

These minutes were approved at the April 13, 2010 meeting.

**Durham Zoning Board
Tuesday February 9, 2010
Durham Town Hall - Council Chambers
MINUTES
7:00P.M**

MEMBERS PRESENT: Chair Jay Gooze; Vice Chair Robbi Woodburn; Secretary Jerry Gottsacker; Ruth Davis; Carden Welsh; Sean Starkey

MEMBERS ABSENT: Edmund Harvey, Chris Mulligan

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

I. Approval of Agenda

Chair Gooze noted that the two Sophie Lane applications had been withdrawn.

After discussion, it was agreed that because of the lengthy Agenda, the Kleinmann application and the CWC Properties application would be heard the following week.

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

II. Public Hearings

- A. PUBLIC HEARING** on a petition submitted by Attorney, Ari B. Pollack, Concord, New Hampshire, on behalf of the Town of Durham and Neuro-Rehab Associates, Inc., for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Zoning Ordinance to allow for a short-term medical rehabilitation facility which is not an allowable use in the Zoning District. The property involved is shown on Tax Map 11, Lot 27-0, is located at the Durham Business Park on Piscataqua Road, and is in the Durham Business Park Zoning District.

Attorney Pollack of Gallagher, Callahan and Gartrell spoke on behalf of the applicants Neuro-Rehab Associates, Inc, an organization under the umbrella of the Northeast Rehabilitation Network. He said the application related to a Town owned parcel, the Durham Business Park, and said the applicants had a conceptual plan for the site right now. He noted that there had been various possible developments considered for the site in the past, but it remained undeveloped. He noted that there were considerable wetland and shoreland buffer requirements for the property.

He said the applicants were seeking a variance to allow for a medical rehabilitation facility on the site, which would be similar to other facilities the company operated. He said the plan

would be to treat the property as a single user campus, and to have one building as well as an accessory building or two. He noted that the need for such a facility in the regional marketplace was regulated elsewhere by the New Hampshire Certification of Need board, and said Neuro-Rehab Associates had been issued a certificate that entitled it to develop a facility in the Seacoast region.

Attorney Pollack made note of the fact that the Town of Durham currently had a Purchase and Sales Agreement with Chinburg Builders concerning development of the Business Park, but said there were no pending proposals. He said Mr. Chinburg was present to answer any questions the Board might have. He said the applicants had reached an assignment agreement with Chinburg Builders to step in as a buyer of the property if the approval processes were successfully navigated. He said the Town had been asked to bless this assignment agreement, and had done so, fully realizing that the land use approvals would still need to be obtained.

Attorney Pollack said the Town was in favor of granting the variance, and noted the letter to this effect from Administrator Selig, which indicated the reasons why Chinburg Builders had so far been unable to find an end user for the Business Park: the decline in the real estate market and economy; the wetland delineation for the site that had eliminated two buildable areas; the NHDOT determination that limited commercial use based on maximum peak trips at the Arthur Grant Circle/Route 4 intersection; and the increase in the availability of quality, relatively inexpensive commercial space at Pease and in Dover.

Attorney Pollack explained that the reason the variance was needed was that the use proposed, described as a medical rehabilitation facility, was not addressed by the Zoning Ordinance Table of Uses. He said this use was somewhere between a hospital use and a medical office complex, and he noted that while medical offices were allowed in this District, hospitals were not. He said rather than ask that this be included as a permitted use in the Ordinance, or that the Zoning officer provide an opinion on this, the applicants had decided to submit a variance application.

Attorney Pollack next went through the variance criteria and explained how they were met. He said granting the variance was not likely to decrease the value of surrounding properties because the immediate abutters were mostly nonresidential, including the Town's wastewater treatment plant. He noted that traffic would have to enter the site off of Route 4, so would not create congestion in the neighborhoods nearby. He said the applicants had met with NHDOT recently, and were told that the expected traffic would be within their tolerances, and wouldn't require off site improvements. He said this information would be provided to the Planning Board.

Attorney Pollack said granting the variance would not be contrary to the public interest because the proposed use was consistent with the Town's desired development of this property. He noted that an advantage of the applicant's proposed use was that it would be a single use rather than a collection of businesses in different buildings.

He said there was hardship in that there was no relation between the constraints of the

Ordinance and the property. He said the purpose of this district was to have this kind of use, and said the Purchase and Sale Agreement between the Town and Chinburg Builders called for development of the site. He said no other developers had been able to bring a project at the site to fruition.

He said the proposed use was reasonable, and said a luxury of having a single user was that it would be possible to maintain trails on the property, which was part of the present Purchase and Sale Agreement. He said it would also allow buffering of the shoreland, and plenty of space for storm water management. He noted that the applicants/ engineering company had said there was adequate space for the development without needing much relief from the Zoning Ordinance.

Attorney Pollack said substantial justice would be done in granting the variance because in addition to the benefits to the applicant, it would allow the Town's tax base to be enhanced through a low impact development involving a single user of the site.

