

These minutes were approved at the September 11, 2007 meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, JULY 10, 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; Jay Gooze; Michael Sievert

MEMBERS ABSENT:

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

I. Approval of Agenda

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

II. Public Hearings:

- A. CONTINUED 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.

Chair Gooze explained that the public hearing from the previous ZBA meeting was still open. He noted that he had not been at that meeting, but said when he watched the tape, he saw that the Board had decided that Mr. Johnson should come back to the Board with some elaboration on this matter. He said there would also be a chance for a rebuttal from the applicant.

Mr. McNitt recused himself, and it was determined that Mr. Welsh would be a voting member in his place since he had been a voting member when the application was heard at the June ZBA meeting.

Mr. Johnson said after the June meeting, he had had a chance to look at previous minutes and notes, and said he had then written a letter to Ms. Paine, dated July 2nd. He reviewed the contents of the letter, and said he stood firm concerning is original administrative decision.

He said the definition of home occupation in the Ordinance spoke about accessory home occupation as being a secondary use of a residential dwelling unit. He noted there were 5 dwelling units on the property, and said he had put an arrow pointing down to one of the dwelling units, and not the entire property. He said he had also noted in the letter that the

owner had to reside in the residence.

Mr. Johnson said the letter also offered that if the applicant wanted to establish a satellite office there, with the main business now located in Berlin, she could apply for a change of use, to establish a home occupation in the dwelling unit she resided in. He said this could be issued as a standard permit, and he also said that if instead, she wanted to establish a home occupation in a second dwelling unit on the property, she would need a variance. He explained that the Ordinance did not address the issue of having a home occupation in a second dwelling unit on a property. He said it did allow an accessory apartment in an accessory structure, but didn't address this concerning home occupations at the present time.

Chair Gooze noted that what they were talking about was what existed at the time Mr. Johnson sent his original letter to the applicant.

Ms. Paine said the word "premise", according to the dictionary, was a tract of land with buildings thereon, and was not necessarily just the dwelling unit. She said the word was not defined in the Zoning Ordinance, and said it referred to the entire tract of land.

She also said that when Mr. Johnson's letter was issued, there was one person working at her office. She said she didn't see this as a violation. She read through the other home occupation criteria, and said these were met, and also said that the impacts, which all were located on the premises, were negligible.

There was discussion on what the square footage of usable space was in the dwelling unit where the office had been. Mr. Johnson said he hadn't addressed this, and had just addressed the fact that the business was in a second dwelling unit that was not used as dwelling unit.

Ms Paine said this situation raised the question of whether everyone in Town who had a secondary business in a separate building had to move into it.

Mr. Welsh said he had noted that some people on his street with two buildings on their property lived in one and worked in another. He asked if this was consistent across town, or if those people were out of compliance.

Mr. Johnson said he would have to look at the individual case file for a particular property. He noted a previous case before the Board where the applicant used part of the main dwelling unit for a home office, and then asked to be allowed to use an accessory structure for another business on the property. He said what was unique here was that there was more than one dwelling unit on the property, plus some accessory structures.

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

Mr. Johnson provided details on the definitions of premises that he had used.

Chair Gooze closed the public hearing. He said he too had done some research on the definition of the word "premises", and found a lot of different things. He said he had looked at

the ordinances for some other towns in the area, noting that some definitions of “premises” were very specific to a building. He said the Board didn’t have that to work with here, so needed to use its best interpretation under the normal context of what this would be.

Mr. deCampi said he didn’t feel the appeal of administrative decision application failed regarding the concept of “premises”. He said he thought it failed because the use was not a secondary use of a dwelling unit at the time Mr. Johnson found fault, - it was a primary use. He said if the appeal failed for any reason, the decision stood. He said the other factors were irrelevant.

Chair Gooze said he agreed, and said that was the reasoning he would use.

Ms. Woodburn asked whether, if the application failed, the Board could give the applicant some direction as to what the next step would be, if she desired to have a home office. She also said the Board could perhaps have a discussion about the meaning of the word “premises” and could then decide if this would include the entire lot, or would mean the specific dwelling unit, as Mr. Johnson said it did.

Mr. Welsh said Mr. deCampi had made a good point, and that the appeal of administrative decision probably failed for that reason. But he said he was not sure what the next step was.

Mr. deCampi said he thought the next step was for the applicant to apply for a variance, and said he thought there was a chance it would succeed. But he said he didn’t think an administrative decision would succeed.

Chair Gooze noted that the Board had previously reviewed a variance request to put a pottery studio in a secondary structure, and the Board had denied it. He also said he had researched the variance that had previously been granted to the applicant for this building, and said it was specifically for a residential property. He said there was a lot of discussion at that time, and said to have just the business there didn’t fit with the Zoning Ordinance.

Mr. Gottsacker said that technically he thought Mr. deCampi was correct. But he said if the applicant did apply for a variance, he would look forward to the discussion on the word “premises”. He said every definition he had seen was broad, and he also noted that a lot of people in New Hampshire had business activities in detached garages, etc.

Ms. Woodburn said she disagreed, stating that if the issue did come down to the word “premises”, the question was whether the use was allowed by right or not.

