

*These minutes were approved at the October 5, 2010 meeting.*

**Durham Zoning Board  
Tuesday July 13, 2010  
Durham Town Hall - Council Chambers  
7:00P.M  
MINUTES**

**MEMBERS PRESENT:** Ruth Davis; Carden Welsh; Sean Starkey; Jerry Gottsacker; Edmund Harvey; Mathew Savage

**MEMBERS ABSENT:** Robbi Woodburn; Chris Mulligan

**OTHERS PRESENT** Tom Johnson, Director of Zoning, Building Codes & Health

**I. Approval of Agenda**

ZBA member Ruth Davis said she would be serving as Chair in place of Robbi Woodburn. She said the Board would not hear any new applications after 10:00 pm unless the majority of them decided otherwise. She then asked if Board members wanted to make any changes to the Agenda.

Mr. Gottsacker noted that the Durham Point Road applications might need to be continued so the Board could do a site walk, but said the public hearings for them would probably need to be opened first.

Chair Davis noted that the Board had heard from abutters that a site walk would be helpful. She said if the Board voted to have a site walk, they wouldn't be able vote on both of the Durham Point road applications that evening. She suggested modifying the Agenda to put Item II F after II C, and then at the end of the meeting, to start the Durham Point Road applications. She said the Board could hear from the applicant and members of the public, but wouldn't deliberate and vote on the applications that evening.

Chair Davis appointed Mr. Gottsacker and Mr. Harvey as voting members for the approval of the Agenda, and for Item II A.

*Carden Welsh MOVED to approve the Agenda as amended by moving Item II F to become Item II D, making what was now Item D into Item E, and what was now Item E into Item F. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.*

**II. Public Hearings**

- A. **PUBLIC HEARING** on a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from Zoning Administrator, Thomas Johnson, denying the construction of a hot tub within a property setback based on the definition of "structure" within the Zoning

Ordinance. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar Point Road, and is in the Residence C Zoning District.

The applicant, Evelyn Sidmore, said she had spoken with a company that installed these tubs, and was told it was a portable, self contained unit. She provided details on this and said it was comparable to an accessory shed, and said based on this, she didn't understand how it fell under the structure definition. She also said that unlike a swimming pool, it wouldn't require a fence because a cover for it was available, which could be locked.

She said they wanted to put the hot tub in the backyard, and noted that the property was nonconforming, as were most lots on Cedar Point Road, with less than 50 ft from property lines to homes. She said the site chosen was close to an electrical connection and to her back yard. She said the Hermans, her neighbors to the left, had a hot tub that was directly within the line of sight of her proposed hot tub. She said it had been on the property for many years.

There was discussion about whether all Board members had received site plans for the application. Mr. Johnson said the building permit application included a plot plan, but the ZBA application did not. He passed around the copy of his plot plan, and Mr. Sidmore also provided copies to Board members.

Chair Davis received further clarification on the proposed location for the hot tub, and determined that this was the same location where the Sidmores had hoped to put a pool in the past.

Ms. Sidmore said 4 people would fit in the hot tub, and also said it would be more than 125 ft from the Bay. She said she had a letter from abutter Judy Herman saying she had no problems with the proposed hot tub. She said the tub was 8 ft by 7 ft 5 in, and estimated that it would hold about 2.5 ft of water.

Chair Davis said the really large hot tubs held about 500 gallons of water, and Ms. Sidmore said this one wasn't very big. She said a temporary pad, that was movable would be used, so there would be no construction involved. She also noted that in the winter, it could be heated and used, or could be drained.

There was discussion on what the setback incursion was. Mr. Johnson said based on the drawing, it looked like the proposed hot tub would be 20 ft from the property line. He said it was beyond the 125 ft shoreland setback.

Mr. Gottsacker asked why the hot tub couldn't be located closer to the house in order to minimize the incursion.

Ms. Sidmore noted the walkway, but said it could be moved a bit closer to it.

Chair Davis noted that there would be a setback issue wherever the tub was placed on the property.

There was discussion on other possible locations to put the hot tub.

Chair Davis asked if there were any members of the public who wished to speak in favor of the application, or who had questions.

**Jay Gooze, 9 Meadow Road,** asked whether if the hot tub was declared not to be a structure, there would be a setback issue.

Mr. Johnson said there would not be a setback issue if the hot tub was not considered a structure.

**Bruce Bates, 10 Cedar Point Road,** said he and his wife were the principal abutters. He noted that in 2006, the Sidmores had requested a variance for a home and a pool. He said the pool, which was denied, was proposed in the same location as the hot tub was now proposed. He said they were back looking for a slightly different structure, which would be virtually on the property line, 28-30 ft from the family room where his family spent most of their evenings, and below their bedroom. He noted that the Zoning Ordinance required a 50 ft setback.

Mr. Bates said the tub was even more objectionable than the pool, because it was used more than 8 months of year, at night, and the people using it spoke loudly in order to be heard over the noise of the jets overhead.

He started to go through the variance criteria and how they were not met with this application, and Mr. Starkey noted that this was not a variance application., and instead was an appeal of administrative decision. He said the Sidmore's appeal was concerning Mr. Johnson's decision that the hot tub was not a structure.

He said if the Board concluded that it was in fact a structure, and the Sidmores still wanted to put it in the same location, they would have to come back to the ZBA for a variance because of the setback issues. He said if the Board determined that it was not a structure, no variance would be needed.

Mr. Bates said the hot tub was a structure, because it had a motor, had a heater, and was lit. He said it was within the sideyard setback, and said a pool had already been denied for the same location. He said it was 28 ft from their house.

Mr. Welsh said the map he had showed the hot tub was about 50 ft from his house.

Mr. Bates said the distance from his family room to the property line was 28 ft .

**Annmari Harris, 56 Oyster River Road,** said she would like to hear what other things were considered structures, so there would be a comparison. She said she believed that the hot tub would be considered a structure.

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

Mr. Gottsacker read the definition of a structure in Article II, Section 175-7 of the Zoning Ordinance.

Chair Davis noted that a hot tub was not specified in the Ordinance.

Mr. Johnson said that back in 2002-2003, there were a lot of ZBA cases involving sheds, and a lot of administrative appeals or variances were granted for small sheds, to the point where the Planning Board was asked to come up with criteria for an accessory shed. He said this was done, and said accessory sheds were now not considered structures.

He said they were probably at the same point now with swimming pools and hot tubs. He explained that his decision was based on the definition of swimming pool. He also said the building, electrical, and plumbing codes, for life safety reasons, considered hot tubs and spas to be swimming pools. He said he had made his decision based on these factors.

Chair Davis said the applicant had said this was not an in ground hot tub, and technically could be moved, so was not permanent.

There was further discussion on whether the hot tub could be moved, and whether it would in some way be connected to the house.

Mr. Gottsacker said he had several years' experience with hot tubs, and said one couldn't say they were portable, with water in them. He said the word portable to him meant something that two people could move around, and said that would not be the case with a hot tub. He also noted that it had to be plugged into the electrical system.

Mr. Starkey said a question was whether the ZBA wanted to define structure here, or wanted to defer to the Planning Board on this.

Chair Davis said the Board could define hot tub as either a structure or not a structure. She asked if the Board would be making a site specific definition just for this site.

