

*These minutes were approved at the August 11, 2009 meeting.*

**Durham Zoning Board of Adjustment  
Tuesday July 14, 2009  
Durham Town Hall - Council Chambers  
MINUTES**

**MEMBERS PRESENT:** Chair Jay Gooze; Jerry Gottsacker; Ruth Davis; Carden Welsh;  
Sean Starkey; Edmund Harvey

**MEMBERS ABSENT:** Robbi Woodburn

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

**I. Approval of Agenda**

Chair Gooze appointed Mr. Starkey as a voting member for approval of the Agenda.

*Sean Starkey MOVED to approve the Agenda as presented. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.*

**II. Public Hearings**

- A. PUBLIC HEARING** on a petition submitted by the Seacoast Repertory Theatre, Portsmouth, New Hampshire on behalf of Federal Savings Bank, Dover, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Zoning Ordinance to change the use of a property from single family land use with accessory buildings to commercial land use of art center/theater/dormitory/community center. 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 appointed Mr. Starkey as a voting member for this application. He then noted that this was a use variance request.

**Stephanie Shaheen** explained that the Seacoast Repertory Theatre was a potential purchaser of the former Mill Pond Center property. She said they currently operated a facility in Kittery to houses actors and construction sets, and with the purchase, would be able to do these things as well as expand their existing youth programming. She said another possible use of the property was to create partnerships with other local organizations.

She said the variances were needed to allow their actors to live in what was considered a single family residence, for 40-50 day periods, a time period that reflected their rehearsal and performance schedules.

Ms. Shaheen explained that they had initially submitted a request for a variance to allow dormitory

use, but said it might make sense to withdraw this and instead request a variance from the 3 unrelated rule in order to allow 9 people to live there as well as a property manager, who could be considered the family of one in the house. She said she understood the concerns that if the dormitory use was approved and the property changed hands, it could ultimately change into student housing. She also noted that it would be more expensive to make the house into a dormitory, and provided some details on this.

Chair Gooze said he was concerned about the idea of changing the variance request when the notice for the current variance request had already gone out. He said the ZBA didn't normally do this kind of thing unless there were very minor changes to an application involved.

He asked Code Administrator/Enforcement Officer Tom Johnson whether there were other things the applicants needed based on what was allowed on the property currently.

Mr. Johnson said all the proposed uses in the current application represented a change of use. He explained that this was because originally, the site plan approval for the house was for single family use, with two accessory apartments and a theatre group. He said because there wouldn't be a family living there, the other uses still had to be considered in the variance request.

Ms. Shaheen said she realized that they might need to withdraw the present application, re-apply and to re-notify the abutters if the application changed. But she asked if the other uses (accessory apartments and theatre group use) would still have to be considered if the single family use remained, and the variance requested was from the 3 unrelated rule. She said her understanding was that there was presently approval for the theatre and the community arts center in the barn, and for the accessory apartments.

Mr. Johnson said initially, the variances for the accessory apartment were for a barn. He said on the site walk, he had also found an accessory apartment in the house that there was no record for, noting that it was apparently created by previous owners and was to be used by a property manager. He said he would have to ready through the old records regarding this.

There was further discussion about whether a changed variance application could be heard that evening without re-notifying the abutters.

Mr. Johnson said the notice for application for the dormitory, if approved, would allow 10 occupants or more. He said that was a worst case scenario, but said if the Board rejected that concept and kept the single family use, it could decide on the number of occupants it was comfortable with.

Mr. Gottsacker said he was concerned that there were already letters from some abutters saying the application wasn't properly notified. He said now they had come to the meeting prepared to comment regarding the existing application, and were being told that there was another application. He said this seemed unfair to the abutters. Mr. Welsh and Ms. Davis agreed.

Mr. Starkey said if the dormitory use was approved, the applicants could have more than 10 people living in the house. He noted their concern about having a commercial use that would have to

comply on a commercial basis. He said if they wanted to avoid that, they would have to re-apply for a variance.

Chair Gooze said the Board wanted to be fair to everyone. He said he hadn't ever seen a change in a variance application like the one being asked for right now.

Mr. Johnson suggested that the Board could hear the pros and cons of the dormitory application because there were members of the public present. He said they all could hear the pros and cons of the application, and then toward the end of the discussion, Ms. Shaheen might want to withdraw the dormitory aspect and re-apply.

Ms. Shaheen said that would be very helpful.

Mr. Gottsacker said if the applicants didn't really want the present application, this seemed like a large use of time to no end.

There was further discussion on whether the applicants should withdraw their existing variance application and submit a new one, and if perhaps the Board could continue the meeting so the new application could be heard within a few weeks. There was also further discussion on whether the other uses listed on the application were actually changes in use. Chair Gooze said this needed to be looked at more carefully.

Mr. Johnson said it was originally a single family home with accessory uses. He said these uses would not necessarily be accessory uses to the single family home anymore.

Chair Gooze said he thought this had been the approval for that property, and Mr. Johnson said that wasn't his reading of the history of the property.

Mr. Gottsacker said what the applicants were proposing, going from single family with accessory uses to art center/theatre/dormitory/community center was a big change of use. He asked if this was more a Planning Board issue.

Mr. Johnson noting that the Planning Board couldn't review what was proposed until the ZBA had addressed the variance issues.

Chair Gooze said his feeling was that Seacoast Repertory Theatre should come in and ask for what they wanted. He said he would have no problem meeting sooner than a month from now in order to allow this. There was discussion as to whether two weeks would allow them enough time to prepare.

After discussion on this, Board members said they were available for a meeting in two weeks.

Mr. Gottsacker received clarification from Ms. Shaheen that the dormitory approach was not the Seacoast Repertory Theatre's preferred approach, because it represented a major change of use and there were cost considerations.