Mr. Johnson provided details that the applicant would have to apply for a change of use permit for the camp property in order to locate a second class home occupation there, rather than in the residence at the main house.

Chair Gooze said in another case, for Tuxedo Painting, the applicant wasn’t going to live there, and the Board determined that the use therefore didn’t qualify as a home business. He said the Board had been consistent on this. He said he thought the definition of “premises”

could be tightened up. But he said even if it meant the whole property, Ms. Paine's building wasn't being used as a residential dwelling unit at the time of the administrative decision.

Ms. Woodburn said it wasn't being used as a residential dwelling unit, but given the original variance, it was still a residential dwelling unit. She provided details on this.

Mr. deCampi said he didn't think that logic worked. He said when this matter came in as a variance, the Board could weigh all aspects of the situation, - the fact that there were five units, the definition of "premises", etc. But he said he didn't think the "premises" definition was critical, and said the question was how much the Board was willing to deviate from the idea of "incidental and secondary use of a residential dwelling unit."

Mr. Gottsacker said he agreed with Ms. Woodburn that a discussion on the meaning of "premises" was really important, either now or later with a variance request. He said he would hate to see a really strict interpretation of this, stating that he thought a lot of people in Durham had businesses in their garages.

It was clarified that if a garage was attached to the home, it was considered to be part of it, and that it was therefore ok to do have a home occupation in it, on a lot with one dwelling unit. Mr. Johnson said if the garage was detached, it was considered to be an accessory structure, and said a variance would be needed in order to put a home occupation in it, unless the definition changed. He said he was hoping Ms. Paine would apply for a variance, so some groundwork could be laid concerning this issue.

Ms. Woodburn said the point was whether there were other properties in Town that were in a situation that was similar to Ms. Paine's situation. She said she would like to know if this was a unique situation., in terms of the variance criteria.

There was further detailed discussion on the primary and secondary home occupation definitions; the definition of premises; and the definition of dwelling unit, - and how these definitions related to this application and a possible future variance application.

John deCampi MOVED to deny the Application for Appeal of Administrative Decision from an April 27, 2007 letter by Zoning Administrator, Thomas Johnson, regarding the definition of a home occupation because the business use was not customary, incidental and secondary to the residential use of the dwelling unit. Carden Welsh SECONDED the motion.

There was further discussion.

The motion PASSED 3-2 with Jerry Gottsacker and Mike Sievert voting against it.

- B. **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.

Ms. Woodburn and Mr. Sievert recused themselves. Mr. McNitt returned to the table, and it was determined that Ms. Davis would be a voting member for this application.

Roger Roy, MJS Engineering, represented Patsy Collins, and went through the details of the proposed project. He said it was a 14-15 acre parcel, containing approximately 600,000 sf, and said about 55% of it was comprised of somewhat poorly drained soils. He also noted some wetlands and ledge outcroppings on the property, and then noted the usable area that remained when all of these areas were subtracted out.

He said that the fact that 55% of the property was comprised of somewhat poorly drained soils greatly affected the usability and development potential of the lot, and said he would provide why the variance was therefore appropriate. He then went through all of the variance criteria

He said granting the variance would not decrease the value of surrounding properties. He said the property, which contained approximately 14 acres, was located in the RA district, where the lot sizes ranged from 20,000 - 35,000 sf. He said the applicant was proposing to do a conservation subdivision, and said the development would conform to the neighborhood, and the character of that area.

He said granting the variance would not be contrary to the public interest. He said the development truly met the intent of the Master Plan, which encouraged infill development in this district, where municipal services were available. He noted that water and sewer could easily be extended to this site, and said putting a development there would reduce the need to develop outer areas of Town. He noted that the Master Plan said higher density should be allowed for conservation subdivision developments, within the core areas of Town, but he said the applicant was not asking for a higher density, and was only asking for a reasonable use of the property.

He said this was an area variance, and said that in terms of hardship, the property was unique. He said the special conditions of the property were that it was in the RA zone where there were few lots of this size that remained. He said an analysis was done using County Soil Survey data, and determined that this was the only lot more than 5 acres in size that was largely comprised of somewhat poorly drained soils.

He said that if the somewhat poorly drained soils were subtracted out, only 6 units would be allowed on the 15 acres. He said this was about 77,000 sf for each lot, which was twice the size of any other lot around the property. He said based on the location of the property in the RA zone, access to water and sewer, and the soils on the property, this was a unique property. He also said the benefits could not be achieved by another method, stating that the applicant wouldn't be allowed to do 15 units without a variance.

Concerning the substantial justice criteria, Mr. Roy noted goals 2 and 3 in the Master Plan for

the RA district, and the aspects of this that the applicant actually met. He also said a further purpose of the RA zone was to maintain the integrity of existing high density residential areas predominately served by water and sewer. He said as the Master Plan recommended, the development would be consistent with and maintain the established character of the neighborhood

Mr. Roy said granting the variance would not be contrary to the spirit and intent of the Ordinance. He said if the variance were granted, the applicant would be allowed to put 22 units on the property, but he said they were not asking for that many, and were only asking for about 15 units. He also said the development would conform to the neighborhood. He said it would meet the Master Plan goal of providing infill development where water and sewer were available, in the RA zone, so it would not be a burden on the community.