He said granting the variance would not be against the spirit and intent of the Ordinance, stating that some form of business or commercial use was envisioned for this property, and was memorialized in the Purchase and Sale Agreement. He noted that the proposed development could be done without requiring dimensional relief that would make it an inappropriate fit for the site. He also said the applicants did not expect to bypass the regular land use review process with the Planning Board.

In answer to a question from Mr. Gottsacker, Attorney Pollack explained that the proposed facility was originally for a location at the Pease Tradeport, and that the Certificate of Needs board expected that this would happen. But he said the applicants had run into some complications with the landlord and the lender that had caused them to seek other possible locations. He said it had become their opinion that the facility would fit nicely at the Durham Business Park. He said things were up in the air right now, and said while it was likely that the facility would be done at Pease, the idea of bringing it to Durham had come a long way, and was a very attractive option.

Chair Gooze asked what the facility would entail, and NE Rehabilitation Services CEO John Prochilo said it would be a short term inpatient facility where patients would come from acute care hospitals after stabilizing, when they would require skilled nursing assistance. He said stays would generally last 12-16 days, and would involve a comprehensive program of physical and other therapies focused on increasing function levels so people could then go home. He said there would be no emergency room, and said there would be a small lab, but that most lab work would be sent out to larger labs in the area.

Ms. Davis determined that the facility would provide the same level of care as the Spaulding facility, as an inpatient rehabilitation facility.

Ms. Woodburn said she was glad to hear that NHDOT was on board, and asked about the number of cars expected per day.

Attorney Pollack said 43 trips were expected at the peak hours, based on traffic counts done at a similar facility during the holiday period. He said there would be a substantial decline from that in the afternoon hours. He noted that there would be people coming to the facility for a variety of purposes, and that the traffic analysis took this into account.

Mr. Welsh determined that there would be 33 beds at the facility, a number set by the Certificate of Need board, and that it was assumed there would be a 77% occupancy level.

Chair Gooze asked Attorney Pollack if the applicants' presentation would be any different if the proposed facility was considered a hospital.

Attorney Pollack said the relief sought by the applicant would be the same regardless, but said it was a distinction worth noting that the facility was neither a hospital nor a medical office complex.

Chair Gooze said a question was whether the applicants thought it was easier going for the variance in the way they proposed, because a hospital was not an allowed use at the Durham Business Park. He noted that if the variance criteria were met, the ZBA could allow the hospital use even though it was not a permitted use.

Attorney Pollack said he thought relief could be granted either way, but said it strengthened the applicant's argument somewhat to be able to say they were not squarely a hospital, which was prohibited in that district.

Mr. Prochilo said the length of stay was 12-16 days, and said there would be about 600 patients per year. He said in an acute care hospital, the total number of patients and the traffic and activity would be higher.

Chair Gooze determined that the Board did not have had any questions to ask Mr. Chinburg. He then asked if any members of the public wished to speak for or against the application.

Mr. Gottsacker noted that the Economic Development Committee had sent a letter, which supported what Administrator Selig's letter had said. He said the letter made the point that in the event that that an application for the proposed development at this location did not move forward, the variance would in the future allow the Town to get a similar type of facility at this location, which would make the property more marketable.

Ahmad Etebari, 3 Riverview Court, said she was concerned that the proposed facility would affect them because of the traffic noise, etc. She said their property was close by, and said in the winter when there were no leaves on the trees, they would be able to see this property. She said this would affect their privacy, and asked how the privacy issue could be dealt with.

Debra Johnson, 112 Piscataqua Road said she lived down the road from the Durham Business Park. She noted that a number of traffic studies had been done concerning this area of Town, which indicated that a lot of cars passed by and that the number had gone up

considerably over the years. She said she chose to live on this road, and said she didn't feel the proposed facility would add that many more cars to Piscataqua Road. She also said it was important that the Town have facilities like this that would increase the tax base.

Ahmad Etebari, 3 Riverview Court, said there were several unknowns, concerning the implications of having this development across from his property. He said this was a privacy issue, and said he would like it to be taken into account.

Attorney Pollack said one of the attributes of the applicants' plan was that there would be a single user occupying what was a substantial site. He said this would allow the flexibility to provide good buffers, which would shield abutters from impacts from the facility.

Daniel Keefe, 59 Piscataqua Road, said he lived across the street, and was concerned about the traffic that this facility would cause. He said he already had an awful time getting out of his driveway.

Attorney Pollack said he was not a traffic engineer, but said there would be a traffic engineer involved if there was a site plan application before the Planning Board. He noted that there had been discussion about a deceleration lane and widening of the area adjacent to the turning area, and also said there were some estimation models that would be use to create an acceptable traffic model.

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

Mr. Gottsacker and Chair Gooze spoke further about the fact that they did not believe that the proposed facility was a hospital.

