

These minutes were approved at the March 13, 2007 meeting.

**ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, JANUARY 9, 2007
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Jay Gooze; Vice Chair John deCampi; Ted McNitt; Myleta Eng; Michael Sievert; Jerry Gottsacker

MEMBERS ABSENT: Linn Bogle; Ruth Davis

OTHERS PRESENT: Thomas Johnson, Zoning Administrator; Minutes taker Victoria Parmele

I. Approval of Agenda

Chair Gooze said he had received a letter regarding the Hills application, which described why it wasn't felt the variance regarding the wetlands buffer was needed. Chair Gooze said he didn't agree with the logic used in the letter, and also said that Mr. Johnson had not had the chance to research this issue. He recommended going with the Agenda as advertised.

Chair Gooze said Mr. Sievert would be a voting member this evening.

He introduced new alternate ZBA member Jerry Gottsacker.

Ted McNitt MOVED to approve the Agenda as submitted. John deCampi SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings:

- A. PUBLIC HEARING** on a petition submitted by Peter Loughlin, Portsmouth, New Hampshire, on behalf of 13 Madbury LLC, Portsmouth, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from October 19 and October 27, 2006 correspondence of Zoning Administrator, Thomas Johnson, regarding the occupancy of a dwelling. The property involved is shown on Tax Map 4, Lot 11-0, is located at 13 Madbury Road, and is in the Central Business Zoning District.

Chair Gooze opened the public hearing.

Attorney Peter Loughlin spoke before the Board, and said that the principal in the application, Peter Stanhope, was also present. He first thanked the Board for previously granting the continuance for this application.

Attorney Loughlin said he had provided a timeline/list that attempted to include every document related to this property, and said both Mr. Johnson and the Fire Department had been provided with copies of this.

He said the applicant was present because he would like the records of the Town made uniform - that 7 unrelated individuals could legally live at the property in question. He explained that when there was a recent boiler inspection at the property, a life safety code issue was raised, concerning the existing ceiling height of the basement. He said the applicant had filed an appeal with the State Fire Marshal concerning this issue, and said they were present that evening to appeal Mr. Johnson's October 19, 2006 administrative decision regarding the basement room.

Attorney Loughlin said that concerning the legality of the basement, the list that he had provided to the Board included documentation that an apartment was created in 1957 in the basement of the house. He said he would therefore challenge the statement that it had been created illegally. He provided details on this, noting that documents from over 20 years ago referred to an apartment in the basement area. He also noted that the latest tax card spoke about a boarding house at the property. He said this basement apartment had been well known to the Town for at least 25 years, and he asked if people in general with finished basements that had been created many years back would be able to come up with proof that they were created legally.

Attorney Loughlin said the second issue was what a valid number of occupants was. He discussed the establishment of the 3 unrelated rule, in 1979, and provided details on information in documents regarding occupancy from some years back, including some letters from the late 1980's from Town staff that conflicted with each other. He handed out a recent letter from the former owner of the property that referred to a form he had gotten from the building inspector in the late 1980's indicating how many occupants could legitimately live on the property. In this same letter, the former property owner said it was reasonable for him to have relied on that letter.

Attorney Loughlin distributed a document that laid out three different ways the number of occupants could have been calculated at the time. He then said the figures used by the building inspector in the late 1980's were reasonable, and said the owner of the property at that time and subsequent buyers of the property had the right to rely on them. He provided additional details on the calculations, and said to the best of their knowledge, there had been 7 people living at the property ever since. He also provided details on how the planner at the time, Mr. Stephan, had probably not calculated correctly, in determining there could be 5 occupants.

Attorney Loughlin said another reason he felt that an occupancy of 5 was not accurate was that besides the letter from the building inspector in 1989, the Town had treated this as an occupancy of 7 over the years. He noted a letter from the former Fire Chief, and other documents, some of which listed 7 occupants, and some of which classified the property as a lodging/rooming house or a boarding house. He said there was history of treating the property this way going back 20 years. He said in order to therefore say this was a single family home, and that there could only be 5 occupants, one would have to ignore contradictory documents in the file.

Attorney Loughlin said he had more information to submit to the Board, and apologized for doing this. But he said the more research he had done, the more he had realized this information existed. He then went through the various pieces of information that he was submitting to the Board.

He said when Mr. Stanhope was thinking of purchasing the property in 2001, he was given the 1989 letter from the building inspector, and called the building inspection office to ask if the property was approved as a student rental for 7 residents as presently configured. Attorney Loughlin said Mr. Stanhope had also asked if there was a record of outstanding code issues for the property. He said Mr. Stanhope was told that 7 occupants were allowed, and that there were no code violations, and with that, had purchased the property and had rented to 7 students since that time.

Attorney Loughlin summarized he had tried to outline how things had ended up at this point, and what it was felt the proper background on this issue was. He said the applicant was asking the Board to find that this property was appropriate for 7 students, which was the way it had been used since the 1980's. He provided details on how he thought Mr. Johnson's calculations were incorrect.

