

*These minutes were approved at the October 12, 2010 meeting.*

**Durham Zoning Board of Adjustment  
Tuesday August 10, 2010  
Durham Town Hall - Council Chambers  
7:00P.M.  
MINUTES**

**MEMBERS PRESENT:** Chair Robbi Woodburn; Vice Chair Ruth Davis; Secretary Sean Starkey; Chris Mulligan; Jerry Gottsacker; Edmund Harvey

**MEMBERS ABSENT:** Carden Welsh; Matthew Savage

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

Chair Woodburn called the meeting to order at 7:04 pm.

**I. Approval of Agenda**

Chair Woodburn said there had been a request to amend the Agenda so that both the Bilotta application and Pine Ledge Holdings application and could be moved up, since most of the people in the audience were there for those two applications.

After discussion, it was agreed that the Andersen application should remain as II. A since it was a continued public hearing, and that that the Bilotta and Pine Ledge Holding applications would be heard directly after it.

Chair Woodburn said Mr. Harvey would be a voting member for the approval of the Agenda.

*Sean Starkey **MOVED** to accept the Agenda as amended. Ruth Davis **SECONDED** the motion, and it **PASSED** unanimously 5-0.*

**II. Public Hearings**

- A. CONTINUED 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.

Chair Woodburn said Mr. Gottsacker would be a voting member for this application.

Mr. Andersen spoke before the Board, and explained that he had reduced the proposed subdivision from a three lot to a two lot concept. He said there would now be a lot of distance between the homes. He also said there would be a potential future lot line adjustment with an abutting piece of land.

He showed on the subdivision plan where the existing house and barn were, as well as the location

of the existing septic system. He explained that Mr. Johnson had suggested that the septic systems for both lots should be designed in time for this meeting, in order to eliminate any concerns.

He noted that he had previously said that the leach field area had been reduced from 4000 sf to 1000 sf, but said the septic system he planned to install only needed 200 ft. He also said a reserve area was no longer needed, since the septic systems had actually been designed.

Mr. Andersen described the Clean Systems septic systems proposed for both lots, and said everything would be located within the setbacks. He noted that the compressors for the systems would be located either in a new outbuilding or in the existing structure, which would be determined later.

He said the reason the special exception was needed was because of the request to reduce the depth to ledge to 2 ft. He said the effluent would be 90% cleaner than would be the case with a conventional system, and noted the handout he had provided on the systems. He said he wasn't able to get someone from Clean Solutions to attend, but said they had helped Mr. Fogg, who was the surveyor and septic designer, design the system.

Mr. Andersen said he had gone through the record of the ZBA from 2007-2009, and had found that every time an application involving a Clean Solutions septic system came before the Board, it was approved.

Chair Woodburn noted that there were criteria that had to be met for a special exception application.

Mr. Andersen said the special exception was necessary because of the variable depth to ledge. He said a reasonable system could not be designed within the parameters dictated by the landscape. He noted that both lots were greater than 5 acres now, and said no State subdivision was required.

Chair Woodburn read the special exception criteria out loud.

Mr. Andersen said there would be no visual impact on the neighborhood from the septic system. He also said again that the system was quite clean, so was a step above a conventional system, and would be better for the public health.

Adam Fogg of Atlantic Survey said he had done the septic design. He said State approval had not been received yet, and would take a few weeks. He said he had been told to provide an approvable system for the ZBA meeting.

Chair Woodburn asked what the State requirements were for the site in question, and how they were different from Durham's requirements.

Mr. Fogg said the system met the State requirements. He said the difference was that Durham required a 4 ft depth to ledge, and there was only 32 inches. He said 32 inches would meet the State requirements.

Chair Woodburn noted that the local regulations allowed a special exception in the case of advanced technologies.

Mr. Gottsacker said with a septic system like this, the sludge formed in the tanks in the system and not in the leachfield, and would need to be pumped out. He asked how often this needed to occur, as compared to the pump out of a conventional septic system.

Mr. Fogg said the requirement was that it be inspected and pumped out every two years, and said this was stated in the Town ordinance as well.

Chair Woodburn noted that there had been discussion at the last meeting about the need for the compressor and how much noise it would make.

Mr. Fogg said he didn't think there would be any noise, and Mr. Andersen said while a traditional compressor was 15 amps, the compressor for the septic system would be 1 amp. He also said the noise would be contained.

Mr. Starkey said it looked like the compressor would go in the basement. He noted that there was concern before that it would be outside.

Ms. Davis asked if there was a problem with frost depth, and Mr. Fogg said no. He said these systems generally warmed themselves, as was the case with a standard leach field.

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

Attorney Christopher Bolt said he represented the immediate abutters, the Brickner Woods. He noted that they had been in opposition to the three lot subdivision, but said the bulk of their concerns had been addressed with the amended plan provided on August 6<sup>th</sup>.

He said if the ZBA felt the special exception criteria, which were somewhat vague, had been met, the Brickner Woods asked that there be reasonable conditions for any approval that tied the approval to this plan, which meant that there would be no return to the three lot subdivision, and no further subdivision.

He said they also asked that the Board consider that the septic systems be maintained according to State regulations, which included a maintenance contract to be worked out with Town personnel. He said in this way, there would be appropriate inspections and repairs if needed.

In addition, Attorney Bolt said the Brickner Woods asked that these septic systems be limited to single family residences, and not use for multifamily or duplex operations.

Mr. Starkey asked Mr. Andersen what the septic system for the new house layout was rated for in terms of the number of bedrooms.

Mr. Andersen said each of the septic systems was rated for a 4 bedroom house as well as a 2 bedroom apartment that would allow for a mother in law apartment.

Regarding Attorney Bolt's requests, Mr. Andersen said he thought the special exception should stand on its own, and said he didn't think tie ins to the plans were needed. He said it wasn't known what would happen down the road. Regarding the proposed condition regarding the septic system, he said there would already be an inspection every other year as required by the Town, and said having to do one annually would be burdensome.

Concerning the idea of limiting the residences and septic systems to single family residence only, he said someone in the future might want to do an adaptive reuse of the barn. He said he didn't think this should be constrained, unless the abutters wanted to pay for the privilege of constraining it. He said he didn't think this request was reasonable

Attorney Bolt said the applicant was asking for permission to do that which he was not allowed to do because of the soil conditions. He said the ZBA had the authority it needed to put these reasonable constraints on. He said the definition of a mother in law apartment in the Town regulations meant there was not a separation of living areas, so it couldn't be rented to other parties. He said if this was what the applicant intended, it was a single family residence which wasn't a problem. But he said it sounded like he intended it to be a duplex, which was wrong. He said his clients were trying to support the application if the conditions he had listed were put in place.

Mr. Andersen said he had no intention of doing anything at the present time, but said if he came back with something, it would stand on its own merits. He said in the RC district, two dwelling units were allowed on a single piece of property. He also said the mother in law apartment didn't need to be in the house and could be in an accessory structure, such as the barn.

**Jay Gooze, 9 Meadow Road,** said it was proper and legal to put conditions on a special exception.

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

Mr. Gottsacker said the Board had seen this kind of septic system at least 10 times, and said there had been no subsequent complaints from neighborhoods like Cedar Point Road, where the neighbors were much closer together, and the setbacks were a much greater problem. He said he didn't see a problem concerning doing conditions 1 and 3, but said condition 2, which increased the maintenance requirements, seemed unnecessary

Chair Woodburn suggested that they review the conditions that the Board would impose. She noted that there should be a condition that there would be State approval of the septic systems, and another condition that the approval would be tied to the August 6<sup>th</sup> plan. She said the other two conditions suggested by Attorney Bolt were that there be a maintenance contract with the Town specifying annual inspections, and that the use be limited to single family residence.

Mr. Gottsacker said the condition he didn't agree with was the maintenance contract and annual inspection.

Asked by Board members how the inspection process worked, Mr. Johnson said he administered the program, but said the Ordinance said the property owner had to have a certified septic evaluator evaluate the system every two years.

Ms. Davis said she recalled an application where the owner of a big single family home on Durham Point Road had asked for a variance so the home could be made into a duplex, and the ZBA then granted this request. She asked if Attorney Bolt's proposed condition would preclude the applicant from coming back to ask for a variance like this, and was told that it would.

