

*These minutes were approved at the August 9, 2011 meeting.*

**Durham Zoning Board Agenda  
Tuesday June 14, 2011  
Durham Town Hall - Council Chambers  
7:00P.M.**

**MEMBERS PRESENT:** Chair Robbi Woodburn (arrived at about 8:30 pm); Vice Chair Ruth Davis; Carden Welsh; Jerry Gottsacker; alternate Kathy Bubar

**MEMBERS ABSENT:** Secretary Sean Starkey; alternate Edmund Harvey

**OTHERS PRESENT** Victoria Parmele, Minutes taker

**I. Approval of Agenda**

Ms. Davis said Chair Woodburn would be arriving at about 8:30 pm, and said she would serve as Chair in her place until that time. She said there were currently four ZBA members present, and said the Board would give applicants the choice to come back to a future meeting when there were more members present.

No applicants asked that their applications be heard at a future meeting.

After discussion, the Board agreed to move Item II E to become first on the Agenda.

***Jerry Gottsacker MOVED to approve the Agenda, including moving Item II E to become the first item on the Agenda. Carden Welsh SECONDED the motion, and it PASSED unanimously 4-0.***

**II. Public Hearings**

**E. PUBLIC HEARING** on a petition submitted by MJS Engineering, PC, Newmarket, New Hampshire, on behalf of GHL, LLC, Newburyport, Massachusetts for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-41(F)(7&8) and Section 175-53 of the Durham Zoning Ordinance to permit the construction of a 3-story addition with residential use on the first floor and to allow for less than a 20% area of windows on the front façade of the current Grange building. The property involved is shown on Tax Map 5, Lot 1-5, is located at 37 Main Street and is in the Central Business Zoning District.

Mike Sievert of MJS Engineering represented developer Peter Murphy. He explained that there was a Purchase and Sale Agreement right now between the Town of Durham and Mr. Murphy regarding the property, which was owned by the Town. He said the Town had previously put an RFP out to try to get some redevelopment possibilities for the Grange, and Mr. Murphy was the only respondent.

He said Mr. Murphy proposed to redevelop the Grange by doing an historic renovation of the property, which was located in the Historic District; moving it forward so it would be closer to Main Street; and redeveloping it into a commercial use on the first floor and residential uses on the second floor. He said Mr. Murphy also proposed to build a 2800 sf, three story multi-unit apartment building at the rear of the property.

He noted that there was a public walkway on the northerly side of the property that connected Main Street to the Mill Plaza area, and said this path would be maintained. He said the Grange building would be put on a new foundation, and would be redeveloped in a way that met the requirements of the Historic District.

Mr. Sievert explained the variance needed from Section 175-53 in order to allow a residential use on the lower level of the Grange, and another variance needed concerning 175-41 (F) 8, which said that 20% of the front wall area of the building needed to be windows. He said the applicant couldn't meet this requirement and also meet the requirements of the Historic District. He said the purpose of the requirement was to allow a commercial presence on the front of a building. He noted that this space on the first floor wasn't slated to become retail commercial space, so the storefront wouldn't be displaying products.

Mr. Gottsacker noted that the Town Council had been involved with this effort to redevelop the Grange property, and that the ZBA had a letter in support of the project that reflected this. He asked Mr. Sievert to discuss this.

Mr. Sievert said this was a public/private effort, and said the Town Council had approved of the applicant's ability to have a residential use on the first floor, which would be workforce housing. He said a renter would have to fit within a certain range of income in order to be able to rent one of the workforce housing units, and said students wouldn't qualify because they were dependants on their parent's income. He said the Purchase and Sale Agreement reflected this.

Ms. Davis noted that at the recent Office of Energy and Planning conference, there had been discussion on the issue of workforce housing.

Mr. Gottsacker said the reality was that because of cost issues, it had been difficult to achieve workforce housing in NH.

Mr. Sievert noted that towns were now required to at least provide the opportunity for workforce housing.

He spoke further about the proposed redevelopment of the Grange building, and said there would be separate entrances for the commercial space in front and the residential space in the back.

Ms. Davis asked if fill would be used in the land behind the Grange, noting that right now

it was fairly steep.

Mr. Sievert said the change in grade would be worked into the design of the building, and said no fill would be used. He spoke in some detail on this, and among other things, noted that the walkway would be handicap accessible to the back apartment.

Ms. Davis asked what businesses were expected to use the commercial space in the Grange.

Mr. Sievert said this wasn't known right now, and said the Town Council had discussed the idea of using it as some sort of public space, which could be rented to clubs, businesses, parties, etc. But he said all the uses allowed in the Central Business District would be possible.

He said the Planning Board hadn't seen the project yet other than seeing a brief layout of the site plan, explaining that the applicant wanted to get the variances first. He noted that there was no Conditional Use Permit application needed for the project because there were no wetland or shoreland overlays involved.

Asked if there was any parking on the site, Mr. Sievert said no, and also said none was proposed because of the narrowness of the lot. He noted that this met the Zoning requirements. He said the plan was to maintain a wider area in front, perhaps with bollards, so vehicles could access the property on move-in and move-out days.

Mr. Welsh asked where people would park, and Mr. Sievert said there was parking available at various other properties nearby, including Mill Plaza.

