

These minutes were approved at the August 28, 2007 meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, JUNE 12, 2007
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: John deCampi; Jerry Gottsacker; Ted McNitt; Ruth Davis; Robbi Woodburn; Carden Welsh

MEMBERS ABSENT: Jay Gooze; Michael Sievert

OTHERS PRESENT: Tom Johnson, Code Administrator/Enforcement Officer; Victoria Parmele, Minutes taker

I. Approval of Agenda

Vice Chair John deCampi said he would be filling in as Chair that evening because of the absence of Chair Gooze. He also said alternate Ruth Davis, Carden Welsh and Robbi Woodburn would be voting members that evening.

Chair deCampi said MJS Engineering had requested that the Collins application be continued to the July 10th meeting. He said there had also been a request from Attorney Ferrini to withdraw the Teeri application, but said the Board would need to vote on this when it got to that Agenda item.

Ted McNitt MOVED to continue the Collins application to the July 10th ZBA meeting. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Jerry Gottsacker MOVED to approve the Agenda as amended. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings:

- A. CONTINUED PUBLIC HEARING** on a petition submitted by Arnet 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 for this application.

Attorney Charles Griffin, representing the abutter, Betsy Sandberg, said there was a procedural issue concerning this application. He said this was the third time this matter had been heard, and said when the application was heard in April, alternates Robbi Woodburn and Carden Welsh were not on the Board, so it would not be proper for them to vote on this application.

Chair deCampi said he would leave it up to Ms. Woodburn and Mr. Welsh as to whether they felt they understood the case well enough to participate. He also said he felt the matter had been covered thoroughly at the May meeting, so a member's absence at the April meeting was therefore not debilitating.

Mr. Welsh and Ms. Woodburn said they would vote because they understood the case well enough.

Attorney Griffin stated again that he objected to this procedure.

Attorney F. X. Bruton represented the applicant. He noted that he had asked that the Board vote on the application at its May meeting, but the Board had asked the applicant to have a discussion with the abutter about the possibility of altering the plan with respect to considering an alternate means of access, and not using the right of way on the Sandberg property. He said the applicant had objected to this because it was felt it would cost a lot of money to move the access, especially because of wetland issues. He said they did go back and address the situation with Ms. Sandberg, but said they were unable to resolve this issue.

Attorney Bruton said that in an effort to address the issue in a different way, the applicant had subsequently changed the plan into a two lot subdivision instead of a three lot subdivision, by deleting a lot line between lot 2 and 3. He said that hopefully in doing this, they had addressed the concerns of the abutter, and could move forward.

He also said that issues raised that evening or at the previous meetings concerning Planning Board issues would be addressed before that Board. He said the applicant was still proceeding under the porkchop subdivision provisions, and said there would be no future subdivision of the properties, and no additional dwelling units. He said as a result of the subdivision, there would be only two lots on 55 acres.

Attorney Bruton said Larry Morse of NHSC Inc. was present to speak regarding the idea of a possible alternative right of way location and the wetland/soils issues that would be involved with this. But he said the issues before the ZBA had nothing to do with whether or not the right of way was moved.

He said the applicant had received a letter that day from Attorney Griffin, but noted that the ZBA had received this letter the previous week. He said this letter contained a letter from an appraiser, and reference to a memo from the Town Engineer. He said he had asked for a copy of this memo, and had received it, but said he found it unusual that it hadn't been received at the same time others got it.

Attorney Bruton said he had provided a written response concerning the issues raised by Attorney Griffin's letter. He provided copies of this to the Board, and said he would like the Board to read this document now so it could receive the same consideration from the Board that Attorney Griffin's letter had received.

Attorney Bruton said the key point of his letter was that there had been a tremendous focus on the right of way issue, and that this focus was misplaced. He said this property had existed for 100 years, and the uses on it had existed for many decades. He said again that the issue of whether the easement was overburdened had nothing to do with the Zoning Ordinance and the variances being requested from it, and should be dealt with separately.

He said this subdivision process would create a lot with a duplex on it, and he asked what harm there was in this. He said there would be no additional dwelling units created, no further subdivision, so nothing would change. But he said that as a result of the subdivision, the applicant would be encumbered by restrictions that currently didn't exist.

Attorney Bruton noted that he had already gone through how this application met the variance criteria at a previous meeting. He said the issues of feasibility and hardship related to the variance requests, not the right of way issue, and provided details on this.

He then asked Mr. Morse to speak concerning the possible idea of moving the access road to the property.

