50/50 but could not support the 25%. Mr. Landry said that he felt that the Board was approaching a substantial departure from what it has done in the past and that 25%

is too low a figure and other applicants may start to request this of the Board; he also would be inclined to support the 50% for this development. Mr. Wilson said the Board has dropped fees in the past and that this is a totally different scope of money than the Board has looked at before which is why he is proposing that it be done. Mr. Hurley said that all the Board is doing is asking that the fees be collected prior to the permits being issued; nothing will be started prior to getting the bond; he feels this protects the Town. Mr. Hurley said that 25% of a 4 million dollar bond was still one million dollars which is a substantial amount of money, five to eight months in advance of a project going forward; he'd be comfortable with 10%. Mr. Coppelman said that the best the Board could do would be to stick to its standard practice but understood that there was valid reason to make an adjustment but the Board should set some limits to an adjustment and that 25% is lower than he is comfortable in supporting for this adjustment to Board policy.

Mr. Hurley clarified that Ms. Bartlett will be a voting member for this application; six Board members are voting during this application. He restated the motion on the floor which had been previously made and seconded, language clarified by Mr. Wilson:

**MM&S to require 25% of the bond prior to the signing of the mylar with the other 75% due prior to a building permit being issued.** Motion passed 4-2.

Attorney Hastings re-iterated his belief that they are very close to the Memorandum of Agreement being signed. He added that if the Board was concerned with taking action in the absence of a final MOA, he would be comfortable with conditioning approval of these changes with having the MOA signed.

Mr. Heitz, speaking as a representative for the Board of Selectmen, asked Attorney Hastings if he had had the opportunity to speak with the Town's counsel, Attorney Kalman about obligations imposed on the Town in the MOA as the Town is not a signer of the MOA. Attorney Hastings is attempting to contact Attorney Kalman about these concerns and is more than happy to change the language as there is no attempt to "obligate" the Town.

**ACTION ITEM: Mr. Heitz will contact Attorney Kalman about contacting Attorney Hastings.**

Richard Roach, who works for the Army Corps. of Engineers, Regulatory Division, addressed the Board to discuss the process. He stated that the Army Corps. of Engineers was not a proponent nor an opponent of this project, they are merely involved because an applicant has applied for a permit and in order to discharge their responsibilities, they have to involve the Advisory Council on Historic Preservation by developing an MOA on how to avoid, minimize and mitigate effects to the Historic District. He stated that it is pretty clear that when a historic property is subdivided in a Historic District that there is going to be an adverse effect and they go through this process. He said that Konover/Hannaford Bros. have agreed to

some changes and there have been some changes that were desired by some parties that they haven't agreed to; they are close to the MOA but there are still some points that are being negotiated. Mr. Hurley asked what would happen if the Planning Board didn't like the changes; Mr. Roach said that the Town did not have to be a party to the MOA; he added that the Selectmen were invited to be a consulting party and they don't think there is any obligation to the Town; the developers have agreed to the changes; the Corps has agreed to enforce the changes; there is no obligation to the Town to do anything. Mr. Hurley clarified to Mr. Roach that he didn't disagree with the changes but wanted to know the Board's obligation. Mr. Roach said that the MOA was a proposal that the developer agreed to in order to make the plans less damaging to the Historic District. Mr. Heitz proposed that it is now the Planning Board's responsibility to decide if the proposed changes to the plan that are in the MOA, that were reviewed this evening, should be adopted as improvements, not whether to adopt the MOA; Mr. Roach agreed. He said that the consulting parties thought these were improvements to the plan but the Planning Board was under no obligation to agree with the changes as improvements. Mr. Wilson stated that if the applicant is meeting or exceeding the original approval, then, for him, that would be an improvement.

Mr. Greenwood asked Mr. Roach at what threshold is the Army Corps. of Engineers involved in wetland permits. Mr. Roach answered that when there is a shovelful of fill in a water in the United States, a permit is required; this one required more than a shovelful but not a substantial amount and probably will be covered by a State program general permit that says that from an environmental perspective, if the State Wetland's Bureau says that this is an okay permit, the Army Corps would not disagree. However, there were additional federal obligations under the National Historic Preservation Act. He said that sometimes the Corps' involvement is often seamless; the Army Corps. has 30 days to notify the applicant; in this case, the applicant heard from the Corps. because they heard from the State Historic Preservation people that there was an impact; the applicant then heard from the Army Corps that they couldn't proceed under the general permit until such times as the historic issues were resolved. He clarified that any permit that would affect an eligible resource has to go through this process. This project is recognized by several groups as having great importance as an important historic environment. He continued that the Corps. gathers information about the archaeology of the site and the historic district and makes a decision whether there is likely to be a significant effect on the historic resource; the decision on this site cleared any archaeological aspects but there was going to be an adverse effect on the historic district which led to the discussions about the Memorandum of Agreement. Mr. Hurley thanked Mr. Roach for the information.

