

**This set of minutes was APPROVED at the April 8, 2008 meeting.**

**ZONING BOARD OF ADJUSTMENT  
TUESDAY, MARCH 11, 2008  
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL  
7:00 P.M.**

**MEMBERS PRESENT:** Chair Jay Gooze; Secretary Jerry Gottsacker; Mike Sievert; Carden Welsh; Vice Chair Ted McNitt; Robbi Woodburn

**MEMBERS ABSENT:** Ruth Davis

**OTHERS PRESENT:** Code Administrator/Enforcement Officer Tom Johnson; Victoria Parmele, Minute-taker

**I. Approval of Agenda**

Chair Gooze said there was a request for rehearing the recent Sidmore application. He said the Board could decide on this that evening, or could put off deciding to the next meeting.

After discussion, it was agreed by the Board to discuss this request that evening, if time permitted.

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

**II. Public Hearings:**

- A. **PUBLIC HEARING** on a petition submitted by David Garvey, Durham, New Hampshire on behalf of Rockingham Properties I LTD, Belmont, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to build commercial buildings under 2004 Zoning setback requirements on a previously approved subdivision. The properties involved are shown on Tax Map 11, Lots 8-1 through 8-15, are located on Valbeth Lane, and are in the Office and Research Rte. 108 Zoning District.

Mr. Gottsacker noted that he had been an advocate of the TIF proposal when it was before the Council. He said he had looked through the disqualification criteria, and noted that it said citizens having a personal or pecuniary interest in an application should be disqualified. He said he didn't think this applied to him, but said he was willing to have the ZBA decide on this.

Ms. Woodburn said this did apply to her, and said she would therefore recuse herself.

Mr. Sievert noted that he had designed the road for Stone Quarry Drive, and had also worked for Rockingham Properties on other projects. He said he didn't think there was an issue, but asked the Board for its perspective on this.

Chair Gooze said he didn't feel this was an issue, and provided details on this, including the

fact that designing the road had nothing to do with this application.

Concerning Mr. Gottsacker's advocacy of the TIF proposal, Chair Gooze said everyone had an opinion on the TIF.

Board members agreed that this shouldn't be a reason for recusal, with Mr. McNitt stating that the issues involved were concerned with setbacks.

Mr. Welsh was appointed as a voting member, in place of Ms. Woodburn.

Chair Gooze said a handwritten letter had been received from Bonnie McDermott, 80 Dover Road, regarding whether Mr. Sievert and Ms. Woodburn should be voting members on this application. He said the Board had now taken care of this issue.

He also noted that he had received 3 phone calls within the last 3 days from citizens who wished to speak with him about this project, and he stressed that he had not discussed the merits of the application with them.

Doug Garvey of Rockingham Properties spoke before the Board. He received confirmation that he could provide an outline of the application, and didn't have to provide all of the details. He said the Stone Quarry Drive subdivision was approved under the previous Zoning Ordinance, and contained 15 lots. He explained that the subdivision was created for business purposes, and said the lots involved were small, and were for small sized users. He said in the creation of the subdivision, it had been anticipated that water and sewer would be provided to the site, and he explained that the cost for this had subsequently doubled.

He said the Zoning Ordinance had changed in 2005. He explained that the 4-year vesting of his property under the previous Zoning Ordinance had expired, and said having to abide by the new Zoning Ordinance would make several of the 15 lots unbuildable, and the balance of the lots not economically viable, because of the setback requirements. He noted specifically that lots 4, 5 and 6 were dramatically affected. He explained that given the topography of the site, the area in the front of those lots was the best area to build on, but said the setbacks significantly impacted the buildable area.

Mr. Garvey spoke about a project before the ZBA in 1995 that had faced a similar situation, and he said the variance requested at the time had been granted. He said there was therefore precedence for what he was now requesting.

Mr. Garvey summarized that the variances being requested were from the wetland, sideline, front line, and back line setback requirements, as well as the lot coverage ratio requirement. He noted that under the previous Zoning Ordinance, the 50% lot coverage ratio had applied only to the building footprint, but he said it now applied to the parking area as well. He noted how this seriously impacted lot 15 and lot 8 in particular. He said there was now a hardship of the land, and said he felt the variances being requested were therefore fairly reasonable.