Ms. Shaheen said that was a consideration among others. She also said a best case scenario from an operating standpoint would be to have dormitory approval because they could fit 10-12 actors, noting that sometimes there were bigger shows and 40-50 actors who needed to be housed.

But she also said from an operating standpoint, they could do what they needed to do if they could house up to 9 people in the single family house, in which case they would need a variance from the 3 unrelated rule. She also explained that there was a signed purchase and sale agreement with Federal Savings Bank that was contingent upon approval of the variance, and that the variance would be granted to the bank. She said the purchase would not be feasible if they weren't able to house the actors.

Chair Gooze said if the Board was going to hear a revised application in two weeks, it would need some clarification on what uses had been allowed on the property.

There was discussion about whether there would be a new application or the same application in two weeks. It was noted that it wouldn't be possible to hear a new variance application until the following month because of the noticing requirements.

Ms. Shaheen said she couldn't guarantee that the bank would allow them that additional time.

Mr. Gottsacker said the problem with just continuing the case was that they still had the problem of not notifying the public of the different variance requests. Mr. Johnson said everyone had been notified but there was one card that wasn't signed.

Mr. Starkey said he didn't think they could continue this anyway because it would be a completely separate application.

Mr. Johnson said he did not recommend withdrawing the application that evening. He suggested continuing it and said this would give the applicants time to consider perhaps withdrawing the dormitory aspect and retaining the single family designation.

After further detailed discussion on how to proceed, Ms. Shaheen suggested hearing from the community about the implications of the proposed dormitory use. She said if it was clear there was not enough support for this and that a variance wouldn't be approved, they could come back and ask for the 3 unrelated variance. She said inaction at this point would be worse than proceeding. The Board agreed to therefore go ahead with the existing variance request.

Ms. Shaheen reviewed the use variance criteria and how they were met with the application. She said there would be no decrease in the value of surrounding properties, and also said granting the variance would not be contrary to the public interest. She noted that there would be onsite property management so they would be running a tight ship. She also said the Seacoast Repertory Theatre's core mission was to continue to serve young people, through theater workshops and classes.

She said there would be a hardship if the variance was not received because this would mean they would be unable to purchase the property. She said substantial justice would be done in granting the variance because historically the property had been used as a community art center. She provided

some history on this and noted that it was used that way when the original purchase occurred.

She said granting the variance would not be contrary to the spirit and intent of the Ordinance. He said residence in the house by the actors would be temporary, and also said the other uses reflected uses for which variances had already been approved, and which had been conducted on the property as recently as six months ago.

Mr. Starkey asked what the plans were for the septic system if there was a dormitory style dwelling, noting that from what the previous owner had indicated, there would be a significant cost involved in upgrading the system.

Ms. Shaheen said they anticipated that the system would have to be upgraded.

Mr. Welsh asked how much parking was available, and Mr. Johnson said in 1980-85, there was talk about 25 spaces being developed, along with an additional area reserved for 66 more spaces, for a total capacity of 94 spaces. He said it was a gravel lot, and also said there would not be parking on the street.

Mr. Gottsacker said there should be less of a parking issue than previously, and Ms. Shaheen said that was correct, providing some details on this. She said the third story theatre would not be used for any more than 49 spaces at one time.

Chair Gooze asked for details on the idea of having a summer camp on the site, noting abutter concerns about the property a few years back regarding outdoor wedding receptions there.

Ms. Shaheen said they didn't anticipate having accessory tents and major special events on the grounds. She said there would be one or two fundraising events held in the main house during the winter months. She also said it was likely that there would be no more than 30 kids at the two week day camp that would be held on the property in July-August, and said it could be fewer than that based on space constraints. She said it would be held during normal business hours, outside in front of the barn on sunny days, and in the barn on rainy days.

She said they also anticipated offering ballet and other dance, yoga, etc. workshops for kids in the barn structure.

There was discussion on how many actors would live in the house, with Mr. Welsh asking Ms. Shaheen if she would have a problem with the ZBA placing a limit on this number. She said they would need to be able to house at least 9 actors in the house. Mr. Welsh then asked about a possible limit on the number of children at the day camp, and Ms. Shaheen said she couldn't see it working for them if fewer than 30 children could be on the site for classes, etc.

Chair Gooze asked those members of the public in favor of granting the variance to come forward to speak.

**Jennifer McKiernan** said she was on the Board of Trustees for the Seacoast Repertory Theatre. She said she would love to see the property stay involved with the performing arts and youth

programming, and said having the Seacoast Repertory Theatre there would bring some new life into Town. She said this would be a fabulous fit for the Town, and asked that the ZBA approve the variance request.

**Susan Roman, 16 Littlehale Road**, said her daughter had had the benefit of youth programming with the Seacoast Repertory Theatre. She said this programming was run amazingly well and provided great opportunities for children who been involved with it. She said she supported this use in Durham, and noted that she had been saddened when the Mill Pond Center had closed. She said this was also a great opportunity to have a place in Durham for things like poetry reading, small play groups and youth theatre, and said she hoped the Board would approve the variance request.

**Trudy Brown** said she was a former member of the Board of Directors of the Seacoast Repertory Theatre and had a son who had attended workshops held by the organization. She said the workshops were well supervised, and also said the actors who would live at the house worked hard and kept long hours. She said she hoped the Board would support the variance request by this amazing organization that wanted to come to Durham.

**Doug Clark, Sandy Brook Drive**, said he was present as a resident and a parent. He noted that a third of the kids at the Seacoast Repertory Theatre camp right now were from Durham. He said the Town desperately needed economic development and commercial diversity, and also said he was very much against sprawl. He said Durham needed a more vibrant downtown core, and said what was proposed by the applicant fit with this. He said it would be a good use for that particular property, and would be good for the community in a broader sense.

