

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

**Durham Zoning Board Minutes
Tuesday November 8, 2011
Durham Town Hall - Council Chambers
7:00P.M.**

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

MEMBERS ABSENT: alternate Kathy Bubar, alternate Edmund Harvey

OTHERS PRESENT: Tom Johnson, Director of Zoning, Building Codes and
Health; Minutes taker Victoria Parmele

I. Approval of Agenda

Chair Woodburn brought the meeting to order at 7: 02 pm. She noted that Items II A (Nevada Land and Water Company) and II B (Archambeault) had been withdrawn.

There was discussion that the Board hadn't heard from the applicant concerning Item II C (Sakowski variance application), but that it was a moot issue. Mr. Johnson said he'd still expected that someone would be at the meeting. Board members agreed to put this item at the end of the agenda.

Chair Woodburn noted that II D was the Shelton application, and asked Ms. Shelton if she minded if II E went before II D, since there were a number of people in the audience concerning II E. Ms. Shelton said she had no objection to this.

Mr. Starkey summarized that what was now II E would be Item II A, what was now II D would be II B, what was now II F would be II C, and what was now II C would be put at the end of the agenda

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

II. Public Hearings

(THIS WAS ORIGINALLY II A)

CONTINUED 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 at 3 Dover Road, and is in the Courthouse Zoning District.

(Withdrawn by applicant)

(THIS WAS ORIGINALLY II B)

CONTINUED PUBLIC HEARING on a petition submitted by Judy Archambeault Living Rev Trust, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Durham Zoning Ordinance to allow for the construction of a two-car garage within the sideyard setback. The property involved is shown on Tax Map 16, Lot 13-0, is located at 242 Durham Point Road, and is in the Residence C Zoning District.

(Withdrawn by applicant)

A. (THIS WAS ORIGINALLY ITEM II E)

PUBLIC HEARING on a petition submitted by Jennifer S. Riccardi, Eliot, Maine, on behalf of Alma B. Tirrell Rev Living Trust, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Durham Zoning Ordinance to change the occupant load to allow up to eight unrelated occupants in one single family dwelling. The property involved is shown on Tax Map 6, Lot 3-15, is located at 14 Mill Road, and is in the Residence A Zoning District.

Jennifer Riccardi said she and her husband were requesting a variance to allow up to eight people to live in the house. She said they realized there were many cases where more than three occupants were renting without the proper zoning. She said she and her husband were looking to work with the Town and the neighbors to meet all the requirements, and to make it a positive experience for everyone.

She said the property was the first house on the right that was actually a residence, and said it fit well with the downtown, the student residences nearby and other properties. She said because of its size and proximity to the University, allowing more than three students wouldn't materially change the makeup of the neighborhood. She said she had been told that some neighbors had already assumed that it was an apartment building or rooming house. She said there were only three residential abutters out of eight possible abutters, and she provided further details on properties nearby.

Ms. Riccardi noted a letter from a woman who lived in the Faculty neighborhood area, who had assumed that it was a multi-unit building and said it didn't in any way impact her neighborhood.

She said the house sat on a half-acre lot, and said there was a barn and trees that buffered it from the next residence. She said the house had been rented to up to six residents for a total of 23 years, and said they were simply asking now that this be allowed to continue. She noted that the former owners were elderly and had stopped renting for a while.

Ms. Riccardi said the neighbors were a primary concern, and said she and her husband intended to repair, improve and maintain the house and property, maintain property values, and contribute to economic development in Durham. She said that in its current condition, the property wasn't adding a great deal of value. She also said they would maintain the structure as an eight bedroom

home, so it would continue to be sold in the future as a single family home, and thus would continue to improve property values as such.

She said it was estimated that the cost of modernizing the house would range from \$100,000 to \$150,000. She said unfortunately that given the size of the house, it wasn't likely that a large family would be able to buy, restore and heat it today. She also said it would be difficult in the current economic climate to secure a loan for the value of the home plus the cost of the renovations. She said the house and barn both needed new roofs immediately per the insurance company, and said a new foundation was needed for the barn. She noted other repairs as well as updates to house systems that were needed.

Ms. Riccardi said they were willing to do this because they were willing to invest all of their savings, and would continue to invest the rental income every year to bring the house back to its original glory. She said without being able to rent to more than three unrelated occupants, this wouldn't be possible. She said with the purchase and improvements, their outlay far exceeded the assessed value of the property. She said what was proposed would enhance property values.

She said she realized there would be concerns about noise, cars, and odd hours. She said as landlords they planned to have very strict guidelines, which would be written into the lease. She noted a document they had provided to the Board on their rules and regulations. She said this would be subject to changes based on feedback from the ZBA and members of the public at this meeting.

Ms. Riccardi reviewed these regulations for the Board, and noted that it included parental notification if needed. She also said the residence would be limited to four registered cars. She said nothing else would be allowed in the front yard except for trash barrels one day a week. She said any group activities would be required to be inside, and would need prior approval. She said the barn would be locked and off limits, and said there would be fines for any violations of the rules.

She said her husband was a stay at home dad, and would make this his full time commitment, and would be available 24/7. She said they would only be 20 minutes away. She said her husband planned to join the Durham Landlords Association and would be active in the community.

Ms. Riccardi said their first obligation was to the safety of students, but said the second was to the Town, and said what they proposed should increase tax revenues. She said if the variance wasn't granted, the house might or might not sell, and could fall into disrepair. She said developers might then move in, and said they were trying to prevent this. She said they had been closely mentored by a friend who owned some student rental properties at the University of Connecticut.

She said there were many advantages to the Town and neighbors in granting this variance. She said right now a family with an indeterminate number of members, plus up to three live-in domestic helpers could live in the house, which could result in eight or more unrelated occupants living in the residence, with an unknown number of vehicles and no property management. She

said the three unrelated rule in this case was not protecting the integrity of the neighborhood, but said what she and her husband had planned would protect the neighborhood with their rules and regulations, and strict oversight.

