

*These minutes were approved at the May 11, 2010 meeting.*

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

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

**MEMBERS ABSENT:** Edmund Harvey

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

**I. Approval of Agenda**

Chair Gooze noted that he would administer the oath for some of the Agenda items that evening.

***Jerry Gottsacker MOVED to approve the Agenda. Robbi Woodburn SECONDED the motion.***

Chair Gooze noted that at the previous meeting, the Board had closed the public hearing for the CWC application. But he said he had asked that another letter be sent to the abutters allowing them to speak again. He asked the applicant's representative, Mike Sievert of MJS Engineering if the applicant was ok with this, and was told yes.

***The motion PASSED unanimously 5-0.***

**II. Public Hearings**

- A. CONTINUED PUBLIC HEARING** on a petition submitted by CWC Properties LLC, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-41(F)(1&3), Article XII, Section 175-53, Article XIII, Section 175-62 and Article XIV, Section 175-74(A)(3) of the Zoning Ordinance to construct a mixed-use building with two accessible residential units on the first floor and the construction of a parking area within the shoreland setback and the wetland setback. The property involved is shown on Tax Map 4, Lot 12-0, is located at 9-11 Madbury Road, and is in the Central Business Zoning District.

Mike Sievert of MSJ Engineering represented the applicant. He noted that at the previous ZBA meeting, 4 variances were requested, and one of them, regarding

the 15 ft setback for frontage on Pettee Brook Lane, was granted. He said the remaining 3 variance applications were continued to the present meeting. He then explained that only two variances were being requested now, one of which was in regard to an incursion into the wetland setback, and the other which concerned allowing two ADA accessible residential units on the first floor of the building. He said the 25 ft shoreland setback variance was no longer being requested, explaining that he'd been able to keep the footprint for the development further than 25 ft from Pettee Brook. He said the building would be a bit more compact than it had previously been.

Mr. Sievert first highlighted the changes that had been made to the conceptual plan since the previous meeting. He said the amount of impervious coverage was now down to 5802 sf, based on a new footprint outline. He explained that there was about 20 ft less footprint on the southerly end, which resulted in this reduction in impervious area. He said there was a reduction of 913 sf of total impervious area within the 75 ft wetland setback with the revised design, whereas previously there had been a slight increase.

He said the previous proposal had 288 sf of impervious area within the 25 ft shoreland setback, but said they were now completely outside of it. He noted the current impervious area within the 25 ft setback from Pettee Brook, and explained that it would be taken out, and a rain garden would be placed there. He said there was also possibly 47 sf of proposed sidewalk area, if it went there.

He showed the proposed layout of commercial space and residential units in the building, and said about 70% of the first floor would be commercial. He said what was proposed was 7 units on the second floor, 7 units on the third floor, and 2 ADA accessible units on the first floor. He said the size of the units was based on 200 sf of habitable floor area per occupant. He said there would potentially be 33 students per floor for both the second and third floors, and 8 students on the first floor.

He said the rest of the site plan was the same as it had previously been. He said the applicants were still proposing 5-6 parking spaces out front as well as the rain garden, which he said would encroach into the drainage easement in that area. He said this had been discussed with DPW, and he noted that there was currently paved parking there.

He said DPW had said it was ok with the design, but that if they had to dig the area up to address a sewer problem, the easement would be adequate for this but the new parking area would have to be destroyed. He also said the rain garden could be put back. He said there might be a requirement that the owner would have to put back the rain garden, and that this would be worked out with the Planning Board.

Chair Gooze asked if the 3 parking places closest to the corner were still within

the wetland setback, and Mr. Sievert said yes. Chair Gooze then asked if the ADA accessible apartments would be limited to individuals with disabilities, and Mr. Sievert said no.

There was discussion that these apartments would be available if needed by a person with a disability, but someone else could rent them if they would otherwise be vacant.

Ms. Woodburn said the footprint was still conceptual, but said she could imagine the entryway on the side for the accessible units, and didn't see any impervious surface area shown that would be needed to get to the entrance. She also said on the other side, the commercial space on Pettee Brook Road, there was an entryway that didn't show any impervious surfaces areas to get to the entrance. She said this area would be within the 75 ft wetland setback.

Mr. Sievert said the entryway would be a pervious paved walkway, and also cautioned that this wasn't the final layout yet. He spoke further on this.

Ms. Woodburn asked if the drainage from the roof would be directed into the rain garden, and also asked if all of the drainage could be accommodated there.

Mr. Sievert said it would, and said that was the reason that a larger rain garden was now proposed. He said the entire roof, potentially part of the sidewalk and all of a proposed berm area would drain into the rain garden. He said with a one inch storm, there would be a reduction in quantity and volume, and said for more than a 25 year storm, there was still a reduction in the quantity but not necessarily the volume, for example when there were back to back storms.

Ms. Woodburn summarized that when there was a storm that was bigger than a 25 year storm or there were consecutive storms, the rain garden couldn't handle the volume of water it received. She said there would be some settling at such a time, and Mr. Sievert said the rest of the water would go through an outlet structure. He said with the rain garden, for up to a 100 year storm there would be no greater quantity of water leaving the site than there was today.

Chair Gooze asked about flooding in that area.

Mr. Sievert said it was outside of the flood zone, and said that had not changed with the revised design. He noted that if there were a 500 year flood, in addition to seeing water in the rain garden, the downtown would be flooded.

Mr. Welsh asked how much less pervious the site would be as a result of these changes.

Mr. Sievert said the applicants were down to a 1% increase in impervious cover over the existing situation, while previously they had proposed a 10% increase.

He said with this scenario, there would never be a worse scenario than what could happen on the site now. He said in no storm event would there be an increase in flow from the site, but said for larger storms, the situation wouldn't be improved substantially. He said it was hard to get significant reductions because the site was so small.

Mr. Welsh received confirmation from Mr. Sievert that the only difference in the design compared to last time relative to the 75 ft wetland setback was that the sidewalk to get into the building was proposed to be pervious pavement, which wouldn't change the amount of imperviousness.

Ms. Woodburn asked if there was any possibility that the footprint could get smaller and Mr. Sievert said yes. He explained that this could happen in the front, where there would be a conflict with a narrow sidewalk and cars opening up into that area. He said the footprint would not get bigger, or he would be back to the ZBA.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application, and there was no response. He then noted that a letter was received from Jason Lenk, an abutter.

Mr. Gottsacker read the portion of the letter pertaining to this variance request into the public record. Mr. Lenk's letter said a concern was the quantity and redirection of storm water runoff resulting from the project, and its impact on flooding of upstream properties. He said he could verify that this was already an area of extreme flooding, and said he feared that incursion into the wetland buffer would exacerbate the problem.

In response, Mr. Sievert first said it was only the portion of the site to the northwest where some trees would be removed. Concerning the comment on flooding, he said what was being proposed would reduce runoff compared to the present situation. He also noted that part of this proposal would be to recommend that as part of the planning process, the culvert shared by the Lenk property and an abutting Town property should be removed, which he said would help deal with upstream flooding by improving the flow through that area, although not dramatically.

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

Mr. Gottsacker said he didn't have much problem with this part of the application. He said if what Mr. Sievert said was true, it looked like the runoff situation would be improved.

Chair Gooze said he had a problem with the parking in the buffer.

Mr. Welsh said he agreed, but said that otherwise this was a better proposal.

Mr. Johnson noted that the parking spaces were not on the applicants' property, and were within the Town right of way. It was determined that the parking issue was therefore not within the provenance of the ZBA.

Ms. Woodburn said she was happy to see that the building would be out of the 25 ft shoreland setback from Pettee Brook. She suggested that there might be pressure from commercial users of the building to enlarge upon the footprint by using the outdoor space, which would be perfect for street terraces facing south. She said some paving would be involved with this, and said allowing this was not part of the variance being requested.

She said she was happy to hear that the rain garden would be able to accommodate drainage from the site.

Ms. Davis agreed with Ms. Woodburn, and said she assumed that this was the only spot where the rain garden could go. She also said she liked the fact that the building had shrunk, and that there would be an improvement in terms of addressing water quantity.

The Board reviewed the variance criteria, stating that there was no evidence that granting this variance would reduce the value of surrounding properties. Mr. Gottsacker said what was proposed bettered the public interest because of the reduction in runoff.

There was discussion that there was hardship because of the constraints on the site posed by the wetlands, a constraint which was specific to this property, and that what was proposed was reasonable. It was agreed that the spirit and intent of the Ordinance and substantial justice criteria were met.

***Carden Welsh MOVED to approve the Application for Variance submitted by CWC Properties LLC, Durham, NH from Article XIII, Section 175-62 of the Zoning Ordinance to construct a mixed use building with a footprint no larger than that shown on the attached plan dated March 2, 2010 within the wetland setback, and further that any required sidewalks have to be pervious. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.***

Mr. Sievert said the next variance, to allow 2 ADA accessible residential units on the first floor, helped to promote the smaller footprint, less encroachment on the 75 ft wetland setback and removal from the 25 ft shoreland setback. He said he wasn't sure this smaller footprint would work without this variance.