He said this was a project the Town Council had tried to advance for economic development purposes with a TIF district. He said agreement had not yet been reached with the Council on a development agreement, but not because of a lack of effort on everyone's part. He said negotiations were continuing, and said there was one issue still separating them, which was

being worked on. He said the Council had said this was a development it wanted, but he said they all still needed to get to the point where it would work.

Chair Gooze received clarification that this subdivision had been approved in April 2004, and the new Zoning Ordinance was approved in 2005. He then asked if there were any members of the public who wished to speak in favor of the application.

**Karl Van Asselt, 17 Fairchild Drive**, said he was a member of the Town Council and the Economic Development Committee. He said his comments were being made as a member of those bodies, but should in no way be construed as reflecting the views of any other members, individually or collectively.

Mr. Van Asselt urged the ZBA to approve the variance application. He first said that it was in the best interest of the Town as a whole for this project to continue. He said he believed it was a community priority for the Town to support initiatives that would increase the Town's tax base, from sources other than single-family residential homes, and said the Stone Quarry project was one step in that direction.

He said a second reason the application should be approved had to do with location. He said the project was being developed on land that was properly zoned for commercial development. He said safeguards existed for areas surrounding the development, in full accord with the Town's land use regulations, Zoning Ordinance and Master Plan.

Mr. Van Asselt said a third reason the variance request should be approved was the fact that the Planning Board had approved the subdivision because it met Town established criteria for such development. He also noted that more recently, the EDC had supported, and the Town Council had endorsed the project through the creation of a TIF district.

He said a fourth reason the application should be approved had to do with the Town's Zoning Ordinance. He noted that it had been changed three years ago, but the area for the project remained zoned for commercial development. He said the new Zoning Ordinance allowed for a variety of initiatives, including residential, industrial and commercial development, and the protection of certain areas against development. He said there was room for a balance between responsible, desired growth and preservation, and said this project helped achieve that balance.

Mr. Van Asselt said a fifth reason the variance request should be approved had to do with project timing, stating that constraints and unforeseen obstacles often existed over which developers had no control. He said this particular project had not been without such obstacles, noting that it was two years before the EDC and the Town Council would even seriously discuss the TIF financing arrangement, and that another 14 months of TIF discussions took place after that. He said the project goals and objectives had remained the same for the community since the time they were approved by the Planning Board four years ago.

He said there was only one direct, relevant link between the TIF and the project, which was that the Town Council, by a vote of 8-1, had approved the creation of the TIF to help make the proposed project a reality. He said that was the only relevant link, and said the TIF district itself, and the pending developer's agreement was not of concern in the ZBA's deliberation on whether to grant a variance.

He said if the project did not move forward, another project would likely move forward for Planning Board approval. He also said that if the project didn't move forward, new Zoning provisions could be adopted to allow a similar development on the land. He said it was important to recognize that if Zoning changes were made, they would be changes that would impact numerous other possible developments in Durham. He said he believed that it was better to proceed with a known plan under the previous Zoning Ordinance and subsequent Town actions that assured that there would be a responsible development in a specific area, with ample protection for surrounding lands.

Mr. Welsh asked why the Zoning Ordinance had been changed concerning the requirements involved with this application.

Mr. Van Asselt said he thought the requirements were changed in order to provide more protection to certain land parcels, to provide clarity on how some of the land would be used, and to ensure that there were parcels in Town that could be developed, and others that couldn't be developed. He said there were various feelings about the specific area in question. But he said the goals and objectives of the project hadn't changed, although the Zoning Ordinance had changed.

**Bonnie McDermott, 80 Dover Road**, said this project would be located in her backyard. She noted that she had attended the Planning Board meetings in 2004 concerning the application for this subdivision. She said she liked the project, and said although she would love to see the fields stay as they were, she also had taxes to think about. She said she was in favor of the TIF district, stating that the Town needed some tax relief. But she asked the ZBA to look at this application on its own merit, and to vote on it without being influenced by the letter from Administrator Selig that represented the views of the Town Council.

Mr. Gottsacker read the letter from Administrator Selig on behalf of the Town Council into the record. This letter is available at the Durham Town Hall.

Chair Gooze said he felt that this was a pretty neutral letter, which was attempting to lay out the issues. He noted that this application was a variance issue, and that this was not a discussion on the merits of the TIF district. He then asked if there were any members of the public who wished to speak against the application.

