

**This set of minutes was approved on June 12, 2007**

**ZONING BOARD OF ADJUSTMENT  
TUESDAY, MAY 8, 2007  
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL  
7:00 PM**

**MEMBERS PRESENT** Chair Jay Gooze; Vice Chair John deCampi; Secretary Jerry Gottsacker; Ted McNitt; Michael Sievert; Robbi Woodburn; Carden Welch; Ruth Davis

**MEMBERS ABSENT**

**OTHERS PRESENT:** Tom Johnson, Code Administrator/Enforcement Officer; Dave Cedarholm, Town Engineer; Victoria Parmele, Minutes taker

**I. Approval of Agenda**

Chair Gooze introduced the members of the Board. He noted that Mike Sievert and Jerry Gottsacker had moved up to regular member positions, and that Robbi Woodburn and Carden Welch were new alternate members. He noted that Ms. Woodburn had previously served on the ZBA as a regular member.

Chair Gooze said the Board had been asked to postpone Agenda Items II E and F. He also said the Board would like hear from Town Engineer Dave Cedarholm concerning the Christensen application, but Mr. Cedarholm had an engagement until 8:30. He recommended that the Christensen hearing be held after that time.

***Ted McNitt MOVED to approve the Agenda as amended. The motion was SECONDED by Jerry Gottsacker, and PASSED unanimously 5-0.***

**II. Election of Officers**

***Jerry Gottsacker MOVED to have Jay Gooze to continue as Chair of the ZBA. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.***

***Jerry Gottsacker MOVED to have John deCampi continue as Vice Chair of the ZBA. Ted McNitt SECONDED the motion, and it PASSED 4-0-1, with Mr. deCampi abstaining.***

*John deCampi MOVED to have Jerry Gottsacker serve as Secretary of the ZBA. Ted McNitt SECONDED the motion, and it PASSED 4-0-1, with Mr. Gottsacker abstaining.*

### III. Public Hearing

- A. **CONTINUED PUBLIC HEARING** on a petition submitted by Arnett Taylor, Jr., Durham, New Hampshire on behalf of Katharine Paine, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-55 (E), 175-55 (F) and 175-56(D)(3)(a), Article XIV, Section 175-74(D) and Article XII, Section 175-39 of the Zoning Ordinance to obtain relief from certain regulations as pertains to the subdivision of an existing single lot into three separate lots, under the “Porkchop Subdivision” regulations. The property involved is shown on Tax Map 11, Lot 35-1, is located at 51 Durham Point Road, and is in the Residence C Zoning District.

Mr. McNitt recused himself, and Ms. Davis was appointed in his place for this application.

Chair Gooze opened the public hearing.

Attorney F.X. Bruton noted that a site walk of the property had been held, with most ZBA members attending it. He explained that two of the variances previously requested were no longer needed. He said it had been determined that the HISS mapping was not needed. He also said that Lot 1 had been reconfigured to have 240 ft of frontage, and the shore frontage requirement for Lot 2 had been eliminated, which meant the 35 ft. shore frontage variance request for Lot 2 was not needed. He said the applicant had proposed an easement to allow Lot 2 to have shoreland access, and said this would be addressed as part of the subdivision application that would be reviewed by the Planning Board.

Attorney Bruton said the variances still being requested were the following:

1. Shore frontage – 240 ft instead of the 300 ft required
2. 125 ft septic setback
3. Rectangle of contiguous, non-wetland area for every new lot created

He said a new site plan had been provided to the Board. He also said a letter was included from an appraiser with respect to issues associated with the plan. He said Jed Shepard of NH Soil Consultants was present to discuss the soils and septic system issues concerning the site.

Attorney Bruton said an abutter who opposed the subdivision was kind enough to attend the site walk. He said this was a project where the structures already existed. He said if the applicants went forward with the porkchop subdivision, this would preclude future subdivision, so they were essentially conserving much of this acreage. He also said the uses were anticipated to remain the same. He produced a deed that Ms. Sandberg had purchased her property in 2005, and said these uses were in existence at that time.

**Ken Saccari, general appraiser** said he had been asked to provide an opinion concerning possible negative impacts to surrounding properties as a result of the proposed subdivision. He said this was a family compound comprised of 4 single family units and an accessory apartment on one of the lots. He

said that by creating a subdivision for three lots, there would be 2 single family home lots and a 2 family house lot, which was more in line with the neighborhood. He said the proposed subdivision stayed in line with what the Zoning Ordinance intended concerning conservation subdivision, in terms of minimizing the impacts of residential development, and providing open spaces and greenways. He said he felt that allowing the applicants to subdivide the property would have no adverse impacts whatsoever on the surrounding neighborhood.

Ms. Davis asked if it was the case that at some point in the future, the lot could not be subdivided.

Attorney Bruton said yes, there was no potential for future subdivision. He provided details on this.

**Jed Shepard, NH Soil Consultants**, said 2 of the 3 dwellings on the property had state approved replacement septic systems. He said Ms. Paine's home used the existing system, which worked fine. He said an extensive number of test pits had been done, and said they had tried to comply to the greatest extent possible with Durham's regulations concerning septic systems, including the 125 ft septic setback. He said an excellent site had been found for the system, and said approval was pending. He said it would be a conventional system, and would be located 75 ft from wetlands, so met the state requirement.

Mr. Shepard provided details on how 75 ft was a sufficient distance from the wetland soils, noting that they actually were useful in removing nitrates. He said there would be no public health issues in granting the variance, and said the system would be an improvement. He said it would exceed state standards, and would meet Durham's standards for lots of record.

Chair Gooze asked if any members of the public wished to speak in favor of the application.

**Lucy Gardner, 61 Durham Point Road**, said she was an abutter one house over. She said she was in favor of granting the variances because the property would remain the same. She said Ms. Paine was a very good neighbor, and said she was sure she would continue to take good care of the property. She said she would rather see this subdivision than the terrible alternatives one could think of.