Chair Gooze noted that it had been the practice of the Board to be pretty definite that the tax card information and Fire Department information were not the same, in terms of occupancy. He also asked whether the adjusted square footage that came up with 7.2 occupants included the basement apartment, and Attorney Loughlin said it did.

Chair Gooze asked whether, if the Board decided that there could be 7 occupants because of the statement made by the former building inspector, and it was then decided that because of fire safety reasons the ceiling of the basement was too low and the basement could not be occupied, this would mean the occupancy would go down to 5, based on habitable space.

Attorney Loughlin said they felt that the 7 occupants figure was grandfathered. He said they didn't really need to get into that argument because the property had effectively been treated as a rooming house, which got them to 7 occupants in another way.

Mr. McNitt said Attorney Loughlin had given the Board a remarkable amount of material. He summarized that the applicant was asking for 7 occupants in a rooming house, with all floors being used.

Attorney Loughlin said the calculations, using Mr. Johnson's numbers, didn't include using the basement as habitable space, and still got to 7 occupants.

Chair Gooze said in other words, the applicant was asking the Board to declare this a rooming house, rather than a single-family home, that was allowed to have 7 people

Mr. McNitt asked if the former owner from the 1980's that Attorney Loughlin had referred to had actually lived at the property, and Attorney Loughlin said he didn't think so. He said Mr. Finnegan, who lived next door, said this former owner had traveled a lot, and had sometimes

asked Mr. Finnegan to keep an eye on the property. He said Mr. Finnegan had said he had done this for about 5 years.

Mr. McNitt asked if it was correct that the Zoning Ordinance said that rooming houses had to be owner occupied, and was told this was in fact the case.

Chair Gooze asked if any members of the public wished to speak for or against the application. There was no response, and he closed the hearing.

Chair Gooze said this was a pretty complicated application. He said the Board had to decide if this property was a rooming/boarding house, and also had to decide who had had the right to tell the owner of the property how many people could be in it. He said after these issues were ironed out, the Board could start to make some decisions on the appeal of administrative decision.

Chair Gooze said he didn't feel the property met the Ordinance definition of rooming house. He also said there were many cases before this Board that had said the information from the Fire Department and from the tax cards were not the same as information that the Zoning office had.

Mr. Sievert said he hadn't had the chance to read the information that had been provided. He discussed whether there had been a definition of rooming house years back, but said he didn't think the property met the current definition.

There was discussion on the fact that there was conflicting information as to what the property was.

Mr. McNitt said the real piece of paper this hinged on went back to the letter from Mr. Stephan from 1989. He noted that he (Mr. McNitt) had been on the Planning Board at that time, and said he remembered that Mr. Stephan was a part-time building inspector at that time, and that the real authority rested with Tom Perry. He said he believed that Mr. Perry had worn several hats, and said he thought that Mr. Stephan had reported to him. He said the fact that the Perry letter contradicted the Stephan letter, and the fact that there was no correspondence between them concerning this property, made him feel that Mr. Perry had the authority in this instance.

Mr. deCampi said he did feel it was terribly important whether this was a rooming house or a multi-unit residence, and said he felt the key issue was whether the occupancy of 7 was correct. He said he didn't think the property was a rooming house by the Ordinance definition. He also said he didn't think the Ordinance supported counting bathrooms and closets as habitable space. He provided details on this, and there was discussion.

Ms. Eng said she didn't believe this was a rooming house, and she provided details on this.

Chair Gooze said if the Board decided this was a single family home that was grandfathered to 7 occupants if one included the basement, if the basement was taken out, one couldn't say that a total of 7 people could be squeezed in to the rest of the building, so the occupancy would go down to 5. He said it was therefore important to decide this. He noted again that in previous

cases, the Board had not relied on information from the Fire Department and the tax card regarding this kind of thing.

Mr. Johnson provided details on information from the 1988 Durham Town Report that described the roles Mr. Perry played as a Town employee. He also noted documentation that indicated that in 1982, the building was occupied by a family of 5.

Chair Gooze said he would open the public hearing again, to ask Attorney Loughlin if he could provide some clarification.

Attorney Loughlin said Tom Perry had signed the letter he had written in 1989 as the Planning Director, and said that normally, it was the code enforcement officer who made code enforcement decisions.

Scott Hovey, 41 Canney Road, said he had been on the Town Council and other committees in the late 1980's, and said as he recalled, Mr. McNitt was right on target concerning the roles Mr. Perry played as a town employee.

Chair Gooze closed the public hearing. He said he thought Mr. Perry was the appropriate person, but asked if there might be anything from this time that would definitely clarify the roles of Mr. Perry and Mr. Stephan.

Mr. deCampi said the Town Report Mr. Johnson had quoted from seemed like good evidence.