**Hans Heilbronner, 51 Mill Pond Road**, said he had served on the ZBA for 10 years or more, and understood what the ZBA dealt with. He said it was his experience in the past that the Zoning Ordinance was sacrosanct. He said the applicant had had 4 years to implement his plans but had not done so. He said he didn't feel that the Town should reward or penalize property ventures. He said this was an attempt to redraw the Zoning Ordinance, reverting it back to the one that was in place before. He said approving this variance request would be a very important transgression of the spirit and intent of the current Zoning Ordinance, and he urged the ZBA to reject it.

**Larry Harris, 56 Oyster River Road**, said he agreed with what Mr. Heilbronner had said. He also said this subdivision looked like a housing development, not a commercial development. He asked why there couldn't be a consolidation of lots to make for a smaller number of

reasonable lots for the commercial development, rather than trying to maximize the number of units, and rolling back the Zoning Ordinance.

Chair Gooze asked why consolidating lots would be more in the Town's interest than keeping the existing number.

Mr. Harris said it would be setting a precedent by significantly rolling back the new Ordinance. He asked why a smaller number of lots wouldn't still be beneficial to the Town. He said he was not against business development, and was not arguing for or against the TIF. But he said a revised plan could be compatible with the Zoning Ordinance and still provide commercial development.

**Henry Smith, 193 Packers Falls Road**, said he was a member of the Town Council, but was speaking strictly as a citizen of Durham. He said Mr. Garvey's argument that this was a process that couldn't be completed in time because of changes that had occurred was way off the mark. He said there had been plenty of time, and said it was a hardship that was of the applicant's own making.

He said he disagreed with Mr. Garvey's argument that granting this variance would not violate the spirit and intent of the Ordinance, stating that it was quite clear from 2005 forward what the spirit and intent of the Ordinance was. He said he felt that both the hardship and spirit and intent of the Ordinance criteria were not met, and said the ZBA should deny this variance request.

**Robin Mower, Faculty Road**, requested that the variance application be denied according to two variance criteria. She said that concerning the hardship criterion, the bottom line was that the developer knew both the physical constraints of the property and the legal constraints (the Zoning Ordinance) in effect at the time of purchasing the property and planning the development. She said it was therefore his fault that time had run out on his 4-year exemption.

She said that in other words he was "creating his own financial hardship because he purchased the property with knowledge of the Zoning restrictions", words she said were quoted from a paper written by Town attorney Walter Mitchell for the 2005 Fall Planning and Zoning Conference, entitled "Zoning Board of Adjustment Roles and Responsibilities."

She said this same paper noted among other things that the Courts had said that "...an applicant could show good faith, by compliance with rules and procedures of the Ordinance; use of other alternatives to relieve the hardship before requesting a variance; reliance upon the representations of zoning authorities or builders; no actual or constructive knowledge of the zoning requirement."

Ms. Mower said that even if this was a case of self-created hardship, the applicant might have accumulated "credit" on his behalf to counter the common sense concept that "it was his own fault." She asked where the evidence for this was. She said she was not an attorney, but said it seemed that the applicant had not shown good faith before requesting this variance. She said he was a seasoned developer, who was well familiar with Durham's zoning ordinances at all points in time, and said he was also privy to the counsel of both the Town Planner and the Director of Zoning, Building Codes & Health. She said that in addition, the public had not seen

evidence that the applicant had considered alternatives to relieve the hardship, such as contemplating merging some of the lots.

She said the applicant had argued that the “the town as a whole would suffer the loss of its time and effort over the last two years of trying to approve the TIF district and creation of tax base for the town.” She then suggested that it had been a loss to the town as well as to the applicant that he did not take action before now.

Concerning the substantial justice criterion, Ms. Mower said the applicant had argued that the lengthy history of cooperation with the Town, including lengthy and detailed discussions, argued for the conclusion of this project under the original Zoning Ordinance, and that continuation of these discussions would represent substantial justice. She said it was this very lengthy cooperation, involving attempts by Town employees and board members to provide significant support to the developer, and it was also hours of residents’ time, both those in support of and those opposed to the development, which lead one to conclude that “enough was enough.”