Chair Gooze asked if any members of the public wished to speak against the application.

**Betsy Sandberg, 49 Durham Point Road**, thanked Board members for attending the site walk. She said the subdivision application involved dividing one lot with one owner into 3 lots with 2-3 owners, each of which could have permitted accessory structures, rental units and home occupation situations in the future. She said she didn't have a problem with subdividing the property, but did have a problem that access to these lots was over her property, leading to a 55 acre parcel that already had significant road frontage. She noted that the assessor who had spoken did not mention this.

Ms. Sandberg said her history as an owner of the property was brief, but said she had lived in Durham for 38 years, and her history with both of these properties was just as long. She said she knew about land uses over time and how they impacted this neighborhood. She said that at the time she bought this property in 2005, the expected uses were in compliance with the Zoning Ordinance, which was there to protect the townspeople of Durham. She said making variances in settings like this changed the Zoning Ordinance, and said she felt she should be able to rely on the Ordinance as it stood.

Ms. Sandberg said that if the Board did decide to grant the variances, she would ask that conditions be applied that would help deal with the fact that they would now be talking about 3 lots, 3 owners, and 3 sets of accessory uses. She said this represented an increase in use and a burden over the right of way. She also asked that if the variances were to be granted, this should be conditional on Planning Board approval of alternate access to the lots that did not involve a right of way situation.

Attorney Bruton said all the applicants were trying to do was put property lines on this. He said the existing uses on the property were there when Ms. Sandberg purchased her property. He said there would be no increased usage of the right of way as a result of the subdivision, and said even if there was, it wouldn't be an issue for the ZBA to consider. He said that issue had nothing to do with the variances being requested.

Chair Gooze closed the public hearing.

Mr. Sievert said regarding the septic setback variance request and the contiguous rectangle of usable area variance request that he thought these issues would be more relevant for a subdivision that would utilize the entire property. He said these proposed lots were so big that he didn't see any problem in terms of sufficient contiguous area. He noted that there couldn't be much development of the site in terms of adding additional units, although he said there could be more bedrooms added to the existing houses.

There was discussion that accessory structures could be added to the lots, but they couldn't be occupied as additional dwelling units. It was noted that the existing dwelling units could contain home businesses.

Mr. Sievert said there could be additional septic loading, for example, if more bedrooms were added to the cottage, but he said this shouldn't be a problem because the lots were so big.

There was discussion that the cottage couldn't be enlarged without a variance because of its proximity to the shoreland area, and Mr. Johnson provided details on this. There was also discussion that the other structures on the property could have more bedrooms.

Mr. Sievert said he thought the 125 ft septic setback requirement was too large, and said he was fine with the fact that it met the 75 ft State requirement. He said that concerning the contiguous usable area variance request, he didn't see that granting this would decrease the value of surrounding properties, and would not be contrary to the public interest because the additional septic loading wasn't a concern.

Mr. deCampi said he thought there was a public interest issue involved, concerning the driveway. He noted that he had been at a site walk for another variance application concerning the property a few years back. He said he remembered that at the public hearing at that time, a tenant of the house that Ms. Sandberg now owned had complained about abuse of the use of the driveway. He said the Board was now hearing those same complaints from Ms. Sandberg.

He noted the letter from Mr. Taylor that tried to find common ground. He said he would like to see this 3 lot subdivision approved, and said other than the driveway issue, he didn't see any problems. He said the variance requests themselves didn't bother him. He said he would like to see the application

continued, while the applicant was charged with finding other alternatives, whether with Ms. Sandberg or not.

Mr. Gottsacker said that it was not correct to say that nothing would change on the properties in the future was not correct. He said they could be sold, and the families who bought them could have teenagers with cars, so there could be a lot more traffic. He said if that did occur, the no decrease in value of surrounding properties criterion could be impacted. But Mr. Gottsacker said, he didn't see problems with the variance requests themselves.

Mr. deCampi said he would probably vote against this application as not being in the public interest.

Ms. Davis said she was ok with the remaining shoreland frontage variance request now that the 35 ft frontage request had been removed. She also said she was ok with the septic setback and contiguous area variance requests. But she said she had concerns about the driveway issue, stating that a family with teenagers could result in traffic that could impact the abutting property owner.

Chair Gooze noted that there was nothing to prevent a family from moving in right now.

Ms. Woodburn noted that there could be three home businesses, each of them with some employees, and said this could result in a big impact. She agreed that the variance requests themselves were ok.

Mr. Welch asked which variances actually related to the driveway issue.

There was discussion on whether the driveway issue needed to be assigned to any one variance request. Mr. Sievert said he was having a problem with this.

Chair Gooze said what he was hearing was that the applicants needed the 3 variances in order to get the subdivision, but if some Board members felt the driveway issue would impact the public interest, they would vote against the variance application. He asked Mr. Johnson what else could be done on this property without the subdivision.

Mr. Johnson said there could be elderly housing there.

Ms. Davis said she assumed that if that occurred, another access road would have to be built, but Mr. Johnson said one couldn't assume that. There was discussion on this.

There was further discussion as to whether the meeting should be continued.

***John deCampi MOVED to continue the public hearing to June 12, 2007. Jerry Gottsacker SECONDED the motion.***

Chair Gooze asked if there was any chance that something could be worked out.

Attorney Bruton said they had met with Ms. Sandberg, and said they didn't feel they could do anything to address her concerns. He said they had offered her an alternative that she had rejected, and she had offered an alternative that the applicants couldn't do. He said they would like the Board to vote that evening. He said he would like the record to reflect how this civil matter regarding the use of the right

of way affected the variance requests. He said the use of the right of way was granted in the 1950's. He noted that it was brought up in the 2003 variance request, and the variance was granted.

