

These minutes were approved at the November 8, 2011 meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, SEPTEMBER 13, 2011
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Robbi Woodburn; Vice Chair Ruth Davis; Jerry Gottsacker; Sean Starkey; Carden Welsh (arrived at 7:17 pm); Alternate Kathy Bubar

MEMBERS ABSENT: Alternate Ed Harvey

OTHERS PRESENT:

I. Approval of Agenda

Chair Woodburn called the meeting to order at 7:02 pm.

It was noted that Agenda Item II A (Flannery variances application) had been continued, and Item II F, (Sigma Beta variances application) had been withdrawn. There was discussion that the site walk for Item II A would be rescheduled.

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

II. Public Hearings:

- A. Continued Public Hearing** in a petition submitted by Bruce M. and Sarah Flannery, Durham New Hampshire for an **Application for Variances** from Article XII, Section 175-54 and Article XII, Section 175-59 of the Durham Zoning Ordinance to allow for the construction of a garage addition with a 2nd story apartment and septic system in the wetlands and building setbacks. The property involved is shown on Tax Map 14, Lot 26-0, is located at 64 Wiswall Road, and is in the Rural Zoning District.

Continued

- C. Public Hearing** on a petition submitted by David E. Hills, Durham, New Hampshire, for an **Application for Special Exception** from Article XXIV, Section 175-139 of the Durham Zoning Ordinance to allow for the location of a leach field. The property involved is shown on Tax Map 11, Lot 22-3, is located at 35 Piscataqua Road, and is in the Residence C Zoning District.

David Hills said this application pertained to the 53 acre lot, which comprised the agricultural fields, woods and farm stand. He noted that 48.12 acres of the parcel was recently placed under an agricultural easement. He said at the time this was done, two areas of the property were excluded from the easement so they could be used for purposes other than agriculture and open

space. He said the first area was the 2.32 acres surrounding the farm stand, and the second was the 3.44 acres along Watson Road, which was reserved as a residential building site and was intended to be subdivided from the larger parcel.

He provided details on the special exception application. He explained that in order to create the subdivision, a suitable site for a leach field must be shown by at least two test pits, indicating a depth of at least 24 inches to seasonal high water table, and 48 inches to ledge. He said the proposed leach field area for the 3.44 lot was defined by three test pits, which were witnessed by the Zoning Administrator and the Town's independent soils scientist in July 2006, and said two of the test pits, 113 and 118 met the current standards.

Chair Woodburn agreed that test pits 113 and 118 did comply, and said 114 was the only one that didn't. She asked if only two test pits were required.

There was discussion that currently, under then new regulations, two test pits in compliance were needed.

Mr. Johnson said that at the time this was approved, the requirement was that there be 4 test pits in compliance.

Mr. Hills said this was originally supposed to be submitted 2 years ago, and said the regulations had changed since then.

Chair Woodburn said the Town currently required two test pits in compliance, and said there were two test pits in compliance with this submission. She asked why the special exception was therefore necessary.

Mr. Johnson said the lot was created under the old regulations, and the test pits were done in 2006. He said the applicant should have come forward in 2006 for approval for the special exception for the one lot.

Chair Woodburn said this didn't exist as a subdivided lot yet.

There was discussion as to whether it was a lot of record yet. Mr. Gottsacker said based on his experience, there wasn't a subdivided lot yet because Mr. Hills hadn't yet been to the Planning Board. There was further discussion.

Mr. Hills said he hadn't been aware that the regulations had changed.

Mr. Welsh arrived at 7:17 pm.

Mr. Johnson suggested continuing the application to the next meeting. He said he would check with the Planning Department to make sure there weren't any issues the Town wasn't aware of. He said if everything worked out administratively, the case could be dismissed.

Mr. Starkey MOVED to continue the application to the next meeting. Mr. Gottsacker

SECONDED the meeting, and it PASSED unanimously 5-0.

- B. Continued 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. Gottsacker said he recalled that the Board had a discussion last time that one of the variances that was needed hadn't been noticed. He said the Board had deliberated on the other variances requested already.

Board members agreed that they didn't have to do this again, and would just deliberate on the final variance being requested now.

Mr. Getchell reviewed how the variance criteria were met. He said granting the variance would not result in a decrease in the value of surrounding properties, noting that the condition of the current house was poor, and it had only about 900 sf of living space. He said the proposed new house would be approximately 2000 sf, would be energy efficient, which should increase rather than decrease the value of surrounding properties.

Concerning the public interest variance criterion, he said the purpose of the Wetlands Conservation Overlay district and Shoreline Protection Overlay district was to provide a buffer for the wetlands, shorelands and human resources. He said the new structure would be about 40 feet further from the closest waterline than the existing structure was, so allowing the variance would enhance those resources. He said the public health, safety and general welfare would not be adversely affected by this variance.