Chair Gooze explained to the abutters that if the ZBA granted this variance and there was then a site plan application, the Planning Board would consider ways that the abutters could be protected, through screening, noise abatement, etc. But he said this site was zoned as a commercial business park, so there was no question that there would be traffic going in and out.

Ms. Woodburn said there was also the issue of the building potentially impacting the privacy of abutters.

Mr. Gottsacker noted that the Table of Uses in the Zoning Ordinance indicated that there were a lot of uses that would be permitted on this site that would have far more impacts. He noted boatyard marina sales as an example of this.

The Board next went through the variance criteria. They agreed that granting the variance would not decrease the value of surrounding properties. Ms. Davis said she didn't think it would, assuming that property values were already reflective of the fact that there was a Business Park across the street, even though it looked like a nature preserve at present.

Chair Gooze read Attorney Pollock's comments regarding how the variance was not against the public interest.

Ms. Woodburn said that was exactly what the zoning of the Business Park was looking for in the first place, and Chair Gooze agreed.

Mr. Gottsacker noted that the letter from Administrator Selig and the EDC supported this.

Mr. Welsh said it was important to consider what the size of the tax base increase would actually be as a result of this development.

Chair Gooze reopened the Public Hearing to ask if the company paid taxes, and Attorney Pollock said they did. He also said that although they hadn't provided a valuation, the contracts for construction for a similar facility on the Portsmouth property was \$10 million plus. He said he wasn't sure how that translated in terms of the value of the finished property.

Chair Gooze closed the Public Hearing again.

Concerning the hardship criterion, Chair Gooze said this was a unique setting, and noted that some previous projects proposed for the Business Park had been knocked out because of wetland issues. He also said the use that was proposed was reasonable, and fit with what would be expected in a commercial business park.

Mr. Gottsacker said this was a much better potential development of the site than a lot of the things already permitted by the Zoning Ordinance.

Ms. Woodburn noted that the conditional use designation upped the ante in terms of the rigor of Planning Board review. She asked if because this use would be similar to a hospital in some ways, the conditional use process would come into play. She noted that hospitals were only allowed by conditional use in some of the districts in Town.

Chair Gooze said he had already decided that this was not a hospital, and said he therefore didn't think the conditional use issue was pertinent. Mr. Gottsacker agreed.

There was the discussion by the Board that the substantial justice criterion was met, given that this project was a way to increase the tax base and get a really good project for the Town. Chair Gooze said this kind of project would seem to be better for abutters than a commercial development on the property.

Ms. Davis said it would be nice to have a rehabilitation facility in Durham. It was also agreed that this would be a better development than others that the abutters might have next to them.

Board members agreed that this proposed use would not be contrary to the spirit and intent of the Ordinance because it would fit into the buildable area. There was discussion about

why hospitals were not permitted uses in Durham, and were only allowed by conditional use in some districts.

Ms. Davis said she thought granting this variance would not be contrary to the spirit and intent of the Ordinance, because of the smaller size, less traffic, etc., of the facility, as compared to a hospital.

Mr. Welsh said the Economic Development Committee had said granting the variance would attract similar opportunities to Durham, even if this particular development didn't go through. He recommended making this variance approval subject to the project actually going through, and not providing carte blanche for all future projects like this.

There was discussion about whether the Board would be granting the variance for any rehabilitation facility in this district, or just for this particular development. Ms. Woodburn said it was a very good point that if the variance was granted as is, this allowed use would go on the deed, and a future development might be bigger, etc.

Mr. Johnson said if this particular development didn't go through, the Town would like to be able to include this allowed use as part of the marketing capability for the Durham Business Park.

After further detailed discussion by the Board, it was agreed that there would be a condition that the use would be approved for this project only, and would be subject to the project actually being done. It was noted that if marketing the property was an issue, the proper way to address the use issue would be to change the Zoning Ordinance.

Carden Walsh MOVED to approve an APPLICATION FOR VARIANCE from Article XII, Section 175-53 of the Zoning Ordinance to allow for a short-term medical rehabilitation facility which is not an allowable use in the Zoning District, as proposed by Neuro-Rehab Associates, Inc., and subject to this project going to completion in a manner similar to what was proposed this evening. The property involved is shown on Tax Map 11, Lot 27-0, is located at the Durham Business Park on Piscataqua Road, and is in the Durham Business Park Zoning District. Jerry Gottsacker SECONDED the motion.

Chair Gooze said the application met all 5 variance criteria.

The motion PASSED unanimously 5-0.

- B. PUBLIC HEARING** on a petition submitted by Loring V. & Brenda R. Tirrell, Durham, New Hampshire, on behalf of themselves and Stephen F. & Deborah A. Johnson, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to create a boundary line adjustment where both non-conforming lots continue to contain less than the required minimum lot size. The properties involved are shown on Tax Map 11, Lots 24-1 and 24-2, are located at 108 and 112

Piscataqua Road respectively, and are in the Residence C Zoning District.