There was a discussion about violations concerning the site.

Ms. Sandberg said she had responded by telephone to Mr. Taylor's letter. She said she thought there were possibilities for moving the driveway. She said she understood the applicants didn't want to make a big monetary investment in this. She said she felt that sliding over the lot line about 200 ft would make a big improvement in the situation.

She said she didn't feel it would be unreasonable to talk about doing a lot line adjustment that gave them the distance they might need for a reasonably sized driveway. She provided details on possible options, and said she was open to alternatives. She said Mr. Johnson had offered to meet with her and Mr. Taylor.

Attorney Bruton said the area that would be involved if the driveway were moved was wetland, and said this would mean the applicant would have to build a causeway. He said that alternative would require permits that they probably wouldn't get, for something that was completely unnecessary.

Chair Gooze noted that the Courts had sent variance cases back to the ZBA so that feasible alternatives could be considered. He said the Board liked the subdivision project, and simply wanted it to be a fair situation.

Attorney Bruton said in that case, he would like Mr. Shepard to discuss what was "feasible" or "reasonable".

Chair Gooze said there was a motion on the table to continue the application, and said looking at some possible feasible alternatives was a good idea.

Ms. Woodburn said the Board was not telling the applicant a specific way to resolve this issue, but was just saying there might be a different approach that could be taken.

Mr. Gottsacker said a search for alternatives could be done in a rational manner.

***The motion PASSED unanimously 5-0.***

- B. **CONTINUED PUBLIC HEARING** on a petition submitted by Jeffrey P. Christensen, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Section 175-74(a) of the Zoning Ordinance to pave a driveway within a portion of the Shoreland Protection Zone. The property involved is located at 595 Bay Road, and is in the Residence C Zoning District.

Chair Gooze opened the public hearing.

Attorney Sharon Somers spoke before the Board, and said the applicant was present in response to the Board's request for design modifications, a berm and a shoulder. He said the applicant had agreed to do these things, and had provided a plan. She also noted that Town Engineer Dave Cedarholm had also been contacted to review the driveway issues. She said Mr. Cedarholm had done this review, and said the applicant's engineer, Christian Smith, had responded to these comments.

She said she thought the Board would find that the evidence provided previously and in response to the Town Engineer showed that the drainage proposal addressed the possible issues, and that there was no evidence that would justify denial of the variance application.

She noted that an issue raised at the last meeting was the possibility of altering the proposal to eliminate a leg of the driveway<sup>33</sup>. She said in this case, this driveway area was needed in order to get to the house and the garage. She also said this driveway area couldn't be put within the setback, so there was no reasonable alternative, and the hardship criterion was satisfied.

She noted that when the original foundation permit was submitted and reviewed, the 2005 plan showed an existing driveway going down to the dwelling, which was made of gravel. She said this indicated that what they were talking about in terms of adding a driveway was a small job. She also noted that when the property was used as a camp, there were two entrances onto Durham Point Road.

There was discussion as to why the driveway contractor hadn't gotten a permit before installing the driveway.

**Christian Smith, of Beals Associates**, noted there had been previous discussion about the potential bypass of flow at the infiltration grate, and also about the erosive potential of water sheeting off of the driveway. He said a berm had therefore been designed to collect water and encourage not to go beyond the grate, and instead to go to the grate. She said they had also agreed to put crushed stone on the shoulder on the bay side of the driveway, to slow the velocity sheeting off of the driveway.

Chair Gooze explained why he thought it would be useful for Mr. Cedarholm to provide an opinion concerning the drainage issues. He asked Mr. Cedarholm to speak.

Mr. Cedarholm said he had reviewed a recording of the previous meeting, had looked at the drainage report, and had visited the site. He said he also had been provided with additional exhibits to make the case that the infiltration trench could handle the drainage from the driveway.

Mr. deCampi asked Mr. Cedarholm to address the proposed solutions, and the current driveway configuration, in terms of whether or not there was a danger to the bay from this driveway.

Mr. Cedarholm said he hadn't seen calculations that showed that the trench was sized to handle the runoff from the roof. He said Mr. Smith had provided a rough way with the perc test to determine if the trench could handle both roof flow and runoff from the driveway. He said the grate was light duty, and said the driveway had the potential to discharge a fair amount of runoff. He said that under normal conditions, the area that was being drained was rather small, but he said if snow built up, it would be pretty easy to have a lot of runoff going into the grate. He said he didn't have enough information about the soils to determine if the trench could handle all of it.

In answer to Chair Gooze, he said the extra gravel that was proposed and the 4 inch berm didn't mean that much. He said the gravel would help, but said from what he saw of the soils shortly after the recent rain storm, he didn't think the soils had a high perc rate. He also noted that the lawn didn't look like it would be able to quickly absorb rainfall. He said a conservative opinion would be to say there was a D soil type and that the vegetation was fair.

Mr. Smith said he had drafted a letter in response to Mr. Cedarholm's comments. /He demonstrated on a soils map that most of the soils on the property were of the Hollis-Charleton complex, and he described their properties, including their adequate drainage rate. He also said there was only a small amount of wetland soils on the property.

He noted that there was a silt fence installed, along with hay bails, and he said there had been no sign of sediment transport. He noted that a lot of the area on the site had been disturbed, but had been seeded, and said the applicant would continue to do this and to encourage additional growth of a lawn.

Mr. Smith also noted that geo-fabric was supposed to have been installed by the contractor for the infiltration trench, but apparently this had not happened. He said this detail had clearly been provided to the contractor.

Concerning the super loading of the grate inlet, Mr. Smith said the numbers that had been used were conservative. He also said the lawn area was not really germane to the trench. He said all that the trench received was a small portion of the runoff from the driveway and the roof. He noted that although a portion of the proposed roof was not approved by the ZBA, it still was included in the calculations for the trench.

