

These minutes were approved at the September 13, 2011 meeting.

**Durham Zoning Board
Wednesday July 12, 2011
Durham Town Hall - Council Chambers
7:00P.M.
MINUTES**

MEMBERS PRESENT: Chair Robbi Woodburn; Vice Chair Ruth Davis; Secretary Sean Starkey; Carden Welsh; Jerry Gottsacker; alternate Kathy Bubar

MEMBERS ABSENT: alternate Edmund Harvey

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

I. Approval of Agenda

There was discussion about Agenda Item II E, and whether the applicant was planning to bring forward more information than what was provided in Board members' packets. Mr. Johnson said his understanding was that professionals had prepared a plan that would be provided for the meeting. The Board agreed to leave Item II E on the Agenda.

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

II. Public Hearings

- A. **CONTINUED 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 noted that the last time this application was tabled, there were a number of questions:

- Is there such thing as amending a prior variance the ZBA had approved ?
- If so, was the ZBA correct originally, in granting the variance with restrictions ?
- Does the Board have the ability to amend the previous variance and give more description so the restriction can be further defined ?

She said she'd talked to the ZBA's attorney, and said the answer to the first question was

yes. She said that regarding the second question, if the Board had brought up the idea of a variance with restrictions, it might not have been in a good position to defend itself. But she said since the applicant's attorney had brought it to the Board, it was allowable.

Mr. Gottsacker said his concern had been whether it was discriminatory.

Chair Woodburn said the Board couldn't do that, but said because the applicant had brought the restriction forward, it could be put in there. She said she didn't get a description as to whether it was discriminatory, but did describe the restriction to Attorney Spector.

Mr. Gottsacker said he'd done some broad legal research on this issue. He provided details on this, and said it seemed to jive with what Attorney Spector had said.

Chair Woodburn said following the discussion with Attorney Spector, Mr. Johnson indicated that the applicants had asked if there were answers to the questions the Board had asked its attorney. She said these answers were passed along to the applicants, and they wrote a letter in response.

She said the Board could craft more definitive language regarding the restriction if they wanted to, but said they needed to remember that this would be creating a precedent for any other applicant who came before them. She said if they chose to go in that direction, she thought the wording would need to be well crafted and reviewed by their attorney.

Mr. Starkey read the letter from the Browns.

"If the ZBA will not approve the removal of the deed restriction on our lot and chooses to develop a definition of "owner-occupied single family," we believe that this definition should allow for at least a rental period of two years at a time. Professors at the University do take such leaves, combining sabbaticals and teaching at our institutions or conducting research on fellowship. Also people may be temporarily relocated for business reasons, even to other countries, yet want to maintain their permanent residence in the U.S. The owner of this lot should be permitted to do this. We do not think that there should be any stipulation about the number of years between such rental periods. This would be putting an unfair restriction on the owner of this lot. The two year period would still be a disincentive to anyone wanting to rent to students. We are not available for a conference call the committee this evening, but we plan to talk to the attorney who assisted us in the original variance application, when we return to Durham in September....We ask the committee to recall the statements we made in our earlier letter about this matter and our desire to be treated fairly in relation to our neighbors in the use of their property."

Chair Woodburn opened the public hearing.

William Johns, 25 Meadow Road, said that with the original application to subdivide the property, he had had no qualms about dividing the land, etc. But he said he was against the

change of language the Board was now talking about. He said the restriction language had originally been brought forward by the applicants' attorney. He said if he was the owner of the house that was part of the subdivision and bought it in good faith with the restriction, and the restriction language was changed, he would consider this a breach of contract, whether by the applicants or the ZBA.

He noted that the houses on Meadow Road now were all owner occupied, and said some residents, including the Browns, had rented to families when they were on leave. He said he could understand what the Browns were saying they thought was a restriction, although he didn't see it that way.

Chair Woodburn asked for clarification on this.

Mr. Johns said when the Browns had previously been on sabbatical, they had rented their house 2-3 times to families, not to students. He said he didn't think any of the neighbors were saying this kind of thing couldn't be done, and said the real thing he was worried about was a student housing project such as a duplex with three students on each side being built. He said a lot of people on the street had small apartments and rented them, and were careful about the noise. He also noted that what the Browns were selling their property for was almost twice as much as the assessment.

Jahnay Pickett, 34 Edgewood Road, said her understanding was that a single family home could be built on the lot next door. She said even with that, it was a narrow lot, so anything that was built would be right next to her. She said she had called her title insurance company that day, to see what her legal position would be if the restriction was changed. She said she had bought the house on the basis of the restriction that there would be a single family home.

Chair Woodburn asked Ms. Pickett how she felt about the idea of defining what "owner occupied" might be.

Ms. Pickett said she didn't have a problem with renting to families selectively when they were on sabbatical, but said she would have a problem with a two year rental. She said she was sorry she hadn't thought to speak to her attorney sooner.

Milton Martin, 81 Madbury Road, said the Browns had been represented by counsel with the original application, and put the deed restriction in. He spoke further on this, and said he believed this was now a banking problem.

Jaroslav Hutar, 24 Meadow Road, first noted that the agenda stated that the lot was on Edgewood Road, but it was actually on Meadow Road and was part of that neighborhood. He spoke about the degree of bankability/marketability of the property. He said that concerning the hardship for the Browns, there was also a hardship to the person who bought the house with certain promises. He also said there was a difference between a sabbatical and a business trip that might take 16 years to hunt down a fugitive. He said he would support 12 month rentals, and said 24 month rentals were more like a long term lease.