Ms. Riccardi said they would have the ability to monitor and remove a student if needed, and said there was no such option with a large home owning group. She said her residents would be carefully selected. She said she and her husband really wanted this to be for the long term. She said they were guaranteeing the house and yard maintenance, and would install safety enhancements that were required by code. She said they weren't looking to be absentee landlords, and instead would be responsible landlords and taxpayers.

Chair Woodburn asked Ms. Riccardi to go through the variance criteria and how they were met.

Ms. Riccardi next read from her application concerning how the variance criteria were met.

Standard of Review-

1. The variance would not cause a decrease in value of surrounding properties

because: Our mission is to to repair, improve, and maintain the building and surrounding property while providing tenant oversight; providing neighbors greater assurance that curb appeal and property values will not be impaired. The property will have a full time manager and we are local landlords.

2. The variance would not be contrary to the public interest because: While the safety of the students would be our first priority, the comfort of the neighbors and integrity of the area are of utmost importance. Our contact information will be available and we will check in with the three adjacent neighbors on a bi-annual basis or more often as they request. Parking for vehicles will be restricted to 25% of the residence's street yard. Noise and behavior rules will be strictly enforced and any infractions will result in sizeable fines and possible eviction.

3. (A) Denial of the variance would result in unnecessary hardship to the owner seeking it because:

(a.) no fair and substantial relationship exists between the general public provision and the specific application of that provision to the property because: There is already an established rental history of 23 years with 6 or more occupants as allowed by the Town of Durham. Therefore, there is a precedence in place.

In addition, the RA Zoning Ordinance allows for a family (by marriage, civil union, adoption, or a foster family) of an indeterminate number of members *plus* up to three live-in domestic helpers. This could result in eight or more unrelated occupants living in the residence (according to the square footage allowance) without oversight or restrictions as our tenants will have. There is the ability to monitor or even remove an undesirable tenant. There is no such option with a large homeowner group.

(b.) the proposed use is a reasonable one because: This spacious 8 bedroom property sits on a half acre lot. As student housing, it would fit the character of the surrounding downtown. The property, 14 Mill Road, is the first actual residential property on the right side of Mill Rd. The properties leading up to 14 Mill Road include UNH dorms, six condominium units, a supermarket and plaza, and two student ministries. All of the buildings behind the homes on the right side in that area are UNH dormitories and parking.

Because of its size and proximity to the university, allowing more than three students to live there would not materially change the makeup of the neighborhood. In addition, the house has 2,663 square feet of livable floor space which would allow 333' per occupant, more than the 300" required. Lastly, a precedence has been set that it can be rented without incidence and no substantial changes in circumstance have occurred since.

3. (B) Owing to special conditions of the property that distinguishes it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it:

This zoning restriction interferes with the reasonable use of the property considering the unique setting of the property in its environment based upon its size as well as proximity to stores and restaurants, dormitories, condos, and ministries.

The property cannot be reasonably used in strict conformance with the ordinance because there is a limited market for massive single family homes needing major repairs including a new roof, electrical system, and foundation issues. Given the current economy, funding for both the mortgage and the approximately \$150,000 needed for renovations, is difficult to secure from lenders. This property has had no such offers as long as it has been on the market. There is a very real possibility of it not selling for quite some time given the market and becoming run down and or vacant, thus damaging surrounding property values.

With the variance, I intend to do \$70,000 of urgent repairs such as a new roof and updates to the electrical system and then utilize the rental income to continue to restore the house to its former glory.

4. By granting the variance, substantial justice would be done because:

Town- My proposal will increase tax revenue to the Town of Durham through renovation and the improved assessed value of the building and grounds. If the property doesn't sell in this challenging economy, the value and taxes will most likely drop. Allowing students to stay locally will also reduce the number of commuter vehicles and traffic in town.

Neighbors- Neighbors could count on a reliable, local property owner who would help protect their property values through constant maintenance and monitor the renters closely.

Students- This opportunity will provide off-campus living opportunities that support and enhance the educational mission of the university as well as help promote the students' development. By providing unique services that reflect the highest standards of off-campus living, students can begin to join the community while still having close oversight. I have a group of 8 young women who are looking forward to moving in with their friends and creating school memories they will have forever.

As a 1986 UNH alumnus living 20 minutes away with college bound children and friends in the Faculty Neighborhood, I have a passion for UNH and the Durham community, a personal reputation to maintain, and very high standards. Thank you for your consideration.

Mr. Gottsacker asked Ms. Riccardi if she and her husband owned the property.

Ms. Riccardi said the Tirrells were the current owners. She said the offer on the property had been accepted, but said what would happen depended on the results of this public hearing,

Ms. Davis asked for details on the past use of the house.

Ms. Riccardi said the Tirrells had lived there, and had rented to three people and had also rented to six people at some time.

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

Warren Tirrell said he was a trustee of the trust that owned the property. He said the family had purchased the house in 1962, and said there were five family members. He also said three bedrooms in the house were rented to students. In addition, he said that from 1976 to 1987, there were six students living in the house. He said there were eight viable bedrooms, as well as ample storage and parking.

Mr. Gottsacker asked what had happened from 1987 to the current time.

Mr. Tirrell said his parents had moved back in, and had lived there until his mother had died six months ago.

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

Jane Kaufmann, 19 Oyster River Road, said she didn't want permission given to anyone to have eight unrelated residents in the house in her neighborhood. She said the number of houses sold to people who rented to students had multiplied in this neighborhood, and said property values had gone down. She also noted that a good friend who had lived on Madbury Road was leaving after 50 years. She said that as much as she loved the students, granting this variance would set a precedent concerning the beautiful houses on Mill Road.

Jay Gooze, Meadow Road, noted that he wasn't an abutter, but was one of the people who had brought forward the three unrelated rule. He said as the ZBA knew, a variance ran with the property, so no matter what the intention of the applicants was, they could sell the property the day after the variance was granted.