Larry Morse, President, NH Soils Consultants, said he had been asked to look at the environmental issues involved with moving the driveway, and the feasibility of doing this. He said the feasibility issue went beyond whether a driveway could physically be constructed there, and said the key issue was whether the environmental permits from the State could be obtained. Mr. Morse provided a number of photos of different locations on the applicant's property, and provided details on these locations, stating in conclusion that the State would look at the existing right of way as the least impacting choice for a driveway, from an environmental perspective. He noted that he had not done an on site wetland delineation of the property.

Chair deCampi asked if the letter from Sally Ford had been received by others besides the ZBA, and determined that copies of this letter needed to be made.

Ms. Woodburn asked whether, if this property did not have development on it and did not have an easement over the abutting property, and the applicant wanted to develop an access to it over the wetland, this would be allowed by the State.

Mr. Morse said yes, because at that point there wouldn't be an alternative that was less impacting than this. He provided details on this.

Ms. Woodburn asked whether, if the owner of this property made changes to develop it and lost the alternative of crossing over the abutting property because of the impact upon it, the State would allow the wetland crossing to access that property.

Mr. Morse said if there was another entity with rights to the property who wanted to subdivide it more intensively and couldn't use that right of way for the expanded use, there wouldn't be a practical alternative, and the entity would be given the right of access at the least impact location.

Mr. Welsh asked what this would cost, and there was discussion.

There was further discussion on Mr. Morse's conclusion.

There was discussion about the fact that the original variance request involved 3 lots, and that even though there were only 2 lots that were now proposed, the three remaining variance requests still applied.

Mr. Gottsacker pointed out that at the May meeting, there had been an effort to take the right of way issue out of the ZBA's domain, and to get the applicant and the abutter to figure this issue out.

Attorney Bruton noted that the applicant had taken exception to this approach, but had nevertheless worked to try to work this issue out. He provided details on this, and said they were not able to do this. He said one reason was that they didn't feel they should have to go out and buy additional land for something that had no effect on what they were trying to do.

Katie Paine, 51 Durham Point Road, said she had received the letter from Attorney Griffin that day. She said that for the record, she had no objection to moving the driveway, but said she couldn't afford to pay for this. She noted that the letter from Attorney Griffin said the subdivision would decrease the value of Ms. Sandberg's property. But she said she disagreed, and provided details on this, emphasizing that moving the driveway would only benefit the abutter.

She spoke about the taxpayer dollars that were being used to figure this issue out, including the work of Town Engineer Dave Cedarholm. She also said there were five dwelling units on the property, and provided details on the fact that this would not change, regardless of whether or not the variances were received.

Lucy Gardner, 61 Durham Point Road, said she would like to speak in favor of the variance requests, stating that she lived next door to 55 acres with 5 dwelling units and 3 houses, and would like to keep it that way. She provided details on why it made no sense to connect the variance requests to the right of way issue. She said there was no way that the right of way would be overburdened by having 2 owners using instead of one. She asked that these variances be granted so the Town could keep 55 acres of land in pristine condition, and she noted that the conditions placed on the approval, which didn't exist now, would adhere to the property. She said one couldn't do better than that in Durham.

Julian Smith, 247 Packers Falls Road, thanked Chair deCampi for his response to Attorney Griffin regarding the issue of whether some of the alternates should be on involved in

deliberating on this application. He also stated, facetiously, that as a Durham taxpayer, he would prefer to see an Indian casino on this property

He said that as a member of the Library Board of Trustees, he had benefited from the hospitality of Katie Paine, and also said he came forward as a member of the Town Council, who was tired of all the squabbling in Durham. He said he also came forward as a retired English professor, who had spent 40 years trying to teach young journalists, attorneys to be, how to write simply and persuasively.

Mr. Smith said he had found Mr. Griffins' letter in the file that morning, noting he was disappointed that the applicant's attorney hadn't seen this letter sooner. He also said he had seen Mr. Cedarholm's letter, and was perplexed about the use of Mr. Cedarholm's time, and the tax dollars expended for that purpose

He noted that an issue addressed in Attorney Griffin's letter was the diminution in the value of Ms. Sandberg's property by \$5,000 as a result of the proposed subdivision, but he noted the 7 page brief prepared by Attorney Griffin on this issue, and said it probably cost the abutter about \$5,000. He said he had found this whole process to be disappointing.

Chair deCampi noted that the ZBA hadn't invited Town Engineer Dave Cedarholm to get involved in this issue. He said if Mr. Cedarholm had gotten involved, he did so because he thought it would benefit the Town, and said he didn't fault him on this.

He asked if there were any members of the public who wished to speak against the variance requests.

Attorney Charles Griffin said he represented abutter Betsy Sandberg. He then read from the letter he had provided. He said every one of the conditions for the granting of the variances must be met, or else the request must fail, and said the applicant had the burden of proof concerning this. He cited Attorney Loughlin's text "Land Use Planning and Zoning" concerning this.