Mr. Getchell said denial of the variance would result in unnecessary hardship. He said the property had a great deal of vertical contouring, as it was mostly a hill rising up from the Little Bay. He said there was a great deal of shoreline setback because of the "Hidden Cove" situated to the north and the Little Bay situated to the east. He also said there was a 100 ft wide easement to PSNH running through the middle of the best buildable portion of the property. He said if the variance was not granted, he would be unable to improve the property to a condition that would allow a family to dwell there, constituting an unnecessary hardship peculiar to his property.

He said the existing house already existed within the overlay districts, and said substantial justice would be done by allowing a new home to be constructed, allowing the living conditions of the property to be improved, and enhancing the estuary environmentally by moving the house 40 feet further from the waterline.

Mr. Getchell said granting the variance would not be contrary to the spirit and intent of the Ordinance. He said the spirit and intent of the Ordinance was in keeping with the public interest

and maintenance of the natural environment of the Little Bay Estuary. He stated again that the purpose of the Wetlands Conservation Overlay district and Shoreline Protection Overlay district was to provide a buffer for the wetlands, shorelands and human resources. He said the new structure would be about 40 feet further from the closest waterline than the existing structure was, so allowing the variance would enhance those resources. He said there was one single family dwelling on the property now, and said there would be the same as a result of granting the variance.

He reviewed a chart he's provided to Board members on the footprint and volume percentages. He said if the deck were included, the footprint percentage would decrease. He said if it were excluded, the new house footprint would represent an increase of 50%.

Mr. Getchell explained that he'd done two calculations for volume because he wasn't sure if there would be 8 ft or 10 ft ceilings. He said the worst-case scenario, excluding the cellar, with 10 ft ceilings, was a 168% increase. He said with 8 ft ceilings, it would be a 114% increase, which he noted was far greater than 30% increase allowed by the Zoning Ordinance. But he said it was an average size home that was proposed.

Chair Woodburn asked if there was anyone to speak for or against the application. There was no response.

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

Chair Woodburn said the footprint and volume percentages were much higher than what was allowed, but said the building would be further back. She also noted that if the deck was included, the footprint increase wasn't that much.

Mr. Welsh said he wasn't at the site walk. There was discussion about the site layout and the degree of slope, in regard to water that would run off the site. Chair Woodburn provided details on this. She said with the bigger footprint of the house, there would be more water going over it, but said she didn't think ZBA members were concerned about erosion getting to the water or wetlands.

Ms. Davis said she believed that the Board had previously determined that what was proposed would be better than the existing situation.

Chair Woodburn reopened the public hearing.

Mr. Getchell said there was virtually no topsoil, and said it was basically oak leaves and rock.

Chair Woodburn closed the public hearing. She said then said the main issue was whether the increase in volume in this location on this particular lot was a detriment to the environment.

Mr. Gottsacker said he thought the variance application met all the criteria. He said what the applicant proposed would be a better situation, and would be quite a ways back from the Bay. He also said 2000 sf was not a McMansion, and noted that a lot of the volume would come from the

Chair Woodburn said the applicant's presentation concerning how the variance criteria were met was great, and said she believed all the criteria were met.

Mr. Welsh said his only concern had been runoff, and said it sounded like Board members were satisfied concerning this issue.

Mr. Starkey MOVED to approve 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, and amended to allow the proposed primary residence to be increased by more than 15% in footprint, and to be increased by more than 30% in volume, as shown on the hand drawn plan dated August 9th, 2011, which is the Final Location plan. 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. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

- D. Public Hearing** on a petition submitted by Nevada Land and Water Company, Newmarket, New Hampshire on behalf of Cumberland Farms Inc., Framingham, Massachusetts for an **Application for Variances** from Article XXI, Sections 175-110, 175-111, 175-115 and 175-116 of the Durham Zoning Ordinance to allow for parking and loading for the potential redevelopment of a commercial property. The property involved is shown on Tax Map 4, Lot 49-0, is located 3 Dover Road, and is in the Courthouse Zoning District.

Adam Schroadter said he was a State Representative from Newmarket, and was also an alternate member of the Newmarket Planning Board, a member of the Newmarket Economic Development Committee, and a member of the Heritage Commission. He said he was involved with this property as secretary of the Nevada Land and Water Company, which was under contract to purchase the property currently owned by Cumberland Farms. He said the company had made them a registered agent.

There was discussion that the paperwork for the variance application was very incomplete.