She said the developer had put forth representations that he would meet the town’s expectations equal to the town’s attempts to meet his needs. She said she was not convinced that this had been case, especially because the surety, which was a critical component upon which the Town Council approved the TIF, was now missing.

In answer to a question from Mr. Welsh, Ms. Mower said the developer decided to buy the property given the constraints of the land, such as wetlands. She said she didn’t think he knew the Zoning Ordinance was going to change, but she said issue was that then when a developer bought a property, he/she had to assume there might be some unforeseen things that happened so that it might not be possible to realize the maximum amount of profit from a project.

She also discussed the idea that there may have been an expectation on the part of the developer that there would be a TIF within the four-year exemption period to provide relief.

**Peter Smith, 100 Piscataqua Road,** said his comments had to do with the process, and not with weighing whether the variance should be approved. He noted the letter from Administrator Selig, and said it had long been his view that the Town as an entity from time to time had an interest in what the ZBA did. He noted a representative situation the previous year, and said the Town must not express its interest in a ZBA matter privately. He said that was clearly not done in this instance, and said the record should be clear on that.

He said variances should clearly be the exception, and said this was a very heavy burden. He said the statement from the applicant implicated one variance criterion, the public interest, in that the Town Council by its actions indicated that this was a development that should be moved forward. He said in this respect, the ZBA should consider the TIF issue, in a defined way.

He said it was valid to say that the adoption of the TIF showed interest on the part of the Town. But he said this case was more complicated, because the Town had also adopted the revised Zoning Ordinance, and was therefore taking the position as a Town that it was in the interest of the Town to change the Zoning Ordinance. He said there were therefore two public interests

involved here, and said the Board needed to consider this.

Mr. Smith said that while TIF represented a new approach to attempt to develop new taxing sources, the Zoning Ordinance was a more permanent thing, although it could be amended. He asked that the Board keep in mind that granting a variance was the exception, and that all 5 criteria needed to be considered. He said he thought this particular matter was one of the more important applications the ZBA had had in some time, and said there were a lot of implications. He said the Board should delve into the facts and the law.

Chair Gooze noted that the applicant had in fact addressed all of the variance criteria in his application. He asked Mr. Garvey if he wished to speak again.

Mr. Garvey said regarding the issue of precedence, there was a precedent, in that in 1995, the ZBA had granted a variance for an entire subdivision, similar to this. He said that regarding Ms. Mower comments concerning the timing of purchase of the property relative to the Zoning Ordinance changes, the property was purchased in the 1980s. He also said his company had been through several subdivisions with the Town. He said Rockingham Properties had provided the land for Stone Quarry Drive, which was used to get to the Public Works Department. He said there had been a good relationship with the Town, also noting that his company had paid for the paving of the road.

He said all five variance criteria had been addressed in his application. He said the variance request was specific to the land, and to the Ordinance. He said consolidating lots would be possible, but he said they were looking for relief from the fact that the lots had in effect become nonbuildable because of the changes in the Zoning Ordinance.

Chair Gooze asked when the TIF discussions had started.

Mr. Garvey said they had started 2 years ago with the Economic Development Committee and Town Council members, and said there had been ongoing discussion since that time. He also said that immediately following the subdivision approval, the cost for water and sewer had skyrocketed, exceeding the original amount that had been projected by a substantial amount. He said this was the reason for the delay, even during the first two years.

He said there had to be economic drivers for a project like this, and said this was why the TIF district idea had originally been brought up. He said without the Town, the project probably wouldn't happen, and said if it did happen, it would provide tax revenue for the Town.

Mr. Welsh asked for more details on why the project had not been started over the course of 4 years.

Mr. Garvey said for the first 2 years, it wasn't started because of the cost involved, and said for the second 2 years, the cause was ongoing discussions with the Town. He provided details on the fact that it was taking a while to get the development agreement in place, stating that everything was in place now except the surety. He said this was currently being worked on.

Chair Gooze noted the condition of approval in the original subdivision approval, regarding bringing water and sewer to the project at no expense to the Town.

Mr. McNitt said this was really a Planning Board issue.

Peter Smith noted that a 1995 action of the ZBA had been referred to, and asked what was involved with this. He said the nature of variance requests was that each was different from the other, so the 1995 case didn't amount to anything unless the detailed facts showed that this present application was in every material aspect the same as that case, and also showed that the 1995 decision was correct.