Attorney Griffin said that in the Board's deliberations the previous month, it had focused on whether granting these variances would be in the public interest, because of the anticipated increased traffic over the right of way that bisected his client's property, and which would result from the creation of two lots out of what was currently one lot.

He noted that the applicant had contended that the issue of the utilization of the right of way was a civil issue, and did not fall within the purview of the ZBA. Attorney Griffin said there were times when issues pertaining to the right of way would be civil in nature. He noted that Ms. Sandberg had testified that each winter, a portion of her lawn was torn up because of snow plowing of the right of way, and he said that clearly this was a civil matter, and something with which the Board should not get involved.

He said however that the issue of the impact of the proposed pork chop subdivision on this right of way was not a private matter strictly between Ms. Sandberg and Ms. Paine and Mr.

Taylor, but indeed was a matter for proper consideration by the ZBA.

Attorney Griffin said the only means of access that the applicant proposed to this subdivision was over the existing right of way that bisected his client's land. But he said by seeking variances and a subdivision, both of which necessitated public hearings, the applicant had made the impact of this proposal on this right of way a public issue that the Board must consider.

Attorney Griffin said that concerning the condition that granting the variances would not be contrary to the public interest, Attorney Loughlin, in his book "Land Use Planning and Zoning", stated "This requirement calls for a judgment call on the part of the Board of Adjustment based on the facts of each particular case. There are going to be situations where the granting of a variance may be in the interest of part of the public, but perhaps not in the interest of neighboring property owners."

Attorney Griffin said Attorney Loughlin then cited the example of granting a variance to place a gas station or trash incinerator or hazardous waste dump on the edge of a residential neighborhood, and said Attorney Loughlin had then stated that while this might benefit the general public in terms of providing a larger tax base and necessary services, it might be questionable as to whether it would be in the best interest of those living in the immediate vicinity of the use.

Attorney Griffin said Attorney Loughlin then concluded "Obviously, if it could be shown that it would diminish the value of surrounding properties, or violate the spirit and intent of the ordinance, even if it was found to be in the general public's interest, the variance could not be granted."

Attorney Griffin said Exhibit 3 of the packet provided was a letter from Vern Gardner, a certified general appraiser licensed in NH and Maine, with over 30 years of experience, who concluded that the granting of the variances would result in a loss of approximately \$5,000 in the value of Ms. Sandberg's property, because of the traffic. He said Mr. Gardner's report was consistent with the comments of several Board members at the May 8th public hearing, that the subdivision would increase the likelihood of more vehicular traffic going over this area.

Attorney Griffin said that arguments had been advanced by the applicant that allowing this subdivision would increase the tax base and would be preferable to other permitted uses. He said however that Mr. Gardner's report demonstrated that the granting of these variances would diminish the value of Ms. Sandberg's property, and said that under the circumstances, the Board could not reasonably conclude that the granting of these variances would be in the public interest.

Attorney Griffin quoted from "Land Use Planning and Zoning" concerning the issue of no diminution in the value of surrounding properties "Board members are permitted to consider their own knowledge of conditions and circumstances resulting from their own familiarity with the area involved and, like any trier [sic] of fact, the Board is entitled to decide how much, if any, weight to give testimony presented to it regarding value as well as any other point." He said that based on this, he submitted that the Board must also find that the granting of these

variances would result in the diminution of the value of Ms. Sandberg's property. Attorney Griffin said that concerning the hardship criterion, the applicant was seeking area variances, and based on the Boccia case, the standard to be applied therefore included whether the benefit sought by the applicant could be achieved by some alternate method reasonably feasible for the applicant to pursue other than an area variance. He said regarding this, the Board had asked the applicant about the possibility of relocating the existing right of way to reduce the impact of traffic on Ms. Sandberg's property, and the applicant had stated that it would not be financially feasible to do so because it would cost hundreds of thousands of dollars, but had submitted no proof to support this claim.

Attorney Griffin cited the Boccia case, which held that in determining whether there were reasonably feasible alternatives for the applicant to pursue, the financial burden on the landowner, considering the relative expense of available alternatives, must be considered. He also cited the Harrington v. Town of Warner case, where he said the Court held that conclusionary and lay opinion regarding the lack of reasonable return was not sufficient, and that there must be actual financial proof provided. He said in the present case, the applicant had not satisfied that burden of proof.

Attorney Griffin said his client had been advised by Town Engineer Dave Cedarholm that he believed the driveway could be relocated to an area where there would be minimal wetland impact. Attorney Griffin provided details on this, and said in light of this informal assessment, it was believed that there was a reasonably feasible alternative available to the applicant to relocate the driveway.

