

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

Durham Zoning Board
Tuesday July 20, 2010
Durham Town Hall - Council Chambers
7:00P.M
MINUTES

MEMBERS PRESENT: Chair Robbi Woodburn; Vice Chair Ruth Davis; Secretary Sean Starkey; Carden Welsh; ; Jerry Gottsacker; Chris Mulligan; Mathew Savage

MEMBERS ABSENT: Edmund Harvey

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

I. Approval of Agenda

Chair Woodburn brought the meeting to order at 7:01 pm. She noted that the public hearing for the Andersen application from the previous week had been continued, and that she had not been present for that meeting. She said she would therefore not act as Chair for that application, and said Ms. Davis would sit in for her. She appointed Mr. Gottsacker as a voting member for the approval of the Agenda.

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

Chair Woodburn noted that alternates who had not been appointed as voting members would be able to participate in the discussion prior to the closing of the public hearings, but would not participate in deliberations.

II. Public Hearings

- E.** Continued Public Hearing on a petition submitted by Mr. 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.

It was clarified that Mr. Savage would be a voting member for this application in place of Mr. Harvey, who had been at the last meeting and was a voting member, but was not at the present meeting. It was also noted that Mr. Gottsacker had been appointed as a voting member for the application as well, and that he would continue in that role.

Chair Davis noted that there had been a site walk. She asked the applicant to come

forward and address questions that Board members might have. She also asked Mr. Andersen if he had a letter authorizing him to speak on behalf of Elizabeth Smith.

Mr. Johnson said he had found the authorization in the Planning Board file.

Mr. Andersen first told the Board that he had received State approval for the subdivision.

Mr. Gottsacker noted that the approval document only mentioned Lot 1, and Mr. Andersen explained that Lots 2 and Lot 3 were not required to meet State subdivision approval because of their size.

Chair Davis asked if the State approval was in reference to the proposed septic systems.

Mr. Andersen said the approval meant he had proven with the test pits and perc tests that the proposed septic systems could be supported. He also said the County soil scientist had recommended that the proposed septic systems be used. He said he couldn't say that the State had looked at Lots 2 and 3, but said he had every assurance from septic designer Adam Fogg that he would be able to design a septic system on them without any problems.

After further discussion, Mr. Andersen explained that septic approval wasn't needed for Lots 2 and 3 yet because he wasn't building anything on them yet, and was only seeking subdivision approval. But he said the test pits and perc tests had proven that the lots were capable of supporting septic systems.

Mr. Welsh noted the question asked at the site walk about doing a conservation subdivision, and he asked whether this could in fact be done.

Mr. Andersen said a reason he didn't want to do a conservation subdivision was the disincentive in not being able to count steep slopes and some other soils toward the developable area. He said when he was done with the calculations, he was lucky to be able to get one lot. He said the only way to get the density that would pay to move forward with a conservation subdivision was to buy the lot in back, but said it was an expensive property. He said it would be nice if the regulations were changed to encourage people to do conservation subdivisions.

Chair Davis asked whether if that property were bought, Mr. Andersen would still be able to only build on the front portion of the property.

Mr. Andersen said there might be other locations, but noted that the Town Engineer was quite adamant about keeping the access location that was proposed. He said this took out the whole left side of the property, near Colony Cove Road. He noted that the property got quite wide toward the back, but said the only other way to get access there would be to go in the right side of the property behind the barn, down the length of the field, and cut over the wetlands crossing to where there was a wide piece of woods.

He said putting such a long road in this way didn't seem to be within the spirit of the Ordinance. He said there would be a large amount of privacy, but said there would also be a large environmental footprint. He said he thought the right thing to do was to develop near the road, and to preserve as much of the rest of the property as he could.

Chair Davis noted that at the site walk, a potential location of a house was shown on Lot 3. She asked if that house was located at the edge of the 100 ft setback, or if it could be moved further down slope.

Mr. Andersen said it was possible to move it down slope perhaps 10 ft. But he said there would be decks and stairs, so practically speaking, he would want to move the house in the opposite direction, closer to the road. He said from a planning perspective, one wouldn't want one house to be sitting within the viewscape of another. He said he was weighing as best as he could what he would view as good planning along with some constraints of the land and regulations.

Chair Davis asked if the proposed home on Lot 3 would be within the viewscape of the abutters across Durham Point Road, and also asked about the situation in the winter.

Mr. Andersen said the abutters on the opposite side of the street had shrubbery. He said with the leaves off, one would be able to see the house, and the view wouldn't be as nice as it was now. He said he thought the more the new houses could be separated, the more the winter view would be preserved. But he said he was constrained by the 100 ft setback, so even though this was a design goal, it wasn't one he could meet as much as he would have liked. He said if the driveway was moved over across from their driveway, their view of the field would be enhanced, although it wouldn't be as panoramic as it was now.

Chair Davis asked whether if the property was only developed into one additional lot, the house built there would still be located right in front of the abutters' home. She asked if this would be the best spot.

Mr. Andersen said it would be more centrally located in front of the abutters' home.

