

These minutes were approved at the January 13, 2009 meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, DECEMBER 9, 2008
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Jay Gooze; Jerry Gottsacker; Ruth Davis; Robbi Woodburn;
Carden Welsh (arrived late); Ed Harvey

MEMBERS ABSENT: Sean Starkey

OTHERS PRESENT:

I. Approval of Agenda

Chair Gooze said Mr. Harvey would be a voting member in place of Mr. Welsh.

Robbi Woodburn MOVED to approve the Agenda as submitted. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings:

- A. **PUBLIC HEARING** on a petition submitted by Frank T. Gutmann, Executor, Exeter, New Hampshire, on behalf of the Estate of Timothy B. Gutmann for an **APPLICATION FOR EQUITABLE WAIVER** from dimensional requirements of the rear yard setback for the construction of a deck and screen porch. The property involved is shown on Tax Map 8, Lot 1-62, is located at 9 Frost Drive, and is in the Residence B Zoning District.

Attorney Christopher Boldt represented the applicant. He first showed photos of the property in question, and said a significant ravine took up about the front 2/3 of the lot, which was a little less than an acre. He said this was probably why the house, which was built around 1970, was placed fairly far back on the lot. He showed the deck in question and the enclosed porch, and noted that based on the tax cards, there were two small concrete footings, for an older, smaller deck when the house was originally built.

He noted abutting properties that, along with the Gutmann property, were a part of the Wedgewood subdivision. He showed a view from the deck, toward the abutting properties, and said these houses could barely be seen. He noted that it was only the rear setback that was an issue.

Mr. Welsh arrived at the meeting. Chair Gooze said Mr. Harvey would remain as a voting member for this application. Attorney Boldt said he was fine with this.

Attorney Boldt said the closest corner of the deck to the property line was about 11 ft, and the furthest north corner was 15 ft. He said the closest corner of the house was only 27 ft from the

property line. He said all of these things were in the setback, which was why the equitable waiver relief was being requested.

He noted a hard copy of the 1983 tax card, which reflected that Attorney Malcolm McNeal had lived at the property at one time, and had sold it in 1977. He said Attorney McNeal had stated that the deck was not there at that time he lived there. He said this tax card indicated a smaller deck when the house was originally built, but said no one could verify that this had in fact been built.

Attorney Boldt said his client's son bought the property in 1994, and said this was important because the 1993 tax card indicated that the enclosed porch and a "stoop" measuring 16 ft by 12 ft was in existence at that time. He noted a seller's disclosure form dated 1994 that listed the porch as being there, and said this represented additional evidence that the porch existed before Mr. Gutmann purchased the property.

Attorney Boldt said a set of the slides being presented to the ZBA had been provided to Mr. Gottsacker for the record. He then went through the equitable waiver criteria under RSA 674:33-a. He said only c and d applied in this situation, and he provided details on this. He said because of this unique situation, with a corner of house included in the setback as well, there would be a monumental cost to correct the existing situation, with the corner of the house, all of the deck and portion of the porch within the setback.

Chair Gooze said his understanding was that the house itself was not an issue.

Attorney Boldt said Mr. Johnson had said it wasn't an issue because the house had been there since 1970. Attorney Boldt said to be on the safe side, he would like the Board to decide that the equitable waiver should be approved for the house as well. He then spoke in detail about why an equitable waiver from the dimensional requirements was justified.

He said this had been a condition that had existed at least from 1993, and probably substantially earlier. He said it had not been seen as detriment to the value of this property or others. He said there would be a significant cost to remove the structures, and said there wouldn't be any benefit to the public from forcing such a requirement. He said the property was out in the middle of the woods, and wouldn't be visible from adjoining properties. He said this had been the case for the many years it had been there. He said the applicant was therefore asking that the ZBA grant the equitable waiver.

Chair Gooze asked where things stood in terms of the current code being met.

Attorney Boldt said the only thing he was aware of was that, when originally constructed, the porch and deck were on 4 x 4s and the current code required 6 by 6's. He said there was nothing internally that Mr. Johnson had alerted him to.

Mr. Gutmann said it had been discovered that the cement bases underneath the vertical posts had been found to be of insufficient depth, so they would be replaced at the proper depth to meet the current code.

Attorney Boldt said the size of the posts and footings would be brought up to code. He said

everything else, to their knowledge, was up to code.