Mr. deCampi said Mr. Roy hadn't indicated what the spirit and intent of the Ordinance was, in relation to this application.

Mr. Roy said the spirit and intent of the Ordinance was to provide building lots that were reasonable to build on. He said subtracting out somewhat poorly drained soils would be reasonable if on site water and sewer were needed, but he said they was not, so allowing those soils to be part of the usable area was reasonable in this instance. In response to Mr. deCampi, he agreed there was no benefit to excluding somewhat poorly drained soils for this purpose.

Mr. deCampi said he wasn't sure he understood the logic of the Ordinance concerning somewhat poorly drained soils.

Mr. Roy said a person could say he didn't want to build on these soils because of infiltration issues, the possibility of wet basements, etc. but he said there were building practices that allowed buildings to be built on these soils. He provided some details on this. He also said the Ordinance didn't specifically disallow building on these soils, so even if the applicant didn't get the variance that evening, some buildings could still be built, including on these somewhat poorly drained soils.

There was discussion about whether somewhat poorly drained soils could actually be built upon, even if the variance wasn't granted. There was discussion that while these soils could be built on if the variance was received, they couldn't be used in the calculation of usable area, which determined the number of units that could be built, so fewer units would be possible. It was noted that six building would be able to be built on the entire parcel of land, under that kind of scenario.

There was discussion on the location of the access road. Mr. Gottsacker said when they had walked that road during the site walk, there had recently been some rain, and it was pretty wet.

Ms. Davis asked whether any of the proposed homes would be located in the wetland buffer.

Mr. Roy said no, but said the grading for the road and potentially even some of the grading for the lots might be located in it.

Ms. Davis asked what the minimum number of homes was to make the project financially doable.

Mr. Roy said 15 homes was felt to be the minimum needed. He also said that when they went before the Planning Board, they would ask for such things as being allowed to lessen the road width, and to not have to use granite curbing, things which would help reduce the project cost. He said if they were allowed, perhaps there would be fewer lots needed to make the project viable.

Ms. Davis said she had contacted Town Engineer Dave Cedarholm a while back, and said he had advocated the use of low impact development components. She asked if these kinds of things would be included in this proposal to address storm water management.

Mr. Roy said yes, and he provided some details on the smaller storm water collection and treatment areas that would be used in the project, which overall would have less impact on the site. He also noted that since this would be a conservation subdivision, and clustering would be involved, less land clearing would be needed.

Ms. Davis said that potentially, there could be a lot of sump pumps that would be needed on this site after a major storm, which could impact the neighborhood.

Mr. Roy provided details on how water would flow on and around the site, including emptying into Little Hale Creek.

Ms. Davis noted that one of the objectives of low impact development was to not funnel a lot of storm water into adjacent creeks.

Mr. Roy provided details on how the site work could be done to reduce the potential for this.

Ms. Davis asked if calculations would be done regarding storm water management and Mr. Roy said this would be part of the subdivision plan that was developed.

Lenny Lord, Carex Ecosciences, explained that he was a soil scientist, and he provided details on somewhat poorly drained soils, noting among other things that these soils had a seasonal high water table of less than 15 inches to the soil surface. He noted that a concern that had been expressed was that somewhat poorly drained soils served as a buffer to wetlands, but he said Durham had buffering requirements. He said the buffers were being maintained for this project.

Mr. Lord said these soils weren't always optimal for building on, but he said there were ways around this. He said slab construction on this site made sense, and also said fill could be used to raise the houses up. He said using fill would cause the somewhat poorly drained soils to become moderately well drained soils.

He cited the Soil Based Lot Size model developed in New Hampshire, for properties with on

site septic systems. He said this model did not exclude siting development with septic systems on somewhat poorly drained soils, although it did recommend larger lot sizes when these soils existed on a property.

Chair Gooze reiterated that Durham allowed building on these soils, but said they could not be used in the density calculation.

There was discussion on whether it would be relevant to see the model soil based lot size ordinance.

Mr. Lord provided further details on the model ordinance.

There was discussion that this model ordinance dealt specifically with septic issues, and that the Board's concerns regarding somewhat poorly drained soils in this instance were not regarding septic issues, but were concerning drainage issues.

Ms. Davis said the reference to the Soil Based Lot Size model now was because some letters from residents who were against this application had cited it.

Mr. Gottsacker said in this variance application, the focus was on the fact that there would be hookup to sewer. But he said there were a lot of reasons why wetlands were important, and why the Ordinance protected them.

Mr. Lord said wetlands with surface waters, would be protected with this development. He said construction was proposed in upland areas, and said wetland crossings would require permits and would be minimized, and wetland buffers would be maintained. He also said he had been in business for 20 years, and didn't know of any other towns that didn't allow construction in uplands areas with somewhat poorly drained soils, when there was municipal water and sewer.