He said there were really no changes from last time that would impact the 5 variance criteria. He said the applicants felt there was a hardship. He first noted that the property was in the commercial core but was not in the downtown center.

He said surrounding land uses were residential in nature, especially on the first floor, and said there was a limited supply of ADA accessible units. He also said in the event of an emergency, it would be harder for a rescue team to get to the second floor if the elevator wasn't working. He said the design proposed would provide easy access to the apartments on the first floor.

Mr. Sievert also said the intent was to put the commercial space in front as part of the main entrance to the building, and said the building would still have a commercial presence along the frontage on Pettee Brook Lane as well as Madbury Road.

Mr. Gottsacker noted that the building being built on the former Houghton Hardware site would have an elevator, and no housing on the first floor. He asked why there couldn't be strictly commercial uses on the first floor of the proposed building.

Mr. Sievert said there could be, but said there were extra site constraints on the applicants' property that all indirectly affected the footprint, as compared to the Houghton Hardware site. He spoke in some detail about this.

Mr. Gottsacker noted that the letters from abutters had voiced several concerns that he thought were legitimate, and had everything to do with keeping student rentals out of the first floor, in order to discourage inappropriate activity and encourage appropriate commercial activity. He said the letters said the separation between commercial and residential uses was needed.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application, and there was no response. He then referred to letters from abutters Bruce Bragdon and Jason Lenk, who owned commercial properties. He said these letters essentially said that the purpose of having commercial uses on the first floor and not residential was to separate these uses, and in part because the business presence on the first floor would provide an opportunity to control student behavior.

**Karen Mullaney, 8 Davis Ave**, received confirmation that if the accessible units were allowed on the first floor and there were no people with disabilities who wanted to rent them, they could be rented to anyone.

**Annmarie Harris, 56 Oyster River Road**, said she agreed with concerns expressed that a student rental property with students living on the first floor would be more intrusive to the community than if they were not allowed to live on the first floor.

In response to the letter from Mr. Bragdon, Mr. Sievert said the applicants would be almost doubling the commercial area on the property compared to what was there now. He also said the benefit from this design, such as improvements in

drainage, went beyond complying with the ADA requirements. In addition, he said he thought there would be a business presence on the first floor of the new building late at night.

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

Chair Gooze said when this variance request was discussed at the previous meeting, he had been pretty adamant that he didn't see any difference between this property and other properties. He said that after reading the letters he was even more convinced of this, and about the purpose of the CBD District. He noted that the ZBA had allowed a structure on Rosemary Lane to have no commercial on the first floor, but said it was very specific that this was an unraveled route, in terms of being able to get customers. He noted that the Board could be wrong about that.

He also said the fact that there were student rentals nearby wasn't a good enough reason to say there was a hardship. He said he agreed very much with the letters from the abutters concerning the spirit and intent of the Ordinance and public interest criteria. He said he couldn't vote in favor of this application because he didn't believe those three variance criteria were met.

Mr. Welsh said he didn't see what was different enough about this property, and noted that the neighbors had pointed out that the problems that Zoning was meant to solve made it questionable whether the spirit and intent of the Ordinance and the public interest criteria were met.

Mr. Gottsacker said he had a problem seeing how the public interest was met, especially the commercial interests of abutters and the downtown in general. He said what really concerned him was that even though these were ADA units, the chances were higher that they would be regular student rentals, which would exacerbate the problems discussed in the letters from the abutters.

Chair Gooze said he didn't think the ZBA should decide that ADA accessible units could be put on the first floor in the CB District, and said the way to address this was by changing the Zoning Ordinance.

Mr. Gottsacker said if the Zoning did change in the future to reflect this, the property could always be adapted to allow residential on the first floor.

Ms. Woodburn said when these provisions of the Ordinance were crafted, the goal was to achieve a balance between allowing commercial and residential development, having student housing to support the commercial development, and keeping the uses separated. She said the fact that allowing this variance could impact nearby businesses and the fact that the Ordinance was specifically intended to go after that meant that the spirit and intent of the Ordinance was not

met.

Ms. Davis said she didn't think this application met the spirit and intent of the Ordinance or the public interest. She said she wasn't sure if it met the hardship criteria, stating that if they needed that many residential units, including on the first floor, it might be because of all the limitations on where they could build on the site. She said there would need to be a larger footprint in order to move the accessible units upstairs. But she noted that in order for the variance to be granted, it needed to meet all 5 criteria.

Ms. Woodburn said the question was whether it was a hardship to have fewer units.

After further detailed discussion on whether there was a hardship, and a lack of consensus on this, it was decided not to include this criterion in the motion.

There was discussion on whether the substantial justice criterion was met. Chair Gooze said the general public was served by denying the variance, so this criterion was not met.

***Carden Welsh MOVED to deny the Application for Variance submitted by CWC Properties LLC, Durham, NH from Article XII, Section 175-53 due to the inability to meet the public interest , spirit intent of the Ordinance, and substantial justice criteria. Robbi Woodburn SECONDED the motion, and it PASSED 5-0.***

Mr. Sievert determined that if the applicants wanted to increase the footprint but still stay out of the 25 ft shoreland setback, they would still have to come back to the ZBA.

Mr. Starkey left the meeting at 8:05 pm.

- B. **PUBLIC HEARING** on a petition submitted by Barbara Langley, Langley Real Estate Et Al, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** on a letter from Zoning Administrator, Thomas Johnson, dated February 19, 2010, related to the creation of a second, principal use, 3-bedroom single family home on a property with a conservation easement. The property involved is shown on Tax Map 12, Lot 13-1, is located at 50 Langley Road, and is in the Residence C Zoning District.

Chair Gooze opened the Public Hearing.

Megan Hamel spoke before the Board on behalf of her grandmother and Langley Real Estate Et Al. She said they were appealing the Administrative Decision because the building already existed. She noted that prior to the conservation



easement, the family property was 55 acres. She said 3 acres was left out to go with the buildings. She said they proposed to switch the commercial use of the building in question to a single family home rental unit.

Chair Gooze said the Administrative Decision was that the applicants weren't allowed to have two accessory apartments on the property.

Ms. Hamel said they were appealing Section 175-109 D, regarding having too many accessory structures on the property. She said prior to the easement, they conformed with that. She said again that the structure already existed, so the building should be grandfathered. She said when it was constructed, it was an accessory commercial structure.

Chair Gooze said that was what the problem was.

Ms. Hamel said it seemed that what they needed to do was to seek a variance to allow this.

Chair Gooze said they should discuss the administrative decision first.

Ms. Hamel stated again that the easement language excluded 3-4 acres around the main house. She said there was a three car garage with an accessory apartment above it, the existing commercial structure they proposed to convert, and a barn structure.

Chair Gooze determined that there was not an accessory apartment in the commercial building right now. He then asked if there were any members of the public who wished to speak for or against the application. He noted that the only thing the ZBA was deciding on right now was whether Mr. Johnson had made a mistake in his administrative decision.

Donna Hamel said what they were thinking when they appealed the Administrative Decision was that although there was a conservation easement on the property, it was still owned by the family. She said nothing else could be built on the easement land, and said they were going for the appeal based on the fact that there was plenty of land there to support another dwelling.

Chair Gooze said that issue was relevant to the variance request.

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

Chair Gooze said two accessory dwelling units were not allowed on the property according to the Zoning Ordinance, so Mr. Johnson's Administrative Decision was correct.

The other Board members agreed.

***Jerry Gottsacker MOVED to deny the Appeal of Administrative Decision submitted by Barbara Langley, Langley Real Estate et al, on a letter from Zoning Administrator Thomas Johnson, dated February 19, 2010, related to the creation of a second, principal use, 3-bedroom single family home on a property with a conservation easement. The property involved is shown on Tax Map 12, Lot 13-1, is located at 50 Langley Road, and is in the Residence C Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.***

- C. PUBLIC HEARING** on a petition submitted by Barbara Langley, Langley Real Estate Et Al, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XX, Section 175-109(C)(1&3) of the Zoning Ordinance for the creation of a second, principal use, 3-bedroom single family home on a property where the proposed home is more than twenty-five (25) percent of the total floor space of the single-family residence to which it is accessory. The property involved is shown on Tax Map 12, Lot 13-1, is located at 50 Langley Road, and is in the Residence C Zoning District.

Chair Gooze opened the public hearing.

Megan Hamel reviewed how the variance criteria were met with this application. She said they did not believe that switching back to a residential structure in a residential zone would decrease the value of surrounding properties. In answer to a question from Mr. Welsh, she provided details on the distance of neighboring properties to this property.

She said granting the variance would be in the public interest because the structure was in a residential zone, and the proposed change was from commercial to residential use.