He said they felt the numbers were a conservative estimate, and provided a level of comfort that what Mr. Christensen was doing would be of benefit to the bay, particularly in comparison with where



things had started on the site. He provided details on this, and also said they felt the driveway was better from an erosion and sedimentation perspective than a gravel driveway would be.

Mr. Smith described what the site would be like when it was fully vegetated. He also noted that there was no evidence of erosion, even in the areas with poor vegetation. He said the applicant was doing everything he could to prevent erosion.

Mr. Cedarholm said that without a test pit in the actual location of the infiltration trench, he really didn't know how well it would work. He noted that soils had a tendency to vary significantly from one location to another within this kind of area.

Chair Gooze asked if a perc test would be required in general when someone asked for an approval for a driveway permit.

Mr. Cedarholm said the Public Works Department dealt with curb cuts, and the rest was under the jurisdiction of the Planning Board. He also said it was unusual to have an infiltration trench associated with a driveway.

Ms. Davis asked if they would have seen it recently if the infiltration trench couldn't handle the runoff.

Mr. Cedarholm said he didn't know exactly where the trench was, and noted that it was not shown on the plans. He said if the area was supersaturated, that close to the shoreland, there could be complete slope failure into the bay.

Mr. Smith said the grate at present was slightly above the elevation of the driveway, and Mr. Christensen explained that it had previously been flush. He said that when the curbing was done, they would make it flush again.

Mr. Smith said that when the gutters went in, half of the roof and 420 sf of driveway pavement would drain to the grate. He said the grate would tie into the infiltration trench. He noted that if there was ponding of the grate because of leaves, etc., Mr. Christensen would be sure to take care of that.

Ms. Woodburn suggested that the Board should require that the grate and the infiltration trench be indicated on the plan.

Mr. deCampi said he would like to approve the application, but he said there was a problem when the Town Engineer couldn't say the plan was safe. He asked whether, if the hearing was continued, this matter could be resolved, and whether it could be determined whether there was a reasonable plan that would better protect the bay. He said he understood that Mr. Cedarholm didn't have the data right now that he needed, and he asked if this could be obtained so he could come back to the Board with a firm conclusion one way or the other.

Mr. Cedarholm said he thought that with the proper data, he could probably come to a conclusion.

Chair Gooze asked whether the applicant should perhaps be paying something toward the work Mr. Cedarholm was doing.

Attorney Somers said the applicant had provided data that night, and she said the evidence Mr. Smith had provided clearly indicated the nature of the soils on the site. He said they weren't poorly drained, and said she didn't feel there was a need for further data. She said if the hearing was continued, she didn't know that there would be a very different discussion. She also said that if the Town wanted to utilize the resources of the Town Engineer, that was fine. But she said this was not a Planning Board proceeding, and said the ZBA did not have the jurisdiction to compel further studies.

Attorney Somers said Mr. Christensen had some additional material that he would like to present. She said Mr. Cedarholm had admitted that he was not presenting information and instead was presenting concerns and assumptions, while the applicant had provided evidence.

Mr. Christensen showed the Board pictures taken at various places on his property around the time of the recent bad storms. There was discussion about these pictures, including pictures of a culvert that channeled water into the bay. Mr. Christensen explained that this water had previously flowed under the house, but said he had now achieved a dry cellar, even during the recent storms.

There was further discussion about the culvert. There was also further discussion about details that were missing from the site plan.

Chair Gooze said if the Board had approved this application at the previous meeting, there would have been some problems with the site, including the fact that the grate was above the level it should be. He said there were now some corrections being provided, but he said he didn't feel the Board had the whole plan yet, and said he would also like Mr. Cedarholm to be involved in evaluating it.

Attorney Somers said she appreciated the fact that there were some things missing from the plan, but she said she was under the assumption from the site walk that Board members were familiar with where the culvert and other things were. She said she felt this issue had been put to bed. She also said, concerning the fact that the grate was slightly above the lip of the pavement, that this could be dealt with as a condition of approval. She said that the concerns had been more than addressed. She said if the issues Mr. Cedarholm had spoken of were valid, the photos would have shown this.

Attorney Somers said that regarding the issue of water flow coming off the side of the house, what was proposed was to heavily vegetate the area, so that even if there was a heavy storm, water would filter through the grass, as it had done over many years, with or without the driveway. She said the problem with gravel was that it would eventually wash into the bay, especially if there was the volume of water that the pictures demonstrated.

She said she appreciated the Board's concerns, but said she felt the applicant had provided the information the Board needed. She said they would be happy to put additional details on the plan and to raise the grate, as conditions of approval.

Chair Gooze asked the Board how it wished to proceed.

Mr. Christensen said there was really no room to bring in the equipment needed to do test pits.

Mr. Cedarholm noted that if it was a septic system issue that needed to be examined, the test pits would have to be done there. He said he thought it was critical to have site specific information on

infiltration. He said maybe they were all Charleton soils, but he said there wasn't the information available to tell them that.

Attorney Somers said the Board had looked at the infiltration trench, and had made the determination last summer that it was sufficient to address the roof runoff. She said that issue had therefore been put aside, and said she didn't want it to be reopened.

Mr. Sievert said it was frustrating that the required information was not on the plan. He said all the evidence had not been provided in one place, at one time, noting specifically that although Board members had seen the culvert, it was not shown on the plan. He said it would be good if there was one plan, and one set of drainage analyses, with calculations. He also said Mr. Cedarholm had made a good point about the soil numbers.

Attorney Somers said they were equally frustrated. She said the applicant had just received the comments from Mr. Cedarholm, and said they were doing their best to respond to them.

Mr. deCampi said the Attorney Somers had stated the Board had to approve the application unless it had data to the contrary. He said this had driven them to ask the Town Engineer if there was such contrary data.