Mr. Garvey said the 1995 action involved the Stagecoach Farms subdivision.

Mr. Sievert asked how soon after the Planning Board approval for the Stone Quarry Drive application the Town Council had approved water and sewer for the subdivision.

Mr. Garvey provided details concerning the fact that there had been a delay.

Robin Mower said she was concerned that the applicant's discussion was intruding more into the area of public interest, based on assumptions, in that the benefits to the Town were realizable if this went through. She said if the ZBA did consider financial benefits, it should realize there was some question concerning this.

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

Mr. Gottsacker noted that the Table of Uses in the Zoning Ordinance indicated that single-family residences could not be built in the OR Rte. 108 Zoning District.

The Board then reviewed the variance criteria.

Chair Gooze said he didn't think that approving this variance would decrease the value of surrounding properties, and Mr. Welsh agreed.

Chair Gooze said the public interest in this instance appeared to be health and welfare, and the economics of the Town.

Mr. Gottsacker said if this project was not in the public interest, the area would not be zoned now for office and research uses. He said the real question was not regarding the type of development, it was whether the application was contrary to the public interest regarding setback issues.

Mr. Sievert said the setbacks that were exceeded were mostly internal, and said he didn't see how there would be impacts to lots that were external to the subdivision as a result of exceeding setback requirements.

There was discussion about the fact that wetland setbacks were exceeded for five of the lots. There was discussion that there was one buildable area on lots 13 and 14 based on the new wetland setbacks, whereas previously there had been two buildable areas in each of these lots. It was also noted that two buildable areas could be fit on lot 15, but that there was still quite a



bit of encroachment as a result of the setback requirements.

Mr. Sievert said it was in the public interest to be able to use the areas that wouldn't be buildable on lots 13, 14 and 15 based on the wetland setback requirements in the new Zoning Ordinance. He said using these areas could potentially be better for the environment because of the flatter topography there, as compared to steeper areas of the lots.

There was further detailed discussion about the wetland setback encroachments.

Mr. McNitt said this application was being decided primarily regarding the hardship and spirit and intent of the Ordinance criteria. He said it was hard to make a decision one way or the other regarding the public interest criterion. He noted that the ZBA hadn't studied the public interest aspect of this project to the extent that the Town Council had. He said he personally wouldn't deny the application based on that criterion.

Chair Gooze said this was an area variance, and said regarding the hardship criterion that he believed there were special conditions of the property. He also said that regarding whether the benefits sought by the applicant could not be achieved by some other method reasonably feasible, the developer could possibly do some lot consolidation. But he said Mr. Garvey was looking to do something different than that. He said he felt the application met the hardship criterion.

Mr. Sievert said he didn't feel that consolidating lots would allow this development to accomplish what it was really striving to do, which was to provide a variety of alternatives to potential businesses of different sizes wishing to locate there. He noted that there was a financial benefit in providing this kind of flexibility. He also said as currently designed, the development would be pushed back from being very visible from Route 108, and said he thought this was the better way to go.

Mr. Gottsacker said the issue of possible lot consolidation was to him a Planning Board issue, not a ZBA issue.

Chair Gooze said it was pertinent because the ZBA was considering whether the applicant had feasible alternatives that could be pursued other than going for a variance.

Mr. Gottsacker read verbiage from the ZBA Handbook concerning hardship. He said this was a unique property, so it seemed to refer to exactly what the handbook was saying.

Mr. Welsh said he didn't necessarily see that this was a unique property, stating that lots of properties in Durham had wetlands.

Mr. Sievert said a uniqueness of the property was Stone Quarry Drive. He noted that the Town and the developer had identified the best place for the road for future development while providing access to the Public Works Department. He provided details on this, and on the fact that there had been a substantial amount of work, and a substantial, shared investment to get this road built.

There was discussion on what the factors were that could make a property unique. Mr. Sievert

stated again that it was the road design on this property that made it unique.

Chair Gooze said he thought that the placement of this property was unique.

Mr. McNitt said regarding the uniqueness issue, another angle was that this property comprised the whole Zoning district, so it was not unique, versus any other property in the district.

Chair Gooze said that could be another way of saying it was in fact unique. He also said this property had been purchased by the applicant before the Zoning Ordinance had changed, and said the fact that the developer was working with the Town to get something done seemed to be a good faith effort. He said he therefore did not feel this was a self-created hardship.