Mr. Sievert next went through the variance criteria concerning Section 175-53. He said granting the variance and the redevelopment of the Grange would not decrease the value of surrounding properties. He said the deterioration of this building and lack of use would cause a greater detriment to surrounding property values than the active redevelopment that was proposed. He noted that there was student housing to the south, as well as student housing and some commercial uses to the east.

Ms. Davis asked what percentage of the first floor of the Grange building would be commercial when the redevelopment was complete.

Mr. Sievert said about 90% of the first floor of the Grange would be commercial, and he provided details on this.

He said granting the variance would not be contrary to the public interest because what the applicant proposed was a great opportunity for economic development of a vacant historic building. He said there was no other opportunity like this in the Central Business District. He said granting the variance didn't preclude the building from being a mixed use building, so the spirit of the Ordinance was observed. He said the project provided a benefit to the public by providing for redevelopment and reuse of an historic structure, as

well as the availability of affordable housing.

He said denial of the variance would be a hardship because no fair and substantial relationship existed between the general public purpose of the Ordinance provision and its specific application to the property. He said that purpose was to provide redevelopment of downtown buildings by allowing mixed uses within existing and new buildings. He said the uniqueness of the parcel was that it was an historic civic building, and the renovation involved a public/private partnership, where there was the opportunity to provide workforce housing.

Mr. Sievert said the proposed use was reasonable because mixed uses were allowed in the district, and this development would still provide commercial use on the first floor in the front building at the Main Street frontage. He said there would be a disadvantage to having commercial space in the back, and also said the applicant was trying to maintain public access from Main Street to Mill Plaza, which didn't happen on other lots nearby. He noted that the pathway would be upgraded with pervious materials and other design elements.

Ms. Davis considered what made this property different from other surrounding properties, and determined that the Grange was owned by the Town, and was also somewhat unique in that it sat so far back on the lot.

Mr. Sievert said the properties on either side were right on the front property line, while the Grange sat 62 ft back from it. He noted that the Zoning Ordinance now required that a new building be no more than 15 ft from the property line.

He said substantial justice would be done in granting the variance, explaining that it would provide the financial resources to fund the redevelopment. He said if it wasn't granted, the development would not be affordable, and so there would be no gain to the public. He said if the variance wasn't granted, the Purchase and Sale Agreement would need to be restructured. He also said other properties in the downtown were currently paying taxes, but this property wasn't, and said this project would put the Grange back on the tax rolls, while also providing some affordable housing.

Mr. Welsh noted that there could be children living in the workforce housing.

Mr. Sievert said the workforce housing units were geared to younger couple, and said at 900 sf, he didn't think there would be a big family living in a unit.

Mr. Sievert said granting the variance would not be contrary to the spirit and intent of the Ordinance, which was to allow mixed uses in downtown buildings in order to provide an active and vibrant downtown business district. He said granting the variance did not eliminate the mixed uses within the building, which included commercial use of the first floor space that fronted on Main Street.

Mr. Sievert next said he would go through the variance criteria in regard to Section 175-41 (F) 9, but Mr. Gottsacker said the need for this variance seemed apparent, in that if

this requirement was met, it would destroy the historic character of the Grange building.

Other Board members agreed, and said Mr. Sievert therefore did not have to go through the variance criteria.

Chair Davis asked if there were any members of the public who wished to speak for or against the application. There was no response.

***Jerry Gottsacker MOVED to close the Public Hearing. Carden Welsh SECONDED the motion and it PASSED unanimously 4-0.***

Mr. Gottsacker said the proposed project preserved an historic building, and also put the property back on the tax rolls. He said he would hate to see the Grange deteriorate to the point where it was destroyed. He said he believed that all of the variance criteria were met, for both variance requests.

Ms. Davis said she agreed with what Mr. Gottsacker had said. She said she thought the value of surrounding properties would not decrease as a result of granting the variance requested from Section 175-53. She said she agreed that granting the variances would be in the public interest.

She said a special condition of the property was that it was owned by the Town and sat so far back on the land. She said the Grange building could be moved forward, allowing the second building to be built in the back. She said that building would essentially be hidden from view on Main Street.

Mr. Welsh said that second building would be well off the commercial byway.

Mr. Gottsacker noted, concerning the public interest criterion, the letter from Administrator Selig about the application, which said "After having conferred with the Town Council, EDC, and HDC/Heritage Commission, I write in support of this variance, as it is being presented by MJS Engineering."

Chair Davis said that regarding the substantial justice criterion, she agreed that allowing the variance would provide a financial resource to fund the redevelopment of the Grange. Regarding the spirit and intent criterion, she said what the applicant proposed would provide a mixed use development for the downtown.

Concerning the variance request regarding the amount of glass in the front façade, Chair Davis said all the ZBA members agreed that if the glass requirement was met, the historic quality of the Grange could not be preserved.

Mr. Welsh said he agreed with what other Board members had said about the first variance request. He then went through the second variance request concerning the amount of glass for the front façade. He said granting it would not decrease the value of surrounding properties, because it was an historic building and its redevelopment would

enhanced the value of surrounding properties.

He said the fact that it was an historic building was a special condition of the property, which was why it should be allowed to have less glass than was required on the front wall. He said the use would still be reasonable because even with less than 20% glass on the front face, it could still be commercial.

Mr. Welsh also said redeveloping this historic building would be in the public interest, and among other things would promote economic development. He said substantial justice would be done in granting the variance because the Town wanted to have an historic looking downtown. He said granting the variance would not be contrary to the spirit and intent of the Ordinance because it would help to create a vibrant, and special downtown. He summarized that all five variance criteria were met.