Chair Gooze said he wanted to be sure the Board had good ground to stand on if it made a decision on this.

Mr. McNitt said he recalled that Mr. Stephan only worked a few hours a day during that time period.

Chair Gooze said it seemed that 5 occupants was the appropriate number based on the letter from Mr. Perry, and that this was not a rooming house. He said he would go with grandfathering with 5 occupants.

Mr. Sievert noted there had been a few other letters written by Mr. Stephan that it turned out later were wrong, and said it seemed odd that they would be consistently wrong. He also noted that Mr. Perry's letter had been written after Mr. Stephan's letter, and said perhaps this came as a result of doing some further research.

Mr. deCampi said he could see that there could be an argument for having 7 occupants. He said the letter from Mr. Perry in 1989 said 5, but he said there was a lot of other evidence that there continued to be 7 occupants for many years. He also said there was a fair amount of evidence that 7 occupants were allowed legally, for a lot of years, until the early 1980's, when the building was rented to a single family. He said he could live with a finding of 7 occupants, if it was determined that the basement was habitable living space, and a finding of 5 occupants if it was not. He said the answer to the basement issue would be determined by someone other than the

ZBA. He also said he felt the applicant had bought the property in good faith, and said the economics of real estate was such that one couldn't separate the value of the property from the number of residents living there. He also said he did not think this was a rooming house.

Chair Gooze said that had been his point concerning the grandfathering issue, and noted that he had done a lot of research on estoppel. He said the history on this property was not clear and said he thought Mr. deCampi's way of looking at the situation was a good one. He said whether the basement was habitable space was not up to the Board, and said he would be in favor of not calling this a rooming house, but would be in favor of grandfathering it to 7, if the basement was determined to be habitable.

Ms. Eng said she agreed with what Mr. deCampi and Chair Gooze had said, and would be comfortable with what they had recommended. She said that unfortunately, some conflicting and perhaps erroneous information had been given to Mr. Stanhope.

Mr. McNitt said he too thought this position was reasonable - that if the basement was included, there could be 7 occupants, and that if not, there could be 5.

Mr. Sievert said he was glad that someone on the Board had come up with this recommendation. He said it seemed that even though the letters had come out, the occupancy had stayed at 7. He said it seemed reasonable to give the benefit of the doubt to keeping the occupancy the same. He also said he agreed that the basement was part of the habitable space, going back as far as 1956, and perhaps even as of 1982.

John deCampi MOVED to grant the Application for Appeal of Administrative Decision from October 19 and October 27, 2006 correspondence of Zoning Administrator, Thomas Johnson, regarding the occupancy of a dwelling, with these limitations:

- 1) If the State Fire Marshall finds that the basement is properly habitable area, the capacity of this property will be seven unrelated rental tenants;***
- 2) The property is not a rooming house, but a grandfathered single family dwelling with additional rental space;***
- 3) if the State Fire Marshall finds that the basement is not a properly habitable area, the limit on the number of unrelated residents in this property shall be five;***
- 4) Because of the existing leases, the landlord may allow the total occupancy to continue at seven persons until the first of June, even if the basement is determined not to be habitable area.***

Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

Break from 8:25 to 8:30 p.m.

(For the following four Hills variance applications, the Board decided, during discussion on the first Hills application, to hear from the applicant, ask questions and hear public comments on all of the applications together, and to then vote on them separately if it appeared that some of the applications were likely to be denied.)

- B. PUBLIC HEARING** on a petition submitted by David E. Hills, Hills Family Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIII, Sections 175-59(A)(2) and 175-62 of the Zoning Ordinance to **permit the rebuilding and enlarging of a farm stand building within the wetland upland buffer strip**. The property involved is shown on Tax Map 11, Lot 22-3, is located at 35 Piscataqua Road, and is in the Residence C Zoning District.
- C. PUBLIC HEARING** on a petition submitted by David E. Hills, Hills Family Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 and Article XXI, Section 175-111(D) of the Zoning Ordinance to permit the construction of a **driveway 24 feet in width within the frontyard setback**. The property involved is shown on Tax Map 11, Lot 22-3, is located at 35 Piscataqua Road, and is in the Residence C Zoning District.
- D. PUBLIC HEARING** on a petition submitted by David E. Hills, Hills Family Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Sections 175-54 and 175-55(B) of the Zoning Ordinance to permit the construction of a **septic system within the sideyard setback**. The property involved is shown on Tax Map 11, Lot 22-3, is located at 35 Piscataqua Road, and is in the Residence C Zoning District.
- E. PUBLIC HEARING** on a petition submitted by David E. Hills, Hills Family Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XXI, Sections 175-111(F) and 175-114 of the Zoning Ordinance to **permit the improvement and expansion of an existing parking lot without meeting the requirements of the Zoning Ordinance**. The property involved is shown on Tax Map 11, Lot 22-3, is located at 35 Piscataqua Road, and is in the Residence C Zoning District.

Chair Gooze opened the public hearing.