Mr. Hurley invited public comment.

Randy Kezar re-introduced himself as representing the Historic District Commission. He wished to re-emphasis some issues. He noted that one of the outstanding issues in the MOA was the monitoring and oversight of the whole project from the



point of view of the details in the MOA. The HDC is suggesting that the Planning Board take the initiative and form a process for monitoring the details of the MOA which are quite complicated. He says that the oversight and monitoring responsibilities need to be clearly defined to protect the interests of Kingston while the project is being completed. The HDC believes this is really important. Mr. Wilson said that it was his understanding that if the changes are accepted by the Planning Board that they become part of the site plan and they will be monitored throughout the project. Mr. Kezar said the question was who would monitor it and what would happen if there was an issue; who takes up the issues. Mr. Greenwood said that there were issues that the Planning Board can take responsibility for but there are other issues in the MOA that are not the Planning Board's responsibility such as future monitoring for the Town. Mr. Heitz said there would be a lot of people involved in the process; all of the Inspectors will be responsible to make sure that it is built to the plan that is a reflection of the approval; Mr. Hurley added that the Town Engineer would be involved; all would address the landscaping. Mr. Heitz added that other items in the MOA such as reviewing traffic would be with the Chief of Police which he will monitor in conjunction with the Highway Department. Mr. Kezar said that his point was to emphasize the plan and MOA as the "devil is in the details"; there was significant discussion in the placing and types of trees that were important details that someone needed to be sure were addressed as approved. Mr. Heitz said that those types of details would be the responsibility of the Town Engineer to check that the whole project is built to meet the approved plan. Mr. Greenwood added that in that instance, it is the Planning Board that the Town Engineer is reporting to and telling the Board if there are any issues. Mr. Hurley noted that the releasing of any bonding comes back to the Planning Board which requires completion of aspects to the plan and verification from the Town Engineer, Road Agent, and other Inspectors; so there are several checks and balances. He agreed with Mr. Kezar's point that there are considerable details to review; he added that some won't come under the purview of the Planning Board; some could be enforcement issues that would need to be addressed by the Board of Selectmen.

Mr. Kezar said that the HDC accepted the changes to the Lighting Plan and he thinks it would be helpful to the Planning Board to see those changes; it will be part of how the building looks at night and is a significant change. Mr. Hurley said that he assumes that the HDC had been heavily involved with the changes in the MOA; he noted that he thought they had done a great job and thinks the building looks much more appealing with the changes.

Mr. Kezar discussed the pending issue of the six-foot fence. He said that there is a slope that lowers the six-foot fence height to four-feet; he explained that the idea for the six-foot fence was to have the top of the fence six feet above the parking lot in order to reduce glare from the car lights coming over the top of the fence so there is a disconnect in terms of the height of the fence and the height of the fence above the parking lot so that is a detail that is still hanging as part of the negotiation at the MOA level. Attorney Hastings explained that there was some discussion amongst the consulting parties to address the additional fencing and screening;

Konover/Hannaford did not agree to everything that was proposed, what they have agreed to is what is before the Board at this time. Mr. Wilson confirmed with Attorney Hastings that 200 feet of fencing was added to the plan which is now solid instead of chain link. Mr. Hastings explained that the fencing, at a six-foot height, still must remain four feet above pavement level regardless of the slope; he noted that height requirement was what had been previously approved. There was discussion about the fence, monitoring, access issues.

Mr. Kezar spoke to other issues concerning the HDC; one of the issues is for tree planting on the slope on the other side of the fence to provide additional visual barrier; the other, which might not be in the Planning Board's purview, are the trees on the Town property on the Rte. 125 side; he said that the HDC would want those trees to stay there as it is a visual barrier between Rte. 125 and the store. Mr. Heitz said that if they are on Town property than Konover could not cut them down; he said the drawing that was provided to them showed the trees in the Town property being cut down. Mr. Wilson thought that the buffer was part of the site plan with limited cutting to keep the buffer; Mr. Heitz said it certainly could not have included cutting trees on the Town's or State's property. Mr. Kezar wanted to make sure that the Town was aware of the trees not being cut down; Mr. Hurley said that the Town was not aware of any Town trees being cut and will keep an eye on them.