**Chrissy Henderson, Pendexter Road**, said she was very much looking forward to her kids attending workshops held by the Seacoast Repertory Theatre if the variance request was approved. She said Durham needed after school activities desperately, and said as a past business owner in Town and a Board member of the former Mill Pond Center, she could see that this would be a win-win situation.

**Christine Carpenter, Bayview Road**, said she had a daughter in the Seacoast Repertory Theatre program. She said she supported what others had said. She noted that she had grown up in Whitefield, NH which had a summer stock theatre. She said 20-40 dedicated actors lived there during the summer months, and said this had always been a positive experience for the town.

**Dennis Meadows, Laurel Lane**, said he was very much in favor of what the Seacoast Repertory Theatre was proposing. He said Durham desperately needs opportunities for citizens to come together in way that built community. He said the Mill Pond Center had been able to provide this kind of opportunity, and said it would be wonderful if residents could have that kind of opportunity again.

**Tom Christie, Dame Road**, asked whether the property was currently allowed as an arts center and a theater.

Mr. Johnson said both uses were part of an approval in the 1980's. He said the use for a community center was also allowed, and explained that the variance was needed because all of these uses were

tied to the present single family use.

Chair Gooze said the ZBA wouldn't approve a variance regarding the property without a condition that only these particular uses would be allowed. He then asked members of the public who wished to speak against the application to come forward.

**Paul Dubois, 28 Newmarket Road**, noted that he had seen the apartments in the barn, and would like to know what would happen with them. He also said that with the two most recent owners of the property, there was not a residential use of the property. He then asked whether a variance approval would go only to the Seacoast Repertory Theatre, or would continue on with future owners of the property.

Mr. Dubois described the use of the property for weddings in recent years, including the appearance of an auxiliary tent at times. He said these weddings had been used to subsidize the arts endeavors of the Mill Pond Center, and he spoke in detail about his opinion that Durham didn't really support the arts. He said he hoped the Seacoast Repertory Theatre had a better experience than the previous owner had. He questioned the idea of housing temporary residents on the property, but said he accepted the fact that the applicants had said this would not be a problem.

Mr. Dubois said he didn't see the hardship for the applicants, stating that if they weren't able to get the variance, there were other properties that were better suited to their purposes, and which wouldn't have the problem of being in a residential area. He said it wasn't fair to expect the neighbors to bail out the bank that currently owned the property. He also said that the ZBA had always been against spot zoning, but said if it approved the variance, it was allowing a commercial property in a residential zone.

**Ed Tillinghast, Mill Pond Road**, said he also supported the arts. He said his concern was the commercialization of that land, and that if this proposed use of the property by the Seacoast Repertory Theatre didn't work out, the commercial use of the property would be irreversible. He said he would be ok with granting the variance if it was granted specifically to this organization, and if their use of the property dissolved, the variance would dissolve as well.

Chair Gooze asked whether if the use were to remain as single family residential, but still with the increased number of occupants, Mr. Tillinghast would still be against this.

Mr. Tillinghast said he would not be against this.

Chair Gooze noted a letter from resident Jeff Hiller, who was about to speak before the Board. He said the letter stated that some of the abutters had not been notified properly about the variance application. Chair Gooze said the notification policy had been followed correctly.

**Jeff Hiller, 6 Laurel Lane** said he would love to see the Seacoast Repertory Theatre be a part of the neighborhood, but said he was concerned about how they were approaching this. He said he was the closest abutter to the farmhouse, where the majority of the issues existed. He said his property line was 100 ft. from the farmhouse, and his house was 250 ft from it.

He said he was concerned about the negative financial impact the dormitory, or whatever it would be called, would have on his property. He said he was concerned about the large number of people who would be there, and the transiency of this occupancy. He said he believed that his rights to reasonably use his own property would be infringed upon as a result of this. He said while he had bought his property some years back knowing there was an arts center nearby with a theatre and accessory apartments that was nothing like what was being contemplated now for the site.

Mr. Hiller said he had read through some previous ZBA minutes, and had found that the Town was particularly sensitive to multi-person occupancy situations, especially when the word dormitory was involved. He read from some of these minutes, and said a line that summed up everything for him was: "At some point, the line needed to be drawn..."

He said he took issue specifically with the idea of the farmhouse being occupied by 9 or more people on a temporary basis, and provided details on this. He then reviewed his perspective that the use variance criteria were not met by the application.

He said common sense dictated that having a large number of people living in the farmhouse would impact his property values. He said there would be noise generated by residents and guests, and also said the garage where sets would be constructed was located about 320 ft from his house. He said there would be a fair amount of noise generated by this as well.

Mr. Hiller said there would be 24-7 activity at certain times including the summer months. He Mr. Hiller said that when he bought his property, the Mill Pond Center was a factor in terms of property values. He said if the use there was expanded, this would limit his pool of potential buyers. And said if there was one penny of loss in value, this meant that the variance criterion was not met.

Mr. Hiller said 98% of Durham residents wouldn't benefit from having the Seacoast Repertory Theatre in Durham. He said the purpose of what they were proposing was not to bring the arts to Durham, but to bring actors to stay in Durham in order to allow the Theatre to expand its operations and revenues.

He said granting the variance would be against the public interest, noting first that if the property reverted to non-property exempt status, the taxes paid to the Town for the property would perhaps triple. He suggested that the farmhouse be allowed to go back to a single family residence, or become a bed and breakfast or elderly housing, which would benefit the Town more in financial terms than the use that was now proposed.

