

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

**ZONING BOARD OF ADJUSTMENT
TUESDAY, MARCH 30, 2010
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.
MINUTES
CONTINUATION OF THE MARCH 9, 2010 MEETING**

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

MEMBERS ABSENT:

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

I. Approval of Agenda

Chair Gooze called the meeting to order at 7:02 pm, and noted that this was a continuation of the March 9th ZBA meeting. He then said he would like to reverse the order in which the applications were heard in order to be fair, since the Mr. Sawyer was not present at the last meeting while the Kostis Enterprises was present.

Jerry Gottsacker MOVED to amend the Agenda to hear Item II I before II D. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings

- 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.

Chair Gooze noted that applicants and their attorneys had been put people under oath at the last meeting, and he explained that the ZBA was a quasi judicial board. The applicant's attorney, **Abby Sicus**, took the oath. She provided a diagram based on a survey.

Chair Gooze said the notice from Mr. Johnson indicated that the issues under discussion involved occupancy and parking.

The Attorney said it was her understanding that there was mutual agreement that there was not a violation regarding occupancy, or a violation regarding the existing parking. But she said Mr. Johnson had suggested it would be beneficial to apply for a variance for some additional parking.

Mr. Johnson said under the current system of compliance inspections, the applicant was

in compliance the day he was there.

The Attorney noted that they had submitted the application prior to getting the survey completed. She said this resulted in thinking they could get more parking in there than was actually possible. She said would like to amend the application to request that there would be only one large parking spot for 2 cars. She said she realized when they got the survey back that 2 parking spaces and not 4 made sense.

She showed the existing area for 4 cars adjacent to Madbury Court, which was colored yellow on the diagram that was provided. She said the parking spaces they were seeking the variance for were colored green, and were located in the rear yard setback. She said this area was proposed for parking because it was not as busy as it would be if cars entered the property from Madbury Road. She said cars would enter the property off of Madbury Court.

There was discussion about the yellow area and whether they were legal parking spaces.

The Attorney said it was her understanding that they were from talking with Mr. Johnson. She said they were approved with the accessory apartment in 1982 and were in compliance with the Zoning Ordinance at that time.

Mr. Johnson noted that the diagram provided was not a licensed survey.

The Attorney said the actual surveys were available to look at if the Board wanted to see them.

Mr. Johnson said he was not sure the yellow parking area was legal for 4 vehicles, and said he hoped that would be discussed that evening.

Chair Gooze received confirmation that the variance being requested was for 2 new legal parking spaces within the sideyard setback.

Ms Woodburn said currently parking wasn't allowed in the sideyard setback, and said part of the yellow parking area was therefore in the sideyard setback unless it was grandfathered.

Mr. Johnson said it wasn't grandfathered as far as he knew.

The Attorney said it was the applicants' position that this parking was grandfathered, stating that people had parked in that area since 1982, when the house was built, and certainly since the property had been transferred from the previous owner.

Mr. Johnson said the Madbury Road frontage was the frontyard setback, and the Madbury Court frontage was the sideyard setback.

Ms. Woodburn said usually, for lots on corners, there were frontyard setbacks on both sides where the roads were.

Chair Gooze said it was important to get the ground rules set before the Board proceeded.

Ms. Woodburn said one way or the other, all along Madbury Court there was either a frontyard or sideyard setback. She said some of the yellow would be in the setback.

Chair Gooze asked how many people were allowed in the house.

The Attorney said the applicant was allowed to have a single family home in the main dwelling, and said there could be up to 4 unrelated people in the rest of the building.

Nick Kostis indicated that 4 women currently lived in the apartment.

Chair Gooze said he wanted to be sure they were all on the same page concerning the occupancy. He noted that the Board had received notes indicating disturbances that had occurred at 45 Madbury Road, some of which involved residents of the property. He asked how many people lived in the main house.

The Attorney said the occupancy issues were outside of the scope of the variance being requested.

Nick Kostis said one person was on the lease, who was Justin Saunders. He said there were 4 ladies on the lease for the apartment. He said he had been there several times with Mr. Johnson, once unannounced, and every time had only found Mr. Saunders. Chair Gooze administered the oath to Mr. Kostis.

Mr. Johnson said according to the Ordinance, for a corner lot, the front property line was the shorter of the two lines adjacent to the street as platted. He said the front of the property was therefore on Madbury Road.

Ms. Woodburn said there was still the sideyard setback on Madbury Court, and determined that it was 10 ft, and the rear setback was 20 ft.