Mr. Welsh said the Board didn't need to define anything, and just needed to determine if this was a structure or not.

Mr. Gottsacker explained that the generic name for what they were talking about was a spa, and a brand name was Jacuzzi. He said a hot tub was a different device, and spoke further on this.

Mr. Starkey said his idea of portable was something that wasn't affixed to anything. There was further discussion.

Mr. Gottsacker said he believed a spa needed a dedicated circuit, and Mr. Starkey said

even that wasn't permanent.

Mr. Welsh said the reason for the definition of structure was that people got bothered by structures that were too close to their property. He said the items specifically eliminated in the definition, like fences, mailboxes, flagpoles, and accessory sheds weren't places where people hung out, talked, and partied. He spoke further on this.

He said because the definition wasn't clear, perhaps the Board should look beyond the issue of whether it stuck to the ground, and instead should consider whether someone who created the definition of structure would say a hot tub was what they were trying to prevent because of noise and disturbance issues.

Chair Davis said that concerning the issue of a spa being a disturbance to the neighbors, a 4 person spa was one of the smallest ones one could get. She said it was more likely to be a 2 person spa, and said that should be factored in.

Mr. Welsh said he didn't think they had to guess if the neighbors were disturbed in this case.

Mr. Gottsacker said if he were the neighbors and the hot tub was there with people drinking beer at 10 pm, he wouldn't be happy. Mr. Welsh agreed. Mr. Gottsacker asked Mr. Johnson if there was any reason why the spa couldn't be put on the porch, noting that the porch was wide. He said if it was on the porch it would be away from the Bates' house, wouldn't be a structure issue, would be out of sight and out of mind, and any noise would be shielded.

There was further discussion about whether there was another place on the property where the spa, as a structure could be put.

Mr. Johnson said if it met the 35 ft front or sideyard setback, and was beyond the shoreland setback, it would be in compliance. He said it could also be put on the porch, which would be within the footprint of the house.

Chair Davis reopened the Public Hearing in order to ask the Sidmores why the spa couldn't be put on the porch.

Ms. Sidmore it would be a very tight fit in the corner. She said she hadn't measured this. She also said she didn't know if the porch would be able to hold the spa because of the weight. She said her neighbors had lawn furniture on their lawn where a lot of people congregated. She said she and her husband would be using the spa, and asked if they had property rights too.

She said the neighbors wouldn't like it no matter what she put the spa. She said it wouldn't be a place to party, and said it might be too heavy to put at the end of the porch. She said she thought they were proposing it in the best place possible. She also noted that a shed couldn't be moved without four people.

Chair Davis closed the public hearing.

Mr. Starkey said the Zoning Ordinance said a structure was something built with a fixed location on the ground , or attached to something having a fixed location. He said he was looking at the spa as something with a fixed location, so it was a structure. He said they weren't going to move it around the yard.

Chair Davis said her shed wasn't moved around the yard, but was not considered a structure.

Mr. Starkey said it was an accessory shed. He noted again that if they were not really sure concerning this application, they could have the Planning Board revisit the definition of structure. But he said he had the information he needed to make a decision now.

There was discussion that if someone complained, lawn furniture could be moved.

Chair Davis said she thought a spa was site specific, based on its size.

There was further discussion on accessory sheds.

Mr. Harvey noted that the spa itself made some noise.

Chair Davis suggested that this might not be considered a structure if it was for 4 people, whereas a 7 person spa might be considered a structure.

Mr. Starkey stated again that any spa would have a fixed location.

Chair Davis determined from Mr. Johnson that this was the first time the issue of a spa had come before the Durham ZBA.

There was further discussion.

***Sean Starkey MOVED to uphold the Administrative Decision from Zoning Administrator, Thomas Johnson, denying the construction of a hot tub within a property setback based on the definition of "structure" within the Zoning Ordinance. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar Point Road, and is in the Residence C Zoning District. Carden Welsh SECONDED the motion, and it PASSED 4-1, with Chair Davis voting against it.***

- B. **PUBLIC HEARING** on a petition submitted by Nary, Norris & Schlapak, P.A., Durham, New Hampshire, on behalf of Michael & Wendy Mahoney, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7, Article XII, Section 175-53(B)(1) and Article XXI, Section 175-111(G)(3) of the Zoning Ordinance to permit more than three unrelated occupants within a residence and to permit more than three vehicles to park within the front yard setback. The property involved is shown on

Tax Map 1, Lot 7-1, is located at 105 Madbury Road, and is in the Residence A Zoning District.

Mr. Gottsacker noted that he was an abutter, and therefore recused himself for this application.

Chair Davis appointed Mr. Harvey and Mr. Savage as voting members for the application.

Attorney Eric Schlapak of Nary, Norris & Schlapak PA spoke before the Board. He said Wendy Mahoney lived in Derry, NH, and her son Michael Money lived at the subject property in Durham. He said they were requesting a temporary variance to permit more than 3 people at the property. He explained that a year ago, the Mahoneys had looked at property in Durham so their son could live in a home with a few friends. He said they bought the property with the impression that 5 unrelated people could live there.

He said at that time and in years prior, at least 5 people had lived at the property, and said the family was led to believe that this was the appropriate amount of people that could live there and park there. He noted that there was a separate entrance and separate apartment to the home in the back, with separate utilities. He said the Mahoneys made agreements to have 4 other students live there over the next few years, and said at no time did they know there was a 3 unrelated ordinance. He said they had wanted to be upstanding homeowners, and hadn't wanted to deceive anyone.

Attorney Schlapak said since the purchase, they had discovered that the Ordinance existed, and didn't want an illegal situation there. He said they wanted to be upfront, and noted that he had discussed the situation with Mr. Johnson. He said they were looking for a temporary variance through July 2011, so the hardship didn't happen that they were unable to pay the note because of the illegal situation that existed.

He said they had put the house on the market this week, and were looking to sell because of the situation that had occurred. He said if the variance was denied, at least 2 tenants would have to move, and the Mahoneys would be unable to pay the note. He said if the variance was denied, there would possibly be litigation in regard to the sale of the home about a year ago. He said he was present that evening to answer questions the Board might have about this possibility, but said if a temporary variance was granted for the year, there wouldn't be any damages claimed.

Mr. Mahoney asked Attorney Schlapak if he was going to go through the variance criteria.

Attorney Schlapak said the primary issue was the hardship piece, which was the ability to pay the mortgage if no more than 3 people could live there. He repeated that the situation never would have happened if they had known about this regulation. He said having 5 people there would bring more than 3 cars on the driveway. He said they would need that, but said they would be willing to discuss the idea of reducing the number of cars allowed.

Chair Davis asked Attorney Schlapak to discuss why granting the variance would not impact property values.

Attorney Schlapak said he had spoken with Mr. Flynn last week. He said for multiple years, at least 5 people had lived there, with more than 3 cars.

Regarding the public interest criterion, Attorney Schlapak said the Mahoneys were doing this just to provide a home. He said they believed that certain things had happened that got them into this position. He said the public interest could be that if the variance was denied, with impending litigation, abutters and townspeople could perhaps be part of the litigation, which he didn't think anyone wanted. He said they weren't asking for a permanent variance to have this be a rental property in the coming years.

Mr. Welsh asked why the family had to buy a house for their son.