Mr. Hiller said that regarding the hardship criterion, the applicants should work within the current variances that had been approved in terms of the uses that were allowed. He said it wasn't fair for them to ask for more than that, and ask the neighbors to give up their property rights.

He asked if they planned to rent out any of the three apartments in addition to having at least 9 unrelated individuals on the property, coming and going on the property all day.

Mr. Hiller said if the variance was granted, substantial justice would not be done to the abutters. He said it would open the door to 24-7 activity for most of the year, and said he was concerned that



transient tenants would have no vested interest in the community. He said substantial justice had already been done with the many variances that had already been granted for this property, and said perhaps it was time to recognize that the use of the property should revert back to residential use.

He said granting the variance would make the property substantially more valuable to the Seacoast Repertory Theatre, but he said the abutters would be stuck with the consequences. He said the intent of the variance request was profit motivated, and he provided details on his reason for saying this.

Regarding the spirit and intent of the Ordinance criterion, Mr. Hiller read through the Table of Uses in the Zoning Ordinance concerning the uses that were not allowed in the RB district, including dormitories. He noted the variances that had already been granted for the property, and said he would argue that it was not the original owner's intent that there not be someone living in the farmhouse as a residence. He said if they could roll back the clock, he thought it would be very hard to justify getting the variance the property had today.

Mr. Hiller said the intent of the Ordinance was to protect the rights and property values of abutters, and not to change the essential character of the neighborhood. He said the character of his backyard would be changed if he had 15 neighbors 100 ft from his property line.

He noted that for a use variance, there were additional hardship criteria that had to be met. He said regarding the criterion "A zoning restriction as applied to the property interferes with their reasonable use of the property, considering the unique setting of the property in its environment", that the property already had many variances through catering to the needs of the owners without totally disregarding the needs of the abutters. He said another variance would erode the remaining right of the abutters in order to give the nonprofit a blank check to do what they wanted.

He said this property was only unique because of previous actions by the town, working together with the performing arts entities.

He said that regarding the criterion "No fair and substantial relationship existed between the general purposes of the zoning ordinance and the specific restriction on the property", that the purpose of the Zoning Ordinance was quite clear, and was to protect the property values of abutters in the RB District. He said the restriction on a dormitory was therefore certainly reasonable.

He said regarding the final hardship criterion "The variance would not injure the public or private rights of others" that the 5<sup>th</sup> Amendment made it clear that property owners' rights could not be diminished without just compensation. He said if one walked the Mill Pond property, they might see his side that it would be a tragedy if this was turned into a dormitory like facility. He said the Town should preserve the non-commercialization of that property, and said granting the variance would be commercializing it.

He said the variance request was all about money, and he asked the Board to deny any further variance requests. He said they did not meet the letter of the law or the spirit of the law. He spoke further on this, and expressed his skepticism that an arts center didn't fit in a residential district. He said there had not yet been a successful operating model there.

Mr. Hiller said he would gladly work with the applicants to allow the uses that were currently allowed, but he asked that no additional variances be approved. He said he supported the arts, but said for him to endorse this would indirectly be sacrificing tens of thousands of dollars of property value, and sacrificing the right to the reasonable use of his property.

**Sharon Griffin, 28 Newmarket Road**, said she supported the points that Mr. Hiller had made. She said she would love to have an arts group in Durham in a commercial center but not in a residential neighborhood. She said people who bought a house in a residential zone, expected that the Town would uphold the Zoning Ordinance. She said over the years, there had been a slow encroachment by the owners of this property, and additional liberties had been taken. She said she was not convinced that some of these things had been permitted, and provided details on this.

Ms. Griffin said multi-unit residences were not even allowed in commercial zones in Durham, and also said several uses planned for the property were not allowed by the Zoning Ordinance. She said there were twelve different variances they would want to have to run the Theatre. She urged that the ZBA deny the application. She said her property values had suffered, along with her rights to enjoy her property. She described some of the noise issues with the Mill Pond Center property in the past, noting that she worked at home and that the noise had impacted her. She said she was concerned that there would be outdoor performances by the Seacoast Repertory Theatre.

She said the rules had been bent to often, and said none of this had worked for Durham.

There was discussion that the uses Ms. Griffin was speaking about were approved uses.

**Dennis Meadows** said he lived close to the Mill Pond Center, and said bringing commercial activity to that area was of grave concern to him. He noted that 60% of the land on the Mill Pond Center property was in permanent conservation easement, so there was no possibility of building anything else there.

Regarding the idea of a dormitory, he said he was concerned that it might be used by students in the future. He said he hoped that if the ZBA approved the variance application that it would make it clear that it was permitting short term residential use that was affiliated with the theatre, and that someone buying the property would not inherit that.

Ms. Shaheen said she appreciated hearing from the abutters. She said her organization had tried to be as transparent as possible in what it was proposing, but she noted that there were some issues they didn't have the answers to yet. She said they had tried to provide their best perspective on what they hoped to accomplish in Durham, and said they did not make a profit with their work. She provided details on this.

She noted that the original owner of the property, Mrs. Roberts, was hopeful and encouraging about the idea of the Seacoast Repertory Theatre taking the property over. She said Mr. Hiller's comment about the intent of the original owner concerning the property was therefore not a fair statement.

Chair Gooze asked if the Seacoast Repertory Theatre was planning to have a full time property

manager when there were actors at the facility.

Ms. Shaheen said yes, and said she was hopeful that the property manager would reside in the accessory apartment connected to the main house.

Ms. Davis asked how long actors would stay at the house, and Ms. Shaheen said they would be there for about 60 days. Ms. Davis asked how much of the time the actors would be on the property, and Ms. Shaheen said during the summer months, they would get home late. Ms. Davis asked if the dormitories would be occupied year round, and Ms. Shaheen said yes.