Mr. Hutar read a letter from **Therice Willkom, 24 Meadow Road**, which said that if the restriction, which was the whole reason for the variance, was removed, she believed that the whole process had to start over again. He said he agreed with this, and said if the main reason for granting the variance was no longer there, there could be challenges on either side. He spoke further on this.

Mr. Johnson noted that concerning Mr. Johns' comments, the variance was for an owner occupied single family home, and said right now, duplexes were not allowed in that zone.

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

Chair Woodburn said the question before the Board was whether they felt that providing added definition to "owner occupied" was merited or not.

Mr. Welsh said he was inclined to leave things as they were. He said the Board had approved the restriction in line with granting a variance that was significant.

There was discussion between the Board and Mr. Johnson about how he would be the person who would be interpreting the restriction and enforcing it. Chair Woodburn asked Mr. Johnson how he would handle a situation where the property was rented out when the owners were on sabbatical, and a neighbor came to him and complained about this.

Mr. Johnson said he would write a letter that the owners were in violation of the Zoning Ordinance, and would start a legal action. He said there would be a land use fine, which for the first offense, which could max out at \$2,475. He said the Town would have to go to Superior Court to get an injunction to force the tenant out. He said that could probably be delayed for the entire rental year. He also said there was also nothing to stop Mr. Welsh and his 19 year old son from buying the Browns' property jointly, and having the son live there with two roommates.

Mr. Welsh noted that this was true of any house in Durham, and Mr. Johnson said that was correct.

Ms. Davis said she didn't think the Board would be placing deed restrictions on future variances it granted. She said perhaps another lawyer would come before them and offer a deed restriction, but said she thought it would be a fairly rare occurrence. She said she thought they could create a better definition of what owner occupied meant, and suggested that Chair Woodburn could present some wording for the Board to look at. But she said if the Browns really wanted to see the language modified, they should have had their legal counsel present.

Mr. Starkey said having come from the real estate industry, he realized that this was a banking issue, and noted that deed restrictions could cause all kinds of problems when a property was being sold. But he noted that properties could be bought without licenses,

making deed restrictions a non-limiting factor. He said the Board hadn't come up with this restriction, and said based on that, he didn't see any reason for them to more narrowly define what an owner occupied single family home meant here. He said he thought the wording should be left as it was.

Mr. Gottsacker said he agreed with Mr. Starkey and Mr. Welsh. He also noted that Attorney Spector had said the original language in the restriction came from the owner, and had advised the Board against adding language. He said the two year rental period proposed by the Browns, to him, meant students, and said a related issue was what the condition of the house might be after two years. He said it would therefore be unlikely that an owner would do this. Noting that he was a landlord, Mr. Gottsacker also said it was unlikely that it would be investor owned and rented because this would result in a negative cash flow. He said the more likely scenario was what Mr. Johnson had described.

Chair Woodburn said she was inclined to say the same thing, especially because the Browns' property was sold based on the restriction. She said the applicant could ask for a rehearing, and as part of this could come forward with a potential definition. She said any hardship here was self imposed, or imposed by counsel.

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

- B. **PUBLIC HEARING** on a petition submitted by Douglas Bencks, Durham, New Hampshire on behalf of the Durham Public Library, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 and Article XXIII, Section 175-129(A) of the Durham Zoning Ordinance to permit the construction of a 22 square foot free-standing sign in the public right-of-way. The property involved is shown on Tax Map 2, Lot 7-1, is located at 49 Madbury Road and is in the Residence A Zoning District.

Chair Woodburn recused herself for this application, and Ms. Davis served as Chair in her place.

University planner Doug Bencks reviewed the site plan materials that had been provided, and noted the illustrations that showed the proposed location of the sign and how it would be seen from Madbury Road. He explained that because of the large hedges that ran along the entire side of the property on Madbury Road, and the recommendation that they not be disturbed, the sign needed to be placed in the public right of way. He noted that it would be located on the owner's (the Town) property, and at least technically speaking

this, was not in compliance with the Zoning Ordinance.

He noted concerns about safety, and said they were pushing the sign back as far as possible, and keeping it parallel rather than perpendicular to the street. He said the intent was that it would be consistent with the signage allowed in the Professional Office district, which was directly adjacent to it. He said the back of the property was in the Professional Office district, and the front of the property was in the Residence A district.

Mr. Bencks said the Town had approved using this property for its new library, which was a use that was consistent with the Professional Office District. He said the sign was a little bigger, but it seemed appropriate there because there was only a sidewalk on the other side of the street, and they wanted to be sure the sign would be visible and readable from the other side of the street as well.

Mr. Gottsacker noted that technically speaking, the variance wasn't needed because this was a Town owned property, and that this was being done as a courtesy.

Mr. Johnson said it was Town policy, and was the same courtesy that the DPW and the Police Department had followed. But he said according to the Zoning Ordinance, this didn't have to be done.

Mr. Bencks said they were following the guidance of the Town Administrator and Mr. Johnson, and wanted to make friends with this process, not enemies.