Mr. Schroadter explained that he had a 90 day contract, so had wanted to get on the ZBA's schedule, noting that the day he got under contract was the day before the submittal deadline. He said it hadn't been clear if he needed to go to the ZBA. He said he'd worked with a draftsman at Newmarket Plains, who had put together the conceptual plan that he and Tom worked off of in terms of whether a variance application was needed. He said since then, he'd had hired survey company, and said he'd received the plans from the company that afternoon. He said it looked like a different picture than what Newmarket Plains had drawn up, and said a variance request wasn't included in these new plans. He said he didn't think a variance was needed.

Mr. Gottsacker recommended continuing the hearing, in case something came up, so Mr. Schroadter wouldn't have to go through the whole thing again.

Chair Woodburn agreed.

Mr. Schroadter explained that if something did arise and he had to come back, he would be under the gun to have completed everything.

Mr. Gottsacker recommended that the information get to the ZBA well in advance of the meeting.

Mr. Schroadter said he understood that he would need to do this.

There was further discussion. Mr. Johnson asked that Mr. Schroadter leave a set of plans with him, so he could determine whether any variances were needed.

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

- E. Public Hearing** on a petition submitted by Alexander & Alexandra Bakman, Durham, New Hampshire,, for an **Application for Variances** from Article XII, Section 175-53, Section 175-54, and Article XIII, Section 175-65(F) of the Zoning Ordinance to create one additional house lot from an existing residential property where one lot would not meet the required frontage, to allow the existing septic system for one of the lots to be within 65 feet of the delineated wetland, and to allow the accessory building on the second created lot to be used for Light Manufacturing. 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 they were before the ZBA previously, when the Board had granted them a variance concerning the minimum lot size. He said the property had a residence as well as what he had called a barn structure. He said some research on the property had turned up the fact that it was originally approved as a subdivision in 1978. He noted the original subdivision plan, with two lots of record. He said the applicants were basically were trying to re-create the original lot line between the two lots, except for a minor deviation as it hit the shorefront so that the dock was included with the residential lot.

He said there were four variance requests now. He said three would be addressed together, and said they followed from the minimum lot size variance. He said the property was for sale, and the owners were trying to preserve as many options as possible for perspective buyers. He said if they reproduced the original lot, one lot would only have 255 ft of frontage on Route 4, so a variance was requested concerning this.

He also said a variance was requested concerning a greenhouse foundation on the property. He noted that the original idea had been to remove the foundation, but an estimate had determined that this would cost \$15,000. He said leaving it there would result in a violation of the sideline setback, based on the drawing of the new property line between the two lots.

Attorney Hogan said the delineation of wetlands on the site as part of preparing the subdivision

application had indicated that the existing septic system for the house lot was within 65 feet of the delineated wetland, so a variance was being requested concerning this as well. He noted that the State wetland setback of 50 ft was met, which was what the system had originally been designed to meet when the original subdivision design was proposed.

He also explained that there was a perspective buyer who was interested in using the barn structure, and said the fourth variance requested was a use variance.

Attorney Hogan said the theme heard last time was that when one looked at this particular lot, the special conditions regarding hardship were that there wasn't anything that would change in terms of the appearance or use of the property or structures themselves. He also said that in terms of the land itself, there was a substantial earthen berm that ran the length of the frontage. He said the property therefore wasn't very visible. He said there were no issues in terms of sight distance and safety, and said no additional driveway cuts were being asked for. He said nothing dramatically would change in terms of use.

He said considering the purpose of the RC district, there wasn't going to be any change in the visual appearance of the property, whether from the road, or from across the river, He said the rural look would be maintained.

He said that regarding the greenhouse foundation, there could be some use made of it, if it remained. He said there was no way to see the property from the different vantage points he'd described, and said the only person who would be able to see the foundation was the person who bought the residential lot. He said there would be no new construction involved in allowing the foundation to remain.

Attorney Hogan said right now, given the fact that this was one lot of record, and the barn was considered to be an accessory structure to the residence, there was a shared septic system. He said several years ago, the Bakmans got a variance to allow 3,000 ft of the barn to be used as a home occupation. He said it had been used commercially in that way for the past several years. He said that use hadn't been an issue for neighbors, and hadn't caused any traffic issues.

There was discussion that the septic system for which the variance was being requested was for the residence lot, when the subdivision occurred, and that this was needed now because of the wetland delineation recently done that had indicated that the system was 65 from the delineated wetland. It was noted that the Town required a 125 ft setback.

Attorney Hogan said with the subdivision, there would be two separate septic systems, which would be an improvement as compared to the current shared system.

