

These minutes were approved at the January 12, 2010 meeting.

**Durham Zoning Board Agenda
Tuesday November 10, 2009
Durham Town Hall - Council Chambers
7:00 P.M.**

MEMBERS PRESENT: Chair Jay Gooze; Secretary Jerry Gottsacker; Carden Welsh; Edmund Harvey; Chris Mulligan

MEMBERS ABSENT: Vice Chair Robbi Woodburn; Ruth Davis; Sean Starkey

OTHERS PRESENT Tom Johnson, Director of Zoning, Building Codes and Health; Victoria Parmele, Minutes taker

I. Approval of Agenda

Chair Gooze called the meeting to order at 7:0 pm.

Jerry Gottsacker MOVED to approve the Agenda. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings

- A. PUBLIC HEARING** on a petition submitted by Hillary C. Scott, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to place an automated generator within the 10-foot sideyard setback. The property involved is shown on Tax Map 1, Lot 5-12, is located at 20 Davis Avenue, and is in the Residence A Zoning District.

Ms. Scott said she wished to put an automated generator on the side of the property. She noted pictures that had been included in the applications, and said she wanted to put the generator there because it would be near the gas intake that came to the house from the street. She said alternate locations would diminish the aesthetics of the property, and would also require quite a bit of piping.

She explained that the generator needed to be 5 ft from the house, and also needed to be 10 ft from the gas meter, which put it within 10 ft of the property line, which was the reason for the variance request.

Ms. Scott noted a picture she had provided that showed the subdivision her property was part of. She showed the 50 ft strip of land between 20 and 22 Davis Ave., and said this 50 ft strip was not to be construed as a building lot. She said she therefore didn't think impinging on the 10 ft buffer was a concern, since the 50 strip could not be built on anyway.

She said the foundation for the generator would be crushed stone, so there would be no cement foundation for it. She noted that she would like to be able to take the generator with her if she moved.

Mr. Welsh asked if one would be able to see the generator from the road, and Ms. Scott said no, and said one would have to come on to the property to be able to see it. She provided details on this, and also said it was a relatively quiet generator.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application.

Paula Roy, 22 Davis Avenue, said her bedroom overlooked the 50 ft buffer area near where the generator would be, and said this application was not a problem for her at all. She said the Davis Ave. neighborhood was usually one of the first to lose electricity, and the last to get it back. She said she would appreciate being able to take a warm shower at Ms. Scott's house, and absolutely supported her application.

She noted that there were already many generators scattered throughout the neighborhood, so this generator wouldn't result in extra noise during an outage.

Joseph Michael, 14 Davis Avenue, said he had a generator, and said Ms. Scott was doing the smart thing in getting one. He said they all provided for the neighborhood when things were tough, and noted that for 3 years in a row there had been power outages. He said he supported the application and said Ms. Scott was a great asset to the neighborhood.

Armida Geiger, 13 Davis Avenue, said she was in favor of approving the variance to allow the generator. She said Ms. Scott had done extensive landscaping on her property, and said she didn't think she would put something in that would detract from the property.

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

Chair Gooze said he had no problem with granting this application. He said he felt it met all of the variance criteria.

Other Board members agreed.

Jerry Gottsacker MOVED to approve the APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to place an automated generator within the 10-foot sideyard setback, as provided in the diagrams submitted with the application, for the property shown on Tax Map 1, Lot 5-12, and located at 20 Davis Avenue in the Residence A Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

B. PUBLIC RE-HEARING on an August 11, 2009, Zoning Board of Adjustment denial of a petition submitted by Stan Pasay, Pasay Properties LLC, Newfields, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IX, Section 175-28(D), Article XII, Section 175-53 and Section 175-54 of the Zoning Ordinance to build two additional 3-unit apartment buildings on a non-conforming lot where there is currently a 5-unit building. The property involved is shown on Tax Map 18, Lot 3-2, is located at 257 Newmarket Road, and is in the Rural Zoning District.

Chair Gooze said although this was called a rehearing, and some of the materials used were from the previous hearing, it was really a new hearing. He noted that at the last meeting, the Board had asked Mr. Johnson what the legal occupancy limit was right now with what was on the property.

Mr. Johnson said the original building was approved back in the 1970's so it predated the 3 unrelated rule and the 4 unrelated rule. He said determining the occupancy therefore fell back to the habitable floor area table.