Mr. Welsh noted that with storms, the amount of runoff could overwhelm the water catching capacity of an area. He said perhaps the rule concerning somewhat poorly drained soils was set up because the Town didn't want a situation where development caused too much runoff, too quickly into surface waters. He asked Mr. Lord whether he saw this issue as being related to the situation with this proposed development.

Mr. Lord said drainage issues could be addressed with engineering design and practices. He also said there would be buffer areas to treat water and slow it down before it got to the wetlands.

Mr. Roy provided details on this. As part of this, he noted that the State's alteration of terrain rules were being updated, and he provided details on the new standards in them, which among other things would address water flow rates and volume. He said there would be more infiltration designs such as bio-retention ponds, which were like constructed wetlands, and allowed for infiltration through natural means and treated the water as well. He said these concepts would be incorporated into the development.

Ms. Davis read through some of the low impact design concepts, and asked if they required ongoing maintenance, and if so, who was responsible for doing this.

Mr. Roy provided details on this, stating that these structures would either be maintained by the Town, or the homeowner association, not the individual home owner.

Mr. deCampi noted that Mr. Lord had suggested that it would be good not to have houses with basements, and asked what Mr. Roy thought about this idea.

Mr. Roy said this would be up to the builder/homeowner, but said it seemed appropriate to do slab on grade with these soils. But he said if they wanted a basement, then fill, under-drains, sump pumps, etc. could be used.

Chair Gooze asked if any members of the public wished to speak in favor of the variance request, and there was no response. He then asked if anyone wished to speak against the variance request.

Bob Marshall, 11 Emerson Road, said he was an abutter. He said he understood the applicant's desire to develop the property, but said he anticipated that this development would result in an increase in traffic in an area which currently experienced very little traffic.

Concerning the drainage issue, he said that from personal experience, he had needed to use sump pumps and perimeter drains to lessen the impacts of storm water in his basement. He provided details on this, and said he had to pump a lot of water. He noted that his house had been raised up with fill, and the elevation was similar to that of the proposed development. He said the reality for that area was that there were houses sitting on the market with wet basements.

Kimberly Nadeau, 18 Emerson Road, said her house was relatively new, stating that she had lived there for five years. She said there had been ledge on her lot before the house was built, and said they had found they needed to use sump pumps because of water issues, and at times now flooded water into their neighbor's yard. She said what the applicant had planned sounded great, but the reality was that there was water everywhere in this area. She said the flooding situation had been getting worse every year since she had moved there.

Mark Morong, 21 Emerson Road, said he was not against someone using the land on the property in question, but said that based on the Zoning Ordinance, he was concerned about the possible over-use of this land. He said he was not a soil scientist, but said his understanding was that wetlands acting like a large sponge to help absorb excess water. He said this area might be able to support 6 houses, but said if this number was doubled, he wondered where all the water would go. He said if fill was used to raise the houses, these houses would then be higher than his house, and he said that unless he then did some engineering with his house, he would be in trouble, since the water had to go somewhere.

Mr. Morong provided a picture of a pond on his neighbor's property that had never been there

before, until recently. He also said he realized that there had been some drainage problems at Fitts Farm, and said he therefore wondered about the effectiveness of these new engineering techniques. He provided another example of this, at the Lee traffic circle, where the road had been flooded out for several days. He said it didn't take 7 days to ruin a basement.

Mr. Morong noted that the road they had walked on the site walk was wet, and he cautioned the Board about making a decision based on some sketchy soils mapping.

Ms. Davis asked if Mr. Morong was saying there might be more wetlands than the map showed.

Mr. Morong said yes, and said he would like to see more definitive mapping before he would make a decision that could affect a lot of people.

Mr. Welsh said he had lived in Durham for 18 years and had been flooded twice, once this year, and once last year. He asked if the flooding problem the neighbors were speaking about had existed beyond those two years.

Mr. Morong said he had lived at that location since 2000, and said there didn't seem to be a lot of water before 2006.

Mr. Marshall said he had moved to that area three years ago, and said the first spring, the sump pump ran almost continually.

Chuck Baldwin, 22 Emerson Road, said the worst experiences with flooding in this area had been within the past two years, and he provided details on this.

There was discussion with Mr. Baldwin as to how it was determined what the right number of lots should be. Mr. McNitt described the process of determining what the usable area was, and based on this, determining the density. He said the issue here was that if somewhat poorly drained soils did not have to be deducted from the usable area, there could be 15 house lots, but if they had to be deducted, there could be only 6 house lots.

Emily Poworoznek, 16-17 Emerson Road said she was a botanist, and she said the issue was not just the ability of the soils to accepting nitrates, it was the ability of the soils to accept water, and where it went, and the issue of what was in the water besides nitrates. She said that using fill increased the grade, and said when the better drained soils were used as fill, water moved through them faster. She said this meant that even with a buffer, more material was transported to the wetland. She said wetlands served a number of important purposes, and she said the Board needed to consider the possible impacts on them.

She said her house would not be impacted by the proposed development, but said she was concerned with the integrity of the wetland. She said if it were flooded, it would no longer be a wetland, and also said that salt runoff and fertilizer runoff could have a significant impact on the wetland. She said silt fences could be constructed, but explained that subsurface flow into the wetlands would occur as well.