Mr. Gooze noted the 1975 case of Durham vs White Enterprises, where the NH Supreme Court ruled on the ability of the Town to base its occupancy requirements on numbers rather than on square footage. He said the court also said families were more likely to control noise and traffic on a property while unrelated occupants had less reason to do this. He said the three unrelated provision had therefore been found to be legal.

He spoke about a possible domino effect on the neighborhood if this property, which was on the edge of UNH buildings, was granted a variance. Concerning the hardship issue, Mr. Gooze said the courts had stated that the property itself had to be distinguished from others in the area, and that the issue was not the plight of the applicant. He noted that he had heard the applicant say what she and her husband needed to be able to do concerning the property. He said in looking at the assessments of properties online, he'd seen that there were a number of properties close by with enough lot size and square footage to be able put in as many bedrooms as this one. He also noted that the tax card said there were seven bedrooms.

Concerning the public interest criterion, Mr. Gooze said Durham police reports over the years had indicated that 99% of incidents were related to rental properties where people who were unrelated to one another were living together. He said the public interest was that it was better to have a family in a house than unrelated people. He said granting the variance would threaten health, safety and welfare, and also said he didn't think granting the variance met the spirit and

intent of the Ordinance. Concerning the substantial justice criterion, Mr. Gooze said if an application didn't meet the other variance criteria, it couldn't meet the substantial justice criterion.

Morey Borovich, 50 Mill Road, said he'd lived in the neighborhood for about 27 years, and said within the last few years there'd been a tremendous change concerning student rentals. He said there were many issues that came up when there were student rentals in a neighborhood, and he noted some incidents this year since the start of the school year, including one where students had done into peoples' homes mistakenly in the middle of the night. He said his neighborhood was becoming a hot spot.

He noted that there was a 20% vacancy concerning student rentals in Town this year. He spoke about the fact that he was a landlord 10 years ago, and was a charter member of the Durham Landlords Association. He said there was no shortage of student housing now, with more being built now by professionals. He said if this variance was allowed, it would seem that this would open the doors for other property owners with large properties to come to the ZBA. He said this variance request was unnecessary and unwanted, and said he hoped the ZBA turned it down.

Katie Wheeler, 27 Mill Road, said she and her husband had lived in the neighborhood since 1967, and said they moved there because they wanted to live in a neighborhood for the sake of their children. She said she had been surprised to hear this evening that this wasn't a residential neighborhood. She said she and her husband had felt that they were a part of the Faculty development, which was established so faculty could live in a University community and raise their families.

She said there had to be a place for families in Durham. She said there was plenty of housing for students, and said they were already encroaching on the residential neighborhoods. She said she didn't think the Town wanted to be without a core of people raising families, and she urged the ZBA to deny this application.

Jeannie Allen, 41 Mill Road, said a lot of students had moved in near her house. She said right now things were fairly quiet, but she recounted a situation this year when at 2 am, a drunk student tried to get into her house. She also said a neighbor had ended up with a drunken student getting into her bed. She said the students had a big impact, and said despite the wonderful presentation and great intention of the applicants, the students couldn't be controlled. She urged the Board not grant this variance. She said she was concerned that the other homes around the property in question also had bedrooms that could be used for students, and that granting the variance could set a precedent.

Ted McNitt, Durham Point Road, noted that he had some experience on Town boards. He said during those years, there had been several occasions when people came before a board and were in tears because they were at the point where they didn't want to bring their children up in their neighborhood anymore because of students doing things that weren't neighborly. He said one factor that he always considered to be important was whether there was something about a property that made it different from every other property in an area that justified giving it special

treatment. He said he'd watched for 30 years as various neighborhoods in Durham had eroded, and said he would hate to see this bite taken out of the Faculty neighborhood.

Linn Bogle, Croghan Lane, first read a letter from Robin Mower.

Ms. Mower said that regarding the property values variance criterion, when a house was perceived to be in a precarious location in regard to abutters, it was less likely to sell as quickly or at the same value as one that was more securely located. She said while the proposed use for this property might technically be the same from a zoning definition perspective, i.e., residential, in the eyes (and experience) of abutters, it would be a significant change.

She said despite the testimony of a realtor supporting this application, this was a real residential neighborhood. She said families still lived on Mill Road, some with children, and some with elderly men and women who had lived in Durham for decades, whether at that location or nearby. She said the neighborhood was under threat from applications like this one.

She said if the application was approved, the property could be rented to eight students, and despite the statement of the applicant that the property and its tenants would be well managed, experience had made people skeptical. She said that as a member of the Faculty neighborhood, she knew first-hand about the tribulations of living among student-rental properties, and had heard numerous secondhand accounts of similar quality-of-life impacts from other residents, here and across Town.

Ms. Mower said she would think twice before purchasing a house near the edge of a residential district abutting the UNH—or any other college—campus. She said as that edge shifted, that attitude would influence potential sales that were now in the center of the neighborhood.

Concerning the public interest criterion, she said significant Durham resources had been applied over the past few years to improving the downtown economic base and vitality and to safeguarding the quality of life in downtown neighborhoods. She said if the edges of residential zones as well as the interiors weren't protected, those edges would soon fall and the boundaries would shift. She said all the investment in the world couldn't help a downtown that was ringed by student rentals, and said the burden on Town resources would increase.

Ms. Mower said impacts on property values as family homes were converted to student rentals affected the tax base and thus the tax burden shared by the entire community. She also said as neighborhoods lost their appeal to prospective homebuyers, the Town as a whole lost stature in the regional real estate market.

She said eight unrelated occupants were likely each to bring a car, and she described the noise impacts this would create.

Ms. Mower said it was exhausting for residents who were vulnerable to this kind of application to continually have to gear up and fight to protect their property and quality of life. She said it would be nice if it were clear to those hoping to "push the limits" that they would not succeed. She said a ruling against this application would send a signal that would be in the public interest.