Attorney Griffin noted that Ms. Sandberg had testified at the April public hearing concerning the facts and circumstances that existed at the time the right of way was deeded, namely that the right of way provided access to one dwelling with one car and occasional visitors.

Attorney Griffin spoke about right of ways, as a form of easement, and said an easement was a limited right to use, but not possess conveyed land. He quoted from Attorney Szypszak's book on Real Estate, and said according to this, the grantee must use the easement reasonably so as not to damage the possessory interest of the grantor. He provided additional details on this, and said an analysis concerning this must take into account the benefits enjoyed by the user, and the disadvantages to the burdened property. He also said the book stated that both the circumstances at the time the easement was created, and the circumstances at the time of use, were relevant in determining the scope of the easement.

Attorney Griffin noted again that Ms. Sandberg had stated that at the time the easement was created, there was only one inhabited dwelling unit on this lot, and he said the conditions which existed at the time of the creation of an easement were an important consideration. He said that changing needs of either owner might operate to make unreasonable a use of the right of way that previously was reasonable, or to make reasonable a use that was previously unreasonable.

He also said that an easement granted to benefit a particular parcel could not be extended to lots subdivided from that parcel, if the result was an unreasonable expansion of the burden. He said the question was whether the expanded use resulted in unreasonable conditions, either for the

land owner to which the easement was subject or for others with rights to the easement. Attorney Griffin said the testimony showed that at the time of this easement was deeded in 1956, it was for a single, un-subdivided parcel.

He said there had been testimony, and Board members had indicated in their previous deliberations, that they felt the traffic resulting from this subdivision would result in an unreasonable expansion of the burden of the traffic crossing Ms. Sandberg's property.

Attorney Griffin said section 175-3 of the Zoning Ordinance included among its purposes protecting the public, health, safety, convenience, and general welfare.....commensurate with the physical limitations of the land. He said the proposed subdivision would interfere with the convenience and general welfare of Ms. Sandberg, and was not commensurate with the physical limitation of the land. He provided details on this.

He said the case of Hill v. Town of Chester stated that when a hardship was self-created, the applicant for a variance bore a heavier burden in demonstrating that the variance was justified. He said the applicant had not satisfied that higher burden because the special conditions--three dwellings on one lot, were created by the owner's own actions, and did not prohibit her from using the property for a permitted a purpose.

Attorney Griffin noted the statement on the subdivision plan that there would be no potential for the future subdivision of the parcel and any of the lots created by the subdivision, nor for the construction of any additional dwelling units on the lots. But he said this statement didn't mean that the use of the existing dwellings could not be maximized to any allowable use within the confines of the Zoning Ordinance, or that the existing dwelling units could not be torn down and new, larger dwellings built in their place.

He said there were a multitude of uses that were permitted in the RC district, and listed several of them, including second class home occupations, which allowed three other persons in addition to the owner to be on the premises; a childcare home, an adult daycare facility, a nursery or preschool, a government facility, etc. He said it would not be necessary to construct additional dwelling units or to further subdivide the parcel to allow these uses to come about.

He said that since there was a potential for significant increases in the use of this property as a result of this subdivision, there was definitely more to this proposal than simply redrawing property lines, as evidenced by the owner's recent filing of an Administrative Appeal from the building inspector's April 27, 2007 decision regarding the definition of home occupation. He said under these circumstances, granting these variances would not be consistent with the spirit and intent of the Ordinance, since this would not ensure that the development would promote orderly growth, preserve historic sites and structures, and ensure that development was commensurate with the character and physical limitations of the land.

Attorney Griffin concluded that because the applicant had failed to meet four of the five variance criteria, the granting of the variances would not result in substantial justice, the fifth criterion. He asked that the Board therefore deny the requested relief.

Vern Gardner, said he had been an appraiser for 37 years, and said one of his specialties was determining adverse impacts, in financial terms, on properties. He provided details on the process he used for determining this, and said he had arrived at a value of \$5,000, as the amount of value lost from the Sandberg property as a result of traffic on the right of way.

Mr. Gottsacker noted that appraisals were an opinion of value, so there was a margin of error involved. He asked what the margin of error was for the appraisal industry, and Mr. Gardner said it was plus or minus 5%. Mr. Gottsacker said a decrease in value of \$5,000 was well within this margin or error, and said it was therefore hard to see that there was a true reduction in value. He also said these values changed for other reasons. There was discussion with Mr. Gardner regarding this.

Attorney Bruton asked that the appraisal report from Mr. Gardner be stricken from the record, since it had not been provided.