Mr. Ouellette, 189 Main Street, stated that he was speaking as a Town resident and not a member of the Board. He expressed his belief that the Board should accept the changes proposed this evening and they should be looked at as positive changes. He did say that there could have been better answers for the fencing and buffering, he understands that the process is a negotiation. He explained that as the fence approaches the building, it goes down the slope and it loses some of its effectiveness. Ideas for evergreen trees were discussed, but no consensus could be achieved during the negotiations. He thinks that more could be done with tree buffering but he doesn't think the Planning Board should not accept the plan; better tree buffering would eventually cover more of the building and a higher fence in the sloped area that would be the entire six-feet, would be an improvement. Mr. Ouellette showed a picture from "Google-Earth" showing the property in the winter with no foliage/buffering. He explained that when he says some more trees could be added, he's talking about between the fence and the abutting properties; the trees could eventually grow to buffer some of the building. Mr. Ouellette spoke to Attorney Hastings previous comment that if the proposed changes were approved by the Board and then were challenged in court, that Konover would go back to the original approval and ask to void this approval. He questioned the legality of the Board making an approval with a condition that if appealed, the approval was nullified; he added that in the MOA there were clauses on how to rectify a situation. He suggested that if the Board liked the changes, they should approve them; if there is an appeal and Konover wants to withdraw the changes, then they should come back with another application.

Mr. Coppelman asked Mr. Ouellette if there was some type of statement made during the MOA meetings that vegetation could not grow on the slope near the fence. Mr. Ouellette said there were reservations because it was such a deep slope that there was a concern that it might jeopardize any of the dredge and fill site specific permitting and that the concern might mess-up the water sheet flow or not be sustainable. Mr. Coppelman stated that usually planting of vegetation would help to stabilize a slope. Mr. Ouellette said that nobody wanted plantings in the pond or on the berm; to not mess up the pond.

Mr. Hastings responded to two points; he said that he probably spoke “in-artfully” of the withdrawing, prejudice issue as he thinks Mr. Ouellette summarized it best. He just wanted to let the Board know that if the changes are proposed and there is an appeal, they want to be able to come back to the Board and withdraw these proposed changes to protect themselves, if circumstances beyond their control jeopardize their ability to do what they want to do. Mr. Coppelman said, regardless of the Board’s action, the applicant has the ability to do those things anyway. Mr. Heitz asked for clarification; he said that his assumption would be that if the Board approved the changes, than those changes replaced the previous approval. Attorney Hastings agreed. Mr. Heitz asked Attorney Hastings to confirm that if someone appealed those changes, his client wanted to come back to say that they wanted to go back to the original plan; Attorney Hastings confirmed this and added that they knew that this would jeopardize their federal wetlands permit and go back to the Army Corps of Engineers to revisit that issue. Mr. Heitz wanted it clarified that the applicant could come back and ask to go back to the original plan, but the Board might not actually grant that. Attorney Hastings said that would be an argument at that time and sincerely hopes that the discussion would never happen as the proposal is a good plan. Mr. Wilson stated that Konover had taken a bold and diplomatic step but it would be a hard step for him, if not the Board, to go backward with that step once they have gone forward. Attorney Hastings said that the only way they would want to go backward was if there was an appeal of tonight’s approval. He said RSA 677:15 says that all proceedings under the site plan are stayed pending that appeal so they wouldn’t be allowed to go forward with an appeal pending.

Mr. Greenwood asked to clarify that these applications to the Board are at the will of the applicant so they have the right to come back to the Board to make a request and the Board would have to consider that request. The Board agreed with that statement.

Mr. Greenwood said that he is concerned that the Board has dealt with Condition #6 this evening because it was not clearly stated in the notice to reconsider actions on Condition #6. Mr. Wilson asked if Mr. Greenwood was suggesting that Konover should come back in to another hearing to request that as a separate public notice. Mr. Greenwood said that due to the notice, it could be an appeal-able issue. Mr. Heitz stated that Mr. Greenwood suggested that the Board not take official action on the proposal tonight until the MOA was signed; if the Board followed that advice, the

Board could take action on the bond issue if added to that posting. Mr. Hurley said that the letter sent out requesting this hearing did ask to have that discussed; Attorney Hastings took full responsibility for the notice not including this request but would urge them not to penalize Konover by not taking action on the MOA tonight. The bonding issue could be done later a properly noticed hearing.