Chair Davis asked if it was the optimal spot for a home.

Mr. Andersen said when he visualized the site, he was trying to preserve the view up and down the street, but also was trying to bring a view up to the houses that would be built. He said there would be a lot fewer trees there, so one had to try to imagine how things would look if they weren't there.

Chair Davis asked if the viewscape down to the field would be wider.

Mr. Andersen said if the house on the left was pulled up the hill, he could also bring it further to the left, which would widen the view for the abutters.

Chair Davis asked if there were other homes on Durham Point Road that were this close

together.

Mr. Andersen said the Schoolhouse was about 10 ft off the right of way. He also said the Gsottschneider house was about 10 ft off the lot line. He noted that the Zoning Ordinance was relatively new compared to a lot of the houses along the street, and a lot of the developments on Colony Cove Road. He said the houses there were really on top of each other.

He noted the goal was to keep the houses on Lots 2 and 3 as far away from each other as possible. He said things could be designed in such a way that close houses didn't feel really close. He noted a development behind the Wentworth Hotel that had 0.1 acre lots, and said with good landscaping, the houses felt like they had space. He said it all depended on how the houses on Lots 2 and 3 were designed.

Ms. Woodburn noted the existing opening where Mr. Andersen had thought the driveway was going to go and that he had then decided to move it down a little bit.

Mr. Andersen said he had made the decision that day. He said he didn't think that moving it 20 ft one way or the other would make a big difference to the ZBA, and said he thought this was more of a Planning Board issue. He said he was asking the ZBA to be allowed to have the second curb cut.

Ms. Woodburn said she was asking this question because of comments from abutters about the removal of trees, and disturbance of the stone wall.

Mr. Andersen said it had struck him that the driveway should go more between the two houses.

Ms. Woodburn said in his attempt to do this, she thought he was making the situation concerning removal of vegetation less acceptable.

Mr. Andersen said if people felt strongly about staying with the existing access, he could design around it. He said he just wanted to come up with the best design possible. He said the sight distances were comparable in both locations.

Chair Davis asked if there was anyone 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.

Attorney Christopher Bolt of Donahue, Tucker and Ciandella said he represented the Brickner-Woods, who were very much against the variance request. He said this was an application that proved that not all property should be overdeveloped. He said 3 lots were being created out of 26 acres, but noted that 3 homes were being put on about 3 acres. He said this was an overdevelopment for the land.

He said the desired lot line created within 50 ft of the existing septic field was a self

created hardship. He also said the porkchop lot was not what one would normally consider a porkchop lot, stating that it was normally a lot that had less than the normal frontage, and that a house would generally be put in the back part of the lot. He said in this instance, all three houses would be in incredibly close proximity.

Attorney Bolt noted that based on what Mr. Andersen had said at the site walk, the footprints shown with the blue flags didn't include decks, stairs, and garages. He said the Board therefore didn't have a full variance application in front of it, and said it seemed like a moving target.

He noted that the applicant had to prove that only one of the variance criteria was not met. Attorney Bolt said that a host of court cases had said that in order to determine that a variance was not contrary to the public interest, it had to be found that the variance wasn't unduly and in marked degree in conflict with the Zoning Ordinance.

He said in this case, the Rural Residential zone was intended for low density development, and said what was proposed didn't qualify. He said one additional lot might be, but two new lots so close to the existing lot was not low density. He said these variance requests asked for 60-70% less in terms of setbacks than what should be there.

He noted that there was a variance request for the leach field setback, as well the issue of the leach field depth, which was the subject of the Special Exception. He noted that for each of the three variances being requested, the applicant had to prove that all 5 criteria were met. He said he didn't think the applicant could do that.

Attorney Bolt said "unduly and in marked degree" was a high standard to meet. He said it required looking at the character of the neighborhood, and noted that Durham Point Road was a scenic road, which had been declared to be of value to the community. He said to change that was not in the public interest. He also noted that Plum Creek in this area fed into Great Bay. He said the 2002 and 2006 Zoning amendments had addressed the protection of Great Bay, and also said the Master Plan had focused in on this issue. He said it was in the public interest to protect the Bay and its estuaries.

He said public health, safety and welfare should also be considered in talking about the density proposed. He noted the speed of cars along Durham Point Road and the sight distance problems. He also noted that the Zoning Ordinance said that for a porkchop subdivision, the common driveway should be used. He said there was a driveway, at the house on Lot 1. He said if this intense development was approved, this was the driveway that should be used, and spoke further on this.

Attorney Bolt noted the collapsing of the spirit and intent criterion with the public interest criterion by the court cases. He said in terms of why setbacks were needed, and why leach fields should be away from the property lines, this was for the public health and safety of the community, the abutting properties and Plum Swamp. He asked the Board to find that the variance requests did not meet the public interest or the spirit and intent of the Zoning Ordinance.