She said denial of the variance would be a hardship because the current commercial structure was vacant with no future commercial use anticipated. She said the proposed use was reasonable because the zoning was residential and they were requesting conversion from commercial to residential use.

She said in granting the variance, substantial justice would be done because the viability of the structure would continue. She also said this would not be contrary to the spirit of the Ordinance, because there would be a structure on what for all intents and purposes was 55 acres, 47 of which would not be built upon because of the conservation easement.

Ms. Woodburn determined that the second residential residence was greater than 25% of the floor area of the existing residence. She asked how much more it was.

Ms. Hamel said the house was approximately 3,000 sf, and the proposed secondary structure was 1,700 sf. She said they would be working with the constraints of the existing structure, and said nothing would be torn down.

There was discussion that the building had been built basically like a house. Ms. Hamel said it was proposed to be a two bedroom house, and would be rented. She noted that they had previously said it would be three bedrooms.

There was discussion that the number of bedrooms wasn't relevant to the Board's decision, and was based on what the septic system could support.

Mr. Gottsacker said the Caseys, who were abutters, had sent a letter that supported the application. He also said the Nature Conservancy had sent a letter that said it supported the application as long as there was no encroachment on the conservation easement.

Ms. Davis determined that the property was considerably larger than others in the surrounding area.

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

Chair Gooze said he had no problem with this application, given that the property was so isolated, and given the amount of land involved.

Ms. Davis asked what the special conditions of the property were, and Chair Gooze said they were its isolation and size.

Mr. Welsh said he didn't think a special condition was that the structure was vacant, but said he did think a special condition was its remoteness. Chair Gooze said there was also the fact that the structure was already built.

There was discussion that the conservation easement was another special condition of the property.

Chair Gooze determined that all of the Board members felt that all 5 variance criteria were met with this application.

Ms. Davis summarized that the size of the property, the fact that it was larger than nearby properties, and the conservation easement were the special conditions of the property.

***Jerry Gottsacker MOVED to approve an Application for Variance submitted by Barbara Langley, Langley Real Estate et al from Article XX, Section 175-109(C)(1&3) of the Zoning Ordinance to convert the building from commercial***

*to single family on a property where the proposed home is more than twenty-five (25) percent of the total floor space of the single-family residence to which it is accessory. The property involved is shown on Tax Map 12, Lot 13-1, is located at 50 Langley Road, and is in the Residence C Zoning District. Carden Welsh SECONDED the motion.*

Chair Gooze restated that the Board felt all 5 variance criteria were met.

*The motion PASSED unanimously 5-0.*

Recess from 8:25 to 8:34 pm

- D. PUBLIC HEARING** on a petition submitted by Thomas P. Sawyer, Durham, New Hampshire, on behalf of Albert K. Sawyer, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XX, Section 175-109(B)(1&2) of the Zoning Ordinance to allow for a goat shed with goats on a lot less than 120,000 square feet and within 100 feet of the property line. The property involved is shown on Tax Map 9, Lot 18-0, is located at 8 Spinney Lane, and is in the Multi-Unit Dwelling/Office Research Zoning District.

Chair Gooze determined that was no one for the Sawyer application was present. He said it would therefore be moved to the end of the Agenda. The application was subsequently continued to the March 30<sup>th</sup> ZBA meeting.

- E. PUBLIC HEARING** on a petition submitted by Pamela Weeks, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow for four unrelated occupants in a single family home. The property involved is shown on Tax Map 4, Lot 19-0, is located at 12 Woodman Road, and is in the Professional Office Zoning District.

Chair Gooze opened the Public Hearing.

Chair Gooze noted that regarding applications concerning occupancy and parking that evening, he would administer oaths under NH RSA 673:15 - Power to Compel Witness Attendance and Administer Oaths. He said applicants and those speaking for or against an application would be asked to take an oath swearing or affirming that the testimony they were about to give was the truth, the whole truth, and nothing but the truth.

Pamela Weeks, Durham Point Road took the oath and then spoke before the Board. She said she had purchased 12 Woodman Road with the purpose of living there with her father, but living there for 7 months made her realize the true character of the neighborhood, which was extremely noisy during the time they liked to sleep, due to pedestrian traffic due to the high density housing on all sides, and students roaming about looking for or leaving parties in the neighborhood.

She said she had tried to change the neighborhood, working with the Police Chief. She said they responded immediately to the parties after hours, which were illegal according to the noise ordinance. But she said it was the heavy pedestrian traffic that was so difficult to control. She said she wouldn't be making this application if the house was in a residential neighborhood surrounded by single family homes.

Ms. Weeks said she had made a valiant effort last summer to rent to families, and showed it to 7 interested parties. But she said when she was honest about the noise, none chose to rent. She said she was currently renting to 3 students, and would like to increase that to 4, which would correspond with the number of bedrooms in the house.

She said there was approximately 1800 sf in the house. She said she invited Mr. Johnson to inspect the house after receiving a letter about the number of cars parked in the drive, which was 4 instead of the usual 2. She said she monitored this, and said it had only happened one time since. She said she had discussed her intention to make the variance application, and said at Mr. Johnson's suggestion, she applied for a building permit to increase the size of the gravel drive to accommodate 4 cars. She said the application also included putting in appropriate egress windows in the bedrooms. She said the house was wired for smoke detectors in every bedroom.

Ms. Weeks said she was an active member of the Durham Landlords Association, owned and managed a 6 unit apartment building on Bagdad Road, was very sensitive to her neighbors there and on Woodman Road, and screened tenants carefully. She said she had a strong lease, parties were not allowed, and noise and trash were controlled.

She said there would be no decrease in the value of surrounding properties by granting this variance because the surrounding properties were already higher density student housing. She said 10 Woodman Road was a single family home but had been rented to multiple students for years, and currently had a variance for 4 unrelated.

She said 9 Woodman Road was a multi-unit apartment building owned by Varsity Durham, and said she was recently told that there were more than 30 students there. She said on the corner of Madbury and Woodman, there were 30 plus students. She said 18 Woodman Road was a multi-unit apartment building owned by Henderson Family Properties, and contained 6 apartments with 3 students in each apartment.

Ms. Weeks said granting the variance would not be contrary to the public interest because the house was surrounded on three sides by properties currently rented to University students, the same population most likely to rent her house. She said

the variance would result in an increase in density by one resident in an already densely populated area.

She said denial of the variance would result in hardship because there were special conditions of the property that distinguished it from other properties in the area, and there was no fair and substantial relationship between the general purpose of the Ordinance provision and the specific application of that provision to her property. She said she was unable to live at the house due to student caused noise in the neighborhood, and said despite due diligence had been unable to rent it to families.

Ms. Weeks provided details on the character of the neighborhood, speaking further on the student rentals in the neighborhood, which she said resulted in a high volume of pedestrian traffic to and from the properties. She spoke further about the noise problems created by heavy foot traffic traveling to and from parties in the neighborhood. She also said there was heavy vehicular traffic because of nearby schools and local deliveries. She said the proposed use was a reasonable one because it increased the density by one person in a neighborhood consisting of higher density housing.

She said substantial justice would be done in granting the variance because the highest and best use of the property at this time was student rentals. She also said granting the variance would not be contrary to the spirit and intent of the Ordinance because this was to protect residential neighborhoods from high density housing. She said the property was zoned Professional/Office, not residential, and also said the character of the neighborhood on all sides was already high density housing.

Ms. Davis asked about 10 Woodman Road, which Ms. Weeks had said had a variance for 4 unrelated people.

Mr. Johnson said in 2002-2003, when there were 8 people living there illegally, it was as brought into compliance, and was granted a variance for 4 unrelated.

There was detailed discussion about single family homes in the area, some of which were being rented to students.

Chair Gooze noted that 10 Woodman Road could be a single family home, and said the only one that wouldn't be was 18 Woodman Road and the ones across the street.

In answer to a question from Mr. Welsh, Ms. Weeks said she purchased the house in May of 2008. She said she grew up on Woodman Road, returned to Durham after living briefly in Gilford and had lived on Newmarket Road for many years.

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

in favor of the application.

Nick Kostis of Kostis Enterprises took the oath. He said the fact that the 18 Woodman Road property his family owned already has 18 students probably would not change. He said he was there to speak in favor of the application, because he said making that stretch of road all students was in the spirit of the Ordinance.

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

**Kitty Marple, 82 Madbury Road,** took the oath. She said she didn't have a particular problem with this variance request, but was against setting a precedent to allow more than 3 unrelated. She asked that the Board uphold the 3 unrelated provision in all cases.

**Henry Smith, 93 Packers Falls Road,** took the oath. He noted that he had served on the ZBA for 5 years, and during that time had to deal with the 3 unrelated issue time and again. He agreed that there was the issue of setting a precedent in allowing more than 3 unrelated, and also said if the variance was granted, one more student was one student too many in a neighborhood where there were already too many students. He spoke about the dramatic decline in residential neighborhoods in Durham, and urged that the ZBA deny this application and all such requests for variances.