Mr. Gottsacker asked if the equitable waiver was being requested because the applicant wanted to redo the porch.

Attorney Boldt said it was because the applicant wanted to sell the property, and the buyer had asked a question that could not be answered.

Chair Gooze asked for clarification as to whether, although supporting posts would need to be larger to meet the code, this wouldn't be addressed now.

Mr. Gutmann said this was someone's responsibility, either the Gutmann estate or a buyer willing to meet it. He said at this point, he felt it was his responsibility to see that the building was safe.

Attorney Boldt said the applicant would be willing to do this, as a condition of the equitable waiver.

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

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

Chair Gooze said he had asked whether the code was met because he felt it was acceptable to put a condition concerning this on a motion to approve the equitable waiver. He said he felt the application met the required criteria as long as the public interest was protected, in that the structure would be safe and up to code.

He said if the applicant was willing to do this, he was in favor of granting the equitable waiver. He said over 10 years had passed, and said surrounding property values hadn't been impacted by the existing situation. He noted that the purpose of the tax card information was specifically to show that the deck and porch were there at that time.

Ms. Woodburn asked if Mr. Johnson had discussed the current structural integrity of the building.

Attorney Boldt said although there was no report on this, his understanding was that Mr. Johnson had questioned the depth of the footings.

Mr. Gutmann said Mr. Johnson had been at the property, but had not seen the digging to verify that the footings were in fact too shallow.

Chair Gooze said that if the applicant was willing to bring the supports for the deck and porch up to code and this solved the public interest issue, he didn't see why the equitable waiver shouldn't be granted.

After further discussion, Ms. Woodburn agreed that clearly, the application met all the equitable waiver requirements. Ms. Davis and Mr. Harvey agreed.

Ruth Davis MOVED to approve the application for equitable waiver from dimensional requirements of the rear yard setback for the construction of a deck and screen porch and house, for the property located at 9 Ffrost Drive, in the Residence B Zoning District, with the condition that the supports of the deck and screened porch will meet the current building code. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

- B. PUBLIC HEARING** on a petition submitted by Kenneth & Gayle Wade, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-53(A)(III)(C) of the Zoning Ordinance to permit the construction of an accessory building with an accessory dwelling unit on a lot. The property involved is shown on Tax Map 16, Lot 4-28, is located at 2 Sandy Brook Drive, and is in the Residence B Zoning District.

Mr. Wade spoke before the Board. He said they were asking for permission to put a detached structure on the property for his 82-year old mother in-law. He explained that they were concerned with her failing health, and also noted that she was very fearful of going into a nursing home.

He showed a rendition of what the home would look like. He said there was a single driveway that would be used for the new dwelling unit as well as the existing structure on the property. He also said there was a State approved septic system. He said there were 3.24 acres on the property. He said letters had been sent to the abutters, and three people had responded in favor of what was proposed. He provided copies of these letters to the Board.

Chair Gooze noted that this was the Residence B district, where the minimum lot size was 40,00 sf. He asked Mr. Wade why a 2-bedroom house was proposed.

Mr. Wade said there would be one bedroom and a study. He said the approximate sf would be 900-1000 sf, for a dwelling unit with one floor.

Chair Gooze asked Mr. Wade if he had thought about subdividing the property, given the minimum lot size for the district.

Mr. Wade said Mr. Johnson had said it would probably make sense to go for the variance, rather than subdividing the property.

Chair Gooze asked Mr. Wade why there couldn't instead be an attached accessory dwelling unit, which would not require a variance.

Mr. Wade said one reason was that his mother in law was very independent. He also said that aesthetically, an attached dwelling unit didn't make any sense, and would take away from the house as it now was. He said they wouldn't consider this approach.

Chair Gooze asked if the property was unique in terms of its size, compared with surrounding properties.

Mr. Wade said most of the properties in the area were about the same size.

Ms. Woodburn said if the Board did entertain granting this request, it would need a drawing that showed more information, such as the dimensions of the building footprint. Etc.. She said without this,

there was no control later on when the building was built. She provided details on this.

Chair Gooze said normally when a variance was granted, it was based on the plans submitted, and said the existing plans were vague in terms of the size, etc.

Ms. Davis received clarification that the road out to the new building would be paved.

Ms. Woodburn said the proposed location of the building put it right at the entry to the neighborhood. She asked Mr. Wade if he had considered putting the structure to the rear left hand corner of the lot.