Ms. Poworoznek also said that another reason to have lower density development on a somewhat poorly drained soil was to limit the amount of impervious surface. She provided details on this.

There was discussion that Ms. Poworoznek had described flow directions that were different from what Mr. Roy had described.

Mr. Welsh asked if Ms. Poworoznek was saying that the engineering approaches to allow building near wetlands didn't work.

Ms. Poworoznek said the Board didn't have a plan that was sufficient to allow it to judge whether this would be feasible. But she said the Board needed to take into account the fact that the majority of the soils on the site were somewhat poorly drained, and that there was therefore a reason why this caused a big impact on the economics of the project, - the land itself. She also said that the Board might want to impose a condition that there would be no basements. She said her experience in this area was that finished basements were not a good idea.

Robbin Mower, Faculty Road said she would provide excerpts from a letter she had provided to Board members. She said she also had some additional comments based on discussion at the meeting. She noted that Ms. Davis had raised the issue of low impact development techniques, and she also noted that there had been discussion about buffers.

Concerning this, she said she recalled a conversation with someone from the Great Bay Estuarine Research center about the goal with low impact development of mimicking the natural hydrologic functions of wetlands. She said her understanding was that Durham required a fairly small buffer for wetlands, but that 100 ft was far better, from a hydrological perspective.

She also said that there had been quite a bit of discussion on possible work-arounds for the development, and said it seemed that when it got to that point, the development would not be on a firm foundation. She noted among other things the possible impacts on neighbors if fill was used. She also questioned the claim that the spirit and intent variance criterion was met because the development would conform to the neighborhood, and said this claim seemed to be based simply on the lot sizes.

Ms. Mower said that concerning the issue of whether a house could actually be built on somewhat poorly drained soils, this was a conservation subdivision, so the process of delineating the primary and secondary conservation areas applied. She said it therefore would be useful to lay out what these provisions specified regarding primary conservation land and common open space. She then went through these in some detail. She said the spirit and intent of the Ordinance was that somewhat poorly drained soils were to be set aside as part of the common open space, and were not to be included in density calculations, and were not to be built upon.

Ms. Mower said that concerning the public interest variance criterion, she had provided details

concerning this in her letter. She also said that the drainage problems in this area had been fully explored in comments provided by the neighbors.

Ms. Mower noted that the “taking” concept had been raised by the applicant. She quoted from Mr. Sievert’s previous comments concerning this, and said the arguments presented were flimsy. She said she believed that NH State law would take a different view of the alleged taking in this case, and she referred to 2005 Municipal Law Lecture Series #3. She read an excerpt from it.

She also quoted from a paper presented by Town attorney Walter Mitchell at the 2005 Fall Planning and Zoning Conference, regarding whether a zoning restriction as applied interfered with a landowner’s reasonable use of the property. He noted that the Court stated that this included “consideration of the landowner’s ability to receive a reasonable return on his or her investment“, and said “a reasonable return on investment was not a maximum return, but required more than a mere inconvenience.” Ms. Mower then provided details on the financial aspects of this property, and said that it was likely that the applicant would enjoy economic viability of the property and a reasonable return on her investment.

Margaret Christensen, 25 Emerson Road, asked if there would be any conservation easements involved with this proposed development, and was told there would not be,

Beth Olshansky, Packers Falls Road, said she was speaking not as someone from the neighborhood, but as someone who had been involved in the development of resource based density calculations as part of the Zoning rewrite process a few years back. She said the people involved had gone through the process of seeing what other approaches were out there, and had specifically decided not to adopt the soils based lot size model, so it was not relevant now.

She said there had been significant input at that time from soils experts, land use attorneys, etc, and that the Planning Board and the Town Council had held numerous hearings on this issue. She said the obvious answer therefore was that approving this variance would absolutely not be within the spirit and intent of the Ordinance.

Ms. Olshansky also said she supported what Ms. Mower had said, that the Zoning Ordinance did not allow building on somewhat poorly drained soils, so the applicant was really asking for two variances. She said one could understand this by reading the related provisions in both the Zoning Ordinance and the Subdivision Regulations. She said the Town required conservation subdivisions now, which requires that the unusable soils needed to be set aside as part of the primary conservation area.

There was discussion about this.

Ms. Olshansky said that regarding the comment from the applicant that this was one of few remaining lots of this size that was not built on, there was a reason for this - and she said testimony from neighbors has clarified this reason.

She then noted a letter from Rachel Rouillard and Amanda Merrill, who were on the Zoning rewrite committee and the Planning Board, which supported some of the reasoning as to why Durham has chosen to take this route. She said this approach was backed by the Master Plan, which spoke about the importance of preserving the remaining undeveloped land in Town that was delicate in nature. She said most of the good land in Town had already been built on, and said the question was where the line should be drawn, in considering both protection of the land and providing quality housing stock.

She said the conservation subdivision regulations were fairly new, and noted that this was one of the first times there had been a variance request involving somewhat poorly drained soils. She said she was very concerned that approving this application would set a precedent, and said if it was approved, she wondered what the point would be of having this regulation.

Chair Gooze asked for rebuttals.