Regarding the substantial justice criterion, Attorney Bolt said the balance was that if there was a loss to the applicant, there must be some benefit to the public. He said the loss to the applicant was not getting the variance, but the benefit to the public was that the Ordinance was upheld and the public health, safety and welfare were protected, in terms of traffic safety, and water quality. He noted that his clients' well was within about 50 ft of the roadway, and also said changing the driveway so car lights hit their living room would be a detriment to them as members of the public. He asked that the Board find that there was substantial justice in denying the variances.

Attorney Bolt said that in regard to whether granting the variances would diminish the value of surrounding properties, Mr. Andersen's prior statements acknowledged that removal of trees, and moving the driveway so it was directly across would be a detriment to the Brickner-Woods. He also said Mr. Gsottschneider, who was a former realtor, would testify that the development would have a negative impact on surrounding properties. He said Mr. Andersen had admitted that there would be an impact, so he couldn't successfully meet this criterion.

Attorney Bolt noted that the Legislature had changed the rules again concerning the hardship criterion. He said there was a new standard, which said the test was only met if it was shown that there were special conditions of the land on the property that distinguished it from other properties in the area. He said in this instance there was no distinction, stating there were many locations in the area with significant wetlands, swamps, and small knobs of developable land near the road front. He said there was nothing that distinguished this property from others in the area, so there could not be unnecessary hardship.

He said even if this criterion was met, it had to be proved that 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. He said the purpose, stated in the Ordinance, was for low density, as well as fewer road cuts for porkchop lots. He said that made sense when applied to this property because of the amount of wetlands, the existence of Plum Swamp, and the traffic speeds on Durham Point Road. He said there was a fair and substantial relationship in this instance.

Attorney Bolt said that concerning whether the proposed use was reasonable, trying to carve 3 lots out of the property in no way could be viewed as reasonable. He said one new lot might be viewed as reasonable. He spoke in detail on this, and said in no way could the applicant meet the test for unnecessary hardship, based on the new provisions of the legislation regarding hardship. He said the applicant didn't meet any of the five variance criteria, but definitely didn't meet unnecessary hardship.

He said it was important that the ZBA not grant septic approval for Lots 2 and 3, stating that it wasn't really known whether NHDES would approve them simply because the lots were larger than the 4 acre minimum in the State's subdivision regulations. He said this was a matter that was of interest to his clients, especially because the systems would be

run with an air compressor. He said this was a noise issue, and also a health, safety and welfare issue, because the power went out for significant periods of time along Durham Point Road.

Chair Davis noted the reference Attorney Bolt had made to the scenic portions of Durham Point Road and the stone walls there. She asked him if he was saying that certain portions of Durham Point Road therefore couldn't be developed.

Attorney Bolt said he had been hired that morning, and didn't know if the Zoning Ordinance had provisions concerning scenic roads, which would address the removal of trees and/or stone walls on such roads.

Chair Davis said what was proposed wasn't that close to Great Bay, and asked Attorney Bolt for clarification concerning what he had said regarding development in the vicinity of the Bay.

Attorney Bolt said when he had said not all property should be developed, he meant that one should be careful how heavily an area like this was developed. He said if he were representing the ZBA, he would want Mr. Fogg to testify as to what this land could actually hold. He said he would wager that it was one more lot, and not two, based on the limited amount of developable soils. He noted that the Durham ZBA had shot him down in the past for asking for much less than what was being asked for this evening.

Mr. Welsh said that in terms of the public interest, there was perhaps the argument that the scenic view for the public was preserved by putting the development in the location that was proposed. He said he realized that the view of the abutters across the street was impacted.

Attorney Bolt spoke further about how one more lot could be created.

Mr. Welsh said with what the applicant proposed, the area would appear rural and low density, at least to people driving by, because the 20 acres of land would still be viewable.

Attorney Bolt said the applicant's development design didn't protect the 20 acres, because he couldn't do anything with it. He said the Zoning Ordinance provisions protected it.

Mr. Welsh said in terms of special conditions of the property, he thought it looked really special. He said it was a large property that had a tremendous amount of land that wasn't developable, and had a special area of highlands that was developable, but barely. He said the ZBA had called properties special that were a lot less special than this one.

Attorney Bolt noted how many dips in the road the Board had gone by on Durham Point Road, where there was significant wetlands, streams, etc. He said there were so many in the immediate area, on both sides of the road and in either direction, that this area wasn't

special when one looked at the area as a whole. He said that was the criterion.

Michael Hoffman, 300 Durham Point Road said the ZBA needed to uphold the Zoning Ordinance. He said the sideyard setback was 50 ft, and said if what had been asked for was about 10% less, perhaps the spirit and intent would still have been met. But he said sideyard setbacks of 15 ft were being asked for. He said this was incongruous to the RC zone, which was the most restrictive zone in Town.

Mr. Hoffman read the purpose and intent of the RC zone. He then said houses 30 ft away from each other needed fire resistive siding, because at that distance apart in a rural area, there would be two house fires rather than one. He also said if they were that close to the road, there would be 3-4 houses in rapid succession, when the average distance between homes in that area was hundreds of feet, not 10s of feet. He said it would almost be spot zoning if this were permitted.