Mr. Sievert suggested that the fact that the Council hadn't approved water and sewer for the project in a timely manner also should carry some weight.

Chair Gooze said he felt the application met the substantial justice criterion, based on the developer's statement concerning this in his application.

Mr. Gottsacker said to him it was a substantial justice issue that the time delays concerning the project were to a large part caused by Town actions, including the TIF discussions. He said he thought it would be wrong to hold the applicant responsible for delays the Town had created.

Mr. Welsh said no developer was born with the right to have a TIF. He said the fact that fact that it took a long time to get the TIF was a factor, but only because the developer refused to build the project without a TIF.

There was discussion about this.

Mr. Sievert said it had not just been a question of waiting for the TIF to get the water and sewer extensions. He spoke about the cost issues involved in extending water and sewer to the site, noting among other things that the Public Works Department had looked into tying into the sewer system, but the cost was too much, even though the wastewater treatment facility was nearby.

Mr. Welsh questioned whether more than 4 years should be allowed to start a project when for whatever reason a Zoning Ordinance changed, because costs skyrocketed.

Chair Gooze noted that if the TIF district had not been involved and the 4 years had gone by, he would not be able to justify that this application met the variance criteria.

There was further discussion on this.

Mr. Sievert said he thought there was a combination of factors involved, which took the project beyond 4 years. He said he agreed that in general, if there was a development and costs skyrocketed or the market died down, that wasn't anybody's fault. But he said he felt there were extenuating circumstances in this instance.

Concerning the spirit and intent of the Ordinance, Chair Gooze said that given how and where

the property was situated, he felt this criterion was met.

Mr. Welsh asked if it might be a good idea to separate the wetland and side yard setback issues. He said he didn't feel the sideyard setback encroachments were a problem, and said it was a wetland setback issue.

There was discussion that 5 lots were impacted by the wetlands setback requirement. Mr. Garvey explained that there was a 50 ft wetland setback in the previous Zoning Ordinance, while now there was a 75 ft setback, which meant there was now a 25 ft encroachment. He also explained that topographically, the area in the western parts of lots 13, 14 and 15 was more level so it was better for development, although there was some wetland encroachment involved.

Mr. Gottsacker asked if there was any natural buffering there, and Mr. Sievert said there was in fact adequate buffering there. He also said there were options for wetlands buffering that the Planning Board could address.

Mr. Gottsacker suggested that the ZBA could say that a condition of approval of the variance request would be that the Planning Board should pay special attention to erosion control.

Mr. Sievert said the acreages that would be taken away from lots 13 and 14 because of the wetland setback requirements were better buildable areas, and said he therefore questioned why they should be taken away.

Chair Gooze said he liked the idea of putting a condition on the variance approval.

Mr. Sievert noted that lot 2 had an insignificant amount of wetlands.

Mr. McNitt read out loud the purpose statement for the Office Research Route 108 District, which was put in place as part of the new Zoning Ordinance soon after the subdivision application was approved.

Mr. Sievert said the present configuration of the subdivision met the spirit and intent of that statement. There was discussion on this between Mr. Sievert and Mr. McNitt, and there was also discussion on whether the statement fit with what one saw on Route 108.

Chair Gooze said he thought that granting the variance would meet the spirit and intent of the Ordinance overall.

Mr. Gottsacker said he didn't think 25 ft was that much of an encroachment.

Mr. Sievert noted that the Public Works facility was developed when there was a 50 ft wetland setback. He said he didn't think the wetland near it had been degraded, despite some pretty aggressive uses there, including storage of road salt.

Mr. Welsh said that for some reason, the wetland setback had been increased to 75 ft in the current Ordinance. He asked whether if this were waived now, doing so would be contrary to the spirit and intent of the Ordinance.

Mr. Sievert said it could be, but said most Board members were saying it would not be contrary to the spirit and intent of the Ordinance.

Mr. Welsh said he didn't remember the ZBA approving a variance concerning wetland issues since he had been on the Board.

Mr. Gottsacker suggested that the Board could impose a condition that there should be a focus on wetlands protection by the Planning Board.

Mr. Sievert noted again that there was a benefit of having other areas of the property that could be developed which weren't so steep. He provided details on this, and agreed that a condition could be put on the motion concerning wetlands protection.