Chair Davis noted that Ms. Bubar would be a voting member.

Ms. Bubar said it was important to remember that the proposed residential use in the second building in the back would support the workforce housing units, which was really important in Durham because there currently wasn't much in the way of workforce housing.

*Carden Welsh MOVED to approve as proposed by MJS Engineering, PC, Newmarket, New Hampshire, on behalf of GHL, LLC, Newburyport, Massachusetts, an Application for Variances from Article XII, Section 175-41(F)(7&8) and Section 175-53 of the Durham Zoning Ordinance to permit the construction of a 3-story addition with residential use on the first floor and to allow for less than a 20% area of windows on the front façade of the current Grange building. The property involved is shown on Tax Map 5, Lot 1-5, is located at 37 Main Street and is in the Central Business Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.*

- B. PUBLIC HEARING** on a petition submitted by Zelda & David Moore, Durham, New Hampshire, for an **AMENDMENT TO A PREVIOUSLY APPROVED APPLICATION FOR VARIANCE** from Article XIII, Section 175-59 of the Zoning Ordinance to build an addition within the wetlands setback. The amendment would allow for a 16'x13' addition instead of a 12'x12' addition. The property involved is shown on Tax Map 6, Lot 2-33, is located at 4 Stevens Way, and is in the Residence B Zoning District.

David Moore said when he had first applied to the Town, the proposed addition was to be 12 ft by 12 ft. He said it was thought that this would be the inside dimensions, but it was later realized that this would be the outside dimensions. He said the 16 ft by 13 ft addition now proposed would still not damage the wetland, and he providing details on this. He noted that the area involved was filled land.

Mr. Moore said his statement about how the variance criteria were met was the same as it had been for the previous variance application, and he briefly reviewed them (see May 10,

2011 ZBA Minutes for details).

There was discussion between Mr. Moore and the Board about the actual proposed layout of the 16 ft by 13 ft addition on the lot.

Mr. Welsh asked how the water drained off of this area, and Mr. Moore provided details, as he had at the May 10, 2011 ZBA meeting on how runoff would be directed away from the wetland.

Chair Davis asked if there were any members of the public who wished to speak for or against the application, and there was no response.

***Carden Welsh MOVED to close the public hearing. Kathy Bubar SECONDED the motion and it PASSED unanimously 4-0.***

Mr. Gottsacker said he didn't think the Board needed to go through the variance criteria again, stating that a 12 inch greater incursion into the wetland buffer was now being requested by the applicant, as compared to the previous variance application.

Mr. Welsh said the impervious surface runoff issue went away because the runoff was directed away from the wetland.

Chair Davis noted that the ZBA had said all of the variance criteria were met for the Moore's' previous variance application. She said all five criteria were also met with this application.

***Jerry Gottsacker MOVED to approve a petition submitted by Zelda & David Moore, Durham, New Hampshire, for an Amendment to a previously approved Application for Variance from Article XIII, Section 175-59 of the Zoning Ordinance to build an addition within the wetlands setback. The amendment would allow for a 16'x13' addition instead of a 12'x12' addition. The property involved is shown on Tax Map 6, Lot 2-33, is located at 4 Stevens Way, and is in the Residence B Zoning District. Kathy Bubar SECONDED the motion, and it PASSED unanimously 4-0.***

- C. PUBLIC HEARING** on a petition submitted by Alexander & Alexandra Bakman, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to create one additional house lot from an existing residential property where both lots would not meet the minimum lot size requirements. The property involved is shown on Tax Map 11, Lot 24-4, is located at 118 Piscataqua Road, and is in the Residence C Zoning District.

Attorney Scott Hogan represented the applicants. He said what was proposed was to subdivide the property so that the residence and barn each became separate residences, with their own lots. He said this was a somewhat unique subdivision because of the existence of a building on each lot, and said the barn was a fairly significant structure. He noted that it had been used as an accessory residential building in the past, also noting that the Bakmans had

been granted approval several years back to use 3000 sf of the structure as commercial office space.

He explained in some detail that the subdivision design proposed now, with the property line drawn down the middle, was essentially the same as an original property line drawn in the 1970's, with some minor adjustments in the acreage. He explained that the owners prior to the Bakmans had come before the Town to voluntarily merge two properties so that they were currently a single tax map lot.

He said a subdivision design that conformed to the Zoning Ordinance would have cut off the rear driveway entrance, and would have put the barn structure within the property line setback. He also said what was proposed made sense based on the lay of the land. He said the existing dock was intended to go with the residential house. He also said that if the subdivision was approved, both house lots would reflect an easement in favor of the cemetery, which each of the lots would contain a portion of.

Ms. Davis asked about other parcels nearby, and Attorney Hogan provided details on this. He noted that there was originally a four lot subdivision of the area approved in 1978, and said after the voluntary merger he had just spoken about, there were three lots, the lot in question now and two smaller lots. He said the acreage of these two smaller lots was 1.85 acres and 1.9 acres.

He said the barn structure had been in use for years, so from the outside, including traffic wise, nothing would change in terms of the use. He noted that there was an existing variance to allow commercial use of the barn. He said there were three employees who had accessed the property.

Mr. Johnson said the use that was approved was residential home occupation, not commercial.

Attorney Hogan noted the berm on the property along Route 4, so views of the property were already extraordinarily limited.