**Karen Mullaney, 8 Davis Ave.** took the oath. She said she had no particular issue with this applicant, but said she had an issue with the premises. She said she didn't yet live in a neighborhood with rental housing, but lived next to one. She said she was an active member of the Durham Residential Owners Association, and said it was important to take a stand and say no to more than 3 unrelated. She also said she thought that when the applicant bought the property in 2008, it was already obvious what was going on in the neighborhood.

**Annmarie Harris, 56 Oyster River Road,** took the oath. She said she was a member of the Durham Residential Owners Association, whose goal was to restore the neighborhoods, including Coe Drive, back to single family residences. She said that since Ms. Weeks had lived in Durham so long, she must have known how noisy this location would be, and that the 3 unrelated restriction existed. Ms. Harris said it was important not to give variances for more than 3 unrelated.

**Sam Flanders, 6 Glassford Lane,** took the oath. He then passed out a picture of the property in question, which showed that it was surrounded on both sides by student housing. He said this situation existed when the property was purchased. He noted that the variance ran forever, and said while he didn't question that Ms. Weeks would be a good landlord, she might sell the property to someone who wouldn't be. He said this was about the future of this home.

He said he had heard the applicant say that because there were already a lot of students in the area, one more student wouldn't affect the balance. He said Ms. Weeks was stating that this was a lost cause, but he said the Town was working really hard to try to reverse the situation with strong code enforcement and police enforcement so people would want to stay in the Town rather than leaving.

Mr. Flanders described the student rental situation of single family homes around him, and said using the criteria being stated with this application, he could say both houses across the street from him had more than 4 students, so he wanted a variance to allow 4 students because the noise bothered him. He said the noise had bothered him until this year, but said the Town was now doing a really good job enforcing the rules, in part because residents had been exerting a lot of pressure. He said that was what was required to reverse the trend.

He said the 3 unrelated provision was in the Ordinance in part to prevent a domino effect. He said in this case, the domino effect was less likely, and he provided details on this. But he said problems at this property could impact nearby streets and contribute to the conversion of those neighborhoods. He said there was therefore the chance that the public interest would not be served.

He also said granting this variance would be giving the applicant a permanent advantage over others who could only rent to three unrelated, because they could collect more rent per month, and could state this as a benefit when they went to sell the house. He questioned the justice of this.

Mr. Flanders said he appreciated how tough the foot traffic and noise were and provided details on this. He said this was happening all over Town, and said the only way to stop it was a concerted effort to stop student occupied single family homes all over Town.

Chair Gooze asked if there were any members of the public who wished to say essentially the same thing, and Robin Mower, Faculty Road, raised her hand.

Mr. Gottsacker noted emails from residents Barbara Wright, Howard Gross and Ann Knight that spoke against the granting of the variance.

Ms. Weeks said that regarding the fact that she had been surprised that there was so much noise, she had lived for 22 years on Newmarket Road, which was a high traffic and noisy place to live. She said she had expected there would be some noise at Woodman, but didn't expect the erratic screaming and loud noise associated with the heavy foot traffic in the area.

Regarding comments made by Henry Smith, she said they all were supporting increased vigilance. But she said there were significant conditions that separated this property from others. She said again that she wouldn't make this application



if it was in a single family neighborhood. She said she hoped this neighborhood could be brought back, but said Mr. Flanders' pictures made it clear that it would be hard to turn 10 and 12 Woodman Road back into residential houses and bring back a feeling of a residential neighborhood.

She noted that most people had said they had no particular problem with her application, but had a problem in general with more than 3 unrelated. She also said Mr. Flanders had said there was little possibility of a domino effect in the neighborhood, and she provided details on this.

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

Mr. Gottsacker said there was no proof either way that granting the variance would decrease the value of surrounding properties. There was discussion, and Chair Gooze and other Board members agreed.

Chair Gooze said he thought hardship, public interest and spirit and intent of the Ordinance variance criteria came into play with this application. He noted that he had been co-chair of the committee that developed the 3 unrelated Ordinance. He said at one time, Durham had a 6 unrelated rule, then it went down to 5, then 4 and then down to 3. He noted that there was even some thought given this year to the idea of going down to 2. He said they settled on 3 to control noise, parties and the character of neighborhoods.

He said from an economic perspective 3 unrelated people was thought to be a number that discouraged conversion of properties to non-owner occupied rentals. He said the provision had been well supported in the courts, and said its purpose was always to control the character of neighborhoods because of the incompatibility of student rentals with residential living. He said he didn't think there was any question concerning what the spirit and intent of this ordinance provision meant, and said it was a matter of whether granting a variance for this particular property would be against this.

Chair Gooze questioned the argument that because there were some large rental properties in the neighborhood, this meant that houses there should be allowed to have more than 3 unrelated. He said he didn't think that was an appropriate way to support the character of the neighborhoods. He said although this was in the Professional/Office District, there was still a neighborhood there. He said it could perhaps go back to being more of a neighborhood, and also said houses should be able to live compatibly with the apartment building if there was proper enforcement.

He said he didn't believe that the application met the spirit and intent of the Ordinance, or the public interest. He also said he did not feel substantial justice would be done in granting the variance.

Mr. Gottsacker said he thought granting the variance would be contrary to the public interest, for the reasons already stated by Chair Gooze, as well as the fact that the variance would travel with the land. He also said that regarding the hardship criterion that the inability to rent the house was not a special condition of the property. He also said granting the variance would not be substantial justice because he didn't think that highest and best use of the property met the definition of substantial justice. He also said granting the variance would be contrary to the spirit and intent of the Ordinance. He said the only one that was debatable was the property value variance criterion.

Mr. Welsh agreed, and said the cascading affect was a concern, as well as the fact that a variance was for the long term. He also said if people said because they were next to a particular use, they should be able to have that use, it was such a matter of time before the whole town was like that. He gave examples of University towns that were a mess because of cascading effects with student rentals. He spoke about streets near Woodman Road where there were problems because of student rental properties.

Ms. Woodburn said she agree with Mr. Gottsacker, stating that concerning the hardship criterion, there was no special conditions of the property other than that there were some multi-student properties around. She also said granting the variance would be totally contrary to the spirit and intent of the Ordinance.

Ms. Davis said she agreed with what others had said. She noted investment in a nearby property to make it a single family home.

Chair Gooze said he didn't think the fact that there was an apartment building next door provided a buffer, and he spoke about this.

***Jerry Gottsacker MOVED to deny the Application for Variance submitted by Pamela Weeks, Durham, NH from Article II, Section 175-7 of the Zoning Ordinance to allow for four unrelated occupants in a single family home, because it fails the public interest, hardship, substantial justice and spirit and intent of the Ordinance variance criteria. The property involved is shown on Tax Map 4, Lot 19-0, is located at 12 Woodman Road, and is in the Professional Office Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.***

- F. PUBLIC HEARING** on a petition submitted by Paul F. Mackin, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** on a letter from Zoning Administrator, Thomas Johnson, dated February 4, 2010, related to improper parking on the property. The property involved is shown on Tax Map 2, Lot 8-6(A&B), is located at 5A & 5 B Madbury Court, and is in the Professional Office Zoning District.

Chair Gooze opened the public hearing.

Ann Connelly took the oath, and said she was present on behalf of the applicant. She said they respectfully disagreed with the parking aspects of the February 4<sup>th</sup> letter from Mr. Johnson. She said it said the number of cars was beyond the maximum number allowed, but she said the ordinance applied was Section 175-113 of the 2003 Zoning Ordinance, when it was the 1999 Ordinance, which did not containing this provision, which should have been applied. She said the property was built in 2002, and said it should be grandfathered.

She said that regarding all of the other issues for parking, she had basically the same argument. She said the building permit was issued and these parking issues were not brought up. She also said the property had been there for 7-8 years and these things had never been enforced. She said at this point it was an equitable waiver of the rights. She said the lack of enforcement in the past precluded the Town from asserting its rights now.

Chair Gooze asked how they knew how many cars had been parked there.

Ms. Connelly said the Town had never gone and seen how many cars were parked there. She said there had been 4 cars parked on each side in the past and said nothing had been done about this over the past 7-8 years, so she believed that based on this, it had been waived at this point.

Ms. Woodburn asked whether, when the building was built, was there any kind of site plan that delineated how many cars there could be for each unit of the duplex?

Ms. Connelly said there was a plan approved and said whatever it had for parking, it wasn't addressed at that time, it wasn't disputed, and there had been 4 cars on each side for quite some time.

Ms. Woodburn said she was trying to establish that from the inception there was documentation on something like a site plan that the number of cars was planned for, and that this had existed continuously since then, as opposed to a driveway being shown on a plan and the parking just happening. She also asked how many cars were allowed for each unit according to the 1999 Ordinance.