Chair Woodburn said the code allowed accessory dwelling units and accessory apartments, which had their own set of criteria. She said she thought Attorney Bolt was asking that the Board limit allowing a duplex. Other Board members agreed.

There was discussion that the owner or a future owner might ask for a variance to allow a duplex at some point in the future.

Mr. Johnson said the application Ms. Davis had referred to that the ZBA had approved was for a larger accessory apartment, not a duplex.

Board members discussed the proposed condition concerning the maintenance requirement, and decided it was not necessary. Mr. Gottsacker said this property owner shouldn't have a different maintenance requirement than any other property owner.

Ms. Davis asked whether, if condition #1 regarding no further subdivision was put in place, the property owner could come back later for a variance to subdivide.

Mr. Starkey said the property could be further subdivided, but said it would be a matter of whether the owner could actually build on the lots. He said multiple variances would be needed in order to do so, and noted what had happened recently with the three lot subdivision the applicant had proposed.

Chair Woodburn said the abutters' requested condition was saying that everyone had already seen this, so the issue of further subdivision should be put to bed.

Mr. Gottsacker said the ZBA had already spoken on this issue by denying the requested variances at the previous meeting.

There was discussion that tying the approval to the August 6<sup>th</sup> plan was one thing, but saying there could be no further subdivision was another.

Mr. Gottsacker said there should be something in the conditions concerning Planning Board approval for the two lot subdivision, which currently was not known.

Mr. Starkey said the approval should be tied directly to the August 6<sup>th</sup> plan. He said if the applicant decided to change the plans, he would have to come back, and the special exception would be void. But he said with this condition, the Board wasn't saying there could be no further subdivision.

Chair Woodburn summarized that the Board was not saying there could be no further subdivision, but was saying the special exception was tied to the August 6<sup>th</sup> plan.

Mr. Johnson said there would be a developed lot and an undeveloped lot, and asked when the new septic system had to be installed on the developed lot.

There was detailed discussion on whether the applicant was asking for a special exception for septic systems for both lots.

Chair Woodburn reopened the Public Hearing, and Mr. Fogg said test pit 11 met the distance to ledge criterion and seasonable high water table criterion. He said the applicant was only asking for the special exception for the second lot.

Chair Woodburn asked if the existing septic system sat totally within the setbacks that would be created with the two lot subdivision.

Mr. Fogg said the only way to really know this was to dig it up, but said his sense was that it was located within the setbacks.

Chair Woodburn said two new lots were being created, and said she wanted to be sure that if a new septic system was placed in the location of the current septic system, it would be within the setbacks. She said this wasn't shown on the plan, because they didn't know exactly where the field was.

Mr. Gottsacker said that was why the Board should only deal with the new system on the new lot. He said Mr. Johnson would deal with the septic system for the other lot when it came up.

It was agreed that the Board was only dealing with the special exception request for the new septic system on the newly created lot, as per the August 6<sup>th</sup> plan.

Mr. Andersen said the leachfield for the existing system was located within the setbacks.

Chair Woodburn closed the Public Hearing.

Special Exception Criteria:

1. That the use will not be detrimental to the character or enjoyment of the neighborhood by reason of undue variation from the kind and nature of other uses in the vicinity or by reason of obvious and adverse violation of the character or appearance of the neighborhood.

Mr. Mulligan said special exception criterion #1 was met, in that this was a residential use in a resident neighborhood. He said he couldn't see how the character of the neighborhood would be impacted by the septic system.

It was noted that the system would be located underground, would not be mounded, and would be within the setbacks.

2. That the use will not be injurious, noxious and thus detrimental to the neighborhood by reason of any of the causes stated in Part B. of this chapter.

Mr. Starkey said it would be a great septic system, and was one that the Board had approved before in shoreland protection areas. He also said the noise from the compressor would be constrained because it would not be located outside.

Chair Woodburn noted that there would be State approval of the 32 inch depth to ledge.

3. That the use will not be contrary to the public health, safety or welfare by reason of undue traffic congestion or hazards, undue risk to life or property, unsanitary or unhealthful emissions or waste disposal or similar adverse causes of conditions.

Mr. Gottsacker said the system proposed was actually an improvement over most septic systems in Durham.

Mr. Starkey said it would protect the public.

4. As to all nonresidential uses subject to site review by the Planning Board or Technical Review Committee pursuant to RSA 672 through RSA 677, that written approval by the Planning Board or Technical Review Committee of the applicant's site plans must be on file with the Board of Adjustment

The Board determined that criterion #4 didn't apply.

Chair Woodburn summarized that the special exception criteria were met.

There was further discussion on the conditions that should be included in the motion.

***Jerry Gottsacker MOVED to approve the Application for Special Exception as 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, with the following conditions:***

- 1. that it is only valid based upon the plan submitted to the Zoning office on August 6, 2010, specifically for proposed Lot 16-19-1***
- 2. that the Planning Board approve the proposed subdivision***
- 3. that the State approve the septic system***
- 4. that the residence for the septic system be limited to a single family residence as***

*defined by Durham Zoning regulations*  
*Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.*

- G. PUBLIC HEARING** on a petition submitted by Barrett Bilotta and Frederick Kell, Weston, Massachusetts, on behalf of themselves and Arden & Alicia B. Hervey, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Sections 175-38(B)(D)&(F) and 175-53 of the Zoning Ordinance to permit land use for a multi-use, multi-dwelling building on a property created from two merged lots. The properties involved are shown on Tax Map 2, Lot 4-0 and Lot 5-0, are located at 14 Edgewood Road and 26 Strafford Avenue respectively, and are in the Residence A Zoning District.

Chair Woodburn said Mr. Harvey would be a voting member for this application.

Barrett Bilotta, said he owned the property at 26 Strafford Ave, and also owned land at 21 Edgewood Road and 57 Madbury Road. He provided some background on himself, and said he was seeking a use variance on the two parcels of land in question. He said he believed that through a careful and detailed explanation of his plan, the Board would properly understand the impacts of granting the variance.

He referred to the Town Council's 2010 goals to diversity the tax base, pursue sustainable, green redevelopment projects, and preserve neighborhoods from the onslaught of students living in single family housing in the neighborhoods. He said his project supported all of these initiatives.

Mr. Bilotta reviewed a sketch plan that showed his properties and surrounding properties. He said this indicated the unique setting of 26 Strafford Ave, and also how the whole Strafford area was changing, and how granting the use variance coincided with the overall evolution of the community in this particular area. He noted that many residents might be concerned with the impact a new building would have, and especially would be concerned about college students changing the dynamic of Durham neighborhoods.

But he said granting the variance would not affect the community along Edgewood Road for a variety of reasons. He said the existing house and garage would remain on the 14 Edgewood lot. He also said due to the topography of the Stafford lot, the building was positioned as far to the east as possible, which would provide a great easement between Strafford to Edgewood.

Mr. Bilotta also said the parking lot would have only one entrance and exit along Strafford Ave, and only 32 spaces outside the building. He said the spaces would be for the office space on the first floor, and said parking for residents would be located in an underground parking lot. He said there would be only one space per unit, because he would like to encourage it to be a building people could walk to, since it was so close to campus.

He said the building he envisioned would set the standard for future development in Town. He said instead of packing the most students per sf, he wanted to establish a new quality of building that added value to the community for both students and residents. He said this would be achieved by making the structure aesthetically beautiful, with large apartments and the highest grade amenities.



He also said he wanted to make it an energy efficient, sustainable, green building. In addition, he said he would be creating grade A office space on the first floor, within walking distance of UNH. He said he wanted to encourage a work-live environment for graduated and undergraduate students, including the opportunity to work on research projects on the first floor.

Mr. Bilotta said the two properties would always be rented to college students due to their location. He said he and his partners were working to minimize the effects their properties had on their neighborhoods. He said they had followed much of Mr. Johnson's advice on how to stop problems. He said that as a landlord, he didn't want to expand with single family residences, but instead wanted to reinvest in the community for long term, sustainable growth, so Durham could continue to be a great town.

Mr. Mulligan asked what the plan was for the existing structures on those lots.

