This set of minutes was APPROVED at the March 11, 2008 meeting.

ZONING BOARD OF ADJUSTMENT
TUESDAY, FEBRUARY 12, 2008
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT: Chair Jay Gooze; Secretary Jerry Gottsacker; Mike Sievert; Ruth Davis; Carden Welsh

MEMBERS ABSENT: Vice Chair Ted McNitt; Robbi Woodburn

OTHERS PRESENT: Code Administrator/Enforcement Officer Tom Johnson

I. Approval of Agenda

Chair Gooze said there were no proposed changes to the Agenda. He appointed Ruth Davis and Carden Welsh as voting members for the meeting.

Mike Sievert MOVED to approve the Agenda as submitted. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings:

A. **CONTINUED PUBLIC HEARING** on a petition submitted by the Mill Pond Center for the Arts, Durham, New Hampshire for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a September 27, 2007, letter of Zoning Administrator, Thomas Johnson, in regards to the use of the property. The property involved is shown on Tax Map 6, Lot 9-8, is located at 50 Newmarket Road, and is in the Residence B Zoning District.

Chair Gooze said he would like the Board to stay focused on the appeal itself, He also asked that those people speaking in favor and against the administrative decision stay focused on whether they thought Mr. Johnson made an error or not.

Jeff Hiller, 6 Laurel Lane, asked if the Board could first explain for residents who were not at the previous meeting on this application, what the administrative letter said, and what the issues were.

Mr. Gottsacker read the letter from Mr. Johnson, which among other things quoted from a letter from Mr. Houseman from 1996 regarding permitted uses on the property. Mr. Johnson said that based on the letter, the zoning ordinance in effect in 1996, current records in the file, the current Zoning Ordinance, and the Technical Review committee findings of approval of Sept 12th, 2007, the proposed increased use of temporary tents did not comply with the permitted accessory use definition, and spirit of the Ordinance.

Mr. Johnson's letter said the tents were being rented for larger capacities, and the

principal buildings were accessory to the rental tents. The letter said the Mill Pond Center would need to apply to the HDC and the Planning Board for this expansion beyond accessory use for weddings, conferences and gatherings outside the principal buildings that were previously approved for use.

Chair Gooze said it looked like the Board needed to focus on whether the tents were an accessory use or not. He asked if there were any members of the public who wished to speak in favor of the administrative appeal.

Walter Rous, Durham Point Road, Board member, Mill Pond Center, said he thought accessory uses and accessory structures were being confused. He said accessory uses were clearly permitted, and weddings were specifically mentioned. He also said tents were not mentioned in the definition of structures, also noting that this definition was not exclusive, and including the wording "..but not limited to.." He noted that the Ordinance talked about temporary structures, as a structure that was put up for less than ninety days, and said the tents for the weddings generally stayed up for less than a week.

He said also that even if the ZBA insisted that tents were structures, an accessory structure was subordinate to the main structure, and the size of a tent had to be compared to the other buildings on the property. He said the tent was much smaller than the barn and the house. He also said the weddings were a very small part of the program of the Mill Pond Center, and of the physical property itself. He said if the tent was determined to be a structure, it was clearly an accessory structure.

Betty Bramante, Board member of the Mill Pond Center, first noted that she had a letter from Susan McDonald. Ms. Bramante said she disagreed with Mr. Johnson's interpretation of accessory. She also noted a temporary structure that had been permitted for a rowing club in Durham, where the issue of concern was how long the tent could stay up and still be considered temporary.

She said the 1996 letter from Mr. Houseman specifically defined the events the Center could have. She said there could perhaps even be these events on the property without a tent in good weather. She said she did think the reason to overturn Mr. Johnson's ruling was the definition of accessory, and she said the Mill Pond Center was correct in its view on this.

Jeff Hiller, 6 Laurel Lane, asked why, if in 1996, the Planning Board had agreed that weddings were an acceptable use for the Mill Pond Center, the facilities themselves couldn't accommodate this use, without the use of a tent. He said the tent was proposed to facilitate assemblies much larger than the existing structures on the property could accommodate, and said this seemed like a back door way of getting into the wedding business. He said he didn't think the Planning Board had envisioned setting up tents for weddings.

He said perhaps this matter needed to be reconsidered by the Planning Board, in terms of what the real intent was of the conditional use permit that had been

granted. He said he understood the Mill Pond Center's concerns about raising money, but he said that as an abutter, he could clearly see the tent, and could hear the noise coming from it.
He said this use of tents for wedding was detrimental to the neighborhood. He said the accessory use of a tent was meant to be accessory to the use of the main buildings for weddings, and the tent was not meant to contain the entire wedding.

Paul DuBois, an abutter, thanked the Board for extending the public hearing, as he had requested so that he could speak concerning this application. He said there were good reasons why the neighbors were objecting to the increased use of the Mill Pond Center as a function facility. He spoke about the fact that his wife often worked at home, including on weekends, and needed to be able to concentrate. He said he former owners of the Mill Pond Center property would never have wanted to impose on the neighbors.

He said this was an issue of noise, and said without the tents, there wouldn't be the amplified music and other noise in the meadow. He said the Town didn't have a decibel meter to measure the noise, but he said it was still a problem for the neighbors. He noted that there were a number of residents in the area, besides the abutters, who could hear the noise.

Chair Gooze asked Mr. DuBois to stay on point.

Mr. DuBois said there was nothing to limit the number of people at these events, or to address security issues at these events. He also asked what was to prevent things other than weddings from taking place in tents on the property. He noted that a ZBA member had previously mentioned density, not only of the facility, but how many times this kind of event would happen. He said 10-12 weeks in the summer meant there could be one wedding a week. He said Mr. Johnson's decision was correct, and he said to countermand this decision would be to establish spot zoning. He said the Town hired staff to give their best advice. He said Mr. Johnson had done this, and his decision should be upheld.

Betty Bramante said she thought it was important to mention that the Roberts had incorporated the Mill Pond Center as a "for profit" business, and the owners after that had done so as well. But she said the Center was now a not for profit business. She said it was important to point out that throughout the years, there had been many weddings on this property.

She said they were talking about a few events that the 1996 letter clearly stated were all right, and she said only these kinds of events had been held. Said all they were talking about was whether the use of a tent, as an accessory temporary structure, was appropriate for those events. She said the size of the tent was not determined in the 1996 letter, nor was it specified that the tent had to be used as a cook tent or a storage tent. She said she believed the desire to use the tent for some specific occurrences was appropriate.

Mr. Hiller said his question hadn't been answered, concerning why a tent was

needed for the weddings rather than using the existing facilities on the property.

Ms. Bramante said that as noted in the letter, there were certain times when the Mill Pond Center engaged in activities that were not specific to day to day arts events. She said those uses could sometimes be more appealing to people if they took place out on the meadow. She said the events would be held out in the meadow itself if good weather could be guaranteed, but she said it was better to have the tent in case if was needed because of the weather.

Mr. Hiller asked if tents were mentioned in the 1996 letter, and was told no. He then said that if he were planning a wedding, it wouldn't seem that the Center had the existing building facilities to accommodate a wedding of 200 people. He said in order to book a wedding, the Center had to propose that a tent could be put up, which would actually host the wedding, and would not be accessory to the wedding location. He said he didn't feel that was the spirit of the 1996 letter, and said he felt this matter needed to go back to the Planning Board, to clarify the intent of what the allowable uses were.

Jerry Gottsacker MOVED to close the public hearing. Mike Sievert SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Welsh said last time, Ms. Woodburn had made a germane point, as to whether the issue was one of accessory uses or accessory structures. He quoted from the Houseman's 1996 letter, and then said he thought the issue of how many weddings there were per year was important, and said this seemed like an accessory use. He said he didn't think it was an accessory structure issue, and said he therefore thought Mr. Johnson was wrong on this. But he said he was open to other opinions on this.