Mr. Roy said he had misspoken about developing on somewhat poorly drained soils. He explained that Durham required conservation subdivision, which meant that primary and secondary conservation areas had to be set aside. But he said there were exemptions from having to do conservation subdivision in the Zoning Ordinance, and said one was that a project would be exempt if three or fewer lots were proposed.

He said if the desire was to build six units, this would have to be a conservation subdivision, so somewhat poorly drained soils couldn't be built on. He said the point he had been trying to make was that the Zoning Ordinance didn't specifically disallow building on these soils, in general.

Chair Gooze said he believed what Mr. Roy was saying was that if the variance was not granted, the applicant could put three units on the somewhat poorly drained soils. He asked how many units could be put on the site without any of the somewhat poorly drained soils being considered part of the usable area.

Mr. Roy showed a possible design where the applicant was not seeking variance, which involved 12 units of elderly housing.

Chair asked again how many houses could be put on the site if somewhat poorly drained soils were not used.

Mr. Roy said not many, and said this led into the taking issue. He said looking at the property as a whole, there was no economically viable way to develop the property without the variance.

Recess from 9:18-9:30

Mr. Lord said a more precise soils plan would be developed, and said everything would be survey located. He also noted that the variance was not asking for 15 lots, and said if the wetlands were bigger, there would be fewer units.

He spoke about the concerns raised about the impacts of using fill for some of the house lots. He noted the direction of flow, and said there wouldn't be runoff onto the properties below the site, because it would be intercepted by the wetland. He also said these units would all have at least a foot of fill, which would essentially construct a soil that mimicked a natural, moderately well drained soil. He noted that there was nothing to prevent the construction of such a soil.

Ms. Davis asked if it would be possible to use soil that was somewhat less permeable in order to absorb more water.

Mr. Lord provided details on the Eldridge soil that would be used.

Chair Gooze asked for details on the claim that wetlands acted as a sponge, absorbing water from surrounding areas.

Mr. Lord said wetlands worked to detain flow and slowly release it. He also said that water on the house sites would not flow onto abutting properties, but instead would be retained on site and slowly released, so there would not be an addition to the current amount of runoff going into the wetlands.

Mr. Roy said that concerning the issue of precedence, this property was unique compared to other properties, in terms of the amount of somewhat poorly drained soils on it.

Michael Sievert said he would like to speak in favor of the variance application. He reminded people that in the original presentation, he had stated that this might not be a 15 lot subdivision, and that everything would hinge on the actual number of lots that could fit there. He also said that the applicant was there to get a variance for density (being able to include somewhat poorly drained soils in the usable area). He said the applicant was not there to address the drainage issue, or to meet the subdivision regulations.

He noted that if it turned out that 12-14 lots could fit there, that was what would be built. He said they were not asking for 15 lots, stating that because of the runoff and wetland issues, it was realized this was a property they needed to be concerned with. But he said they were asking for a variance because sewer and water were available to the site, and said this seemed to have been forgotten. He said what was being discussed now was something that should be discussed before the Planning Board. He said concerns about roads, drainage, etc would all be addressed by that Board, and he asked the ZBA to keep this in mind.

Chair Gooze asked if there were any rebuttals from those who were opposed to the variance request.

Mr. Morong said he didn't see how possible impacts on abutters from drainage problems didn't apply, in terms of considering whether this variance should be granted. He also said he didn't see how putting more impervious surfaces in this area would not cause impacts beyond that site.

Kimberly Nadeau said again that her house was five years old, and was the newest in that area.

She said she had been told that the engineering for the house would take care of the water issues, but she said the engineers couldn't control nature. She said there was no way of assuring that what the engineers said they could do, could actually be done.

Chuck Baldwin noted the hardship aspect of the variance application that had been discussed. He said this was a property that had originally been bought for \$25,000, and was a buildable lot with a lot of acreage. He said it could be sold for a reasonable profit.

Ms. Poworoznek said she was not concerned about the flow of water to her house, which was located below the wetland, but she said she was concerned about the flow to the wetland itself. She said that water flowed to the wetland from her site, and also said there was runoff from Fitts Farm.

Ms. Davis said drainage was a concern of the Board, and she asked Mr. Roy if he could show the path of flow on the map.

There was detailed discussion with Mr. Roy about this. Among other things, he said that low impact development techniques would cause water to be held and infiltrated on site, which would create post development conditions that closely matched the existing conditions.

Chair Gooze asked if the Little Hale Creek development was located on somewhat poorly drained soils, and was told that it was not.

Mr. deCampi asked if the applicant would accept a condition that there would be no basements.

Mr. Roy said a lot of issues that had come up were Planning Board issues, and said that Board might restrict basements. But he said he didn't want this to be a condition of the variance.

Mr. deCampi asked if an acceptable to condition would be that the applicant would need to prove to the Planning Board that surface water runoff would not adversely impact existing homes in the area.

Mr. Roy said the applicant would not be opposed to that. He said again that the issue of basements was a Planning Board issue, but said if it would help with the variance, the applicant would be open to having a condition concerning this. He said they were trying to do a reasonable development.

Chair Gooze closed the public hearing.