He said the general theme with these three variances being requested was that the Board had approved the minimum lot size variance, understanding that it was a reasonable configuration. He noted that the applicants had originally tried to do one conforming lot and one lot not conforming, and then saw the original subdivision layout, which was the only practical, reasonable configuration. He said again that the uniqueness of the situation was that there wasn't any construction, and no change was planned on the ground. He said the barn by itself was unique in that it was very large, and lent itself specifically, as did the house lot, to what they

Greenhouse foundation variance request

Attorney Hogan said there was no way the remainder of the foundation would impact the value of surrounding properties. He said with the subdivision, the property would likely be assessed at a higher value, which would likely increase the value of surrounding properties.

He said granting the variance would not be contrary to the public interest, noting that the foundation had been there for years, and had some utility for the property owners. He said there would be a substantial cost involved in removing it, and no practical value in doing this. He said there didn't seem to be any public interest implicated in granting this variance.

Attorney Hogan said regarding the hardship criterion, given the special conditions of the property, there was no place else to put the property line. He said it was where it was originally approved, and said the special conditions of the property really dictated things. He said it met the criterion of being a reasonable use as well.

He said substantial justice would be done in granting the variance. He said the foundation could not be seen, so there didn't seem to be any general public issue.

Attorney Hogan said in terms of the spirit of the Ordinance being observed, the purpose of side setbacks was to not have structures and uses crowded up to the property line. He said the foundation had been there for years, and also said the only person implicated would be the person owning the residence. He also said it didn't interfere with anything on the ground so as to be contrary to the spirit of the setback ordinance.

Mr. Welsh asked if the Board ran the risk of people building on the foundation without coming back to the ZBA, if this variance was granted.

Attorney Hogan said no.

Mr. Welsh suggested that the variance could perhaps be granted with the condition that it couldn't be built on, and Attorney Hogan said that would be acceptable.

Road Frontage variance request

Attorney Hogan said the frontages were what had originally been approved, and said the access would not change, noting that there was a shared driveway. He said the sight distances weren't an issue, and said there hadn't been traffic accidents in that area. He said given this, there would be no effect on the value of surrounding properties.

He said granting the variance wouldn't be contrary to the public interest, stating that there wouldn't be any safety implications, and that the use of the barn and the residence would be about the same as they were now.

Attorney Hogan said regarding the hardship criterion, the issue of special conditions of the property, uniqueness in the area and reasonable use all flowed from the fact that this was the only reasonable configuration of the two lots.

He said substantial justice would be done in granting the variance, stating that there wasn't any way that public safety would be implicated.

He said in granting the variance, the spirit of the Ordinance would be observed. He said historically, the purpose of minimum frontage requirements was for density, spacing, and visual aesthetics. He said consistent with the purpose of the RC zone, the lots wouldn't change in any way.

Septic Setback variance request

Attorney Hogan said the septic system was existing, and said there hadn't been any failures. He said test pits had been done, and the requirements were met, so there would be no decrease in the value of surrounding properties. He said the system met the state setback requirements, and also noted that the setback involved was to the wetland, not the river. He said the septic load would be decreased by having separate systems.

Concerning the public interest criterion, he said as was the case with the minimum lot size variance previously requested, there would be no possible effect on the river or wetland. He also said the applicants' proposal would be adequately reviewed by the Planning Board.

Regarding the hardship criterion, Attorney Hogan said given the special conditions of the property, including the river setback, well radii, etc what was proposed was the only reasonable lot configuration and location for the separate septic systems.

Attorney Hogan said that regarding the substantial justice criterion, there would be no gain to the general public in denying the variance. He said there was a unique situation, where creating two separate systems would be better for each of the systems, compared to what was there now.

He said that regarding the spirit of the ordinance criterion, the septic system was originally designed and approved under the then existing regulations, He said the system met the State regulations now, and also said there hadn't been any issues with the septic system.

Use Variance – Light Industrial Use

Attorney Hogan provided a packet to Board members concerning the use variance being requested. He said Dave Lancaster from Atco Landair had a facility in Newington, had visited the Bakmans' property in Durham, and was interested in relocating to the barn structure. He said the business would be completely contained within the building, and said there would be no processes that would emit noise, odor, light, vibration, etc., which were the traditional nuisances that were inconsistent with residential uses.

He reviewed the packet, and said there were nine employees right now in Newington. He said the

company inspected and assembled small parts that were components to aircraft. He said the barn on the Bakman property was very large inside, and had a lot of potential for reconfiguration. He noted photos of Mr. Lancaster's current facility.

Attorney Hogan said he had asked about any use of caustic chemicals, and said there was only one process where glue was used to attach two parts together. He said otherwise, there was assembly and inspection of smaller pieces. He spoke about the high tech equipment used to do calibrations, etc. He said the use proposed matched the Durham definition of light industry, stating that it was self-contained, without any industrial processes.