The Attorney restated that they were requesting a variance for the parking spaces colored green on the diagram, and that the existing spaces colored yellow were already permitted.

Mr. Johnson said it was in the sideyard setback, so was not permitted.

Mr. Gottsacker noted that the application requested a variance concerning the rear yard setback.

There was discussion.

Ms Woodburn said unless the Board had evidence that the yellow parking existed prior to the enacting of the most recent Zoning Ordinance, it was not legal.

The Attorney said she had the documents that showed the building permit from 1982, with that parking drawn in.

Chair Gooze said this issue might influence how the Board thought about the variance request.

The Attorney said she and the applicant had come to the meeting thinking that the yellow area on the plan was not an issue. She said they would like a continuance if there would be discussion about the yellow area.

There was discussion about how to proceed.

The Attorney said if she could provide the survey so the Board would be satisfied, perhaps the continuance wouldn't be needed.

Mr. Gottsacker suggested that the Board should move on to the next application to allow the attorney more time to get the survey. Other Board members agreed.

Jerry Gottsacker MOVED to continue the application until after Item II D. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

- 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.

Tom Sawyer, said there were two issues under discussion, one of which was that the lot was 2.2 acres, when 3 acres was required for livestock. He said the other issue was that the setback for the shed needed to be 100 ft. He said the setbacks were 92 ft, 75 ft, 80 ft, and 290 ft. He said the property was located at the other end of Town and said there weren't many houses around.

He said on two sides were the UNH hay fields, and said on the back was his brother's property, and noted that he had no problem concerning the goats. He said concerning the remaining side, the Potters or the Hoene property had no objections to what he proposed. He said the only issue was they had a rental property that was 90 ft from his property, but said the distance to the goat shed would be about 200 ft. He noted that the shed had been put back into the woods so the smell wouldn't be an issue for the abutter.

Mr. Sawyer also noted that the shed would be 15 ft into the wetland buffer zone, and said at the Planning Board meeting, there was discussion that this issue would be reviewed by the Conservation Commission.

He said the shed was 10 x 14 ft. and said there would be fencing, explaining that there would be several pens to rotate the goats so they didn't overgraze.

There was discussion about the wetlands issue. Mr. Johnson said Mr. Sawyer would probably have to come back for a variance for this. He said he was looking to see if there was an exemption for livestock.

Mr. Gottsacker asked if the application could perhaps be continued so everything could be done at once.

Ms. Davis noted the proposed location of the shed, and asked if it could be moved closer to the rental house.

Mr. Sawyer said it could be, but he said the spot he proposed to put it was where a shed used to be. He said if the shed had to be put somewhere else, more trees would have to be cut.

There was discussion that the shed would be more visible if it was moved someplace else.

Mr. Johnson suggested that they not talk about the wetland issue, noting that it was possible that it wasn't a jurisdictional wetland. He said this issue could be reviewed as part of the building permit, and said Mr. Sawyer could come back to the ZBA if he needed to.

Chair Gooze asked if there was any place the shed could go without needing the variance.

Mr. Sawyer said there was not, without having to put it right in his backyard. He noted that it was an irregularly shaped lot, with a pond.

Chair Gooze asked Mr. Sawyer to present the variance criteria and why they were met.

Mr. Sawyer said there would be no decrease in the value of surrounding properties as a result of granting the variance. He said the Hoenes, who were abutters, had a horse farm, and he also said the rental property owned by the Hoenes was not in good shape. He said another abutting property was the UNH farm fields, and also said several other people down the road had horses. He said the goats shouldn't cause any disturbance to the value of surrounding properties.

Concerning the public interest criterion, Mr. Sawyer said that section of Town had agricultural uses, and said there was nothing about having goats that should cause any problems. He noted that he had made an effort to keep them away from the road.

Regarding the hardship criterion, Mr. Sawyer said he did a lot of gardening, and needed the goats to help keep the garden clear. He said he would use the manure, and noted that they were castrated males so there would be no breeding.

Mr. Sawyer said substantial justice would be done in granting the variance, given the fact that this end of Town was an area where people had horses and the University did farming, and the fact that he would have a limited number of animals.

He said the spirit and intent of the Ordinance criterion was met with this application because there were several people down the road who had horses. He said the provisions of the Ordinance under discussion would be more applicable to a residential neighborhood than they would be in this area.

Ms. Davis asked Mr. Sawyer if his property was larger or smaller than the surrounding

properties.

There was discussion.