Mr. Wade said this was considered, but said the surveyor had determined that this location would require another driveway, and would also require a lot of blasting. He said they were limited because there was so much ledge.

Ms. Davis asked Mr. Wade how he saw the property in terms of someone else potentially owning it in the future.

Mr. Wade said they hadn't thought about resale values, etc. But he said it was so important that they have the ability to take care of his mother in-law that they would sacrifice the resale value for this. He also said the thinking was that this accessory dwelling unit would be an asset for the right person, but he said it was realized that it would limit the number of buyers who would be interested in the property.

Chair Gooze noted that this was a use variance. He asked what made the property unique, compared to surrounding properties.

Mr. Wade said the property contained 3.24 acres. He also said the neighbors knew that it would be paramount to him that anything put there would be in keeping with, or an improvement to an already tasteful home.

Ms. Woodburn asked if other properties in the area had detached accessory dwelling units.

Mr. Wade said there were properties in the neighborhood where aging parents lived with their children. He said he was not sure if any of these were detached dwelling units, but said he didn't think so.

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

Carol Camp, 8 Sandy Brook Drive, said she was an immediate abutter, and also a licensed real estate agent. She said the Wades were wonderful neighbors and whatever they did would be tasteful. But she said she still felt that the variance, if granted would impact the neighborhood in a negative way.

She said this was not an attached dwelling unit that was proposed, and noted that she had an attached dwelling unit where an elder parent lived. She said when there was no longer a need for the in-law unit at the Wade property, the question was what other purpose it would serve. She said it would be quite an expensive undertaking to build the accessory structure, and said perhaps there was no intention to ever

rent it out. But she said if the property was sold, there was no guarantee that the new owner would not rent it.

Ms. Camp said her opinion, as a real estate agent, was that if the property was sold with the intention that it would never be a rental, the Wades would have little chance of recouping the cost of building the accessory structure. She said their property would not suit most buyers' needs unless they could rent it. She provided details on this, and said it would wind up selling for less than its assessed value. She said this would impact the value of surrounding properties.

Jodi Murphy, 5 Sandy Brook Drive, said her biggest concern was that 5 to 10 years down the road, the property in question would become a rental property. She said she felt this would depreciate the value of surrounding properties, and would also set a bad precedent for others who might not construct an accessory dwelling unit with the same taste that the Wades would. She also said renters wouldn't have the same vested interest in the neighborhood as non-renters did.

John Belcher, 7 Sandy Brook Drive, thanked Mr. Wade for his presentation. He said he understood his situation and the difficulties this presented, but said he still had to oppose the variances being requested. He said the first reason was that the uniqueness of the neighborhood was that there were large acreages that were single-family dwellings, and that the area was isolated.

He said people spent a lot of money to live there, and said it was a priority to keep this area as it presently was. He said building this detached dwelling unit would be for a temporary situation, and said at some point, it would become a vacant accessory building that could be used for student housing. He said from there, it would go down hill.

Mr. Belcher said if the integrity of the area was broken by allowing this structure, the value of the properties in the neighborhood would go down. He asked the Board not to let this happen. He noted that the Nature Conservancy property was located down the street, and said it was a huge benefit to the community. He said if accessory dwelling units were allowed in the area, it would go down hill, and a huge value to the Town would be lost.

Chair Gooze asked Mr. Wade if he would like to provide a rebuttal.

Mr. Wade said it seemed to be understood that the way the new building would look would not negatively impact the neighborhood. Regarding the rental issue, he asked what would prevent someone from coming in and using the existing house as a rental, or renting an accessory, attached unit on the house in the future.

He said he didn't understand why what he wanted to do with his property would be anything different than this. He also said he didn't think that others in that neighborhood could speak as to what a future buyer of their properties would do with them.

Mr. Belcher said the neighborhood, except for the Wade property, was governed by covenants that prohibited rentals. He said he realized this was beyond the Board's purview.

Mr. Wade said if that was true, he would be happy to say that anyone who bought his property couldn't

rent it out.

Chair Gooze said the Board couldn't approve something like that.

Mr. Belcher said in about 1988, a property manager from Massachusetts had bought the Sandy Brook development, and put covenants in place for all the properties there but the Wade property, which had been the first one to be developed. He said there was an ensuing bankruptcy. He said since the Wade property was the first property into the development, he felt the same policy should apply to it, although noting that he realized that the Board couldn't address this.