She said that regarding the variance criterion concerning the spirit and intent of the ordinance, the three unrelated rule in the Durham Zoning Ordinance was adopted specifically to protect the integrity of single-family neighborhoods. She said variances by definition were intended to accommodate minor deviations from an ordinance, and said this request flew in the face of the spirit and intent of the ordinance.

Mr. Bogle said he was becoming alarmed at the number of houses deeper into the Faculty neighborhood that were being made into student rentals, and said this really was detrimental to their neighborhoods. He said he wished there was some way to deal with this problem apart from the three unrelated rule. He noted that the deeds for the homes in the Faculty neighborhood said that single family homes would be built, but didn't say anything about an accessory apartment. He said he realized the house in question wasn't technically in the Faculty neighborhood.

Mr. Bogle noted that he had served on the ZBA. He said if this house was granted a variance, he didn't see how the owner of the Hatch house up the street as well as owners of other houses in the area wouldn't say they wanted a variance as well. He urged the ZBA not to grant this variance.

Alice Dealba, 25 Mill Road, said the idea that the property could be rented to eight students and could be well managed by someone not living at the house was hard to believe. She urged the Board to vote against this application.

Mr. Starkey read into the public record letters received from residents concerning the application:

Will Clyde, 51 Mill Road;

Dear Mr. Johnson,

I am writing to say that I am against the variance requested by the owners of 14 Mill Rd. to change the student occupancy from 6 to 8.

Although I understand the importance of having student housing in Durham and near downtown, I feel that the many recent conversions to student housing in our neighborhood have seriously diminished the quality of life and, consequently, lowered property values in this part of town. I can provide a personal example as evidence. About 6 weeks ago, a drunk student neighbor intruded into our house in the middle of the night and traumatized my family. Because of this incident and the general deterioration of the neighborhood, we are now seriously considering moving. Safety is one of the most important quality-of-life aspects of a neighborhood like Mill Rd./Faculty Neighborhood and is an important driving force in home values. The kind of change that is being requested with this variance most certainly has negative impacts in this context and should be rejected.

Sincerely,
Will Clyde
51 Mill Rd.

Rob Swift, 18 Mill Road

First of all, I want to state that the Tirrell's have been very good neighbors for about 35 years. I am sorry to learn that Tirrells will no longer be living there as a family.

The application for variance to increases the number of unrelated occupants (effectively turning 14 Mill into student housing), however, raises the following concerns:

- Approval will definitely lower the value of my adjacent property. The primary market for my house would be as a starter home for a young family. Having students, instead of another family, next door would make my property less desirable. While assurances have been made in the application, these will get lost if 14 Mill gets sold. This event is highly likely – there is a "For Sale" sign out in front of the property as I write this.
- Approval would not be in the public interest since it would contribute to further erosion of a family-oriented residential neighborhood.
- It appears to me that any hardship sustained by denial is really due to poor real estate market conditions, one that affects all of us.
- No justice would be done by approval. In fact, approval would be an injustice to other residents in the neighborhood.
- Approval would definitely be contrary to the spirit of the ordinance. The ordinance was developed specifically to prevent this sort of change.

I certainly hope the Tirrell's are able to find a suitable family to purchase their property. Or that members of their extended family decide to live there. Either of these solutions would be most welcome!

Thanks for your consideration.

Rob Swift
18 Mill Road, Durham
868-5238

Kitty Marple, Chair of Rental Housing Commission

I am writing to ask the Zoning Board of Adjustment to deny the variance request made on behalf of the Alma B. Tirrell Rev. Living Trust to allow eight unrelated persons to live at the subject address. The Rental Housing Commission is trying to discourage all landlords from having more than three unrelated individuals in residential neighborhood housing. It is important to reemphasize the three unrelated ordinance every time a landlord asks for a variance.

Thank you for your time.

Kitty Marple

Chair, Rental Housing Commission

Charles Forcey, 12 Thompson Lane;

Thank you for all that you have done to improve the quality of construction and the upkeep of Durham Properties. I am especially grateful for the recent efforts you and other town officials have made to get ahead of the movement of student housing into residential areas like my own, the Faculty Neighborhood. Through your efforts, a student rented property on Valentine Hill went from being a weekly source of grief and problems for the families living there to a quiet, and hopefully soon to be family occupied space. This was the #1 issue that scared us about the future of Durham, caused anxiety for our property values, and impacted our sleep and the safety of our children. We can't thank you enough for reversing that trend.

It is in that context, then, that I write about the application for a variance on the unrelated people zoning rule for 14 Mill Road. I am loath to limit the economic viability and freedom of use of any private property in town, but the specter of a boarding house row up and down Mill Road with a similar look and feel to the fraternity row up and down Madbury Road compels me to write in opposition to this variance.

At the moment, Mill Road contains some of our largest, best constructed and highest profile houses in the neighborhood. These houses, and their higher resale value, have helped support the efforts of many of us in the adjoining neighborhoods to enlarge, improve the efficiency of, and add value to our homes (originally built to much more modest standards). When we look for comparable sales, the near mansions on Mill Road are a rare and important set of higher value properties that can be directly compared not to other rental properties (of which Durham has no shortage) but to single family dwellings of similar square footage and build quality.

The conversion of these big houses to rental properties would not, therefore, create the kind of real estate value that Durham most needs to maintain its residential and village quality. In this regard, I respectfully disagree with the real estate agent who wrote in support of the application because of its potential to raise nearby property values. My understanding is that the group home would leave the residential comps pool and disappear into the much larger and much less likely to be undervalued downtown rental property market.

As I am no expert at property valuation, my argument there may or may not convince the committee to oppose this statement. What compels me most to write, however, is not the potential property valuation effects, but the social and aesthetic damage that a dwelling with up to eight unrelated occupants (and their inevitable partners and friends) would do to this fragile row of stately homes that occupy such a visible position at one of Durham's primary scenic gateways.