Mr. Sawyer said that at the Planning Board meeting where an application for the proposed use was heard, Mr. Campbell had indicated that abutter Dick Gsottschneider had no objections to what was proposed.

Mr. Johnson noted that the Planning Board had approved a conditional use permit for the proposed, use, conditional on getting the two variances.

Mr. Sawyer said there had been brief discussion about the number of animals there could be, and he had said he wanted a maximum of two goats.

There was discussion on the fencing that would be 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.

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

Mr. Gottsacker said he had no problem with this, stating that his only concern had been whether the abutters had problems with it. He said he could see why they didn't, given the layout.

Chair Gooze noted that abutters had had an additional opportunity to speak, at the Planning Board public hearing. He asked if there were any Board members who thought the application didn't meet the five variance criteria.

Ms. Davis said she was trying to determine what the special condition was that meant there was hardship, and warranted granting the variance. She said the property was narrow compared to surrounding lots, and its shape as well as the location of the water on the property made it difficult to place the shed within the wider part of the lot. She said she therefore felt it met the hardship criterion.

Mr. Welsh said the property location itself should also be considered, in that the area was very agricultural.

Ruth Davis MOVED to grant the Application for Variance from Article XX, Section 175-109(B)(1&2) of the Zoning Ordinance to allow for a goat shed for no more than two 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. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Chair Gooze noted to Mr. Sawyer that he might have to come back before the Board if it was determined that a variance was needed concerning the wetlands setback.

- I. Continuance of 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.

The Attorney provided copies of the survey that had recently been done, and also provided copies of the 1982 Zoning Ordinance, as well as a sketch submitted with the building permit in 1982, when the accessory apartment was constructed. She discussed the sketch in detail, and said in 1982, the Ordinance would have required that a house with an accessory structure have 4 parking spaces, with 1.5 spaces per dwelling unit, and 1 space for every two unrelated occupants. She said the size requirement at that time was 10 ft by 20 ft. She said there were at least 3 spaces, and said the 4th space, which was smaller was right in front of the garage space, and had been used for years.

She said the preferred way of approaching this would be through an equitable waiver, not a variance because it had been going on forever.

There was discussion about the 1982 Ordinance parking requirements.

The Attorney said the requirement at the time was 4 spaces. She said if this was built today, six spaces would be needed, which was why the applicants wanted 2 more parking spaces.

Ms. Woodburn said on both of the sketches for the building permit, the yellow part of the driveway ended at the end of the accessory apartment. She said on the other sketch, there was an area that extended beyond the accessory apartment that was in yellow.

The Attorney said she thought it was a graphic issue, and spoke in detail on this.

There was detailed discussion.

Attorney said the intent was to provide as much possible space between the green and the pink line, which denoted the fence that would be added, so the parking would be contiguous with the existing parking, and there would be as much space as possible between the proposed new parking and the edge of the boundary of the lot.

Ms. Woodburn said it sounded like there was a 4 ft walkway along side the accessory apartment, and the pavement lined up with it, so there was a little more pavement than was shown on the building permit. She said the Board would need more in terms of dimensions in order to pin things down.

Ms. Davis said she drove by the property that day at about 8:45 am, and there were 4 cars parked in the yellow area, and 1 car parked in the green area.

Mr. Welsh said he drove by before the meeting and there appeared to be a car parked in the green area. He said he had thought it was paved.

The Attorney said the applicant had told the tenants to park only on the paved portion, and said there was adequate parking there for the people currently living in the home.

Mr. Gottsacker noted that there had been discussion about what the setbacks were when the house was built. He said the section of the 1982 Zoning Ordinance provided to the Board didn't talk at all about setbacks for parking. He asked if there were other parts of the Ordinance that did.

Mr. Johnson said he would have to read through this.

Board members summarized that the yellow parking area wasn't an issue because it was in the building permit.

Mr. Gottsacker said the number of spaces and the issue of the location of the yellow spaces in the setback had been resolved.

The Attorney summarized that the yellow parking was not an issue because it was there and there was a record of it, and that they were talking about the green parking because it was in the rear yard and side yard setbacks.

Chair Gooze said they were allowed the 4 spaces, which were there, and were asking for 2 more spaces.

The Attorney said if more detailed measurements were needed, she would respectfully request a continuance after her presentation. She then reviewed how the variance criteria were met. She said there would be no decrease in the value of surrounding properties, noting that there were duplexes, approximately one single family home on Madbury Court, and an elderly apartment. She said the surrounding properties were generally rental properties.

Chair Gooze questioned the statement that there was only one single family home. He said they were all single family homes.