He noted that the existing lot line would cut into the existing well circumference. He said it shouldn't do this, especially when there was a hand dug well. He said that was a serious concern.

Mr. Hoffman said highly manicured landscaping wasn't appropriate for this zone, and said the woods were the rural view. He also said if this land was developed, the trees would be killed.

He also said it appeared that the septic field for the existing house was on the lot line.

Mr. Hoffman said what was proposed was an attempt to get around the Zoning Ordinance by asking for a porkchop subdivision as well as a stack of substantial variances.

Dick Gsottschneider, 280 Durham Point Road, said he was an abutter who owned 35 acres of land, and had lived at that location for about 35 years. He said he was opposed to the project, and said if it was approved, real estate values in this neighborhood would be hurt. He said he had founded and run for 30 years the largest real estate consulting and appraisal firm on the east coast. He said he was qualified as an expert in real estate values and had testified in courts throughout New England.

He said he loved Durham and Durham Point, and had moved out there for the distance between homes, the rural nature and the special character there. He said this project as configured with the houses so close together and near the road would detract from the ability to sell them at a decent value. He said he believed the highest and best use of the lot was the house and one lot.

Mr. Gsottschneider questioned the numbers Mr. Andersen had quoted for the price of the houses that would be built. He said this was a neighborhood of \$300,000-to 500,000 houses. He said one house, properly sited and looking out over the field would be very marketable, and would fit into the neighborhood and character of the area. He asked the Board to deny the application, simply based on the issue of diminution of property values

of the neighborhood.

Mr. Welsh asked Mr. Gsottschneider what he thought Mr. Andersen could sell the two houses for.

Mr. Gsottschneider said he would be lucky to get \$300,000 for each house, and said he could get about \$500,000 for one nicely designed house. He noted that he had introduced someone to Mr. Andersen who was interested in one house but heard that two were proposed that would be close to each other, and then was no longer interested.

Mr. Welsh asked if the likely area for the one house would be in the central area between the two properties.

Mr. Gsottschneider said that seemed to be the likely place for it. He said he wasn't against one additional house, but said he was quite convinced that two houses would hurt the Brickner-Wood property and the entire neighborhood.

Stacy Brooks, 255 Durham Point Road, said she lived across the street from the property. She noted that Mr. Andersen had marked out a possible septic location on the right side of the driveway. She asked whether, if these two new lots were approved, the plan would be to move the septic system from the left side to the right side of the driveway. She noted that on that right side, there was a culvert. She said soon after she moved into her house in February, there was flooding and she had over 12 inches of water in her basement. She said she was concerned that there would be a septic system right by the culvert, and that the water would drain right down to her well. She noted that the well was located at the lowest point on her property.

Ms. Brooks said she was also concerned about the wells that would be drilled on the property, and how this would impact the existing wells nearby.

She noted that there had been a lot of damage to the road over the culvert. There was discussion on the location of the culvert.

Ms. Brooks said another concern was the proposed driveway. She noted a fatality on the road this year, as well as another recent accident. She said the present Smith driveway was already a dangerous driveway, and said she had seen two near misses coming out of it because people came around the corner and were traveling very fast.

Ms. Brooks provided numbers on the relatively small number of houses on Durham Point Road, from the Brickner-Woods' house to Route 108 that had three car garages. She also said there were two properties that had shared driveways.

Chair Davis asked speakers to be brief, especially concerning points that had already been made.

Townsend Zwart, 5 Edgerly Garrison Road, said he was opposed to the variance

application for at least three of the reasons already stated. He noted accidents he had helped clean up out there, and said adding more driveways would be tricky. He said another concern was the watershed. He said his property included the drainage from this proposed development, and he provided details on this.

He noted that when the subdivision was done on the other side of the Smith property, a lot of perc tests had to be done before they passed. He said he would therefore be very cautious granting variances for septic systems. He also said this kind of subdivision would lower property values for most of the people in the neighborhood.

Mindy McMahon, 248 Durham Point Road, said she was an abutter. She said she had one of the two shared driveways on Durham Point Road. She said it worked fine, and was necessary given the dangerous curve of the road in that area. She said she was worried about traffic, and about health concerns for her neighbors because of the new septic system proposed. She said she and her husband were both against the variance application.

Mr. Starkey said an email was forwarded to the Board from Jay Gooze, which noted the problems with curves and sight lines on Durham Point Road, and the use of shared driveways by some to minimize the hazards. He asked the ZBA to consider the public interest carefully in deliberating on the variance request.

Chair Davis asked Mr. Andersen if he would like to provide a rebuttal.

Mr. Andersen said he had heard a number of concerns, especially the dangerous location of the driveway, and said he thought this spoke in favor of the second curb cut. He also noted that whether there was one additional house or two, there would still be an additional curb cut. He also said with two houses, there wouldn't be a significant increase in traffic.

He said there would be an intense level of treatment in the septic systems he was proposing. He noted that the State felt a 10 ft setback was sufficient for a conventional system, and said he was sure there was plenty of research to support this. He said the system he was proposing which would treat the water 95% cleaner and would result in runoff grade water, so the health concerns went out the door.