He said based on the assessing square footage, and taking the gross sf times the definition of habitable floor area using the 70% factor for an unmeasured building, this came out to roughly 33 occupants. He said if instead, one took the living space and factored in habitable floor area, it came out to about 29 occupants.

Mr. Johnson said as part of the original subdivision, when this property was broken off from the main farm, there was a general floor plan, but he said it was general in nature and didn't have specific dimensions. He said if this application was approved, as a condition of approval he could measure the existing units.

Mr. Gottsacker said these occupancy numbers were similar to the numbers in the request for rehearing.

Chair Gooze said they were therefore talking about somewhere around 30 occupants. He asked how many people were living there now.

Mr. Pasay said 14 people were living in the apartment building now. He said he was requesting a variance to allow 2 three unit apartment buildings to be constructed behind the existing 5 unit building on the property. He said there was a need for student housing in Durham, and said his proposal would accommodate the needs of students, the University, the Town's tax base, as well as his own needs.

He said the intent was to construct the two buildings in a way that was unobtrusive as possible to the abutters. He said he would not be removing trees, and said this was a secluded area, with limited visibility from the road or abutters. He noted that he intend to be as green as possible in constructing the buildings and provided details on this. He said the intent was to make them as efficient, economical and useful as possible to the Town

and the University.

Mr. Welsh said his understanding was that at the last meeting, the Board had said it would entertain something that kept the number of eligible tenants in tact. But he said what was proposed went up to 38 occupants.

Mr. Johnson noted that wasn't a new application, and was a rehearing of the original application.

Mr. Welsh said he believed the point Mr. Starkey had made at the last meeting was that there was an option to keep the same number of people with the new housing, so that was new information, and Mr. Starkey had therefore thought they should rehear the application.

Mr. Harvey said in looking at the Minutes of the meeting, he thought what Mr. Starkey was getting at was that the 14 occupants should stay the way it was in that building, but that in talking about a total of 38 requested for all the buildings now, it wasn't that big of an extension, given what was legally allowed in the original building.

Chair Gooze said that was his understanding as well.

There was discussion.

Chair Gooze said in the Board's previous discussion, he didn't think they had really taken into consideration what the total number of occupants could be.

There was further detailed discussion on. Mr. Welsh said the Minutes were unclear on this. He noted that they indicated that Mr. Starkey had said that if there was no increase in the allowed occupancy, he would be willing to rehear the application. Mr. Welsh said the allowed occupancy was 30.

Chair Gooze said the Board could decide to limit the occupants to 30, or whatever they decided was the legal amount. He said he didn't think this issue was a problem in terms of rehearing the application.

Mr. Welsh said he just wanted to clarify that it was different than what he had expected.

Mr. Pasay went through how the variance criteria were met. He said there would be no decrease in the value of surrounding properties as a result of granting the variance. He said there was a conservation area abutting two sides, a residence on the third side and a residence across the road on the fourth side. He said all residences were completely out of the line of sight due to the heavily wooded properties. He noted that entrance and egress from the proposed construction would use the same driveway.

He said the project in all probability would not be visible from the road. He also said the architectural design and landscape plan and layout of the project would result in a very

attractive housing complex. He said he maintained rigid guidelines in the renting application process, which weeded out students still interested in the party scene. He said he had been successful in attracting those students seeking a quiet, non party environment, who respected the neighbors and his property.

Mr. Pasay noted concern at the previous meeting about traffic and noise that could contribute to perceived lost of value to the Todd property. He noted that the variance for a multi-unit building had been in place for years. He also said his tenants mainly used the Wildcat Transit system, and also said the Todd driveway was over 100 ft long, and buried in the trees. He said Route 108 was a busy road, which detracted from the rural designation, and said adding an additional 20-30 cars from his property over the course of the day would be virtually imperceptible.

Mr. Pasay said there would be an increase in the value of his own property with the new buildings he was proposing. He then noted commercial properties in the vicinity of his property, many of which he said were highly visible and not attractive. He said they contributed little or nothing to enhance the rural feeling of the area.

He said his proposal addressed the needs of Durham, the University, the students and himself in an inconspicuous, visually inoffensive manner, compared to this commercial development. He said he would argue that the wonderful rural feeling that was important to retain existed between the Rowing Center and the Town of Durham.

He said Mr. Todd's house was located 125 ft through thick woods, and said the house was lined with a wall of well established evergreen trees. He said all these things contributed to both year round visual privacy and noise abatement. But he said he was sensitive to Mr. Todd's concerns.