Ms Connelly said in the 1999 Ordinance, there was no provision about a maximum allowance of parking a residence could have. She also said she wasn't sure the plot plan was specifically approved for 3 cars or 4 cars. She said she believed the plot plan perhaps drew 3 cars per side, but said she wasn't sure, She said the building permit was accepted, and this issue was never raised.

Ms. Woodburn said if there was a site plan approved, it would show a driveway and it could be scaled to see how much parking spaces were on it. She said it

would be interesting to get some proof to allow the ZBA to determine that a building permit was issued for a situation that allowed for more cars than what the Ordinance now allowed.

Ms. Connelly said perhaps part of the reason there wasn't an issuance for more than the maximum allowed was because there wasn't a maximum allowance provision at that time.

Ms. Woodburn said there were setbacks, the driveway, curb cuts, and the fact that cars couldn't park on the lawn, so it could be figured out from that accepted plan what could possibly have been done in terms of cars.

Chair Gooze said he would like to look at the plan as well, and suggested that perhaps the application could be continued.

Mr. Johnson said he couldn't respond regarding the 1999 Ordinance provisions, but said the applicant had provided a copy of the plot plan approved in 2003, which showed parking for 3 cars on each side, with 9 ft by 8 ft parking spaces.

Ms. Woodburn said it was clear from the approved plan that 6 spaces, each of which was 9 ft by 8 ft, were allowed.

Mr. Johnson noted that this was the current dimensional requirement.

There was some discussion on the history of the review process concerning this property.

Mr. Gottsacker said it was clear from the plan that 6 spaces was allowed, and said they were even numbered.

Ms. Connelly said if the Board found that the number of parking spaces on the plan was six, she said there was still the equitable waiver issue. She said this was being brought to the homeowner's attention for the first time, yet there were times in the past when there were more than 3 cars per side in the past.

Chair Gooze said there were many times that these things didn't get attention until there were the resources to address them or unless complaints were received and the Town was then followed up on them.

Mr. Gottsacker said an equitable waiver application was separate from this Appeal of Administrative Decision. He said one couldn't be turned into the other.

Ms. Woodburn said she agreed with this.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application. He first noted that those speaking should address

whether they thought Mr. Johnson made a legal error in the decision he had made. He said if not, they should wait to speak concerning the variance application.

Annmarie Harris, Oyster River Road, first took the oath administered by Chair Gooze. She said she wished to speak in favor of the decision made by Mr. Johnson. She said she recalled being a member of the Planning Board at the time this property came before it. She also said Mr. Mackin owned other properties in Town where he had other problems concerning parking. She said he was familiar with the regulations. She said Mr. Johnson had not made an error.

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

Chair Gooze said that based on what he had seen on the plan, it didn't matter what was in place in the 1999 Zoning Ordinance.

There was discussion on pictures recently taken at the property, and Mr. Gottsacker said they clearly showed more than 6 cars on the property.

***Jerry Gottsacker MOVED to deny the Appeal of Administrative Decision submitted by Paul F. Mackin, Durham, NH on a letter from Zoning Administrator, Thomas Johnson, dated February 4, 2010, related to improper parking on the property. The property involved is shown on Tax Map 2, Lot 8-6(A&B), is located at 5A & 5 B Madbury Court, and is in the Professional Office Zoning District. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.***

- G. PUBLIC HEARING** on a petition submitted by Paul F. Mackin, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow for four unrelated occupants within each side of a duplex. The property involved is shown on Tax Map 2, Lot 8-6(A&B), is located at 5A & 5 B Madbury Court, and is in the Professional Office Zoning District.

Chair Gooze opened the public hearing.

Ms. Connelly took the oath administered by Chair Gooze. She said Mr. Mackin had been a Durham resident for 7 years, had children who attended UNH, was an active member of the community and cared about the community. She said they were not absentee landlords, and were able to take care of the property and address concerns regarding it in a timely manner.

She addressed the variance criteria, and first stated that granting the variance would not decrease the value of surrounding properties. She said this area of Madbury Court was surrounded by student rentals, including Strafford

Apartments which abutted the property, except for one residential property.

Chair Gooze asked if other properties than the apartment building were still considered residential properties, even though they rented to students.

Ms. Connelly said she believed so, also noting that this was a duplex. She said there were fraternities and sororities in the area, so it was heavily populated with students, and was close to campus. She said unlike Woodman Ave, there weren't a lot of residences around the area, and it was almost entirely comprised of student rentals.

She said that allowing an extra tenant to live on either side of the duplex would not affect the value of surrounding properties, wouldn't change the character of the neighborhood, and wouldn't change the appearance of the home. She said allowing 4 people on each side would be a maximum number, and also noted that according to the Ordinance, there could instead be 8 family members living on one side.

She said a lot of the homes in the area were already grandfathered in, and weren't subject to the three unrelated rule. She said because the variance would not change either the character of the neighborhood or the appearance of the home, this criterion had been met.

Ms. Connelly said granting the variance would not be contrary to the to the public interest. She said the Supreme Court had stated that pretty much any variance would be contrary in some way to the public interest because it would be an exception to an Ordinance. She said the standard that needed to be applied was whether it unduly and in marked degree conflicted with the ordinance so that it violated the basic principles of the zoning objectives. She said this was a higher standard that had to be met. She said to determine this, one had to consider whether it would alter the essential character of a locality, and also whether it would threaten public health, safety or welfare.

She said the purpose of this Ordinance provision was to prevent student housing encroachment into residential neighborhoods so that they weren't residential areas anymore. She said unlike the situation with Woodman Road, this entire area was already almost entirely student housing, so there was no residential neighborhood to encroach upon. She noted a strip of land between this property and the abutting property that was commonly used by other students to get to classes, dorms, fraternities and sororities, or going out for the night. She said it was a very loud area.

Ms. Connelly said noted that there had been discussion that the 3 unrelated provision needed to be a blanket rule, but said if that was the case, what was the purpose of a variance? She said these things needed to be considered on a case by case basis, based on the particular location of the property and the character of the

neighborhood, which was all student rentals.

She also said there was no threat to public safety or welfare having 4 people in each unit, noting this could happen if the people were related. She said this variance request was to allow a maximum of 4 people in each unit, regardless of relation, and said this was a reasonable and fair proposal. She provided details on this.

Ms. Connelly said literal enforcement of the Ordinance would result in unnecessary hardship. She noted that the Legislature had recently redefined what was an unnecessary hardship, and she reviewed these criteria. She said the special condition that distinguished this property from other properties in the surrounding area was that it provided about 375 sf per person, which was more than the Ordinance required, and was far more than what was provided at Strafford Apartments or in other neighboring properties .

She also noted that it was different because it was one of the only homes where the three unrelated provision even applied. She said she understood the Board's concern about a possible domino effect, but said she didn't think that it was true for this situation.

She said the specific application of the three unrelated provision to this property wouldn't serve a purpose because there was no fair and substantial relationship between the general purpose of it, which was to prevent overcrowding, and the specific application to this home. She said they were asking for only 4 on either side, and she spoke in further detail on this. She also said the tenants at this property had historically been law abiding citizens, and spoke further on this.

Ms. Connelly also said a family wouldn't want to want to live here given its location. She said the applicants were forced to search for students who were related, and said in that situation, they might get renters who were less responsible. She said the purpose of preventing nuisances therefore wasn't necessarily served by applying the Ordinance to this particular property.

She said the request to allow 4 tenants on either side was a reasonable one, and was consistent with the character of the neighborhood. She noted that variances should be decided on a case by case basis.

She said granting the variance would be substantially just, stating that the neighborhood for which the variance was requested had clearly undergone change, and the surrounding properties were utilized predominantly for student rentals. She quoted from Supreme Court case Labrecque vs. Salem, which held that granting a variance permitting a residence to be used for commercial use would be substantially just because the neighborhood had undergone change and the surrounding area was predominantly commercial in use. She said in this case, permitting the reason to allow 4 unrelated on either side would be substantially

just because this neighborhood had undergone change, and the surrounding area was now rental properties.

Ms. Connelly also said that RSA 674:17, II stated that “every Zoning Ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular use.” She said this particular part of Durham was pretty much downtown, next to the campus and between fraternity rows.

She said granting the variance to allow this use would not be contrary to the spirit and intent of the Ordinance. She said because the applicants were proposing to allow for a maximum of 4 unrelated individuals in each unit, there was no danger of overcrowding or nuisance. She said this would allow the applicants to choose tenants who were law abiding, responsible, would not have parties, and would abide by the terms of the lease. She said the proposed variance could actually limit the number of occupants in the dwelling to 4.

Ms. Connelly said a variance had to be looked at on a case by case basis, and said not to do this frustrated the purpose of having variances. She said now and in the future, the property would be close to dorms, student housing, etc , given its location, which was in the Professional/Office district.