Ms. Davis said she thought there had been concern that the detached accessory dwelling unit could perhaps set a precedent for other properties in the area.

Mr. Belcher said the problem was that the covenants were a neighborhood enforced policy, and not a Town enforced policy. He said if the ZBA said the detached structure could be built, perhaps someone else could come in and ask for the same thing.

There was further discussion.

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

Mr. Welsh said the ZBA didn't normally grant variances unless a substantial plan was submitted. He said in this instance, there wasn't a plan, and said he didn't think the Board could grant a variance based on the information that had been presented.

Chair Gooze agreed. He suggested that the Board could go through the variance criteria, and if they decided they could approve the application, it could be continued until plans were provided. He said he would be willing to do this, but said it was the will of the Board as to how this should be handled.

The Board agreed to go through the variance criteria. It was noted that there were a lot of questions right now.

Mr. Welsh said he did not think the hardship criterion was met, stating that he didn't think that the fact that this was a large property was a unique setting.

Chair Gooze and Ms. Woodburn noted that they had asked about the other properties in the area, to get at the issue of whether there was in fact a unique setting. There was discussion.

Mr. Gottsacker said that regarding the hardship criterion "would not injure the public and private rights of others", the abutters were opposed to the application. He also noted that other properties in the neighborhood had covenants on them that said they would not be rented. He said he therefore felt that granting the variance would in fact injure the public and private rights of others.

There was discussion about the purpose of not allowing a detached accessory dwelling unit in this district. Ms. Woodburn said she thought the issue was the general purpose and intent of the Zoning

Ordinance, which was to protect the rights and property values of abutters. There was discussion that detached accessory dwelling units were not allowed in Residence A and Residence B districts, but were allowed in the Residence C district.

Chair Gooze noted that the property was larger than what was required in the Residence B district. He said there might be a case if the property in question was particularly large compared to others in the area, and if the accessory dwelling unit were placed back far enough where it wouldn't hurt anyone. But he said there was nothing unique about this property.

There was discussion about whether, if the accessory dwelling were allowed, it would run with the property in the future.

Mr. Gottsacker said a concern was that the covenant issue was not the domain of the ZBA. He said the homeowners who were covered by it could sue a property owner if they wanted to, so this was a private issue.

Ms. Woodburn said there was an argument to be made that legally, these covenants were not defensible. She said it was therefore correct that even though there were covenants in place, allowing this use in this instance could set a precedent for other properties.

Mr. Gottsacker said that if this house came up for re-sale with the detached accessory dwelling unit, he would definitely see it as a student rental, in order to cover the property taxes. He said this scenario was highly likely if the property were sold, and said a purpose of the Ordinance was to avoid that kind of situation.

Ms. Woodburn said if the variance application wasn't approved, the owner decided to build an in-law apartment, and that property was then sold, the new owner could rent it out. But she said that kind of attached dwelling unit would have a higher level of control as compared to the detached unit that was proposed.

Chair Gooze said that was a key reason why detached accessory dwelling units were not allowed in the Residence B district.

Mr. Gottsacker said putting the covenants aside, renting in that neighborhood didn't really work out financially, given the three unrelated rule. There was discussion. He said the key point was that if the accessory dwelling unit was attached, a lot more control was possible.

There was discussion that under the use variance criteria, the three hardship criteria were not met. It was noted that all three of these hardship criteria needed to be met, and that all five variance criteria needed to be met, in order for the application to be approved. The Board determined that despite this, they would continue to go through the variance criteria.

Ms. Woodburn said she felt that granting the variance would decrease the value of surrounding properties.

Chair Gooze agreed, stating that based on where the property was located, allowing this use would

make a difference in the neighborhood.

Mr. Gottsacker said there was a reason the Zoning Ordinance didn't allow detached accessory dwelling units, and said this related to the public interest.

Ms. Woodburn said while there would be substantial justice for the applicant if the variance was granted, there would not be substantial justice for the neighbors.

There was discussion about this, and there was also discussion that granting the variance would be against the spirit and intent of the Ordinance. Chair Gooze said the issue was the provisions of the Ordinance that were concerned with the general welfare of the community. He also said granting the variance would be contrary to the public interest, noting that this variance criterion went along with the spirit and intent of the ordinance these days.