Mr. Bilotta said only the structure on 26 Strafford Ave would be demolished and said the new parking lot would go in there. He said after hearing concerns from neighbors about demolishing the house on 14 Edgewood, they figure out a way to leave it and the garage on the property. He said they would also be open to possibly moving it to a new lot.

Chair Woodburn determined that the existing single family house was currently rented out to college students.

Ms. Davis asked if this house could have a property manager, and Mr. Bilotta said yes. He said they were very open to input on this.

Chair Woodburn asked if the potential number of units had been determined.

Mr. Bilotta said it was very conceptual right now, and said if the use variance was granted, those final determinations would be made. He said he was trying to capture the premium of the market, which people who wanted quieter housing, with higher amenities.

Chair Woodburn 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.

**Diane Foster, Edgewood Road**, said she objected to opinions being presented as facts in this variance application, and said she didn't see that any analysis had been performed. She said it had been stated that the properties in question would never be acquired for a personal residence, but noted that she had been prepared to acquire the property the previous year. She also said she didn't see that any analysis had been performed to show that granting the variance would not decrease the value of surrounding properties. She also questioned the comment that properties remaining as single family homes were not of substantial benefit to the community.

Ms. Foster said she didn't see anything that proved to her that traffic wouldn't be an increased problem. She also said concerning the substantial justice criterion that she wasn't aware that an

injustice had been done.

**Jay Gooze, 9 Meadow Road,** said he would go through the variance criteria concerning this application. Regarding the hardship criterion, he said there had to be a uniqueness to a property in order to qualify. He said if the Board said these properties were unique, it was saying that every property bordering a non-residential zone should be allowed to have non-residential uses. He noted that he had a two acre property that bordered a commercial zone, but still wouldn't expect to get a use variance for this kind of project. He said there were no special conditions of the applicant's properties compared to others that bordered nonresidential properties.

He said that regarding the public interest criterion, the Zoning Ordinance said a purpose of the RA district was to ensure that new development, redevelopment or expansion of existing buildings and structures was consistent with and maintained the established character of the neighborhoods there. He said every zone had some border to it, but said the essential character of this neighborhood was still residential. He also said the fact that some of the properties there were rented didn't mean that this would always be the case. He said the white house on Edgewood could still sell as residential, and also noted that there were single family owner occupied properties across the street.

Mr. Gooze said there was no evidence from the applicant that property values would not be affected if the variance was granted. He noted that an appraisal of his property some years back specifically stated that it was not located next to a multi-unit property, and that if it had been, the appraised value would have been reduced. He said he therefore did think granting the variance would affect the value of surrounding properties.

Mr. Gooze said that regarding the substantial justice criterion, in this instance the preservation of the neighborhood far outweighed the loss to the applicant. He also said that regarding the spirit and intent of the Ordinance, the zoning of certain districts as residential, severed from other uses, was essential to preserving the general welfare of the community. He said granting the variance would violate the spirit and intent of the Ordinance.

**Dick Gsottschneider** said he was present to represent George Frick, who had lived across the street from the applicant's property for over 50 years. He said it was amazing that the ZBA would even listen to this application. He said the rezoning of this area was a matter for the Planning Board. He said the applicants were asking for a significant land use change, and said if the variance was granted, this would guarantee that the redevelopment of Edgewood Road, etc. would be hastened right up to the corner of Madbury Road and right down it to the downtown.

He said if the goal was to preserve the neighborhoods and to uphold the fact that the Master Plan committee, which he had worked hard on, had determined that this area was residential and should remain so, the ZBA must deny this application. He said the ZBA should not be making a significant land use change. He said the house on the property could easily go back to being a single family home. He said just because some speculators bought it, this didn't mean the variance had to be granted

Chair Woodburn noted that the ZBA didn't get to choose what it listened to, and said every

applicant had the right to ask for a variance.

Mr. Harvey questioned going forward with this application because it was so conceptual, and other Board members said because this was a use variance, and not a dimensional variance, it was appropriate to continue with it.

**Attorney Brad Loun**, said he represented George Frick, who lived at 13 Edgewood Road. Attorney Loun said he appreciated what the applicants were trying to do, which was to maximize the use and value of their property. But he said that was not something that the ZBA should consider. He said the ZBA should not be considering, as the applicant had stated, the best and most valuable use of the properties, and instead should be considering whether the application met the variance criteria.

He said it did not, and said none of the criteria were met. He said that regarding the hardship criterion, it was ridiculous to assert that there was no reasonable use for these two parcels. He said there were two single family homes being rented out to students, and said they could be sold for a significant amount of money, so this was a reasonable use.

He also said there was a fair and substantial relationship between the general purpose of the Ordinance and the specific restriction on the property. He said it was zoned RA because it was across from his client's house and other single family homes. He said granting the variance would injure the public or private rights of others, and noted comments from neighbors that they didn't want a multi-floor building with apartments and commercial uses.

He said this would therefore injure the rights of others. He said the applicants had therefore not proved their case. He said there were no special conditions of the property that created an unnecessary hardship, and he noted that there were 10-15 uses that were permitted in the RA district.

Attorney Loun said justice would not be served in granting the variance, and said there was no hardship. He also said the applicants were going about this the wrong way, when their argument was really a rezoning argument.

**Karen Mullaney, 8 Davis Ave**, said if this application wasn't so troublesome, it would be funny. She first noted that about a week ago, the Town Council had spent hours discussing the idea of changing the zoning on a plot of land on the outside of Town to allow a student housing project. She also said that in the last year, she had attended Town Council and Rental Housing Commission meetings where there had been discussion on the student housing problems, and how neighborhoods changed when student housing was a part of it.

She said her house was built in 1941 and that she had lived in it since 1975. She said she had put a huge investment in it, as had neighbors on her street with their properties. She said her biggest worry was the properties such as those the applicant owned. She said the presence of student housing whether in single family homes or apartment complexes could do no good for the neighborhood. She said it would change them in many ways, and would also change the property values.

She said the reason why the former owners could not immediately sell their house was that they were bordered by rental properties. She asked what was to keep the next applicant from wiping out a whole piece of Edgewood. She noted Amherst, MA as an example of what happened when no one was paying attention to where student housing was put.

**Brian Geiger, 13 Davis Ave,** urged that the ZBA to deny the request for variance.

**Donna Brown, 34 Edgewood Road,** said she had lived in Durham since 1972, and had lived in the neighborhood since 1984. She said over that time, she had seen the deterioration of many neighborhoods in Town. She asked the ZBA and the Town to really focus on how to preserve the integrity of the neighborhood. She said a line had to be drawn, and said Strafford Ave was that line. She said on her side of Stafford Ave, they were still single family homes, although some were rented to students, and should be preserved.

She said potential trash, noise and traffic issues spoke to three of the variance criteria. She noted a duplex at 21-23 Edgewood Road where there presently were noise and trash problems. She said a development such as what the applicant proposed would only increase those problems as well as traffic problems.

Ms. Brown also said that regarding the issue of possible impacts on property values, she had noticed a nice property that was priced somewhat low, and had determined that it abutted two homes that were rented to students. She asked that the integrity of the residential areas be preserved. She said what the applicant had proposed in terms of the quality of the development he envisioned was fine, but said it should be done someplace else in Town.

**Robin Mower, 11 Faculty Road,** said she had spoken with a former member of the Planning Board, who had told her that 26 Strafford Ave. was deliberately kept in the RA zone. She said the area in question was a juncture of two districts, and said it was important to draw the line or else there would be a domino effect. She said many years ago, the entire length of Edgewood Road was a lovely street. She said it would continue to deteriorate unless people decided they wanted to do something about this.

She also said it was her understanding that the applicant owned 21 Edgewood Road, where there had been trash violations. She said there had been violations against some of the applicant's other properties, and said it made her wonder whether there was truly a benefit to the community in having the owner take on another student rental property.

**Hillary Scott, 20 Davis Ave,** said she supported those who had spoken against the variance request, and said her concern as well was the preservation of residential neighborhoods. She said there could be a domino effect of deteriorating residential properties down Edgewood Road and Madbury Road, and she provided details on this. She said she personally was concerned about noise issues and the overall integrity of the neighborhood. She noted that most residents currently felt safe walking down Edgewood Road, but said concern had been expressed about what this development would pose in terms of safety issues.