Chair Gooze asked if there were any other members of the public who wished to speak in favor of this application. There was no response. He then asked if there were any members of the public who wished to speak against the application.

**Robin Mower, Faculty Road**, said regarding the grass situation on the site that it was tight grass, so wouldn't be able to create a buffer. She said because this property was in the shoreland district, this was a big concern. She also questioned whether chemicals should be used on the lawn, given the proximity to the water. She asked whether there had been discussion on the idea of using pervious pavement. She also noted that the photos that had been taken of the site were taken at one point in time, and said additional storms could create changes in the site. She said it was important to take additional precautions here.

Chair Gooze closed the public hearing.

Mr. Gottsacker said that first of all, the property was in much better condition than it previously had been. He also said that Mr. Cedarholm's input was valuable, stating that Board members were not experts. He suggested that it would be a good idea for the engineers to get together to discuss the site.

Mr. Gottsacker said this application had been a hassle for everyone. He said his own perspective was that if it had been a permitted driveway and it had then come before the ZBA, there wouldn't have been such a hassle. Finally, he noted that he, like Chair Gooze, he had not seen the culvert on the site, because he was focused on the garage.

Chair Gooze asked how the Board wished to proceed.

Mr. deCampi said he would like to continue the hearing so that there could be a reasonable conclusion from Mr. Cedarholm. He said the technical details were way beyond the Board.

Mr. Sievert said he would like to try to iron out the issues that evening, and to move to grant the variance. He said if there were some other things needed of the applicant, there could be conditions. He said Mr. Cedarholm had been brought in toward the end of the process, and said the timing of this had been tough on the applicant. He said he still had a few concerns about the drainage plan, and noted that he didn't agree with some of the data Mr. Smith had provided, and tended to agree more with Mr. Cedarholm.

There was further discussion about how to proceed. Mr. Gottsacker said it was fair that the Town should undertake the cost of further analysis of the data.

Ms. Woodburn said the Board should discuss whether the grass was adequate as a swale stabilizer.

Mr. Sievert said for the first section there could potentially be rip rap and some stone, but he said the grass at that slope was fine. He provided details on this. He said if the Town Engineer was ok with the drainage plan, he felt the variance would meet the criteria.

Mr. McNitt asked what condition Mr. Sievert would put on a motion to approve the application.

Mr. Sievert said the condition would be that the plan satisfied the Town Engineer's concerns, and that he and Mr. Smith had come to agreement on the analysis - that there was the right amount of flow, and that the trench was adequately designed, - to include roof flow and driveway flow. He said the analysis should also look at winter conditions, since the property was right next to the bay.

Mr. McNitt said he agreed it was more difficult to deal with an application for something that had already been built. He also said his own front yard was similar to what Mr. Christensen had. He said he didn't like it that the driveway was there on Mr. Christensen's site, but he said he didn't think it was something that was earthshaking. He said he was ok with this if the basic requirements were reasonably satisfied. He said he felt that more than enough time had been spent on this application.

Mr. deCampi said he respected Mr. Sievert's engineering skills, but said he was more confident having Mr. Cedarholm come back with his further analysis. But he said he didn't want to make Mr. Christensen tear up the driveway. He said he would rather come back next week and vote based on cleaner data, but said he could go either way on this. He also said he would like it if the proposed driveway to the garage was porous pavement.

Chair Gooze said he didn't know if the Board could get into this.

Mr. deCampi said he was not suggesting porous blacktop, but simply concrete block, which really worked. There was further discussion on this.

Ms. Davis said she agreed with Mr. Sievert, that the application could be approved, with conditions.

Mr. Welch noted that there was already a problem with the grate, and said perhaps a bigger grate was needed. He noted that a variance could run for many years. He said the plan seemed flawed, and said it seemed that more work needed to be done.

Ms. Woodburn said there should be a condition that the plans met the approval of Mr. Johnson and Mr. Cedarholm, in adequately showing the changes proposed.

Chair Gooze said he agreed with Mr. McNitt's comment about the Board having to address the driveway after it had been constructed. He also noted how long the variance issues with this site had gone on. But he said he didn't think he wanted to say the driveway should therefore be torn up. He said his concern was that the bay would be safe as a result of the driveway, and said he could approve the variance with conditions.

***Ted McNitt MOVED to approve a petition submitted by Jeffrey P. Christensen, Durham, New Hampshire for an APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article XIV, Section 175-74(A) of the Zoning Ordinance to pave a driveway within a portion of the Shoreland Protection Zone, because all of the variance criteria have been met, with the conditions that the Town Engineer be satisfied with the plans for drainage on the site, and that the plans be upgraded to reflect everything that has been approved to date on the house, garage, septic system and driveway, per the approval of the Code Enforcement Officer. Jerry Gottsacker SECONDED the motion.***

Mr. deCampi said he would like to add the idea of porous pavement, as a friendly amendment.

Chair Gooze said if Mr. Cedarholm felt the drainage plan was fine without it, he was ok with this.

Mr. deCampi agreed with this.

***The motion PASSED unanimously 5-0.***

- C. **CONTINUED PUBLIC HEARING** on a petition submitted by MJS Engineering PC, Newmarket, New Hampshire, on behalf of Patsy Collins, So. Newfame, Vermont, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-55(F)(1) and Article XIII, Section 175-64 of the Zoning Ordinance to obtain relief from the requirement that somewhat poorly drained soils be deducted from the calculation of usable area. The property involved is shown on Tax Map 1, Lot 15-0, is located on Edgewood Road, and is in the Residence A Zoning District.

Chair Gooze assigned Ruth Davis as a voting member in place of Mr. Sievert, who represented the applicant in this application.

Mr. Sievert explained that he hadn't planned to present the application that evening. He said he hadn't asked an employee from his firm to be present to make the presentation because he had thought the only thing that would be addressed that evening was scheduling of the site walk.