Concerning the public interest criterion, Mr. Pasay said his proposed development would not infringe on anyone's privacy or enjoyment of their properties. He also said the variance would allow the Town to accommodate the student housing shortage, and would increase the Town's tax base. He questioned whether the public interest would be better served if a comparable project was approved in an already congested area, where it would be far more visible and would add to the congestion.

Mr. Pasay said he acquired the property with the intention of developing it further as he approached retirement. He noted the current economic conditions, and his upcoming retirement, and said he had never considered the possibility that he couldn't expand the property, with the amount of land associated with it.

He said there was a shortage of housing for students in Durham, and said the variance would allow him to maximize the potential of the property for his personal financial benefit during difficult financial times while also benefiting the Town financially and the University. He provided details on this, noting among other things that he spent a great deal of time at the property and said the addition of the two new buildings would further justify that presence. He said he planned to incorporate an office in one of the new

buildings, which would encourage maintenance and control of the property.

Mr. Pasay said the variance being requested was consistent with how the property had been used for years. He said the only difference was that it would be collectively improved, and with a greater sense of management due to the addition of the office.

He proposed that a provision be written into the variance that would require a scheduled professional nightly security service to patrol the property several times during the evening. He said this service should be required to be activated if there were two calls for a disturbance of the peace or other activities that warranted Police Department involvement.

He said the ZBA could determine the frequency of incidents that would trigger this, and said this would provide relief to any complaints from abutters that were not appropriately addressed by future owners of the property. He then provided other details on methods to be employed to discourage inappropriate behavior, and said he would retain the quite, unobtrusive atmosphere that had characterized the property for years.

Mr. Pasay suggested that those aspects of his lease the Board felt could address concerns could be written into the new variance, to be protected and preserved with subsequent owners. As an example, he said while the existing building could legally house 28-30 students by current landlord standards, student occupancy could be restricted to 14, as he had done for the past 6 years. He also said there could be an overall restriction to 38 students in the variance. He suggested that there could also be something concerning security added to the variance.

Chair Gooze asked Mr. Pasay what he meant in saying he would be amenable to having some kind of professional security service that might be activated.

Mr. Pasay said he was extremely sensitive to the concerns of any abutters regarding maintaining their quality of life. He said this would be maintained as long as he owned the property, and he noted that this had been the case since he had owned the property.

He said the question was raised about subsequent owners of the property, and suggested that the variance approval could reflect the potential for the Board to enforce the need for a security management service to be employed if activities kick up that warranted the police coming out to the property. He provided details on this, and said if there were no complaints from abutters, life would go on. But he said requiring the landowner to get a security service would provide relief for the abutters if there was a problem.

Mr. Pasay said he qualified this in the context of having students. He said if he was applying for regular apartment housing, he didn't know if there would be these kinds of concerns. He suggested that there could be verbiage in the variance approval that two disturbances on the property over a period of time would activated the security force.

He said he was approaching this from a business standpoint, trying to keep his profit

margin suitable so there was enough income and he didn't have to skimp on the building construction. He spoke about the green elements he was proposing to include.

He then noted that there was the potential to house 30 people in the existing building, and he only had 14 people living there. He said he was not looking to max out the density, and wanted it to be a quality building for kids. He said the residents didn't pay for heat, his rents were lower, and there was one person per room.

Mr. Pasay said in the interest of keeping his expenses down, the security service would only kick in if this were warranted. He said if he had to hire someone, this would cut into his profit margin. He said he wasn't out to make money or he would have maxed out the building, and said he was just trying to do a good job, be fair to the kids, and provide good housing.

Chair Gooze asked Mr. Pasay if he would accept the idea of keeping the existing number of occupants in the present house on the property, as a condition of approval.

Mr. Pasay said yes, provided that the building was retained as student housing. He said if a subsequent owner said he didn't want to have student housing, he didn't think it would be fair to impose the 14 person limitation, when there could be small families, etc. He noted that when he bought the property, there were more than 14 people living there.

Chair Gooze noted a concern about what percentage of students in the building would make qualify it as student housing.

Mr. Johnson said they were talking about a building with 5 apartments in it, and said perhaps there could be agreement to limit the number of occupants to 3 unrelated per unit, or a single family in each unit, or a combination of the two. He said this would mean the 3 unrelated rule would kick in for this building, and there could be a maximum of 15 people living in the building. He said if it kicked in as well for the two new buildings, the 3 unrelated rule would apply to the whole property

Mr. Pasay said he didn't anticipate having a maximum of 24 students in the two new buildings at any one time, and he provided details on this.