Chair Gooze said there was a beautiful residential home on the other side of that street that had all kinds of trouble with noise, and said anything added to that would be very difficult. He also said that concerning the argument that other properties were used as rentals so there was no reason why the applicant couldn't have more than the allowed numbers, he noted that the courts had upheld that the character of a neighborhood could be controlled.

There was discussion between Chair Gooze and Ms Connelly on this issue. She said there was no threat of a domino effect with this property because more than 3 unrelated was already grandfathered into surrounding properties.

Chair Gooze said most of these properties were still single family residences, and Ms. Connelly said they weren't occupied by single families. Chair Gooze said they could be next week, and Ms. Connelly said this was highly doubtful given the character of the neighborhood, which had undergone significant changes over the past several years.

Mr. Gottsacker noted the Supreme Court case, *White v Durham*, concerning the ability of the Town to discriminate between related and unrelated, which had found this to be constitutional.

Chair Gooze said he had been involved with at least 3 ZBA decisions where more than 3 unrelated was allowed, based on the circumstances involved but not just because other properties around were rented, when next week they could be not



rented. He also noted that while the Mackins could be wonderful people, the variance would run with the property. He asked how many people lived on either side now of the duplex now, and Ms. Connelly said 4. She also said there was no issue of absentee landlords here, and in addition said these units were larger than others around them that allowed 4 residents on each side.

Chair Gooze said the ZBA had seen many cases where there were large houses that could handle more than 3 unrelated, but the Board had been very strict, and the decisions had held up in court. He said the size of the building didn't matter, but said it might make a difference if the property was larger.

Mr. Gottsacker said the ZBA didn't use precedents and didn't set precedents, but said this was commonly misunderstood by the public.

Ms Connelly said she wasn't suggesting that the Board did use precedents.

There was discussion on the rental status of other properties in the area. Mr. Johnson provided details on this.

There was discussion about how long there had been 4 residents on each side. Ms. Connelly said there had been siblings living there, and said historically there had been one car for each of the 8 people living on the property.

Ms. Woodburn said that based on the description of occupancy of surrounding properties, it was hard to see that there were any special conditions of this property that would compel the Board to not have a blanket approach to this and allow 4 on each side. She said it sounded like this property was very similar to many of the other properties surrounding it.

There was further discussion with Ms. Connelly.

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

**Sam Flanders, 6 Glassford Lane**, took the oath. He said when there was higher density, there was a higher probability of nuisances. He said this had been seen all along Madbury Road, including with single family homes. He said it wasn't just the properties themselves that caused problems, and said it was also roaming students in the area. He said the fact that there were already a lot of students in the area didn't mean that more should be allowed.

**Annmarie Harris, 56 Oyster River Road**, took the oath. She said about 75 ft from this property was the Damambro property, and between it and this property was a private residence. She said Marty Lavoie, who had lived nearby, was forced out of his house because of the building of this property. She said the properties in the surrounding area had changed only within the period of time that this duplex

went in, and said it contributed greatly to the demise of a beautiful little pocket neighborhood. She said she was definitely opposed to increasing the number of students.

Mr. Welsh asked Ms. Harris what she meant about Mr. Lavoie being forced out.

Ms. Harris said the noise was bad, and also said there was a cut through that was used by the property owner to move furniture, and by students walking through. She said this area had previously been like a common natural area.

Mr. Gottsacker noted emails from Barbra Wright, Howard Gross, and Ann Knight that were against the application.

Ms. Connelly said that regarding the comment that the duplex caused the demise of the neighborhood, to the contrary the duplex was a nice unit and increased the value of surrounding properties. She said she graduated from UNH in 2002, and this cut through existed during that entire time. She said the premise that the duplex created the cut through and more population passing through it was completely unfounded.

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

Chair Gooze noted that this property was the last duplex permitted in Town. He said he walked that area quite a bit, and worried about the fact that this variance would run with the property. He said he had seen trash, etc, there, and said he believed the applicants tried hard, but it was the nature of the situation, and was a reason for the 3 unrelated ordinance.

He said he agreed with Ms. Woodburn that there was nothing different about this property, since there were other single family rental properties in the area. He said people had a right to rent, and also said if all three houses in his neighborhood rented legally, this didn't mean he would be able to rent to more than 3 unrelated people. He said he thought that would be against the public interest and against the spirit and intent of the Ordinance.

Ms. Davis noted that the ZBA had granted a variance to allow 4 unrelated for the duplexes behind the Holiday Inn hotel, so the Board did take this on a case by case basis. But she said this was a very different neighborhood.

Mr. Johnson said that was a multiunit complex that included 3 duplexes and the hotel on one lot. He also said the applicant had asked to be allowed 4 unrelated but got 3 because of the square footage of the units.

Mr. Gottsacker said granting this variance would be contrary to the public interest, stating that allowing no more than 3 unrelated served the public interest

and was what the Ordinance wanted. But he said the greater issue was that a variance traveled with the land. He said he thought the application failed the hardship criterion, and was against the spirit and intent of the Ordinance. He said he was ambivalent concerning whether granting the variance would decrease the value of surrounding properties.

Mr. Welsh agreed, based on what the Board had discussed. He also said the argument made about the surrounding area was interesting, but wasn't factual. He said the surrounding area tended to be houses that were rented out, and said he didn't think there was anything special about the property.

Ms. Woodburn said this wasn't a property that was surrounded by all greater density properties, and said the applicant therefore lost on the argument concerning special conditions of the property that resulted in hardship.

Ms. Davis agreed, and said she didn't think the application met the hardship criterion because it was surrounded by a variety of homes that in large part were single family homes that were rented, and could revert back to being owner occupied. She said a duplex could be a nice place for a family to live, even with a large apartment building behind it. She also said the spirit and intent of the Ordinance was pretty clear.

***Jerry Gottsacker MOVED to deny the Application for Variance submitted by Paul F. Mackin, Durham, NH from Article II, Section 175-7 of the Zoning Ordinance to allow for four unrelated occupants within each side of a duplex because it doesn't meet the public interest, spirit and intent of the Ordinance, hardship and substantial justice variance criteria. The property involved is shown on Tax Map 2, Lot 8-6(A&B), is located at 5A & 5 B Madbury Court, and is in the Professional Office Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.***

- H. PUBLIC HEARING** on a petition submitted by Steven F. Kimball, Pine Ledge Holdings Inc., Hooksett, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** on a decision of the Planning Board to approve a Site Plan application for Xemed Holdings, LLC, at 16 Strafford Avenue. The property involved is shown on Tax Map 2, Lot 8-3 is located at 16 Strafford Avenue, and is in the Professional Office Zoning District.

Chair Gooze opened the public hearing.

Mr. Kimball noted that he abutted the property in question, and he then handed out documentation to Board members concerning his Appeal. He said there was a full sized packet, which contained the full context of material that he had taken excerpts from, as well as a smaller packet.

Mr. Kimball said if the Board decided it needed to continue the application, they could let him know. He then reviewed the three bases for the appeal.

1. He said the first basis of his Appeal was his questioning of the proposed use for the site as Professional Office. He said at least one member of the Planning Board had said he was concerned that the use proposed did not clearly fit the Professional Office definition. (See Section 2 on page 1 and 2 of the smaller Appeal document for more details)

2. He said the second basis of his Appeal was that the Planning Board had failed to ensure that the applicant had complied with Section 7.02 D.4.m of the Site Plan regulations, regarding getting a stamp from a State certified wetlands scientist. (See Section 2 on page 1 and 2 of the abridged document for more details)

3. He said the third basis for his Appeal was regarding the variance granted in December 2005 by the ZBA to build a second commercial building on a lot and have less than the required parking. He said this was what the applicant relied upon when submitting a plan for more than 50% impervious cover. Mr. Kimball said the Planning Board did not apply the requirements of the variance to the site plan that had been submitted. He said the variance granted specified that the increase in impervious cover and reduction in parking were Conditional Uses. He also said the site plan submitted was not for a second commercial building on a lot, as stated in the variance application, and the variance in its entirety should not be available for relief to the site plan applicant.

There was discussion about the wording "The variance granted specific that the increase in impervious cover and reduction in parking were Conditional Uses."

Mr. Kimball referred to the meeting Minutes that related to this, found in Section 4.6 on page 6 of his Appeal document. Ms. Woodburn read this wording.

Chair Gooze asked if these words, stated by Henry Smith, were saying that because the variance said Xemed could have a second building and they expanded instead, the company didn't follow the variance.

Mr. Kimball said he could explain that issue now, or when they got to section 4.6 of his Appeal.

Chair Gooze said he wanted to take the first part of the Appeal first. He asked if the variance granted mentioned anything about the use.

Mr., Kimball said there was significant discussion on the use.

Chair Gooze said there was ample discussion as to whether the use was manufacturing or Professional/Office, and said it was decided that it was the

latter.