Mr. Gottsacker spoke about Mr. Houseman's letter, and the fact that it did not preclude using the property for accessory uses such as weddings. He said the problem came with putting a tent there, in which case, according to what Mr. Johnson said, there was a problem. He said his interpretation was that this whole thing revolved around the addition of a tent. He said he was tending toward thinking that Mr. Johnson's letter was correct. He noted that Mr. Johnson's letter said there could be weddings there, if the Mill Pond Center used specific facilities for this.

He said if the Board did decide that Mr. Johnson's letter was correct and the Mill Pond Center therefore couldn't use the tents, the applicants could come back with a request for variance, so there were other avenues for them to pursue.

Chair Gooze noted that Mr. Houseman's letter said the use of the "property" was limited to these uses, and didn't say the structures on the property. He said there was therefore the issue of what the "property" meant. He said one way to interpret the letter was that there could there be an outdoor wedding.

Mr. Gottsacker said this was a good point, and said he wondered whether, if a

wedding was held on the property with no tent and took place outside in the meadow, this would come before the ZBA.

Mr. Johnson said no, and said the intent of Mr. Houseman's letter was in reference to the developed property. He said the Mill Pond Center had received a conditional use permit for the development of that property, and a barn and arts center were created. He said in the context of those buildings, the property was allowed to be used for certain uses, including accessory uses. He said if the owners wanted to put on an addition to the existing buildings for large scale events, this would have to go before the Planning Board.

He said the Mill Pond Center had originally gone to the Planning Board regarding putting up the tent, and this was sent to the Technical Review Committee. He said the Committee had come up with a list of conditions, and he noted that this had happened a few times. He said the third time, abutters started showing up because of their experience with the first two events.

He said in effect the Mill Pond Center was expanding the property's use and the buildings' use, without the benefit of constructing a building with soundproofing, etc. He said he felt they needed to go back to the Planning Board so issues like parking, security, sound, and other neighborhood quality of life issues could be addressed, as a part of looking at the existing conditional use permit.

Chair Gooze said when the conditional use permit was first approved by the Planning Board, the weddings uses seemed reasonable. But he said a question was at what point this accessory use was not accessory, and how many was accessory. He said he was in favor of upholding Mr. Johnson's decision, and said that since this was not a normal use, he would like to see more oversight provided concerning it, based on the way it was originally set up as a conditional use. He said that otherwise, making a decision on this would be too arbitrary. He said the question was what was accessory, noting that he didn't have a good definition of accessory uses.

Mr. Sievert said he didn't think the letter stated that the use had to be within the buildings, and he noted that Mr. Johnson had said having weddings outside was ok. He also noted that the letter hadn't been written concerning having concerts outside, which would also produce noise. He said he was therefore going to say he disagreed with the letter.

He said he looked at this as an accessory use rather than an accessory structure. He also said he didn't think a tent fit under the definition of structure. He said he didn't know that they were talking about the number of events, and said maybe this was an issue. He also said perhaps there were issues regarding size of events, etc that needed to be addressed at the Planning Board level, and said he wasn't sure the ZBA was the right place to be addressing this situation.

In answer to a question from Chair Gooze, Mr. Johnson said that in making his administrative decision, he had not looked at the original conditional use permit,

and had just looked at the letter from Mr. Houseman.

There was detailed discussion about the accessory use issue, and it was noted that the Houseman letter was very general. There was also discussion about why this issue had been before the Planning Board in 2007. There was discussion about the fact that residents of Durham sometimes had weddings on their property, but that this considered more of an incidental use.

Mr. Gottsacker said he understood the needs of the Mill Pond Center in Durham, but he said there were legitimate abutter concerns. He said if the ZBA said Mr. Johnson was wrong, the abutters would have lost all recourse. He said if the Board said Mr. Johnson was right, the applicants had the option to go for a variance, or to go to the Planning Board, where perhaps conditions could be put in place to address the concerns of the abutters.

Mr. Welsh asked if this was the job of the ZBA. He said he had sympathy for the abutters, but said he thought the Board's job was to interpret Mr. Johnson's letter.

Chair Gooze said he was judging the letter, and said he couldn't come up with how many uses made a use accessory, in a situation like this. He said because of that, he thought the letter stood, and said he could justify not approving the appeal of administrative decision.

Mr. Gottsacker said the ZBA was there to determine whether Mr. Johnson's letter was right or wrong. But he said Mr. Houseman's letter was vague, and there was therefore room for interpretation. He said he felt this was the heart of the issue.

There was further discussion on Mr. Houseman's letter.

Ms. Davis said she was inclined to want to uphold Mr. Johnson's decision, and said this would allow there to be further clarification of weddings as an accessory uses on the property. She said the Houseman letter was vague, and said the definition of accessory use in the Ordinance was also vague. She said this was enough to allow her to stand behind Mr. Johnson's letter.

Jerry Gottsacker MOVED to deny the Appeal of Administrative Decision from a September 27, 2007, letter of Zoning Administrator, Thomas Johnson, in regard to the use of the property, located at 50 Newmarket Road, in the Residence B Zoning District. Ruth Davis SECONDED the motion.

Chair Gooze noted that if the ZBA denied the appeal of administrative decision, Mr. Johnson's letter said the applicant would have to apply to the HDC and the Planning Board He asked if that was what ZBA members would want, in upholding Mr. Johnson's letter.

Mr. Gottsacker said he would feel uncomfortable if he didn't vote to uphold the letter. He said local boards existed in part to deal with situations where there was vagueness, but he said unfortunately in this instance, the ZBA couldn't serve in

that capacity because of the nature of the appeal.

Mr. Sievert said it seemed that this process was already in place, in that the applicants would have to go to the Planning Board for any future events, whenever they planned to set up a tent.

Mr. Gottsacker said if that was in fact the case, the letter from Mr. Johnson was almost irrelevant, and there was a process in place to deal with these issues.

Ms. Davis asked if the applicants had to go in front of the Planning Board if there was going to be a wedding.

Mr. Johnson said no, if there was no tent involved, because weddings were allowed as an accessory use of the buildings at the Mill Pond Center. He also said the wedding could be held outside, and if it rained, the backup plan would be to use the buildings.
Chair Gooze provided clarification that by upholding this decision, this wouldn't stop concerts, etc, but if the Mill Pond Center wanted to put up a tent type structure for weddings or other events, and the use of the buildings on the property was accessory, they would need permission in order to do so. He said this made sense to him.

Mr. Gottsacker said he felt more comfortable upholding this decision than making a decision where there was no recourse.

Mr. Sievert asked if upholding the administrative decision meant that if the Mill Pond Center wanted to put up a temporary structure for any future event, they would need to go to the Planning Board and the HDC.

Mr. Johnson said that would depend on the circumstances. He said if they said they wanted to hold a wedding inside the building, and wanted a temporary tent for cooking the food, he would approve that.

The motion PASSED 4-1, with Carden Welsh voting against the motion.

B. CONTINUED PUBLIC HEARING on a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article IX, Section 175-30(D)(3), Article XIV, Section 175-74(A)(1) and Article XII, Section 175-54 of the Zoning Ordinance to install cement retaining walls for soil removal and erosion control on south end of the basement and north end, 8 feet east from original house stairs, and also, to construct rear door egress stairs from south door and north door stairs within the shoreland and sideyard setbacks. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar Point Road, and is in the Residence C Zoning District.

Attorney Tanguay said he represented the Sidmores, and he provided the most recent plans for the project. He summarized that the project had been before the Board previously, before any construction was done. He said a variance was

received, construction proceeded, and after the work was almost done, there were some issues still to be addressed, which were outlined in a November 9, 2007 letter from Mr. Johnson.