He said a special condition that made this property unique was that the barn had existed as a really large accessory structure, standing on its own previously approved lot. He said it really did seem custom made for the use Mr. Lancaster had in mind, while also providing a natural setting for the employees. He noted that the company had outgrown its building in Newington, and said it was a unique opportunity for them to locate their business there.

Attorney Hogan said that at the current location in Newington, the business had been a quiet neighbor for ten years. He also stated again that there was no real visibility concerning the Bakman property. He said the company wanted to be anonymous, quiet, clean neighbors and bring a dynamic, vital business to Durham. He noted that this was what the Town was trying to do. He said the property lent itself to the use proposed.

Attorney Hogan next reviewed the five variance criteria for this application. He said that concerning the value of surrounding properties being impacted if the variance was granted, the look of the property and structures would not change. He said in terms of employees coming and going, this had already occurred there, and no additional driveway cuts would be done. He said there might be more human beings there, but said it was pretty close to the use in the past. He said there would be no noise, odor, vibration, or visible nuisance that would have a negative impact on the value of neighboring residential properties.

He said granting the variance would not be contrary to the public interest. He noted that to be contrary to the public interest, what was proposed must unduly and in marked degree conflict with the ordinance such that it violated the ordinance's basic zoning objectives. He said the purpose of the RC zone was to maintain the current rural residential atmosphere, but noted other uses permitted in the RC zone, like kennels, marinas, etc., which had some obvious external nuisance potential. He said the proposed use would be self contained within the building, and said it didn't seem that any of the Ordinance's basic zoning objectives would be implicated with what was proposed.

Regarding the hardship criterion, Attorney Hogan said that concerning the special conditions of the property that were unique, it was a funny property to try to market residentially. He said the barn was set up to do a lot of possible things with it, but said it would need to be reconfigured internally to make it a residential use. He said its aesthetic was unique, and it was not a traditional residential property. He said if it were used as proposed, the berm would eliminate any issues, even if the building and parking was to be changed.

He said the construction of the structure, the layout of the lot, and the fact that it was originally two lots, as special conditions, were custom made for the use proposed.

Attorney Hogan said regarding the substantial justice criterion that there were no traffic safety issues, and no aesthetic issues. He also said there would be an increase in tax revenue if the lots were used separately. He said there would be no gain to the general public by denying the variance.

He said the spirit of the Ordinance would be observed in granting the variance. He said looking at the purposes and permitted uses in the RC district, there was nothing in the proposed use that would be obnoxious to abutters. He said nothing would change, and said the use would be self contained in the building.

Chair Woodburn noted a copy of the site plan indicated that there was pavement on the property, and she asked if it was existing.

Attorney Hogan said yes, and said it was a driveway that accessed doors in the rear and basement of the building.

Mr. Gottsacker said he had been on the ZBA when the variance for the use of the 3,000 sf in the barn was requested. He said at no time did the Board say there could be a commercial use.

Attorney Hogan said it was a home occupation use.

Mr. Gottsacker said Mr. Bakman had told the Board he would use it for research and development.

There was discussion that this had been a second class home occupation, which meant that there could be up to three employees.

Mr. Gottsacker said that use was completely different than what was proposed now.

Attorney Hogan said it had been used by employees, as a nonresidential use.

Chair Woodburn said what was proposed would have more people, and parking, and wasn't the same, and instead was an escalation of a version of the same thing. She said if there was going to be nine employees, there would need to be parking for them. She noted that there was the shoreland setback and other limiting factors to consider concerning this.

Mr. Gottsacker said variances traveled permanently with the land. He said if the variance to allow light manufacturing was granted, the issue would be not just the use proposed now, and said the Board had to consider this.

Chair Woodburn said they wouldn't necessarily be able to control what could then come in other than the description of light manufacturing in the Zoning Ordinance.

Attorney Hogan said the Board could attach whatever conditions of approval it thought were necessary to mitigate concerns. He said someone in the future wanting to use the property for light manufacturing, but outside the conditions opposed for this presently proposed use, would have to come back to the Board.

Mr. Gottsacker noted that the Board had received some correspondence from its attorney that didn't support that. He asked where, in the court cases, having a prospective buyer was a basis for a variance.

Attorney Hogan said the Bakmans were asking for the relief, and said it was standard to enter into a contingent purchase and sale agreement.

Mr. Gottsacker said he had two properties for sale on Madbury Road, in the RA district. He asked where in the RSAs it said that if someone wanted to put a gas station there, that was a basis for granting a variance.

Attorney Hogan said Mr. Gottsacker would have the right to come to the ZBA, and ask for the variance.