Chair Gooze said he didn't have a problem with simply scheduling the site walk.

Mr. Johnson suggested that the Board might want to hear from abutters who were present, and said their concerns could then be considered during the site walk.

Chair Gooze asked Mr. Sievert to provide a short presentation on the application, for people who hadn't previously seen it. He said the Board could then take brief comments from the public, and schedule the site walk.

Mr. Sievert said this was a 14 acre parcel located off of Edgewood Road and Emerson Road. He said a variance was needed in order to allow somewhat poorly drained soils to be used in lot sizing. He said the applicant would like to add back in these soils as usable acreage because the site was served by municipal water and sewer. He said the applicant was not asking for an increase in density over what was allowed in the Residence A District, and he provided details on this.

Chair Gooze said in other words, the applicant was asking for a variance because it was felt there was no harm to the public if these soils were counted as usable area.

Mr. Sievert said that at the next ZBA meeting, the applicant's engineer and soils consultant would be present. He said it would make sense to go through the variance criteria at that time.

Chair Gooze asked if any members of the public wished to speak for or against the application.

**Michael Curley, 9 Emerson Road**, asked how many lots could be put on the site without the variance being requested.

Mr. Sievert said there could be 6 lots without the variance.

Mr. Curley said he was not against building on 6-8 lots. But he said he didn't see the hardship involved with this variance application. He asked whether the applicant was looking to put in age 55 and older housing, and Mr. Sievert said no, although he said this idea had originally been looked at.

**Jan Nesbitt, 9 Woodside Drive**, asked at what point the Zoning Ordinance didn't mean anything anymore. She asked whether the process citizens went through in classifying certain soils as not allowable as usable area was respected. She asked the Board whether, if it approved this variance, this would create a serious precedent to grant others. She said she knew the land involved here. She asked the Board to ponder the larger question she had asked, and said the people who had worked on the Ordinance deserved a bit of respect.

***John deCampi MOVED to continue the public hearing on a petition submitted by MJS Engineering PC, Newmarket, New Hampshire, on behalf of Patsy Collins, So. Newfame, Vermont, for an APPLICATION FOR VARIANCES from Article XII, Section 175-55(F)(1) and Article XIII, Section 175-64 of the Zoning Ordinance to obtain relief from the requirement that somewhat poorly drained soils be deducted from the calculation of usable area. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.***

The site walk was scheduled for May 24, 2007 at 5:00 pm

- D. **PUBLIC HEARING** on a petition submitted by Christopher Dennen and Sarah Larson, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to build a barn within the frontyard setback. The property involved is shown on Tax Map 14, Lot 5-0, is located at 367 Packers Falls Road, and is in the rural Zoning District.

Mr. Dennen said that he and his wife were looking for more privacy, and explained that their house was located on a busy section of the road, which was getting busier. He said the house was close to the road, and said there were noise and safety issues, providing details on this. He noted among other things that he and his wife had a two year old son.

He said they would like to get as close to the front property line as possible, and said the plan was to

put it back 10 ft bfrom the line. He also said the driveway had a fairly steep entrance, making it difficult to make turns, especially toward Lee. He described the old garage that existed on the site, and said the plan was to remove this, and to construct the new garage/barn near the road. He said they would keep the rural feel of the area with the design of the barn, and said here would be a one car garage at the end of the barn.

He noted there was a letter of support from a Trustee of Spruce Wood. Mr. Dennen said it would improve the property to remove the old garage, noting that it was located in the center of the property, which had disadvantages. He said he and his wife were simply looking for a greater degree of privacy and safety for themselves and their son.

He noted that he was before the ZBA four years back for a variance for the septic system, which had never been built. He said with this new site design now involving the relocation of the barn, there would be greater area available for the septic system. He said the system was being redesigned, and said that hopefully it would be installed as part of what he and his wife were planning for the property.

There was discussion about the incursion into the front setback. Mr. Dennen said he wanted to put the barn 20 ft into the setback. He noted that he wasn't sure which was technically the front of the building, but said he assumed that the road was the front, although the house didn't technically face the road.

Mr. Gottsacker noted that this was a collector road as compared to an arterial road. It was agreed that the frontyard setback for this road was 30 ft.

There was discussion about the proposed location of the barn. Mr. deCampi asked why the same thing the applicants desired couldn't be accomplished with a dense landscaped border, so the barn could be moved back further from the road.

Mr. Dennen said he would rather put the barn there than landscaping, stating that anything that was planted there would have to be pretty tall.

Mr. deCampi said he had planted hemlocks on his property, and they had filled things in within about 6 years.

Mr. Dennen said he would prefer not to wait 6 years. He also noted that the barn couldn't be put on the other side because of the well, and that if the barn was moved back from the road, it would block the view, looking out from the front of the house. He stated again that the main reason he didn't want to replace the existing garage in place was to achieve some privacy close to the road. He noted that the new barn would be timber frame, but would essentially be a garage that looked like a barn.

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

Mr. Welch said he was not familiar with the area where the property was located, but said granting the variance probably would not diminish the value of surrounding properties, and would not be against the public interest. He asked what the intent of the front yard setback was in this instance. There was discussion about this. He also asked whether the safety of drivers on this road was an issue.

Mr. Johnson noted there was another application where a barn was allowed close to the road, and Chair Gooze said the Board had allowed this because doing so would improve the line of sight

compared to the existing situation. There was discussion about this.

Ms. Woodburn said she was uncomfortable with how close the barn would be to the road. She said the applicants wanted privacy, and didn't want to cut the lot in half, and said perhaps there was a site plan that could achieve what they wanted. She suggested that the barn might be placed no further toward the road than the closest part of the house, which would mean moving it back 5 ft. She said this would be in keeping with the existing architecture in the area.