Ms. Scott asked if anything had been approved or denied, before this application came before the ZBA, and she noted the rules of procedure concerning this.

There was discussion about this, and about whether at the conceptual stage, this should go to the Planning Board or the ZBA.

**Armida Geiger, 13 Davis Ave**, said she had gone through the complete folders on 26 Strafford Ave. She said there had been an application for a variance in 2003, where the owner wanted to house a wrestling team. She said the variance was denied, and said she thought it was important that the Board have the information on this.

**Joe Michael, 14 Davis Ave**, said he was present to speak in support of his neighbors. He also said he had an 8 year old son, and that they road bicycles down Edgewood Road. He said this was already difficult, and said he couldn't imagine why commercial space and more residential space was needed on there. He said he was concerned about the safety of kids being able to move around Durham. He said this project would be a detriment to the neighborhood. He said he would like to maintain as much of the character of the neighborhood as possible, and said he hoped the ZBA would take this into account.

**Mike Everngam, 49 Emerson Road**, asked the Board to reject the application based on the information it had just heard.

**Mr. Gooze** noted that the applicant had said he owned other properties. He said on Saturday night, there were 3 police calls to 57 Madbury Road. He said over the past two years, the property had been in front of the Police numerous times. He provided details on this, and said one would think that after discussions with the Police and the University dean of students, there would be no more problems.

He said over the last year and a half, there had been numerous times he had called and sent pictures regarding the Strafford Ave property, because of trash and other problems. He also said in 2003, he was on the ZBA when there was a variance application regarding this property to house a wrestling team. He said it was turned down, and said the variance criteria were met even less with this application than for that previous application.

**Gregory Betts, 11 Edgewood Road**, spoke in detail about the impacts of the student housing in his neighborhood on property values. He also spoke about the noise and other problems he had been subjected to over the years because of the student housing around him. He said he was trying to lead a normal life. He said to take the position that this new development would provide a barrier for the neighborhood against these problems was absurd.

Mr. Starkey read into the public record an email from **Peter Flynn, 103 Madbury Road**, which said he was opposed to granting the variance. Mr. Flynn said doing so would set a bad precedent and would open up such use of merged properties in the future.

Mr. Bilotta provided an abuttal. He said he appreciated the comments, and said he understand very much the problems the neighborhood was facing. He noted that he didn't own the Strafford

Ave. property in 2003 and acquired it in 2007. Regarding the issue of his properties being in a unique setting, he said he was right across from the New England Center. He said because of this, the Whittemore Center and other properties in the area, what he was proposing would not impact property values any more than these other properties in the area.

He said that with the kind of structure he was talking about, he would be able to hire a property manager, which would mitigate any potential noise and trash problems. He also said with the acquisition of the 50 Madbury Road property, this would take another property off the hit list.

Mr. Bilotta said he was a long term player, and was looking to invest in and create good in the community, and to reshape a lot of its image.

Mr. Gottsacker asked Mr. Bilotta if he was a member of the Durham Landlords Association, and Mr. Bilotta said no.

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

Mr. Starkey said to him, the jury was out on whether there would be a decrease or increase in property values, in this area, if the variance was approved.

Ms. Davis said in this case, the Board might have some information on this. She noted the information Mr. Gooze had provided concerning the appraisal of his property and what he had been told about the negative impact of having a multiunit development next to it. She said they could assume that this would happen to other properties in the area.

Mr. Mulligan said he didn't doubt what Mr. Gooze had said, but said many of the properties surrounding the applicant's properties were not similar to Mr. Gooze's property, and were fairly institutional uses and parking lots that wouldn't be affected by what happened. He said some properties across the street probably would be affected, and said he thought the impact on property values was therefore a toss up.

Regarding the public interest criterion, Chair Woodburn said the public interest and spirit and intent of the Ordinance were combined here. She said the public interest was drawing that line in the sand and creating a division between the uses, and not allowing creep. She said she felt that granting the variance would be contrary to the public interest in this case with this lot.

Mr. Starkey agreed. He said the Planning Board had zoned these lots for a specific reason, including to protect the public interest.

Ms. Davis said if this apartment complex did solve some of the disorderly conduct problems, etc. it would be nicer than what was there now. But she said the Board didn't have any way of knowing this. She said the public interest that was clearly threatened here was maintaining the residential character of the neighborhood.

Mr. Harvey said this was where the houses began, and said what was proposed would change the

area in a big way. He also said there was always an opportunity for a single family home to return to that use. He said this was tied in with the spirit and intent of the Ordinance.

Mr. Mulligan said this property was on the edge of a zone, and said the fact that the uses that somewhat surrounded it seemed to be incompatible with what was in the RA zone was essentially by design. He said this was a buffer property, and for that reason, looking at the spirit and intent of the Ordinance and the public interest, he came back to the fact that it was on the edge of a zone. He said this was a residential zone for a reason, and said the Board had to be very careful when dealing with properties on edges of zones.

Regarding the hardship criterion, Mr. Mulligan said he thought the hardship criterion was met given what surrounded the property, with institutional uses on two sides. He also said it was an edge property, and was not like every other residential property on Edgewood, because of where it was situated on Strafford, and also somewhat because of the topography.

Mr. Starkey said there was a self imposed hardship, because the applicant was talking about redeveloping two merged lots. He also spoke in detail about the properties in the area.

There was further discussion about the properties in the area.

Ms. Davis said she didn't think there was a hardship. She said in a different real estate climate, she believed all the homes along Edgewood would be purchased for residential homes.

Regarding the substantial justice criterion, Mr. Starkey said he didn't see how this was met. based on what was proposed.

Mr. Harvey said that concerning this criterion, what the applicant proposed was too radical a shift. He said it might be different if he were talking about reconfiguring one of the properties or redeveloping what was there. But he said what was proposed was moving in a different direction, putting in a big parking lot, etc.

Mr. Mulligan said that concerning the substantial justice criterion, the applicant still had the existing use of the properties, even if this wasn't the highest and best use. He said the ZBA's job was not to make a decision as to the highest and best use, and was to grant relief where it was warranted. He said this criterion was not met.

Chair Woodburn noted that the spirit and intent of the Ordinance had been covered, and other Board members agreed.

***Sean Starkey MOVED to deny an Application for Variances submitted by Barrett Bilotta and Frederick Kell, Weston, Massachusetts, on behalf of themselves and Arden & Alicia B. Hervey, Durham, New Hampshire from Article XII, Sections 175-38(B)(D)&(F) and 175-53 of the Zoning Ordinance to permit land use for a multi-use, multi-dwelling building on a property created from two merged lots. The properties involved are shown on Tax Map 2, Lot 4-0 and Lot 5-0, are located at 14 Edgewood Road and 26 Strafford Avenue respectively, and are in the Residence A Zoning District. Chris Mulligan SECONDED the motion, and it PASSED***

*unanimously 5-0.*

Break from 8:58 to 9:05 pm

- B. PUBLIC HEARING** on a petition submitted by Pine Ledge Holdings Inc., Hooksett, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a letter written on February 5, 2010, by Zoning Administrator, Thomas Johnson, regarding a violation of parking on a property. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue, and is in the Professional Office Zoning District.

Chair Woodburn said Mr. Gottsacker would be a voting member for this application.

Attorney Sharon Somers of Donahue, Tucker and Ciandella spoke before the Board. She said she had provided the Board with copies of some photos and a narrative version of her testimony. She also noted an old plan that was difficult to read, from 1942, which depicted the front dwelling unit and a parking area. She said there was also a larger version of the plan submitted as part of the building permit application.

She said the applicant was present to talk about parking. She said the administrative decision from February had addressed a possible issue having to do with occupants on the property, as well as the number of parking spaces. She noted that resolution was reached with Mr. Johnson about the appropriate number of occupants.

Attorney Somers first discussed the historical use of the property. She said both dwellings on the property were constructed in 1935, and said the rear building had been used as a rental property since 1951. She noted that it did not have separate frontage, and shared a driveway with the other building.

She said parking for the rear dwelling unit had existed adjacent to it since at least the early 1950s. She said both of the building were set relatively far back from the road, and said it would be impractical to expect that anything other than off street parking would be used. She said plan C-1, which was submitted with the building permit application, showed the configuration of the buildings.