Chair Davis asked about the proposed location of the sign in the right of way, and also asked about where other road signs were located relative to the right of way. There was discussion that the hedge was all within the right of way, and would probably have to be cut back for safety reasons. Ms. Davis noting that right now the hedge came really close to the road shoulder.

Mr. Bencks said he would be happy to work with the DPW to ensure that any safety concerns were addressed.

Mr. Welsh asked what the objective of the sign was, and Mr. Bencks said it was to announce the location for the future library, noting that some people weren't yet up to speed on this. Mr. Welsh asked why the sign couldn't stay at 20 sf instead, and Mr. Bencks said it was a judgment call. He said the idea was to ensure that the sign would be readable from the other side of the street. He said it could be shrunk down somewhat if needed.

Mr. Welsh asked if the applicant would be amenable to that, and Mr. Bencks said the applicants wanted to be respectful of this if it was an urgent concern.

Mr. Welsh noted that he had been the lone dissenter concerning the variance that had been requested regarding the sign at the Durham Business Park. He said some people didn't like additional signs, because they wrecked the view for people walking by. He

said they had a point, and said there was a Zoning provision that said there could be a 20 ft sign.

Mr. Bencks noted that a 20 sf sign was allowed in the Professional Office District, but not in the Residence A District.

There was discussion. Mr. Johnson said in the Residence A district, a 6 sf sign, 5 ft high would be allowed, and said nothing was allowed in the right of way.

Chair Davis said Ms. Bubar would be a voting member for this application.

Mr. Starkey asked how long it was expected the sign would be there.

Mr. Bencks said if things went the way they were planned, there would be the opportunity to complete the fundraising this year, and to put forward a bond to the voters in March of 2012. He said construction would begin in the summer of 2012, and would be completed within a year of that.

Chair Davis said a nice sign there would be helpful with fundraising, and Mr. Bencks said absolutely.

There was discussion about the fact that the sign would measure 22 sf, and would be about 4 ft by 5.5 ft. Mr. Bencks said it would be in scale with the hedge. He noted that when the library was complete, the sign that would be placed there would be comparable in size to this, but would be set back from the right of way. He also said it would be perpendicular to Madbury Road.

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

Councilor Jay Gooze, Meadow Road, said if the sign was perpendicular, he would have a significant problem with it, but said he didn't think that a parallel sign would create a problem. He also said that regarding the fact that the sign would be close to bicyclists going by, the bike lanes were narrow to begin with.

He said the Town Council had voted to purchase this property, and he noted that plans to do so had been in the CIP for the last three years. He said he thought the consensus of the Council was that a new library would be an important part of Durham, and anything that could be done to get the word out to the public on it, especially during fundraising, would be very much in the public interest. He said he didn't think the sign would be a problem for abutters, and said he thought the application met all of the variance criteria.

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

Mr. Welsh asked Mr. Bencks why there was advertising on the sign, and Mr. Bencks said

this was a standard thing for a construction project. Mr. Welsh asked Mr. Bencks if he would be averse to removing it.

Mr. Starkey said a concern regarding this was that the companies involved would instead put their own signs on the site, which would be more ghastly, and wouldn't need to be approved by the ZBA.

Mr. Welsh asked what was to prevent them from doing that anyway.

Mr. Starkey questioned how the names on the sign detracted from anything, and Mr. Welsh said it was advertising.

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

Mr. Welsh said his concern was that the property was on the edge of a business district, but was a residential district, and he questioned whether he would want this sign next to his house. He said he understood the public purpose for this, and said he could sort of agree with a 20 sf sign, which was what was allowed in the next district, if there wasn't advertising. He said making it larger than what was allowed in the district as well as the district next to it seemed a bit excessive.

Mr. Gottsacker said he didn't feel strongly either way concerning granting the variance, but said perhaps it would be more appropriate to put the names of the companies involved on the website instead.

Chair Davis said it would be easier to catch the website name on the sign if it was there by itself.

Ms. Bubar said it had taken her awhile to determine what property was the site of the new library. She said a small sign wouldn't do it, and said something was needed that would catch the eye. She said she didn't have a problem with what was proposed because it would be helpful. She also said didn't have a strong opinion about having the names on the sign, but agreed that perhaps they could be left off and could be put on the website instead.

Mr. Starkey noted that the abutters on either side of the property and across the street were renters, and also said Xemed was behind the property. He said because the sign was going parallel to the road, he didn't think it would be a visual distraction. He said he didn't feel strongly either way about the variance application, and also said the names on the sign were not advertising and were tastefully done.

There was discussion about whether any Board members thought that any of the variance criteria were not met. Mr. Starkey said he thought all five criteria were met, and Mr. Gottsacker agreed.

Mr. Welsh said there was a reason to have zoning for signs. He said the specialness of this property was the hedges, and the fact that the Town owned it. He also said it was a good point that there were rental properties around it, so the area was sort of more commercial than residential. He said he wasn't sure why the sign had to be bigger than the 20 sf size that was allowed in the next zone, and also said the names on the sign were advertising, although it was tastefully done. He said if the names were taken off and the name of the website was made bigger, people would notice that name more.

Mr. Gottsacker agreed, and suggested that the Board could recommend that this be done, and then leave this up to the applicant.

Mr. Starkey said another thing to take into consideration was that the architect and contractor might be funding the sign. It was noted by Mr. Bencks that they were not funding the sign.

Ms. Bubar said she was thought the variance criteria were met.