Chair deCampi said he would like copies made of this report.

Mr. Gardner said he could provide the report. He also provided comments concerning statements regarding the appraisal made by Attorney Bruton in his June 12th letter.

Mark Morong, 21 Emerson Road said he had been a guest at this property over the course of the last 35 years. He said he was having a hard time understanding how if the subdivision went through, and the duplex became its own entity on a separate lot, this would change the amount of traffic. He noted that there had always been functions held there, and a number of people living there.

He also said he saw this subdivision as a win for the Town of Durham, since there would be no further dwelling units and no future subdivision of the property. He said he didn't follow the reasoning that these buildings could be made larger, or turned into a nursing home, etc. He also said he hadn't seen a change in the traffic that related to a \$5,000 decrease in the value of Ms. Sandberg's property. Mr. Morong noted that he personally had had two appraisals done, and said the values arrived at differed widely. He said he felt that by offering not to build more houses and limiting her options, Ms. Paine had taken a greater financial loss than the \$5,000 loss to the abutter that had been spoken of.

Resident Edie Bauer said Katie Paine had been her best friend for 40 years. Ms. Bauer said she had extensive knowledge of the property in question, and said she couldn't imagine how there would be an increase in traffic. She also said that if Mr. Taylor didn't buy the property, Ms. Paine would ultimately lose it. In addition, she compared the \$5,000 figure to what Ms. Paine would have to pay if the driveway were moved. She also noted that if the 55 acres was subdivided the way it could be according to the regulations, this would result in more kids and more taxes.

Attorney Bruton said Attorney Griffin's point regarding permitted uses should not be the basis for denial of the variances. He also said that regarding Mr. Gardner's report, the margin of error spoke for itself. He said Mr. Gardner's premise was based on an increase in traffic, and said

there was no evidence for this. Attorney Bruton provided additional details concerning Mr. Gardner's reasoning, and said this reasoning was not justified.

Chair deCampi said he would declare a brief recess so copies could be made of Mr. Gardner's report and the letter from Sally Ford. He said the Board would also review Attorney Bruton's letter during that time.

10 minute Recess

Chair deCampi said the public hearing was now closed. He first noted that he had been on the ZBA in 2003 when the matter of the cabin on the Paine property came before that Board. He said at that time, the ZBA had required that the cabin be moved back because it was so close to the water, and said at that hearing, the former owner of the Sandberg property had complained bitterly about the usage of the driveway. He provided details on this, and said the driveway issue went back a long time. He said the Board hadn't chosen to do anything about it in 2003 because of the nature of the application.

He said there seemed to be three choices available to the Board concerning the present application - to grant the variances with no conditions, to deny it with no conditions or to grant it, with the conditions that there would be no further construction, no further subdivision. He said they could also grant the variances with the condition that the driveway would need to be relocated.

Mr. Gottsacker summarized the process that had occurred regarding this application. He said the right of way issue had become a ZBA issue, and said he didn't think this should have happened, and that he didn't feel the Board should be talking about this issue. He also said it was hard to see how the right of way changed the value of the Sandberg property, stating that most of the testimony indicated there would be no change in the traffic patterns, or, if there would be a change, it would only change the value of the property by \$5,000. Regarding the issue of permitted uses, Mr. Gottsacker said it would be incorrect for the Board to judge this application based on a potential future permitted use. He said such a thing should be discussed in the future, and was not relevant now.

Ms. Woodburn said she believed that the reason the Board had taken the turn regarding the right of way issue was that some Board members had said the variance requests didn't bother them, and started to focus instead on the right of way issue. She said there would in fact be a change with the subdivision of the property, noting that two home offices would now be allowed, with two lots., and that there basically would be the right to do two times the amount of things that could be done on one lot. She said additional traffic from this would impact the right of way, and said that was why there had been interest in seeing if there was an alternative means to enter the property.

Ms. Woodburn said she realized the benefits to the Town from this subdivision and the need to help a neighbor, and she said it was tempting to allow variances because of this. But she said the spirit and intent of the Ordinance was to make sure that the things the Board allowed didn't have a negative impact on abutting properties. She said because the right of way ran over the

abutting property, the subdivision did change the status quo, and could negatively impact that property.

There was detailed discussion by the Board as to how many people could potentially be coming and going from the site as a result of the subdivision,. There was also discussion about how specifically the property could change in the future.

Ms. Davis said her concern was that one of the variances requested was for less shore frontage than the Ordinance permitted. She said she felt the quality of the shoreland in that area was poor and seemed unstable, and said granting the variance concerning this would be contrary to the spirit and intent of the shoreland protection overlay district provisions of the Zoning Ordinance. She provided details on this, and noted among other things that accessory structures, including docks, might be built, and could impact the shoreland.