Mr. Starkey said his biggest question went to the issue of special conditions of the property regarding frontage and the greenhouse foundation setback. He said the special condition seemed to be created by the separation into two lots, and said he didn't see a special condition of the lot, prior to the lot line being drawn.

Attorney Hogan said the ZBA approved the variance for the minimum lot size, so at the time saw that it was a reasonable use to have two lots configured as presented.

Mr. Starkey said now there was one lot, and a home with an accessory structure. He asked what the special condition of the property was, lending to the granting of these two variances.

Attorney Hogan said it was the only feasible lot line, which was the original 1978 approval. He said that had created 250 ft of frontage. He said the special condition was that approval. He said in terms of special conditions, the frontage was the same as it was when the Board thought those two lots configured as proposed was a reasonable use.

Ms. Davis asked whether if the barn was granted a variance, and that lot was allowed to have light manufacturing, this would be made obvious to buyers of the adjacent lot.

Attorney Hogan said those were conditions the property owners were creating for themselves, and were issues they would have to work through as they marketed the lots.

Ms. Davis asked what was across Route 4 from the barn lot. There was discussion that there was an office business there, and that it was not light manufacturing.

Mr. Welsh said he was having trouble with the frontage variance, and spoke briefly on this. He also asked if there was any place else to put the septic system, and was told no.

Chair Woodburn asked if there was anyone to speak in favor of the application.

David Chote, Grubb and Ellis, said he represented David Lancaster. He said it had been an interesting process of looking for a building. He said what the company did was mostly light assembly, and office use. He said there were small packages and UPS trucks and not large delivery trucks. He said Durham was an attractive community for Mr. Lancaster. He noted how pro business Durham was becoming, but said there wasn't much to choose from right now in terms of places to locate.

He said that concerning parking, etc, the ZBA could attach conditions, but said these were Planning Board issues to address during the site plan review process. He said Mr. Lancaster's intent was to minimize impacts to the site, and said not much parking would be created. He said one wouldn't know that anything was going on there, except for a few more vehicles. He said in terms of future use of the building, he thought it was unlikely that the next user would be anything other than a low impact office user. He said this proposed business in this location was rare, and said most companies like his would want to go into an industrial park, where they could have a loading dock, and classic industrial space.

Mr. Chote said it was terrific testimonial to Durham that Mr. Lancaster wanted to locate there, and said hopefully there would be support for this. He said there would probably be no perceptible impact on the property from this use. He said it was a great location for employees, and said Mr. Lancaster had great plans for improving the building.

Mr. Welsh asked about the possible use of the Durham Business Park instead.

Mr. Chote said an existing building could be moved into relatively quickly, which was the goal here. He said the company didn't have the option of waiting a year or two.

Ms. Davis determined that the current location of the business was in an industrial zone.

Chair Woodburn asked if there was anyone to speak against the application, and there was no response.

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

Mr. Welsh said the first three variances had sounded benign, but then the Board had heard the fourth variance request, which in some ways went against the other three.

Chair Woodburn said without the fourth variance request, the first three stood on their own. She said they made sense, but said the fourth was a much bigger issue. She suggested discussing the fourth variance request first. She said all three variances requested reflected things that already existed, and said nothing would change with what was proposed. She said there would be less going into the septic system, and also said that the curb cut would remain as it was and nothing would change in terms of the frontage.

Mr. Starkey said he had a serious concern about the special condition of the property regarding the greenhouse and the frontage.

Chair Woodburn said she understood that, because it was a self-imposed thing.

Mr. Starkey said he wanted to discuss this, but said at the moment he didn't see a special condition that wasn't being created by putting the property line there. He said 1978 was 1978.

Mr. Gottsacker said the need for the variance wouldn't exist unless there was the subdivision request, which was created by the owner and not the lay of the land.

Ms. Davis said the other variance granted was for a lot that was smaller than what was required, and said at that point, she was thinking that these variances they were looking at now was where things were headed. There was discussion that the Board had had the subdivision plan for that meeting.

Mr. Gottsacker said he was generally very much in favor of economic development, and doing the best they could to help it. But he said the fourth variance request was asking the Board to rezone that property for light manufacturing forever. He said this meant that despite the best intentions of the current buyer, the Board had to think beyond that, which was a big concern.

He also said because the applicant had a potential buyer who wanted to change the zoning, this was the rationale for the variance request.

Mr. Starkey said that had been the basis for the Seacoast Repertory Theatre application.

There was discussion.

Chair Woodburn read the purpose of the RC zone, as well as the performance standards in Section 20 of the Zoning Ordinance concerning "light industry".

Ms. Davis said she and her husband were starting a small light manufacturing company, and had found no space for this in Durham, so located in Dover. She said this search had started the ball rolling concerning allowing more light manufacturing in Durham. She said the Zoning would be changed soon.