The Attorney said they were all serving as rental properties.

Chair Gooze said they were still single family homes, and said that was really important.

The Attorney said it was her understanding that at this time, they were used as rentals, and said the uses for years and years had been the same. She said the property was located in the Professional Office District, which permitted multi-dwelling rental properties. She also said the abutter closest to the proposed parking would be screened by the fence that would be put in.

Chair Gooze noted that the Professional Office District allowed multi-use, with residential above and retail or office below.

The Attorney said she hadn't understood this from reading the Ordinance. She said from the facts provided, granting the variance would not diminish the value of surrounding properties.

The Attorney said granting the variance would not be contrary to the public interest. She said the Ordinance contained expressions such as minimizing entry points onto roads, requiring parking in the side and rear yards of homes to reduce the visual dominance of parking areas and promote pedestrian safety, etc. She said according to the Ordinance, setbacks existed to provide open space, provide visual breaks between properties, etc, and said the proposed use satisfied all the objectives of the Ordinance.

She said the use was proposed in the side and rear yards, where the Ordinance encouraged it to be. She also said the entrance on Madbury Court served essentially as a large driveway to the property. She said the other options to add parking would require having an additional driveway come off of Madbury Road, which would not be encouraged by the Ordinance because it would be an entry way onto to a busy street, and would involve more paving. She said the parking would be shielded with a fence and landscaping, and also said people on Madbury Road wouldn't see it much because the parking would be tucked behind the house.

There was discussion concerning what would be involved if a new driveway had to be put in off of Madbury Road.

The Attorney said granting the variance would result in unnecessary hardship for the owner. She said the property was distinguishable from others in the area in that it was a corner lot, there were three roads that met, and the grading was lower in the back where the proposed parking was. She also said the grandfathering, the layout of the house, etc. meant there was no fair and substantial relationship between the general public purpose of the Ordinance provision and the specific application of it to the property. She noted again the public benefits of what was proposed.

She also said the proposed use was reasonable, because adding the parking would assist in renting the front single family portion of the home to a family, so they would have a place to park while still maintaining the rental property in the back of the building. She also said allowing for proper parking for people living there would alleviate many of the concerns the Town had had with the property.

She said the applicants would like to be good neighbors, and make sure the people living there had the right place to park. She also said it was reasonable to put the parking in the proposed area rather than in another location where a whole new driveway would be needed.

She said granting the variance would result in substantial justice because the property was located in a relatively densely populated area. She said the people who lived there needed a place to park their vehicles, and noted again that if the property were built today, 6 spaces would be needed to accommodate the people living in the building. She said permitting the variance would serve the public interest and would also benefit the applicant's use of the property.

She said the proposed use would not be contrary to the spirit and intent of the Ordinance because many of the general public purposes of the Ordinance, including those concerning the setbacks, would be served. She said pedestrian safety and vehicular

safety would be increased, and also said the plantings and fencing as well as putting the parking spaces as close to the house as possible would serve the purpose of the Ordinance.

She asked that the variance therefore be granted.

Chair Gooze asked why the applicant wanted the two extra spaces.

The Attorney said one reason was that there was a parking problem. She said even though there were enough spaces for the people who lived there, putting in these spaces would mean there would be no question that all of the people who lived there had enough places to park, and there would be no issue concerning parking on the grass. She also said the applicants wanted to rent to a family because they would be better tenants and it would be nice to be able to provide more of that kind of housing in Durham. She said to do that, having additional parking flexibility would be helpful.

Chair Gooze asked if the applicants would get a family there, with the renters on the other side. He spoke about a note from the Police Department that was sent to Mr. Kostis concerning 250-300 people leaving the property on January 25th and walking down the road. He said the Board was trying to decide how much density there should be in this area, whether families could live there, etc., and said they were making these decisions based on the public interest.

The Attorney said she didn't believe the applicants had enjoyed the situation the past year with the property, and said they believed that if they got a family in the front, many of the problems would be alleviated, and they could continue to use the property the way it was permitted so they could participate kindly and gently in the Durham community. She said they were working on screening the tenants to make sure they were as good as those tenants in the accessory apartment.

Chair Gooze noted that it had been said if this building was built now, 6 parking spaces would be allowed. But he said if it was built now, the applicant would probably be allowed an accessory apartment for 2 people, and 3 unrelated people.

The Attorney said her point in saying that was that given the number of people that were allowed to live there today, the Town would require the 6 spaces.