Mr. Johnson suggested that the Board could say the 4 unrelated rule could apply for the two new buildings, in granting the variance. He noted that there was a non-conforming use, and there could be an expansion up to 50%, but the applicant was doing the expansion as detached buildings instead of expanding the existing building.

There was discussion on how the 4 unrelated rule could perhaps be used in this instance, and how this related to allowing a maximum of 24 occupants in the new buildings. Mr. Johnson said three 2 unit town houses were proposed, with 4 people per unit.

Mr. Johnson noted that if the applicant wanted to avoid the ZBA, he could go directly to the Planning Board for his Conditional Use Permit, expand the existing building by 50%, and go up to 49-50 people on the property.

Mr. Gottsacker pointed out that none of this was addressed previously by the Board.

Mr. Pasay said he had a few other comments to make. He said if deemed necessary for approval, evergreen trees could be planted that would close the existing small window of visibility that might exist from the road. He said this would retain the rural feeling of the area while also making it impossible to see his project from the road.

He also noted that according to the Zoning Ordinance, he could put in an elderly care facility, museum, etc. without needing to get a variance, which were uses that would be far more offensive than what he was proposing. He said what he proposed would be very innocuous, and would reflect maximum concern for the abutter, hopefully through conditions written into the variance approval.

Mr. Pasay suggested that a length of stockade fence, or a berm with a fence on top of it could be put in, to allow more privacy and also noise abatement if this was deemed necessary. He said currently student activity on the site was virtually nonexistent, noting that both the old and the proposed new buildings didn't encourage outside activities. He said outdoor grilling was not allowed on the site, and also noted that in summer, there was only a 15-20% occupancy.

Chair Gooze said his understanding was that each of the new buildings would house 12 people.

Mr. Pasay said that was correct, and noted that one of the buildings would also have an office in the basement.

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

Nathan Pasay, said he was a former tenant at the property. He first spoke about the fact that Wildcat Transit stopped at the property, which he said was very convenient, and said it was common practice for residents to use it. He said most of the time, cars were left on the premises.

He said the security issues were negligible, noting that Mr. Pasay was usually there, and that he himself was there as well. He said the students living there were aware of this. He also noted that the Police Department maintained consistent visibility in the area, and said all of this discouraged nefarious activities.

Mr. Welsh noted that students could often be rowdy, and asked why they weren't at this property.

Nathan said the first reason was that Mr. Pasay was constantly on the premises, with his car parked out front, and knocking on doors. He also said he was constantly improving the quality of the property. He said the police presence was also a factor.

He noted that the property was located so far from campus that it was inconvenient for students on campus to get there, especially if there was drinking involved. He said the house vacated on weekend nights, when people wanted to be closer to campus. He also said Mr. Pasay selected tenants who wouldn't create a disturbance,

Chair Gooze asked if there were any members of the public who would like to speak against the application, or had questions.

Jeff Todd, 259 Newmarket Road, said the applicant's presentation on the need for student housing was irrelevant. He also said that regarding Mr. Pasay's being able to develop his business on this property, that was irrelevant because this was a nonconforming lot.

He said if 33 renters were legally allowed, he would prefer that the existing house was expanded to allow the 33 people. He said he didn't think the original intent with this property was to build other houses on it, and said the intent was to allow 33 people for that structure. He also said perhaps 33 residents didn't make sense, and was wrong for that building.

Mr. Todd said by putting other buildings in, this was creating an apartment complex, with a parking lot, dumpsters, etc. He said he had concerns about this as a neighbor who didn't really have a buffer between himself and the property all the time. He said by fall, it was gone, and he could look into the open field where the new buildings and parking lot would be.

Mr. Todd said he paid more taxes than Mr. Pasay did, and said part of what he paid for was privacy. He said the zoning was set up for this. He said he had no problem with the apartments that were there now, and also said parking there was not an issue. He said the only issue was the idea of putting two more buildings and a parking lot on the property, and said this would definitely interfere with his backyard in terms of visibility.

Regarding the issue of security, he said he thought what Mr. Pasay had described seemed pretty complex, and asked how one would impose this on the next owner of the property.

Mr. Todd said that regarding the 5 variance criteria, he was very concerned there could be a decrease in the value of his property. He said Board members would be concerned too if there was an apartment complex in their backyard. He said this was a reason the variance shouldn't be granted.