There was discussion about whether the applicant could apply for a dock in the future, and Mr. Johnson confirmed that this was an option in the future.

Ms. Davis said there should be discussion by the Board about the variances themselves, and she said there was the potential to have quite a few people using the shoreland. She noted as an example that the duplexes could be torn down and rebuilt.

There was discussion that 300 ft of shoreland frontage was required, and that the applicant was asking to be allowed to have 240 ft of frontage.

Chair deCampi suggested that the Board could impose a condition to prohibit further development, perhaps including accessory structures.

Mr. Welsh asked if there was any other accessory structure besides a dock that the Board couldn't prohibit, and Mr. Johnson provided details on this. Mr. Welsh asked for clarification on what the danger to the shoreland was from the subdivision, as compared to a situation where there was no subdivision.

Ms. Davis said with the subdivision, if the property owner wished to put an accessory structure close to the water, it would have to occur within the 240 ft of frontage. But she said if the property was not subdivided, there would be more shoreland frontage to work with.

Chair deCampi said the Board could say there could be no dock on lot 1, and no accessory structures built within a certain number of feet from the shoreland. He said that saying there could be no further development of the properties would not necessarily preclude accessory structures. He also noted that as Attorney Bruton had said, the Board would need to see what the impact of these conditions would be on the applicant.

Mr. Welsh said he agreed with Mr. Gottsacker's point that the Board should talk about the variances being requested. He said he thought \$5,000 was too small an amount to be significant. He said he felt the public interest and the other criteria were met, and that the variances should be granted, as long as the shoreland could be protected through conditions.

Chair deCampi said he thought the driveway was an issue the Board should address, and said this was a chance to correct a wrong that currently existed, where a neighboring property owner was being impacted. But he said he thought the motion the Board made should represent the basic will of the whole Board.

Mr. Gottsacker said he believed the ZBA's domain was fairly narrow. He said he was uncomfortable dealing with the right of way issue, and said he thought it should be addressed by the Planning Board.

Chair deCampi said he was fine with this although he didn't necessarily agree.

A number of possible conditions to include in a motion were discussed by the Board. Chair deCampi asked if these were acceptable to the applicant.

Attorney Bruton said the applicant agreed there would be no further subdivision, and no further dwelling units. He asked that the applicant be allowed to do what the Zoning Ordinance allowed, and provided details on this.

Jerry Gottsacker MOVED to grant the variances from Article XII, Section 175-55(E), Article XIV, Section 175-74(D) and Article XII, Section 175-139 of the Zoning Ordinance to obtain relief from certain regulations as pertains to the subdivision of an existing single lot into two separate lots, under the "Porkchop Subdivision" regulations, with the following conditions:

- *That there will be no further subdivision at any time following the granting of the variance;*
- *That there will be no further dwelling units built on the property after the granting of the variance;*
- *That there will be no accessory structures built within 150 ft. of the shoreland on either lot;*
- *That the Planning Board will look into the driveway crossing the Sandberg property as being troubling, and will consider remedies.*

Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

- B. **PUBLIC HEARING** on a petition submitted by Attorney Francis X. Quinn, Jr., Portsmouth, New Hampshire on behalf of Katharine Paine, Durham, New Hampshire for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from an April 27, 2007 letter by Zoning Administrator, Thomas Johnson, regarding the definition of a home occupation. 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

Attorney Quinn said if applying the permitted use of the property, what the applicant was doing when the violation was issued was permitted under the Zoning Ordinance, and was consistent with the definition of second class home occupation on pages 13 of that Ordinance. He went through the requirements that needed to be met for a second class home occupation, and said

the second class home occupation on the property met these requirements, providing details on this. He said the applicant had not violated the Ordinance, and he asked that the Board therefore grant the appeal of administrative decision., and reverse the cease and desist order on the property.

Chair deCampi noted a photo provided in Board members' packets with a number of people in it, and said if there were more than 3 people there on or about April 27, the Appeal of Administrative decision was moot.

Ms. Paine said the people in the picture were not there as employees, but were there for training. She provided details on this, and on the employees on the site over time, and said there hadn't been any more than 3 people working out of that building. In answer to a question from Chair deCampi as to how many desks there were, Ms. Paine said there were 4 desks. She said that as of April 26, there were no employees working there. She said when the cease and desist order was received, the operations were shut down.

Chair deCampi said the real issue was what the conditions were that existed when Mr. Johnson wrote his letter to the applicant.

Ms. Paine provided further details on this.

Attorney Quinn noted again that because this was a permitted use in the RC district, Ms Paine would be permitted to have 3 or fewer employees, as long as the requirements for a second class home occupation were satisfied.