There was discussion. Ms. Davis said this building was perfect for the location, but said it was too bad it was sitting in this zone.

Mr. Starkey said somehow, special conditions from 1978 that were not explained to him still existed. There was discussion. He said he couldn't find something tangible to the property that created special conditions. He said he understood that there was no mathematical way to create 300 ft of frontage for each of the lots, no matter how the boundary line was drawn. But he said he still didn't see how it was a special condition of the property.

Ms. Davis asked how Mr. Starkey had voted concerning the minimum lot size variance application.

Mr. Starkey said he couldn't remember totally, but said he was guessing that he had found something. He said he had no issue with the septic setback variance request because he could find special conditions of the property. He also said he wasn't having a problem with the light manufacturing variance request.

It was agreed to discuss the light manufacturing variance request first.

Mr. Welsh said he found it hard to believe that granting this variance wouldn't result in a decrease in the value of surrounding properties. He noted the number of employees that would drive down the shared driveway, along with delivery trucks, and said this would result in a lot of trips in and out every day. He also said that was a lot of traffic accessing Route 4 each day.

Mr. Gottsacker said the hardship he saw was that a potential buyer wanted to do something illegal on the property, but said that wasn't a hardship in terms of how the ZBA decided.

Chair Woodburn noted the wording on special conditions that distinguished it from other properties in the area.

Mr. Gottsacker said there were certain elements of the presentation that said the hardship was that they couldn't sell the property. He said that was not hardship.

Chair Woodburn said both Mr. Starkey and Mr. Gottsacker were saying there was no apparent special conditions of the property that supported the hardship criterion.

She said the public interest criterion involved safety issues on Route 4, and said it was a bad location for the number of employees who would be coming in and out. There was discussion that the exact number of employees proposed wasn't clear, but that all the numbers mentioned were more than the three employees that were currently allowed.

Mr. Gottsacker said what was proposed was not a home occupation.

Chair Woodburn said she understood that the proposed use would be as low key as possible, but said the number of cars could change the character. She said she understood how the business proposed could not be seen and heard, but said it was hard to envision conditions the Board would need to put in place for all potential light manufacturing uses, based on the definition in the Ordinance.

Mr. Gottsacker said a recent communication from the Town attorney had made him a lot more cautious in terms of imposing conditions and limitations.

Mr. Welsh said with 10-15 employees, and cars, in a location that would be pretty close to the river, this made the public interest a harder hurdle to pass.

Chair Woodburn said these were Planning Board issues, but said they also pertained to property values and the public interest.

Mr. Gottsacker said the spirit of the ordinance was that light manufacturing belonged where it was zoned, and was prohibited in the residential zones.

Ruth Davis MOVED to deny an Application for Variance from Section 175-53 of the Zoning Ordinance to allow the accessory building in the proposed second created lot to be used for Light Manufacturing. 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. Carden Welsh SECONDED the motion, and it PASSED 4-0-1, with Sean Starkey abstaining.

Mr. Gottsacker said he thought all the remaining variances were intertwined, and could be voted on together. He said the only issue he had was the special condition issue.

Chair Woodburn referred to the variance granted to the Bakmans a few meetings back, regarding the lot being less area than was required, and asked where the special condition was there.

Mr. Gottsacker said it was just shy of the area so it was pretty minor, and the special condition was that the applicants couldn't make it work, but could almost do so.

Chair Woodburn said a question was whether that perspective could therefore be applied to the frontage issue as well.

Mr. Starkey said there was a volume and road frontage issue with the previous application, and it was a wooded piece of property. He said this lot had buildings on it, and said it was a separate situation. He said it was hard to compare the two.

Mr. Gottsacker said everything but the special conditions issue made sense to him.

Chair Woodburn re-opened the public hearing to hear from Attorney Hogan.

Attorney Hogan said when the applicants were before the ZBA last time, the Board had unanimously found that there were special conditions of the property.

Mr. Starkey asked what the special conditions were.

Attorney Hogan said there was the topography, the setbacks from the river, and capturing the dock on one lot. He said the plan was presented that if the house lot was to be the conforming lot, it came up to the rear of the barn. He said the Bakmans had looked at possible alternative configurations, given setbacks from the river, the fact that there were only two locations for a septic system, and the fact that the driveway existed and would continue to be shared.

He said if the Board felt there were special conditions of property that justified creating the two lots in the configuration they were now, it was known what the frontages were. He said that issue should probably have come before the Board at that time as well. He said the Board had worked through the specifics of the property and the way it was laid out. He noted again that the lot was originally two lots, but the owners prior to the Bakmans had asked that it be merged. He said the

Bakmans bought it in that configuration.