Mr. Todd said that regarding the public interest criterion, granting the variance would mean there could be an additional 20-30 cars entering and exiting the property, which might be a concern for the public. He noted that court cases considered abutters as being part of the "public" that was considered under the public interest criterion.

He said that regarding the hardship criterion, the fact that this was a nonconforming use

should not enter into the issue of hardship, and provided details on this.

Mr. Gottsacker noted that the Zoning Ordinance allowed a whole list of uses, including elder care facility, museums, etc, which would not require a variance, and could create more traffic, etc. He asked Mr. Todd how that figured into his arguments.

There was discussion. Mr. Todd said just because a use was allowed on a piece of property, that didn't mean it was going to happen. He said he and his wife had received notice of a proposal to put two apartment buildings and a parking lot on the property, and said they had concerns about this. He said they would probably have concerns as well about what Mr. Gottsacker had said, and maybe they wouldn't be able to address that. But he said they could address this.

Mr. Welsh determined that Mr. Todd's property was the next one toward Newmarket. There was discussion that the Todd residence was toward the road.

Mr. Todd said from there, one couldn't see anything on the abutting property. But he said half way down, between the house and the barn, it was wide open and one could look right over onto the Pasay property.

Mr. Pasay said he was extremely concerned about the Todd's' concerns about privacy. He said he proposed to create a 4-5 ft berm along the property line, on top of which would be put a 6 ft fence that would be lined with hemlock trees, that would grow to 15-18 ft. He said this would provide some visual appeal and would create some noise abatement as well.

He said for economic reasons, he was looking to develop his property, and said he would exercise another option if he didn't get this variance, for reasons he had already expressed. He said he wasn't saying this as a threat, but said he needed to develop the property.

Mr. Todd said he and his wife wouldn't object as much if there was the understanding that there would be a berm or something desirable along half of that line. He said something had to be done there.

Mr. Pasay said they could work this out.

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

Chair Gooze said he had some concerns about whether granting the variance would decrease the value of surrounding properties. He noted that from his own experience, an appraiser had said his property was worth a certain amount because he was not close to student housing.

He said that regarding the elderly housing issue, it was allowed in a number of places in

Town according to the Zoning Ordinance. He spoke about why he thought this use was allowed when student housing was not. He also said having one building was different than having a complex of buildings.

Mr. Welsh said 14 students was one thing in terms of property values, but said 38 students was a lot.

Chair Gooze noted that the applicant could legally put up to 33 people in the existing house, and up to 40 or more with an expansion of the building. But he said he was thinking about the idea of an apartment complex.

Mr. Harvey said even if it did go to 49 residents, it would still be just an expanded farmhouse.

Mr. Gottsacker said the key thing for him in terms of property values was that given the overall size of the property, an eldercare facility could be put in that would have 2-3 times the number of residents of what was proposed here. He said this would have a much greater impact on property values.

Mr. Welsh said the fact that elderly housing was allowed shouldn't totally gut the purpose of the Rural District. He said it was set up for a reason.

Mr. Gottsacker said his point was that in this instance, it was a strategy of the lesser of two evils. He said this had nothing to do with what he thought about the Rural Zoning District.

Mr. Harvey said in allowing elderly housing in certain districts, he thought the Planning Board had said it would rather have senior housing there, and said he didn't think it was for the ZBA to decide what it would rather have there. He said the ZBA voted on the criteria based on what was before it.

Chair Gooze said he was looking at this as a complex of buildings, in terms of affecting property values, and not in terms of the residents. He discussed the view of Mr. Pasay's property from Mr. Todd's property, and noted that Mr. Todd had said that if there was a suitable buffer, he would feel better about the situation. Chair Gooze said he would feel comfortable that the property value criterion was met, if there was a suitable buffer.

Mr. Gottsacker said the difficulty was how a condition could be written so there would be an acceptable buffer.

Chair Gooze said the ZBA had done this kind of thing before.

Mr. Johnson said if the Board granted the variance, it could grant it with the direction that the Planning Board would include conditions of approval for a berm/buffer/fence/trees and security management. He said the Planning Board did this for Conditional Use Permits, which were recorded with the County and become a contract with the Town and

the property owner forever.

Chair Gooze asked if there was an assurance that the Planning Board would actually do what the ZBA directed.

Mr. Johnson said there was no guarantee the Planning Board would agree with the ZBA decision. But he said the property owner and abutter were willing to cooperate, and said they would be coming before the Planning Board.