Applicant David Hills spoke before the Board. He explained that his plan was to make a number of changes to the existing building. He said he wanted to upgrade and expand the building on the site, and to make some additional changes to the site. He said the intention was to build a bigger building so they could do more of what Emery Farm already did, as a farm stand. He also noted that they wanted to orient the building more to the south for greater visibility and to get better solar access, in the hopes of putting solar electric cells on the roof.

He said granting this first variance would allow some of the reconstruction to take place within the upland wetland buffer strip. He noted that no construction was proposed within the wetlands themselves.

He provided details on plans to add additional pavement to the existing driveway, and to change its direction slightly. He also noted plans to put in some additional gravel, porous parking space, and also noted a planned snow storage area. He described plans for handicapped parking near the building, as well as a loading area and a trash storage area. He said there would be two restrooms for the building, while currently, there were none, and also described the proposed area for the

septic system. He said with the recent conservation easement on a portion of the property, it was amazing how tight the site now was. He went through the variance criteria, and how he felt they were all met with this application.

Chair Gooze noted that a portion of the existing building was already located within the wetland buffer.

Mr. deCampi said there were two issues concerning parking, one regarding the wetland setback, and one concerning the paving issue. He asked whether as part of the present variance request, Mr. Hills was asking for a variance to allow parking to be located within the wetland setback.

Mr. Johnson said the applicant would like to include all incursions into the wetland setback in this application.

Chair Gooze noted that the driveway was in the buffer and the current parking areas incurred into the buffer, and asked if the proposed plans would change the current parking area incursion into the wetland buffer. There was discussion about this with Mr. Hills.

Mr. Hills described the present unorganized parking situation, and provided details on plans for extending parking in the areas where people already parked, in order to do a better job of controlling it.

There was discussion that the parking incursion issue was relative to the wetland buffer variance being requested, but that the paving issue was addressed in another application.

Mr. Johnson explained that the reason that two separate applications were submitted concerning parking was that it was felt that if one of the applications was denied, the applicants didn't want this to affect the whole project. He suggested that the Board discuss the 4 variances together so the site details and issues didn't have to be rehashed each time. He said that when it then came close to the time to vote, if it looked like the Board might deny one or two of them, the Board could deliberate on the applications separately.

The Board agreed that this approach made sense, and Mr. Hills said that was fine with him.

Chair Gooze asked how much extra incursion there would be into the wetland with the parking expansion, compared to what there was presently, and Mr. Hills provided details on this.

There was discussion that the so-called wetland near Route 4 was actually an area of runoff from the road, and was not considered a wetland.

There were no further questions from the Board regarding the wetland buffer variance being requested.

Mr. Hills next read his variance criteria letter concerning the construction of a driveway 24 feet in width within the frontyard setback.

There was discussion about this by the Board.

Chair Gooze asked how runoff from the driveway would be handled, and Mr. Hills said he didn't presently know the answer to this.

Mr. Johnson noted that the Planning Board would get into these kinds of issues with the applicant.

Chair Gooze asked why Mr. Hills thought he needed a 24 ft width, and Mr. Hills said this would be safer, because of the way people drove.

Mr. Hills read his variance criteria letter regarding the construction of a septic system within the sideyard setback

Mr. McNitt asked about the slope of the proposed leach field location, and Mr. Hills said it sloped to the southeast.

Mr. Hills read his variance criteria letter regarding permitting the improvement and expansion of an existing parking lot without meeting the requirements of the Zoning Ordinance.

Ms. Eng asked if and how the parking spaces would be marked.

Mr. Hills said the parking spaces were not currently marked, and would not be with the expansion. He provided details on how people generally parked in the designated gravel parking areas.

Ms. Eng asked if the proposed plan would prevent people from parking near the stone wall.

Mr. Hills said there was too much of a drop beyond the designated gravel parking, so this probably would not happen.

Chair Gooze asked if any members of the public wished to speak for any of the proposed variance applications.

Russell Mason, 7 Tirrell Place, said he had no objection to the proposed project.

Chair Gooze asked if any members of the public wished to speak against any of the applications. Hearing no response, he closed the public hearing.

Chair Gooze said he would ask Board members if they had any objections to any of the applications, and if so, which variance criteria they had in mind that were not met.

Variance application to permit the rebuilding and enlarging of a farm stand building within the wetland upland buffer strip

Mr. Sievert said that in reading the provisions of the wetland overlay district, he wondered if the building needed a variance, since it would be allowed as conditional use.

Mr. Johnson said he had not had time to respond to Mr. Farrell's letter concerning this.

Mr. Sievert said he agreed all the variance criteria were met for both the building and parking area, based on the explanation he had heard, and having been at the site.

Mr. McNitt said he tended to agree with Mr. Sievert regarding this.

Mr. deCampi said the building could be moved to address the wetland buffer issue, but said he didn't think there was any serious harm in what was proposed.