Attorney Schlapak said with the market as it was, it seemed like a natural fit, and a good investment.

Chair Davis asked what special conditions of the property distinguished it from surrounding properties.

Attorney Schlapak said some special conditions were the nature of the sale, and said the applicants didn't want to be in this situation.

Chair Davis asked if there were any special conditions of the land itself

Attorney Schlapak said there was nothing special, and said it was pretty typical.

Chair Davis opened the public hearing, and asked if there were any members of the public who wished to speak in favor of the application. There was no response, and she then asked if there were any members of the public who wished to speak against it.

**Jay Gooze, 9 Meadow Road,** noted that he had been on the ZBA for 7 years, and during that time there were several similar requests for variances, and the Board's decisions on them were upheld in the courts. He said there was nothing unique about the applicants' property, and also said the fact that they were unaware of the Ordinance didn't constitute a reason for granting the variance.

He noted that if they had been given improper information by the Town, an estoppel would be put in place, and said that was not the case here. He also noted two cases where properties were advertised as allowing more than 3 unrelated, and this was found not to be an excuse for not knowing.

Mr. Gooze said there had been an occasional instance when the ZBA allowed someone to stay in for a few months, because the Board felt they were in a bind, and it was felt this



would be better for everyone. But he said in this instance, the applicants were talking about having a few years. He noted that school wasn't even in session right now, and said there was no reason whatsoever to grant the variance. He said he was sorry the Mahoneys weren't aware of what the regulations were.

He noted a case, Durham vs. White Enterprises in 1975, where the NH Supreme Court had upheld the Town's unrelated rule. He also said the Supreme Court of the US in 1975 in Beltaire vs. Barass, upheld the constitutionality of a local zoning ordinance that limited the number of unrelated individuals who inhabited a building. He said it was an issue of the health and welfare of the community, and the Court thought there was a difference between a family and unrelated people, and that the number of unrelated people allowed could be decided by a town.

He noted that Durham used to allow 5 unrelated people, and this was changed to 3 in the late 1980s because there was too much noise, and parking, and it was becoming a problem for the neighborhoods.

Mr. Gooze said he didn't know if it could be said in this instance that the property value criterion wasn't met, but said he believed that all of the other variance criteria were not met. He urged the Board to vote against the application.

**Jerry Gottsacker, 107 Madbury Road**, said he was speaking as a private citizen and an abutter. He also noted the letter from the abutters on the other side. He then reviewed the variance criteria as they applied to this application. He said it was hard to say whether there would be a decrease in the value of surrounding properties if the variance was granted, noting that the board always had a hard time with this criterion.

He said granting the variance would be contrary to the public interest, stating that the 3 unrelated rule existed, which was in the public interest, so that violating it would be contrary to the public interest. Concerning the hardship criterion, he said financial issues were generally not considered to be hardship. He also said self created hardship didn't qualify.

Mr. Gottsacker said substantial justice would not be done in granting the variance. He also said granting the variance would be contrary to the spirit and intent of the Ordinance, which clearly was to keep no more than 3 unrelated people in rental properties. He noted that the attorney had said that the applicants had already put the house on the market. He said if the variance was approved, it would run with the property, which was saying to the seller to make what could be turned back into a family home into a student rental.

**Barbara Taravainen, 102 Madbury Road**, asked the Board to deny the variance request. She said the regulations existed to preserve single family neighborhoods in Durham, and said the neighborhood shouldn't be expected to protect the investment made by the applicants. She said her investment was her home, and said she must defend it.

**Karen Mullaney, 8 Davis Ave.** said she had been in the council chambers many times over the past year, for the same issue, which they were beginning to make some progress with. She said this was the second time in the past few weeks, a situation like this had come up, a variance was requested and denied, and the house was on the market.

She said she agreed with what others had said, and said it was important to remember that the variance would go with the property. She noted that she had driven by the property several times and wondered why so many cars were in the drive, but had thought they had several teenage children. She said it was a single family home with an accessory apartment, and said there were many houses in Town like this. She said if this variance was approved, there would be many people coming before the Board asking for the same variance.

**Doug Churchill, 100 Madbury Road,** said he had some sympathy for the applicants. But he said if someone went to the bank to borrow some money regarding a possible income producing property, the bank would want to see numbers to see where the income would come from. He said an appraiser would check to see if the building was approved for 5 people, and noted that any appraiser in the area would know that Durham had a 3 unrelated person occupancy rule. He said he couldn't believe that this was missed, and said he wondered what was going on here.

Mr. Churchill said he had a live and let live attitude, and said while the Zoning Ordinance conflicted with this, he accepted that there were reasons for it. He said prior to these owners, 5 people were there but this wasn't recognized because the owner kept a lid on things. But he said he did know that the police had been there a few times, and said the attorney hadn't mentioned this. He noted that his family had called the police because of fights there. He said there were things that went on there that were not conducive to a single family neighborhood, and said the variances should be denied.

**Ann Marie Harris, 56 Oyster River Road,** said she agreed with those who had spoken against the application. She said it went against the Zoning Ordinance, and said all the realtors had been notified that there was a 3 unrelated regulation, regardless of the number of people who had lived at a property in the past. She said student rentals were not compatible with the lifestyles of single family residents, and said the purpose of the 3 unrelated regulation was to preserve health, safety, welfare and the enjoyment of single family residences. She said this obviously did not qualify.

**Robin Mower, 11 Faculty Road,** said she understood a degree of sympathy one might feel for someone who was misled by a realtor. But she said it was hard for someone who hadn't been present to know if there had been a misleading situation, and even if there were, to expect that someone who was going to derive income from renting to students wouldn't investigate the regulations in Town. She said ignorance of the law should not have significance, and said to protect the neighborhoods, the 3 unrelated rule really needed to be upheld.

Mr. Starkey read letter from abutters, **Laura and Peter Flynn, 103 Madbury Road,**

which said that the applicants' case should be with the realtor, and not with the Town. They said granting the variance would set a bad precedent, and said the Town should enforce unequivocally its restriction on occupancies of this kind. They said in the 12 years that they had lived at their address, there had obviously been more than 3 unrelated occupants at the 105 Madbury Road property, and from 4-7 cars in the parking area. They said at times, the noise level was more than what would come from a family in residence.

Chair Davis asked for rebuttals.

Wendy Mahoney said when the family purchased the property, they looked at about 10 other places in Durham, and knew everything about the law. She said they were misled by the realtor, and were pulled away from a Purchase and Sale agreement at another property, because they were told that this place had a legal apartment and that it was multi-family. She said they lost money on the previous P & S agreement because they didn't want to violate the laws.

Ms. Mahoney said they were totally misled and mistreated by two different realtors in Town. She said she understood that the case was with the realtors, but said they had to prove hardship, and said right now, she would rather not prove hardship. She said the property was on the market, because they wanted to prove to the ZBA that they realized they were violating the laws.

Ms. Mahoney said if they were allowed a year to sell the house, they would sell it. She said she had thought the variance would only be for them. She said the realtor they had just hired understood they were selling it as a single family home, with an in-law rental only. She said the realtor knew all about Durham's laws, and said they did not intend to sell the property with rental to more than 3 unrelated in mind.