Ms. Riccardi provided a rebuttal to the comments that had been made. She said she understood the distress of the neighborhoods about not wanting to be surrounded by student housing. But she said this house wasn't in the middle of Faculty Park, wasn't on Oyster River Road, and didn't involve plunking down a monstrosity. She said it was the first residential property on the right side of Mill Road, and she described the University, commercial and other properties that were in that area.

She said directly across the street, on the corner of Faculty Road was a house that had always been rented, and was currently rented to seven students. She said with what she was proposing, the character of the neighborhood would not be changed. She also said that if the owner three houses down wanted to do what she was proposing, it would be in a different setting because it

would be surrounded by residential properties, unlike the property in question. She said the entire back yard of the property in question was filled with dorms and parking lots.

Ms. Riccardi also said there was a difference between a house that was closely monitored and a fraternity house, and said she and her husband would be vigilant. In addition, she said there should be an increase in valuation due to what she and her husband wanted to put into the house, including making it safe for students to live in. She said they wouldn't contribute to speed or traffic issues, and said the number of cars could be limited to whatever made the Town comfortable.

She said this house did meet the criterion of being substantially different than other houses in the area, because five of the eight abutters were not single family homes. She said a family living there wouldn't have the restrictions or oversight that she and her husband would put on the property, and she provided details on this.

Concerning the number of bedrooms, Ms. Riccardi said a bedroom was a room with a closet. She said there were seven rooms upstairs and one room downstairs that met that criterion.

She said she didn't understand how it could be said that what was proposed would be a threat to health, safety and welfare. She said this was a university town, and said this property was next to dorms, other student rentals, etc. She also said she and her husband were in this for the long term.

Ms. Riccardi said this was a large property, which had been rented in the past. She said it wasn't located in a way that was on top of other peoples' properties. She said it hadn't been maintained properly so wasn't currently adding much to property values in the area. She said she and her husband would put quite a bit of money into it, but noted again that someone could still move back into it as a single family home in the future. She also noted that because the property was located on the edge of campus, there was no absolute need for vehicles to be parked there.

Mr. Gottsacker noted a letter received from Carol Camp, and it was noted that she was the buyers' agent.

Mr. Borovich said having a student rental property required diligence, the right tenants and an onsite manager. He said property values went down when students lived in an area that was inhabited by families. He said he didn't see that there was any urgency to have this property turned into a rental property. He also said a house that had been referred to that was rented to seven students at the corner of Faculty Road and Mill Road hadn't been used that way for a while now.

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

Mr. Welsh said he believed that the variance application failed on all five criteria. He said it was clear that there were a lot of issues in Durham with student properties. He noted a similar application the Board had recently spoken about, which had been approved a few years back. He

said there was a sign right now on the property, which was for sale, concerning options for using the property. He said one couldn't trust what an applicant said would happen to a property, because the variance went with the property and it could be sold at some point.

He said it did appear that there was a decrease in the value of surrounding properties when a property that was converted to student housing bordered on a residential neighborhood. He said it seemed that the further a property was from student rentals, the better off a property owner was concerning his property value. He said students had a different lifestyle, and said it was good to have family neighborhoods and student neighborhoods somewhat separate.

Mr. Welsh said granting the variance would be contrary to the public interest, which was to have strong family neighborhoods. He said seen the intrusion of houses inhabited by students over time decreased the Town's ability to have strong family neighborhoods.

He said he didn't see that there were special conditions of the property that caused a hardship. He said just because this was a large house, it wasn't different from others on the street. He said there were a number of large houses that were in or close to a nice family neighborhood.

Mr. Welsh said he didn't think substantial justice would be done in granting this variance. He said there would be a problem because of having student housing in a neighborhood that people were trying to preserve. He also said he believed granting the variance would be contrary to the spirit and intent of the Ordinance.

Mr. Gottsacker said he agreed that all five variance criteria were not met. He said he'd been a landlord for the house he owned right next door to his own house. He questioned the idea that a lease was relevant to the people who lived there, noting issues he's had with parties, cars, etc. He said living in Eliot, Maine was not local enough, noting that even living next door, he had to be really on top of things.

He said a year from now, Capstone would be bringing 619 new beds online, so the local apartment vacancy rates would probably increase. He said it would be very difficult for him to fill his rental house with students, which meant that the financing would fall apart for this use. He said he expected that there would be residential rentals on the market, and said if a house with a variance that allowed eight tenants was on the market, it would be in a worse situation than when it started.

Mr. Starkey said he agreed with what other Board members had said. He spoke about a possible domino effect if the variance was approved. He noted that there was a rental property one house away from him, where there were some serious issues. He said the owner lived in the next town, and had no control over what was going on. He also said there was a large amount of student housing that was now vacant. He noted that there was also new student housing being built downtown.

He said he had a hard time saying any of the variance criteria were met. He said he didn't think there was good information one way or the other concerning whether granting the variance would result in a decrease in property values. He said despite being rented, the property would

still be assessed as a single family home, and would look that way in terms of comparables. He also said he didn't think there were special conditions of the property.

Ms. Davis said she didn't think this application met any of the variance criteria. She said she commended the applicants for making a good effort concerning renovating the building and proposed safeguards, including the lease. But she said ultimately it was against the spirit and intent of the Ordinance to have more than 3 unrelated people living in house, and said the variance traveled with the property. She said the ZBA therefore couldn't feel comfortable granting the variance.

Chair Woodburn said she agreed with other Board members concerning the variance criteria not being met. She said it was clear that at least four of them were not met. She said the application had been presented well, but said the Board couldn't guarantee down the road who would own the house. She said in this particular instance the spirit and intent of the Ordinance was really clear.