Mr. Hurley asked for additional public comment. Judy Ruben, of the Historic District Committee, said that when approached, Hannaford has made changes willingly, acting as a "good neighbor". She asked the Planning Board to take a "field trip" to East Way and look toward the property; she said that the lights are very visible this time of year; she added that by taking the "field trip", the Board could see why there is so much discussion about the fence and the trees. She would expect that with the size of the project, Konover would willingly and graciously plant the 8 or 10 evergreen trees that were still being discussed; she urged the Planning Board to approve the changes.

Stanley Shallette addressed the Board by speaking as an abutter not a member of the HDC. He stated concerns of the five-year duration of the MOA in light of pending NH Supreme Court litigation and funding. He had concerns about the sloping of the land in light of the six-foot high fence that would actually only be four-feet due to the sloping. He said that the fence does not provide any buffering to the abutters on the opposite side of the street that belong to the Harlowes; the possibility of problems with their well, due to the widening of the road. He stated that he would understand that abutter getting an injunction as he had in the past. He urged the Board to put the MOA in abeyance and take some time to think about the changes; he agreed that the building would look better with the changes proposed but he found flaw in the argument that the fence couldn't be higher because they wanted to be able to see the pond; he suggested that Hannaford could put cameras out to see the pond as they do in the store to prevent shoplifting and cameras in parking lots to prevent crime. He asked the Board not to approve until all of the issues were addressed, for the abutters and safety to the public. He thanked the Board for their time.

Mr. Hurley asked Attorney Hastings about the addition of some pine trees in the fencing area as this appeared to the main subject being addressed by abutters; he asked why this was a problem or if Konover was interested in doing this. Attorney Hastings said that this has been discussed in the 106 process; he said that this area was in the wetlands where they have a permit to fill; they are trying to do less in that area so as not to create any problems with the wetlands fill and felt that it was unnecessary and potentially complicated their State wetlands permit; they feel that the fence itself will block the lights. However, they did explore with the Ouellettes privately which would have provided additional buffering such as if Konover did take control of the Alberts property next door, to plant trees on that property to provide additional screening. He said that Konover and Hannaford are willing to continue those discussions with the Ouellettes.

Attorney Hastings said it was hard to be entirely forthcoming with different options when he heard one of the abutters, in his mind, threaten some litigation against Konover. Mr. Hurley confirmed that the issue was Konover having to readdress the wetlands in order to put trees in that area. Attorney Hastings said that it was a mitigating factor.

Mr. Wilson said that the fence and the buffer had been reviewed a lot during the original approval so he feels that it is an old issue and that Konover has done a better job in addressing abutter's concerns. Mr. Coppelman said that, to be fair, Konover wasn't doing it out of the goodness of their heart, there was a process that is being undertaken which has resulted in alternatives and changes which the applicant has agreed to do; he agreed that most of the changes have been positive.

Mr. Heitz asked for clarification about the fence by asking Attorney Hastings if the idea that the fence would be two feet lower in spots would still be above the parking lot by four feet and would block out the majority of the headlights yet still provide visibility to look down into the pond. Attorney Hastings said that Hannaford has sacrificed some of their concerns to look into the pond and as long as the fence is kept at the six-foot level, they are comfortable accepting that with gates added so personnel can get through the gates. Mr. Heitz asked if Hannaford believes that the eight-foot height just won't work; he understands the issues with the abutters and being threatened but added that it would do away with plantings and impacting the wetlands; Mr. Heitz added that there are other ways to monitor the pond if that is a concern. Attorney Hastings said that it would be problematic to go to eight feet; he added that Mr. Wilson put it best by saying that what was approved a year ago provided much less of a buffering of the lights than what is being proposed here. Mr. Heitz explained that if Attorney Hastings is concerned about an appeal, maybe people would be less reluctant to go down that avenue by simply installing an extra two feet on a fence. Attorney Hastings said that was a nice thought and maybe if he could get signed releases tonight from everyone, he would be willing to go down that road.