Attorney Somers said the 1942 plan that had been submitted reflected a conveyance at that time of property across the way to UNH. She said since that time, the area shown in front of the front dwelling had been designated for parking. She said the space was about 60 ft long, based on analysis by the applicant and discussion with the Planning Board. She said it historically had accommodated either 6 head in cars, or 5 cars with one car in the garage.

There was discussion on the width of this area, and Mr. Kimball said not including the driveway width, it was about 22 ft deep.

Attorney Somers stated again that these spaces had been used since 1942. She said in 2009, Pine Ledge Holdings had sought a Conditional Use permit to replace and enlarge the rear building with a new building. She said the existing 5 spaces in the rear were reconfigured, in part to provide better



emergency access. She said as part of the Conditional Use permit application, permission was also sought to renovate the front dwelling, but said no changes were sought to add or reconfigure the parking in the front.

She said since no enlargement of the existing nonconforming parking was sought, the Planning Board didn't address the parking in the Conditional Use permit. She said the approval was obtained, a building permit was issued, and an occupancy permit was obtained for the rear building in December of 2009. She noted that no work had yet been done on the front building.

Attorney Somers said Mr. Kimball was the grandson of the prior owner of the land and the two dwellings, and was well acquainted with the historical use of the buildings. She said he had lived there in the mid 1990s, and noted pictures that showed two cars adjacent to what was the rear dwelling at the time, with Mr. Kimball in one of the pictures. She said he recalled that there were multiple vehicles parked in the rear, and also remembered that parking in the front as it currently existed had been in place from at least the 1970's.

She said the second issue of concern regarding the parking was that there was a preexisting nonconforming use. She noted that the first Zoning Ordinance in Durham was adopted in rudimentary form in 1934, and was amended in 1952 to say off street parking had to be provided although no detail was provided on this. She said it wasn't until 1974 that the Zoning Ordinance was amended to set forth minimum parking requirements, and said it wasn't until 2008 that the Zoning Ordinance was amended to set forth the maximum number of parking spaces that was allowed.

Attorney Somers said given the historical parking on the property, including the front parking area, and comparing it to the dates when the various Zoning Ordinances were adopted, in particular the 2008 amendments, the applicant's position was that the parking shown through the evidence, which was 6 spaces in the front, and up to 5 spaces in the back, was a preexisting legal nonconforming use.

Mr. Starkey asked Attorney Somers to point out the spaces in front, for clarification.

Attorney Somers noted a configuration on the 1942 plan that had the same shape as the gravel drive depicted on the June 2009 plan that was used as part of the building permit application. She said this area was large enough to contain either 6 head in parking spaces, or 5 spaces with one in the garage that was adjacent to that area.

Mr. Starkey asked Attorney Somers if she was saying that as part of the redevelopment of the rear property, the front 6 spaces were not addressed.

Attorney Somers said that was correct, because there were no additions or reconfiguration to it.

Mr. Starkey summarized that based on the historical information, and what the Zoning Ordinance used to say, the owner didn't feel the parking needed to be addressed.

Attorney Somers said that was true, but also said the feeling was that there was going to be no change whatsoever in the use of those spaces. She said the CU application was filed in April of

2009, and in May, the Conditional Use permit was granted. She said it contained relief to replace the rear dwelling, and also to allow at some future point renovation of the front parcel. She said as part of the review process, the Planning Board had looked at the parking out back, and it was determined in their findings that there were no negative impacts regarding parking.

She said what was requested and then put on paper in a more definitive form when the building permit was applied for in June were the 4 spaces shown in the back. She said the reason there were no markings for the front parking was because there were no changes contemplated to it. Attorney Somers said with the facts she had provided in mind, the applicant's premise was that the parking in the rear and front was a preexisting legal nonconforming use, because it was in existence prior to the adoption of any of these ordinances. She said as with any other owners of any preexisting legal nonconforming use, the applicant wanted to insure that he was able to continue with that right, consisting with what his needs were.

Attorney Somers said the violation notice said a Conditional Use was required for over 6 spaces. But she said Section 175-21 C of the Zoning Ordinance, the Conditional Use Permit ordinance, said "Any use that was lawfully established prior to the adoption, extension or application of this chapter and is now permitted by this chapter subject to a Conditional Use permit may continue in the same manner and to the same extent as conducted prior to said adoption or extension of this chapter".

She said the applicant was not proposing to add or change the parking that had historically existed. She said the only change to the parking resulting from the Conditional Use Permit was the reconfiguration of the rear parking to make it more compliant and more accessible to emergency vehicles.

Attorney Somers also said that under Section 175-110 of the Zoning Ordinance, "No use of premises shall be authorized or extended and no building shall be erected or enlarged unless parking and loading requirements are met for the new or added use". She said again that no further parking was required for the replaced structure. She noted that the rear building contained 3 bedrooms with 3 residents. She said there would be a total of 6 residents on the lot when the work on the front building was complete. She said because there would be no enlargement, the applicant clearly met those requirements.

Attorney Somers said the third key point she wanted to make was regarding the permit process itself for the Conditional Use permit. She said the criteria for a Conditional Use permit had to be met, and included the amount, location and screening of off street parking. She said written findings had to be made with regard to these criteria before the permit was granted. She said the findings of the Planning Board, as shown in the Minutes, did not show that any concern was raised about the number of parking spaces. She said if there was any concern, this was the time it should have been raised.

She said the Conditional Use permit was not appealed by anyone, the building permit was issued and the construction of the rear building went forward. She said a certificate of occupancy was granted around December, and said it was not until about 2 months later that the issue of possible violation concerning the number of parking spaces was raised. She said it was important to understand this chronology, because the applicant went forward with his construction plan based on

the Conditional Use permit that was granted and the building permit, without any comment about parking.

Attorney Somers said she knew the Town was actively engaged and wrestling with student housing issues, including illegal occupancies. She said she couldn't offer an opinion on the wisdom of that effort, but she said the applicant had a grandfathered right to the parking that had existed for decades. She said Town policies shouldn't impact this, and said it was unfair to put someone with a grandfathered right in the middle of that dispute.

She said the applicant had indicated that there were no police reports with regard to the property. She said there was only one report of a party on the property, and said Mr. Kimball was the one who had turned the tenants in. She also noted the lease, which clearly indicated that overnight parking was not allowed.

Attorney Somers said it was in the realm of reason to think that if there were 5-6 people living there, they might at times want to have guests. She said that would be their right, as long as they didn't stay overnight. She said some spaces might also be needed by professional maintenance people as well as the applicant.

She said the ZBA might have heard that over the years, there might not have been a continual sighting of all of the parking spaces being occupied. She said that might be the case, but said not all the parking spaces needed to be occupied 24/7 in order to substantiate the grandfather claim. She said it had been used in various capacities for parking, including use as parking for nearby fraternities and sororities in the early 1970s.

Attorney Somers said the applicant believed that the violation notice itself contained procedural deficiencies, because it didn't specifically indicate what the violation was, or any required remediation. But she said the key arguments were the established use well in advance of the 2008 Ordinance and earlier Zoning Ordinance, as well as the process involved with the Conditional Use permit, which suggested that everything was in order and that Mr. Kimball should be allowed to proceed.

Mr. Mulligan noted that this application was before the ZBA in March of 2010, and the applicant at that time requested that it be continued so he could try to get a revised Conditional Use permit. He asked what had happened with that.

Attorney Somers said Mr. Kimball did go before the Planning Board, and ultimately decided to withdraw the application because among other reasons, the Planning Board was getting caught up in confusion about what he was discussing. She said the Planning Board thought he was proposing an addition to the parking that had been on the site historically, which was not the case. She said rather than proceeding to a decision that would be based on erroneous facts, the applicant chose to withdraw the application. She said the appeal now to the ZBA was to try to get a decision on the underlying issue.

Mr. Mulligan noted that the Certificate of Occupancy was issued in December, and he asked if there had been any change in the parking between December and February, when the violation was noted.

Attorney Somers said no.

Chair Woodburn asked Attorney Somers if she was present for the Planning Board discussion and was told no. Chair Woodburn then asked Mr. Kimball what the Planning Board's understanding was of how much parking was shown on the plan.