Kevin McEneaney, speaking on behalf of the applicants, said the variance requested was to allow a lot line adjustment. He explained that currently, the minimum lot size in the Residence C Zoning District was 150,000 sf. He said the two lots in question were created in 1978, when the minimum lot size was 60,000 sf, so they were conforming at that time. He explained that the lots were created in anticipation of family members building on both of them.

He said the lot line was drawn the way it was in order to include an existing fireplace on one of the lots, in anticipation of one of the Tirrell family members using that lot. He said the photos provided showed that the Johnson house was topographically separated from the Tirrell lot, noting there was a 25% slope, and said for all intents and purposes, the Johnsons would think the fireplace was a part of the Tirrell property.

Mr. McEneaney reviewed the variance criteria. He said there would be no decrease in the value of surrounding properties because there would be no change in the use or appearance of this area if the variance was granted and the lot line adjustment was approved by the Planning Board. He said there was a large ravine located to the east of the proposed boundary line, which meant the Johnsons were unable to access the area in question with the fireplace.

He also noted that the Tirrells had used this area, with the permission of the Johnsons, since the Tirrells had built their home in 1995. He said there was an existing use easement the Johnsons had granted to the Tirrells for Parcel A, the area in question, which contained 12,000 sf, and had 20 ft of frontage along Route 4 and 80 ft of frontage along the water.

Mr. McEneaney said granting the variance would not be contrary to the public interest because the lot line adjustment would not result in any discernible change of use or appearance of any kind. He noted again that the large ravine located to the east of the proposed boundary line meant the Johnsons were unable to access Parcel A. He provided some history on why the lot line was originally drawn the way it was.

He said that concerning the hardship criteria, a variance was needed to enable the applicants' proposed use of the property, given the special conditions of that property. He said both parcels were currently grandfathered, nonconforming lots in terms of their lot sizes, but were conforming when they were created. He said granting the variance and a subsequent lot line adjustment would not increase the non-conformity of the two parcels as a whole.

Mr. McEneaney also said the benefits sought by the applicants could not be achieved by some other method that was reasonably feasible. He said the applicants could not obtain ownership of Parcel A without first getting a variance approval, and then getting a lot line adjustment from the Planning Board.

He said substantial justice would be done in granting the variance because the boundary

line would be located in a much more logical place than its present location. He said while there would be no net increase in non-conformity, the variance and subsequent lot line adjustment would allow the Tirrells to have ownership of a substantial piece of their backyard. He said there would be no effect on any frontage requirements, and said these requirements would continue to be met.

Mr. McEneaney said granting the variance would not be contrary to the spirit and intent of the Ordinance. He said both parcels were created when the minimum lot size was 60,000 sf., and also said if the variance was granted, there would be no net increase in the non-conformity of the two parcels. He also said the Shoreland Protection Act prevented any additional building on the parcels.

He said there would be no discernible change in the neighborhood with the granting of the variance. He said the Johnsons would be the only abutters affected, and he noted that the reason these lots were now nonconforming was because of an act by the Town to change the minimum lot size requirement.

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

Steve Johnson, 112 Piscataqua Road, said he and his wife supported this variance request. He said the area in question that would be impacted by the proposed boundary line adjustment was topographically impossible for his family to get to, either by water or from Route 4. He said the area had historical value to the Tirrell family because of the fireplace, but said it had no such value to him and his family.

There were no members of the public who spoke against the variance request.

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

Chair Gooze asked Board members if they felt any of the variance criteria were not met. It was agreed that all of the criteria were met.

Ruth Davis MOVED to approve an APPLICATION FOR VARIANCE submitted by Loring V. & Brenda R. Tirrell, Durham, New Hampshire, on behalf of themselves and Stephen F. & Deborah A. Johnson, Durham, New Hampshire, from Article XII, Section 175-54 of the Zoning Ordinance to create a boundary line adjustment where both non-conforming lots continue to contain less than the required minimum lot size, as per the proposal presented tonight with the lot line adjustment plan shown on the survey dated December 29, 2009. The properties involved are shown on Tax Map 11, Lots 24-1 and 24-2, are located at 108 and 112 Piscataqua Road respectively, and are in the Residence C Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Recess from 8:10-8:20 pm

C. PUBLIC HEARING on a petition submitted by M. Daniel & Lois Emily Smith, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIV, Section 175-74(B)(1) of the Zoning Ordinance to replace a septic system/leach field within the shoreland setback. The property involved is shown on Tax Map 6, Lot 2-17, is located at 17 Orchard Drive, and is in the Residence B Zoning District.

Daniel Smith spoke before the Board. He said the current septic system was 40 years old, and said he had recently taken steps to replace it. He said there had never been any problems with water coming out of it, or leaking of effluent down the hill, so there had been no effect on the Oyster River at all. He said when the septic designer dug up the portion of the system closest to the river, it could be seen that the soil in the leach field needed to be replaced, but he said there was no leakage toward the river.