Sean Starkey MOVED to deny a petition submitted by Jennifer S. Riccardi, Eliot, Maine, on behalf of Alma B. Tirrell Rev Living Trust, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Durham Zoning Ordinance to change the occupant load to allow up to eight unrelated occupants in one single family dwelling. The property involved is shown on Tax Map 6, Lot 3-15, is located at 14 Mill Road, and is in the Residence A Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

B. (THIS WAS ORIGINALLY ITEM II D)

PUBLIC HEARING on a petition submitted by Valerie Shelton, Appledore Real Estate, Newmarket, New Hampshire on behalf of Peter T. Logan Rev Trust and Pamela W. Logan Rev Trust, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article IX, Sections 175-28(D), 175-30(A)(C) & (D)(3)(c&d) and Article XX, Section 175-109(C)(2&3) of the Durham Zoning Ordinance to permit the construction of a 24' x 34' detached accessory structure, which increases the cumulative building footprint by more than 15%, increases the cumulative building volume by more than 30% and encroaches a maximum of five (5) feet into the frontyard setback, for the purpose of providing an accessory apartment and storage, the apartment being greater than 25% of the total floor space of the single family residence to which it is accessory. The property involved is shown on Tax Map 20, Lot 1-0 is located at 595 Bay Road, and is in the Residential C Zoning District.

Ms. Shelton said she was very mindful of Mr. Welch's concerns that were voiced at the last meeting about incremental development of this property through variances. She said the applicants hadn't planned to be before the ZBA again, believing that the proposed structure would have fallen under a variance granted in 2006. But she said the building permit was denied based on the current owners' request to use an accessory structure as an expansion of their living area, and not a garage to house vehicles, which was what the 2006 variance was for.

She said this property was located on the Durham/Newmarket town line, and was very different from all of the other lots in the neighborhood. She said this was because of the

configuration of the property. She said it had 1.93 acres, and had 380 ft along the waterfront and 680 ft along the road, so was a very narrow lot. She used the site/building plan to note the various setbacks on the property, and the legally buildable envelopes on it. She said this plan showed the prior open decks that had been granted, and the pavement that would be removed based on the variance granted last month.

Ms. Shelton said the applicants wished to construct a building in the northwest section of the lot. She said relative to the proposal before the Board, the public notice had been expanded a little beyond what the applicants had requested. She said this was her fault because the application came in at the last minute before the deadline. She said Mr. Johnson had added the items relative to the accessory apartment/dwelling because on the plans submitted, it did show an area with a sink and refrigerator.

She said the plans provided this evening had been revised, and said it had not been the applicants' intent to have an accessory apartment in the building or have an accessory dwelling unit. She said it was their intent to have additional living space that couldn't be accommodated in the house.

Ms. Shelton said instead of moving forward with a variance request to enlarge the home within the shoreland district, the Logans wanted to add an additional livable area on the property where they could entertain friends, move some of their belongings to and use for hobbies, etc. She said the accessory structure that was proposed was outside of the shoreland area, but would encroach on the frontyard setback. She said they would also like to put a patio within the buildable envelope, and she provided details on this.

Ms. Shelton said the applicants were trying to address how the notice was written, and how to present their case to meet the criteria.

Chair Woodburn noted that the footprint of the garage that was given a variance was much larger.

Mr. Johnson said it was 30 ft by 36 ft, and Ms. Shelton noted the picture of that previously proposed garage.

Chair Woodburn said she was trying to clarify why the applicants were before the ZBA. She said the original variance was a garage structure that was bigger. She said when the applicant went to the Code Officer, the garage space was shown as living space, and because the variance was given for a garage, the applicants were back here.

Ms. Shelton said the applicants could have easily filed for a garage and finished it.

Mr. Starkey said it was also to clarify that it was not the intent of the applicants to have an accessory apartment, which was in the public notice.

Mr. Johnson said this was in the notice because of the original plan submitted.

Chair Woodburn said the applicants were asking for a cumulative building footprint of more than 15% and an increase of more than 30% for the volume. But she said with the original variance granted for the garage, these things were already part of that.

Mr. Johnson explained that when the variance for the garage was approved, it was approved as an accessory structure which was accessory to a single family home, which was the old camp. He said what the applicants proposed now was an extension of a single family home, and not a garage. He said it was an accessory structure but was also adding to the volume of the house.

Ms. Davis said it wasn't attached to the house, and asked why it was appraised as such.

Mr. Johnson said only one single family home was allowed on the property, and new living space was being added but it was in another building. He said it wouldn't be considered living space if it was a garage. He explained that an accessory apartment and an accessory dwelling unit were similar, and were dwelling units that were accessory to a single family home property. He said in the RA and RB zones, they had to be in the single family home or attached to it, but in the RC and Rural zones they could be in detached structures like garages because those areas had larger lots.

Chair Woodburn said if the Board was to allow this request, without calling out or highlighting the fact that the applicant had said it was not an accessory apartment, it would be allowed because it was allowed in the RC zone.

Mr. Johnson said an accessory apartment was a right in a single family home in all zones. He said the original drawing had a kitchen, bathroom and large living area, so looked like a second home on the property (an accessory dwelling unit) and exceeded the 25% rule. He said with the notice, that provision had been added so the applicants wouldn't have to come back next month. He said now the Board was getting clarification on this issue, so might be able to remove it from the variance request.

Mr. Gottsacker said the issue here was footprint and volume, and incursion into the setbacks, because by right the applicants could put in an accessory dwelling unit.

There was discussion.

It was noted that the abutter, Mr. Gallant, had been at the previous meeting to speak about the renovations to the primary residence. Mr. Johnson said he was now in Florida, and was noticed on this application. He said Mr. Gallant didn't get a copy of the plans, but knew that a garage had already been approved a few years ago.

Ms. Davis asked why there would be no kitchen in the building.

Ms. Shelton said there would already be a kitchen in the other building. She said there would be a wet bar/sink in the new structure.

Chair Woodburn said the structure would be about the size of a small colonial.

Mr. Welsh said it would be pretty big, but Chair Woodburn said it would be smaller than what was originally approved.

Mr. Welsh asked if the applicants planned to extend the driveway.

Ms. Shelton said no, and said there were discussions right now about the fact that some of the driveway would be removed and replaced with pervious pavement.