Mr. Kimball said the Planning Board did not make a determination of the number of spaces. He said the application stated that the purpose was to document the existing, grandfathered parking so that it would be on a document with the Town, and so that going forward, it would be known what his parking needs were.

He said for some reason, which could be legitimate, the Planning Board had viewed it as expand the parking beyond what was allowed by the Ordinance. He said procedurally, perhaps that was the only authority they had. But he said since he only wanted to document the existing parking, he had withdrawn the application because it appeared he was perhaps in the wrong venue, and should go to the ZBA.

Chair Woodburn noted that Attorney Somers had said that historically there had been 6 parking spaces at the front structure.

Mr. Kimball said that was correct and provided clarification that the cars parked head in, to the stone wall.

Mr. Starkey received clarification from Mr. Kimball that he thought he should be grandfathered for 11 spaces.

There was discussion on the plan approved by the Planning Board and the plan approved as part of the building permit. He noted the plan submitted as part of the building permit, and said his presumption was that the Town determined that it was compliant to the Conditional Use permit, and issued the building permit.

Chair Woodburn asked for further clarification on what the difference was between the two plans.

Mr. Kimball said the Planning Board plan was a sketch, and he provided details on this. He said that as part of the original Conditional Use permit application, there was discussion about paving the parking, and the Board said it would like it to remain gravel parking. He said the discussion ended at that point, because it was moot. He said if he was going to retain gravel parking, he therefore had all the parking he needed.

Mr. Starkey said for the front portion, he understood the grandfathered spaces that had been noted. He asked if these spaces were delineated on the Planning Board plan.

Mr. Kimball said the plan provided to the Planning Board was the same plan, but with the parking sketched as opposed to delineated

Chair Woodburn asked what was meant by “sketched” in terms of the rear parking spaces. She asked if there was an outline of the footprint without the parking spaces shown, and Mr. Kimball said yes.

Attorney Somers said a question for the ZBA seemed to be what the Planning Board had had, as compared to what was shown on the building permit plan. She said the Planning Board had a plan which didn’t have the detailed delineation of the number of parking spaces in the rear, as was shown on the building permit application. But she said they did have a request for the number of parking spaces that would-be delineated, and also how the driveway would be configured in the back.

She also noted that the Planning Board had done a site walk. She said they discussed the parking in the back, and were able to see that there physically was room in the rear, even if there were not striped spaces. She said they also had the chance to ask questions about and observe parking in the front.

Chair Woodburn said the reason she was having trouble with this was that the graphic that was discussed by the Planning Board was the evidence, to her, of what the expectation was for use. She said when she looked at the building permit plan, she could see at least 7 spaces. But she said if this was different from what was discussed with the Planning Board, the ZBA needed to know that.

She provided clarification that it was the back parking that she was focusing on. She said she could see the front parking because there was a footprint that could have accommodated 6 cars if there was an historic use of it. She said it would be great if the ZBA could get another photo. She said she needed to know what the Planning Board was looking at. She said if it was similar to this but didn’t have 4 parking spaces called out, she thought the applicant might have a leg to stand on. But she said if the Planning Board had a different plan, this was different.

Attorney Somers said the Planning Board had a sketch that did not depict additional spaces going in, in the back. She showed Board members the sketch and submitted it for the record. She said it didn’t depict any delineated parking spaces.

Mr. Gottsacker said comments had been made that implied that the Planning Board had approved the Conditional Use permit in 2009 with parking spaces. He said he had read the Minutes of the Planning Board meetings in 2009, and there was no discussion of the parking area. He said there were 3 bullet points on page 21 of the April 29 Minutes, one of which was regarding adjusting the driveway parking area and garage. He said there was no further discussion of the number of spaces in those Minutes or the May 13<sup>th</sup> Minutes.

He also noted that it had been said that there was a site visit, but he said just because nobody specifically talked about the parking spaces during a site visit, when it wasn’t even a topic of the site visit, this didn’t mean they approved parking spaces that weren’t on a diagram. He said he was confused.

Attorney Somers reviewed page 21 of the April 29<sup>th</sup> Minutes. She said at the Planning Board proceedings, they did consider the parking in general on the property, and didn’t make any determination that the configuration or amount was at issue. She said the sketch showed the

proposed configuration, and said later on, when the building permit was applied for, that was when details came out in terms of the actual number of spaces, together with the driveway configuration that would actually be constructed.

Mr. Gottsacker said based on this, the best the ZBA could say was that the number of spaces was not a topic of conversation or considered by the Planning Board.

Attorney Somers said this was because they did not consider it to be an issue. She said they had no concerns about parking.

Mr. Gottsacker said the issue was not discussed.

Chair Woodburn said looking at the sketch, there were the 6 spaces historically used in the front, and it then showed the driveway going past it, and the widening at the end. She said perhaps there were 2 additional spaces, looking at that plan. She said there may have been 2 additional spaces in the back. She provided further details on this, and said there could only be 2 or else no one could get out.

Attorney Somers said there was no particular parking pad in the back, and people just parked there. She said it was physically spaced for more than 2 to go in to park in the rear. She said it was all dirt, but said there was enough physical space back there. She said it wasn't just those 2 spaces suggested by the sketch.

Mr. Gottsacker said he didn't see any spaces delineated in any of the plans that had been provided.

Chair Woodburn noted that they were delineated on the building permit plan, but that this wasn't germane to the discussion. She noted that the Planning Board had historically been painfully precise in terms of what was and was not on plans. She said based on this, she thought they would have gone after the issue of new parking. She said if the Planning Board felt there was going to be a change in the number of spaces from what existed, she couldn't imagine that they would not have had it on the plan.

Attorney Somers said that was the core of the argument. She also said it was important to remember that there was historical evidence that there were well in excess of 6 parking spaces used on the property, well prior to the 2008 Zoning Ordinance amendment.

Chair Woodburn asked what evidence other than anecdotal there was.

Attorney Somers said there was Mr. Kimball's recollection of the 6 front spaces being used, and also the evidence going back to 1942. She said there were no delineated plans or photos going back to 1942 for the front parking, but said there was no thought at that time that such evidence would be needed now.

She said she appreciated the ZBA's frustration about the lack of plans, but said it was sufficient for Mr. Kimball to testify from personal knowledge of the 1970's, which was well before the Zoning Ordinance requirement concerning the maximum number of parking spaces came into effect in

2008. She said sufficient evidence had been provided to satisfy the contention that more than 6 spaces were historically used on the property.

Chair Woodburn asked how many more than 6.

Attorney Somers said there wasn't a plan showing what happened in the rear of the site. But she said Mr. Kimball recalled that there was parking in the rear of the property in excess of 2 at least, because the people living there would have guests. She said she didn't know if there were 4-5 people in the rear all the time, and didn't think Mr. Kimball knew either. But she noted that he lived there in the mid 1980's, and said he could testify that there was a practice of having in excess of 2.

Mr. Starkey said the big issue he had was that redevelopment of the property was requested after the Zoning Ordinance changed. He said he understood historical uses and grandfathering, but said the applicant asked for a redevelopment of 2 buildings, with parking up top. He said there were 6 people living on the property and said 6 spaces should more than accommodate that. He said if there were overnight guests once in awhile, he didn't think it would be brought up.

But he said saying 11 spaces should be grandfathered seemed excessive. He said the Planning Board specifically said they had no problem with parking, and saw there was enough room for the house in the back to have ample parking, and 2-3 in the front. He said they never said how many spaces, and said there was ample parking. He said they were never presented with a plan that said 11 people could park there.

Attorney Somers said 6 parking spaces were allowed because there was one space per resident, and said with the 10% rule there could be 7 and perhaps 8 spaces. She quoted Section 175-21 C again, and said it squarely addressed the issue Mr. Starkey had raised. She said while there was redevelopment of the property, the applicant didn't alter the front parking area, or suddenly decide to install parking extraordinarily above what the historical memory was of the rear parking area.

Mr. Gottsacker said given the fact that it was almost 10:00 pm, it was clear that the ZBA wouldn't be able to complete the Agenda.

One of the applicants, Mr. Joglekar asked that his application be heard that evening.