He said the drainage issue was important, noting that both the spirit and intent of the Ordinance and the public interest criteria came into play. He also said that impacts on surrounding properties were important to consider. He noted that someone had engineered the drainage system at the Lee Traffic Circle.

He said a question was whether there was something different about this property, and he said

there was no question that there was. He also noted that there had been five or six cases regarding hardship since the Simplex case, but said the Court had not yet weighed in on the issue of fiscal impact.

Chair Gooze said he was looking at this variance request in terms of the spirit and intent of the Ordinance, public interest, and substantial justice criteria. He said the Zoning Ordinance had been very well thought out, and said the idea was not just to provide protection in terms of sewage issues, but to protect wetlands, abutting properties, etc.

He said that from personal experience, and listening to the testimony, he didn't feel the spirit and intent and public interest criteria were met. He said that concerning the substantial justice criterion, the issue was whether the individual's interest was outweighed by the public interest. He said he didn't think this criterion was met either.

Mr. Welsh said he generally felt the same way noting the water problems that people, including himself, were having in Durham already, perhaps related to global warming. He said there were water issues in the neighborhood already, and said he felt granting the variance could have a further negative impact on it. He said he also didn't see that there would be fiscal hardship if the variance wasn't granted, stating that there could be a house built with land, which could sell at a good price.

In response to a comment from Chair Gooze concerning possible impacts on wetlands from increased storm water runoff, Ms. Davis said that if low impact development methods were used, supposedly additional water would not be flowing off site. She said these methods should be able to manage the volume of water, but she said perhaps the volumes that were being talked about now were different.

There was discussion about the direction of water flow in this area.

Ms. Davis said she was concerned about the idea of precedent setting. She asked if this was relevant to talk about, and there was discussion on this. She said she was concerned that if the Board approved it because it believed the engineering would take care of the possible problems, the question was what there was to stop the Board from turning down future requests to develop on poorly drained soils. She said this would raise the question of why the Ordinance had been written, and said the Board would be almost saying that it felt that the thinking that went into the writing of the Ordinance was not quite correct.

There was discussion that this might be said about every variance request that came before the Board.

Ms. Davis said the hardship in this instance was that this was a large property, and that there was very little that could be done with it if the variance wasn't granted.

There was discussion on this.

Ms. Davis went through the variance criteria, and said she didn't think granting the variance

would particularly decrease the value of surrounding properties. She said granting the variance could potentially be contrary to the public interest, if it adversely impacted Little Hale Creek, but she said didn't think it was against the public interest because that flow could probably be managed.

She said she felt the variance request met the area variance hardship criteria. She also said she believed the substantial justice criterion was met because the gain to the applicant outweighed the possible risk to the public.

She said she believed the spirit and intent of the Ordinance was specifically to not allow development on somewhat poorly drained soils to avoid wet basements, potential flooding, and potential impacts to surface water bodies. She said she would like to believe that if it were specified that low impact development techniques would be used, this project could be deemed not to be contrary to the spirit and intent of the Ordinance.

Mr. Gottsacker said the issue of precedence seemed to be irrelevant. But he said he was concerned about how the "no decrease in value of surrounding properties" criterion would be met, stating that it was hard to picture a situation where there would be the same amount of water impacting on the neighborhood as there was now, as a result of this development. He said this was troublesome.

He also said he didn't buy the argument that the issue of somewhat poorly drained soils was tied only to the sewer issue. He said there were a wide range of issues involved in terms of soils capabilities, and said it was not clear that these all had been addressed. He said the map was also unclear concerning the wetland delineation, and he questioned having to decide on a variance when this map was uncertain.

He said a lot of the issues regarding the spirit and intent of the Ordinance, substantial justice, etc. would be decided by the Planning Board. But he said he felt these issues were relevant to the ZBA, noting that if the Board could know now that the Planning Board would make the right decisions concerning these issues, it could be more confident in delegating this responsibility.

Ms Davis said the reason she thought the impact of excess water on the neighbors to the south was not as great as she originally had thought was that she had heard that there was water flowing toward the wetland from those homes. She said it would be helpful to see a flow path, and to look at the topography out there.

Mr. deCampi said he thought this application was potentially approvable. He said he had gone to one of the public hearings on the Zoning Ordinance where the issue of somewhat poorly drained soils was addressed, and learned that a large percentage of undeveloped properties in Durham would be affected by a restriction concerning them. He said it would therefore be confiscatory, and said he had never heard a reason as to why this restriction was needed, and that there had been problems in Town that this would solve.

He said he had been on a town council for 30 years, and had come to believe that engineers

could do amazing things with groundwater. He said he believed Mr. Roy when he said this could be controlled. He said if the Town and its engineers watched this closely it was a controllable situation.

Mr. deCampi said he was not sure what conditions should be placed on the application. He said he was inclined to say there should be no basements, and that it should be proved to the Planning Board that the engineering could prevent the worsening of the groundwater situation on the properties in the neighborhood. He said he was inclined to grant the applicant some relief, and also said he didn't think there would be a precedent set if this were approved. He noted that the property could have been built on without a variance a few years ago.