He noted that when he originally bought his house, the setback requirement from the Oyster River was 75 ft, but it was now 175 ft. He said he thought it would be reasonable to grant this variance, and said it was important that the leach field be constructed properly.

Chair Gooze determined that the 125 ft shoreland boundary would fall in the middle of the proposed leachfield.

Ms. Woodburn said the plan indicated that the new system would be located exactly where the existing one was.

There was discussion about whether there was another feasible place to place the septic system that would put it further from the river. It was noted that Adam Fogg had designed the new septic system, and that it had been approved by the State.

Ms. Davis asked if the septic system that was proposed would be more technically sophisticated than the existing system.

Mr. Smith said yes, and said he had hoped Mr. Fogg could be present to speak about this.

Ms. Woodburn said it appeared that a standard stone and pipe septic system was proposed.

Mr. Welsh received confirmation from Mr. Johnson that the State approvals had been received.

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

Mrs. Smith noted that their neighbor, Tamara A. Martin, had no issues with what was proposed, and was in favor of granting the variance.

Robbi Woodburn MOVED to close the Public Hearing. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.

There was discussion by the Board about whether there was any other feasible location for the septic system. There was also discussion about the type of system that was proposed.

Ms. Woodburn said the existing system was most likely a stone and pipe system. She also said from the topographic map, it looked like moving the system location would cause more impact on the shoreland because of more grading, vegetation removal, etc. She said it would make the Board's job easier if a more modern, smaller system that produced cleaner effluent was proposed. She noted that the Board had never actually required this kind of system before, although other applicants had come before the Board with them.

Chair Gooze noted that with other applications before the ZBA where a more modern septic system was proposed, the Board had taken this into consideration. But he said since this was a replacement system that would go in the same place as the existing system, and they would be getting something better than what was there now, he was ok with this.

Ms. Woodburn noted that the proposed system would be outside of the State shoreland setback.

Chair Gooze said he had no problem with any of the variance criteria.

Ms. Davis said she was OK with what was proposed, and noted that if the proposal was to move the system closer to the River, she would be less comfortable with it.

Chair Gooze said as described in the sheet provided by the applicant, all five variance criteria were met.

Jerry Gottsacker MOVED to approve an APPLICATION FOR VARIANCE submitted by M. Daniel & Lois Emily Smith, Durham, New Hampshire, from Article XIV, Section 175-74(B)(1) of the Zoning Ordinance to replace a septic system/leach field within the shoreland setback, according to the plans already presented to the Code Enforcement Officer. The property involved is shown on Tax Map 6, Lot 2-17, is located at 17 Orchard Drive, and is in the Residence B Zoning District. Ruth Davis SECONDED the motion.

Chair Gooze said because of the topography of the site, the uniqueness of the property meant that the hardship criterion was met. He said he didn't see any other feasible way to put in a new septic system without creating more disturbance.

The motion PASSED unanimously 5-0.

- D. PUBLIC HEARING** on a petition submitted by Milton T. & Edda M. Martin Jr., Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 and Article XII, Section 175-54 of the Zoning Ordinance to construct a parking area within the sideyard setback and to construct a house greater than 30 feet in height. The

property involved is shown on Tax Map 2, Lot 1-8, is located at 83 Madbury Road, and is in the Residence A Zoning District.

The applicant, Sandy Martin, first explained to the Board that his lot had been subdivided the previous year. He said one variance being requested was to construct a parking area within the sideyard setback. He said there was a driveway there currently, and said a portion of it would remain, so they could continue to park their motor coach there. He noted that they had been parking it there for over 10 years. He said the plan was to remove the pavement and replaced it with porous pavement, and also said the plan would be to convert this area to some kind of buffer zone in the future.

Mr. Martin said the second variance requested was concerning allowing the height of the building to be greater than 30 ft. He explained that the proposed new building would be about 6 inches too tall on the back side. He provided details on the heights for different parts of the building, and provided pictures that he said showed that the street view was the smaller part of the house. He said the larger part of the house was toward the back, and said it sat up on a slight knoll, with a 4 ft elevation change. He noted that the neighborhood had mostly 2 or 2 ½ story houses.

Mr. Martin reviewed the variance criteria. He 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. He said the house should be quite attractive from all views, and would fit with the rest of the neighborhood.

He noted that he was looking at installing a geothermal heating system for the house, and said the additional six inches of building height would be needed to allow air flow as part of this system. He also said the 45 degree pitch would be ideal for solar panels, stating that if they had to change the pitch of the roof, the panels would have to be raised in the back, and that it wouldn't look good from the street. He noted that he was trying to make the house as green as possible.

Mr. Martin said the residence would fit with the neighborhood, noting that the houses across the street were all about the same spacing. He said he believed that granting the variance would therefore not be contrary to the spirit and intent of the Ordinance.

There was detailed discussion about where the additional 6 inches of height being requested came from. Mr. Johnson said he came up with 32' 10", rather than 30' 10", and noted that this was more than 6 inches over the height limit. He provided details on this, and Mr. Martin said he might be right.