She said the police had come to the house once, and said that was during Homecoming Weekend, when UNH got that way. She said the fine was immediately paid, and it hadn't happened since. She said they were willing to do just 3 cars in the driveway. She noted that one tenant worked for Comcast and had a truck there because it was his work vehicle. She said they could try to get it moved off the property.

Ms. Mahoney said if she could have 4 tenants, she could pay her mortgage, but said with just 2, she couldn't. She said they were asking for a variance, even if it was for just six months, in order to sell the house.

Robin Mower suggested that the Board might ask whether at any time, the owners of the house had spoken with Town officials about whether they were allowed to have this occupancy.

Jerry Gottsacker said Mr. Churchill had mentioned that the previous owners/tenants were quiet, and said that was his belief as well. He said ironically, these previous owners had contacted Mr. Johnson at the time they bought the house, and were very clear on the 3 unrelated law. He said buyers needed to call the Code Enforcement Officer if they were

going to have tenants, in order to find out what the situation was.

He said another issue with the house was that there had been beer cans that stayed there for weeks, and garbage cans that weren't taken in, which was something that one saw with a student rental, and not a single family house.

Chair Davis asked Ms. Mahoney if she had called the Code Enforcement Officer when making the purchase, and Ms. Mahoney said no.

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

Mr. Welsh said it was straightforward that 4 out of 5 of the variance criteria were violated.

Mr. Harvey said he agreed with the letter from the Flynns that the case was with the realtor and not the Town.

Mr. Starkey went through the variance criteria. He said it wasn't known whether granting the variances would impact property values, but said granting the variance would be contrary to the public interest. He said the 3 unrelated rule was created for a reason.

He said that concerning the hardship criterion, no one had cajoled the applicants into buying the property, they didn't contact Mr. Johnson and didn't do their due diligence. He also said there were no special conditions about the property.

He said temporary or not, granting the variances would not set a good precedent for the Town. He said he didn't believe the variance criteria were met.

There was discussion about whether a temporary variance could be granted.

Mr. Starkey noted that the former ZBA Chair had said this was sometimes done, but said he didn't think it was something to be discussed in this situation. He said it was a tough situation, but said the law was clear, and said unfortunately the applicants were given false information, but also didn't follow up with the Town.

Chair Davis summarized that the Board felt this application clearly did not meet 4 of the 5 variance criteria.

***Carden Welsh MOVED to deny the variance from Article II, Section 175-7, Article XII, Section 175-53(B)(1) and Article XXI, Section 175-111(G)(3) of the Zoning Ordinance to permit more than three unrelated occupants within a residence and to permit more than three vehicles to park within the front yard setback. The property involved is shown on Tax Map 1, Lot 7-1, is located at 105 Madbury Road, and is in the Residence A Zoning District. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.***

- C. **PUBLIC HEARING** on a petition submitted by Park Court Properties, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Sections 175-50 and 175-54 and Article XIII, Section 175-62 of the Zoning Ordinance to permit the construction/placement of portions of multi-unit buildings and certain portions of the access driveway/parking areas within the 75' wetland setback for an amended site plan. The property involved is shown on Tax Map 13, Lot 5-0, is located at 262 Mast Road, and is in the Multi-Unit Dwelling/Office Research Zoning District.

Mr. Gottsacker rejoined the Board.

Chair Davis appointed Mr. Harvey and Mr. Gottsacker as voting members for this application.

Bill Doucet of Doucet Survey represented the applicant. He explained that when the multi-unit development on the site was designed, it was felt that the existing building on the property did not fit with the overall design for the project. He noted that the approvals subsequently received for the project indicated that the building would be removed.

But he said over the past few months, as construction had continued, it had become apparent that the existing building fit better with the new buildings than had been expected. He said the applicant therefore sought some variances to keep the building there. He said the existing building and the parking were located 100% within the 100 ft frontyard setback, the parking was within the 50 ft sideyard setback, and the majority was within the 75 ft wetland setback.

Mr. Doucet said they proposed to move the existing parking area to the other side of the existing building. He said right now, it was gravel parking, and said the new parking lot would have a porous surface, to maintain the buffer area to the wetland. He provided details on this. He also said that by moving the access and parking to the west side of the existing building, instead of having two curb cuts to Mast Road, there would only be one.

He said in November of 2008, a variance was received to allow a certain amount of impact from the project within the buffers. He said what was proposed now would decrease the impact by 5,000 sf. He noted that this was in part because instead of 6 smaller new buildings being built, 3 larger buildings were built.

He noted that whether or not the existing house on the site was removed, there would be the same overall number of housing units.

Mr. Gottsacker said with the 2008 variance application, there was a wetland that had been turned into lawn, and the applicant was going to bring the wetland back.

Mr. Doucet said the lawn was technically a wetland, and said the applicant had taken many measures to protect it. He noted that there was a wetland management plan that the

Conservation Commission had recommended in order to try to improve the function of the wetland. He said the plan was to make sure there was a zero net discharge to the wetland, and to stop mowing it.

He said the plan said that at five years, there would be a review with the Conservation Commission to see how it was working. He said this ongoing monitoring was part of the original approval of the project by the Planning Board.

Chair Davis said she had stopped by the property that day, and had asked the owner what the advantage was to keep the building.

Mr. Doucet said they thought it looked nice, and said other residents agreed. He said it didn't matter from a business standpoint whether the building stayed, but said from day one, they had tried to do what was right. He said this seemed right.

Chair Davis received confirmation that there would be one rental unit and an office in the existing building, and if the building was torn down, these would be put in one of the new buildings.

Mr. Doucet said the abutters and members of the University said the house fit. He noted that he originally had thought the building should be torn down, but once the new buildings were up, had realized that he liked it. He said it was aesthetically pleasing, and helped with the transition in what was now a residential neighborhood. He noted that there was another house to the east.

Mr. Harvey said he went past the property almost every day, and said part of the appeal was that the area almost looked the way it had before, except that there were some new buildings behind it now. He elaborated on this, and said the new and old together worked.

Mr. Gottsacker asked if the rationale was that the site would still almost look like a farm if the house remained.

It was noted that 45,700 sf of disturbance was proposed with the original site plan, and that now, 40,687 sf of disturbance was proposed. It was also noted that there would be green roofs for the new buildings.

Mr. Starkey asked if less stormwater discharge was expected with the new plan, and Mr. Doucet repeated that there would be a zero net discharge.

Mr. Gottsacker received clarification that the parking area was 40 ft by 45 ft, and that there would be an ADA accessibility ramp.

Mr. Doucet explained the site constraints that had resulted in the parking design and location.

There was discussion about how the buffer between the property and the abutter to the

east would be impacted.

Mr. Doucet said the applicant wouldn't be impacting that buffer, and would be providing for the ability to vegetate it. He said in addition to plantings to provide a buffer between the property and the property to the east, there would also be extensive plantings to buffer the wetland.

Chair Davis asked if an advantage of keeping the house was to get more vegetation on the east side of the house.

Mr. Doucet said if the house was torn down, that area would be re-vegetated.

Mr. Gottsacker asked if the driveway would also be pervious.

Mr. Doucet said yes. He also provided a copy of the letter dated June 21, 2010 from the Conservation Commission, as well as a copy of the wetland monitoring and maintenance plan.