The Board agreed to do this, and also agreed to meet on August 17<sup>th</sup> if the room was available.

Applicants Janet Mackie and members of Great Bay Rowing agreed to have their applications heard on that date.

Applicant Robert DiBerto noted that there were two variance issues that were supposed to be heard by the ZBA, including the issue of the square footage for an accessory apartment, but that only one had been noticed.

It was agreed that his applications would be re-noticed, and would be heard at the September ZBA meeting.

Mr. Kimball described how cars had parked in the past, stacked in, which was why it was reconfigured to have parking off to the side. He said if he had been told the parking would be taken away if it was reconfigured, he would simply have had the cars park straight in. He said he came to the Planning Board, did his best in good faith to tell them what he was up to, got the approvals and the building permit, and then was told he couldn't have the parking spaces. He said he had done his best to disclose everything. He said the Planning Board didn't ask him to delineate the spaces on the whole plan. He said to come in after the fact and take away his right to use his property because they made a procedural error was pretty unfair.

**Marty Gooze, 9 Meadow Road**, said she was an abutter. She said they had lived on the street for 30 years, since the mid 1970s. She said they had been close to Mrs. Stevens, and walked back and forth through the woods and had seen the parking there. She said as one came in the driveway and went to the back, there was a cabin and a little space cleared, and said one would see one or two cars there. She said Mrs. Stevens lived in front, and often parked in the garage or out front. She said if the car was in the garage, she needed space to back out and turn around because the driveway was narrow. She said she never saw crowds of cars in the front, and said there was perhaps one other car than Mrs. Stevens' car.

Ms. Davis noted that it had been said that 6 cars were parked there.

Ms. Gooze said in the 30 years she had lived there, including the time Mrs. Stevens was there, that was not the case.

Mr. Kimball said she stopped living there in 1995.

Ms. Davis asked about the parking between 1995 and 2005.

Ms. Gooze provided further details that there were usually only 2 cars parked in the back, and said it was only since 2000 that the numbers had increased.

**Jay Gooze, 9 Meadow Road**, asked Chair Woodburn to ask Attorney Somers and Mr. Kimball what was the last Planning Board meeting they had attended concerning the parking issue.

Attorney Somers said the Planning Board at which Mr. Kimball sought to amend the earlier approval was June 23<sup>rd</sup>.

Mr. Gooze said he was at that meeting, and said there was a long discussion on how many spaces were there through grandfathering. He said Mr. Kimball's argument then was the same as it was now, showing the plan with no spaces delineated. He said the Planning Board didn't provide the final decision, but said they came up with 7 spaces, which was 6 spaces plus an additional 10%. He said Mr. Kimball was asked to come back to delineate where those 7 spaces would be, but Mr. Kimball then withdrew the application.

He said the Planning Board very definitely made a decision of 7 spaces at that meeting, and provided further details on the Planning Board meeting. He also said he and his wife had walked through the property once a week, when Mrs. Stevens lived there, and never saw that kind of use of



the property.

Mr. Starkey read a letter from abutter Bill Hersman, owner of Xemed, which criticized the angle at which the driveway of 20 Strafford was aligned with the street, allowing acceleration of cars, which were directed at his car and his employees using on street commercial parking spaces, for which he paid the Town. He noted a recent speeding incident there, and said this behavior endangered his safety and property, and would not be possible with a normal driveway that was perpendicular to the street.

Mr. Hersman's letter said Mr. Kimball was a non-resident landlord, and said he believed he was less able to provide oversight of his tenants than resident landlords. He said increasing the parking would increase the number of residents and/or size of parties, further tempting irresponsible behavior. He said he didn't believe the Town had an interest in relaxing its zoning requirements for this application, for a motivation with no other purpose than increasing income for one non-resident individual. He said the orientation of the driveway and the irresponsible behavior of tenants he had witnessed argued against the applicant's request.

Attorney Somers said the applicant wasn't contending that this was a parking lot. She said they had said there were certain spaces available, which historically had been used. She said they were not contending that they had all been used 24/7, and said that would not be true of any number of parking situations at single family residences or elsewhere, She said the number would fluctuate. She noted that Ms. Gooze had said the frequency of parking had increased since 2000, but said the pivotal time was 2008, concerning the maximum number of spaces allowed.

She noted that the applicant had tried to work in good faith with the Town, and said at some point, there should have been more effort made to do a Zoning review to flag any perceived issues earlier in the game.

Mr. Gooze said he commended Mr. Kimball for his control over the students who rented his property. He said he and his wife had had no problems with them.

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

Chair Woodburn said the basic issue was whether Mr. Johnson had made an error. She said it appeared that there could have been error on the part of the Planning Board, in voting for the CU permit, based on the fact that they didn't address this issue. She said that was another way of looking at it, and said she wasn't sure that was the case, and wasn't sure that was what the applicant was asking for.

Mr. Gottsacker said this had been very confusing because the presentation talked a lot about what the Planning Board did or didn't do. He said the 2009 Planning Board Minutes that were provided indicated that there wasn't any discussion about the parking area, but said the ZBA didn't have the Minutes for the meetings in 2010 where it was discussed. He said he would like to see those Minutes and/or the DVD before the ZBA went forward. He suggested continuing this application so board members could see this information.

Mr. Starkey agreed, since there had been so much confusion. He also suggested contacting the Planning Board Chair to determine what was discussed.

Chair Woodburn agreed.

There was discussion that Board members could get copies of the DVD and Minutes of the June meeting. Mr. Gottsacker said he would be sure to watch the DVD. There was also discussion that the hearing would be reopened at that time. Chair Woodburn said if it was found that the Chair of the Planning Board couldn't be there, it would be continued to the September 14<sup>th</sup> ZBA meeting.

***Sean Starkey MOVED to continue to the continued meeting on August 17<sup>th</sup> the Application for Appeal of Administrative Decision from a letter written on February 5, 2010, by Zoning Administrator, Thomas Johnson, regarding a violation of parking on a property. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue, and is in the Professional Office Zoning District. Jerry Gottsacker SECONDED the motion.***

Ms. Davis said she was uncertain as to whether she needed to see the Minutes or the DVD of the Planning Board meeting.

Mr. Starkey said his view was that this information should be reviewed so they knew for sure.

Chair Woodburn said she wanted to know more than what happened at the June meeting., said it was the Planning Board's initial intention that she wanted to know about.

***The motion PASSED 3-1-1, with Ruth Davis voting against it, and Chris Mulligan abstaining.***

- E. PUBLIC HEARING** on a petition submitted by Amit Joglekar, Durham, New Hampshire on behalf of the Town of Durham for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-59(A) of the Zoning Ordinance to demolish a deck and to construct an addition within the wetland setback. The property involved is shown on Tax Map 18, Lot 18-23, is located at 56 Ross Road, and is in the Rural Zoning District.

Chair Woodburn said Mr. Harvey would be a voting member for this application.

Mr. Joglekar spoke before the Board. He explained that there was a need for more room in his house, and said he proposed to remove the deck, which was not used, and to get a small addition in the existing space the deck currently occupied. He said it would be a multi-purpose room that would be utilized to hold more people when there were family functions, and would also be used as office space.

He said granting the variance would not decrease the value of surrounding properties. He said the addition would remove a part of the house that he had not used, and said he thought the addition would increase his property values, and would improve the aesthetics of the house. He said the place where the addition would be built would not be visible to others in the community.

Mr. Joglekar said granting the variance would not be contrary to the public interest. He said it was purely for a residential use, and would not be visible from the outside. He said the house was part of a subdivision that had already been approved. He noted that the house was a legal nonconforming building. He also said the area where they were planning to build was away from the wetland setback.

He said denial of the variance would result in unnecessary hardship. He said there was a need for additional space on the ground level for a number of reasons. He said it had become more important recently because they needed additional space for his parents, who had health issues, to be able to relax. He said the area proposed for the addition was the only one possible without requiring major structural changes to the house.

Mr. Joglekar said the proposed use was reasonable because they needed a usable room on the ground level, and also said it would make the best use of the land they had. He said the deck was not usable at present, and was too close to the wooded area.