Ms. Eng said she felt the application met all the variance criteria, stating that she agreed with what other Board members had said concerning this.

Chair Gooze said concerning the issue of expansion of a nonconforming use, which was addressed in the letter the Board had received concerning this application, this letter referred to this as being a use issue. He said he disagreed, and said this was an area variance being requested.

Chair Gooze said if the amount of incursion into the wetland buffer were happening as part of a new project, he would have a great deal of difficulty with it. But he said the building was already there. He also said that because of the uniqueness of the property, there was no other feasible way to do it. He said the applicant's proposal was well put in terms of the variance criteria being met, and he said he agreed that the application met them.

Mr. McNitt said a great deal of work had been done to fit the proposed development in on the site with minimal impact to the district.

The Board agreed that they would only talk further about the variance requests they had a problem with.

Variance application for construction of a driveway 24 feet in width within the frontyard setback.

Mr. deCampi said the wider the driveway was made, the more this encouraged people to go fast. He said the driveway could just as easily be 22 ft., but said he didn't think there was a lot of harm in having a 24 ft. driveway. He said the variance criteria he would say were not met with this application was meeting the spirit and intent of the Ordinance, and meeting the public interest.

Mr. McNitt said the point made regarding a wider driveway was well taken.

Chair Gooze noted there was a lot of traffic on Route 4, and said he was more inclined to give more width to the driveway for the sake of safety. He suggested the Planning Board could

require that there be a speed bump to address speeding on the property. He said he felt the variance being requested met the spirit and intent of the Ordinance.

Variance application for construction of a septic system within the sideyard setback

The Board discussed the proposed location of the septic system, and had no problem with it. Mr. Johnson said he had been out to the site several times with the soils consultants, and said what was proposed was the best location. It was noted that it was important that the septic system not be put in a location that would impact the agricultural soils on the site.

Ms. Eng said the application met all five variance criteria, and Chair Gooze agreed.

Variance application for improvement and expansion of an existing parking lot

Board members had no issues with this variance application.

The Board decided to vote on all of the variances requested by the Hills as a package.

Mr. deCampi said a 24 ft driveway was very wide, but said the fact that it became a gravel driveway well before the parking lot would cause people to slow down.

Ms. Eng noted that this was a business that was located on the site, and said it would be safer for cars and buses coming off Route 4 and entering the site if there were a 24 ft. wide driveway. She said the safer this situation could be made, the better.

John deCampi MOVED to grant, for the property shown on Tax Map 11, Lot 22-3, and located at 35 Piscataqua Road, and is in the Residence C Zoning District:

- 1) the Application for Variance from Article XIII, Sections 175-59(A)(2) and 175-62 of the Zoning Ordinance to permit the rebuilding and enlarging of a farm stand building within the wetland upland buffer strip)***
- 2) further, to grant the Application for Variances from Article XII, Section 175-54 and Article XXI, Section 175-111(D) of the Zoning Ordinance to permit the construction of a driveway 24 feet in width within the frontyard setback;***
- 3) further, to grant the Application for Variances from Article XII, Sections 175-54 and 175-55(B) of the Zoning Ordinance to permit the construction of a septic system within the sideyard setback;***
- 4) and further, to grant the Application for Variance from Article XXI, Sections 175-111(F) and 175-114 of the Zoning Ordinance to permit the improvement and expansion of an existing parking lot without meeting the requirements of the Zoning Ordinance***

- Referencing the site layout of Dec 5, 2006, as revised on Dec 20, 2006.

Myleta Eng SECONDED the motion, and it PASSED unanimously 5-0.
9:35 to 9:40 PM – Break

- F. PUBLIC HEARING** on a petition submitted by Joseph Caldarola, Portsmouth New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-55(F)(4) of the Zoning Ordinance to permit the inclusion of the moderate depth-to-ledge soils (20" to 40") in the useable area calculation of a parcel of land. The property involved is shown on Tax Map 10, Lot 7-0, is located on Bagdad Road, and is in the Residence B Zoning District.

Mr. Caldarola said his preference was to go through the applications one at a time. There was agreement on the Board that this should be done, but that all of Mr. Caldarola's applications should be addressed that evening, once the process was started.

Chair Gooze read the letter from Town Planner Jim Campbell, which said the Planning Board supported the variance request concerning moderate depth to ledge soils. The letter provided details on the fact that it had been an oversight on the part of the Planning Board that the moderate depth to ledge soils were not included as part of the useable area calculation.

Chair Gooze opened the public hearing.

Mr. Caldarola said the special condition for this application was the error in the Zoning Ordinance, and asked that the variance request be granted, based on this.

Chair Gooze asked if any members of the public wished to speak for or against this application. Hearing no response, he closed the public hearing.