Ms. Davis asked if the driveway would be shared if the subdivision was approved.

Attorney Hogan said there would be no change from what occurred now, but said there would be an easement concerning use of the driveway by the owner of the barn property. He said there were no plans to construct or reorient anything.

Mr. Gottsacker said the diagram said "existing barn/proposed office, which was confusing. He also asked for more details on the cemetery.

Attorney Hogan said there was currently no easement in favor of the cemetery. He said as part of expressing that it would remain there forever, the deeds for both lots would have an easement allowing use of the cemetery.



Mr. Gottsacker determined from Mr. Johnson that the cemetery was maintained by the Town. There was discussion about whether a condition of approval was needed in regard to this issue, and Mr. Johnson said these kinds of issues would be addressed when the applicants went before the Planning Board.

Attorney Hogan noted the Ordinance provision on accessory sheds having to be set back from property lines at least 10 ft, unless the abutter provided written approval to the Zoning Administrator for a reduced setback. He said in this instance the abutter, in his reading of the Ordinance, was the applicants because they owned what would be the two subdivided parcels.

Mr. Johnson noted that there were several other conditions that needed to be met in order to have an accessory shed.

After further discussion on the shed issue, Chair Davis summarized that this issue was not part of the application before the ZBA that evening.

Attorney Hogan noted concerning the accessory shed issue that the property was for sale, and that a buyer might want to buy the property as on lot, with a single family home and a large accessory barn structure. He said the Bakmans were trying to leave as many options open as possible, and he provided details on this.

Attorney Hogan said another issue was that the barn would to be able to qualify as a residence. He said another condition of approval would be that it would have to qualify as a residential structure and get a certificate of occupancy. He said it was ready to be a home, and said it would not be considered an accessory structure if this variance was approved, and the subsequent subdivision application was approved by the Planning Board.

Mr. Gottsacker asked if the septic system would service both properties.

Attorney Hogan said right now the system was shared, but said this was an issue they would like to leave open for prospective buyers. He said if more capacity was required later, this could be a condition of approval of the subdivision application.

Attorney Hogan next went through the variance criteria for the application.

He said granting the variance would not decrease the value of surrounding properties, since nothing was changing in terms of the use or look of the property. He also said if the subdivision application was approved, there would be two separate lots of record, and said in that configuration the assessment would mean increased property tax revenue for the Town. He said the value of surrounding properties, if anything, would therefore increase. He noted that a neighbor had submitted an email that said he believed granting the variance would increase the value of nearby properties.

Attorney Hogan said granting the variance would not be contrary to the public interest. He noted that the land was originally approved as two lots and so had existed in this

configuration before. He said nothing was changing now in terms of the use, and said septic approval would be addressed by the Planning Board. He said there was therefore nothing here that conflicted with the minimum lot size requirements.

He said that concerning the hardship criterion, owing to the special conditions of the land the proposed use was reasonable. He said the applicants had tried to come up with a 3.4 acre lot that would conform to the Zoning Ordinance, but said this didn't result in a feasible configuration. He said the proposed design resulted in the most logical, efficient use of the land, and said there wasn't another layout that made sense given the lay of the land.

He also said he didn't think he'd ever seen a situation like this where the subdivision was proposed and the additional lot to be created contained a building that was ready to be used as a home.

Attorney Hogan said substantial justice would be done in granting the variance. He said when looking at the property owners' opportunity to have two separate lots, he didn't see that this would affect the interests of the general public.

He said granting the variance was not contrary to the spirit and intent of the Ordinance. He said the subdivision design that was proposed was the most logical and efficient one available, and reflected the original lot sizes. He said there would be no new construction, and nothing that would be a nuisance to surrounding properties. He also said the subdivision could result in additional tax revenue from the two properties as well as surrounding properties.

Mr. Gottsacker asked Attorney Hogan to speak further on this.

Attorney Hogan said there would be two separate house lots, and said the barn would be considered a residence rather than an accessory building, so would go into a higher tax category.

Chair Davis asked about the greenhouse that was attached to the barn, according to the plan.

Attorney Hogan said it was no longer there, although the foundation was still there. He said the applicants proposed that it remain, noting that it would cost \$15,000 to remove it, and that it could perhaps be used in some way. He said the foundation was within 50 ft of the setback, so there would be a side setback issue if the subdivision application was approved. But he noted that the only property owner to be impacted would be the future owner of the subdivided property next door.

Mr. Gottsacker said the greenhouse foundation was really a separate issue, and was not part of the current application. He said the foundation was not illegal unless or until a subdivision occurred.

Chair Davis asked if there was any way to include a condition regarding this as part of the current variance.

Mr. Johnson said he didn't think so. He said right now, the Board could only deal with the lot area issue. He reviewed the variances that would be needed for both lots if the subdivision was approved.

Attorney Hogan agreed, and said getting the various concerning the lot size issue would allow the applicants to move on to the Planning Board. He said in the mean time, the applicants could decide whether and when they needed to come back to the ZBA.

Ms. Davis said if the variance was granted, she didn't see how the barn could be advertised as a residence.

There was discussion on the shared septic system for the house and barn. Mr. Johnson noted that there was plumbing in the barn but no bedrooms, and said septic systems were designed based on the number of bedrooms. He said septic designs for each property, or a design for a community septic system for both properties would be needed. He said this could be worked out before going to the Planning Board or during that process. He said they might need variances if they couldn't meet the setback requirements.