Mr. Starkey asked if the plan was to use the accessory apartments in the barn for housing as well, and Ms. Shaheen said yes. She said there would be room for 4 more people.

Ms. Davis asked if all of the people living there would be temporary residents or if there would be some permanent residents as well on the site. Ms. Shaheen said they didn't anticipate having any permanent residents, although stating that there might be actors appearing in multiple shows who might get to use the apartments.

In response to a question from Mr. Gottsacker, Ms. Shaheen provided details on cost issues involved with upgrading the farmhouse to a dormitory to meet fire and safety codes.

There was discussion that if there were going to be 9 people, there was not a code that had to be met regarding sprinkling the building, but once the number of people reached 10, there were such code requirements. Mr. Johnson said there would definitely be code upgrades required with 9 people, but said this wasn't a Zoning Board issue.

Mr. Starkey asked if the accessory apartments would be rented to anyone, and Ms. Shaheen said they didn't plan to do so. She said the way the variance read, they would be able to rent the accessory apartments, but said that was not their plan.

Chair Gooze asked whether, if the variance was granted, the accessory apartments in the barn would be beyond the Board's concerns.

Mr. Johnson said if there was a dormitory and the single family occupancy no longer existed, the accessory apartments would no longer exist either and would not be allowed.

There was discussion that if there were only 9 units in the house, it would stay a single family house and not a dormitory and the barn units would stay as accessory apartments.

Ms. Davis said the Board was being asked to consider changing the house from single family residence to a dormitory.

Chair Gooze said they were being asked to change the buildings to commercial land use, unless the Board decided to grant the variance with a condition that it be kept as a single family house.

Mr. Dubois said he would like to see where the permits were for the various uses, stating that he had

not been able to find them. He said this should be public information. He said in 1995, the owners had tried to put an apartment in the barn and were denied.

Mr. Hiller noted the issue of the actors coming back rather late in the evening, and the fact that they would be less than 275 ft from his house when they did so. He said he had routinely heard cars coming and going from the Mill Pond Center at night. He also said he was concerned about the septic system and its proximity to his house and his well.

***Sean Starkey MOVED to close the public hearing. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.***

Chair Gooze said he reserved the right to re-open the public hearing if the Board had a specific question it needed to ask.

He said the ZBA would need to hold an additional meeting. After discussion with the Board and other applicants at the meeting, it was agreed that Agenda Item II B and E would be continued to July 28<sup>th</sup>.

#### **Break from 8:59 - 9:07 pm**

Chair Gooze said he thought the uses other than the dormitory use were already there, and the only issue the Board was really dealing with here was the number of people who were going to be living in the house. He said the applicants were asking for a commercial use in a residential zone, and he noted that while the ZBA normally didn't spot zone, if it felt the property's uniqueness warranted it, it could be done.

Mr. Gottsacker said the Minutes from the ZBA meeting of April 16, 1980 indicated that the uses on the property were allowed uses at that time, and only became nonconforming when the new Zoning Ordinance came into effect in 2000.

Chair Gooze said the Board could decide how it wanted to handle the commercial/non-commercial issue, and whether a new application would be needed for a variance from the 3 unrelated rule. He suggested that for the sake of argument, the Board say it was going to be a commercial use, and then go through the variance criteria, while considering that they were going to allow a certain number of people to live there.

Mr. Welsh suggested that the Board should instead go through the criteria assuming that the house was not going to be a commercial use.

Mr. Starkey said he would prefer to do this not as a commercial use.

Mr. Johnson said a commercial use was a nonresidential use, and said this property involved residential use with a lot of accessory uses.

Chair Gooze said from what he had heard that evening, whether the use was commercial or not, there were abutters who were against what was proposed. He said if the Board wanted to approach

this as a residential use, they could let the chips fall where they might.

Mr. Gottsacker agreed, and said the issue was largely about the number of people who would be living there.

There was discussion that the Board could address the idea of having up to 9 people in the main house, not including the property manager's apartment, without getting into the dormitory idea.

The Board next reviewed the variance criteria. Regarding the impact on the value of surrounding properties, Chair Gooze said the Board didn't have definite proof one way or the other on this, so he thought this criterion was met. Others Board members agreed.

Regarding the public interest criterion, Chair Gooze said he was having trouble with this criterion because of what the abutters had said about people coming back to the property late at night, with the resulting noise. He said he therefore needed to be convinced regarding this criterion. He noted that if it was the Planning Board considering this, they could think of ways to ameliorate the situation.

Mr. Gottsacker said he was a landlord who owned the property next door, as a rental property. He said he couldn't control the number of guests his tenants had, and questioned how this could be controlled on the property now being considered.

Mr. Johnson said the applicants would have to go before the Planning Board, so some of these things, like professional property management, could be handled there. He provided details on how this had been done with other properties.

Chair Gooze said this still didn't solve the problem of people coming home late at night.

Mr. Gottsacker said regardless of what the Planning Board said, the ZBA had to deal with the variance criteria.

Mr. Starkey said if the Mill Pond Center property re-opened as a full-time theater, there could be people coming in and out at night as well, who could be creating noise.

Mr. Gottsacker said when the tent issue had come up, those kinds of issues had come up.

Mr. Starkey said there could have been a noise issue prior to what was proposed now.

Chair Gooze said if there was the right property management and it was strictly enforced, he could see how the situation could be controlled. He said he would be ok with the ZBA giving direction to the Planning Board regarding its great concern about the noise issue.

Mr. Starkey said the ZBA had been comfortable in the past with the idea of putting on a condition that there be a full time property manager, for multi-unit buildings.

Ms. Davis said she live next door to a property where there were people coming and going, but she

said it was very quiet because they knew they were being watched carefully. She considered whether it would be possible to manage the Mill Pond Center property so it wasn't really noisy at night.