He said the ZBA had subsequently determined that three of these issues, regarding the porch, the chimney and the building elevations had already been addressed, or did not require a variance. He said there had then been two remaining issues, concerning the retaining wall and the removal of some soil at the south end of the house. He said at the January ZBA meeting, the applicant hadn't yet heard back from DES as to its position on these two issues, so the Board had deferred making a decision on the application until DES had in fact made its decision.

Attorney Tanguay said the applicant had then received a letter from DES that set forth the deficiencies that needed to be corrected. He noted that the basement apartment was not the issue, and said the issue was concerning the second means of egress, and the decision that had been made to put in two retaining walls at an angle off the end of the building, one to the southeast and one to the southwest. He said DES had found the retaining walls to be a violation.

He said he and the applicant had met with DES last week, and had proposed to cut off the wing wall at the end of the porch, at the southeast end, so that the retaining wall would only be under the porch. He described in some detail how the design of the retaining wall would hold back the fill. He said DES was fine with that.

He said they had told DES that for the retaining wall at the southwest end, they would like to start at the edge of the building, cut off the retaining wall at a 45 degree angle, and then fill in around it. He said DES had said that approach wasn't quite good enough, and said the Sidmores should either remove the wingwall entirely, or bury it so it would not be seen.

Attorney Tanguay said the applicants had decided they wanted to cut off the wingwall essentially at the porch, bring the fill around, and put additional retaining wall under the porch to hold the fill back. He said DES liked that approach, and he provided further details on this. He said they planned to figure out exactly what amount of soil had been there before, and bring the same amount back.

He said it was realized that the neighbors had concerns about a patio and the wide walkout area for the downstairs apartment, where people might congregate. He said to meet their needs, the applicants had come up with an approach that would address privacy concerns

He provided some renderings that had been done before the Eckman plan had been made final, and said although these rendering were not completely accurate, they did give a pretty good sense of how things would look, and how the elevations would be raised up more to address privacy concerns. He also noted that the fence that had been put in had been taken down, so was no longer a

concern.

Chair Gooze asked if any of the area of the retaining wall under the porch was located within the sideyard setback. He said he wanted to be sure that it was just the shoreland setback issue that the ZBA was dealing with for that area.

Attorney Tanguay said he didn't know, and said that issue had never been raised

Mr. Johnson said the corner of the deck was about 27 ft from the sideyard setback.

Chair Gooze said he knew that a concern of the opposition was that there might be parties under the deck on the patio, so part of the variance request had to do with what setbacks were impacted.

Attorney Tanguay said the retaining wall would not extend beyond the porch, which the Board had already approved.

Chair Gooze said the Board had granted a variance to allow the porch to be within the sideyard setback. But he said the issue now was whether the area underneath the porch, where the French doors were, was also within the sideyard setback. He said what the Board had originally granted didn't include the excavation and the area the abutter were concerned people would gather on.

Attorney Tanguay said that issue had never been raised before. He said what the applicants had done was to limit the retaining wall to the area under the porch, and to not bring any structures out any closer to any sidelines or any closer to the water than had been the case before. He said they were trying to keep the ZBA and DES happy, and said they had had gone beyond what DES had requested.

He noted that this was a continuation of a prior public hearing on this application. He said he had previously gone over the various variance criteria, so what was on the record already and in the present application covered all of the criteria.

He also said that in anticipation of arguments in opposition, the applicants didn't need to have sliding glass doors for the second means of egress, but he also noted that they didn't need a variance for this. He said regarding concerns from the opposition that ground material had been disturbed, that this material would be restored. He said they wanted the applicant to rearrange the soil so as to block the door, and to replace the door with a large window as a second means of egress. But he said this didn't pass the common sense test, and he provided details on this.

Attorney Tanguay asked that the ZBA approve the variance request. But he said there was also a question as to why the variance, which pertained to a structure, was even needed now. He said that in cutting off the retaining wall as he had described, there would be no structure extending beyond the area for which permission had been granted before. He also said a variance was not required to remove soil.

He also asked that after the decision was made that the occupancy restrictions that had previously been put in place would be lifted.

Chair Gooze said the issue concerning the area under the deck where the doors opened up was a completely new variance request. He said none of that had been included in the plans from July. He said that was why he had asked about the sideyard setback, because a purpose of a sideyard setback was to prevent encroachment on neighbors. He noted that in another application for this property, the ZBA had denied granting a variance for a pool because it was so close to a neighboring property.

He said if this new area in question was within the sideyard setback, it would need to be dealt with. He said Attorney Tanguay would then need to tell him why it was ok to put in the French doors rather than a window for someone to crawl out of.

Attorney Tanguay said he wished he had seen this in the letter, in which case the issue would have been addressed.

Chair Gooze said the ZBA seemed to see different plans every time the applicant came in.

Attorney Tanguay said the area underneath the porch didn't come any closer to the Bates' property line than what had already been approved by the Board, and he said it did not involve a structure. He also said the applicants didn't need a variance for patio.

Chair Gooze said the patio did affect people nearby, and was an addition to what had originally been shown to the ZBA. He said if it was within the sideyard setback, it would be need to be addressed, and he would consider this in deliberating on this application.

Mr. Sievert asked what the surface of the patio beneath the deck was comprised of, and was told that it was concrete pavers.

After further analysis, Chair Gooze said it had been determined that at least half of this area in question was within the sideyard setback.

He then asked if any members of the public wished to speak in favor of the application. There was no response, and he then asked if anyone wished to speak against the application.

Attorney Shulte, representing the Bates, abutters to the property, said he had planned to talk about two things but would now have to talk about three. He noted first that Attorney Tanguay had said he didn't see why a variance was needed because the retaining walls were going to be cut back. But he said these retaining walls, which extended all the way out from the foundation at a substantial angle,

had never been approved at all.

He also said that although the retaining walls would be cut back, new retaining walls would also be added. He said the portion of the retaining walls the ZBA had never granted a variance for were in place, and were in violation because they were too close to the water, and were within the sideyard setback. He said this plan still incorporated structures that had never been approved by the Board.

Attorney Shulte next spoke about the integrity of the process concerning this property. He reviewed it in detail, and described what the ZBA and others had been told the work on the property would entail. He said the original plan showed that there would be no disturbance at all on the south end of the property. He said even with that presentation, the ZBA had said that what was proposed was too big, and had denied the variances that were requested.

He said the applicants had asked for reconsideration and the variances were then granted. He said after all of those things had been approved, it now appeared that the plans had changed. He said instead of using the old foundation, a 30 ft foundation had been put in. He said this had increased the dimensions of the cellar by 50% more than what had been approved, and had increased the variance the applicants should have asked for concerning increased volume.

He said sliding doors were added to the south end of the house, and to accommodate that, 250-300 cubic yards of fill had been excavated, and 20 ft long retaining walls had been put in. He said the applicants hadn't asked the Town or DES for permission for this. He said when construction on that end of the house had been started, Mrs. Bates had said to the Sidmores that they didn't have permission for this. He described what had happened after this, which resulted in the letter from Mr. Johnson.

Attorney Shulte said the Sidmores had then built a spite fence along the property line, but he said they had to take it down because it was located within the setback along the property line, and did not have a permit. He noted that the letter from DES addressed the fence. He also described the landscaping that was removed in order to make room for the walkout area beyond the French doors.

He said a big problem with the excavation that had occurred was that the 4 sliding glass doors had become the primary entrance and egress for the downstairs apartment. He said the lower apartment in the old home only had one access, through the garage area, and had previously been declared to be illegal. He said while there did need to be some means of egress, there did not need to be sliding glass doors.

Attorney Shulte noted that Mr. Johnson had said that an acceptable egress would be a large emergency egress window. He then provided some designs that would meet the building code. He said it was understood that a second egress was needed, but he said this could be achieved in a way that didn't diametrically change the access to the property. He provided details on how the French doors,

the walkout, parked vehicles, etc. would dramatically change the impact of the Sidmore's basement apartment on the shorefront area.