Chair Davis agreed, and said the only point where there might be disagreement was in regard to having the advertising on the sign. She said if it was taken out, the name of the website would be made bigger, and agreed that the Board should leave this up to the applicant.

Sean Starkey MOVED to approve a petition submitted by Douglas Bencks, Durham, New Hampshire on behalf of the Durham Public Library, Durham, New Hampshire for an Application for Variances from Article II, Section 175-7 and Article XXIII, Section 175-129(A) of the Durham Zoning Ordinance to permit the construction of a 22 square foot free-standing sign in the public right-of-way, which was part of our package, with the recommendation that they consider removing the names of the architect and the construction company, and thereby emphasize the size of the website. The property involved is shown on Tax Map 2, Lot 7-1, is located at 49 Madbury Road and is in the Residence A Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Chair Woodburn returned to the table.

- C. PUBLIC HEARING** on a petition submitted by Milton T. & Edda M. Martin Jr., Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Durham Zoning Ordinance to allow for surface parking on a lot of record as a principal use. The property involved is shown on Tax Map 2, Lot 1-8, is located at 83 Madbury Road, and is in the Residence A Zoning District.

Mr. Starkey recused himself for this application, and Chair Woodburn appointed Ms. Bubar as a voting member.

Mr. Martin explained that he said he had purchased his house next door at 81 Madbury

Road in 1996, and said by 2007, it was realized that he and his wife needed more space. He explained that there were two driveway cuts on the property. He said the original subdivision that created the lot at 83 Madbury Road was done in 2008-2009. He said the plan had been to put a house on the lot, but in excavating the site, they had hit a large amount of ledge, right where the foundation was proposed. He said it was decided it would put them over budget to remove the ledge.

He said he had been parking his large green coach in the driveway at what was now 83 Madbury Road for several years. He noted that the hedges had been removed and by opening it up like this, the lot was now more attractive. He noted that they had removed some hot top from the property. He said it would take some time to redesign the house in a way that would allow them to stay away from the ledge, and said right now, he wasn't sure if he wanted to add to the existing house, or build another one on the 83 Madbury Road property.

He said the use of the lot to park his vehicles(s) was an accessory use, and hadn't changed since 1999. He noted that the three other vehicles there, besides the coach, were generally parked out back, and didn't impact traffic in any way. He said the coach was moved occasionally.

Chair Woodburn said the surface parking use proposed was called a principal use in the packet, but Mr. Martin's application called it an accessory use.

Mr. Martin said it was accessory surface parking, which it was before.

Chair Woodburn said it was now on a different lot.

Mr. Martin agreed, but said he hadn't moved the house, and the land was still in the same place. He said he just wanted to continue the same use.

Mr. Johnson said because the original property had been subdivided, there was no use on the 83 Madbury Road property. He said the first use on there would be a surface parking lot, or a campground, which was not an allowed use. He said Mr. Martin's intention was to own both lots, and put his camper on the lot in question. He said it would be a surface parking lot, accessory to the lot next door, which was under his ownership.

Mr. Gottsacker said his understanding was that parking the vehicle there was now a problem because the lot got subdivided, and Mr. Johnson said that was correct.

Mr. Welsh asked what would happen to this situation when the Martins went ahead with building the house, and Mrs. Martin said this could be 10 years down the road. There was discussion about the driveway for the lot, with Mr. Martin noting that it had existed already before the subdivision. He said he wasn't sure where it would go if there was a house on the lot.

Chair Woodburn said the existing curb cut was where it was, and said this issue would

come up when the plans for the property were developed in the future.

Mr. Gottsacker noted that the variance was needed because the lot was too narrow.

Mr. Johnson said where the new parking area would be and if the new house was built, Mr. Martin would be allowed to continue to park there because the sideyard setback requirements for a structure would be met.

Chair Woodburn said currently, until and if the house was built on the property, even though Mr. Martin would like the parking area to be an accessory use, it wasn't because there was nothing on the lot besides it.

Ms. Davis said when a house was built there, the parking area would become accessory to the primary use, so what the Board said now would only matter until that time.

Mr. Johnson said it wouldn't even be accessory, and would be a legal parking space for a family vehicle. He said if the applicants sold the house, they wouldn't want an empty lot of record, because someone might then want to rent parking spaces.

Mr. Martin said he didn't mind it if there was a condition that said the use would end if he and his wife sold their house.

Ms. Davis asked if the Board could perhaps limit the number of vehicles, and Mr. Gottsacker said he'd had the same question.

Mr. Johnson said the Board could do whatever it liked concerning this.

Mr. Gottsacker asked whether there was anything that could be foreseen in terms of possible future variances that would be needed when the house was built, because of this variance being requested.

Mr. Johnson said because of the ledge problem, the applicants might need to site the house too close to the property line.

Chair Woodburn said if someone else bought the property, they might not think the ledge was a problem. There was discussion. She also noted that there were minimal setback requirements for this lot, and that the allowed impervious surface ratio was pretty high.

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

Sean Starkey, 80 Madbury Road, said he lived across the street, and had lived there since 2004. He said he had no issues with what was proposed. He said the applicant had cleared the lot with hopes of building a house, but couldn't do that right now. He said the RV parked on the lot didn't stand out now anymore than it did before. He said he didn't notice it coming and going, and said it was kept pretty far back on the lot. He said the

Martins had done a great job with the property.