He said there would be substantial justice in granting the variance because it would allow him to use the property to the fullest, and would be a convenience for his parents, who had health issues. He said the only other alternative he had would be to move out of the house, which would be a hardship.

Mr. Joglekar said the use would not be contrary to the spirit and intent of the Ordinance. He said it was a residential area being built to increase the utility of the current space. He noted that the ZBA in the past had granted approval of the lot to build the house, despite the wetland boundary. He said the addition would build away from the wetland boundary.

Mr. Mulligan determined that this would be a one story addition, and would be on the existing footprint.

Chair Woodburn asked the builder to explain why the addition couldn't be put anywhere else.

The builder said the addition would be about 270 sf, and would be on essentially the same footprint as the existing deck. He said it would be built on a frost wall, while the deck was on sonotubes. He said the new work would be further from the wetlands than the house was. He said the house was about 55 ft from the wetland, and the new construction would be another 20 ft away. He noted that the wetlands setback was 100 ft. He said the house was built on a knoll, but said with the flooding in the spring, there had been no water in the basement or pocketing of water on the site. He said he didn't expect to see any impacts to the site from the work that was proposed.

He explained that there was a farmer's porch on the front, a garage on the left, and said the right side was where all the utilities came in. He said there was no other place than the location proposed where the addition could be built affordably,

He noted that several other variances had been granted for properties on Ross Road, and were similar to Mr. Joglekar's request. He said Mr. Joglekar wasn't asking for anything really

exceptional in that neighborhood. He said he didn't feel the value of surrounding properties would be adversely affected. He said if any of the neighbors had had objections, they would have indicated this.

Mr. Harvey asked how the house dealt with runoff, and what the plans were for the addition. The builder said the house had perimeter drains, and the addition would have them as well. He said there weren't plans to put in gutters or downspouts.

Mr. Johnson said the code required either gutters or a stone strip around the foundation, for whatever came off the roof.

The builder said there was the stone strip currently.

There was discussion that the house was located on a knoll, and the addition would be uphill from that.

Mr. Starkey received clarification that a piece of the deck would remain, and would be the screened in porch area.

Ms. Davis asked where the rain that came off the roof of the addition would go.

The builder said the new addition would have a hip roof, and would have a valley that would throw water where it was currently going, on the driveway side.

Ms. Davis noted that in some cases, the ZBA had asked applicants working within the wetland setback to use gutters. She said she was wrestling with whether this was a necessary request in this case or not.

Mr. Gottsacker said it sounded like the perimeter drain would be able to handle the runoff, and he spoke briefly about this.

The builder said the perimeter drains would go down about 8 ft, and stressed that he didn't want to risk having any water building up against the frost wall.

Ms. Davis asked where the water that went into the perimeter drains went to, and the builder said it day-lighted right beyond the house, down the hill toward the street, and not toward the wetland.

Chair Woodburn noted that there was no one to speak in favor or against the application.

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

Ms. Davis said she wanted to make sure the Board thought about when it should ask for guttering and when it shouldn't. She said in this case, she was leaning away from this because it seemed there was a good distance of 75 ft to the wetland.

There was discussion that a deck was considered pervious, so the addition would be adding impervious surface to the lot.

Ms. Davis said the question was whether the Board would allow the addition, and if so, if it should request that something more be done with the runoff. She noted that there would be 75 ft from the runoff to the wetland, and the rest of the roof was already running off in that direction and was closer to the wetland.

Board members agreed that there would be no decrease in the value of surrounding properties if the variance was granted. Ms. Davis said it could be argued that the addition would make the house more desirable, and could increase the value of surrounding homes.

Concerning the public interest criterion, Chair Woodburn said the issue was the health of the wetland, and whether the incursion of extra imperviousness within the 100 ft wetland setback needed to be mitigated.

There was discussion that the wetland setbacks on Ross Road had been smaller when the houses there were built.

Mr. Starkey said the addition would mean there would essentially be more water going into a smaller area, as compared to the runoff situation with the current deck.

There was discussion about whether there could be a condition about what happened to the water once it day-lighted. Ms. Davis said she was concerned about possible erosion where the runoff day-lighted. Chair Woodburn agreed this was a concern, noting that water collected in a perimeter drain came out with some speed, so could cause erosion.

Mr. Johnson said the building code required a perimeter drain around a basement that drained to daylight or a sump pit. He said a drip edge was either stone on the ground or controlled by gutters, and said it would slow the water before it got to the perimeter drain. He said the water coming out of this drain therefore wouldn't come out as fast as it had come off the roof. He also noted that a perimeter drain wasn't always a pipe, and could be stone wrapped in filter fabric. He said he wasn't sure which kind of perimeter drain there was on the applicant's property. He said he preferred a drip edge to gutters.

Chair Woodburn said the only reason a gutter might be better in a wetland situation was that it could redirect the water away from the wetland. She said her inclination in regard to the public interest criterion was that nothing more should be required in terms of the drainage system.

Mr. Harvey said he thought the drainage system proposed would be able to handle the runoff.

Concerning the hardship criterion, Mr. Starkey said the proposed use was reasonable because the applicant was trying to make proper use of an area that was already being used, and was trying not to impede the wetlands. He said because of the Zoning there, doing anything would mean he would need relief, so there was an unnecessary hardship because of the special conditions of the property.

Chair Woodburn said there was no fair and substantial relationship between the general public purpose of the Ordinance provision, which was the protection of the wetlands, and the specific application of that provision to the property.

Chair Woodburn said substantial justice would be done in granting the variance, and Ms. Davis said it would harm the applicant more to deny the application than it would harm the wetland to approve it.

Mr. Starkey said granting the variance would not be against the spirit and intent of the Ordinance, because the applicant would be taking an already usable part of his house that was nonconforming and just covering it.

Ms. Davis said in this instance, the spirit and intent of the Ordinance was protection of the wetland. She said with what the applicant had proposed, there would be adequate protection of the wetland for this particular site, given the distance from the wetland and the proposed collection of roof runoff.

Chair Woodburn summarized that all of the variance criteria were met.

***Ruth Davis MOVED to approve the Application for Variance submitted by Amit Joglekar, Durham, New Hampshire from Article XIII, Section 175-59(A) of the Zoning Ordinance to demolish a deck and to construct an addition within the wetland setback, and stay within the footprint as per the plan dated May 10<sup>th</sup> 2010 and the site plan provided in the packet. Runoff from the addition will be collected with a drip strip and perimeter drain. The property involved is shown on Tax Map 18, Lot 18-23, is located at 56 Ross Road, and is in the Rural Zoning District. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.***

- C. PUBLIC HEARING** on a petition submitted by Janet Mackie, Durham, New Hampshire on behalf of Michael C. Mullins, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIII, Section 175-59 and Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to construct a replacement septic system and an 8-foot stockade fence as well as to expand the existing one-car garage within the property, wetland and shoreland setbacks. The property involved is shown on Tax Map 12, Lot 2-7, is located at 3 Cedar Point Road, and is in the Residence C Zoning District.

Continued to the August 17<sup>th</sup> ZBA Meeting

- D. PUBLIC HEARING** on a petition submitted by Robert DiBerto on behalf of Elaine Helstrom, Eliot, Maine for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-65(F) of the Zoning Ordinance to construct a replacement septic system within the wetland setback. The property involved is shown on Tax Map 11, Lot 2-0, is located at 116 Dover Road, and is in the Office Research Zoning District.

Continued to the September 14<sup>th</sup> ZBA meeting

- F. PUBLIC HEARING** on a petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an **APPLICATION FOR VARIANCES** from Article XIII, Section 175-59 and Article XIV, Section 175-74(A)(1) of the Zoning Ordinance to continue with the use of a structure within the wetland and shoreland setbacks. The property involved is shown on Tax Map 11, Lot 11-4, is located at 8 Old Piscataqua Road, and is in the Residence A Zoning District.

Continued to the August 17<sup>th</sup> ZBA meeting.

**III. Approval of Minutes – No Minutes**

**IV. Other Business**  
A.

**V. Adjournment**

*Sean Starkey MOVED to adjourn the meeting. Chris Mulligan SECONDED the motion, and it PASSED unanimously 5-0.*

Adjournment at 11:07 pm

Victoria Parmele, Minutes taker

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Sean Starkey, Secretary