Mr. Welsh asked if there was anything else Board members were worried about in regard to the public interest criterion.

Mr. Gottsacker said a concern of his was that the variance would travel with the land. He said it could be argued that the Seacoast Repertory Theatre's use of the property could fail just as the previous arts uses of the property had failed, and that if this happened, the property would then pass into other hands.

There was discussion that the Board could put some kind of limit on a variance approval regarding this, and it was suggested that they could say that the variance would only hold as long as the owner was a nonprofit. Mr. Johnson suggested there could be a condition that the occupants could not generate income for the property. There was discussion on this.

Regarding the issue of hardship, and the idea of a unique setting of the property, Chair Gooze said he had no problem seeing how this criterion was met because of the nature of the property itself, - its size and where it was located. He also noted said the arts center use of the property was already approved.

Mr. Gottsacker said he had a problem with the issue of whether granting the variance would injure the public or private rights of others. He said the abutters had clearly said it would injure their rights.

Chair Gooze said that regarding the noise issue, there had been a theatre there before, and said he didn't know how much more noise there would be if the variance request was approved.

Mr. Welsh said noise at 1:00 in the morning was worse than noise at 11:00 pm. He also said the issue of injury of the rights of others should be looked at in regard to this variance only, and there shouldn't be a comparison to noise issues on the property in the past.

There was discussion that there might be performances on the property now as well, and that the Board could perhaps put limits on this.

There was also discussion about putting possible restrictions on outdoor use of the property. Mr. Starkey said this felt like more of a Planning Board issue.

Regarding the issue of whether granting the variance would alter the essential character of the locality, Chair Gooze said it would not because there had already been an arts center on the property. He noted that there was also the issue of whether granting the variance would threaten the public health, safety or welfare.

Regarding the substantial justice criterion, Chair Gooze said this went with the public interest criterion. Regarding the spirit and intent of the Ordinance, he said the applicants were asking for a

variance to allow more people to live in the house. He said the question was whether the property was big enough to support the use, and if the neighbors could be protected enough from it.

Ms. Davis said a question for Board members to ask themselves was how they each would feel if this use was proposed near their houses.

Mr. Starkey said when he moved to Durham, which was a University town, there were certain things that he therefore expected to find there. He then said it was not that he thought the abutters didn't have a reasonable case, but he said he would be more concerned if the property all of a sudden was changing into an arts center.

Mr. Gottsacker said he agreed with what Mr. Starkey had said regarding living in a University town.

Mr. Welsh said the farmhouse was 250 ft from Mr. Hiller's house. He said that was almost a football field, which was a lot.

Ms. Davis said her neighbor's house was 35 ft away from her house, and provided temporary student housing. She said they were extremely quiet because there was a lot of scrutiny of the property. She said she wondered if there could be some leverage concerning this, in some situations.

The Board discussed possible conditions to put on a motion to approve the application, after which Chair Gooze said these conditions would make him comfortable with voting to approve it.

Ms. Davis asked if the Board could address other uses like weddings and outdoor concerts, and there was discussion about whether a proposed condition regarding the Planning Board mitigating abutter concerns would cover this.

Chair Gooze noted that the Planning Board would have the opportunity to address all of these issues.

***Sean Starkey MOVED to accept a Variance from Article XII, Section 175-53 of the Zoning Ordinance to change the use of the property shown on Tax Map 6, Lot 9-8, located at 50 Newmarket Road in the Residence B Zoning District from single family land use with accessory buildings to commercial land use of art center/theater/ dormitory/community center as presented; with the exception that the designation of the property remain residential, and with the following conditions:***

- ***Maximum of nine residents in the main house***
- ***Live in, onsite full time property manager in the apartment in the main house***
- ***Limit use of all living space on property to non-rental, nonprofit arts use only***
- ***ZBA requests that the Planning Board focus on mitigating abutters' concerns***

There was discussion that the day camp use of the property would be something for the Planning Board to discuss.

***Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.***

- B. PUBLIC HEARING** on a petition submitted by Slania Enterprises Inc., Durham, New Hampshire for an **APPLICATION FOR APPEAL FROM AN ADMINISTRATIVE DECISION** of the Planning Board as per RSA 676:5(III) regarding the approval of a Site Plan Application to build a new three-story, mixed use building. The property involved is shown on Tax Map 4, Lot 8-0, is located at 6 Jenkins Court, and is in the Central Business Zoning District.

Continued to July 28, 2009

- C. PUBLIC HEARING** on a petition submitted by Ursula R. Hoene, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 and Article XX, Section 175-109(C)(2) of the Zoning Ordinance to build an accessory apartment in a single family home in excess of 25% of the total floor space of the dwelling in which it is located. The property involved is shown on Tax Map 9, Lot 15-0, is located at 281 Mast Road, and is in the Multi-Unit Dwelling/Office Research Zoning District.

Mr. Harvey was appointed as a voting member for this application.

David Potter, represented his family before the Board. He noted that architect Shannon Alter was present. He said he and his wife were retiring, and had been working on a plan for the property for about a year or so, which was the culmination of years of effort and planning.

He said part of the plan was to have Ursula Hoene, his wife's mother, move into the annex of the house, which would be increased in size to make it sufficient as an accessible apartment for her, on one floor. He said the area of the existing old office, which was 26 ft by 25 ft, would be opened up into a dining area, a living room area, a small kitchen and a staircase going upstairs.

Mr. Potter said the adaptation of the attic for an added bedroom and a half bath would ensure that Ursula would be able to stay in her own home in years to come with the help of a caregiver if necessary. He explained that the stairway going upstairs would allow access upstairs to such a caregiver, or to guests.