Attorney Shulte said the second point was the issue of encroachment on the sideyard setback as a result of the excavation and the egress that had been constructed. He said the applicants needed to be able to show that there wouldn't be an impact on the neighbors, but had not submitted anything concerning this.

He said the Bates had submitted letters from realtors indicating that increased use, and the fact that the building overshadowed the Bates's property and the deck was closer than anticipated, would affect property values. He said the main thing was that changing the primary entrance from the north end of the house to the south end would make that south end the primary access to the apartment, where there would be an outside area for the tenants to use.

Attorney Shulte said a second key issue was that the application couldn't meet the hardship requirement. He said whether this was a use variance or a dimensional variance, the applicants had to show that there was no reasonable alternative. He said there was an alternative, a big window with steps.

He said they couldn't show there was a hardship that therefore required that they have a patio, sliding glass doors, retaining walls, and that they couldn't restore the contours to what was there before. He said as long as there was an alternative, the variance couldn't be granted because the application couldn't meet the hardship requirement.

Mr. Sievert said he had a problem with the letter from the realtor, which talked about the height issue as a cause of a decrease in property values. He said the ZBA had already established that this was not an issue. He also said he couldn't believe that the use of the south end of the house decreased property values. He asked where it ended, in terms of a neighbor telling another neighbor what they could do with their property, within the variance requirements.

Attorney Shulte said the variance originally granted to the Sidmores was based on the premise that the activity would be centered at the other end of the house, away from the water and away from the Bates' property. He said constructing the building as they did had completely changed its orientation, and dramatically changed the use of the south end of the property.

He said there were impacts to the shoreland from this greater use, and there were also impacts on the ability of the neighbors to use their property. He said there would have been significantly more opposition to the original variance request if it had been presented this way. He said it was not just a difference in amount, it was a difference in terms of the quality of life of the neighbors. He said the activity was now in their front yard.

Mr. Sievert said it was not their front yard, and also said the Board had approved that whole 10 ft porch. He also noted that if there was parking on the south end as

had been described, the applicants would need to apply for another variance concerning this. He said he didn't see a parking area on the plans.

Mr. Gottsacker agreed that none of the plans showed a driveway.

Attorney Shulte said plowing had occurred down to the south end of the building, and said there was no need for this because there was no construction going on.

Ellen Bates, 10 Cedar Point Road, said she was incredulous that another variance was being considered, for another code violation. She said the current request involved an area that was within 20 yards of her house, and said granting this variance would result in a total loss of privacy on the front lawn and inside her house. She said this would greatly diminish the value of her property, and it would forever change for the worse the shoreland of Little Bay.

She described the layout and landscaping on the property before the new construction was done, noting that among the trees, rosebushes, flowers, shrubs, etc. there was the oldest pear tree in the State. She said the vegetation had been clearcut, and said an entire lower level of living had been created, which had essentially created a three story house. She said the shoreline was now being plowed so cars and truck could park there.

Mrs. Bates noted that she owned a commercial interior design firm and had extensive experience with engineers, architects, etc., so she knew how the process worked. She said when she had seen what was being built and that it was not what had been approved, she called and emailed the Sidmores. She said she had asked that they work together with her and her husband to accommodate the Sidmores' needs while not destroying the Bates' enjoyment of their home, and the value of their property.

She said these comments had been ignored, and the excavation continued. She said she had appealed to the Town Administrator by phone and email, and had asked how this work could continue without being questioned. She said she was told that Town staff was on vacation, and said she had finally hired Attorney Shulte. She said it was now 8 months later, after the Sidmores had built what they wanted without the benefit of variances and in violation of the State Shoreland Protection Act. She said they were all now sitting here considering rewarding them for their action, and said why bother with laws to protect the neighborhood, the environment, and the community.

Mrs. Bates asked that the ZBA deny the variance request. She asked that they honor the spirit and intent of the Ordinance concerning protection of the shoreline, allow her to enjoy the property she had enjoyed for 40 years, and not decrease the value of her property even further.

There was discussion about which stairs were being dealt with in the variance, and it was determined that it was the stairs underneath, not the stairs off of the deck.

Attorney Tanguay said the Sidmores' approach, and whatever had been built, was on a plan, and said all of the plans were submitted to the building inspector. He said part of the DES permit was to allow 2700 sf of soil to be disturbed, and he said of that amount, 320 sf was the land at the end of the structure, where the porch was constructed, with the patio underneath. He said this had been before the ZBA at the beginning of the process. He agreed that the sliding glass doors weren't shown on plans. He said it was always known that an apartment would go there, but there were no details on the doors and windows.

He said that regarding the parking and plowing issue, things were still in the construction phase, noting that a wood stove was being put in. But he said the Sidmores could stipulate that the tenants couldn't park anywhere other than existing parking area at the front of the building. He said if they wanted an additional parking area, they would need to come back for a variance. But he said the Sidmores didn't want parking on the other side either.

Attorney Tanguay said that regarding the variance criteria, the neighbors on the street had said there would be no diminution in property values. Regarding the hardship criterion, he agreed that the Ordinance allowed for a secondary egress to be a window, but he said because of the way the land was, and what was done above, the doors were the safe and the right way to go. He said to require a window didn't pass the common sense test, and said with the hardship criterion, the issue was whether the alternatives were reasonable.

There was discussion on what material the deck was made of, and it was determined that it was a sold concrete, simulated paver deck.

Mr. Welsh asked if the initial plan was that the remodeled house would be on the old foundation.

Attorney Tanguay said the original plan was that the old foundation would stay, and the new foundation would be built around it.. He said what was built was what was represented. He noted that in the construction process, an interior cement wall to the rear of the building was removed.

Mr. Welsh asked why the area in front of the house was being plowed, and Attorney Tanguay noted again that a woodstove was being installed.
Mr. Sidmore said there were no vehicles parking there. He said the reason the area had been plowed was to allow the woodstove to be brought in, and to get ready for construction of a handicap ramp.

Attorney Shulte said a permit was granted for soil disturbance, including 320 sf on the south end of the building, for columns to support the deck. He noted that a letter from the applicants to DES talked about landscaping that would be preserved, and also said that plans provided to the ZBA also showed that things would be left intact. But he said Attorney Tanguay had implied that it had always been understood that the area on the south end would change. He said the

representation to DES and the ZBA had been that nothing would change, and he said that was what DES had approved.

Jerry Gottsacker MOVED to close the public hearing. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.

Chair Gooze said he proposed that the Board should look at this as a new variance request, as a stand alone issue that was separate from other things the Board had already approved.

There was discussion on this, and that the variance being requested now was based on the plan that had been received that evening.

Chair Gooze said the sideyard setback issue bothered him a lot. He said the new construction was a good ways into this setback, and said with this full walkout patio, it did affect the neighbors. He said the Sidmores had the right to use their property, but he noted the purpose of sideyard setbacks. He said he didn't feel this application met the spirit and intent of the Ordinance, and said granting it would allow a definite encroachment on the neighbors.

Chair Gooze said that concerning the shoreland aspect of this variance application, he thought there was another, feasible way to do this. He said the Board needed to pretend that this wasn't built, and that there was no patio there, and to imagine that the Sidmores were saying they needed a variance in order to have another way to get out of the basement apartment.

He said there was a reasonable way to do this, and said there were a number of things that could be done. He said the French doors were there, but they weren't supposed to be there. He said he therefore didn't think this met the hardship criterion, and the spirit and intent of the Ordinance. He said agreed with Mr. Sievert that the property was the Sidmores' business, but not when it was within the shoreland setback.

Mr. Sievert said they were looking at this as a new variance application, but old issues kept getting thrown in.

Chair Gooze said the Board was not looking at the old issues.

Mr. Sievert noted the picture of the original house that was proposed, with a 10 ft. deck wrapping around to the chimney. He said this had been approved, and he asked if at that time, thought had been given to the fact that people would be out on this deck, and if it had been thought that the Sidmores weren't going to use the south end of the property. He also said he wondered if this was the primary entrance to the house, noting that the Sidmores said it was a second egress.