Mr. Welsh asked why the RV was being mentioned.

Mr. Starkey said the Board would be allowing the variance for a parking structure, and this was what would be parked there.

Chair Woodburn said the Board could put limitations on what could be parked there.

Mr. Johnson said the Board would be voting on the use, and could put conditions on the approval so it didn't become a student parking lot.

Mr. Starkey said the cars on the lot were hidden away, and said he believed that the variance criteria were met.

Councilor Jay Gooze, 9 Meadow Road, said he was in favor of granting the variance, but he also noted that the variance would run with the property, and the Martins could sell the property next week. He said unless the right conditions were put in, it could become a surface parking lot. He said he thought the Martins would be amenable to having a condition placed on the approval.

Chair Woodburn said variances went with a lot, unless a condition was put in that said if the property was sold, the approval would disappear.

Councilor Gooze noted that Mr. Martin could change his mind about what he wanted to park there, if the Board simply allowed surface parking on the lot. He suggested that the Board could specify that the variance was to allow the motor coach specifically, which was what Mr. Martin wanted to park there.

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

Mr. Gottsacker said it was unfortunate that the Martins had to come back for this variance, and said he believed that all 5 variance criteria were met. He said a condition of the variance should be that what would be allowed there was the RV coach owned by the Martins.

Chair Woodburn suggested that the Board could add another condition that once the property was sold, the variance would go away.

After further discussion, Board members agreed that all five variance criteria were met, with the conditions that had been discussed.

Carden Welsh MOVED to approve a petition submitted by Milton T. & Edda M. Martin Jr., Durham, New Hampshire for an Application for Variance from Article XII, Section 175-53 of the Durham Zoning Ordinance to allow for surface parking on a lot of record

as a principal use, such surface parking to be used by an RV coach or similar vehicle owned by the Martins and with the stipulation that this variance terminates when the Martins sell either property. The property involved is shown on Tax Map 2, Lot 1-8, is located at 83 Madbury Road, and is in the Residence A Zoning District. Kathy Bubar SECONDED the motion, and it PASSED unanimously 5-0.

- D. PUBLIC HEARING** on a petition submitted by Pamela Sakowski, MJS Insurance, Stratham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Durham Zoning Ordinance to allow for a change of use of a property from commercial to residential. The property involved is shown on Tax Map 2, Lot 8-8, is located at 39 Madbury Road, and is in the Professional Office Zoning District.

Ms. Sakowski explained that her husband had died of cancer and she had to take over his business. She said it was a residential property until 1994, when he got permission to make it into a commercial property. She said she'd sold the business because she was ill, but kept the building. She said she wasn't interested in it being a student rental, and understood the problems there could be with this. She also said she thought it would be difficult to rent the building commercially because there wasn't that much space downstairs. She said there were two rooms upstairs.

Ms. Sakowski noted a commercial property that was currently being developed on the corner (of Pettee Brook Lane and Madbury Road). She also said she thought her house was more amenable to being residential, and said she didn't plan on being a landlord who didn't pay attention to her property. She said she understood the student housing issues, and said her intention would be to have a family there.

She said the house next door at 41 Madbury Road was a rental, and said also said there was an apartment building next door as well.

Mr. Johnson noted that the Professional Office district went all the way up to the Library site, which was in the Residence A district.

Ms. Sakowski said the property was changed to commercial with the purpose of it being an insurance agency. She said with her husband not there, she wasn't interested in renting it commercially. She said it was a cape code house, and was located across from the Durham Family Health Center. She said had beautiful hard wood floors and was newly painted. She said she had gotten advice that it would be hard to rent as a commercial property because of the nature of the building.

Ms. Davis asked Ms. Sakowski if she had tried to sell it as a commercial property.

Ms. Sakowski said she had no intention of selling the property, and wanted to rent it. She said it seemed that what people were looking for in commercial property was smaller spots downtown. She noted that someone from Edward Jones had wanted to pay a minimal amount for renting her property, and said that process, along with talking with Mr. Johnson, had made her realize that there wasn't much floor space for a commercial use. She said she

wanted to be able to pay the taxes.

Ms. Davis asked Ms. Sakowski if she had tried to rent it as commercial space, and Ms. Sakowski said no.

Chair Woodburn asked what improvements would be needed if the property continued to be a commercial property, and Mr. Johnson said it was already set up as an office for an insurance company, accountant, etc..

Ms. Sakowski said the economics for a commercial rental property weren't good, because of low balling. She said considering the taxes, she wasn't sure it would be worth it.

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

Sandy Martin, 81 Madbury Road, said the property looked residential to him. He said that was probably the highest and best use for the property. He said he would rather see fewer businesses crawling up Madbury Road, and stay more in the downtown area. He said it made sense to revert the property back to residential.

There was discussion about the location of the property, with Mr. Johnson noting that there was a ramp on the property, as well as a large parking area.

Chair Woodburn asked if there were any members of the public who wished to speak against the application.

Steve Kimball said people often came before the ZBA asking for a waiver of the Zoning Ordinance, in order to be able to make more money. He said he didn't know if that was the intent of the Ordinance. He said the Professional Office was created to encourage professional office development there, and said if this was tossed out the window because someone could make more money, he didn't know what the point of zoning was.