Attorney Hogan noted again that the applicants were trying to leave as many options open as possible right now.

Mr. Welsh asked about the purpose of the 3.4 acre minimum lot size for the Residence Coastal district, and Mr. Gottsacker read from the Zoning Ordinance.

Mr. Johnson noted that historically, the lots there didn't meet this requirement.

Mr. Welsh noted the pollution issues Great Bay had, and said if there were two lots, this doubled the septic load. He said he therefore had a problem saying there was no fair and substantial relationship between the purpose of the Ordinance provision and its application to the applicants' property. He said if the properties were on Town sewer, he would say this wasn't an issue.

Mr. Gottsacker said the ZBA could make this something that was pointed out to the Planning Board.

Attorney Hogan agreed that this issue would be scrutinized as part of the Planning Board subdivision application approval process, and he spoke further on the nitrogen issue.

He also addressed the purpose statement concerning the Residence Coastal district, and said the only issue could be possible additional septic loading because of the additional house lot. But he reiterated that this would be addressed as part of going through the Planning Board review process.

Mr. Gottsacker said the ZBA should have a condition asking the Planning Board to take special care concerning the cemetery.

There was discussion about whether the ZBA needed to say anything about the barn not being residential already right now.

Mr. Gottsacker said he thought this was part of the permitting process.

Mr. Johnson said whatever was not addressed tonight could be a condition of approval of the Planning Board.

Attorney Hogan said a condition of approval for the Planning Board could be that the barn structure would have to get a certificate of occupancy, in which case it would qualify as a residential structure.

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

Mr. Gottsacker read into the public record a letter of support from abutter David Hills.

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

***Jerry Gottsacker MOVED to close the Public Hearing. Kathy Bubar SECONDED the motion, and it PASSED unanimously 4-0.***

Ms. Bubar said she didn't hear that approving the variance request would decrease the value of surrounding properties, and said what was proposed was basically going back to the original subdivision. She said granting the variance also would not be contrary to the public interest.

She said she didn't know that denial of the variance would result in unnecessary hardship, although the applicants claimed it would. She said they were basically asking to be able to divide the lot the way it was originally done. She said there wouldn't be any visual difference in the property, and said it would comply with the spirit of the Ordinance.

Mr. Welsh said he didn't think there would be a decrease in the value of surrounding properties as a result of granting the variance. But he said he was having trouble with the hardship criterion, and whether there was a fair and substantial relationship between the general public purpose of the Ordinance provision, which was to protect the quality of the community's principal surface waters, and its specific application to the property. He said having more people there could potentially be detrimental.

Mr. Gottsacker said he agreed, but said there were a lot of septic design alternatives to address this. He said a condition was needed to point out to the Planning Board that they should take special care in regard to addressing this issue.

Mr. Welsh said the special condition of the property was that it used to be split in to two

lots, and the two buildings on each proposed lot already existed. He said he was ok with what was proposed.

Chair Davis said by subdividing the lot as proposed, there would be two lots that weren't quite as large as they were supposed to be. But she said there was no evidence that this would decrease the value of surrounding properties. She said this might even increase the value.

She said in this case, the issue of the public interest was related to the size of lots in this district, and that larger lots protected rural character and water quality. She said she thought that with the proper septic system construction, if the barn was turned into a residence, water quality would be protected. She also said the look of the properties would be protected, noting that no additional driveway cut was proposed.

Chair Davis said that concerning the hardship criterion, she didn't think there was a fair and substantial relationship between the general public purpose of the Ordinance provision and its specific application to this lot. She said allowing the property to be made into two lots would mean they would look like other lots in the area, and the way they had once looked. She said the proposed use was reasonable.

She said substantial justice would be done in granting the variance because other lots in the area were of a similar size.

She said the spirit and intent of the Ordinance was to address visual crowding and water quality issues, and said granting the variance would be not be contrary to this. She summarized that she thought the application met all five variance criteria, and said there should be a condition concerning septic system approvals. She also said the Planning Board should take a close look at what it would take to make the barn into an actual residence.

Mr. Gottsacker said he was on the ZBA when the applicants had come in with their previous variance application. He said he agreed with what other Board members had said, and said he had written a condition regarding the cemetery.

***Carden Welsh MOVED to approve a petition submitted by Alexander & Alexandra Bakman, Durham, New Hampshire, for an Application for Variance from Article XII, Section 175-54 of the Zoning Ordinance to create one additional house lot from an existing residential property where both lots would not meet the minimum lot size requirements, subject to the following conditions: that the Planning Board take special care with any septic system approvals to minimize or eliminate impacts on Great Bay; and that the Planning Board determine the appropriate deed restriction regarding the cemetery. The property involved is shown on Tax Map 11, Lot 24-4, is located at 118 Piscataqua Road, and is in the Residence C Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.***

Break from 8:58 to 9:05

Ms. Woodburn returned as Chair during the break.

**D. PUBLIC HEARING** on petition submitted by Warren R. Brown, Brown Living Trust, Durham, New Hampshire for an **AMENDMENT TO A PREVIOUSLY APPROVED APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Durham Zoning Ordinance to permit the subdivision of a lot into two lots where one lot is less than the required minimum lot size of 20,000 square feet. The amendment would allow for the removal of the deed restriction that the lot use must be an owner-occupied single family home. The property involved is shown on Tax Map 2, Lot 1-9, is located on Edgewood Road and is in the Residence A Zoning District.