Chair Gooze asked Mr. Martin why he thought there were special conditions of the property that distinguished it from other properties in the area. He noted that when the variance was granted the previous year to split the original property into two smaller pieces, an argument used was that there were other smaller properties in the area that were just like this. He asked what now made this property unique compared to other properties in the area, regarding both of the variance being requested.

Mr. Martin said the spacing between the other dwellings on the street seemed uniform, while their lot was this big piece of space that had no utilitarian use whatsoever. He said with a house on it, it would look more like the rest of the neighborhood.

Ms. Woodburn said she was looking at whether there was some way to move things around in order to agree with the Zoning Ordinance. She noted that this was a new lot they were talking about, and that the property line had recently been created. She said although the Martins had parked on the existing driveway forever, there was now this property line. She said it appeared that the applicants could fit the driveway in front of the building, and therefore be in compliance with the Ordinance.

Mr. Martin provided details on the fact that if the parking area had to be over another 10 ft, there would be serious issues with parking the motor home. He noted that it would be easier if he could move a light pole that would be in the way.

Ms. Woodburn suggested that the curb cut could remain where it was, and that the driveway could be move over. She said there would be a curve to the driveway, but said it would be in compliance. She said some grading might be needed, but said this was an alternative that did meet the regulations.

Etta Martin said their motor home was 40 ft long, and explained that backing up with it was practically impossible.

There was discussion that the motor home had been easier to park before the subdivision occurred, and that the light pole made things more difficult.

Mr. Martin said if the parking area was moved over, the motor home would be right up against the house, which would be very unattractive.

Mr. Welsh noted that the concept of sideyard setbacks was intended so that there would be open space between properties.

Mr. Martin noted that having the driveway near the lot line would be permissible if he wasn't going to be parking there.

There was discussion about the fact that a three car garage was proposed. Mr. Martin explained that a two car garage wouldn't be large enough for their three cars as well as storage. He said there should be a garage of that size for a house that was over 3,200 sf, .

Mr. Gottsacker asked if the roof pitch could be changed to compensate for the fact that the proposed height right now was 2 ft or more over the allowable height.

Mr. Johnson said the peak could be brought down, which would reduce the measurement in the attic.

Ms. Woodburn also noted that there was some room to work with on the first floor, which was 10 ft high, while the two upper floors were each 8 ft high.

Mr. Martin said they could go to 9 ft or 9 ft 6 inches on the first floor, but said according to Mr. Johnson's calculations, the height would still be too much. He explained again that he wanted to put geothermal heat in, and said changing the height could cause difficulties with the ceilings and duct work that was needed. He also said if the roof was flattened, there wouldn't be the 45% angle needed for the solar panels. He said he needed a 12 pitch roof, and noted that most of the houses he had built in Town had 12 by 12 pitch roofs.

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

Ruth Davis MOVED to close the Public Hearing. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

Chair Gooze said this was a large house for a small piece of property, and noted that Mr. Martin had previously asked that he be allowed to have these smaller properties. He said there appeared to be a self imposed hardship, and said he was therefore having a great deal of difficulty regarding this variance criterion, in regard to both the building height and the parking area. He said he thought what was proposed was too much for the lot.

Ms. Woodburn said with some finessing, what the applicants wanted could be done without a variance. She said while it would involve a compromise, it could work. She said this was a self created problem, noting that the lot had been made a certain size by the applicants. She said while she could understand the limitation regarding the motor coach, the parking area could be put 10 ft off of the property line and therefore meet the Ordinance.

Chair Gooze asked Mr. Johnson if the new parking area would be OK as long as it met the setback requirement.

Mr. Johnson said yes, stating that as a structure, it could be put anywhere within the buildable area. He said the porous pavement was probably a condition of approval imposed by the Planning Board with the lot line adjustment.

Chair Gooze asked Board members if they thought granting the variances would decrease the value of surrounding properties.

Mr. Welsh said his gut feeling was that they would, but said the Board didn't have any specific evidence regarding this.

Chair Gooze said unless there was evidence, he would think the Board would say the application met the property value variance criterion.

He noted again that he was having difficulty seeing that the hardship criterion was met. He said he didn't see what the special conditions of the property were that distinguished it from

other properties in the area. He noted that Mr. Martin had asked for this smaller property, and said he remembered that when the ZBA granted the previous variance for the original property, it said dividing it up would create properties that would fit with others in the neighborhood.

Ms. Davis said that concerning needing a variance for the driveway and the building height, she didn't see anything that was different about this property. She said the shape and topography wasn't unique, and said it seemed to be very similar to surrounding properties. She said it was an adequate lot for a structure that was similar to others nearby, and noted that these other properties generally had smaller structures and less parking.

Ms. Woodburn said she agreed with what Ms. Davis had said.