He then said he didn't think the application met any of the variance criteria. He also said there were other ways to do this to get the same benefit. He then asked whether, based on seeing a plot plan, Board members would change their decision on the application.

Board members said having a plot plan would not cause them to change their decision.

Carden Welsh MOVED to deny the APPLICATION FOR VARIANCE from Article XIII, Section 175-53(A)(III)(C) of the Zoning Ordinance to permit the construction of an accessory building with an accessory dwelling unit on a lot for the property located at 2 Sandy Brook Drive, in the Residence B Zoning District, due to the inability to meet any of the five variance criteria required. Robbi Woodburn SECONDED the motion.

Chair Gooze said he felt there had been an adequate discussion on each of the five criteria to justify this decision.

The motion PASSED unanimously 5-0.

Mr. Wade said he had heard from the Board's discussion that if this were an attached dwelling unit that was proposed, this would be ok.

Board members explained that a variance was not needed for an attached accessory apartment. Chair Gooze noted that certain size criteria would still need to be met, and he said Mr. Johnson could perhaps help Mr. Wade with this.

Mr. Wade said he felt it was speculative to say that if there were an attached apartment, there would be a greater degree of control than if there was a detached apartment. He said he thought it depended on who was in charge of controlling the property, and said there would be controls in place if he rented the property.

Chair Gooze noted that Mr. Wade might not own the property in the future.

Break from 8:22 – 8:30 pm

- C. **PUBLIC HEARING** on a petition submitted by Bill Hersman, Xemed Holdings LLC, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIII, Section 175-59 and Article XXI, Section 175-111(G)(5&6) of the Zoning Ordinance to construct a new building within the building and wetland setbacks and to construct parking spaces in front of the newly expanded facility. The property involved is shown on Tax Map 2, Lot 8-3, is located at 16 Strafford Avenue, and is in the Professional Office Zoning District.

Mr. Hersman spoke before the Board, and first talked about his business, Xemed. He said 16 Strafford Ave was a unique location, given its proximity to the University, and said the property, which presently contained two structures, was about a half acre in size. He said there was student housing on several sides of the property, along with a sorority, a piece of conservation land, and the Kimball development.

He said he had appeared previously before the ZBA in order to get variances to allow him to build a second commercial building on his lot and to provide fewer parking spaces than was required for a commercial building. He said as part of its decision, the Board had recommended that there be no more than 75% coverage with impervious materials, that there be a minimum of 16 parking spaces, and that the Board's approval be conditional upon the granting of a conditional use permit by the Planning Board for the project. He noted that the property was not a part of the Professional Office district at that time, but now was a part of that district.

Mr. Hersman said his feeling now was that building the new building at the back of the lot and preserving the existing structure on the lot was not an ideal plan. He said he would instead like to merge his existing operations into a single structure. He explained that preserving the existing structure during construction would put some constraints on the project.

He said a 10,000 sf facility was proposed, but said there was some uncertainty because of the existence of ledge on the property. He also said he would like to have multiple entrance and exits from the building. He said he was proposing to have about 26 parking spaces, explaining that right now there were as many as 12-14 cars coming onto the site. He showed the Board a plan where parking was provided in front of and behind the building, and said handicap parking was proposed in the back, where the building entrance might be at grade level. He noted that he planned to provide permeable pavement for some of the parking spaces.

Mr. Hersman said the new structure would contain 3800 sf on both the first and second floors, and said a third floor, with a gable, would be somewhat smaller. He provided further details on the building, and showed a picture of a building that suggested what the architectural design of the building might look like.

He said one constraint which resulted in the need for variances was that with the proposed placement of the structure, there was no alternative than to put the new structure behind the existing structure. He said if the building were pushed all the way to the back of the lot, it would be penned in, and would not be aesthetic.

He said with the design proposed, rear parking alone wouldn't meet the requirements, and said a

variance was required to allow parking in the front of the lot. He noted that the existing facility on the property would eventually be demolished, and parking would also be put there.

There was discussion that the Ordinance called for a minimum of 16 parking spaces, and that Mr. Hersman had previously requested less than this, but now wanted 26 spaces. It was clarified that the issue now was not the number of spaces, but the placement; the fact that parking was being requested in the front of the property, and that the parking in the back was within the setback.