Ms. Davis asked what the percentage of impervious surface would be with the additional spaces, and said it looked like it was getting close to 50%. She said the area already felt so dense, and said she wondered if the lot could hold more pavement.

Mr. Welsh said when one drove back there, it looked like a very impervious area. He said he would like to check that out.

Ms Woodburn noted the decks and walkways as well on the property.

Mr. Welsh noted that it had been said that by adding 2 spaces, it would be more likely that the owners could rent to a family.

The Attorney said admittedly there was a parking issue, and said having unambiguous parking that was sufficient for the number of people living in the house would be helpful in renting to a family. She said if there were things that needed to be provided in order for the Board to be able to make a decision, she would be happy to continue this to the next meeting.

Chair Gooze suggested that it might be good to have a site walk. He then asked if there were any members of the public who wished to speak for or against the application, and there was no response.

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

Chair Gooze said he didn't think there would be a problem with continuing the meeting to the next month if needed.

Ms. Davis said it would be good to discuss the purpose of the rear yard setback. She said it felt like it was to prevent visual crowding, and provide some open space. She said the applicant had also pointed out safety arguments, and said the Board had to weigh two parking spaces in the rear setback as opposed to two spots that would necessitate a driveway on Madbury Road.

Chair Gooze said he didn't see getting a permit to come off of Madbury Road.

Ms. Woodburn noted that it would be very close to a chaotic intersection.

Ms. Davis said it was a crowded lot already, and also said if 2 spots were needed, the proposed location seemed to be the only place to put them.

The Board agreed to go through the variance criteria.

Chair Gooze said based on seeing that area, hearing the testimony of the applicant, and seeing that there was no proof the other way around, he didn't think the value of surrounding properties would be affected.

Ms. Woodburn and Mr. Gottsacker noted that an issue was that people were already parking in the area for the proposed parking spaces.

Chair Gooze said the question was whether the houses in the area would sell for less if this parking was there.

Ms. Davis said originally this was a grassy area, and said paving there would make the lot look fully developed, and not like a single family home anymore. She said unless a lot of the homes reverted back to non-rental use, she didn't think paving the spot would decrease the value of surrounding properties.

Mr. Gottsacker said it wasn't likely that a family would want to live there given the neighborhood, the noise complaints, etc. He said he wasn't convinced one way or the other concerning a possible decrease in the value of surrounding properties if the variance

was approved.

Chair Gooze said he didn't think the parking itself would decrease the value of surrounding properties.

Mr. Welsh said the Board had never turned something down, as far as he knew, unless there was other evidence.

Mr. Gottsacker said being a landlord, he knew that parking was at a premium. But he said granting this variance would run counter to the spirit and intent of the Ordinance, because it would encourage more kids because there was more parking. He also said he thought this should be decoupled from the idea of having high quality tenants.

Mr. Welsh said having these spaces made it more likely that there would be student housing. He said he didn't think the argument that the spaces were needed in order to attract a family was persuasive.

Ms. Davis said at this point, they could either legally put a single person in the main house, or triplets, or could find a couple or a family that was tolerant. She said if they moved anybody in there and there were only 4 spots, and 4 tenants, there wouldn't be enough spaces unless they cut back on the number of tenants.

Chair Gooze noted that Ms. Lyons, who built this house, did well with 4 parking spaces. He said not all of the tenants had had cars.

Mr. Gottsacker said, as a landlord, he would love to rent to single families, but said it was near impossible to do this, because competitive rents from students make it unaffordable to families.

Ms. Woodburn also noted that families didn't want to pay the premium. She said while she was not saying the applicants were over in terms of the impervious lot coverage percentage, it looked like there was a lot of coverage on the lot. She said by getting rid of the rear setback area, there would be very little open space on the lot, and said this was a public interest element that needed to be considered.

Ms. Davis said the grass on the 1982 sketch gave the site a more balance appearance.

Ms Woodburn said regarding the public interest criterion that the Board appeared to be leaning against thinking that it was met.

Mr. Gottsacker said he didn't think it met this criterion.

Ms. Woodburn said the Board had to balance out the safety issues with the open space issue.

Chair Gooze said it had been said that the public interest and spirit and intent of the Ordinance criteria were interrelated. Concerning the essential character of the neighborhood, and the health, safety and welfare of the public, this depended on what one thought the spirit of the Ordinance was. He said the Professional Office District was very

specific concerning rentals, and also noted that this area was meant to be more pedestrian, as a transition zone between the downtown and residential areas.

He said while he could look at it the opposite way concerning the health, safety and welfare of the public, he was comfortable that the application didn't meet the public interest criterion, regardless of whether the impervious cover limit was met.