Mr. Andersen said the idea that two expensive houses would lower property values of nearby properties was absurd, and he spoke further on this. He noted that this was not waterfront property, and said the highest and best use for it was not a \$1.3 million house, and was two \$650,000 houses.

He also said it wasn't true that the soils circled in red were no good, as has been said. He said they were fine under the pork chop subdivision regulations, but not under the conservation subdivision regulations. He said if he simply had to meet the State subdivision regulations, he could probably get 50 houses there. But he said Durham's ordinances were mostly good, and protected what they all wanted to protect.

Mr. Andersen said the Board should be looking at the merit of the variance requests, not the number that had been requested.

Mr. Savage asked if a septic system could be put on the soils circled in red, and Mr. Andersen provided details on this.

Mr. Welsh asked about the issue of the compressor noise.

Mr. Andersen said soundproofing would be used, and said if he needed to build a compressor room, he would do so.

Chair Davis noted the point brought up by Attorney Bolt that he would be surprised if there could be one unit if there was a conservation subdivision.

Mr. Andersen noted his letter to the Planning Board concerning this issue. He said the Board was discussing changing the regulations to make them more user-friendly. He noted that few people had applied to do conservation subdivisions.

He said this was a unique parcel, the way the land was, and because of the desire to preserve it. He said three house lots on 28 acres was low density, and said what he was proposing would cluster the houses, as the Zoning Ordinance requested. He noted other houses in the area that were relatively close.

Attorney Bolt said a concern he had was the representation that all of this land was developable. He noted that the Zoning Ordinance authorized the ZBA to hire an independent soil scientist to verify the soils information. He said this wasn't 3 houses on 28 acres being proposed, but rather was 3 houses on 3 developable acres that was proposed. He also said that case law instructed that reasonable return on investment was the standard, and maximum return on investment was not.

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

Mr. Gottsacker spoke about Cedar Point Road, and the fact that there were a lot of setback issues there and that some residents there had come to the ZBA for variances because their septic systems had failed. He said these variances had made sense. He said the property in question with this application was undevelopable due to the way the land was, and said using the Zoning Ordinance to give variances in order to make it more developable was just the opposite of the situation on Cedar Point Road. He said he didn't think it was the way to use the variance process.

Mr. Welsh asked if part of the concern was that it was a porkchop subdivision, but wasn't really what a porkchop subdivision was supposed to be.

Mr. Gottsacker said regardless of what kind of subdivision it was, the land was what it

was. He said trying to make a property as developable as possible was a misuse of the variance process. He elaborated on this.

Concerning the issue of whether granting the variances would decrease the value of surrounding properties, Mr. Gottsacker he said he was ambivalent about this. But he said there were several things, such as traffic issues, health and safety issues, scenic issues, which spoke to the fact that granting the variance would be against the public interest.

He said he thought the hardship was self created, in that the applicant wanted 3 lots rather than 2, had land that was undevelopable and was therefore saying there was hardship. He said the land was what it was.

Mr. Gottsacker said he didn't agree that substantial justice would be done in granting the variance. He also said in many ways, granting the variance would be contrary to the spirit and intent of the Ordinance.

Chair Davis noted that there were three separate variances being requested. She said she was uncomfortable addressing them together, and asked if other Board members thought the variances should be addressed separately.

Mr. Gottsacker said as had been the case on several occasions, there was a system of variances and if one wasn't granted, the others fell apart.

Mr. Savage said he thought it would be fine if the variances were lumped together, and Mr. Starkey agreed.

Chair Davis said a critical variance request that tied them all together was the sideyard setback variance request. She recommended that it be discussed first. She said she thought the septic setback issue wasn't a real issue, regarding possible impacts on water quality. She said the system proposed was protective of the water quality of surrounding wells and Great Bay. She also said even if only one additional lot was created, another driveway would be created, so that issue wouldn't go away.

Chair Davis said the big issue that evening was whether to allow two houses to be clustered closely together, thus allowing the porkchop subdivision. She said requesting a reduction from 50 ft down to 15 ft for the side setback was the crux of what the Board was debating.

She noted that there was testimony from Mr. Gsottschneider that clustering the two homes would cause a reduction in the property values in that area. She asked Board members about the issue of property values.

Mr. Welsh said the Board usually passed on this variance criterion. But he said this was the first time there had been a strong opinion expressed by someone who had done a lot of this sort of thing. He also noted that other neighbors had complained about this, and suggested that the Board come back to this variance criterion.

Chair Davis asked if Board members thought that clustering the houses would be contrary to the public interest. She said the immediate public was not interested in having such closely clustered homes.

Mr. Starkey said given so much public sentiment against the application, the Board was hearing that the larger part of the public would not be in a favor of granting the variance.

Mr. Welsh said this was a tricky issue, noting that clustering was desirable in a conservation subdivision. He said what had happened here was that the applicant had overstepped what was reasonable.

Chair Davis noted the illustration in the Ordinance of what a porkchop subdivision typically looked like, where the house was further back.