Mr. Kimball disagreed, stating that the Xemed had not been applying for a use variance, and was applying for area variance. He said the ZBA therefore felt the use issue wasn't relevant to the discussion, so deferred that discussion. He said people had commented about the applicant coming back for a use variance.

Mr. Kimball next provided Background information for his Appeal. These details are found on page 3 of the Appeal document.

He then reviewed the first basis for his appeal, concerning the use. He reviewed the definitions in the Zoning Ordinance concerning Office/Professional, Manufacturing/ Light, and Research Facilities and Labs. He also spoke in detail about the operations at the Xemed facility, and said that given marketing materials about the company and the size and configuration of the proposed building, with an electronics assembly area, polarizer assembly area and a large delivery door in the front of the building, it seemed that the building was being designed for a much larger production capacity than two units per year. (Full details can be found on pages 3-5 of the Appeal document.)

Chair Gooze said at the Planning Board meetings in June of 2006, the Board essentially knew what Mr. Hersman's business was at that time.

Mr. Kimball said yes, and said Mr. Hersman said he only built one or two units per year.

It was noted that these discussions with the Planning Board were part of a design consultation at that time, and that the Board was aware of what was happening.

Mr. Gottsacker said he thought it was a huge logical jump that Mr. Kimball was making regarding what would be going on at the facility.

Chair Gooze noted that the packet provided said Xemed was planning on having seven facilities. He said he thought the company would be using the facility in Durham as an office with some research.

Mr. Kimball said this was the same slippery slope he saw. He asked what happened if the number of units went up to 4, and then 8 and then more, and at what point it became manufacturing.

Mr. Gottsacker said this would be self limiting, and said at a certain point the company would go get more space. He said that happened to every business that grew.

There was discussion. Mr. Gottsacker said he remembered the Planning Board discussion, and said it was pretty clear that it would be research and development,

but not in the context of the Zoning Ordinance.

Ms. Woodburn said in order to digest what Mr. Kimball was saying, ZBA members needed to look at a copy of the Minutes of the original ZBA decision in order to determine if they did or did not talk about the issue of use.

There was discussion on which Minutes were pertinent.

Ms. Woodburn noted that the information presented by Mr. Kimball that evening was different than what had been provided in their packets for the meeting.

Mr. Kimball said he was not demanding that the Board make a decision on his Appeal immediately.

Ms. Woodburn said she would have liked to have had the full benefit of his presentation, having reviewed this information before the meeting.

Mr. Gottsacker said he would like to continue this hearing in order to see the relevant Planning Board and ZBA Minutes. He said he was sure there was a lot of discussion by the Planning Board on this, but said ZBA members were only seeing small extracts right now. He said he would also like to hear from the Planning Board Chair and the Planning Director, who were now present at the meeting.

Chair Gooze read from his own comments in the Dec 9<sup>th</sup> 2008 Minutes concerning why it had not previously been decided that this was a manufacturing use. He said he was saying this was not manufacturing, and wasn't anything except testing.

Ms. Woodburn agreed with Mr. Gottsacker that perhaps this hearing should be continued. She also determined that the variance the ZBA had granted at that time was concerning the wetland buffer.

Chair Gooze said this had essentially been an area variance. He also said the variance granted in 2005 was to allow the building of a second commercial building on the lot and to provide fewer parking spaces. He said Mr. Hersman had discussed his business at that time, and he said he remembered this discussion. He said ZBA members had all agreed that there was no problem with that part of it.

There was discussion that no variance was ever requested concerning the use itself.

Mr. Kimball said he believed this was discussed, and said if one reviewed the DVD, one would find that the Board was split on the topic. He provided details on this.

Chair Gooze said one thing the ZBA could do at the present meeting was to make a decision as to whether they thought the use was Professional/Office, Manufacturing/Light or Research and Development.

Mr. Gottsacker said he thought they should let Mr. Parnell and Mr. Campbell speak, get the pertinent Planning Board and ZBA Minutes and continue the hearing.

Chair Gooze agreed to hear from Mr. Parnell and Mr. Campbell, and then decide if they wanted to continue this.

Mr. Johnson said Mr. Parnell and Mr. Campbell might be able to provide additional material for the ZBA to read over the next three weeks.

There was discussion that the second basis for Mr. Kimball's appeal was regarding the wetland delineation issue.

Chair Gooze said his understanding was that the Conditions of Approval the Planning Board had just voted on stated that everything had to be stamped before the Chair signed off on the Site Plan.

Mr. Gottsacker said the Board had received this packet 20 minutes ago, and would have appreciated getting it sooner. He stated again that he thought they should get the pertinent Planning Board and ZBA Minutes, and should also let Mr. Parnell and Mr. Campbell speak at the present meeting.

Chair Gooze read from the recent Site Plan Application Conditions of Approval: "All final plans must be stamped by appropriated professionals." He said he therefore didn't think there was any problem with this item. He said perhaps this hadn't been done earlier, but said the practical result was that the wetland stamp had to be done as a Condition of Approval of the Site Plan application. He asked if other Board members agreed.

Mr. Gottsacker said he would still prefer to continue this whole thing to the next meeting.

There was discussion on the third basis of the appeal, regarding the wetland buffer variance. There was also discussion on whether the Board should be deciding on this that evening.

Mr. Kimball said he wasn't asking for a decision that evening, and said if the Board needed time to review the documentation, that was their decision.

Ms. Woodburn said they should review the packet and get the backup information.

Mr. Kimball said two of the three bases for the Appeal were in the original packet provided to the Board, although he noted that the amplifying arguments for them were not provided. He noted said in the course of doing research, he had found the third basis for his Appeal.

Mr. Gottsacker noted that Mr. Kimball was asking the Board to respond to the packet they had just received.

Mr. Kimball said he understood, and was more than happy to just present the material.

Chair Gooze asked those who had come to speak to do so. He said the Board would then continue this to March 30<sup>th</sup>.

Lorne Parnell, Chair of the Planning Board, said he represented the Planning Board. He said this Appeal had come in, and would now be delayed for a month, but he said meanwhile, the approval the Planning Board had given for the Site Plan was doing nothing. He then read into the record the letter from the Board's attorney, Attorney Laura Spector.

The letter said the Appeal seemed to be an untimely attempt to appeal a 2006 decision permitting the change of use of the property to the professional office use. She said as her firm understood it, there was nothing about the 2010 decision which implicated the use at all, and said all that decision did was to authorize a new building in which to house the existing use. She said assuming the use of this new building would not be substantially different from the existing use, her firm believed that the appeal must be dismissed as untimely.

Mr. Parnell said the letter had the backing of the Planning Board. He said the Board had discussed the project four years ago, and at that time it had agreed unanimously that this was an appropriate project for that area. He said nothing was different about the present project other than, in effect, better offices. He said he thought there was enough information now for the ZBA to be able to make a decision, but said he would leave this up to them.

Mr. Gottsacker asked what the appeal period was for a Planning Board decision, and was told it was 30 days. He then said that 30 days appeal period had expired a long time ago. Chair Gooze read from the Minutes of the June 14, 2006 Planning Board meeting.

There was further discussion on this.

Mr. Parnell said that regarding the stamping of the wetlands document, as just discussed by the ZBA, it was something that had to be done before the final approvals were given.



Jim Campbell, Planning Director, said that in 2005, Mr. Hersman came before the ZBA for a dimensional variance, and then in 2006 got a building permit from Mr. Johnson. He said he also received a certificate of occupancy in 2006, and went to the Technical Review Committee regarding converting the garage to a space used for professional offices, which was approved.

He said in 2008, Mr. Hersman came before the ZBA and was granted a variance. He said each of those times, notices were sent out, and Mr. Kimball, as an abutter received one. He said not one time since then did he say the use was not professional office. He said he didn't think Mr. Kimball could now say it wasn't professional office, and said it had been treated that way since 2005.

Mr. Campbell also said the documentation provided by Mr. Kimball that evening should not be part of the present appeal because it wasn't timely. He then said he wasn't prepared to comment on the third basis of the appeal, but said he was sure the Board would discuss it at the next ZBA meeting.

He said that regarding the issue of the wetland stamp, he said the plan would be stamped by a wetland scientist as part of the final approval, along with stamps from the other professionals involved. He noted that this happened with a lot of applications.

There was discussion about the site plan review process the Planning Board went through, and that when the final approval was provided by the Board, the conditions had generally not all been met yet, and the signature of the Planning Board Chair hadn't happened yet.

Mr. Gottsacker said he would retract what he had said earlier concerning continuing this appeal to the next meeting.

Ms. Woodburn asked what recourse someone would have if a building was approved, based on a particular use, operations started, and it later became apparent that the building was functioning in a different manner.

Mr. Johnson said the person could put in a zoning complaint. He provided an example of this.