He said an accessory apartment was allowed to be 25% of the square footage of a house, but said the expansion would put them at 30%, which was 267 sf over the 25% limit. He said that limit made sense to prevent an accessory apartment from dominating a structure, but said clearly in this instance, the addition on a house of 4800 sf would not in any way dominate it.

Mr. Potter went through the variance criteria. He said approving the variance would not result in a decrease in abutters' property values because none of the abutters could even see the house. He noted that the property contained 15 acres. He said the property would never be subdivided due to extensive wetlands and the family's commitment to the property.

He said granting the variance would not be contrary to the public interest, either from granting the variance or in the final effect to the Town, except for an increase in taxes as a result of the increase in the assessed value of the property as a result of the expansion.



He said denial of the variance would be a hardship in preventing the family from being able to provide Ursula with adequate space and having the ability to house a caregiver for her in the future.

Mr. Potter said there would be substantial justice in granting the variance by allowing this family, which had lived in Durham for 45 years, to have the ability to allow Ursula to remain on the property through her senior years and be able to entertain an occasional guest.

He said allowing the variance would not be contrary to the spirit and intent of the Ordinance, because the accessory apartment would not become the prominent structure, and would not house multiple families. He said they wished to keep the property in the family, and said eventually the apartment would house Ursula's granddaughter, who would become the barn manager for the horse facility on the property,

Ms. Davis asked for details on the comment that the property would not be subdivided.

Mr. Potter said although it was not in the deed, the family would continue to own the property and would not subdivide it in the future. He also noted that there was 7 acres of either wetland or wetland buffer on the property.

Mr. Johnson noted that family had already gone before the Planning Board and received approval for a horse farm and equestrian breeding facility on the property. He said it would be located directly across from the UNH equestrian facility. He noted that the MUDOR zone allowed apartment buildings, but said the house would still be a single family home, and would not be visible from the road.

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

***Carden Welsh MOVED to close the Public Hearing. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.***

There was agreement on the Board that all of the variance criteria were met with this application. Ms. Davis noted that in the past, the Board had tended to make sure that accessory apartments stayed to the size limit, but she said this was not a dense neighborhood, and said it seemed like an allowable situation to grant a variance for.

Mr. Harvey agreed that especially because of the area of Town the property was located in, the difference between 25% and 30% was minimal.

***Carden Welsh MOVED to grant Variances from Article II, Section 175-7 and Article XX, Section 175-109(C)(2) of the Zoning Ordinance to build an accessory apartment in a single family home that exceeds 25% of the total floor space of the dwelling in which it is located by a maximum of 300 SF, for the property shown on Tax Map 9, Lot 15-0, located at 281 Mast Road in the Multi-Unit Dwelling/Office Research Zoning District. Ed Harvey SECONDED the***

*motion, and it PASSED unanimously 5-0.*

- D. PUBLIC HEARING** on a petition submitted by Larry & Mary Singelais, Bow, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance to build a single-car garage and a rear addition within the sideyard and shoreland setbacks. The property involved is shown on Tax Map 12, Lot 2-3, is located at 239 Piscataqua Road, and is in the Residence C Zoning District.

Chair Gooze appointed Mr. Starkey as a voting member.

Larry Singelais spoke before the Board, and said he and his wife were planning to move into their home, which they had owned for 3 years, on August 15<sup>th</sup>. He explained that they had gotten the necessary septic approval from NHDES, and were working with NH Soils Consultants (NHSC) to get DES shoreland approval. He said they expected to get this within the next 30 days. He noted that NHSC had indicated that with the addition, 13% of the site would be impervious, and that 20% was allowed by NHDES.

He said they would like to add a single car attached garage to the left side of the house, as well as a rear expansion of the building, in order to create an accessible one way entry into the main house. He said this would allow his wife to drive into the garage and go directly into the house. He noted that she had trouble going up steps, especially when transporting groceries, because she had issues with circulation in her legs, which had needed surgery the past year.

Mr. Singelais explained that there was an existing 10 ft addition on the back of the house that had an extremely flat roof, and said they were having trouble with drainage off of it. He said they would like to do an addition/expansion to the rear of the house, with a steeper roof pitch, which would extend the rest of the house out 10 ft and would provide more space, including the entry into the house from the garage. He noted that presently, they entered the house from the old garage using an internal set of stairs. He explained that the garage floor sat lower than the first floor of the home.

There was discussion that the proposed garage would extend the house to within 30-35 ft of the side property line.

There was discussion that additional decking on the house was proposed. Mr. Singelais explained that it would go out no further than where the steps currently were.

Mr. Starkey received clarification that the change in the pitch of the roof would be extended across the entire back of the house, to address rainwater issues. He asked if there would be gutters, and Mr. Singelais said this could be done, noting that there were gutters on the front of the house.

Mr. Welsh received clarification from Mr. Johnson that the additional roof area would not be going any closer to the shoreland than the existing house, which was already totally within the Town's shoreland setback.

Mr. Singelais said there was currently 11% of impervious surface, or 4173 sf, and said with the addition, there would be 13%, which represented an additional 1230 sf.

Regarding the driveway, Mr. Singelais said the curb cut had already been there but was illegal. He said he had filed a permit with NHDOT to get approval for the driveway, and said while it had not been approved yet, NHDOT had indicated that it had no issues with it. He said there was already drainage in place for the driveway.

Chair Gooze noted that NHDOT looked at driveways (in this instance on Route 4) from a traffic and safety standpoint.

Mr. Singelais said the driveway design proposed would be a lot safer for him and his wife. He then went through how the variance criteria were met with the application.

He said there would be no decrease in the value of surrounding properties, stating that the proposed improvements to the property and septic system would improve the structure and therefore increase property values in the neighborhood.