Mr. Welsh said 26 acres would be preserved with what was proposed, but said the applicant had overstepped the bounds. He said if he had asked for less in terms of the amount of side setback reduction, he would be more comfortable with it. He said he had perhaps crossed the line in terms of the public interest.

Mr. Savage said he agreed that the bounds were overstepped quite a bit in terms of the public interest.

There was next discussion on the hardship criterion in regard to the side setback variance being requested.

Mr. Gottsacker read from the ZBA Handbook, which said that when hardship was being shared equally by property owners, there were no grounds for a variance. He said the land on the applicant's property was typical Durham Point land.

Chair Davis asked if it was pretty typical in that area to have large areas of marshy land and ledgy, rocky soils.

Mr. Starkey agreed that the hardship was self imposed. He said the lot had been there for a long time, and someone wanted to develop it and make the best use of it. He said he didn't know that what was proposed was the best use. He said with all the variance requests, it was hard to see that the hardship wasn't self imposed. He said this was the lay of the land. He said there were similar properties out there that weren't developable and said he didn't see how this was an unnecessary hardship.

Chair Davis asked if Board members agreed that there was nothing special or significantly different about this land as compared to others in the area.

Mr. Welsh said he had trouble with this. He said there were houses in the area that were closer than what the current regulations required. He said this hardship was imposed after a lot of the houses in the area had been built. He also said this property did seem a little

special in that there was a large field, highlands, and only one section that was conceivably buildable.

Chair Davis said all the properties out there didn't look just like that. She also said this property seemed to have a larger percentage of marsh and open area than some other properties.

Mr. Gottsacker read the wording in the ZBA Handbook "the restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone". He said that was definitely the case, although other properties were not exactly configured like this one. He said they had ledge, marsh, etc, so there was no hardship.

There was discussion that concerning whether the proposed use was a reasonable one, the issue was whether it was reasonable to squeeze two houses so closely together.

Mr. Starkey said it was almost overstepping the bounds. He said a reasonable use of the property would be to have a total two lots there, and all the other land would be conserved because of the type of land it was. He said with just one more house, the houses wouldn't be right on top of each other. He said splitting it three ways wasn't a reasonable use.

Chair Davis said there was the question of whether it was a reasonable use based on the total acreage of the property, and also whether it was reasonable based on the amount of buildable area on the property.

Mr. Starkey said they were simply being asked to look at the area of the lot that could be developed, and said putting three lots on that was not a reasonable use.

Mr. Welsh said he was looking at how to say it was contrary to the public interest, but was reasonable.

Mr. Savage said he agreed with Mr. Starkey that it was not a reasonable use to split the lot three ways.

Chair Davis said she wasn't sure it was reasonable. She said it was a huge lot, but said the buildable portion along the road was small. She said she was uncomfortable with how close the houses would be if the sideyard setback variance was granted.

There was further discussion on whether there was anything special about this parcel.

Concerning the issue of whether granting the variance would provide substantial justice, Mr. Gottsacker read from the ZBA Handbook that this criterion meant that any loss to the individual (applicant) that was not outweighed by a gain to the general public was an injustice. He said it was a balancing act.

Chair Davis said the applicant would get two homes with 15 ft setbacks. She said if the

variance application was denied, the gain to the community would be to preserve more open space, rural character and more space between homes.

Mr. Welsh said the gain would also potentially be the health of neighbors and Great Bay.

Chair Davis said the Board had heard a lot from members of the public about the intent of the 50 ft side setback in this area, to preserve the rural character of the area, minimize the appearance of crowding, and allow the quiet enjoyment of their properties.

Mr. Starkey said the issue was generally the health, safety and general welfare of the community. He said concerns about each of these had been brought up.

Mr. Gottsacker said the spirit and intent of the Ordinance was that if the property couldn't meet the setbacks, it was undevelopable.

Mr. Welsh agreed, and said the intent was basically to limit crowded development.

Mr. Starkey agreed, and noted that although they had heard that the State setback was smaller, it didn't matter, because Durham created its rules for the community. He said the State provided a guideline.

Mr. Welsh said the spirit and intent of a porkchop subdivision wasn't this, which was why there were setback problems.

It was agreed that the Board would vote on the sideyard setback variance request.

Sean Starkey MOVED to deny the APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to reduce the side yard setbacks for a potential porkchop subdivision. 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 SECONDED the motion, and it PASSED unanimously 5-0. There was next discussion on the variance requested to allow a reduction in the frontyard setback.

Mr. Starkey said it was hard to tell whether the innovative septic systems would impact property values one way or the other.

Mr. Gottsacker said there was a fair amount of evidence in Town that this had no effect on property values.

Regarding the public interest criterion, Chair Davis said she didn't think granting this variance wouldn't be contrary to the public interest. She said because what was proposed was such a high end system, it would be adequately protective of water quality, and would not be a visual issue.

Mr. Savage said he didn't think there would be noise concerns either.

Mr. Gottsacker said there was evidence that the water coming out of such a septic system was far superior to a conventional system, so this supported the spirit and intent of the Ordinance.