Mr. Hurley said that there are obviously some areas that are not finalized in the MOA and asked Attorney Hastings if these items were concerns for the Planning Board. Attorney Hastings described those issues and said there were no concerns that would implicate the Planning Board's approval. Attorney Hastings suggested that the Board modify the approved site plan to reflect the specific changes as described in section B1 subject to the condition that the MOA is signed by the parties with no substantive changes to section B1 as presented to the Board.

**MM&S to follow Mr. Greenwood's recommendation to not act on this and to continue the hearing until such time that the MOA is finalized and there is something in place to act upon.** (Motion by Mr. Coppelman, second by Mr. Wilson for discussion)

Attorney Hastings advised the Board that there are some reasons why the Board's approval tonight is significant to the parties involved that don't involve the Planning Board process so if there is a way to get an approval tonight with the appropriate condition, it would be very much appreciated by Konover and Hannaford. He added that he didn't think it would be a detriment to the Planning Board. Mr. Wilson asked Mr. Roach if there was anything that was still being discussed that would affect the total agreement. Mr. Roach said if not approved, that would be a problem and a great dilemma. He suggested that the Board could simply approve the plan as presented this evening and forget the MOA; just simply approve the plan and the drawing and not reference the MOA, just use the language itself as the changes. He explained that it didn't prevent Konover coming back with a further modification if needed due to the MOA. Mr. Roach commented that a tree could be planted without jeopardizing the wetland's bureau permit; there were items that could be addressed, if it was worth the money and if it was effective. He said if the changes were approved now, then there would be a clear sense that 99% of the work was done and that the community wanted these changes. Mr. Hurley asked if this was approved if it would facilitate the finalizing of the MOA; Mr. Roach stated that he thought it would. Mr. Heitz asked if the proposed changes were approved, would it be seen that the Board was 100% satisfied and that the Town wouldn't like to see anything else added; Mr. Roach did not see that as the case; he didn't read into the discussion that the Board would not want to see further improvements added to the MOA. Mr. Heitz suggested that the Corps. could encourage Konover in this direction. Mr. Greenwood said there is a limited amount of disagreement at the moment and that if the Board approves this tonight, there might not be any reason for further discussion of the MOA. Mr. Heitz clarified that was why he asked the question so that the everyone could take back with them that some members of the Board may like to see a few more improvements and the Army Corps could re-open those discussions; that a little more "tweak" could help put to bed the abutters concerns to move the project forward. Mr. Greenwood said that by approving tonight, any other changes would require an amendment to the site plan; Mr. Heitz said that would need to be taken up anyway due to the bonding issue. Attorney Hastings said that would be true unless Konover withdrew its request on the bonding issue. Attorney Hastings said that the changes proposed tonight were, in one sense, independent of the MOA. He added that they were proposing them because they had gone through the MOA process and had agreed to do these changes and this is what they are asking the Board to approve now; if the MOA ends up not getting signed or gets signed in a different form then they are going to figure out how it relates to what the Board approves tonight and they will deal with it accordingly.

Mr. Hurley returned to the motion: Mr. Coppelman said the intent of the motion is not to deny but to continue to a future meeting at which time the MOA would be final and the Board would be dealing with a finalized document.

Mr. Hurley suggested that Mr. Roach was telling the Board that by approving these changes, the MOA would move forward. Mr. Hurley reminded the Board that there is a current site plan approval for this applicant and if the Board denies, there is still

an approved plan which would set the plan back from where it is today. He said that Mr. Roach is giving indication that it would help if the Board approved the changes and suggested that the Board is missing the point tonight. Mr. Hurley felt it necessary to send Mr. Roach out with an indication that the Board would like the MOA to include some additional trees or additional fencing in the finalized version of the MOA and the Board can move the process forward instead of stalling the project. Mr. Coppelman disagreed that the Board had stalled the process; the Board had not been part of the 106 process as they were not a party to it; he said that if the Board took action to move the process forward, the Board would be inserting themselves into a process that they had not been part of up to this point; he said he didn't know if that would be positive or negative but definitely a change.

Mr. Landry asked if the request was to approve the proposal this evening either as part of the MOA or not part of the MOA. Attorney Hastings said that he was asking for the Board's approval tonight and they would need to address the MOA accordingly. Mr. Landry then clarified that the request before the Board was simply a modified site plan request.