Chair Gooze said the ZBA could strongly word the condition, and could ask the Planning Board to pay particular attention to certain issues.

Mr. Mulligan said he thought the ZBA should give more direction than this.

There was detailed discussion about how this should be addressed.

Mr. Gottsacker said the condition could read that buffering would be done to the satisfaction of the abutters. He said this would put them in the driver's seat, and the Planning Board could work this out.

Mr. Mulligan said that gave the abutter almost a veto over the project.

There was further discussion.

Chair Gooze said they could think about this more, but said he did think there was a way to address the property value criterion with conditions.

There was discussion that the conditions could be concerning buffering, security, and the number of tenants in the existing building and the new buildings. Mr. Johnson suggested a condition that there could be no more than 3 unrelated people in the existing building, and no more than 4 unrelated people in the new buildings.

Regarding the public interest criterion, Chair Gooze said with the right conditions, he could be comfortable that this criterion was met.

Mr. Welsh said he had concerns about whether the public interest and the spirit and intent of the Ordinance criteria were met, and noted that these criteria were related. He read the purpose of the Rural District as written in the Zoning Ordinance, and said he was worried about this.

Mr. Harvey said if this was approved, the applicant could get 49 people without having to come to the ZBA. He then asked where the parking lot and the other pieces that went with the project would go, and asked if the ZBA was just talking about the buildings.

Mr. Johnson said these things would be addressed by the Planning Board as part of their conditions of approval.

Mr. Harvey said his point was that just because the variance was approved, this wouldn't mean the applicant would necessarily be able to functionally use the property while keeping it in a rural condition.

Mr. Johnson said if the variance was approved and the plan went to the Planning Board, he would look at the plan, and it would have to meet things like the 20% impervious surface ratio requirement. He said if the applicant asked for 25% imperviousness, he would have to come back to the ZBA for another variance.

Mr. Mulligan said he didn't think this project as proposed would be contrary to the public interest. He said he believed that even though a significant expansion was proposed, it was a residential development that would be designed so the character of the neighborhood would be maintained. He said there were steps and conditions proposed that would limit the visual impact and building impact, so it would still appear as a very rural non-intensive area.

Chair Gooze said he agreed with Mr. Mulligan, and said he didn't feel this was out of character with this particular neighborhood, and wouldn't take away the rural nature of the area. He noted the boathouse nearby, and also said other properties in the area had a number of outbuildings on them. He said the fact that there would be 3 buildings on the property therefore didn't take away from the rural character of the area. He noted that the Nature Conservancy property was nearby as well.

Mr. Welsh said putting in 38 students was not a typical use of the Rural District, and also said he didn't think the fact that it was near Newmarket had anything to do with it. He provided details on this. He said there were things that could be done like plant trees in the front, and said he would like to see a condition for this.

Chair Gooze noted that Mr. Pasay had proposed this.

Mr. Gottsacker said he had a hard time picturing being able to see these buildings from Route 108, behind the existing farmhouse, driving by at 40 mph. He said there was a very small window of visibility there.

Mr. Welsh said right now, you could see the parking lot, the house and the cars. He also said there was a sign there that he thought was out of character. He said perhaps putting trees there would help offset the fact that there would be more cars, etc.

Mr. Johnson noted that the Nature Conservancy bought this property and got rid of two hundred head of dairy cattle that had been causing methane and groundwater pollution, in a Rural zone.

There was further discussion about possible conditions of approval.

Chair Gooze said that regarding the hardship criterion, there was an apartment building

that was a nonconforming use, which made it different from surrounding properties. He also noted the existence of the Nature Conservancy parcel, and said he was therefore comfortable that there were special conditions to the property.

Concerning the hardship criterion, Chair Gooze said there was also the question of whether there was another feasible way to accomplish what the applicant wanted to do. He noted that expanding the existing building was a possible option, but said Mr. Pasay wanted to keep the numbers down in the main building because he didn't want to crowd the residents. Chair Gooze said in order to get the number of occupants the applicant wanted, there seemed to be no other way to do this.

Mr. Gottsacker said he thought there were other feasible methods, but they were worse than what the applicant was proposing. He also said granting a variance would allow more control over what happened on the property than if Mr. Pasay did something else with it. He provided details on this.

Chair Gooze noted that the spirit and intent criterion had been discussed as part of the discussion on the public interest criterion.

Regarding the substantial justice criterion, Chair Gooze suggested that a question was whether putting buffers in, and not crowding the students so a better lifestyle was provided for the residents outweighed any possible losses to the individual, etc.