Chair Woodburn asked Mr. Johnson to read into the public record a letter from the Browns, who were unable to be present at the meeting.

Mr. Johnson read the letter out loud.

In January 2010 our request for a variance to divide our property at 34 Edgewood Road and to create a nonconforming lot was approved by the Zoning Board and subsequently the Planning Board. In addition to meeting all the standards of the Zoning Board, we agreed to "the condition that there will be a deed restriction on the smaller property restricting the lot use to a single family owner-occupied structure." We are now asking the Zoning Board that we be permitted to remove this language from the deed.

In presenting our original application for a variance to the Zoning Board we were willing to restrict the lot to a single family home. We had lived in this very neighborhood since 1974 and were well aware of concerns regarding student rentals. However, the actual language that was approved was not simply that a single family home should be built but that the lot would be "owner occupied." It was clear to us, to the ZBA, and to our neighbors that we were all trying to prevent the lot from turning into a student rental. However, we now see that this language is creating a hardship for us in selling the property and it places a greater burden on our property than exists for any of the abutting properties or other properties in the neighborhood.

From a buyer's point of view, the "owner occupied" language suggests that they can never rent their property, not even to non-students and not even if they had to be away for a short-term or had to leave the area before they could sell their house. On four separate occasions we have rented our house so that we could go on a year-long sabbatical from the University. The "owner occupied" language would prevent the owner of this lot from renting in a similar case.

We have already experienced the detrimental effect of this language on our ability to sell the lot. In March a couple signed a sales agreement. Subsequently, when they read the deed, they withdrew from the sales agreement because of the owner-occupied restriction, not because they

planned to rent to students, but because they wanted the flexibility to rent their property, if necessary. After this experience, we asked our realtor to inform interested buyers up front about the restriction. Several potential buyers have expressed interest in the lot, but when told about the deed restriction, they have declined to pursue the purchase.

We are now asking that the ZBA and Planning Board to permit us to remove this language from the property deed. Such a restriction is not placed on any other property in the neighborhood. A number of houses have accessory apartments and home owners are free to rent to whomever they wish, including to students. If the town has no legal recourse to keep students from renting single family homes in in-town residential areas, we do not feel that the burden should be placed on individual property owners to help solve this problem. The town can only rely on the good sense of property owners and their desire to maintain the quality of their neighborhoods. In our neighborhood we have had many, many discussions of this troubling matter of students rentals, and we and our former neighbors have been dedicated to do what we can to maintain our neighborhood as a single family neighborhood.

Our earlier application met all the criteria that the Zoning Board applies to such a variance. Removing the conditional language from the deed will not change this, since it would only allow our deed to be consistent with the deeds and regulations that apply to all of our neighbors. We originally agreed to the language to assure our neighbors that the house would not be rented for student housing, but since any of our neighbors can rent their houses to students, this restriction places an unfair burden on us now and on the people who ultimately buy the lot. We are being asked to guarantee to our neighbors something that they are not obligated to guarantee to us or to the future buyer. Too, it is highly unlikely that a buyer will buy this lot and build a brand new house for the purpose of renting to students. It is more likely that some of the older homes in the area would be rented to students (as is the case currently at 31 Edgewood Road and numerous other houses on Edgewood closer to the University).

We, therefore, ask to be allowed to sell our property without this restriction that does not apply to other properties in the area.

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

**Mr. Hutar, 24 Meadow Road**, first read into the public record a letter from Therice Willkom, 24 Meadow Road. The letter urged that the ZBA preserve what was left of the single family residences in her neighborhood, and not approve what the applicants were now asking for. She said a rental property there would be detrimental to the neighborhood.

Mr. Hutar then said it had been wise to put the restriction on the previous approval, that the house on the new lot would be owner occupied. He said when the new lot was created, Attorney Bruton had heavily premised his arguments for granting the variance that this would happen..

He said this effort had been crucial in lessening the resistance of residents living in that area to the previous approval. He said Attorney Bruton had borrowed an argument from a recent ZBA decision allowing a variance, and he provided details on this. He said he lived in a neighborhood that when first created, had homes that were about 1300 sf. He said today, the average size of a new dwelling was about double that.

Mr. Hutar said the residents were led to believe that the applicants would follow the deed restrictions, and fit the design plans into the character of this 1940's neighborhood. He said

the crux of the problem was to decide what was beneficial in the long run for the community that continued to live here. He said he thought that “owner occupied” didn’t mean that someone had to be in their home 24/7.

He said the neighbors wanted to work with the Browns, and noted that the neighbors were already losing the green space/buffer area, which would result in some runoff issues. He also noted that multiunit dwellings were allowed in the RA zone. He said single family occupancy was crucial, and said “owner occupied” needed to be further explained by the agents of the owners.

**William Johns, 25 Meadow Road**, said he lived across the street from the property, and said they had to be careful about the definition of “owner occupied”. He said the previous approval for the subdivision had happened because of that restriction, in order to satisfy the neighborhood, as well as the Browns’ own personal beliefs.

He said he believed that if a unit went in there involving more than one family or student rentals, it would devalue his own property and others around it because of noise issues, etc. He said it was a family oriented area, and having students there would really be a detriment.

Mr. Gottsacker said what was permitted in the RA district was only single family residences, and not duplexes or multifamily units.