Ms. Shelton next went through the variance criteria and how they were met.

1. No decrease in value of surrounding properties would be suffered because:

Facts: The proposed structure will be constructed with the highest finished materials including natural wood and a stone veneer exterior to give the appearance of a country outbuilding appropriate for the scenic landscape along Bay Road. The proposed use of the structure is consistent with the neighborhood, a maximum encroachment of five (5) feet does not add any contributing negative factor to any neighboring property, and since this is an area of very upscale, highly taxed waterfront homes, increasing the value of the subject property will have a positive impact on the value of surrounding properties. The proposed improvement would be aesthetically appropriate for the neighborhood and would not diminish property values.

2. Granting the variance would not be contrary to the public interest because:

Facts: The proposed improvement will not adversely impact water quality, wildlife habitat, shoreland resources or require additional services from the Town. Facilities within the proposed accessory structure will be connected to the existing drilled well and existing 4-bedroom septic system which currently services the 2-bedroom residence. The structure will be serviced by existing underground electric and propane. Extension lines and conduit were installed to the proposed building site during the reconstruction of the residence by the prior owner. Silt fencing will be installed between the building site and Great Bay to prevent any siltation run-off from the site during construction periods and shall remain until the area is re-stabilized. Use of the structure will be for storage and enjoyment of the current owners' personal items and to provide expanded living area to entertain friends and family members which can not be accommodated in the very small living area of the existing residence.

Concerning the hardship criterion, Ms. Shelton said:

The purpose of Article IX is to allow owners of nonconforming uses, lots and buildings and structures continued use subject to the provisions of the Article.

Article 175-28 (D) pertains to Enlargement of Nonconforming Use of the property.

Facts: The use of the proposed building is consistent with the residential use of the property which is a permitted use in the RC zone. The application does not propose to change the use of the property, but given that the existing dwelling unit is only 912 square feet, expansion by 50% would be limited to 456 square foot. Neighboring properties have primary dwelling units ranging in size between 3384 to 4300 square feet, allowing expansion of their current uses to over 1,690 square feet. The applicant is seeking to expand the existing permitted residential by 1,224 square feet. Limiting expansion to only 456 square feet would create an unnecessary hardship for the applicant and provide no substantial benefit to the general public in this case.

Article 175-30 (A), Continuance of a Nonconforming Building or Structure and 175-30 (C), Alteration of a Nonconforming Building or Structure, provides for continued use of an existing structure so long as it is unaltered or extended in any way which will result in a new and increased violation or does not deviate further from the chapter except as provided for under subsection (D). **Facts:** The current primary structure is non-conforming due to its location within the shoreland setback zone. Given the unique configuration of the lot and the existing improvements, there are very small buildable envelopes which conform to the setbacks of the current regulations, thus the proposed accessory structure can not be built without a variance from one of the setback regulations. The proposed accessory structure will conform to the 125' shoreland setback zone, but encroach by no more than five (5) feet into the front yard setback. The 125' setback from the shore front would appear to be the more important regulation based on the stated purpose of the base zoning district, therefore the applicant is requesting relief from the front yard setback. Permitted expansion within the Shoreland Protection Overlay District of 15% of the footprint and 30% usable building volume would render a 2-story 10 x 13 addition of 273+/- square feet. As previously stated, the size of the existing primary residence is a distinguishing factor of the property compared to neighboring primary residences which range in size from 3384 to 4300. Additionally, the proposed structure will not be located within the 125' Shoreland Protection Overlay District, therefore, limiting expansion to only 273 square feet would create an unnecessary

property due to the very limited buildable areas outside of the various setbacks;

3. The proposed 24' x ~~32~~34' accessory structure is smaller than allowed under the existing variance granted in 2007 to construct a 30' x 36' garage in the same location and with a greater encroachment into the front yard setback;
4. Two accessory structures are permitted on this lot under the Ordinance;
5. The proposed traditional New England architecture and use of natural materials is of a scale and vernacular consistent and complementary to the scenic qualities of this district;
6. The tree canopy along the shorefront will provide a visual buffer from the shore to the building site. No trees are required to be cleared along Bay Road for construction of the building;
7. A stone building near the road will enhance the rural character of this area, historically settled as small farms which could be viewed along Bay Road before residents started planting and letting vegetation grow up to increase their privacy.

b. the proposed use is a reasonable one because:

Facts: The applicant does not propose an accessory use on the property. They are proposing an expansion of the existing use beyond what the primary dwelling unit can accommodate and they wish to adhere to the 125' shorefront setback. The use is a reasonable one and permitted within the RC district. Accessory Structures, defined as "a detached structure from a principal building on the same lot and incidental and subordinate to the principal building", are permitted within the RC district. It is reasonable for a property owner to want to house and enjoy their personal belongings at their residence and have reasonable indoor space to entertain friends and family.

4. By granting the variance substantial justice would be done because:

Facts: Denial of the variances would create more of a hardship on the applicant than any

gain to the general public. Allowing the applicant to construct the accessory structure would provide additional finished and storage areas typical of residential properties in this neighborhood. Similar to other neighboring waterfront property owners, the applicant is paying significant property taxes and substantial justice would be done if they were given the right to have more reasonable use of their property given that the proposed improvement is not contrary to the spirit and intent of the ordinance.

5. The use will not be contrary to the spirit and intent of the ordinance because:

Facts: Residential use is a permitted use in the RC district and the proposed application to construct the accessory structure which would encroach into the front yard setback would not adversely affect water quality or the rural character of the neighborhood. The existing infrastructure was completed to service an accessory structure and the expansion of the residential use of the lot. This is also evidenced by prior Zoning Board approvals which granted variances for a 4-bedroom septic and a larger 1 ½ story out building in this same location. Furthermore, expansion of non-conforming buildings and uses are intended to minimize adverse impacts on quality of neighborhoods, the environment and good land use planning. This proposal is not contrary to any of these issues.