There was discussion on how this criterion should be evaluated in regard to the variance application. Mr. Welsh asked what the Board was saying equaled substantial justice or not. He asked if they were talking about a proposal to allow up to 15 occupants in the first building, and up to 12 occupants in each of the two new buildings, for a total of 39 residents. He said determining substantial justice depended on how many people would be allowed, and said 32 or 39 people was different than 60 people.

Mr. Harvey said he was thinking of the 39-residents number, and also said he liked the idea of stipulating a maximum of 12 residents in each of the new buildings. He said otherwise, he thought there would be loopholes with a future owner.

Board members agreed with this, and Mr. Gottsacker noted that this avoided the 3 unrelated and 4 unrelated issue.

Chair Gooze said if the Board could decide on the conditions, he felt the application met all the variance criteria.

Mr. Johnson said that based on the current discussion in Town regarding student rentals, he suggested that there could be a condition that would require a code inspection once every semester in order to verify occupancy.

Chair Gooze said he was ok with that, and Mr. Welsh said it was a great idea. There was discussion on how this would work in practice.

Mr. Gottsacker said there was also the issue of what happened if the property was sold in the future. He said perhaps the Board was dealing with this by limiting the maximum number of residents per building.

Mr. Welsh said that seemed to be the cleanest way to handle this, and Mr. Harvey agreed that the Board should approach this in terms of a maximum number of residents per building, regardless of who the owner was.

Chair Gooze said this made him feel more comfortable in terms of why the variance could be granted.

There was further discussion on this.

Regarding the issue of buffering, Mr. Gottsacker said there was first the issue of abutter buffering.

There was discussion on the specific type of berm and landscaping that could be required. Mr. Gottsacker and Chair Gooze agreed that they would like the abutter to have a say on the details of the buffering. Mr. Gottsacker suggested that if the abutter and the applicant couldn't agree on this, then the Planning Board would get involved.

Mr. Mulligan asked if a condition could be that appropriate visual buffering, as finally decided on by the Planning Board, must be implemented.

There was discussion on this, and also on the details of a condition concerning buffering at the front of the property.

Mr. Gottsacker said he was more comfortable letting the Planning Board address the details of buffering at the front of the property, because this didn't involve the abutter.

Wording was developed concerning the condition for the front buffer. There was also refinement of the wording in the condition concerning occupancy numbers and an inspection regarding occupancy, and refinement of the condition concerning the abutter buffer.

Concerning the issue of property management, Mr. Johnson noted that the Planning Board had been requiring a specific property management plan with several recent applications for student housing. The ZBA agreed that there should be a broad condition that the Planning Board would address property management to provide adequate security.

There was discussion on the sign out front on the property. Mr. Gottsacker said it didn't seem to fit with the rural character of the area, and asked if it was allowed by the Ordinance. He said he would love to see the sign go away, and Mr. Welsh agreed that it was big.

Chair Gooze said he didn't want the ZBA to play the Planning Board. He then recommended reviewing the conditions with the abutter. He reopened the public hearing, and asked Mr. Todd if he was comfortable with the conditions that had been developed.

Mr. Todd said yes, if they could agree on something for the screening. But he noted that he wouldn't agree to anything if this was left up to the Planning Board. He said he and Mr. Pasay would reach an agreement.

Chair Gooze said the condition in the variance should be that they had to reach agreement, and if it wasn't met, there wouldn't be a variance.

Mr. Mulligan said he thought this would set a bad precedent, because it would give the abutter too much power over the project. He said the best the ZBA could do was give them this opportunity, and if they couldn't agree, the Planning Board would have to make some design decisions.

There was further refinement of the condition on the visual buffer.

Mr. Todd asked if there could be minimums in the condition concerning the berm and the trees.

Mr. Pasay suggested that he could build a berm to specifically conceal the structures, and could make this as wide as necessary.

Mr. Todd said he was open to the idea of more trees, and less berm. He suggested there could be a minimum of 8 ft fir trees spaced 4 ft on center, that were staggered, or whatever was recommended by a nursery.

Chair Gooze recommended that Mr. Pasay and Mr. Todd would reach an agreement on this, so the Board would leave the condition it had developed as it was.

Mr. Johnson said this agreement would be reflected in the site plan that went to the Planning Board.

Mr. Todd noted that each new building would be limited to 12 occupants, but said a concern was if the apartments weren't rented to students. He asked if there was any way that FHA couldn't happen.