***Jerry Gottsacker MOVED to approve the Application for Variance from Article XII, Section 175-54 of the Zoning Ordinance to build commercial buildings under 2004 Zoning setback requirements on a previously approved subdivision involving properties shown on Tax Map 11, Lots 8-1 through 8-15, and located on Valbeth Lane in the Office and Research Rte. 108 Zoning District, with the condition that the Planning Board focus on protecting the wetlands tied to lots 13 14 15, 1 and 2. Mike Sievert SECONDED the motion.***

Mr. McNitt said he didn't think alternatives had been explored, and also said he completely disagreed that the variance request met the spirit and intent of the Ordinance. He said the new Office Research Route 108 District was created with full knowledge that there was a subdivision there. He said the Planning Board as well as the Town Council had passed it that way and he questioned the right of the ZBA to override that.

Chair Gooze said that given the specific layout of the subdivision, and where it was, he felt the variance application met the spirit and intent of the Ordinance.

Mr. Sievert agreed.

***The motion PASSED 4-1, with Ted McNitt voting against it.***

- B. **PUBLIC HEARING** on a petition submitted by Beverly Lyndes, Durham, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a letter dated February 5, 2008, from Zoning Administrator, Thomas Johnson, regarding the designation of a property as a single family home with an accessory apartment as per Article III, Section 175-9(A)(13) which states that the Zoning Administrator shall "take the most conservative or restrictive approach in applying or interpreting these regulations." The property involved is shown on Tax Map 2, Lot 8-4, is located at 45 Madbury Road, and is in the Professional Office Zoning District.

Chair Gooze said he had visited the site, and other Board members said they had driven by.

Ms. Lyndes spoke before Board, and provided details on the property and surrounding area. She explained that because of the changes to the neighborhood involving student housing over

the past 26 years, it was now better suited to being a student rental property than single family housing.

Chair Gooze noted that this hearing involved an administrative decision, not a variance request to allow a duplex, and said what the Board needed was some facts on why this property was in fact a duplex.

Ms. Lyndes provided some history on her property. She said that duplexes had been allowed in the RA zone in the past, and said her dwelling had been rented out for the past 26 years, to 4 students. She noted that she had lived in the front of the house. She provided details on the layout of the house, and the fact that there was sufficient habitable floor area for 8 units, 4 in the front, and 4 in the back. She said there were separate entrances.

She explained that over the years the homes around had been sold and were now student housing. She said a duplex had been built behind her house three years ago, so she was now surrounded by student housing. She said she felt a family would not want to buy her duplex at this point, noting the noise on the road from students, especially on weekends. She then provided details on how she would be financially impacted if she could not sell her property as a duplex. She noted a letter of support from her neighbors.

Mr. Welsh asked Ms. Lyndes if she was proposing that the entire property would be student housing, and she said yes.

In response to questioning from Ms. Woodburn, Ms. Lyndes said each unit had its own utilities.

Chair Gooze asked if there was anyone who wished to speak for or against the application. Hearing no response, he closed the hearing.

He then noted that he had personal experience with a piece of property that was similar to what Ms. Lyndes was experiencing. He provided details on this. He also noted that the building permit for work done on Ms. Lyndes' property mentioned a proposed addition, but didn't say anything about a duplex. He said he couldn't state that this property was a duplex, having looked at it, and said he thought it was an accessory apartment. He said he understood the owner's problem, but also stated that the properties in this area wouldn't necessarily all be student rentals forever. He said that based on what was in front of the Board, he couldn't say the property was a duplex.

Ms. Woodburn noted that there wasn't a definition for duplex in the Ordinance. There was discussion on what the definition of duplex might have been in the past. Ms. Woodburn said there was some separation in terms of the utilities for the units, but she said the sticking points were that this hadn't been used as a duplex, and the owner hadn't asked for a duplex in the previous building permit.

Chair Gooze said the use was not allowed in the Zone, and said he didn't know how to get around that.

Ms. Woodburn said she thought the applicant would have to ask for a variance concerning this matter.

There was some discussion on this. Mr. McNitt noted that the issue was whether Mr. Johnson had made the right decision, and said the variance issue wasn't relevant now.