Chair Davis said she was basically ok with this variance. She suggested that there were special conditions of the property that would to allow the placement of the septic system that close to the front.

Mr. Gottsacker said the special conditions of the property were self imposed, and therefore wasn't a hardship.

Mr. Savage said he agreed with Mr. Gottsacker.

Mr. Welsh said he thought there were special conditions that necessitated putting the system somewhere where it would have to violate the frontyard setbacks.

There was discussion that the septic system could either go in front of the house, or behind it.

Mr. Gottsacker said a 10 ft setback when a 30 ft setback was required was a significant difference.

Chair Davis said she thought there was hardship regarding the placement of the septic system, and that based on the soil testing that had been done, it was necessary to put it that close to the road.

There was discussion that the applicant was asking for this for a potential porkchop subdivision, and not for the lot in general.

Mr. Welsh said because he was the only Board member who thought there were special conditions that caused hardship, the hardship criterion was not met, and they therefore didn't need to discuss whether what was proposed was a reasonable use or not.

Chair Davis said she didn't think substantial justice would be done in granting the variance, and Mr. Starkey agreed.

Mr. Welsh said he disagreed, given that this system was a better than a conventional system.

Chair Davis said she agreed with Mr. Welsh. She said she was having a problem with the septic system aspect because it was tied in with the porkchop subdivision, yet independently it was an excellent system.

There was discussion that the variance was for the possibility of three systems for a porkchop subdivision, and that the system itself wasn't the issue.

Chair Davis said she didn't think granting the variance would be contrary to the spirit and intent of the Ordinance, and Mr. Welsh agreed.

The other Board members said they disagreed, because this was a porkchop subdivision.

Sean Starkey MOVED to deny the APPLICATION FOR VARIANCES from Article XII, Section 175-54 of the Zoning Ordinance to reduce the front yard setbacks for a potential porkchop subdivision. 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 SECONDED the motion, and it PASSED 3-2, with Chair Woodburn and Mr. Welsh voting against it.

Mr. Welsh explained that he thought the porkchop subdivision didn't work because of the sideyard setback issue, and not because of the frontyard setback issue.

Chair Davis noted the third variance being requested, concerning putting in two driveways for a porkchop subdivision when only one driveway was permitted.

Mr. Starkey said he didn't see how adding an additional driveway would decrease the value of surrounding properties, when there were many driveways already.

Mr. Welsh said he didn't think granting this variance would have a big impact on the value of surrounding properties.

Chair Davis summarized that the Board didn't have evidence that adding the driveway would change property values.

Mr. Gottsacker said there was testimony in general that the variances requested would decrease property values, but said there was no independent third party that had provided this information to the Board. He said there wasn't a lot of proof one way or the other.

Mr. Welsh noted that the location of the proposed second driveway was in an open, straight stretch of the road.

Concerning the public interest criterion, Mr. Starkey said he could see the public's concern, because there was already a driveway on the corner that was dangerous. But he said where the new driveway was proposed, there was plenty of view in either direction, so this wasn't going to cause severe problems.

Mr. Welsh said what was proposed was better. He said if this project was forced to have one driveway, that would be more dangerous than having two driveways.

There was discussion on the hardship criterion in regard to this variance request. Mr. Starkey said because of the special condition of the property, it didn't make sense to keep one driveway there, and to have owners have to drive around the back of the properties to

access them He also said having one driveway in the middle that split off to the three lots didn't make sense. He said it did result in an unnecessary hardship, in that it was hard to have three lots and one driveway to them.

There was further discussion about the porkchop subdivision aspect of this. Mr. Welsh said the proposed driveway was ok, and said he would close the existing driveway and use the proposed one as the driveway for the three lots, if this was a true porkchop subdivision.

There was discussion that the additional driveway in this location wouldn't cause additional safety concerns for neighbors or people driving up and down Durham Point Road. Board members agreed that the additional driveway would be a reasonable use.

Chair Davis said substantial justice would be done in granting this variance.

There was discussion that concerning the spirit and intent of the Ordinance, the intent of not having two driveways for a porkchop subdivision was safety.

Mr. Gottsacker said the system of variances was needed to create the porkchop subdivision. He said if one of the variance requests was granted, that would travel with the land. He asked what the repercussion of this would be.

Mr. Starkey said they were speaking about this and the other variance requests within the frame of reference of a porkchop subdivision.

Mr. Gottsacker said he would like to see a condition attached to the variance that was very explicit that if there wasn't a porkchop subdivision, there would be no variance. Other Board members agreed.

Mr. Starkey said the intent of the Ordinance was that with a porkchop subdivision, there shouldn't be three different driveways, with one longer and two shorter driveways. He said the property was being split that way, but the proposed placement of houses was different than would be the case with a typical porkchop subdivision. He said he didn't think granting the variance would be against the spirit and intent of the Ordinance because the applicant was still trying to minimize traffic to a much more dangerous cut that already existed.

Other Board members agreed.