Jay Gooze, Meadow Road, noted that the purpose of the Professional Office district, as stated in the Zoning Ordinance, was to provide an area for the growth of professional services and offices adjacent to the Downtown. He said one of the things the Town Council was looking for when it made this change was to see fraternities and sororities change into multi-use developments with offices downstairs.

He said he thought this property should stay as commercial, and said that was what the zone was meant to be. He said he thought it would destroy the purpose of the zone to say a better use was to rent it (as a residence). He said he thought the ZBA should uphold the Zoning Ordinance, and said he said he didn't think the variance application met the public interest criterion.

There was discussion that prior to the Zoning change that created the Professional Office district in 2000, the applicant's property was located in a residential zone. Chair Woodburn

said the building was residential in 1994, when it was made into a commercial property. She said the idea with the Professional Office zone was that that there was a lot of competition for space, and this zone would be a place where offices could happen.

Ms. Sakowski questioned whether Mr. Gooze should be able to speak about the zoning, since he had been on the ZBA before.

Mr. Gottsacker explained that anyone could speak during the public hearing.

Chair Woodburn said this was especially the case when someone had prior knowledge of why things were done. But she noted that she would have read the Purpose language in the Zoning Ordinance herself if it hadn't already been read.

Ms. Sakowski said she had not been involved with the insurance agency. She said if she was interested in money, she wouldn't have not rented the property for a year.

Chair Woodburn explained for Ms. Sakowski the process the ZBA needed to go through, including public comments.

Ms. Sakowski asked what the building to the left was, and she noted the rental property to the right. She asked if it had received a variance.

Chair Woodburn said the whole zone was Professional Office, and said if those residential uses existed before that Zoning change, they were grandfathered and could therefore continue until someone said he wanted to go commercial. She said once it went to Professional Office, it stayed that way.

Ms. Sakowski said she wasn't running a business there, and didn't think people would be interested in a cape cod house. She said this had nothing to do with getting more rental money. She noted that there were people who did want to put student housing there, and said maybe she should sell the property. She said she was just asking for a small change.

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

Chair Woodburn noted that the Board had talked about the purpose of the Professional Office zone, and why it was created. She said the idea was to expand opportunities for professional offices. She said there was so much competition for student rentals in pre-existing buildings that there was no competitive professional office space in Town. She said the zoning change was clearly a move to let that happen in that zone. She noted that she had faced this problem in trying to find professional office space for her business

Mr. Gottsacker said the dynamics of Durham regarding residential rentals and commercial uses were changing. He said the downtown was currently in the process of building several nice commercial properties, and said that concerning student rentals, the Capstone project was starting because the court case was done. He said it would be much more difficult for

any landlord to rent a single family home once Capstone was built out. He said it was hard to figure out what the dynamics of the property or the district were because things were in flux.

Chair Woodburn noted that regarding this particular property, Mr. Martin had said it looked like a house, so the question was why it shouldn't be one. She asked Board members what they thought about this.

Mr. Gottsacker said he felt both ways about this.

Mr. Johnson said they were not changing the classification from Professional Office to Residence A. He said it would stay Professional Office, but the Board would possibly grant a variance for residential use. But he said if someone came in and said he wanted to tear down the building and others nearby to put up an offices building, this was an allowed use. He said they would go to the Planning Board.

They reviewed the variance criteria.

Chair Woodburn summarized that there was no information on whether granting the variance would decrease the value of surrounding properties.

Regarding the public interest criterion, she said this was the gist of the variance request, and said it was controversial. She said the applicant had addressed this in a general way. It was noted that the applicant's paperwork on this wasn't in the packet, and Mr. Johnson went out to make copies.

Chair Woodburn said as defined by the Ordinance, the public interest would clearly be to encourage professional offices there, but she said the question was whether it was ok to have one, small residential like structure, stay as residential until someone bought it and changed it.

There was discussion on what the square footage of the building was. Chair Woodburn reopened the public hearing to ask the applicant about this.

Ms. Sakowski said there was about 858 sf on the first floor, and about 300-400 sf upstairs, where there were dormers.

Chair Woodburn went back to discussing the property value criterion, and noted that the application said no decrease in the value of surrounding properties would be suffered because the area surrounding it was currently in residential use.

There was further discussion about the public interest criterion.

Ms. Davis said the reason she had asked about renting or selling was that she thought that she could see it being modified if someone bought the property. But she said if it was rented as is as office space, it was a compact space. She said the upstairs couldn't really be rented.

Regarding the public interest criterion, the question was if it was contrary to grant variance. She noted that the ZBA had granted a variance to revert a commercial property back to residential.

Mr. Gottsacker asked whether, if the Board granted the variance for residential use, an owner would also have the ability to rent it as professional office space.

Mr. Johnson said no, and said if a person was interested in reversing the process, they would go straight to the Planning Board for an allowed commercial use, unless a variance was needed for other reasons.

Mr. Welsh asked if the three unrelated rule applied for this zone, and Mr. Johnson said yes, so if it was converted to residential, the limit would be no more than three unrelated people in the house.

There was further discussion on the public interest criterion.

Ms. Davis said part of her felt that turning it back to residential in this case was against the public interest, because having a commercial business there was a foothold of what Durham wanted to see in that area.