Mr. Hersman clarified that the variance for the rear setback would only be needed if there were 26 spaces, and he provided details on this. He said parking on the side and rear were allowed if there was a 6 ft solid screen and 5 ft of green space, and the use wasn't single family or duplex. He said presently, the two properties behind his lot on Madbury Court side were single family residences, but were rentals. He also noted that 14 Strafford Ave went all the way up to the setback, but had screening.

Mr. Hersman said the edge of the wetland was at the far edge of the Damambro property, and he spoke of it in relation to his property.

Ms. Woodburn noted that the parking area that was triggering the need for a variance because it was within the wetland buffer was proposed to be permeable pavement.

There was discussion that the commercial building that was planned was a permitted use in the Professional Office district, and that the use would be the same as what was occurring there now. Mr. Hersman provided details on this.

Chair Gooze asked why it had not previously been decided that this was a manufacturing use. There was discussion that the use was considered to be more like research and development than manufacturing.

Mr. Hersman said testing was done there, but said he was not scaling up to mass production of a product.

There was discussion that the proposed footprint for the building was considered to be compliant, and that it was the parking that was proposed that necessitated the variances.

Mr. Hersman said the first variance was to allow 16 parking spaces. His written submittal listed how the variance criteria were met, and he stated specifically to the Board that granting this variance would not be contrary to the spirit and intent of the Ordinance because it would be consistent with other parking on the street; would be an improvement over the present configuration; would be an aesthetically pleasing design; and would not create a substantial nuisance for abutters.

He said the second variance was to allow the utilization of areas within the front, rear and sideyard setbacks for parking. His application listed how the variance criteria were met, and he stated specifically to the Board that granting this variance would not be contrary to the spirit and intent of the Ordinance because it would be consistent with other parking on the street; would be an improvement over the present configuration; would be an aesthetically pleasing design; and would

not create a substantial nuisance for abutters.

Mr. Hersman said the third variance was requested to permit the proposed utilization of areas within the 75 ft wetland setback for parking. His application listed how the variance criteria were met, and he stated specifically to the Board that granting this variance would not be contrary to the spirit and intent of the Ordinance because it would be consistent with other paving on the adjacent property at 20 Strafford Ave; it would be 65 ft from the wetlands; it would be an engineered and aesthetically pleasing design; and it would not create substantial nuisance for abutters.

There was detailed discussion of whether the plans that had been presented to the Board were sufficient for the Board to make a decision. Chair Gooze noted that the building itself didn't need the variance, so Mr. Hersman could do what he wanted in terms of the building design that was arrived at.

There was discussion about the fact that more than one plan had been provided to the Board. Ms. Woodburn noting that now that she had heard the presentation, the only building plan Mr. Hersman could do was the one he had described. There was discussion that the building was allowed by right, as long as it met the code.

Mr. Welsh asked for clarification concerning the fact that potentially 3 plans had been provided.

Mr. Hersman apologized for any confusion this had caused, and said only one plan was workable. He said he had included the other one to show why it was inferior.

Ms. Woodburn said this hadn't been clear from the packets Board members had received.

Chair Gooze asked if the Board would be willing to discuss another plan, if the variances for the first plan weren't granted.

After further discussion, the Board agreed to go forward with hearing the application, focusing on Mr. Hersman's preferred plan, which he had he discussed at length with the Board.

Chair Gooze noted that the Zoning Ordinance hadn't yet defined "permeable paving". He then asked what the applicant's plan was for this.

Mr. Hersman said a friend who was an engineer had shown him an area in Rochester where this kind of paving had been put in. He said he thought it was great, and would like to use it for his project.

Mr. Welsh asked if there was drainage from Mr. Hersman's property into the wetland on the adjacent property, and Mr. Hersman said there was. He said there was a gentle slope toward the wetland.

Chair Gooze noted that permeable paving was not proposed for the sideyard setback area, and Ms. Woodburn said the area involved was less than 400 sf.

Chair Gooze asked if there were any members of the public who wished to speak in favor of the

application.

Steve Kimball, Pine Ledge Holdings, 20 Strafford Ave, said he had some questions. He first asked if this was an engineered plan that met all of the technical requirements for parking lots.

Mr. Hersman said it was a sketch done by the engineer, who was not certified to do this. He said the dimensional requirements had been looked at, but said the site hadn't been fully engineered yet. He noted that the site was pretty flat.