There was discussion that one of the three variance requests, Section 175-30 D:3 concerning building volume, was no longer relevant, and that only two variance requests were being considered now, regarding the shoreland and sideyard

setbacks.

Ms. Davis received clarification that the issues of concern in both of these setbacks was structures, and that the structures involved were the retaining walls. She asked if the concrete slab patio was also considered a structure.

Mr. Johnson said the concrete patio and the two sliding doors and two windows were structures.

Chair Gooze noted that this was an area variance that was being requested.

The Board agreed to go through each criterion concerning the sideyard setback variance request.

Sideyard Setback Variance Request

No decrease in the value of surrounding properties would be suffered.

Chair Gooze said more specific information on this was needed in order to prove this, and said he therefore felt the application met this criterion.

The use must not be contrary to the spirit and intent of the Ordinance.

Chair Gooze said he didn't think the application met the spirit and intent of the Ordinance. He said the purpose of sideyard setbacks was to protect property owners from what went on next to them. He said there was a house and a porch, and now there was a patio within the setback, which was another area for people to congregate.

Ms. Davis noted that the Board had approved the porch, which was within the sideyard setback, and said her understanding was that Chair Gooze was saying that the construction of the doors and patio allowed more density to that part of the sideyard setback.

Mr. Welsh said an analogy would be putting an apartment on the second floor, with another porch, which would also increase the density. He said the construction of the doors and the patio had clearly upset the neighbors, and he said the spirit and intent of the Ordinance was to protect people from nearby uses that were too close. He said this seemed to be too close, and said he agreed the application didn't meet the spirit and intent of the Ordinance.

Ms. Davis said if this was an outdoor space for that dwelling, it would be expected that there would be people out there.

Mr. Sievert said the spirit and intent of the Ordinance was to provide separation. He said the wrap around porch intruded closer to the neighbors than the patio underneath it, which was blocked by retaining walls on two sides. He said he didn't think it exacerbated the situation, and noted that the neighbors would be

able to see people sitting on the deck.

Mr. Welsh said that regarding the deck, he recalled previous discussion that this was just wrapping around in order to be able to get to the door, and wasn't supposed to be part of the deck.

Mr. Sievert said people sitting out on the end of the deck would clearly be within view of the neighbors.

Ms. Davis said the picture showed there would be more soil and said it might be a sound barrier. She also said there might be spillover of people onto the lawn.

Hardship

Mr. Gottsacker said his measurements indicated that there would be a lot of activity going on within the sideyard setback. He noted that much of the house was already in it.. He said there were reasonable alternatives for egress under the deck, stating as an example that only one slider was needed, and that the left one was probably not in the setback.

Mr. Welsh said he felt the application didn't meet the hardship criterion because there were alternatives.

Chair Gooze and other Board member agreed that there were other feasible alternatives for a secondary egress from the downstairs apartment.

Granting the variance would not be contrary to the public interest

Ms. Davis said the Board had heard that there had been specific adverse effects on the abutter.

Mr. Welsh said he had always thought that the public interest in this context meant more than the neighbors. He said that perhaps views of the property from the water was a public interest issue.

Chair Gooze said he had definite positions concerning the hardship and the spirit and intent of the Ordinance criteria, but said the other criteria might be too difficult to address with this application.

There was discussion that if the Board denied this variance, the applicants could talk with the neighbors and Mr. Johnson, and could come up with something that would have less impact.

Chair Gooze said he would be satisfied with something that was big enough to get people out safely, but didn't allow a big congregation out on the patio.

Shoreland Setback Variance Request

Mr. Sievert said the shoreland setback encompassed the entire house, and almost all of the lot, so an issue was how anything could be done on this lot without impacting that setback.

Chair Gooze said there could be less excavation done.

Mr. Sievert said excavation would still need to be done even if another access was proposed, and he provided details on this. He said the shoreland setback was about erosion control, and said they had that now.

Mr. Sievert said the question was whether the applicants needed to do as much excavation as they had done.

Chair Gooze said he felt there were other feasible approaches that wouldn't impact the protection of the shoreland.

Mr. Sievert said other options chosen would still be within the shoreland area, and said the issue was how much another option would impact it.

There was brief discussion on the fact that it was getting close to 10:00 pm, and that there were still several applications for the Board to hear. It was agreed to hear all of them that evening.

Mr. Welsh asked Chair Gooze what the concern was regarding the shoreland setback encroachment.

Chair Gooze said the issue was the amount of excavation and fill. He noted that it was important to view this as something that was not there.

Ms. Davis said that regarding special conditions, the applicants wanted to put in retaining walls.

Mr. Sievert said another special condition was what the old plans for the property from the 1960's indicated, and the fill that was there.

Chair Gooze said the Board was looking at whether, if there wasn't a sideyard setback issue, it would allow this in the shoreland setback. He asked if any Board members thought this variance request didn't meet any of the criteria.

Ms. Davis noted that the spirit and intent of the Ordinance was to limit the amount of soil removal and land disturbance. She said the amount of disturbance involved, in constructing the retaining walls, was fairly extensive.

There was detailed discussion about what DES had said concerning this, including the fact that it had said there should be minimal excavation and regarding for access on the south side of the dwelling.

Mr. Johnson said whatever was worked out with the ZBA would be added to the

plan, and submitted to DES for their review and approval.

There was discussion on whether the applicants' most recent plan met DES's requirements.

Chair Gooze noted that Durham could require more than DES did. He said the issue was what the Board would do if this variance request came to it fresh. He said he didn't feel it would meet the spirit and intent of the Ordinance.

Mr. Welsh agreed.

Mr. Sievert said it didn't quite meet the spirit and intent of the Ordinance, but he said the point was that there would have to be something there, and less was better.

Carden Welsh MOVED to deny the application for variance from Article XII, Section 175-54 of the Zoning Ordinance to install cement retaining walls for soil removal and erosion control on the south end of the basement and north end, 8 feet east from original house stairs, and also, to construct rear door egress stairs from south door and north door stairs within the sideyard setback, for the property located at 8 Cedar Point Road, in the Residence C Zoning District, due to the inability of the application to meet the hardship and the spirit and intent of the Ordinance criteria. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.

Carden Welsh MOVED to deny the application for variance from Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to install cement retaining walls for soil removal and erosion control on the south end of the basement and north end, 8 feet east from original house stairs, and also, to construct rear door egress stairs from south door and north door stairs within the shoreland setback, for the property located at 8 Cedar Point Road, in the Residence C Zoning District, due to the inability of the application to meet the spirit and intent of the Ordinance criterion. Ruth Davis SECONDED the motion, and it PASSED 4-1, with Mike Sievert voting against it.

Break from 9:58-10:05

C. **PUBLIC HEARING** on a petition submitted by Matthew Crape, Plymouth, Vermont for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow a change in occupancy from three unrelated tenants to five unrelated tenants on each side of a duplex. The property involved is shown on Tax Map 1, Lots 17-1A&B & 17-1C&D, is located at 46A&B & 46C&D Emerson Road, and is in the Residence A Zoning District.

Mr. Crape spoke before the Board. He explained that some issues had arisen because of the behavior of his tenants. He said he wanted to work out some ways this situation could be remedied, and said he wanted to become a member of the Durham Landlord Association in order to find ways to better manage his tenants.

He said the DLA had suggested the idea of having a graduate student live on the property for free to monitor the situation. He said another possible approach was to hire a property manager to watch the property twice a day on party nights, and once a day on the other days of the week.

Mr. Crape said he lived in Vermont and came to Durham once a week, but said this was not often enough to enable him to manage the property adequately. He suggested there should be a compromise, where he would be allowed to have two additional students in each half of the duplex, which would allow him to have the cash flow he needed in order to provide this high level property management.