Mr. McNitt went through the variance criteria as they applied to this application. He said there might be a decrease in the value of surrounding properties, noting that the neighbors seemed to think there would be. He said the neighbors also said approving the variance would be contrary to the public interest, and he noted the costs there could be to the Town if from drainage problems. He said it was a standoff as to whether there was hardship. Regarding the substantial justice criterion, he said it was a question of the neighbors versus the developer.

Mr. McNitt said that concerning the spirit and intent of the Ordinance criterion, this was clearly an attempt to bypass the somewhat poorly drained provision. He said the purpose of this provision was primarily to use conservation subdivision with unusable land provisions to minimize the impacts of residential development when there was the opportunity to increase the number of houses. He provided details on this, and said the provision was put in after much care and deliberation by the Planning Board and the Council.

He said the unusable land provisions were new, and came as a shock, but said it should be observed. He said that increasing the number of houses on this site would tend to increase the amount of impervious cover, which could have negative impacts. He said one of the primary elements in the Ordinance was the protection of wetlands and their buffers. He said that on balance, the public interest and spirit and intent of the Ordinance criteria were not met.

Chair Gooze said he very much agreed with Mr. McNitt. He said there had been good testimony about how the Town had gone through the issue of somewhat poorly drained soils at length. He said even though this was a unique property in its setting, he thought the spirit and intent of the Ordinance was not met.

He said it was a judgment call, listening to the testimony of the applicant and the abutters, as to whether the site could be adequately engineered. He noted again some of the projects in the area where there had been drainage problems, and said it was too dangerous to take a chance here. He noted again that he felt the variance request did not meet the spirit and intent of the Ordinance, the public interest or the substantial justice criteria.

Ms. Davis said she agreed with Mr. deCampi that she would be in favor of granting the variance with conditions. She provided details on this.

There was discussion as to whether such conditions were for the ZBA or instead the Planning

Board to put on the development.

Mr. Gottsacker said he would be in favor of imposing conditions, but said it was a chicken and egg situation concerning the ZBA and the Planning Board.

Chair Gooze said if they were going to approve this variance with conditions, to him this said that an Ordinance change was needed. He provided details on this.

There was further discussion on what conditions might be imposed.

Mr. deCampi said a condition could be that there would need to be detailed engineering in the subdivision application submitted to the Planning Board to ensure that there would be no increase in water for the houses surrounding the development. He said the ZBA could also require or recommend to the Planning Board that it limit the number of structures with basements.

There was discussion that this might be getting beyond the jurisdiction of the ZBA.

Mr. Gottsacker said there wasn't sufficient information on the wetlands, stating that they seemed larger in person than what was portrayed on the map. He said the ZBA was being asked to decide a lot of things based on this information.

Chair Gooze noted that the applicant could ask for a rehearing to provide more information in the future.

Ted McNitt MOVED to deny the Application for Variances submitted by MJS Engineering PC, Newmarket, New Hampshire, on behalf of Patsy Collins, So. Newfame, Vermont, 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, because it does contrary to the public interest, and does not meet the spirit and intent of the Zoning Ordinance. Chair Gooze SECONDED the motion, and it PASSED 3-2 with John deCampi and Ruth Davis voting against it.

Mr. deCampi left the meeting.

III. Approval of Minutes – April 17, 2007

Need Page #'s

Page 1, 3rd paragraph from bottom, last line, should read :Section 1755 F (4)

Also page 1, under MEMBERS ABSENT, should read "alternate Ruth Davis"

Page 3, 2nd paragraph, should read "He said conservation subdivisions..."

Page 4, 5th full paragraph, should read "...the variance concerning Section 175-55 F (4)

Page 5, 5th paragraph, should read Ron Clark

6th paragraph, last line, should read "...with the rest of the project because of the small amount of land in question."

5th paragraph from bottom should read "Chair Gooze re-opened the public hearing..."

4th paragraph from bottom, spelling should be "Sievert"

Page 9, 1st paragraph, should read "...would need to talk to the Planning Board about possibly.."

Page 11, 1st full paragraph, should read "...he would have a group of structures (3 story, 1 story, 2 story) that would not be in keeping with.."

Robbie was appointed as a voting member.

Jerry Gottsacker MOVED to approve the April 17, 2007 Minutes as amended. Robbie Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

IV. Other Business

A. Next Regular Meeting of the Board: ****August 14, 2007**

B.

There was discussion on current cases based on previous ZBA applications, including the Christensen case, and a case involving the old Wallace property. Mr. Johnson provided details on this.

Chair Gooze noted that it was important to keep in mind that the Board shouldn't really be having give and take discussion with the applicant during the public hearing process. He also said that regarding emails, it was important to avoid discussion with Mr. Johnson in emails, and that emails received from him were informational in nature.

Mr. Johnson agreed that he didn't intend to have a conversation when he sent emails out to Board members.

IV. Adjournment

Mike Sievert MOVED to adjourn the meeting. Carden Welsh SECONDED the motion, and it PASSED unanimously 4-0.

Adjournment at 11:41 PM.

Victoria Parmele, Minutes taker

Jerry Gottsacker, Secretary