Mr. Starkey read the letter out loud, which indicated that the proposed modifications to the original approved proposal still met the conditions of the original conditional use permit, and no additional actions or modifications were necessary.

Chair Davis summarized that the Conservation Commission was not opposed to this variance request. She then asked if there were any members of the public who wished to speak for or against the application.

There was no response.

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

The Board agreed to discuss the variances be requested together.

Mr. Starkey received clarification from Mr. Johnson that if the existing curb cut was closed, the owner would have to get State approval to reopen it. He also asked what the permitted use of the building was right now.

Mr. Johnson said he believed that it was a former single family home of the owner who sold it to Mr. Bryant.

There was discussion that the total number of rental units on the entire property would stay the same, if the existing house remained on the site.

Mr. Gottsacker said although there had been no testimony on this, he couldn't see how what was proposed would do anything but improve the value of surrounding properties.

Mr. Starkey said it would spruce the Bryant property up having the existing home there, and also noted that the applicant was planning to improve the existing buffer. He agreed that granting the variance wouldn't decrease the value of surrounding properties.

Chair Davis summarized the variances being requested:

- allow the relocation of portions of the parking area for the multiunit building from the rear to the front of the building
- Allow the placement of buildings and access driveway/parking area in locations that extend within the 100 ft property line
- Allow the placement of portions of buildings and access driveway/parking area within the 75 ft wetland buffer.

Board members agreed that granting all 3 variances would not impact the value of surrounding properties.

Concerning the public interest criterion, Mr. Starkey said he thought what was proposed was within the public interest. He said keeping the house there, and having a single curb cut gave the site more of a single family feel. He also noted the water resource protection measures that were a part of the entire project.

Chair Davis said that regarding the hardship criterion, they needed to decide if there were special conditions of this property that distinguished it from other nearby properties, which would warrant keeping the building and moving the parking.

There was discussion.

Mr. Starkey said there was a wetland in the middle of everything. He said the applicant had already set the other buildings back as far as possible, and said there was a hardship in that the wetland was everywhere. He said what was involved was an existing building that sat partially within the wetland buffer and a parking area that would sit completely within it.

But he noted that the parking area would be pervious. He also said if the parking on the other side of the building was retained, there would be two curb cuts. He said given the site, he thought they had picked the most logical location to move the parking area to. He said he thought there was a hardship concerning where to put the parking, because he didn't see any other feasible place to put it.

Chair Davis summarized that a special condition of the property was the wetland in the middle of the site, and that there was therefore a hardship in regard to the three variances.

Concerning the substantial justice criterion, Mr. Gottsacker said he thought it was met.

Concerning the purpose and intent of the Zoning Ordinance, Chair Davis said the intent of the wetland buffer was to protect the wetland. She said the applicant would be doing his best to protect the wetlands with this project, with the help of the UNH Stormwater



Center.

Concerning the incursion into the 100 ft setback, Mr. Gottsacker said the spirit and intent criterion was met in 2008. He said what was proposed now, in terms of the general thrust of the development, was an improvement over what was presented at that time.

There was detailed discussion about whether the proposed incursion into the 100 ft setback by the proposed parking area and driveway was contrary to the spirit and intent of the Ordinance.

Chair Davis suggested that the Board could ask for some additional plantings right by the road. Mr. Gottsacker said there should also be a condition that the parking lot would be pervious.

There was further discussion about the fact that one of the proposed parking spaces pushed beyond the side of the building and put that portion of the parking area in the front of the building. Mr. Starkey said adding the additional buffering vegetation would address this. He said he thought all five variance criteria were met, for all three variances.

***Jerry Gottsacker MOVED to approve the APPLICATION FOR VARIANCES from Article XII, Sections 175-50 and 175-54 and Article XIII, Section 175-62 of the Zoning Ordinance to permit the construction/placement of portions of multi-unit buildings and certain portions of the access driveway/parking areas within the 75' wetland setback for an amended site plan, with two conditions: that the parking surface, including the driveway included in the variance will be pervious; and that additional vegetation will be placed between Mast Road and the new driveway and parking area, for buffering purposes. The property involved is shown on Tax Map 13, Lot 5-0, is located at 262 Mast Road, and is in the Multi-Unit Dwelling/Office Research Zoning District. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.***

- F. **PUBLIC HEARING** on a petition submitted by Fall Line Properties, Portsmouth, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Sections 175-53 and 175-54, Article XIII, Section 175-59 and Article XXI, Section 175-111A of the Zoning Ordinance to convert an existing two-unit building into a three-unit building with the associated required parking for the new use. The property involved is shown on Tax Map 11, Lot 28-2, is located at 68 Piscataqua Road, and is in the Residence C Zoning District.

Chair Davis appointed Mr. Gottsacker and Mr. Harvey as voting members for this application.

Paul Berton spoke before the Board, and provided background on his rental of properties in Durham over many years. He said the property under consideration with this application was a three story brown cape that had been rented since 1959. He said it was grandfathered for its existing use, which was a five bedroom house up, and a thee

bedroom apartment down, for a total of 8 tenants. He said he had owned it for 24 years, and said it housed mostly graduate students as well as UNH staff members.

He said he wanted to change the rental structure, not the number of occupants in order to respond to the quickly changing rental market. He noted that over 1000 new beds had come on line on campus, and that there would be 250 new beds off campus as of August. He explained that said the old format of 5 people living together on the top floors wasn't that appealing, especially as the bar was being raised in Durham with much better options. He said the downstairs unit still had great curb appeal.

Mr. Berton said the plan was to change the top two floors from one 5 person unit to two units, with the middle floor being the same as the downstairs as a three bedroom three person unit, and the top floor being a two bedroom two person unit. He said the total number of occupants would not change. He noted that the Coast bus stopped in front of the property, which served it well.

Mr. Berton said the second variance being requested had to do with parking situation.

Chair Davis asked for clarification on what variances were being requested.

Mr. Johnson said Section 175-53 was concerning the Table of Uses and the fact that this was becoming a three unit building instead of a two unit building. He said Section 175-54 had to do with the dimensional requirements, including the setback requirements because of the existing nonconformity with the highway and the parking lot. He said Section 175-59 dealt with the Wetland Conservation Overlay District, and Section 111 A had to do with the size of the proposed parking spaces.

Mr. Berton noted that the State had taken land away from the parcel twice in order to widen Route 4. He the State had put the parking in, as well as the trees. He said he was constrained because he had lost land twice.

Mr. Starkey asked what the size of the parking spaces were, and Paul said they were 9 ft x 18 ft.

He said it was the parking space width that they were looking at. CHECK THIS

Mr. Gottsacker said the setback issues under Section 175-54 were the shoreland setback, front setback and wetland setback. He said there was also the primary building setback that the State required.

Concerning the parking issue, Mr. Johnson said there were 8 people living there now, and said there needed to be one space per tenant. He said with the change proposed in the size of the units, they wanted to have all the parking delineated.

There was discussion.

Mr. Berton said with the redesign of the units, his understanding was that he would need

7 parking spaces, and said that was what he had shown on the plan. He said he currently had 8 spaces.

There was further detailed discussion, and it was summarized that the variance was needed to change the parking configuration.

Mr. Gottsacker asked if the inside of the building would change.