Mr. Starkey said he was going to go in the opposite direction on that. He said the current uses around that property were residential, and said the initial intent when the building was built was residential. He said the current owner had requested that it be changed to commercial, without having to do major renovations, leaving it essentially as a residential home. He said to bring it back to be used as residential wasn't against the public interest for two reasons. He said the building was never built for that purpose, and the remaining structures around it weren't being used for that purpose right now. He said it would not be contrary to the public interest to grant the variance.

Mr. Welsh said on either side it was residential, and asked what was behind it.

There was discussion that there were residential rentals behind it. Chair Woodburn said the Professional Office district was one lot deep, all the way down.

Mr. Johnson said it included Strafford Ave, and included fraternities/sororities and multi-unit buildings.

Mr. Starkey said the property was completely surrounded by properties being used as residential, because they existed prior to the change in the Zoning district.

There was discussion that it was residential use by students, subject to the three unrelated rule.

Chair Woodburn considered whether the hardship criterion was met. She said the applicant was saying the special condition of the property were that it was set up as a small single

family home, and things didn't balance in terms of the revenue one could get from renting it as an office.

Mr. Welsh said it was also relevant that it was surrounded by residential properties.

Chair Woodburn noted that the applicant said the proposed use was reasonable given the surrounding properties, and the fact that the property was residential until 1994.

Mr. Starkey said that was where he agreed that there was a hardship, because it was so much surrounded by residential properties that this could pose a difficulty in keeping it as a professional office. He said he thought there were plenty of people who wouldn't want to rent office space completely surrounded by rentals.

There was discussion.

Mr. Starkey said the hardship criterion was giving him a problem. He said he could see the applicant's side regarding the hardship, and said he wouldn't look for professional office space in an area that was surrounded by residential properties. He said with his work he needed to get out to people, and not just to people who surrounded him.

Chair Woodburn noted that there was the added benefit that the property was on a high traffic corridor.

Mr. Starkey said on the other hand concerning hardship, the applicant's husband had turned it into a commercial use, and since then, the Professional Office district had been created, so the property use conformed to the current district. He said the numbers in terms of what the property could be rented for were irrelevant to him. He also said the public didn't have an interest in her renting it.

Chair Woodburn said since these areas had been zoned as Professional Office, the Town was expecting the small houses there to be rented as Professional Office. She said if the economics worked out that the rents that one could get for professional office there didn't cover the taxes, there was an interesting conundrum.

Mr. Starkey said the Board didn't know that someone wouldn't offer the applicant 500,000 in order to tear the building down and build something else.

Chair Woodburn noted that the applicant had testified to that.

Mr. Starkey said whether the market could support it or not, the Town had made this the Professional Office district in the Master Plan, for the reasons stated at the public hearing and/or for tax purposes.

Mr. Gottsacker said the whole issue of taxes and financial liability was murky, and said he wasn't sure that it could be a part of the Board's discussion.

Chair Woodburn summarized that the Board was uncertain concerning whether the hardship criterion was met, had no evidence concerning whether there would be a decrease in property values if the variance was granted, and felt that granting the variance wouldn't necessarily be contrary to the public interest. She asked if everyone agreed with this.

Mr. Gottsacker said the public interest could be argued both ways.

Ms. Davis said she it felt that this was a good place to put an office, and made a statement about what the Town was trying to achieve.

There was further discussion on whether Board members thought there was a hardship.

Mr. Starkey said he was split on the hardship criterion, and he essentially repeated what he had previously said. He said he could argue this both ways. He said he was fine with the public interest, substantial justice, and spirit and intent of the Ordinance being met. He said the spirit and intent of the Ordinance was to build a professional office district, and said he loved the idea, but it wasn't there yet. He said he wouldn't force people to put that use there, and he noted again the existing residential homes that surrounded the applicant's property.

Mr. Gottsacker explained for the applicant that the Board had to go through the 5 variance criteria, and couldn't base its decision on anything other than them.

Chair Woodburn reopened the public hearing.

Ms. Sakowski said there was a hardship because part of the problem was that there were all these developments coming in downtown, which were competing with her property.

Chair Woodburn said those were commercial properties downtown, which was different than professional office.

Mr. Johnson noted that commercial property was anything that wasn't residential, and said the Professional Office district and others were potentially commercial districts.

Ms. Sakowski said she didn't know how many office buildings were going to be opening downtown. She said the nature of her building was that it wasn't big enough, and it was only done as commercial because her husband wanted to use it for a particular purpose, and that purpose was gone. She asked how many commercial spots were downtown, and said she didn't know what was not in the public interest, if there was already a lot of commercial space downtown.

Chair Woodburn said the commercial district downtown allowed commercial uses of various kinds, but said in the particular corridor in question, the Town was looking for professional offices.

Mr. Starkey also said the Town wasn't looking for retail stores there.

He said he could see that four of the five variance criteria were met except for the hardship criterion.

Mr. Welsh asked if would help if the Board could limit the allowed residential use until Ms. Sakowski sold her house. He said by then, it might be more definitive what the neighborhood was.

Mr. Starkey said no, and said he didn't think that would make things more definitive. He said he thought that in that zone, it wouldn't develop lot by lot, and instead would change when a developer came in and developed the majority of the area. He said he didn't see a developer buying a multi-unit building and saying he would put in three doctors' offices in an existing building, because of the all the rules that would have to be followed in order to redevelop the building.