Concerning the hardship criterion, Mr. Gottsacker said there were 4 spaces there now, and with the building permit this was deemed to be adequate. He said the previous owner had lived there with 4 spaces, and asked what the hardship was about the current situation.

Ms. Davis asked if it had worked in the previous situation, and there was discussion.

Chair Gooze said he didn't remember in the past seeing parking on the property where he saw it now.

There was further discussion about whether the hardship criterion was met.

Ms Woodburn said a special condition was that the property was too small.

Mr. Gottsacker said not having enough parking wasn't a special condition. He said there had been 4 spaces there under the previous owner, which had been fine, and said the property didn't change, only the ownership changed.

There was discussion about the fact that it was a small corner lot, and Chair Gooze said there was a uniqueness about it. But he said there had to be more to it than that.

Mr. Gottsacker said there were corner lots all over Town, and that didn't make them unique or justify parking variances.

Ms. Davis said the argument was that if they needed 2 more spaces, the question was where else they could put them.

Chair Gooze said the way the hardship criterion was written, based on the size and configuration of the property, an applicant could say that in order to do what they wanted to do, there was a hardship. He said unless one could say there was nothing unique about a property, that pretty much meant the hardship criteria were met. He said he could therefore see that there was a hardship.

There was further discussion on the hardship criterion and whether it was met with this application.

Mr. Gottsacker said he thought in this instance, there was a relationship between the general public purpose of the Ordinance and the specific application of the provision to the property. He said the Ordinance had parking regulations for a reason, and also said he couldn't see what made this property different.

Mr. Welsh said in a more congested area, there was more reason to not pave a lot over.

He said he therefore did think there was a fair and substantial relationship between the general public purpose of the Ordinance and the specific application of the provision to the property.

Chair Gooze said the applicants wanted the variance because of the previous use of the property, but said that didn't mean the property itself was unique. He spoke about whether the properties around were different and might ask for the parking too. He said he could be persuaded that the application didn't meet the uniqueness criterion for hardship.

Ms. Davis said she had been thinking that a special condition was that it was a small lot and a corner lot, but said there were other corner lots around, as well as lots that were small.

Regarding the substantial justice criterion, Ms Woodburn said there would be no loss to the owner by not getting the extra parking spaces because they had enough, noting that the area was supposed to be pedestrian oriented.

Concerning the spirit and intent of the Ordinance criterion, Chair Gooze said this had been addressed during the discussion on the public interest criterion.

It was noted that the setbacks served the purpose of providing open space and quiet enjoyment of properties.

Chair Gooze asked if any Board members needed more information in order to make a decision.

Ms Woodburn said she didn't think any further information they would ask for would change things.

Chair Gooze said finding out that the impervious cover percentage was greater than 50% would actually make it more difficult to get the variance. He said he sensed that the variance would be denied, and asked what criteria should be included in the motion.

Carden Welsh MOVED to deny the 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 rear yard setbacks because it doesn't meet the public interest, hardship, substantial justice, and spirit and intent of the Ordinance criteria. 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. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.

Recess from 8:44 - 8:51 pm

III. Approval of Minutes –

January 12, 2010

Page 1, note that Sean Starkey, Chris Mulligan and Ed Harvey were appointed as voting members for the first application.

Page 10, note that Ed Harvey and Chris Mulligan were appointed as voting members.

Jerry Gottsacker MOVED to approve the January 12, 2010 Minutes. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

IV. Other Business

A.

B. Next Regular Meeting of the Board: ****April 13, 2010**

Mr. Johnson noted the NHOEP conference that would be held on May 8th.

Chair Gooze told Board members that the Superior Court had upheld the ZBA decision concerning the Seacoast Repertory Theatre. He noted a statement in the court decision that referred to something he had said about the property values criterion. He said while the Board had talked about why surrounding properties would not be affected by the Seacoast Repertory Theatre, his statement was that there didn't appear to be evidence one way or the other, so it was ok. He said the court felt that something more specific should be said about the criterion wasn't met.

He said there was still the possibility that this decision would be appealed.

Ms Woodburn thanked Chair Gooze for his work as the Chair of the ZBA, and said she hoped he'd have fun on the Town Council.

Chair Gooze said the new Chair would be appointed in May. There was discussion that Ms Woodburn would be the acting Chair in April.

V. Adjournment

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

Adjournment at 9:02 pm

Victoria Parmele, Minutes taker

Sean Starkey, Secretary