Mr. Kimball said in his recent experience with his own project, a number of things had come to light that impacted parking. He said he thought the layout described would be considered to have two parking areas, and handicap parking would therefore be required for each. He also said the site was required to have a loading zone 50 ft long, which could disrupt the parking areas that were planned. He said if the applicant's sketch that didn't take these things into consideration, the applicant might need more area to get 26 parking spaces.

Mr. Kimball noted that for his project, he had worked with the Conservation Commission to ensure that there was no new disturbance of the wetland. He said this project involved new disturbance, and asked if perhaps the parking could be designed so that it stayed outside of the wetland setback. He said he didn't know how hard the applicant had worked to find a plan that was compliant and also successful.

He said he liked the project, but he noted that the properties at 12 and 14 Strafford Ave were totally paved from lot line to lot line, and were really ugly. He said this look shouldn't be propagated, and said some green space and groundcover on Mr. Hersman's site would be attractive. He said he wasn't opposed to the idea of parking in front, but said he wasn't ready to say the variance was or was not a good idea. He said he didn't feel he had enough information.

Mr. Gottsacker asked if Mr. Kimball had had answers to these kinds of questions before he came before the ZBA regarding his own project.

Mr. Kimball noted that his variance requests had been denied, and his plan had then been reconfigured to achieve conformance without requiring variances. He asked what the hardship was in this instance. He also said that given the nature of the Professional Office district, he wasn't opposed to the project if it respected the setbacks.

Mr. Hersman said he hadn't thought of the 50 ft loading zone issue, but said he thought there was a stretch where this could be accommodated. He also said deleting one parking space wouldn't pose an enormous hardship, but said he felt the distance from the wetland made the variance request make sense. He also said the plan for the project had been considered over the past few years, and said he felt the information was therefore available to allow the ZBA to make a decision.

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

Concerning the variance requested to allow parking spaces at the front of the lot, Chair Gooze noted

that other properties in the area had on street parking.

Mr. Welsh asked whether they were saying that since this precedent had been set, the Board was willing to ignore the fact that the Zoning Ordinance didn't allow this.

Mr. Gottsacker said the whole goal of the ZBA was to judge each case on its merits, and not to set precedents. He said future applicants had no entitlement based on what was decided on in this case. There was detailed discussion on this.

Mr. Welsh said the applicant was using as evidence that a variance should be granted the fact that a variance was given to the property next to it.

Ms. Woodburn said that property was ugly, and said that was why the regulation concerning parking in front existed. But she said the applicant's plan showed that there was a proposed hedge in the front, and that the area that was not parking would be green space. She said that as a landscape architect she would find the application more acceptable if there was a condition that required this, and given the constraints of the site.

Chair Gooze said if the Board did decide to allow this, the Town engineer would have to approve the permeable paving.

Ms. Woodburn agreed that the paving should be designed to meet NH Stormwater Center standards, and that Town approvals would be required.

Chair Gooze asked if it would be a good idea to take out the last parking space. There was detailed discussion on this, and on ways to minimize impervious paving in the wetland buffer.

Mr. Welsh said taking the parking space out and making it green space would provide a buffer to the wetland, to address pollutants that would come off of the driveway.

Board members said there could be conditions of approval that the last parking space would be eliminated, and that incursion into the wetlands from the driveway would be minimized.

Ms. Woodburn said another condition should be that the Planning Board would have to approve a site plan before the variances went into effect. She noted that the things Mr. Kimball had discussed would be addressed by the Planning Board. She said she believed that the variance could be granted that evening, based on certain conditions. She said the dimensional information had been provided on the plan.

Mr. Gottsacker asked Mr. Hersman if removal of the parking space would be devastating to the project, and Mr. Hersman said it would not.

It was agreed to address the criteria for all of the variances together.

Chair Gooze noted that these were area variances being requested. He said that regarding whether there was another reasonably feasible method to do the parking, Mr. Hersman had said this was how

he wanted to do it. He said given the constraints of the property, a variance was required in order for him to do what he wanted regarding the parking.

Mr. Gottsacker said there were other feasible ways to do this, but said he would be willing to grant the variances with conditions.

There was discussion with Mr. Kimball regarding the wetland buffer issues with his property. Ms. Woodburn said in this case, with more than half the parking pavement permeable, this would act a certain kind of buffer. She said she thought this would work fine, and said there would only be a small incursion on the wetland.

Mr. Welsh said his concern with having a parking space there was that leaking oil could get into the wetland buffer. There was discussion that a properly designed permeable pavement system could address this.