He said granting the variance would not be contrary to the public interest because elimination of the illegal circular driveway would improve safety for those entering and exiting the property as well as cars traveling on Route 4. He said the improved septic system would promote public health and safety, and said this and the proposed addition would create minimum disturbance in the shoreland area.

Mr. Singelais said denial of the variance would be a hardship because of the inability to create an accessible entry into the building without the addition. He said because of the width of the residence and the shoreline and sideyard setback requirements, there was no other location that was suited for the accessible one level entry. He also said denial of the variance would impact his ability to sustain employment by preventing the operation of an owner occupied business and operations, which was permitted in the RC district

Chair Gooze noted that the property had previously been approved for a home occupation, and there was discussion.

Mary Singelais said she was excited about the idea of having everything on one level, and not having to go up and down the stairs.

Chair Gooze asked Mr. Singelais if he was ok with the Board imposing a condition that there be a gutter on the roof on the back of the house as part of approving the variance application, and Mr. Singelais said yes.

There was discussion with Mr. Singelais about the construction of the deck, and it was made clear that there would be spaces between the boards to allow water to drain through.

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

***Carden Welsh MOVED to close the Public Hearing. Sean Starkey SECONDED the motion and it PASSED unanimously 5-0.***

Chair Gooze summarized that Board members were in favor of granting the variances because they met the variance criteria. But he said there should be a condition as part of the approval that the roof in back of the house would be guttered.

Mr. Starkey said he would like to see something more than guttering to address runoff from the roof.

Chair Gooze re-opened the Public Hearing, and asked architect Nick Isaak to speak on this issue.

Mr. Isaak said there could be a gravel spillway for the gutter to come into and a drywell to keep erosion from happening. He noted that this would occur about 100 ft from the shore, so if there was significant stormwater and the drywell overflowed, there would still be quite a bit of lawn to drain through.

There was discussion about how the condition should read.

***Sean Starkey MOVED to grant Variances from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance to build a single-car garage and a rear addition within the sideyard and shoreland setbacks as per the plans submitted, with the condition that proper drainage be provided off the rear of the house, for the property shown on Tax Map 12, Lot 2-3, located at 239 Piscataqua Road in the Residence C Zoning District.***

Mr. Johnson said the drainage issue would be addressed as part of getting the building permit.

***Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.***

- E. PUBLIC HEARING** on a petition submitted by Ionian Properties LLC, Dover, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-62 of the Zoning Ordinance for the redevelopment of the parcel with a new 4-story, mixed use, commercial/residential building within the wetland setbacks. The property involved is shown on Tax Map 2, Lot 12-11, is located at 10 Pettee Brook Lane, and is in the Central Business Zoning District.

Continued until July 28, 2009

### **III. Approval of Minutes – May 12, 2009**

Mr. Harvey was appointed a voting member for the Minutes.

Throughout Minutes, include comma for numbers - example, page 7, 2<sup>nd</sup> paragraph from bottom,

should read 6,234 sf instead of 6234 sf.

Page 1, it should say "Ms. Davis arrived at the meeting." under Approval of the Agenda

Page 2, 4<sup>th</sup> paragraph, should read ".. benefit the community by attracting business.."

Page 6, 3<sup>rd</sup> full paragraph, there should be a close quotes at the end.

Page 21, 5<sup>th</sup> paragraph from bottom, should read "Chair Gooze asked why 175-41 (F) (2)

Also, 7<sup>th</sup> paragraph from bottom, should read Section 175 (41)(1&2)

Page 23, 5<sup>th</sup> paragraph, should read "Chair Gooze asked for details..."

Page 28, 3<sup>rd</sup> paragraph, should read "..including the fact that the right applicant was not..."

***Carden Welsh MOVED to approve the May 12, 2009 Minutes. Ed Harvey SECONDED the motion, and it PASSED unanimously 5-0.***

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

##### **A. Rules and Regulations**

Chair Gooze explained that the Board needed to vote to change its Rules of Procedure, concerning the role of alternates. He said they should be changed to read: "... alternates are encouraged to attend all board meetings, and would be permitted to participate in discussions and vote only when designated by the Chair person to fill the vacancy...."

He explained that the reason for this was the concern that since the alternate was not a voting member, discussion was inappropriate.

***Carden Welsh MOVED to change the Rules of Procedure to read: "... alternates are encouraged to attend all board meetings, and would be permitted to participate in discussions and vote only when designated by the Chair person to fill the vacancy....." Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.***

Mr. Johnson said the inspection of the landscaping restoration for the Sidmore property had taken place on July 1<sup>st</sup>, and said he, the NHDES representative, a representative from Eckman Engineering, and Town Engineer Dave Cedarholm attended. Restoration needed by July 1<sup>st</sup>.

Chair Gooze said he thought the landscaping that had been installed looked fantastic. There was discussion that it looked very similar to the landscape drawing the Board had approved, and was exactly what they were looking for.

He asked if the Sidmores had withdrawn their pending court case, and Mr. Johnson said he believed they had, but would check on this.

Mr. Johnson noted that there would be Municipal Law Lecture series addressing among other things the 5 variance criteria, and said he would get Board members the dates for this.

##### **B. Next Regular Meeting of the Board: \*\*August 11, 2009**

## V. Adjournment

Chair Gooze said the continued ZBA meeting would take place on July 28, 2009, and would include Agenda Items II B and II E.

*Carden Welsh MOVED to continue the ZBA meeting to July 28, 2009 at 7 pm. Ed Harvey SECONDED the motion, and it PASSED unanimously 5-0.*

Adjournment at 10:45 pm

Victoria Parmele, Minutes taker

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Jerry Gottsacker, Secretary