John deCampi MOVED to grant the APPLICATION FOR VARIANCE from Article XII, Section 175-55(F)(4) of the Zoning Ordinance to permit the inclusion of the moderate depth-to-ledge soils (20" to 40") in the useable area calculation of a parcel of land, for the property shown on Tax Map 10, Lot 7-0, and located on Bagdad Road, in the Residence B Zoning District, - based on the letter of the Town planner stating that this was an error in the drafting of the Zoning Ordinance. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

- G. PUBLIC HEARING** on a petition submitted by Joseph Caldarola, Portsmouth New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-55(F)(6) of the Zoning Ordinance to permit the inclusion of soils with slopes between 15% and 24% in the useable area calculation of a parcel of land. The property involved is shown on Tax Map 10, Lot 7-0, is located on Bagdad Road, and is in the Residence B Zoning District.

Mr. Caldarola said he might not need this variance, pending confirmation of the soils mapping being done by the NRCS (Natural Resources Conservation Service), explaining that at the present time, he had 65 sq. ft. more in the way of suitable soils than he needed. He asked that this application be tabled for 60 days.

John deCampi MOVED to table this application until the March 2007 ZBA meeting. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

H. PUBLIC HEARING on a petition submitted by Joseph Caldarola, Portsmouth New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIX, Section 175-107(L) of the Zoning Ordinance to permit a reduction of the 100-foot buffer to 30 feet, as per the Site Plan Regulations, to allow the construction of a shared driveway and buildings. The property involved is shown on Tax Map 10, Lot 7-0, is located on Bagdad Road, and is in the Residence B Zoning District.

Mr. Caldarola noted that the subdivision plan that ZBA members were looking at was what was currently also before the Planning Board. He explained that originally, only a site plan had been submitted to the Planning Board. He said that now there was also a subdivision plan, because the Planning Board's attorney had determined that even though there was no actual subdivision of land involved, the subdivision plan was needed. He explained that the determination had kicked in the conservation subdivision requirements, including the 100 foot streetscape buffer requirement, which had resulted in the need for the variance, and said that as a result of this, he was now before the ZBA.

He noted that the site plan had been designed around standards that called for a 30-foot streetscape buffer, and also said the plan, in following the site plan regulations, was better for the neighborhood. He noted that following the 100 foot buffer requirement in the conservation subdivision regulations, he could get the allowable units on the site without impacting it, but said the design was not as good for other reasons.

He showed how in the original site design, the driveway ran within the 100 ft buffer, and how the buildings were within it to a certain extent as well. He said if the 100 ft buffer was required, the only way to develop the site was to create two buildable areas, because of the wetland in the middle of the site, and because of other setbacks on the site. He said this would mean that instead of having a generous buffer between the development and the neighborhood, it would be closer, and in some cases, very close, to neighboring houses.

Mr. Caldarola said he was presently considering having some or all of the units not be elderly housing condominiums, and instead be single-family homes. But he said either way he went, there were the same issues regarding the land. He showed a plan with single family homes laid out on the site, and said he would still prefer to have the same driveway as had already been engineered.

Mr. Caldarola went through the five variance criteria as they applied to this variance application. He said there would be no decrease in the value of surrounding properties, based on a 30-foot buffer, and said in fact the preferred plan was based on that buffer. He said granting the variance would avoid a possible decrease in the value of surrounding properties that would result of the development was built closer to the abutting properties. He also said he wanted the highest value for the property, which would be affected by being closer to the abutters.

He said it was felt that the public interest was best served by following the setbacks in the existing plan, which separated the development from the existing buildings in the neighborhood more effectively. He said he believed this was the intent of having buffers.

Regarding the hardship criterion, Mr. Caldarola said the special conditions of the property were the shape and characteristics of the site, which was shallow. He said the 100 ft. buffer requirement was written with the idea of separating properties, but he said in this case it put him in close proximity to the abutters.

Concerning the substantial justice criterion, Mr. Caldarola said he felt this was the best overall plan for the neighborhood. He also said he felt that buffers were generally intended to separate properties, and said the design that was proposed better accomplished this, so met the spirit and intent of the Ordinance.

Chair Gooze asked what there was on the front of the site at present, and Mr. Caldarola said there were woods that were 40-50 feet deep. He said he would plan to keep the woods, noting the required 30 ft. buffer, and said there were mostly younger pine trees there.

Mr. Sievert asked about properties across the street from the proposed project, and how they would be impacted by pulling everything up to the front of the site. He also asked about abutters to the west of the site.

Mr. Caldarola described the locations of the houses in the neighborhood. He said the buildings in the proposed development would for the most part be back 100 feet, so there would still be a lot of distance separating the project from abutters to the south. He said the alternative design following the 100 foot streetscape buffer made things tight for abutters to the side and back of the property. He said the proposed buildings would be more visible from the street with a 30 foot buffer than a 100 foot buffer, but said that on balance, this would be much less offensive to abutters than the alternative design would be.

Ms. Eng said it looked like with the alternative plan (with two buildable areas), the development would be closer to the wetlands.