Mr. Gottsacker said that regarding the hardship criterion, there appeared to be several reasonable alternatives concerning the building height, including reducing the pitch of the roof and decreasing the height of the first floor, which wouldn't cost any more than what was proposed.

There was discussion by the Board about how the most recently defined criteria regarding hardship came to bear in this situation.

Chair Gooze said the applicants couldn't say the property was different from others in the neighborhood, especially since they had previously asked for a variance based on the fact that what was proposed would be similar to other properties in the area.

Mr. Welsh said he agreed.

The Board discussed the public interest criterion, as well as the spirit and intent of the Ordinance criterion, and how they related to the issue of fitting in with the neighborhood. Chair Gooze said he had trouble with these, stating that this was a very large structure, although it met the setbacks except for the parking area.

He questioned whether, if there was just the building height issue, what was proposed would be in the public interest, and said he thought it depended on what one thought the purpose was of having a height limit.

Ms. Woodburn said the issue with height was that structures should not impose on their surroundings. She also noted that in urban areas, which this wasn't, there were shading issues, etc.

Chair Gooze said he thought the height limit was there for the good of the community, and said he didn't think either the public interest criterion or the spirit and intent criterion were met concerning it. He also said the issue with the parking area seemed to be self imposed.

Mr. Welsh asked how the Board was supposed to consider the issue of the motor home.

Chair Gooze said while he could see why the applicant wanted to put it in the proposed location, he could find another feasible place for it. There was detailed discussion on this issue.

Mr. Gottsacker read from the ZBA Handbook concerning the issue of self imposed hardship as not being grounds for a variance. He said it also indicated that when a hardship was shared equally by property owners, there were no grounds for a variance. He said everybody in that district faced the height limit issue. He said the Handbook also said it was only when some characteristic of the particular land in question made it different from others that hardship could be claimed. He said this made it pretty clear that there was no hardship in this instance.

Mr. Welsh agreed. He also said it would be one thing if the applicants were trying to fit the house in. But he said they could decide to put the motor coach some place else.

Ms. Davis said she was not in favor of allowing the large motor coach to be placed in the proposed area, which would not be great for the neighbors.

The Board discussed further the substantial justice criterion and the spirit and intent of the Ordinance criterion. Ms. Woodburn said if there was something unique about the site, the applicants would have had grounds for claiming there was a hardship. She also said what was proposed was definitely contrary to the spirit and intent of the Ordinance.

Concerning the issue of whether the variance request was against the public interest, Mr. Gottsacker noted that no members of the public had come to speak against the application.

After further discussion, the Board agreed to include the hardship criterion and the spirit and intent of the Ordinance criterion in their decision.

Robbi Woodburn MOVED to deny an APPLICATION FOR VARIANCES submitted by Milton T. & Edda M. Martin Jr., Durham, New Hampshire from Article II, Section 175-7 and Article XII, Section 175-54 of the Zoning Ordinance to construct a parking area within the sideyard setback and to construct a house greater than 30 feet in height, due to the fact that it doesn't meet the hardship and spirit and intent of the Ordinance variance criteria. The property involved is shown on Tax Map 2, Lot 1-8, is located at 83 Madbury Road, and is in the Residence A Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

- E. PUBLIC HEARING** on a petition submitted by Daniel W. Duvall, Duvall Management LLC, Durham, New Hampshire, on behalf of Robert S. Kennedy and C. Anne Broussard, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance to replace a concrete patio, to replace/enlarge an upper level deck, to construct a new foundation wall and wood framing, to add a new garage/storage bay to an existing one-car garage, to replace a dock and to install an underground propane tank within the sideyard, frontyard and shoreland setbacks. The property involved is shown on Tax Map 11, Lot 31-7, is located at

18 Riverview Road, and is in the Residence C Zoning District.

The applicant, Daniel Duvall, said the 50 year old home involved here had recently been purchased, and was in a significant state of disrepair. He said the owners were looking to make improvements with respect to a number of features, and he reviewed the work that was proposed.

He said he didn't feel the improvements proposed would decrease the value of surrounding properties, and said it would actually increase their value, since the home right now was quite run down. He also said the changes to the house would be environmentally friendly and would be code compliant.

Mr. Duvall said granting the variances would not be contrary to the public interest, stating that the house currently had a number of unsafe features. He said the repairs would be beneficial to the public, aesthetically pleasing, environmentally friendly, and would not have a negative impact on the public interest.

He said denial of the variances would create a hardship, because the house in its current condition was unlivable. He said there were limitations to the house and the lot, and said not being able to make the repairs would be a hardship. He also said substantial justice would be done in allowing the owners to make the changes.

Mr. Duvall said he did not believe that granting the variances would be contrary to the spirit and intent of the Ordinance. He said the variance would allow the owners to improve their property without creating a negative impact on the river or the Great Bay estuary.

Chair Gooze determined that on the western side of the property where the setback was encroached upon, the house on the abutting property was 50-70 ft from the property line.