Attorney Hastings asked a hypothetical question to the Board: If Hannaford agreed to either make the fence eight foot high in some or all along the length of it or if they agreed to plant trees along the slope, if possible; would the Board approve it tonight, knowing that the MOA had not been signed. He is asking if the issue is that the MOA has not been signed or is the issue that they haven't done enough. Mr. Wilson said his hypothetical answer is that yes, he would approve based on the fact the Mr. Roach said that it can be taken out of the MOA. There was discussion by two members of the public that was inaudible. Mr. Hurley brought the discussion back to the table.

Mr. Greenwood stated that he had knowledge that the fence height was a troubling concern to some people and his concern was that he didn't want the Planning Board to be unintentionally assisting one side over the other. He said that the Board was not involved in 95% of most of the MOA and he is kind of "irked" that on one side, the developer has asked the Town to save financing on \$3 million and then say that some small extension to the height of the fence is too costly which was the original comment from Mr. Hastings. He finds this troublesome. Mr. Hurley agreed that by inserting itself into the 106 process, the Board will be agreeing with one side or the other. Mr. Hurley said that the additional two feet would cure the issue for him; he would vote for the proposal regardless but the additional two feet would have made life a lot easier.

Mr. Hastings told the Board that Jay Lord said that they would accept as a condition of approval tonight to build the fence at an eight foot height which would amount to six-foot above the grade of the parking lot.

Mr. Hurley returned to the motion on the floor: Mr. Coppelman stated that he was making the motion based on Mr. Greenwood's recommendation. He asked if Mr.

Greenwood's recommendation had changed. Mr. Greenwood said that it had changed based on Attorney Hastings and Jay Lord's comments. Attorney Hastings did say that he would have on-going discussions with people who have appeals pending in court and if there are resolutions to be had, they would be willing to talk with them. Mr. Coppelman withdrew his motion, Mr. Wilson withdrew his second.

**MM&S to approve tonight's proposed architectural and landscaping changes as presented, with the addition of a two foot increase in height of the fence along the westerly side and the applicant incorporate the lighting changes as shown on the new design in any parts of the plan set as appropriate.** (Motion by Mr. Coppelman, second by Mr. Wilson) **PUNA**

Mr. Hurley commented that the discussion of Condition 6 would apply as they were able to change that without further notice of a public hearing because that was all part of the additional plan that was approved. Mr. Greenwood was concerned about creating a Board action that was appeal-able. Attorney Hastings's suggested simply waiting 30 days to see if there was an appeal; he added if there was, they could re-notice and come back. Attorney Hastings's doesn't believe that it is a big deal and falls under 676:4 of a non-material procedural error that isn't necessarily appeal-able and he said that they can come back in 30 days if necessary.

Mr. Hurley thanked everyone for coming to the hearing.

The Board recessed at 10:05; reconvened at 10:12.

### **Board Business, continued**

- Plan Review: Camp Lincoln; a letter read from Building Inspector re: denial of utility building; several waivers is being requested; the building will be for commercial use. A waiver from \$5000 to \$250 for the engineering fee was requested; Mr. Greenwood is inclined to agree with the request; the applicant will need to go to the ZBA due to the expansion of a non-conforming use. The Board agreed to accept the reduction in the engineering bond. The Board will eventually require a plan that can be recorded; an engineer can add a statement to the submitted plan. Mr. Greenwood said that the plan should be added to the Feb. 16<sup>th</sup> public hearing. The waivers will be voted on at the Public Hearing.

### **Camp Lincoln added to the Feb. 16<sup>th</sup> hearing at 7:15.**

- Draft letter re: Water District; comments and cautions on the letter were given to Mr. Landry by Mr. Wilson and Mr. Hurley regarding the bottom two paragraphs; Mr. Wilson thinks stopping at the end of the first two paragraphs makes a better letter. Mr. Coppelman thanked Mr. Landry for a good start and would recommend that the Chair do a rework and bring back to the



Board; Mr. Hurley would like to sit down with the BOS about wording for the article to coincide with any of their efforts.

**ACTION ITEM: Mr. Hurley to rework the “Water District” letter; meet with the BOS about it.**

- Copies of Innovative Land Use Planning Techniques were distributed for the Board’s continuing discussion; the section for Groundwater and Surface Water Resources. Mr. Landry asked to preclude last minute discussions of ordinance changes and to continue these as on-going discussions. Mr. Hurley agreed with on-going discussions.

**MM&S to adjourn at 10:25.** (Motion by Mr. Wilson, second by Mr. Ouellette) **PUNA**