Mr. Gottsacker said the most recent date the Planning Board or the ZBA had dealt with this was 2008, and he said the 30 day appeal period was over. He said Attorney Spector was saying that this was therefore an untimely appeal.

Ms. Woodburn said the wetland stamp issue would be addressed as part of the fulfilling the Conditions of Approval.

There was discussion that the third basis for the Appeal was in regard to the impervious cover variance that had been granted.

Chair Gooze said he thought they could finish addressing the Appeal that evening.

Regarding the first two bases of his appeal, Mr. Kimball said he wasn't sure what he should have appealed in 2006 and 2008. He said 2006 was a preliminary design consultation, and no approvals were given, so there was nothing to appeal. He also said the variance in 2008 did not address the use, so there was nothing on this he could have appealed. He said this was the first opportunity he had had to appeal a decision relative to this project.

Mr. Gottsacker asked when the use was last discussed by the ZBA or the Planning Board.

Mr. Kimball said the use was discussed every time, but said the only time he knew of any formal discussion on the use was as part of the Site Plan application.

There was discussion on this. Mr. Kimball said the Planning Board in 2006 said that when Mr. Hersman came back for his site plan approval, the Board would give its final answer.

Ms. Woodburn said if the Planning Board entertained the site plan based on the use it was, it wasn't an issue. She said if there was an issue with what the use was, it would have come to the ZBA.

Mr. Kimball said he was suggesting that the applicant planned to expand the use to a level that no longer fit what they had envisioned. He then asked why a larger building was needed if Mr. Hersman was going to be doing the same thing.

Chair Gooze said the Board needed to make a decision on whether it felt the use planned was similar to what was there now.

Mr. Gottsacker said this was all about the 30 day appeal period.

Ms. Woodburn asked if the ZBA had ever ruled on the use aspect of that property.

Mr. Gottsacker said there was a 30 day window to file an appeal, for everything except the list of conditions in the recent Planning Board decision. He said this Appeal was therefore not correct, and said the appeal should instead go to Mr. Johnson.

Mr. Kimball said he didn't agree with this. He said there was no appealable event.

Chair Gooze asked Mr. Kimball to go over the third basis of the appeal.

Mr. Gottsacker read RSA 677 concerning the 30 day appeal period.

Mr. Kimball said he didn't have a problem with not pursuing the wetland stamp issue, stating that this issue had been clarified. He then read Section 4.6 of his Appeal concerning the impervious cover variance.

Chair Gooze said that variance was received in 2005, and said in 2006, Mr. Hersman went to the Planning Board.

Mr. Kimball noted that this was for a design consultation. He said this design was to keep the original building one or two stories high. He said the 4 story structure didn't match the description of the project that was presented in 2005, and what was described to the Planning Board in 2006.

Chair Gooze asked if there was anyone there to speak to the issue.

Mr. Campbell said he was not prepared to speak on this issue.

There was discussion about whether this issue could be addressed, or if the appeal period had expired. Mr. Gottsacker stated again that the appeal period only applied to the Site Plan Conditions of Approval.

Ms. Woodburn said the variance went with the property, and if there were specific elements Mr. Kimball felt were not paid attention to in the site plan recently approved, he was now appealing that.

Mr. Gottsacker referred to the letter from the ZBA's attorney.

Mr. Welsh said he didn't think it related to the third point being made by Mr. Kimball, which he said might be valid.

Mr. Hersman spoke before the Board. He said what Mr. Kimball had said about this being a 4 story building was a misrepresentation. He said on the outside it appeared as a 2 story building with a gabled roof and a dormer, and also said it had a finished basement. He said he didn't have a copy of the packet provided to the Board that evening, and said he would like to have the opportunity to correct any others issues.

He said this process had started in 2005, and said the proposed application was discussed, and the disposition of the Planning Board at that time was that it didn't require a variance, and did comply as a professional office. He said that was why he didn't come for a variance on this.

Mr. Hersman explained that the company maintained continuous progress, and renovated the property with a building permit and change of use permit which allowed them to change the garage to a magnetic resonance imaging facility for some of the measurement they did, as part of quality control and improvement of the device.

He said he maintained that his representation of the use was not significantly different and had not changed in quantity, but he said the quality of the work they had to do was now being held to a higher standard. He said the engineers, using the building as their professional offices with associated labs, were pursuing this, and he said this was why the garage was no longer suitable.

John DeStefano, construction manager for the Xemed project, said his company was brought in to design and build the building. He said when he was brought in, he was relying on the approvals information to start the design. He said they were well into the design based on the information approved.

He said Mr. Hersman had already spent significant money on engineering and architecture to get to this point. He said the untimely appeal now was causing undue hardship, noting that they were supposed to start construction in a week. He said if they went another 3 weeks, they would lose the favorable pricing they had, and would be pushed into winter conditions at the back side of the project.

Mr. Welsh asked Mr. DeStefano if he had knowledge of the original variance, and whether the plans now were consistent with the variance given in 2005.

Mr. DeStefano said he did have knowledge that they were consistent. He said he hadn't brought the site plan with him, but said that regarding the 75% and the parking, there had been many discussions on this and had relied on those approvals in moving forward and making the application. He said he was the construction manager, and had hired a site engineer, Mr. McGuire, and an architect, Mr. Schoonmaker. He said he was responsible for the design and construction, and they were subcontractors.

Chair Gooze asked Mr. Johnson if the Planning Board would be allowed to grant the expansion of the building they got on February 10<sup>th</sup>, and Mr. Johnson said he would think so. Chair Gooze said if they had a variance that said "as per the plans in front of us", which included the second building, and if the parking was no worse than the ZBA approved at that time, he didn't see where anything had happened. He said Mr. DeStefano had just said that he had followed those variance requirements.

There was discussion that ZBA members didn't have the plans in front of them.

Mr. Hersman said at the time he talked about building a second building it was because he wanted to retain the first building for economic reasons. He noted that hadn't thought he could afford to replace that space. But he said in discussions with the Planning Board, it seemed more favorable to do so. He also said Mr. Johnson had indicated that the existing building didn't meet the ADA requirements and therefore couldn't be expanded. He said the more recent decision was in the spirit of the original discussions, if not in the letter of what

was described.

Chair Gooze asked if there was any more encroachment on the wetlands from the project approved in 2010 as compared to what was granted in 2008.

Mr. Hersman said in 2008, he presented a plan that had one additional parking space, where 2-3 ft of the 9 ft width encroached. He said the recommendation of the ZBA was to remove it, and it was removed. He said the present plan was now several feet from what was deemed to be the wetland barrier, after that parking space was removed.

Chair Gooze said he had no problem with this.

Mr. DeStefano said there were 25 parking spaces on the site plan, and they were less than 75% impervious. He said there were no new rooms, and said every room, office, space in the new building was the same as in the existing building, and just a little bit bigger.

Chair Gooze said the Board had to decide if the Planning Board had made a legal error in approving the site plan application. He said that regarding the third basis for the Appeal, it had been in front of the Planning Board, and said he thought there would be no extra harm done, compared to what the ZBA wanted in 2008. He said he felt this was ok, and didn't think the Planning Board had made a legal error.

Ms. Woodburn said the ZBA hadn't seen the plan.

Chair Good said they had heard the testimony, and said he was ok with it.

Mr. Gottsacker said he agreed with Chair Gooze. He said two of the items were way beyond the appeal period, and were completely irrelevant.

Chair Gooze said there was less than the ZBA had approved in 2008. He said the only thing that was different was that they didn't have a second building.

Mr. Johnson suggested that the majority of the Board make a decision, Ms. Woodburn could then look at plan and could ask for a rehearing if she thought the ZBA made an error.

***Jerry Gottsacker MOVED to deny the Appeal of Administrative Decision submitted by Steven F. Kimball, Pine Ledge Holdings Inc., Hooksett, New Hampshire on a decision of the Planning Board to approve a Site Plan application for Xemed Holdings, LLC, at 16 Strafford Avenue. The property involved is shown on Tax Map 2, Lot 8-3 is located at 16 Strafford Avenue, and is in the Professional Office Zoning District. Carden Welsh SECONDED the motion, and it PASSED 4-0-1, with Robbi Woodburn abstaining.***

- I. PUBLIC HEARING** on a petition submitted by Kostis Enterprises, LLC, Dover, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance for the creation of parking spaces within the sideyard and rearyard setbacks. The property involved is shown on Tax Map 2, Lot 8-4, is located at 45 Madbury Road, and is in the Professional Office Zoning District.

*Jerry Gottsacker moved to continue this application to March 30, 2010 and Carden Welsh seconded the motion. It PASSED unanimously.*

**III. Approval of Minutes – January 12, 2010 Postponed**

**IV. Other Business**

- A.  
B. Next Regular Meeting of the Board: **\*\*To Be Determined**

**V. Adjournment**

Adjournment at 11:30 pm

Victoria Parmele, Minutes taker

---

Sean Starkey, Secretary