It was noted that Mr. Kennedy had approached all the neighbors about the variances being requested, and didn't encounter any issues. It was also noted that there was no one present at the meeting to speak against the variance requests, but that it would have been helpful if letters of support had been provided.

Chair Gooze said he was primarily concerned about the abutter to the west, Windsor LLC. But he said it didn't look like there was another place where the garage could be put, and said this appeared to be part of the uniqueness of the property.

Mr. Johnson said the applicants could do a detached garage 35 ft from the property line. He noted that if there was a breezeway, the garage would still be considered to be attached to the house.

There was discussion that there was a discrepancy between the plot plan dimensions and the surveyed plan. It was agreed that the surveyed plan would be referenced to make sure the numbers were correct.

Chair Gooze noted for the record that there were no members of the public to speak for or against the application.

Ms. Woodburn asked why a variance was needed for the new foundation since the building footprint was beyond the 125 ft setback.

Mr. Duvall said the applicants had looked at this as disturbance within the 250 ft shoreland overlay. He said the entire lot was within the overlay, so they thought it was better to ask for the variance.

Mr. Johnson said that his letter was based on the original survey plan, which looked like the rear of the existing foundation was 125 ft or less.

Mr. Gottsacker said a lot of things were being asked for here, and said the things that seemed to potentially have the most impact were the garage, the deck area, and the underground tank. He said he thought most of the other things dealt with remodeling.

Mr. Duvall said that was a fair statement.

There was discussion that the applicants would have to apply to NHDES for a replacement dock, and that a variance wasn't needed for the dock.

There was discussion about the propane tank, and the fact that it was regulated by the State and was also covered under local fire, building, and other codes. Mr. Johnson said it was considered a structure. There was detailed discussion about access issues and setback issues for the tank. It was noted that the house was currently heated by oil but the homeowner wanted to remove the oil tank, and thought heating with propane was cleaner for the environment.

There was discussion that the deck would allow water to drain through. Chair Gooze noted that there was nothing in the Zoning Ordinance that stated that there had to be a pervious deck.

Ms. Davis said a deck was considered as part of the impervious cover percentage that was allowed on a lot. Board members agreed that a condition of approval would be that the deck had to be pervious. It was noted that both decks would need to be mentioned in the approval.

Mr. Duvall said the existing patio had a masonry block foundation, with a bluestone and mortar surface, so was impervious. He said there would be stone under the decks.

Ms. Davis determined that there were no gutters on the house plans.

Mr. Gottsacker suggested that the dimensions for the decks should be included in the approval, and was told it was sufficient that these details were in the application.

Ms. Davis received clarification that there was 5 ft of encroachment of impervious surface into the 125 ft setback.

Mr. Welsh asked whether the driveway would be pervious.

Mr. Duvall said it was anticipated that it would be impervious, but said the applicants were flexible on this.

Mr. Johnson noted that this wasn't an issue because the applicants would be well under the impervious cover percentage allowed for the whole lot. He also said the driveway would not be located within the 125 ft shoreland setback.

Ms. Davis noted that there was already work going on at the property, and Mr. Johnson said only the interior work was being done right now.

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

Chair Gooze said that based on the Board's discussion, it didn't have any problems with the variances requested. There was then detailed discussion on how the motion should read.

Jerry Gottsacker MOVED to approve an APPLICATION FOR VARIANCES submitted by Daniel W. Duvall, Duvall Management LLC, Durham, New Hampshire, on behalf of Robert S. Kennedy and C. Anne Broussard, Durham, New Hampshire, from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance, as per the application submitted to the Zoning Board:

- to replace a concrete patio with a lower level pervious deck and replace/enlarge an upper level pervious deck as per the dimensions in the letter dated January 25, 2010;

- to construct a new foundation wall and wood framing;

- to add a new garage/storage bay to an existing one-car garage not to exceed 35 ft from the sideyard setback: and

- to install an underground propane tank within the sideyard, frontyard and shoreland setbacks, as per the sketch plan dated February 2010.

There is no need for a variance to replace the dock.

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

- F. PUBLIC HEARING** on a petition submitted by Joseph Caldarola, Sophie Lane LLC, Portsmouth, New Hampshire, for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to allow for the continued existence of an accessory barn which is located within the sideyard setback. The property involved is shown on Tax Map 10, Lot 7-2, is located on Sophie Lane, and is in the Residence B Zoning District.

Withdrawn

G. PUBLIC HEARING on a petition submitted by Joseph Caldarola, Sophie Lane LLC, Portsmouth, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to allow for an impervious surface ratio of greater than 30% on eight separate lots. The properties involved are shown on Tax Map 10, Lots 7-2 through 7-9, are located on Sophie Lane, and are in the Residence B Zoning District.

Withdrawn

Chair Gooze said the ZBA would meet the following week to complete the Agenda.

Ruth Davis MOVED to continue the meeting until February 16, 2010. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

Meeting ended at 9:55 pm

Victoria Parmele, Minutes taker

Sean Starkey, Secretary