There was discussion. Mr. Johnson said duplexes, multi-family units and elderly housing were also permitted uses in the RA district, along with single family homes.

**Jahnay Pickett, 34 Edgewood Road**, said she had bought her property from the Browns under the condition that the new lot that was separated off would be owner occupied. She said she absolutely believed that anything less than this would devalue her property. She said the Browns were wise and generous to consider the neighborhood they had been a part of, with this condition. She said she didn’t think it was appropriate for them to back out of this now. She said that land was her buffer, and said she was against the variance request.

**Milton Martin, 81 Madbury Road**, said he lived directly behind the lot in question. He said the problem he had was the language “owner occupied”, and he asked how a situation was addressed where the owner was deceased, didn’t live on the property anymore, or if the property was vacant for a period of time. He said he had great compassion for the idea of this area remaining a single family neighborhood. But he said the major issue he had was this language, and whether it would stand the test of time.

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

Chair Woodburn said when the original variance was granted to the Browns in 2010, she and Mr. Gottsacker weren’t present at the ZBA meeting. She said she’d like to hear the



points of view of Ms. Davis and Mr. Welsh, who were at that meeting.

Mr. Welsh said Attorney Bruton, representing the Browns, had agreed up front that the property would be owner occupied. He said there was a lot of concern expressed by the neighbors about the size of the lot, possible impacts on vegetation, and possible infringement on the niceness of the neighborhood. But he said the variance was approved.

He said resident Jay Gooze had spoken in favor of granting the variance, given that there would be a restriction on renting the property. He said the offer to put the restriction on was germane to the discussion, and wasn't simply tacked on at the end.

Ms. Davis noted that this condition was offered by the applicant. There was discussion.

Mr. Welsh said Ms. Wilkomm had still been against the variance application despite this offer, and said there was a lot of discussion by the Board.

Ms. Davis agreed that even with the stipulation, some neighbors were against the variance request. She said Ms. Wilkomm had been concerned with where the house was proposed and about possible crowding, and said she didn't think the offer to make the property owner occupied had changed her mind and the minds of some others.

Mr. Gottsacker said he wasn't at the meeting, and was surprised when he read the Minutes of the meeting. He noted that he had a lot for sale, and could not restrict who he could sell it to. He said he would love to have someone build a single family home and live there, but if a buyer said he wanted to build a rental property, he couldn't say no. He said deed restrictions were in a different ballpark, and said he had some real questions about whether this deed restriction was legal.

Chair Woodburn noted that Attorney Bruton had put this idea forward.

Mr. Gottsacker said if it wasn't legal, one would think that Attorney Bruton would have said something. He said he would like the Board to continue this application, and in the mean time get an opinion from the Town Attorney.

There was discussion about this idea, and about whether this should be the Board's concern. There was also further discussion about whether the restriction was legal.

Chair Woodburn agreed that it would be a good idea to get a legal opinion. She said it was likely that if the ZBA denied this request for an amendment to the previous variance approval, the applicants would be looking for some recourse, whether from the ZBA or from another party. She said it couldn't hurt the ZBA to be well informed by talking with the Town Attorney. She said another question was whether there was a way for the ZBA to assist in the clarification of what the deed restriction actually meant. She said she didn't know if it was their place to do this.

Mr. Johnson said he didn't have an opinion on that. He described his experience with

some so-called owner occupied properties over the past 10 years that he'd worked in Durham. He said there was nothing to stop a parent of a student from constructing a building on a lot, putting the son or daughter on the deed, and having them and two additional students live there. He said this would be considered an owner occupied building. He said by chasing away the families that wanted to buy this lot, they could wind up with an investor coming in and building a student rental house, moving their kid in, and selling it to another parent of a student in a few years. He said this kind of thing happened all over Town.

Mr. Gottsacker said it was clear that the applicants had previously offered the owner occupied deed restriction, and that this was a main reason that the application was approved. But he said the question was whether this was legal. He said the wording was overly vague.

There was continued discussion by the Board on how to proceed.

Chair Woodburn said another question was what it meant that the applicants were asking for an amendment to an existing variance.

There was discussion on what questions to ask the Town Attorney, and the following were listed:

- Is "owner occupied" legal
- Is an amendment to a variance legal, and what is the protocol if it is.
- Does the ZBA have the jurisdiction to deal with this, since it is a deed restriction.

There was further discussion about the fact that the only reason the variance was granted was because of the deed restriction. Chair Woodburn said if this went to court and the deed restriction was found to be illegal, the variance would go away.

Mr. Welsh noted that the applicants had offered the deed restriction, and the ZBA had accepted it.

***Jerry Gottsacker MOVED to continue the application to the July 12, 2011 ZBA meeting, and in the interim, get answers from the Town Attorney on these questions. Kathy Bubar SECONDED the motion, and it PASSED unanimously 5-0.***

Mr. Johnson said any new information from the Town Attorney would be shared with the public, and they would have the opportunity to comment on it.

- E. PUBLIC HEARING** on a petition submitted by Miklos Palfi, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XXIV, Section 175-139 of the Durham Zoning Ordinance to permit the installation of a septic system within 125 feet of very poorly drained soil. The property involved is shown on Tax Map 10, Lot 6-15, is located at 6 Gerrish Drive and is in the Residence B Zoning District.

Dan Marston of Epping Septic Tank Service said the system there now was a failed

system, so his company had to keep pumping the tank so effluent didn't run on top of the ground. He said it was a failed Enviro-septic system, and said he believed it had been put in about seven years ago.