Chair deCampi asked Mr. Johnson what had led him to the conclusion he had reached concerning this home occupation situation.

Mr. Johnson said he had reached the conclusion based on a combination of factors - documentation filed with the Secretary of State; pictures on the business's website, comments on employees working there, and the ZBA site walk. He also said the building was clearly not used as a residence, noting that there was a conference table, not a kitchen table, and that there were 6-7 desks that were utilized there.

Attorney Quinn said there was a computer server on one of the desks, and there was further discussion about what the desks were used for.

There was discussion about the issue of whether the building was used as a residence.

Ms. Paine noted that the Zoning Ordinance said that a resident had to live on the premises.

There was discussion as to whether "premises" meant the entire lot or the building, and there was further discussion on how many people were currently utilizing the property.

John deCampi MOVED that the Board finds that as of today, the Zoning Ordinance is being met fully and completely, with Katherine Paine living on the property and no more than 3

employees of the business.

There was discussion by the Board that before voting on this application, it needed to allow Mr. Johnson to clearly determine that the property was now in conformance with the Zoning Ordinance.

Mr. deCampi withdrew his motion.

Robbi Woodburn MOVED to defer this matter back to Mr. Johnson and to continue this matter to the July 10, 2007 ZBA meeting. Jerry Gottsacker SECONDED the motion.

Attorney Quinn said if it was determined that the property was in conformance, it was hoped the applicant would not have to appear for the July 10, 2007 ZBA meeting,

The Board agreed that in this circumstance, the applicant could simply send a letter that the Appeal of Administrative Decision had been withdrawn.

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.

This application was continued to the July 10, 2007 ZBA meeting.

- D. **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 an Inn. The property involved is shown on Tax Map 14, Lot 34-1, is located at 66 Bennett Road, and is in the Rural Zoning District.

Applicant Stephen Lamb said he and his wife had purchased the Highland House, a historic structure in Durham, and were in the process of renovating it. He said the Zoning Ordinance definition for an Inn said it could not contain more than six individual sleeping rooms, but said he and his wife wanted to have ten sleeping rooms, which was what the historical use of the Highland House had been. He then noted the documentation he had provided to the Board concerning why the variance request should be granted.

Julian Smith, Packers Falls Road, said that when he first came to Durham, he had stayed at the Highland House, and he provided details on this. He said once the owner, Ina Thompson, gave it to the University, what had been there before was lost, and the house was then maintained as a boarding/rooming house. He said having an inn there now would be consistent

with the use of the property when Ms. Thompson had owned it. He also said the Lambs really did need more than six sleeping rooms for the inn, and said a result would be that this property would now be back on the tax rolls. He said this was a wonderful situation, and said he hoped the Board would grant the variance. He noted that he wouldn't want to see a casino there.

Mr. Welsh asked Mr. Smith if there were any concerns about noise, traffic and other possible impacts on neighbors as a result of the granting of this variance.

Mr. Smith said he would like to see Durham become more of a destination place, and also said he would like to see more tax revenues for the Town, especially from a business like this. He said he was not concerned about additional traffic that would result from this, and said it would be a good kind of traffic as compared to truck traffic. He also said there would be more of a vested interest in keeping this area intact, as more people learned about the Highland House, and said the inn would be good for the Town in terms of getting the word out about Durham.

Lori Lamb said she didn't think increasing the number of rooms for sleeping from six to ten would make much of a difference in terms of traffic impacts.

There were no additional members of the public who wished to speak, and Chair deCampi closed the public hearing.

Mr. Gottsacker complimented the applicants on the financial documentation they had provided. He said he could see that there was a big difference, from a financial perspective, between having an inn with six sleeping rooms and one with ten sleeping rooms. He said it appeared that receiving the variance would tilt things in favor of financial success.

Ms. Woodburn said it didn't seem that there would be a negative impact on surrounding properties as a result of granting this variance, and said the request appeared to meet the spirit and intent of the Ordinance.

Other Board members agreed, with Mr. McNitt stating that the application met all the variance criteria.

Chair deCampi noted that this was an existing building, and said he was in favor of granting the variance request.

Ted McNitt MOVED to grant the VARIANCE from Article II, Section 175-7, Definition of an Inn, of the Zoning Ordinance, to have more than six, for up to 10 sleeping rooms, within an Inn. John deCampi SECONDED the motion, and it PASSED unanimously 5-0.

- E. **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.

This application was withdrawn.

- F. **PUBLIC 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.