Mr. Gottsacker said it was against the law to discriminate concerning this, and there was further discussion.

Mr. Welsh said this was why limiting the number of residents, no matter whom they were, was a good idea. Chair Gooze agreed.

Mr. Todd asked about the lighting that was proposed.

Chair Gooze said this was another Planning Board issue, and noted that the Planning Board was very attuned to abutters' concerns about lighting, etc.

Mr. Johnson noted that the plan submitted to the Planning Board would include everything, including the proposed lighting plan.

There was discussion about the possible use of low lighting, and Mr. Pasay said he would be doing this. A condition was developed concerning minimizing light pollution on the abutter.

Mr. Pasay noted that it hadn't been his intent to block visibility by the road with trees. But he said he could put trees behind the existing farmhouse that would obstruct the minimal view from the road.

Mr. Johnson noted that there would be trees in front of the parking lot, so the parking couldn't be seen.

Chair Gooze noted that there had to be some landscaping as part of the site plan requirements.

There was discussion that this condition regarding the trees should be left fairly broad.

Concerning the sign issue, Mr. Pasay said the sign was very instrumental in getting rentals, so was very important for the viability of his business. He said he tried to minimize the size as much as possible.

Mr. Johnson said a 6 sf sign was allowed, and the sign was 4 sf, so it was legal.

Chair Gooze closed the public hearing.

Mr. Welsh asked if they could say there wouldn't be a light on the sign.

Mr. Pasay agreed that there shouldn't be a light on the sign.

Jerry Gottsacker MOVED to approve an APPLICATION FOR VARIANCES from Article IX, Section 175-28(D), Article XII, Section 175-53 and Section 175-54 of the Zoning Ordinance to build two additional 3-unit apartment buildings on a non-conforming lot where there is currently a 5-unit building, at the property shown on Tax Map 18, Lot 3-2, located at 257 Newmarket Road in the Rural Zoning District, with the accompanying conditions:

- There will be a visual screen to effectively block the parking lot and cars, to preserve rural character as much as possible.***
- The existing building will be limited to 15 occupants and each new building will be limited to 12 occupants, to be verified each semester by the property owner granting the***

Code Enforcement Officer access on short notice.

- Visual buffering between the applicant and the abutter must be agreed upon by both the applicant and the abutter. If no agreement can be reached, the Planning Board will define the buffering.

- The Planning Board will address property management to provide adequate security.

- The ZBA directs the Planning Board to pay particular attention to directional lighting to minimize light pollution on the abutter

Chris Mulligan SECONDED the motion, and it PASSED 3-2, with Carden Welsh and Ed Harvey voting against it.

Mr. Harvey said he thought it would be difficult to prevent a group, like a team, from occupying the units. He provided details on this, and said his concerns were based on his own experience. He also said even with the security and buffering, 39 occupants went way beyond the present 14. He said his reason for voting against the motion related to the decrease in property values criterion, as well as the public interest criterion.

Mr. Welsh said a great effort was made to meet the spirit and intent of the Ordinance, but said he still thought the application violated the Ordinance. He provided details on this, and said he couldn't believe that putting 39 people in the Rural District met the spirit and intent of the Ordinance.

Recess from 9:10 to 9:16 pm

III. Approval of Minutes – October 13, 2009

Page 1, motion to approve the Agenda should say 5-0, not 6-0.

Page 7, 3rd paragraph from bottom, should read "...the whole house could be rented.."

Page 11, 7th paragraph, should say "Ms. Davis...."

Carden Welsh MOVED to approve the October 13, 2009 Minutes as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

IV. Other Business

A.

Chair Gooze noted that there was still the court case pending concerning Seacoast Repertory Theatre and Mr. Hillard.

Mr. Johnson said Seacoast Rep would be coming before the Planning Board with their application in November, and there would be a public hearing in December. He said this would not affect the court case, but he said if in the mean time they could work out their differences, potentially Mr. Hillard could drop the court case.

He said if they couldn't work out their differences, the case would proceed. He said if the

Planning Board approved the application, the court case could have a bearing on this approval.

B. Next Regular Meeting of the Board: ****December 8, 2009**

V. Adjournment

Chris Mulligan MOVED to adjourn the meeting. Ed Harvey SECONDED the motion, and it PASSED unanimously 5-0.

Adjournment at 9:24 pm

Victoria Parmele, Minutes taker

Jerry Gottsacker, Secretary