Chair Gooze asked when the apartments were built on to the duplexes, and was told it was in the late 1980's.

Mr. Johnson said the building was built as a duplex, and had a side porch that went up to a studio accessory apartment above the garage. He said this had been a permitted use, but he said under the current Ordinance, the accessory apartment theoretically didn't exist any more because there was no family in residence.

There was discussion about the fact that there could be 3 residents in each of the two dwelling units in the duplex.

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

Duane Hyde, 47 Emerson Road, said he lived directly across from the property. He thanked Mr. Crape for stopping by his house concerning this application, and noted that he wasn't there at the time.

Mr. Hyde said he didn't think this variance application was necessary, and also said he didn't think it met the variance criteria. He said he had lived in the neighborhood for about 10 years, and had never before had problems with the tenants in the applicant's property. He said within the last six months, since the applicant had purchased the property, his wife had to make four calls to the police department, and said there probably should have been a lot more. He said he had brought the police records on this with him, and noted the calls were made between 1-2 am, when he and his wife couldn't take it anymore.

He said there were two other rental buildings next door that were well-managed and there had never been problems there. He said the previous owners of the applicant's property had lived in Indiana, and had managed it from there. He said there had never been any problems, and said he was not sure why the issues with this property had arisen now.

There was discussion that this was a use variance being requested.

Mr. Hyde said he felt that if this variance was granted, it would decrease the value

of surrounding properties. He said this was already happening to his property. He also said there was no hardship involved, stating that this was not a unique situation. He said the three unrelated limitation was equally shared across the abutting properties and the district.

He said there were two rental properties next door, and said if this variance was granted, what would prevent them from asking for a variance like this. He said if variances were granted to all three properties, this would have a major impact on the neighborhood, and said it would be vastly against the spirit and intent of the Ordinance.

He said the purpose of the RA District was to maintain the integrity of the neighborhood while ensuring that development was consistent with the established character. He said duplexes were a nonconforming use, and what was proposed was an expansion of a nonconforming use. He said this would not be consistent with the predominantly single family use of the neighborhood.

Mr. Hyde said there were other solutions, and he noted that he had talked with Mr. Crape concerning this. He said he thought Mr. Crape could work with the Durham Landlord Association to find out how to screen tenants better and to set higher expectations of them. Mr. Hyde also said he would try to do a better job of reaching out and working with tenants.

He also suggested that another idea was that rather than providing a rent free apartment for an onsite property manager, there could be a reduced rent. He also said it would be good to make sure the lease agreements had the proper clauses in them concerning lease violations.

He said the 2007 ZBA handbook stated that granting an improper use variance could alter the character of a neighborhood forever, and said this statement was particularly on-point for this application. He said he hoped the Board would vote against this variance request, and any variance request to increase the number of unrelated occupants in this structure.

Charles Clark, 40 A Emerson Road, said he hadn't personally experienced the problems with the tenants. He spoke about the Town's decision some years back to concerning the 3 unrelated provision of the Zoning Ordinance, and he said if this variance was granted, that would essentially be rewriting the Ordinance. He said he didn't see any reason for the Board to do this.

Debbie Nicholls, 43 Emerson Road, said she agreed with what others had said, and she noted that she too had to call the police concerning the tenants' behavior. She said she was concerned that there would be problems with this property if this variance was approved, even if there was a property manager on the property, stating that this wasn't going to stop inebriated young people. She asked the Board not to approve the variance request.

Judith Moyer, Corner of Bagdad and Emerson Road, said she was a landlord,

and concurred with what others had said.. She said she was pleased that Mr. Crape was willing to work with the neighbors and the DLA to keep the character of the neighborhood. She said there had been repeated issues with trespassing of students on her property, and said this involved liability as well as privacy issues.

She said for some reason, this bunch of students was not responding to complaints. She said she would rather not change the character of the neighborhood any more than had already occurred, and said that as a landlord, she tried to keep this a genial place to live. She said she hoped the ZBA would help with this.

Debra Haley, 45 Emerson Road, said she had lived in this neighborhood since 1981. She said it was a family neighborhood, and said she didn't like seeing 12-15 cars parked across the street. She noted she had a letter from Mike Everngam concerning this application. She said she hoped the ZBA would uphold the Zoning Ordinance.

Mr. Crape said he sympathized with the neighbors, and said he had opened the lines of communication in order to try to remedy the situation. He said he was here to figure out some kind of compromise, stating that what he was currently doing was not working. He said he would join the DLA and would find ways to deal with these issue. He said he realized it was somewhat contrary to the Ordinance to add more students, but he said if the variance was granted, the revenue that would result from this would go toward monitoring the property.

Mike Sievert MOVED to close the public hearing. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Welsh said he felt that the variance request didn't meet all five variance criteria. He said granting it would decrease the value of surrounding properties, and would be against the public interest, which was to allow quiet family neighborhoods that were zoned for this.

He said there was no hardship because the landlord could get by, by prescreening and managing tenants without requiring that people come by all the time to monitor the situation. He said he didn't see how substantial justice would be done in granting this variance. He said the spirit and intent of the Ordinance was to have a blend between the Town and the students that worked, and he said this tilted away from something that had worked.

Mr. Gottsacker agreed that the application failed on all five variance criteria. He noted that he was a landlord, and said he had found that in order to be successful at this, one had to be on top of things with student tenants, who after all were away at college and wanted to have fun. He noted that the variance would run with the property, so allowing 5 people in each unit would therefore never go away. He also pointed out that the three unrelated issue was a fire and safety issue. He said adding more tenants in this situation was the opposite of what was needed. He said what was needed was good tenant selection and a good lease.

Chair Gooze said he agreed that the application failed all five variance criteria. He said that regarding the hardship criterion for a use variance, there had to be unique circumstances. He said the Board had in fact allowed more than three unrelated in unique circumstances, but he said this property wasn't unique, even though the building was set up for more people. He said granting the variance would injure the private rights of others, and said he knew what it was like to have rental properties nearby.

He said the issue of whether the application met the public interest was a public health and welfare issue in this application. He said there were safety issues involved, and noted there had been several calls to the police.

Concerning the spirit and intent of the Ordinance criterion, Chair Gooze noted that he had been one of the instigators of the three unrelated provision, which the Town had overwhelmingly approved, in order to try to control noise, etc that affected the health and welfare of Durham residents.

Mr. Sievert said he agreed.

Ms. Davis said she agreed.

Ruth Davis MOVED to deny the Application for Variance from Article II, Section 175-7 of the Zoning Ordinance to allow a change in occupancy from three unrelated tenants to five unrelated tenants on each side of a duplex, at the properties 17-1A&B & 17-1C&D located at 46A&B & 46C&D Emerson Road, in the Residence A Zoning District, because the application does not meet any of the five criteria for a use variance. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Johnson said when people called the police concerning disturbances, they should also either call him or email him.

D. **PUBLIC HEARING** on a petition submitted by Alger Rollins, Andover, Massachusetts, for an **APPLICATION FOR VARIANCES** from Article XXIV, Section 175-139 of the Zoning Ordinance regarding the design requirements for a septic system and from Article XII, Section 175-154 of the Zoning Ordinance regarding the frontage requirements for a proposed two-lot subdivision. The property involved is shown on Tax Map 20, Lot 12-5, is located on Durham Point Road, and is in the Residence C Zoning District.

Mr. Rollins explained that he owned this property with his siblings. He said the plan was to cut the property in half, and sell half of it because they couldn't afford to keep the whole parcel anymore. He said the half they wanted to sell contained the existing two houses on it. He noted that several years back, a conservation easement was put on the southern half of the whole property, which included a portion of waterfront acreage.

He said when this had been done, the family was thinking ahead to a possible scenario like this where they would want to split the property. He said they had **e**xcluded an area of about 3 acres on the south side of the driveway from the property they wished to keep, as a desirable location for a potential future home site.