The applicant, Dick Gsottschneider, thanked the Board for rehearing his application. He noted that he had already gone through the conditional use process before the Planning Board, for a proposed development in the MUDOR District. He provided details on the apartment building/office building he planned to build, and noted that there was already an office building on the same lot, the lot was already on Town sewer, and that it abutted University property.

He said he hadn't made a particularly good presentation before the ZBA when his application was first heard, and noted that the Board had chosen to deny his variance request. He explained that the situation was somewhat complicated because the Zoning Ordinance was not particularly clear concerning what an apartment was and what a duplex was. He said the Zoning Ordinance didn't define duplex, and said he would argue that the common definition of duplex was typically two units separated by a fire wall, with each unit having its own heating system, water system, etc.

Mr. Gsottschneider said he was not proposing to do this, and said there would be one apartment on top of the other, with shared systems. He explained that if the structure he planned to build was accepted as an apartment building, there could be 1.5 people per 300 sf, but if it was determined it was a duplex, only 1 person was allowed per 300 sf. He said he was not building a duplex, and stated again that the definition of duplex was not clear.

He said that a few years back, when Mr. Berton had built a hotel in Durham, he had to move three existing units on the site. He said Mr. Johnson considered the development to be new construction, so this meant Mr. Berton could no longer have 4 residents per unit. He explained that these were duplexes, so there could be only 1 person per 300 sf, and said this had meant that Mr. Berton could only have 2 people per unit instead of the 4 per unit he had previously had.

Mr. Gsottschneider explained that Mr. Berton had appealed this determination, and the ZBA had granted this appeal. He said the Board had treated the units as apartments, not as duplexes, and granted Mr. Berton what was now being asked for with this own application.

There was discussion about the situation Mr. Berton had been in concerning his property, with Mr. Johnson providing details on this.

Mr. Gsottschneider said the dwelling units in the building designed for his property were not completely separate, with one furnace, one hot water heater, one sewer line, etc. He also argued again that the definition for duplex was not clear. He said this was not a building that could be

sold as condos, and said it was either an office building or two apartments.

Chair deCampi said he was sympathetic regarding the definition situation, and said who was to say it was not apartments that Mr. Gsottschneider planned to build.

There was further discussion on this.

Mr. Gottsacker said it was common to see vagaries like this in the Zoning Ordinance, and also said what Mr. Gsottschneider planned to build was apartments. He also noted that the applicant was only looking for a variance for 188 sf of space.

Mr. McNitt said he had previously voted against this application, based on the fact that it was new construction, and that what Mr. Gsottschneider wanted was a density change that had been suggested for this district but that was not posted yet. But he said Mr. Gsottschneider had provided information now on the duplex issue, which had allowed him (Mr. McNitt) to see the application in a different light. He said he felt the application met all the variance criteria, and said he didn't see why it should not be granted.

Mr. Welsh said he agreed with Mr. McNitt.

Ms. Davis also said she agreed, and she noted that the last time the Board heard this application, she said the Board should approve the variance request because what was proposed looked more like apartments than a duplex.

Chair deCampi said he would like to see this variance granted. He said he had voted against it the previous time it was heard by the Board and had probably been wrong. He said he had received clarification on the situation, based on Mr. Gsottschneider's present submission.

Ted McNitt MOVED that the Board reconsiders its April 10, 2007 decision regarding the property located at 277 Mast Road, and concurs that the proposed structure is apartments in a two unit dwelling in the Multi-Unit Dwelling/Office Research Zoning (MUDOR) district, and thereby is permitted a density of 1.5 people per 300 sf of habitable area. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

- G. **PUBLIC HEARING** on a petition submitted by David Witcher, Strafford, New Hampshire on behalf of Catherine Nadeau, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-53 and Section 175-54 and Article IX, Section 175-30(D)(3) of the Zoning Ordinance to build a single family home within the Coe's Corner Zoning District and within the sideyard setback. The property involved is shown on Tax Map 10, Lot 20-2, is located at 36 Dover Road, and is in the Coe's Corner Zoning District.

This application was continued to June 19th, 2007.

- H. **PUBLIC HEARING** on a petition submitted by Carrie Salas, Durham, New Hampshire on behalf of Bruce Mohl & Marian Tucker, Meredith, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-39(D) and Section 175-53 to change the use

of a single family home into a professional office. The property involved is shown on Tax Map 6, Lot 9-4, is located at 24 Newmarket Road, and is in the Residence B Zoning District.

This application was continued to June 19th, 2007.

III. Approval of Minutes

April 10, 2007

May 8, 2007

Postponed to the continued meeting of June 19, 2007

IV. Other Business

V. Adjournment

Jerry Gottsacker MOVED to adjourn the meeting. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0

10:30 pm Adjournment

Victoria Parmele, Minutes taker