Attorney Hogan said these three variances followed from the Board's finding that there were special conditions of the property that justified the lots' configuration, and the placement of the property line where it was now. He said if there were misgivings now, perhaps they should look at the discussion last time.

Mr. Starkey said that would be good idea, stating that he didn't think he was at that meeting.

Mr. Gottsacker noted that the Board had been cognizant that the Bakmans would have to come back for additional variances.

Chair Woodburn said she was in the audience at that previous meeting, and saw the second half of that application. She said she didn't recall that the Board had a problem concerning the special conditions issue. She agreed that the Board should take a step back, and suggested that they look at the DVD from the June 17, 2011 meeting,

The other Board members agreed to proceed as has been suggested.

Attorney Hogan noted that the subdivision application was currently before the Planning Board. He said they might still be able to coordinate the two processes, since the acceptance was planned for the October 5, 2011 Planning Board meeting.

Sean Starkey MOVED to Continue the Application for Variances from Section 175-54 and 175- 65(F) to the next meeting. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Break from 9:19 to 9:25 pm

Chair Woodburn noted that she had made her yearly presentation on the ZBA to the Town Council the previous evening. She said the Council had thanked Board members for their service to the Town.

F. Sigma Beta

Withdrawn

III. Board Correspondence and/or Discussion

Carden Welsh MOVED to switch Items III A and B on the agenda. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

- A. **Request for Rehearing** on a July 12, 2011 denial of a variance on a 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 sf. The amendment would allow for the removal of the deed restriction that the lot 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.

Mr. Gottsacker said the Board had to determine if there was new information, or if the Board had made a procedural error. He said he believed there was new information available. He spoke about how the original variance application was done, and said the applicants had now had time to do some rethinking. He spoke in some detail on this, and said he thought in some ways this meant there was new information available.

Chair Woodburn said the new information went to the application for amendment, not to the original variance.

There was discussion that the request to amend the variance was that the applicants wanted to remove the deed restriction for an owner occupied house.

Ms. Davis said they now wanted to use the language “family household”.

There was discussion that this was in fact new information.

Mr. Starkey noted that there was the language “family household” in the Zoning Ordinance, and said he considered that to be new information.

Mr. Welsh agreed that it did seem to be new information.

Ms. Davis agreed, and said it was grounds for granting the rehearing.

Sean. Starkey MOVED to accept the request for rehearing on a July 12, 2011 denial of a variance on a 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 sf. The amendment would allow for the removal of the deed restriction that the lot 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 unanimously 5-0.

It was agreed that the rehearing would be in November, at the request of the applicant.

- B. Request for Rehearing** on a July 12, 2011 denial of a variance 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 Mad bury Road, and is in the Professional Office Zoning District.

Mr. Gottsacker read from the ZBA handbook regarding what “new information” was. He said with this application, the applicant hadn’t taken the time to figure out what the proper language was. He said what was provided now was therefore new information.

Other Board members agreed. There was discussion that a lot of new information had been provided. Ms. Davis said the biggest thing she had seen in terms of information was the efforts that had been made to rent the building.

Chair Woodburn said not all the abutters had been noticed with the original application, which was important information.

Mr. Johnson said he hadn’t yet read through the revised application. He said with the first case, the discussion was on converting from commercial to residential use. He noted that the commercial use included residential use, with an accessory apartment. There was discussion that this was more new information.

Mr. Gottsacker said unfortunately the owner had done the original presentation, and didn’t do a very good job. He said there was now appraisal information, financial information, etc. that hadn’t been presented before

Mr. Starkey said the Board had learned that it was mixed use, which was certainly new information.

Ms. Davis said the Board understood the fact that Ms. Sakowski’s presentation had been emotional and that this had been a hard situation, and that the way to go was to have an attorney prepare the application.

Jerry Gottsacker MOVED to grant the Request for Rehearing on a July 12, 2011 denial of a variance 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 Mad bury Road, and is in the Professional Office Zoning District. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

IV. Approval of Minutes – July 12, 2011

Page 4, bottom paragraph, should read “...could be bought without licenses, making deed restrictions a non-limiting factor.”

Page 9, 5th paragraph, should read “She said if it was taken out, the name...”

Page 15, bottom paragraph, should read “...any landlord to rent a single family home...”

Sean Starkey MOVED to approve the July 12, 2011 Minutes, as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

V. Other Business

A.

Chair Woodburn noted the upcoming Law Lecture series that would take place in September and October.

B. Next regular meeting of the Board: October 11, 2011

VI. Adjournment

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

Adjournment at 9:42 pm

Victoria Parmele, Minutes taker

Sean Starkey, Secretary