She also said that although it wouldn't provide a totally unobstructed view out to the yard, it wouldn't split the property in half, and also wouldn't place the barn uncomfortably close to the road. She said another benefit of putting the garage a bit further back was that it would improve the sight distance a bit so there would be a better chance of getting out of the driveway safely. She provided further details on how this approach could work.

Mr. Sievert said his only concern was that the sight distance wouldn't be enough, with what the applicant had proposed. He said there were probably enough constraints on the site to be able to say there was hardship. But he said putting the barn 10 ft from the road was a little too close, in terms of the sight distance.

Mr. Gottsacker said he was having a problem with the fact that the barn would be so close to the road. He also said he was having a hard time seeing how there was hardship, when there were other places to put the barn.

Mr. deCampi said he agreed with Mr. Gottsacker. He said he didn't have a problem with the barn itself, but said it would just be too close to the road, as proposed. He said he didn't think the variance could be approved based strictly on the criteria, but also said he didn't see a lot of harm in granting it. He also noted that there were a lot of things located close to the road in this area of Town.

Chair Gooze said for the application Mr. Johnson had referred to, the Board felt the Town got something in exchange for granting the variance. He said he was having trouble with this variance. He said he would be willing to grant it if the barn would be no closer to the road than the existing house. He said this would be better from a visual perspective.

Ms. Woodburn said it was not just the visual perspective that needed to be considered concerning setbacks, but also safety considerations.

Mr. McNitt said he recognized that this was a very unique piece of property, and also said he felt the spirit of the Ordinance was to maintain the rural feel of this area. But he said he thought a death trap would be created in putting the barn where the applicants proposed, and said the applicants themselves were most likely to suffer as a result of this. He said moving the barn back to the edge of the house would be much better, although he said he would prefer to put the barn where the existing garage was located. He said if the applicants felt the barn had to be located where they proposed it, he would have to vote against the application.

Mr. deCampi said he could grant the variance. He said he felt there was enough support granting it, with the condition that the setback would at the minimum be the same as the setback from the house.

Mr. Sievert said he had concerns about exiting safety and sight distance. Regarding the hardship criterion, he said there were special conditions of the property. But he said there were other options for the applicants, although they were not great, given the land and the lot factors. He said he agreed that



the barn should be pulled back somewhat, and also said he agreed with the applicants concerning the need for protection.

Chair Gooze said he felt the application could meet the variance criteria, with the condition that the road side of the barn would be no closer to the road than the closer point of the existing house. He said if it didn't, he didn't think the application would meet the public interest. He said he thought it was hard to say the application didn't meet the hardship criterion, stating that for what they wanted, there didn't appear to be a feasible alternative. But he said if the barn wasn't moved somewhat, the application wouldn't meet the spirit and intent of the Ordinance or the public interest.

Chair Gooze reopened the public hearing to see if the applicants would accept the condition.

Mr. Dennen stated that the driveway could be pushed further down.

Mr. McNitt said the issue with the public interest was that with the barn so close to the road, cars coming down that road wouldn't be able to see a car coming out of the driveway.

Mr. Dennen noted another property nearby that was close to the road. He said the public safety records indicated that there had never been an accident there as a result of this.

Chair Gooze asked if the applicants would still build the barn, if they had to put it where the Board wished it to be put.

Mr. Dennen said he didn't know, and said he would have to think about whether he would want to see the barn as he was looking out from the front of his house.

*John deCampi MOVED to grant the petition submitted by Christopher Dennen and Sarah Larson, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to build a barn within the frontyard setback, for the property located at 367 Packers Falls Road, in the Rural Zoning District., with the condition that the barn will be no closer to the property line than the closest corner of the house is to the front property line, and that the variance criteria are met with that condition in place. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.*

- E. **PUBLIC HEARING** on a petition submitted by Stephen & Lori Lamb, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7, Definition of an Inn, of the Zoning Ordinance to have more than six individual sleeping rooms within the Inn. The property involved is shown on Tax Map 14, Lot 34-1, is located at 86 Bennett Road, and is in the Rural Zoning District.

**(The applicant has requested that this application be postponed until June 12, 2007)**

- F. **PUBLIC HEARING** on a petition submitted by Thomas G. Ferrini, Dover, New Hampshire, on behalf of Robert & Gale Teeri Living Rev Trust, Durham New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from an April 18, 2007 e-mail from Zoning Administrator Thomas Johnson regarding the occupancy of a building. The property involved is shown on Tax Map 5, Lot 2-2, is located at 15 Main Street, and is in the Church Hill Zoning District.  
**(Postponed until June 12, 2007)**

#### IV. Correspondence and/or Discussion

- A. **REQUEST FOR REHEARING** on a March 13, 2007 denial of a petition submitted by Jeffrey P. Christensen, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance to enclose an approved deck on an existing, non-conforming structure within the Shoreland Protection Zone. The property involved is shown on Tax Map 20, Lot 1-0, is located at 595 Bay Road, and is in the Residence C Zoning District.

Chair Gooze said the question was whether the Board had made a legal error, or there was new evidence. He said from what he had seen, there was nothing new that had been presented. He also said the Board had noted that the applicant already had some screened in porch.

*John deCampi MOVED to deny the petition submitted by Jeffrey P. Christensen, Durham, New Hampshire for an Application for Variances from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance to enclose an approved deck on an existing, non-conforming structure within the Shoreland Protection Zone, for the property located at 595 Bay Road, in the Residence C Zoning District., based on the fact that no new information was provided, and that no obvious legal errors were made. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.*

- B. **REQUEST FOR REHEARING** on an April 10, 2007 denial of a petition submitted by Van Rich Properties LLC, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to obtain relief from the 300 square-foot per person dwelling unit requirement. The property involved is shown on Tax Map 9, Lot 20-0, is located at 277 Mast Road, and is in the Multi-Unit Dwelling/Office Research Zoning District.