Mr. Caldarola noted there was an exemption concerning these wetlands because they were less than 3,000 s.f. in size, but said he would prefer not to have the development that close to the wetlands.

Dennis Day, 89 Bagdad Road, said his house was located on the corner, to the east of the site in question. He said he had lived there for 11 years, and said he thought the original plan for the development was more in line with what would fit into the neighborhood. He noted there were mostly woods across the street from where the driveway would be, and provided details on this. He said this plan would have much less impact on the neighborhood than the alternative plan, which, with two cul-de-sacs, would be horrendous for him and others living in the neighborhood.

Eric Weinberg, representing Pam Bradley, 4 Ambler Way, said he strongly supported the variance being requested. He said dual cul-de-sacs would negatively impact Ms. Bradley's property, in putting the buildings in the development closer to her property, and increasing runoff. He said putting the buildings closer to the front near Bagdad Road would benefit the

development and the neighborhood, and would decrease the amount of fragmentation of the forest that would otherwise occur with the alternative design.

Otho Wells, 65 Bagdad Road, said he was not personally impacted by this proposed development, but said as a member of the community, he preferred the first design to the second, especially if there were a vegetative buffer in front of the houses. He said the two cul-de-sacs design was not aesthetically pleasing, and said he felt this would impact the abutters.

Ben Getchel, 12 Ambler Way, said he supported the variance application. He said he lived behind the site in question, and said there were serious runoff problems in that area. He provided details on this, and said he therefore had grave concerns about anything built back there that would affect his property. He noted that there was a wildlife corridor running through the back of the site, and also explained that the flow of runoff eventually went into Johnson's Creek. He said the alternative design would lower property values, and would have a serious impact on the quality of life in the neighborhood.

Toby Clark, 6 Ambler Way, said he supported the variance request. He provided additional details on drainage issues in the neighborhood, and said he was in favor of the original design for the development, which respected the setback from his house, and preserved the wildlife corridor.

Scott Hovey, 22 Cutts Road, said he had originally planned to speak against this variance request, but said in talking to the neighbors concerning the wetland issue and the wildlife corridor concerns, he had realized it was important to preserve these areas as much as possible. He said based on where he lived in the neighborhood, the alternative design would be better for him, but he said that in the scheme of the entire neighborhood, the original design was a far better plan. He said he therefore supported the variance application.

Chair Gooze asked if any members of the public wished to speak against the application, and there was no response. He then read a letter from **Bill and Thanh Johns, 90 Bagdad Road**, who lived across Bagdad Road. The letter said they were opposed to the variance being requested, and it provided details on why the property, if developed, should be done without variances.

Chair Gooze then closed the public hearing. He noted that from what he had heard, Ambler Way was one of the wettest places in town.

Mr. Sievert provided details on the fact that he was uncomfortable with the idea of the driveway running parallel right through the buffer. He said he wasn't necessarily saying he was against this plan, but said it didn't seem there would be much of a buffer left except for perhaps the first 30-40 ft. He noted that some of the underground utilities would also have to go there. But he said it sounded like this didn't matter that much to the neighborhood, or was the lesser of two evils.

Chair Gooze said perhaps the Board should discuss the purpose of the 100 ft buffer requirement in the conservation subdivision regulations.

Mr. McNitt said with conservation subdivision, houses could be built closer together, and he said the intent of the buffer was to ensure that the development wouldn't be an eyesore to people living nearby.

Mr. deCampi noted that residents supporting the variance lived on Canney Road and Ambler way, and that the opposition came from across the street on Bagdad Road.

Mr. deCampi said the two cul-de-sac design wasn't bad, and he provided details on this. He said he was not particularly in favor of the variance being requested.

Ms. Eng said she was more in favor of the original plan, because it would be the least destructive in terms of the wildlife corridor. She also said the alternative plan would create more runoff problems. But she said she was uncomfortable with the driveway going into the 100-foot buffer, and said she wondered if it could be moved back.

There was detailed discussion by the Board on other possible ways to minimize the impact on the 100-foot buffer.

Mr. McNitt said of the two designs, he preferred the original design for the site to the alternative design, stating that it provided more open space, which was one of the objectives of conservation subdivision. He said he would be in favor of granting this variance, although reluctantly.

Chair Gooze said the property was unique in terms of the buildable area, and said the further away from the back area that the buildings could be, the better. He provided details on this, and said although it would be nice to have a forest buffer out front, he wasn't sure how this could be done.

Chair Gooze then decided to re-open the public hearing, to ask Mr. Caldarola what could possibly be done concerning a buffer to the front along Bagdad Road.

Mr. Caldarola said he had met with a forester to talk about this, and said he would be amenable for everyone's sake to have a condition that an intensive forest buffer improvement plan must be developed, by a licensed forester. He provided details on this, including the fact that a layering of tree plantings could beef up the buffer.