He said the proposed replacement system would be further away from the wetland than the existing failed system. He said it was a stone and pipe system, and said these systems worked much better. He said the system had been State approved. He said he believed that the variance request met all 5 variance criteria, and spoke briefly about this.

Chair Woodburn said ZBA members were under the impression that the higher tech septic systems were better.

Mr. Marston said the effluent was cleaner when it came out of an Enviro-septic system, but said the average system lasted 10 years, while the average stone and pipe system lasted 30 years. He said it wasn't a maintenance issue, and said the Enviro-septic systems were designed to clog, explaining that the purpose of the fabric filter in the system was to clean the effluent, which it did, but the filter eventually clogged and the only way to fix it at that point was to dig it up.

Chair Woodburn said hearing the opinion from the engineer on the short life of the Enviroseptic systems was dismaying to the ZBA.

There was discussion by the Board on the Environseptic systems, which the Board had been allowing in sensitive areas. Chair Woodburn said they were great for as long as they lasted. She suggested that the Board could include conditions that said these systems needed to be inspected etc.

Mr. Johnson said if there was enough land, stone and pipe systems were the way to go. He said the Clean Solutions system were a newer technology, and owners were obligated to maintain them on a certain schedule.

Chair Woodburn said it might be a good idea for the ZBA to have a workshop, where the Town Engineer and some septic engineers could come in to discuss this issue. She said they perhaps could also ask the NH Office of Energy and Planning to do a workshop on this.

Mr. Johnson said a NHDES person could perhaps do a workshop in Durham. There was further discussion, and Board members agreed this was a good idea.

Mr. Johnson said he would try to schedule something as part of a regular ZBA meeting, depending on how many cases there were on the Agenda.

Mr. Marston said it was the only place to put the new system, and said it would be a major improvement.

Mr. Welsh suggested that perhaps it was better to violate the frontyard setback than the

wetland setback, and there was discussion.

Mr. Marston said it would be a hardship for the applicants if the system had to be put someplace else. He said they had already spent \$2,000 on this plan.

Mr. Fogg said installing a system in a location uphill with a pump would be a problem.

Chair Woodburn said this pertained to the specific characteristics of the property.

She asked if there were any members of the public who wished to speak for or against this application, and there was no response.

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

Mr. Gottsacker said there was a failed septic system, and there appeared to be no alternative to what the applicant proposed, and .

Chair Woodburn reopened the public hearing to ask about what would be done with the old, failed septic system.

Mr. Marston said it would be removed.

Chair Woodburn closed the hearing.

Chair Woodburn said all five variance criteria were met. She said substantial justice would be done in granting the variance. She said granting it would meet the spirit and intent of the Ordinance and said doing so would definitely be in the public interest. She said it would not result in a decrease in the value of surrounding properties, and also said there was a hardship, as the Board had discussed

***Ruth Davis MOVED to approve a petition submitted by Miklos Palfi, Durham, New Hampshire for an Application for Variance from Article XXIV, Section 175-139 of the Durham Zoning Ordinance to permit the installation of a septic system within 125 feet of a poorly drained soil. The property involved is shown on Tax Map 10, Lot 6-15, is located at 6 Gerrish Drive and is in the Residence B Zoning District. Kathy Bubar SECONDED the motion. The motion PASSED unanimously 5-0.***

### **III. Approval of Minutes –**

**April 12, 2011**

Page 1, Take out DRAFT on top. Also, last paragraph, should say "...would recuse herself for this application..."

Page 2, Font of last line on page is off

Page 3, 6<sup>th</sup> full paragraph, should read “..was approximately 60 ft...”

Also, 3<sup>rd</sup> paragraph from bottom, should say “mono-pine”

Page 5, 6<sup>th</sup> paragraph, should have just one period at end

Page 8, motion should say “...and dated 11/05/10

Page 9, 2<sup>nd</sup> full paragraph, should read “Mr. Gsottschneider said it sloped...”

5<sup>th</sup> paragraph from bottom, should say “Chair Woodburn said there was...”

Page 10, motion at bottom should say *Sean Starkey MOVED to approve.....and it PASSED unanimously.....*”

Page 11, under V. A., should read “...for 8 parking spaces...”

*Ruth Davis MOVED to approve the April 12, 2011 Minutes as amended. Kathy Bubar SECONDED the motion, and it PASSED unanimously 5-0.*

#### **IV. Other Business**

- A. Chair Woodburn noted that the Nancy Barrett had appealed the ZBA’s decision concerning her tent, and that the Board’s attorney’s reply was included in their packet.

Mr. Johnson said the hearing was scheduled for Thursday, and Chair Woodburn said she would be there.

There was brief discussion on the recent NH Office of Energy and Planning conference, which Ms. Davis and Ms Bubar had attended.

Ms. Davis noted that there was a challenge by the Legislature to the State’s Shoreland Protection Act, and there was discussion.

She also noted that Attorney Christopher Bolt did the Legal Update, and that he said expectations needed to be lowered about what the State could do, because it was out of money.

- B. Next Regular Meeting of the Board: **\*\*July 12, 2011**

#### **V. Adjournment**

*Jerry Gottsacker MOVED to adjourn the meeting. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.*

Adjournment at 10:16 pm

Victoria Parmele, Minutes taker

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Sean Starkey, Secretary