Chair Gooze noted that he had voted for this application the first time.

Mr. Gottsacker said he had been an alternate at the time the Board heard it. He noted that they were only talking about a 188 sf difference.

Chair Gooze said he had read through the letter from the applicant, and said it sounded like the request for rehearing was based on the spirit and intent of the Ordinance criterion.

Mr. Gottsacker noted that the Housing Task Force had been talking about the idea of allowing increased density, and that Chair Gooze had discussed this issue before the Town Council recently.

Chair Gooze stressed that this was not a done deal.

There was discussion as to the fact that the ZBA knew the Planning Board had granted a conditional use permit for this property, when it heard the variance application.

There was discussion about the applicant's referral to the Burton case in his letter.

Mr. McNitt said there were real limitations on the applicant's property because of the lack of Town water. He also said that if the applicant waited, he might not even need a variance. He said if the Board granted the variance, and the possible Zoning Ordinance change didn't happen, the Board would have created a nonconforming situation.

Mr. Johnson said he had the impression that because the applicant had gone to the Planning Board for the conditional use permit, he had thought it would be relatively easy to get the variance from the

ZBA. He said the applicant had therefore not really done his homework. Mr. Johnson said there were only 188 sf involved, and said he was therefore inclined to give the applicant another shot so he could do some research. He also provided details on the use of the site in the past.

Mr. McNitt said he was not against a rehearing, but said the applicant had to show that the Board had done something wrong, in order for the Board to decide to rehear the application.

Mr. deCampi said he felt that if there was any doubt concerning this, the Board should grant the rehearing.

Mr. Johnson said there perhaps could be new evidence.

Chair Gooze said that perhaps the Planning Board could weigh in on this, and what their intent was in granting the conditional use permit. There was discussion about this. He said he would like to grant the rehearing request, and said he would also like to ask that the ZBA hear from the Planning Board in some way concerning this property.

Mr. Welch said the Board had determined that no legal mistake had been made, and that there was no new evidence. He asked if the Board was saying the applicant could provide new evidence.

There was discussion about whether new evidence had been provided.

Mr. Sievert said he thought the duplex/apartment distinction was new evidence, and also said he thought the Burton information could be considered to be new evidence. There was discussion about this.

Chair Gooze said the new evidence would be hearing from the Planning Board.

Mr. McNitt said the Planning Board had the concept of mixed use, but said it was an advanced concept, and said it might take awhile to make it happen.

Mr. Gottsacker said he had learned from the recent conference that ZBA members should err on the side of property rights, when there was doubt.

***John deCampi MOVED to grant the request for rehearing on an April 10, 2007 denial of a petition submitted by Van Rich Properties LLC, Durham, New Hampshire for an Application for Variance from Article II, Section 175-7 of the Zoning Ordinance to obtain relief from the 300 square-foot per person dwelling unit requirement, for the property located at 277 Mast Road, in the Multi-Unit Dwelling/Office Research Zoning District. Mike Sievert SECONDED the motion, and it PASSED unanimously 5-0.***

**C. DISCUSSION OF REQUEST** from Code Enforcement Officer, Durham Fire Department and the applicant to amend the Conditions of Approval for the Appeal of Administrative Decision of 13 Madbury Road, approved January 9, 2007.

Mr. Johnson explained that this case went back to the 1950's and provided details on it. He said there had been a lot of bad paperwork on the Town's part. He said if the Town went to court concerning it now, it had a weak case, and said if the case were lost, the Town could end up with someone living essentially in a dungeon for the life of the building. He said this scenario was not acceptable to his department, the Fire Department, the applicants or their attorney. He said they would like to see a compromise.

Mr. Johnson provided details on what that compromise was.

*John deCampi MOVED that the Zoning Board of Adjustment approve the 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 following conditions apply: 1) The property is not a rooming house, but a grandfathered single-family dwelling with additional rental space; 2) The non-habitable basement/utility space, ordered vacated by the Durham Code Official and Durham Fire Marshal shall permanently remain non-occupied, and all partitions, plumbing, and electrical finishes shall be removed, except for those items required for boiler, water heater and washer & dryer; 3) The enclosed front porch shall be renovated to become habitable and meet all state building and fire codes; 4) The Durham Code Official and Durham Fire Marshal shall each inspect all areas and measure all interior spaces for calculation of habitable areas under their respective codes; 5) Once all conditions have been met, the occupancy of the dwelling shall be no more than seven occupants; 6) Until the required alterations and Conditions set forth have been completed to the satisfaction of the Durham Code Official and Durham Fire Marshal, the occupancy due to existing 2006/2007 leases shall continue at seven persons until the first of June 2007 and then be limited to five persons on June 2, 2007; 7) All renovations must be completed by August 24, 2007. The motion was SECONDED by Jerry Gottsacker and PASSED unanimously, 5-0.*

**V. Approval of Minutes**

April 10, 2007

(Postponed to June meeting.)

**VI. Other Business**

Mr. deCampi referred to the Ferrini appeal, and asked if it was fair game to appeal a decision that was that old.

Mr. Johnson said that in his recent email, he said he was standing by his previous decision.

Mr. deCampi said when he chaired the meeting in June, he would bring up the issue of whether this in fact was a valid application.

Mr. Johnson noted a case that would be going to court concerning Alpha Gamma Rho. He said the fraternity rented to boarders, and claimed it had been doing this since the 1920's. He said the ZBA had heard variance requests on this twice, and said the applicant was now going straight to court. He said there would be a pre-trial hearing.

**VI. Adjournment**

*John deCampi MOVED to adjourn the meeting. Mike Sievert SECONDED the motion, and it PASSED unanimously 5-0.*

Adjournment at 11:00 pm

Victoria Parmele, Minutes taker