Engineer Rubin Hull provided details on the driveway design for the original plan compared to the alternative plan, and said regardless of what plan was used, there would be some disturbance in the front area of the site because of the installation of utilities.

Mr. Caldarola said some areas of the development in the original plan would need less improvement than others, noting that locations closest to the road would need more intensive plantings than those that were further away. He also noted that most of the area across the street was wooded.

Mr. Sievert asked if the grading plan for the 3-unit condominium site plan was the same as the grading plan for single-family houses.

Mr. Hull said the grading plan would be about the same.

Chair Gooze closed the public hearing.

Mr. Sievert asked if the variance being requested pertained to all of the structures that were in the buffer, and the Board agreed that it did.

Chair Gooze said he felt the variance application met all of the variance criteria, as long as there was assurance that the project would be well done. He said in weighing the public interest of one group against the other, he thought the original plan would be better. He also said that if the Board didn't grant the variance, the applicant would be free to do the alternative plan.

There was discussion that the ZBA could give direction to the Planning Board by including a condition that there would be a landscape plan.

There was also detailed discussion as to whether the variance being requested was only for condominiums, or was also for single-family homes.

Mr. Caldarola said he was leaning strongly toward doing single-family homes, and said if the Board was only going to vote on one approach, it should therefore go with single-family homes.

Chair Gooze opened the public hearing to discuss this issue further.

Mr. Caldarola showed the Board the design for single-family homes on the site. He noted that because of the sight distance issue, there were still really only two places for the driveway access on to Bagdad Road. He provided details on the design, and said according to the regulations, 9 houses could be put on the site. He demonstrated the continuing limitations of the two cul-de-sac design when there were single-family homes instead of condominium units.

He provided details on how doing single-family houses on the site would result in less in the way of buildings being seen from the road. He stated again that he was strongly leaning toward doing single-family houses, and said he could agree to a condition that the variance would only be for single-family houses.

Mr. Sievert agreed that this would be a less intense use of the site, in terms of driveways, parking, and other impacts on the buffer.

There was discussion that the Board didn't know the specific details of runoff issues for the different plans, and that this would be addressed by the Planning Board.

Mr. deCampi said he felt age-restricted housing was much more attractive, and provided details on this.

Chair Gooze closed the public hearing.

Mr. Sievert asked whether, in terms of the 100 ft setback, it really mattered what plan they were talking about, and Board members said no. He then went through the variance criteria. He said it was a wash as to whether there would be a decrease in the value of surrounding properties. He said in terms of the public interest, this depended on who got the benefit, abutters to the front or to the back, but said he felt the application met this criterion, in the broadest sense.

Mr. McNitt said he agreed with this.

Mr. Sievert said the application met the substantial justice criterion.

There was discussion by the Board as to whether the application met the hardship criteria because there was no other feasible way to do the development. Mr. McNitt said it all hinged on the 100 ft buffer requirement, and said there was no other feasible way to do what the applicant wanted to accomplish. He provided details on this.

Ms. Eng said the special conditions of the property were the long and narrow shape of the property, with the wetland in the middle.

Mr. McNitt said he thought the applicant had done the best he could with this property to meet the spirit and intent of the Ordinance.

Chair Gooze asked which Board members felt the application met all five variance criteria, and all Board members except Mr. deCampi agreed with this. Mr. deCampi said he didn't feel the application met the public interest criterion or the spirit and intent of the Ordinance criterion.

There ensued detailed discussion about each of the conditions that should be included in the motion.

Chair Gooze MOVED to grant the Application for Variance from Article XIX, Section 175-107(L) of the Zoning Ordinance to permit a reduction of the 100-foot buffer to 30 feet, as per the Site Plan Regulations, to allow the construction of a shared driveway and buildings, for the property located at Tax Map 10, Lot 7-0 on Bagdad Road, in the Residence B Zoning District.

The following conditions shall apply:

- 1) The ZBA requests to the Planning Board that there be no cutting within the 30 ft. buffer, with the exception of access and utility areas, and according to best forest management practices;***
- 2) The ZBA requests that the Planning Board work with the developer on establishing an acceptable landscape plan to replant the area that will be clear-cut within the 100 ft. buffer, at least the area between the two access points, to get the maximum possible sight shield;***
- 3) Subject to Planning Board approval of this application;***
- 4) Reference plans submitted to the ZBA on this date that shows the access road running parallel to Bagdad Road.***

Michael Sievert SECONDED the motion, and it PASSED 4-1, with John deCampi voting against it because he said it was against the spirit and intent of the Ordinance, and was against the public interest.

III. Approval of Minutes – No Minutes

V. Other Business

- A. Next Regular Meeting of the Board: **February 13, 2007

IV. Adjournment

Ted McNitt MOVED to adjourn the meeting. John deCampi SECONDED the motion, and it PASSED unanimously 5-0.

Adjournment at 11:15 p.m.

Victoria Parmele, Minutes taker

Myleta Eng, Secretary