There was discussion that the building in question already existed as a professional office.

Mr. Welsh said presumably when it sold, they would have a better feel as to whether they would want to continue to allow residential in that area.

There was discussion about this idea, and that the variance, if worded this way, wouldn't run with the property.

Mr. Welsh said one of the things the Board was concerned with was denying the public interest. He noted the comments made by members of the public, and said the Board could say it had heard them, and knew what the Zoning Ordinance required. But he said the Board could also say that they weren't there yet, because they had heard the testimony about the surrounding residences. He said they could allow the residential use under the current ownership but it would then go away, because what they really wanted was for it to be professional office space.

Mr. Starkey said if the Board did this, and the property transferred hands in 5 years, someone could walk in, understanding that he had bought a property in the Professional Office district, but it might still be surrounded by residential properties. He asked what the Board was supposed to say at that point if someone wanted it to be used as residential.

Mr. Welsh said he would say that was ok. He said if they were going to agree to it now, the only reason he would do so was because it was not what was intended.

Mr. Starkey said the intent now was completely different than it was back in 1994.

There was further discussion. Mr. Starkey said he couldn't say the hardship criterion was met, and also said testimony from the public had been compelling.

Chair Woodburn said this was a hard decision to make.

Mr. Gottsacker said a number of the criteria could be argued both ways.

Chair Woodburn said she wanted to give the applicant as much leeway as possible, given the circumstances and her compelling argument. But she said the Board needed to look at this application coldly, based on the criteria. She said in doing this, she truly believed that the definition of the zone, and the idea of extending that Professional Office down Madbury Road was a good thing. She said by granting the variance, they were yanking that potential movement back. She said she didn't know how that fit with the various criteria. She said she did think granting the application would be contrary to the spirit of the ordinance.

Mr. Gottsacker said if the Board denied this application, there was an opportunity for a rehearing. He said the applicant could get an attorney if she wanted to make some substantial arguments one way or the other, or wanted to reinforce or clarify some of these issues they were having difficulty with. He said right now he thought the Board should look strictly at the criteria.

Mr. Welsh asked if it would help Mr. Gottsacker if the use would end when the property was sold.

Mr. Gottsacker said no, although he understood the argument. He said the public interest was that the Zoning Ordinance was written in the interest of the public. He said the application didn't meet the purpose of the Professional Office district.

Ruth Davis MOVED to deny a petition submitted by Pamela Sakowski, MJS Insurance, Stratham, New Hampshire for an Application for Variance from Article XII, Section 175-53 of the Durham Zoning Ordinance to allow for a change of use of a property from commercial to residential because we feel that the application for variance does not meet the 3rd variance criterion, pertaining to unnecessary hardship criterion. The property involved is shown on Tax Map 2, Lot 8-8, is located at 39 Madbury Road, and is in the Professional Office Zoning District. Jerry Gottsacker SECONDED the motion

Mr. Welsh asked if the Board agreed that criteria 2, 4 and 5 were met.

Chair Woodburn said if it didn't meet one, that was it.

Mr. Welsh asked whether there was an appeal, it would be based on the one criterion.

Mr. Gottsacker said an appeal could argue the whole thing over again.

The motion PASSED unanimously 5-0.

E. **PUBLIC HEARING** on a petition submitted by William F. Getchell, Durham, New

Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIII, Section 175-59(A)(2) and Article XIV, Section 175-74(A&B) of the Durham Zoning Ordinance to allow the redevelopment of the primary residence, accessory buildings and septic within the wetland, shoreland and property setbacks. The property involved is shown on Tax Map 20, Lot 12-1, is located at 295 Durham Point Road, and is in the Residence C Zoning District

Mr. Getchell provided details on the current septic system on the property. He said he intended to build a larger home, and said there was no way a traditional septic system could be done there, so there was a hardship. He said he intended to install a Clean Solutions system, which would reduce the loading. He said it was an extremely steep property, and there were really no wetlands there.

There was discussion about what the application was actually for, and that it currently said it was to allow the redevelopment of the primary residence, accessory buildings and septic within the wetland, shoreland and property setbacks. Mr. Gottsacker said this was really a septic system application, and said the Board hadn't seen any plans for a new house yet.

Chair Woodburn said the Board had just been handed the plans, and hadn't had time to think about them and clarify the issues involved.

After further discussion, it was agreed to continue the application until the August ZBA meeting, so Mr. Johnson would have a chance to review the plans and determine what issues were involved.

Mr. Johnson suggested that the Board should do a site walk, regardless of what he determined in looking at the plans.

Jerry Gottsacker MOVED to continue the application to the August 9, 2011 ZBA meeting, and to do a site walk that day at 5:30 pm. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

III. Approval of Minutes – May 10, 2011

Page 3, a space is needed between the last paragraph and the paragraph above it.
Page 4, in the motion, there is an extra period after the word construction.

Sean Starkey MOVED to approve the May 10, 2011 Minutes as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

IV. Other Business

A.

Chair Woodburn made note of the fact that the Barrett Superior Court decision had come

back, and that this decision had affirmed the ZBA's decision. She spoke further about the fact that the applicant was appealing the Court's decision.

B. Next Regular Meeting of the Board: ****August 9, 2011**

V. Adjournment

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

Adjournment at 9:40 pm.

Victoria Parmele, Minute taker

Sean Starkey, Secretary