Mr. Berton said it might be more cost effective and easier to take the existing top floor off and put a full third story on it.

Mr. Starkey said they were looking at the variances for setbacks because of changes to be made to the house, which was located within several setbacks. He said another variance issue was that this would be a multi-unit building in the RC district, and said the use was not normally permitted.

It was noted again that the building was grandfathered for 8 people.

Chair Davis asked if any members of the public wished to speak in favor of the application, or against it. There was no response.

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

Chair Davis recommended that the Board discuss the three variances together. She asked if there was any evidence that what was proposed would impact surrounding property values, and ZBA members said no.

Concerning the public interest variance criterion, Mr. Gottsacker said granting the variances would result in better quality housing stock.

Mr. Harvey said Durham was trying to avoid 5 person apartments at this point.

Mr. Starkey said the applicant was proposing to reconfigure the parking and lowered the amount by one space. He said the exterior of the building wouldn't change based on this application. He agreed that the quality of the housing would improve because the 5 person unit would be split into a 3 person unit and a 2 person unit.

There was detailed discussion on the proposed parking configuration of 7 spaces.

Mr. Starkey asked how many violations there had been at the property concerning parking over the last several years, and Mr. Johnson said there were none.

Concerning the hardship criterion, Mr. Starkey said special conditions of this property were that almost the whole property sat within the existing wetland setback. He noted that it was already configured to be a multiunit.

Mr. Gottsacker also said the existing apartment, with 5 bedrooms, was going out of style. He said it was not a desired setting anymore, so there was a hardship in that it would be less attractive as housing stock.

Board members agreed that the proposed use was a reasonable one, and that the hardship criterion was therefore met.

Board members agreed that substantial justice would be done in granting the variances, and also agreed that granting the variances would not be contrary to the spirit and intent of the Ordinance.

Mr. Starkey said the area where the parking would be was the same location as it currently was, and would be reconfigured to take a space away. He said the building location, with the various setbacks, wasn't being changed, and he stated again that it was already a multi-unit building. He said the same number of people would live in the building. He said there would be no new construction, and said no land would be disturbed. He said the spirit and intent of the Ordinance was met. But he recommended that there should be a condition of approval that there could be no more than 8 tenants in the building.

***Jerry Gottsacker MOVED to approve the APPLICATION FOR VARIANCES from Article XII, Sections 175-53 and 175-54, Article XIII, Section 175-59 and Article XXI, Section 175-111A of the Zoning Ordinance to convert an existing two-unit building into a three-unit building with the associated required parking for the new use, and where the downstairs has 3 tenants, one upstairs unit has 2 tenants and one upstairs unit has 3 tenants. The property involved is shown on Tax Map 11, Lot 28-2, is located at 68 Piscataqua Road, and is in the Residence C Zoning District. Sean SECONDED the motion, and it PASSED unanimously 5-0.***

Break from 9:29 to 9:36 pm

- D. **PUBLIC HEARING** on a petition submitted by Peter Andersen, Durham, New Hampshire, on behalf of Elizabeth C. Smith Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 of the Zoning Ordinance to reduce the front yard and side yard setbacks for a potential porkchop subdivision, and from Article XII, Section 175-57 to propose two driveways for a porkchop subdivision where only one driveway is permitted. The property involved is shown on Tax Map 16, Lot 19-0, is located at 260 Durham Point Road, and is in the Rural and Residence C Zoning Districts.

Peter Andersen spoke before the Board, and said he first wanted to provide an overview of the property and its special conditions, and how he believed what was proposed met the spirit of the code. He noted the high density soil map that had been done for the property because he had been thinking that a conservation subdivision could be put in there. He said he had always wanted to cluster the houses, and had wanted to have 6 of

them.

He said there was 800 ft of frontage on the original lot, which meant he was 100 ft short for a three lot subdivision because each lot was required to have 300 ft of frontage. He also noted that a large portion of the property contained poorly drained soils. He said part of it was wooded, and part was an open field that was a nice amenity on the property. He said there was an existing house and barn on the northeast corner of the property. He said he had realized that if he went with the conservation subdivision approach, he couldn't get the 3 lots he was trying to attain.

Mr. Andersen explained that the Town allowed for an exception to having to do a conservation subdivision if there was a subdivision of three or fewer lots, or a pork chop subdivision. He then noted that under the pork chop subdivision regulations, the setback requirements were greater than they were for a conservation subdivision, and thus reduced the amount of buildable area he had to work with.

He said he wanted to prove that it would be in the best interest of the Town to allow certain variances and special exceptions so he could build two new house lots and two houses in locations that were the most practical, economical, and the only ones that were feasible because of the conditions of the land, and trying to preserve open space, wetlands, etc.

He said the first variance requested was concerning the sideyard setbacks. He said Lot 1 had about 4 acres. He noted the location of the well, which fed the existing house. He also described briefly how Lot 2 and Lot 3 were laid out, and said he had just enough useable sf on each of the lots. He said it was anticipated that a portion of Lot 2 would be transferred to an abutter in the future, with a lot line adjustment. He noted that this was not part of what was before the Board that evening.

Chair Davis asked where the houses might be located on Lot 2 and Lot 3.

Mr. Andersen said Lot 2 had 160,000 sf of useable area. He said according to the pork chop subdivision regulations, he needed 50 ft of frontage, but said if they went with that, there would be a negative 50 ft side setback. He said the assumption was that with a flag lot, the house would go somewhere in the back of Lot 2, but said that was not the case here. He said he had tried to make the frontage on Lot 2 as wide as possible, and still have enough space to put a house on Lot 3. He provided details on this.

He said the best place for the access was at the crest of the hill, where there was already currently an access to the fields. He noted that there was an existing driveway on Lot 1.

Mr. Andersen said if he couldn't get a reduction in the side setbacks, the houses would get very narrow and would be hard to market. He noted that this was considered one of the nicest parts of Town, and said he'd been encouraged by the realtor to build houses for about \$650,000, which would have 4 bedrooms and 3 car garages. He said he was hoping to make them in a rambling, farmhouse style that would fit with the surrounding older

properties. But he said that if they couldn't get enough footprint, they couldn't make them look that way.

He said he had asked for a side setback reduction from 50 ft to 15 ft, for both Lot 2 and Lot 3. He said he was only asking for the variance for a side setback reduction between these two lots, so it was an internal setback issue, and did not involve the abutters. He said he believed that what he was asking for met the intent of why a developer was able to be free form in terms of meeting setback requirements when doing a conservation subdivision.

Chair Davis asked if the side setback reduction would put Lot 2 and Lot 3 about 30 ft apart.

Mr. Andersen said yes, but said he most likely would put the garages of the houses 30 ft apart. He said he would pay a lot of attention to layout when putting the houses in, but reiterated that he needed the space in order to have enough footprint. He elaborated further on this.

He said he couldn't see that there would be a reduction in the value of surrounding properties based on the internal reduction in the side setbacks, if the variances were granted. He noted that Lot 1 would be able to put on an addition in the future.

Mr. Welsh asked Mr. Andersen why he was asking to be allowed a reduction in side setbacks from the boundary between Lot 1 and Lot 2.