Ms. Davis said the abutting property had to make a lot of modifications because of possible impacts into the wetland buffer, and said she was concerned about the equity issue.

Chair Gooze said he wasn't an engineer, but would like to see less incursion into the wetland buffer, although the incursion proposed was small. He said the incursion proposed was small.

Ms. Woodburn said asking for one less parking space, and minimizing the incursion was totally reasonable.

Chair Gooze said he would like to see that area protected more, but said he wouldn't mind keeping the parking space if it was all permeable pavement.

Mr. Welsh said he would like to see the space deleted. He said a lot of these little incursions were happening in Durham.

Board members agreed, and said the pavement in the incursion into the wetland buffer should also be permeable.

Chair Gooze said granting the variances would not decrease the value of surrounding properties.

Ms. Woodburn agreed.

Mr. Welsh noted the single-family property in the back that was rented.

Mr. Gottsacker said the owner had not come to speak at the public hearing.

Chair Gooze said his feeling was that anyone who would buy that house, even to use as a single family home, would not care whether there was an office building next door, given the other properties in that area.

Ms. Woodburn said lighting issues should be considered, given that lighting could impact nearby

residential properties. She noted that this was a Planning Board issue.

Chair Gooze said the Board could include a condition to direct the Planning Board to require directional lighting. There was further discussion.

Ms. Woodburn noted again that there should be a condition that the variances wouldn't go into effect until a plan was approved by the Planning Board.

There was discussion that there needed to be a condition concerning a hedge in the front of the property.

Ms. Woodburn said given that the property was in the Professional Office district, it made no difference whether there was a 5 ft or a 20 ft setback if there was screening.

Mr. Gottsacker said if there was a change in property values, it had occurred when this area was rezoned Professional Office.

Chair Gooze noted that the issue was the importance of protecting abutting single-family homes, and that the Madbury Court properties were not in the Professional Office district. But he said he didn't think granting the variance would affect the property values of surrounding properties, and said having the commercial building there might even be better than having an apartment building there.

Mr. Welsh said the one thing the Board could do to address impacts to the abutters in the back was requiring the 20 ft setback.

Chair Gooze noted that this abutter had been notified, and was not present. There was discussion.

Ms. Woodburn restated that it was the Professional Office nature of the property that impacted property values, not where the parking was located.

Chair Gooze said the public interest and spirit and intent of the Ordinance criteria went together. He said that regarding the public interest criterion, one issue was the importance of protecting the wetland, and he noted that the Board had discussed this. He said another issue relating to the public interest was the parking in front of the building. He said the Board had also discussed this, and the fact that a condition of approval of the application would be that the parking area would be screened by an appropriate hedge, something that would have to be approved by the Planning Board.

He said the hardship criteria were met in this instance, and noted that it was difficult not to meet these criteria with an area variance. He also said the substantial justice criterion was met.

Robbi Woodburn MOVED to approve the Application for Variances from Article XII, Section 175-54, Article XIII, Section 175-59 and Article XXI, Section 175-111(G)(5&6) of the Zoning Ordinance to construct a new building within the building and wetland setbacks and to construct parking spaces in front of the newly expanded facility, for the property located at 16 Strafford Avenue, in the Professional Office Zoning District, as per Plan #1, page 7 as submitted, with the following conditions:

- 1. the corner parking space within the wetland setback will be eliminated*
- 2. pervious pavement will be used in the wetland setback designed to UNH Stormwater Center standards, and approved by the Town Engineer*
- 3. the front parking area will be screened appropriately and approved by the Planning Board*
- 4. The parking lot lighting at the rear of the building shall be dark sky compliant, and there shall be no overspill of light onto any adjacent properties*
- 5. The variance won't be in effect until the Planning Board approves the Plan.*

Chair Gooze asked Mr. Hersman if he could work with these conditions, and Mr. Hersman said he could.

Chair Gooze summarized that those members of the Board voting yes on this motion felt that with these conditions met, all of the variance criteria were met.

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

III. Approval of Minutes – No minutes

IV. Other Business

- A. Chair Gooze said the Town's response regarding the Sidmore equitable waiver court case was available at the Town offices.
- B. Next Regular Meeting of the Board: ****January 13th, 2009**

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

Adjournment at 10: 05 pm

Victoria Parmele, Minutes taker