He said they were looking not only to subdivide the property, but were planning to put most (about 90%) of the remaining property into a conservation easement. He said idea was to cluster the building areas in the middle of the property, so there wouldn't need to be any new roads built, and disturbance of the land, including near the bay, would be minimized.

He said both lots needed to be conforming, and said test pits were therefore dug in order to be able to site a septic system. He said thin soils were found there, and said a total of 21 test pits were dug on proposed lot 12-5-2. He provided details on this, and said only two locations were found that met the State's depth to ledge requirements. He said none of the pits met the Durham requirements.

Mr. Rollins said a septic system was designed to meet State standards, and said DES had provided a provisional approval of it, pending the Town approving it. He noted that the family had no immediate plans to put in this septic system.

Chair Gooze received clarification that there was an existing septic system for the two houses on proposed lot 12-5-1.

Mr. Rollins said the second variance being requested was for road frontage. He noted first that the existing road entering the property was being used as the line to subdivide the property. He said when this was done, that left about 200 ft on the north side of the driveway, and 900 ft on the south side. He said the remedy to that would be to move the road, in order to obtain the required 300 ft of frontage. He said this could be done, but said that didn't accomplish a lot. He said it would disturb more of the property, in that they would have to route the road closer to some wetlands and some existing stone walls.

He said if the variances were not granted, the family would have to sell the whole property. He also said their interest in doing the conservation easement would be different if they didn't live there anymore.

There was detailed discussion between Board members and Mr. Rollins concerning the location of the existing as well as the proposed conservation easements, and about how this related to the road frontage variance issue.

Mr. Gottsacker noted that given the conservation easement areas on the property, and given the distance of the houses from the road, one wouldn't really know there was a property division.

Mr. Rollins said if the driveway was moved to allow adequate road frontage, the existing conservation easement would be an issue, so there would be another process the family would have to go through.

He then went through the variance criteria. He said there would be no decrease in the value of surrounding properties, because there were no houses within sight of the existing curb cut to Durham Point Road. He said the two lots resulting from the subdivision would be very large, so the homes would not be within sight of the road.

He also said the septic system that had been designed would not decrease the value of surrounding properties because the design met the State requirements, and the leach field would be located outside the setbacks, and could easily be blocked from view with plantings.

He said granting the variances would not be contrary to the public interest because there was no potential environmental harm because the location of the site in the middle of the lot was about a half mile from Little Bay. He also noted that the variance would allow the owners to proceed with the addition of a conservation easement that included public access. He said there would be some public access to Great Bay as part of this. He said there would be no direct impact to the public interest due to the road frontage.

Mr. Welsh asked how people would know they were in the public access area, and Mr. Rollins said the details on this were being worked out.

Chair Gooze asked if the acreage of the conservation easement was set, stating that he wanted to be sure about this in thinking about granting the variances.

Mr. Rollins said the only acreage that was yet to be determined in finality was the excluded area for the house lots.

Mr. Gottsacker received clarification that if the family had to sell the whole property, the existing conservation easement would remain, but there would be no additional conservation easement acreage as was proposed with the subdivision.

Mr. Rollins said denial of the variances would result in unnecessary hardship, and would result in the inability to subdivide the property. He said given the current costs, they would not be able to keep the property. He also said they were trying to avoid locating the septic system in sites near the waterfront and in the open fields, and that sites other than those they had chosen would result in poor lot configuration. He said moving the existing road by 100 ft in order to meet the frontage requirement would add additional expense without any real benefits, and would move the road much closer to a valuable wetland area.

He said substantial justice would be done in granting the variances because it would allow the family to retain ownership of a portion of the family property, and would also allow it to proceed with plans to place a conservation easement on much of the remaining property, which would benefit the whole community.

Mr. Rollins said granting the variances would not be contrary to the spirit and intent of the Ordinance. He said the septic system that had been designed would be a little higher than if the soil depth was already correct, but he said this wouldn't result in a

greater density of homes. He said if everyone agreed the design was sound, he didn't believe there would be any environmental issues with it. He also granting the variance for the road frontage would not be contrary to the spirit and intent of the Ordinance because this would not result in more houses being built.

Mr. Sievert asked if it was the case that the applicant couldn't get the extra 100 ft for road frontage because of the conservation easement, and he also asked him why he had said the road would have to be moved in order to get the extra 100 ft.

Mr. Rollins agreed that the road wouldn't actually have to be moved, and provided clarification for Mr. Sievert that the existing conservation easement didn't allow subdivision, and that was why they couldn't get the frontage, not because of the location of the driveway.

Mr. Sievert said he first wanted to say that he didn't think the applicants needed to be there asking for this variance, because he thought the Ordinance was more restrictive than it needed to be. He asked if there were any other places on the entire property that could get 4 test pits.

Mr. Rollins provided details on this, stating that they had found some good test pits on the north side of the subdivision boundary line, but didn't look far beyond that because locating a system further out would change the configuration of the subdivided lots.

Mr. Sievert said the problem was that this kind of situation had come before the Board before,.

There was discussion on this, and there was also discussion on the changes in septic technology in recent years, and whether the Zoning Ordinance reflected this.

Mr. Johnson said the septic provisions were relatively new, and were very restrictive, for whatever philosophical reasons.

Chair Gooze said it was hard to go against a new Ordinance.

Mr. Sievert said the current Ordinance precluded something like this, which was a perfect situation.

Duane Hyde spoke as a representative of the Nature Conservancy. He said he was there to echo what Mr. Rollins had said. He said the Nature Conservancy held the conservation easement, and said this didn't allow further subdivision. He said this meant that the lot couldn't be adjusted for frontage, and also said the septic system couldn't be placed within the easement area. He said the owners were kind of locked into the exclusion area for the location of the septic system.

He said there were some unique aspects of the property, including the fact that it was encumbered by the conservation easement restrictions, and that they were trying to locate the septic system within a disturbed area. He said the reason the area was

labeled as disturbed was that there was a workshed there, and he said it was identified that way in order to protect the natural resources on the property.

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

Jerry Gottsacker MOVED to close the public hearing. Carden Welsh SECONDED the motion and it PASSED unanimously 5-0.

Based on comments from Mr. Sievert, there was detailed discussion by the Board on another application that was similar to this one, in terms of the issue of siting a septic system.

Chair Gooze said they didn't want to be a Board that changed the Zoning Ordinance. He said there had to be something unique about this property that would allow one to say this variance was ok. He said he felt that what the Nature Conservancy had said was sufficient to allow the Board to approve this.

Mr. Welsh said the proposed location for the septic system was far away from the neighbors and from Great Bay, where as in another application, that was not the case. He said he didn't see the problem with not having sufficient test pits.

Chair Gooze said he was very comfortable with saying this as well.

There was further discussion on the conservation easement, - how it related to this situation, added uniqueness, limited options, etc.

Mr. Sievert asked if there was anything that precluded putting a potential house lot and septic system area on the other side of the road, if there were good test pits in that area.

Mr. Rollins described the radius that was looked at in terms of test pits.

Chair Gooze asked what the septic system was for the existing houses, and it was noted that this was a replacement system.

He said he felt the application met the variance criteria, because of the uniqueness resulting from the conservation easement aspect. But he said he wanted to be sure the new conservation easement was going through, and he suggested that there should be a condition regarding the conservation easement acreage.

There was discussion that there was already a conservation easement in place, and any restrictions might affect its value, which could be problematic in terms of the deal being put together with the family now.

Mr. Johnson said the Board could table this until the Nature Conservancy came back with some suggested language to be included in the variance.

Chair Gooze said he was ok with granting this variance with the condition that the conservation easement acreage on lot 2 be would be within some reasonable percentage of what was on the plan.

Mr. Hyde noted the late hour, and said he would want to check with counsel on this, but he said he thought it would work.