Mr. Andersen said the house on Lot 2 would have a very good chance of being close to the property boundary between them, so he wanted the side setback reduction to be allowed for Lot 1 on the other side of the boundary as well. He also said that currently, the money view on Lot 1 was out toward the field. He said any future addition to the house on Lot 1 would most likely be on the side toward Lot 2. He noted that as part of his building plans, he might come back with an addition to that house.

He said granting the variances would be in keeping with the public interest in that it would be in keeping with the conservation subdivision concept.

Mr. Andersen said the second variance being requested was to allow a reduction in the frontyard setback from 50 ft to 10 ft for Lots 2 and 3. He said 20 test pits were done, and said in walking the property and getting the soil mapping, it was found that the best spots were closer to the road. He also said he wanted to stay as far away from the wetland in the center of the original property as possible. He said the septic systems would not be visible from the street because of the grade, and said even if they were, it would be a lawn.

He said he wasn't sure why a 30 ft setback was needed for a septic system, and noted that the State required a 10 ft setback. He said easements would be needed in order to put septic systems in locations other than what he proposed for Lot 2 and Lot 3, and said that

wasn't a road he wanted to go down. He said if the variance was denied, this became basically unbuildable land.

Mr. Andersen noted the existing system that serviced the house on Lot 1. He said if the special exception and variances were granted, he hoped a septic system could be put on the north side of Lot 1, but noted that there would be a side setback issue. He said he therefore wanted a variance to allow the side setback from the property line shared with the abutting property to the north to be reduced from 50 ft to 20 ft. He explained that on Lot 1, the ledge there would prevent water from causing problem for the abutter.

He also said he would like the side lot lines for Lot 2 and Lot 3 to be reduced from 50 ft to 10 ft to permit the desired location of the septic systems.

Mr. Starkey asked if a new septic system was proposed for Lot 1, and Mr. Andersen said no. He provided further details on his reason for asking for the reduced sideyard setback between Lot 1 and the abutting property.

Chair Davis said there was a lot of information involved, and suggested letting Mr. Andersen finish his presentation, opening the public hearing, and then continuing the application to a future meeting in a week or so.

There was discussion about this, and it was noted that there would be a site walk where the Board could get more information.

Chair Davis said Mr. Gottsacker and Mr. Savage would be voting members on this application.

There was discussion that the site walk just prior to the continued meeting would be very beneficial. Chair Davis scheduled the continued meeting for July 20, 2010.

Mr. Johnson noted that there was a letter from the State disapproving the septic application, and said this might hold up the acceptance of the subdivision application by the Planning Board.

Mr. Andersen said he had discussed this with Mr. Campbell, and said the perc tests would be done.

Mr. Johnson said the letter from the Smith Trust authorizing Mr. Andersen Peter as the representative hadn't been received, and needed to be in the ZBA file prior to the site walk.

Chair Davis said the last item on the Agenda, regarding the Andersen Special Exception application would be continued to the next meeting. She noted that the Board could get information about what was involved at the site walk.

Mr. Andersen said two driveways were proposed for the 3 lot subdivision, where one

now existed, on Lot 1. He noted that one was allowed with a pork chop subdivision, and explained how having only one driveway didn't make sense in this instance. He also said if the second access proposed, off of the field was the only access, the barn on Lot 1 would be unusable for practical purposes. He said he didn't think the Zoning Ordinance took into consideration a pork chop subdivision where one house already existed on one of the lots.

Mr. Andersen said the second access would be for both Lot 2 and Lot 3, and said it would be located on Lot 2 right near the lot line shared with Lot 3, and would curve into Lot 3 from Lot 2. He said he didn't see how this would decrease property values, and said it met the intent of the code.

Mr. Starkey asked if the applicant would have to come back for a variance in regard to where the driveways would sit in relation to the lot line.

Mr. Johnson said he hadn't seen a proposed footprint for the building. He said typically a driveway could go in along the lot line, but said if a car stopped in the driveway, it was a parking area and was considered a structure.

Mr. Welsh asked if this was in fact a conservation subdivision that was proposed.

Mr. Andersen said it was not, even though he would have liked to have done one. He said he couldn't get the same number of lots, so it wasn't practical.

Chair Davis asked if there were any members of the public who wished to speak in favor of the application. There was no response, and she then asked if there were any members of the public who wished to speak against the application.

**Dea Brickner-Wood, 1 Colony Cove Road**, said she lived directly across from the property in question. She noted that she had submitted a letter to the ZBA concerning the application.

She said she and her husband were opposed to the variance request, and believed any subdivision and development of the property should be done in accordance with existing local and State regulations. She said they believed that the environmentally fragile nature of the area and the parcel would be harmed by the granting of the variances. She said they did not believe the variances were justified under the five variance criteria, and also said granting the variances would be incompatible with the Master Plan and would have an adverse impact on their neighborhood and their own property.

She said granting the variance to allow a reduced frontyard setback for the septic leach field would be against the public interest. She said there was significant cause to question if the reduced setback would uphold the intent to maintain good public health. She spoke in detail on possible impacts to the water quality of Great Bay, which she noted was already experiencing problems with nitrogen loading. She also noted that a number of residences on Durham Point Road were served by on site wells, and that the property in



question was in proximity to a number of them. She said her own well was located in the front of her property, near Durham Point Road.

Ms. Brickner-Wood next spoke about the variance requested for an additional road cut, and its impact on the public interest. She said Durham Point Road was a challenging road, and noted that her driveway had two accesses, one on Durham Point Road and one on Colony Cove Road. She said she drove onto her property from Durham Point Road, but drove out onto Colony Cove Road because of the questionable sight distance on Durham Point Road. She said the driveway proposed was directly across from her property, and said there were some safety issues with this. She said she didn't think it was unreasonable to request that the developer use one driveway to access additional lots.

Regarding the sideyard setback reduction variances and the public interest, Ms. Brickner-Wood said the problem was that this was a rural residential district, which had historically had been a low density area. She said the Zoning Ordinance spoke about trying to maintain the character of the area, and also recognized the limited carrying capacity of the land out there. She said this section of Durham was very rich in wetlands, ledge, and biodiversity, and said these same characteristics presented development limitations. She said there was concern about trying to develop more than was allowed by both the land and the Zoning Ordinance.

Ms. Brickner-Wood next addressed the spirit and intent of the Zoning Ordinance in relation to the three variances that had been requested. She said these variances were in direct conflict with the intent of the Zoning regulations as amended in 2004 and 2006 that regulated the calculation of usable area and minimum lot size. She said the Zoning regulations allowed for suitable development based on lot characteristics and resources as deemed suitable for development in the Town. She said lowering those standards to allow for an increase in density would have ramifications for the immediate neighborhood as well as set a precedent for development throughout the Town.

She noted that according to the Master Plan, the view on Durham Point Road across from Colony Cove Road was one of the identified view sheds of Durham. She also said Durham Point Road was a scenic road, and said future development should be done in such a way as to not detract from its scenic nature.

Ms. Brickner-Wood said the Zoning Ordinance had established certain dimensional requirements for public health and safety purposes. She said the frontyard setback should therefore not be waived for the sole purpose of increasing development on a parcel due to inadequate soils.

In regard to the variance requested to allow an additional road cut, she said it was reasonable for the applicant to be allowed only one driveway road cut as stated in the Zoning Ordinance for a pork chop subdivision.