Sean Starkey MOVED to approve an APPLICATION FOR VARIANCES from Article XII, Section 175-57 to allow for a second driveway cut only for a porkchop subdivision where the first driveway cut will remain as shown on the survey and record dated June 2010. 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.

Mr. Welsh said he wanted to see a condition regarding the scenic stone wall.

Mr. Starkey reworded the motion.

Sean Starkey MOVED to approve an APPLICATION FOR VARIANCES from Article XII, Section 175-57 to allow for a second driveway cut only for a porkchop subdivision where the first driveway cut will remain as shown on the survey and record dated June 2010, provided that the current stone wall section will be replaced to the current opening that will be replaced with the new driveway cut. 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. Matt Savage SECONDED the motion, and it PASSED 4-1, with Jerry Gottsacker voting against it.

Mr. Gottsacker said he had voted against the motion because he thought it was all tied up with the porkchop subdivision.

Break from 9:34 - 9:42 pm

- 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.

Board member Robbi Woodburn served as Chair again.

Mr. Andersen said he submitted data at the last meeting about how the septic system used a quarter of the area of a typical system. He said he was therefore asking for a reduction from 4000 sf to 1000 sf, and was also asking for a reduction in the depth to ledge from 4 ft to 3 ft. He noted that he had already testified as to how clean the water would be, and also said this kind of system had come before the ZBA in the past. He also said all of the State guidelines would have to be met.

He said Mr. Gottsacker had said there was no proof one way or the other that such a septic would impact property values. He explained that the site had a variable depth to ledge, and also said public health would be preserved by using such a good system. He said there would be less nitrates going into the groundwater. He said this Special Exception application was based on the efficacy of these systems, which had been proved.

Chair Woodburn said many of these systems had come before the Board, but said she wasn't aware of a request for special exceptions due to the depth of ledge and its effect on the innovative system. She said she wouldn't feel comfortable voting on this without having the septic designer describe the system and why the depth to ledge requirements should be waived.

She discussed this with Mr. Andersen, and said it was necessary and customary to have

applicants' consultants present for something like this. She asked other Board members if they agreed.

Mr. Mulligan said in a perfect world, they would have evidence that the site couldn't meet the standards, but said the application didn't establish that.

Chair Woodburn said the test pits relayed this information, so they knew the applicant had a problem. She said she would like to question the septic designer on the effects of higher ledge, and/or less fines on the septic system.

Mr. Welsh said this request was consistent with what the ZBA had requested in the past.

Mr. Mulligan said if the Board was satisfied that the applicant could not meet the standards, the next hurdle was whether there was enough evidence to support a special exception. He agreed that there wasn't enough information provided on this, and said he supported Chair Woodburn's request.

Mr. Andersen explained that his best location for a 4000 sf leach field was out because it was too close to the setback. He spoke about another possible location for it, but said it wouldn't work because of the contours and the driveway.

Chair Woodburn said that given the results of the previous application, the applicant would be reassessing the layout. She asked if perhaps the application should therefore be continued.

Mr. Andersen said he would have to go back and do some figuring. But he said he had done enough test pits. He confirmed that the Board would like to hear professional testimony from the septic designer.

Chair Woodburn said if the layout was reworked, the applicant would know which test pit data would be used, so more specifics would be available on the leach field and there could be a review of it.

It was agreed that the application would be continued to the August 10, 2010 meeting, and if necessary, it could be withdrawn at that meeting if the applicant had put in a new application.

Chris Mulligan MOVED to continue the Andersen Special Exception application to the August 10, 2010 ZBA meeting. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

III. Approval of Minutes

April 13, 2010

Page 3, 1st full paragraph, should read "...that those were the two main objections."
Page 5, 3rd paragraph from bottom, should read "There was further discussion."

Sean Starkey MOVED to approve the April 13, 2010 Minutes as amended. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.

May 11, 2010

Need page numbers and headings

Page 1, should read "Matthew Savage"; also, should say that Tom Johnson, Director of Zoning, Building Codes & Health was present

Page 3, 6th paragraph from bottom, should read "...behind that rental house, and..."

5th paragraph from bottom, should read "...and public interest criteria had been addressed."

Page 4, 6th paragraph from bottom, should read "Mr. Mulligan asked if a condition needed to be added..."

Page 5, 2nd full paragraph, should read "Chair Woodburn asked if the new leach field would go in the same place..."

Sean Starkey MOVED to approve the May 11, 2010 Minutes as amended. Chris Mulligan SECONDED the motion, and it PASSED unanimously 5-0.

IV. Other Business

A.

B. Next Regular Meeting of the Board: ****August 10, 2010**

There was discussion on the listing of Board members' phone numbers and emails on the Town website, and what Board members were able to discuss with members of the public who called them.

Mr. Johnson said once he had dates for the Kimball/Xemed case and the Mackin case, he'd contact the Board. He said he generally liked to have one Board member attend the hearing, and said it was generally the Chair that did this. There was discussion.

V. Adjournment

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

Adjournment at 10:18 pm
Victoria Parmele, Minutes taker

Sean Starkey, Secretary