Mr. Gottsacker said Mr. Hyde could always come back and say it didn't work.

Jerry Gottsacker MOVED to approve the Application for Variances from Article XXIV, Section 175-139 of the Zoning Ordinance regarding the design requirements for a septic system and from Article XII, Section 175-154 of the Zoning Ordinance regarding the frontage requirements for a proposed two-lot subdivision, for the property shown on Tax Map 20, Lot 12-5 located on Durham Point Road, in the Residence C Zoning District, because it meets all of the variance criteria, with the condition that for lot two, as represented on our map, the conservation easement will be 90% of what was on the map. Mike Sievert SECONDED the motion, and it PASSED 5-0.

E. PUBLIC HEARING on a petition submitted by Chinburg Builders, Inc., Durham, New Hampshire, on behalf of the Town of Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 and Article XXIII, Section 175-133(C)(2 & 3) of the Zoning Ordinance to allow for a free-standing/ground, temporary sign that exceeds the size and height requirements and is not set back one-half the required depth of the street yard. The property involved is shown on Tax Map 11, Lot 27-0, is located at the Durham Business Park on Piscataqua Road, and is in the Durham Business Park Zoning District.

Mr. Sievert recused himself for this application.

Steve Schuster Vice President of Development for Chinburg Builders, spoke before the Board. He said the company was requesting a 32 sq ft (4 ft by 8 ft) sign, 30 ft back from the existing edge of the pavement. He said it would be a temporary, free standing real estate sign, and provided details on this. He also provided details on the fact that the sign would be isolated from the view of the neighbors, 1,000 ft from the nearest home on Route 4. He said there would therefore be no negative effect on property values

He said granting the variance would not be contrary to the public interest, in that no harm would be suffered by granting the sign variance. He said denial of the variance would result in unnecessary hardship, stating that the property was unique in that it was the only undeveloped lot designated for development of office research uses in a business park setting with direct access to /route 4. He said this carried with it unique marketing challenges.

He said in order for a sign to be safely read while traveling on Route 4, relief from strict compliance with the Ordinance was necessary and warranted. He said

an inability to effectively market the property would interfere with the reasonable use of the property, and said any less relief would prevent them from achieving the benefit of the variance request.

Mr. Schuster said substantial justice would be done in granting this variance, in that no gain would be realized by the general public by restricting signage on the property, given its uniqueness of scale and distance from abutting properties. He said granting the variance would not be contrary to the spirit and intent of the Ordinance, as well as the underlying Master Plan. He said inherent in these documents was the promotion of health, safety, and the general welfare of the community. He said in the marketing and promoting of economic development, a uniformity of aesthetic values could be maintained.

There was discussion on what a temporary sign meant.

Mr. Chinburg said in this instance, temporary meant 2 years. He said this was a market driven decision, and said the reason for the size that was requested was that the sign would be well off the road, in an open area at Arthur Grant Circle.

A letter from abutters, the **Keefes of 59 Piscataqua Road,** was read out loud. This letter provided details to the effect that the request for variance should be denied because of the visibility of the sign.

Mr. Johnson noted that there was no specific time limit on a temporary real estate sign, and provided some examples of this in Durham.

Chair Gooze asked what the Keefes would see of the sign.

Mr. Schuster provided details on this, and said they wouldn't be able to see the sign from their house. He said the sign would be further back than the Wastewater treatment plant sign.

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

Jerry Gottsacker MOVED to close the public hearing. Carden Welsh SECONDED the motion, and it PASSED unanimously 4-0.

Chair Gooze said this was an area variance. He said he felt it did meet the variance criteria, and said he thought the Business Park needed the sign. He said he thought that if a neighbor could look out the window every morning and see the sign, it would be a different situation.

Mr. Welsh said he felt there were issues concerning the spirit and intent of the Ordinance and the public interest, because of the view for people driving by the property. He said there were very few signs in that particular area, and said there were also signs like this in Town that were smaller. He said what was proposed was unusual for that stretch of scenic road in Durham. He also said that a few

years was a long time to have a sign there. He said both the spirit and intent and public interest criteria were not met.

Chair Gooze asked if perhaps there could be a compromise, and the sign could be allowed for 6 months or so, He said if people said it was ugly, it wouldn't be approved again. He asked Mr. Schuster how much the sign cost, and was told it cost $650.

Mr. Welsh asked what the magic was in the size that was proposed for the sign, as opposed to something smaller.

Mr. Schuster said he had asked the person who created the sign to create one that would be a legible, safe sign.

Mr. Johnson noted that the intent was that this sign would eventually turn into a directory sign for the Business Park.

Chair Gooze asked if Mr. Schuster would be comfortable with the idea of allowing the sign for 6 months, and then reviewing the situation.

Mr. Schuster said the company had a partnership with the Town for a year.

Mr. Gottsacker noted that he had sat through some of the Planning Board and Town Council meetings concerning the agreement between the Town and Chinburg Builders in regard to the Business Park. He said the Town still owned the property, and said what was proposed therefore met the public interest. He said the Town wanted to sell the property, and it was in everyone's best interest to get things moving as soon as possible to get tenants. He said he was sure the company would also be using other real estate marketing methods.
He said he also said he thought the ZBA should define temporary, and that when this period expired and if more time was needed, the applicant could come back to the Board and ask for this.

Mr. Welsh said he thought a year was too long. He said it was hard to tell how people would feel about the sign, and he noted there were a lot of people who drive by that location on Route 4 every day. He said again that it was an issue of whether this sign was in the public interest.

Mr. Johnson said he got calls about, and picked up a lot of signs in Durham for various reasons. He said people most likely wouldn't call about a sign like this.

Mr. Gottsacker said people would call if they didn't like the sign, so they would find out what people thought about it.

Ms. Davis noted that she had lived in Durham for 14 years, and had no idea where the Durham Business Park was.

Jerry Gottsacker MOVED to approve the Application for Variances from

Article II, Section 175-7 and Article XXIII, Section 175-133(C)(2 & 3) of the Zoning Ordinance to allow for a free-standing/ground, temporary sign that exceeds the size and height requirements and is not set back one-half the required depth of the street yard, for the property located at the Durham Business Park on Piscataqua Road, in the Durham Business Park Zoning District, because it meets the 5 variance criteria, with the condition that this approval be limited to one year. Ruth Davis SECONDED the motion.

Mr. Welsh said he would in favor of the application if it was approved for 6 months.

The motion PASSED 3-1, with Carden Welsh voting against it.

III. Approval of Minutes – January 8, 2008
Postponed

IV. Other Business

A. Discussion of ZBA Rules & Regulations Chair Gooze asked that members look at this, this will be on the agenda until ZBA members address it

B. Discussion of Matthew Beebe's Request for changes at 25 Cedar Point Road

It was explained that the changes being requested would result in no change to the building footprint, and would be located across the road from the shoreland setback.

Chair Gooze said the only issue he had with this was that in its previous variance decision, the Board had said "without a garage".
Mr. Johnson noted that at the time, some people had been surprised that the applicant wasn't including a garage.

Mr. Gottsacker said his concern was that if the ZBA agreed to this, the abutters wouldn't be aware of the change.

Chair Gooze agreed.

Mr. Gottsacker said the Board would want to request input from the abutters again, and Chair Gooze said that would have to occur as part of another variance request.

There was detailed discussion on how this could be handled appropriately. The Board determined that Mr. Beebe would have to apply for another variance.

Mr. Johnson updated the Board on recent court cases involving previous ZBA decisions.

Chair Gooze noted that he would be in court on March 5th concerning the Stonemark case. He also said he would be going to court on April 3rd regarding

the Palmer case.

C. Next Regular Meeting of the Board: **March 11, 2008

V. Adjournment

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

Victoria Parmele, Minutes taker

Adjournment at 11:45 pm

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Jerry Gottsacker, Secretary