Regarding the variance requested to allow the reduction in side setbacks between the 3 proposed lots, Ms. Brickner-Wood said the intent of these setbacks was to maintain the

rural character of the area and to protect the property values of existing homes. She said reducing the setbacks by up to 70% would change the character of the area by putting additional homes where they really could not be accommodated.

Concerning the substantial justice variance criterion, Ms. Brickner-Wood said the existing lot was large and was being purchased as a single family house lot. She said the prospective owner/developer was not being denied this use, and also said one additional house lot could potentially be accommodated. She said one could argue that the granting of a variance like this would create an injustice.

Ms. Brickner-Wood next said that while the houses the applicant was proposing to build might be expensive, granting the variances to allow this would have an adverse impact on the value of surrounding properties because of the plan to cluster the houses and also because of the additional road cut.

She next addressed the hardship criterion in regard to the variances being requested. She said there was nothing unique about the applicant's property that required such variances, and noted that it was similar to much of the land on Durham Point Road, which was known for its resource values and limited development potential. She also said there was concern that if the variances were granted, this could possibly set a precedent in the area and potentially throughout the community.

Larry Brickner Wood, One Colony Cove Road, first noted that the Gsottschneiders, the McMahons and Stacy Brooks, who were all abutters, had submitted letters to the ZBA concerning this application. He read the letter from Ms. Brooks into the public record.

The letter noted Ms. Brooks' experience with dealing with clay and ledge on her own property, which she had moved to recently, and said this made her concerned about the proposed development of two homes and a driveway in the area. She said she didn't believe the property was in a location to support another driveway, noting that the road was very curvy and had many blind spots. She said she was concerned about the proposed shared septic system, as well as a potentially reduction in water levels because of the new wells that would be drilled. She also said the proposed subdivision that created a pork chop lot was not in the best interest of that property and the rural character of the neighborhood.

Mr. Starkey said the letters from the Gsottschneiders and the McMahons read essentially the same way that the Brooks letter did.

Mr. Welsh noted that the Gsottschneider letter indicated that he was a real estate professional.

Mr. Andersen said he had not seen the letters, and was told he could get copies of them. He then said he would like to rebut comments that had been made at the meeting. He said water quality was an issue when a septic system was put in anywhere. He then explained that the systems being proposed were aeration systems, and not systems with a typical

leach field. He provided details on this, and said the water that came out was 95% cleaner, and was of about the same quality as water that ran off the road.

He said at the ZBA meeting the following week, it would be explained that only a 1000 sf area and not a 4000 sf area was needed for these systems, because it would be water that was being dissipated, not effluent. He also said the nitrogen loading would be much lower with this system, noting that a third of the nitrogen would go into the air, and not into the ground as was the case with traditional leach fields.

Mr. Andersen said he was a very responsible developer, and had been in business for 25 years. He noted that the Town Engineer had said the sight distances were fine in the access locations he had indicated. He also said the view from Colony Cove Road was beautiful, and should be preserved. He noted that the houses proposed would be in front of the Brickner-Wood house, and said while he wished the wetland setback was smaller, the wetland constraints prevented him from pushing the houses down further to preserve the view for them. He then said he didn't think it was rational to say one couldn't subdivide a 26 acre lot into more than one or two house lots.

Mr. Andersen provided additional information on the septic system design he proposed to use, and Mr. Gottsacker noted that there were a fair number of these systems now in Durham.

Mr. Andersen noted that there was allowance in the Zoning Ordinance for the septic systems to be accepted by special exception. He then said that when the site walk was done, he would like the Board to pay attention to the distances between the houses in that area. He said they were all less than 50 ft. He also noted that there was a stone wall out there, which had a 10 ft State setback for septic systems, and asked that the Board observe what was built on to the stone wall. He also noted that the Board should ask Mr. Johnson what had happened at the property to the north.

Mr. Andersen said he wasn't trying to do anything underhanded. He said he had called all the abutters, and had given them the chance to speak with him.

Mr. Welsh said one of the letters suggested that the highest and best use of the land was to build one additional unit, and not two.

Mr. Andersen said a question was whether there was a market for a \$1.3 million house, instead of two \$675,000 houses. He said he and Mr. Gsottschneider had had several meetings discussing the property, and disagreed on this issue. He noted that he was also a realtor and an engineer, and had been a contractor for 25 years. He said Mr. Gsottschneider had dreamed of building a house on the property in question for his daughter, but said it didn't look like that would happen. He noted again the closeness of abutting properties to their property lines.

He said the site walk would give the Board a chance to try to imagine what a developer, and someone who wanted to buy, would think would fit in on the property.

Larry Brickner Wood said while he was a minister now, he had spent 20 years as a town manager and town planner, including serving as a town administrator in Durham, so also knew something about land use. He said there was no question that his well, which was located in the front yard of his property, would be impacted by the development. He said in addition to concerns about aesthetics, they were concerned about the water quality of the general area.

He said their main point the wanted to make was that people should do what the regulations allowed, unless there was a clear justification for a variance because of hardship. He said a justification was not that someone wanted to get more density in order to get more economic profit. He said that simply wasn't hardship under Zoning law.

He said he and his wife welcomed new neighbors, and weren't antidevelopment, but he said a plethora of variances was not the way to develop, especially in an environmentally fragile, sensitive area. He said this could affect them, and could drastically affect their property values. He said the Zoning Ordinance wasn't that old, and said they also wanted the development to be done in a way that was in keeping with what the Master Plan said.

Mr. Johnson suggested that Board members carpool for the site walk, and that the applicant mark out where the septic system and building footprints would be located.

Mr. Starkey suggested that the driveway access should be marked out as well.

***Sean Starkey MOVED to continue the ZBA meeting July 20, 2010 at 7:00 pm, and to schedule the site walk for 5:00 pm preceding the meeting, in order to get further information, including visual information on the proposal. Jerry Gottsacker SECONDED the motion and it PASSED unanimously 5-0.***

- F. **PUBLIC HEARING** on a petition submitted by Peter Andersen, Durham, New Hampshire, on behalf of Elizabeth C. Smith Trust, Durham, New Hampshire, for an **APPLICATION FOR SPECIAL EXCEPTION** as per Article XXIV, Section 175-139 regarding the suitability of the location for a leach field. The property involved is shown on Tax Map 16, Lot 19-0, is located at 260 Durham Point Road, and is in the Rural and Residence C Zoning Districts.

***Jerry Gottsacker MOVED to continue to the July 20, 2010 meeting the Application for Special Exception per Article XXIV, Section 175-139 regarding the suitability of the location for a leach field, for the property shown on Tax Map 16, Lot 19-0 and located at 260 Durham Point Road in the Rural and Residence C Zoning Districts. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.***

**III. Approval of Minutes**

April 13, 2010

May 11, 2010

*Jerry Gottsacker MOVED to postpone approval of both sets of Minutes until the end of the July 20, 2010 meeting. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.*

Mr. Starkey noted that Mr. Savage and Mr. Harvey had been voting members for the previous three motions that had been made.

**IV. Other Business**

**V. Adjournment**

*Chair Davis MOVED to Adjourn until the continued ZBA meeting on July 20, 2010. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.*

Adjournment at 10:47 pm

Victoria Parmele, Minutes taker

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Sean Starkey, Secretary