Board members agreed that Mr. Johnson had not made a mistake in his administrative decision.

***Jerry Gottsacker MOVED to deny the appeal of Administrative Decision because it does not meet the criteria for a duplex based on the 1982 Zoning Ordinance, and has been used as an accessory apartment since the addition was built. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.***

After brief discussion, the Board agreed to put off discussion on whether to rehear the Sidmore application, noting among other things that it would take some time to review the information that had been provided.

### **III. Approval of Minutes –**

January 8, 2008

***Ted McNitt MOVED to approve the January 8, 2008 Minutes as submitted. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.***

February 12, 2008

Page 3, 2<sup>nd</sup> full paragraph, should read “He spoke about the fact that his wife...”

Same paragraph, should read “Mill Pond Center”.

Page 5, 2<sup>nd</sup> paragraph from bottom, should read “He said he didn't know that they...”

Page 6, 2<sup>nd</sup> full paragraph, should read “..he understood the needs of the Mill Pond Center..”

Page 8, 5<sup>th</sup> paragraph from bottom, remove bolded words “at the southeast end”.

Page 10, 2<sup>nd</sup> full paragraph, should read “He said none of that had been included...”

Same paragraph, should read “He noted that in another application for this property, the ZBA.....”

Page 14, 3<sup>rd</sup> full paragraph, fix paragraph spacing.

Same page, 3<sup>rd</sup> paragraph from bottom, should read “He noted that in the construction process, an interior cement wall to the rear of the building was removed.

Page 15, top paragraph, should read “..would be left intact.”

Page 16, 4<sup>th</sup> paragraph from bottom, should read “..the Board had approved the porch, which..”

Page 17, 5<sup>th</sup> paragraph, should read “”..much of the house was already in it.”

Page 20, top paragraph, should read “..to hire a property manager to watch the property twice a day..”

Page 22, 1<sup>st</sup> full paragraph, should read “..what others had said. She said she was pleased that Mr. Crape....”

Same page, 3<sup>rd</sup> full paragraph, should read “Mike Everngam”.

Page 25, 2<sup>nd</sup> paragraph, should read “He also said the septic system .....”

Page 26, top paragraph, should read “..result in a greater density of homes.”

Page 28, 2<sup>nd</sup> paragraph from bottom, should read “He said the company was requesting a 32 sq ft.....”

Ms. Woodburn recused herself because she was not at the February 12<sup>th</sup> meeting, and Mr. Welsh was appointed to vote in her place.

***Jerry Gottsacker MOVED to approve the February 12, 2008 Minutes as amended. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.***

#### **IV. Other Business**

##### **A. Discussion of ZBA Rules & Regulations**

After discussion by the Board, the following proposed changes were made to the ZBA's Rules and Regulations:

Under C. Meetings, 4. Disqualification - change title to Recusal/Disqualification

Also, delete the sentence "The Chairperson shall make a brief announcement explaining the reason."

Add an additional paragraph to 4. "Recused members may make statements during the public hearing, on the same basis as other citizens.

Under C 5. Order of Business, Approval of Minutes should be listed after Public Hearings.

Under D. Applications/Decisions, 1 c., add North arrow to list of items that should be included in plans

Also, D. 3.b. should read "The Secretary of a person designated by the Chairperson shall read the public hearing notice and the letter of intent.

Also, D.3.k. should read "The Chairperson may place reasonable time limits on all speakers."

Also, D.5. should read "The Board shall make a decision in a timely manner consistent with NH RSA 676:3, and notify the applicant....."

Under E. Records, 1. Should read "Final written decisions will be placed on file and available for public inspection per NH RSA 676:3.

Also, E.2. Should read "Minutes of all meetings including names of Board members, persons appearing before the Board, and a brief description of the subject matter shall be open to public inspection as per NHRSA 91-A:2.

Board members agreed they would vote on these proposed changes at the next ZBA meeting.

##### **B. Next Regular Meeting of the Board: \*\*April 8, 2008**

Chair Gooze said he had attended the court session on the Stonemark case, and he provided some detail on this. He also said he would be going to court regarding the Palmer case.

#### **IV. Adjournment**

***Ted McNitt MOVED to adjourn the meeting. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.***

10:15 pm adjournment

Victoria Parmele, Minutes taker

---

Jerry Gottsacker, Secretary