Chair Woodburn said the volume and footprint restrictions applied to structures within the 125 ft setback. She said this was a proposed expansion of a nonconforming use within the 125 setback, but the actual proposed use was outside of that. She asked why the variance was needed if the footprint and volume weren't being expanded within the 125 ft setback.

Mr. Johnson said the applicant wasn't expanding the physical building, but was intensifying the use of the property.

Chair Woodburn said that wasn't what the regulation went for.

Mr. Johnson said with the last 10 cases for the property, the ZBA had been concerned that there was an old camp that had no bedrooms and now there were two bedrooms. He said there had been concern about the intensity of the use on the property, so he now wanted to err on the side of caution and bring this to the Board's attention so it could factor these things in. He said the benefit was that what the applicants proposed would be outside of the 125 ft shoreland setback. He said the Board's discussion would be in the public record.

Mr. Starkey said this was an expansion of a nonconforming building, and said he could see why the application was noticed this way, whether or not it was within the 125 ft setback.

Mr. Johnson said over the last 10 years, there had been three owners of this property, 10 cases before the ZBA, and about 30 ZBA members who had reviewed the various applications. He said the discussion about expansion on the property came up every time, so he wanted the 2012 version.

Mr. Welsh asked whether, if what was proposed wasn't within 125 ft of the shoreland, the size expansion limitation would not be necessary.

Mr. Johnson said that was correct, and quoted from Section 175-30(D) of the Zoning Ordinance concerning this.

Chair Woodburn said this was a separate accessory structure associated with the building. He said it wouldn't touch the building and would be on the other side of the lot.

Mr. Gottsacker noted page 89 of the Zoning Ordinance, which indicated that accessory structures were permitted by right in the RC zone. He said page 90 said accessory dwelling units were permitted by right.

Chair Woodburn said Mr. Starkey was saying that because the new building would be an accessory structure, it was an expansion of a nonconforming building. She said she didn't agree, because it didn't touch the nonconforming building and wasn't part of it. She said it was completely separate.

Mr. Starkey asked what it was, therefore, accessory to.

Ms. Shelton said it had been very difficult to decide between requesting a variance or requesting an appeal of the administrative decision. She said based on the work she did with the Town, the right thing to do seemed to be to request a variance, rather than appealing a decision she believed that Mr. Johnson had made in good faith based on his interpretation of the Zoning Ordinance.

Mr. Welsh said what was proposed would cost \$200,000, and asked Ms. Shelton if she was aware of any other plans for the property.

Ms. Shelton said no, noting that there was an outstanding variance to allow a large three bedroom house and detached garage, subject to the boathouse and original house coming down. She said with what was proposed now, she believed that the outstanding variance, realistically speaking, was eliminated. She provided details on her reason for saying this.

Chair Woodburn asked if there were any members of the public who wished 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.

Mr. Gottsacker said if someone could have all three of the accessory uses by right, he agreed with Chair Woodburn's analysis. He said they could still grant the variance as a safeguard.

Mr. Starkey said he believed that it was right for the applicants to be there, because he didn't think that this was as clear in the Zoning Ordinance as some other Board members said it was. He said the applicants were using a fail-safe approach, and said he thought this was a variance that could in fact be asked for and granted.

Chair Woodburn said she didn't want to grant a variance that wasn't needed. She said what was being requested was a volume expansion, and said she would feel uncomfortable if it was proposed in the shoreland setback. But she said it wasn't. She said the magnitude of the application looked completely different without that volume and footprint.

Mr. Starkey said he agreed, but said there was no language in the Zoning Ordinance that specifically supported what Chair Woodburn was saying, or what he was saying. He said he therefore understood why Mr. Johnson had put in what he did.

There was further discussion by Board members that making a decision on the variance application would clarify the situation.

Chair Woodburn said that regarding the fact that the applicants said there wasn't going to be an accessory apartment/dwelling unit, if the Board granted this variance, it needed to determine if it would put a restriction on it that agreed with this, or if it would simply grant the variance and the applicants would retain the right to have it be an accessory apartment/dwelling unit.

Mr. Starkey said he felt it was clear that the Board would have to approve Section 125-109(C) 3, regarding the accessory apartment usage if the applicants asked for it because it was allowed by right.

Mr. Gottsacker said if the Board imposed a condition regarding this as part of an approval, it would take away the right, which it couldn't do.

Chair Woodburn said they were asking for a variance even though they didn't need it. Mr. Starkey and Mr. Gottsacker said maybe they did need it, because of the ambiguity of the Ordinance.

There was further discussion.

Mr. Gottsacker said there was ambiguity in the regulations, and said to clear this up, the applicants were covering their bases and asking for a variance that would address the ambiguity. He said he believed they could have an accessory apartment by right, but stated again that granting the variance would address the ambiguity.

Mr. Johnson said if owners #4 bought the property, they might decide to make the original camp the accessory apartment, or the new structure the accessory apartment, and it would exceed the 25%. He said the Board should include this in its thought process.

Mr., Welsh said he didn't understand granting a variance for an accessory apartment when the applicants weren't asking for it.

There was further discussion.

Concerning the variance criteria, Board members said they didn't know if property values would go down as a result of granting the variances.

Mr. Starkey said that concerning the public interest criterion, there had been no testimony for or against this application by members of the public.

Mr. Welsh said granting this variance would result in more impacts to the property, but said these impacts would be minimal.

Chair Woodburn said it was totally clear what the special conditions of the property were.

Board members agreed that the proposed use was a reasonable one. Mr. Starkey said this could be said, given that the applicants were trying to keep development outside of the 125 ft setback, and especially given the minimum amount of area on the property outside of that setback.

Board members agreed that the applicants were trying to minimize impacts on the shoreland by being as far away from it as possible on the lot. Chair Woodburn noted that this meant that they encroached on the frontyard setback.

Ms. Davis noted that a purpose of the Ordinance was that the house, as viewed from the water, not look huge. She said the applicants weren't changing the size of the camp.

Mr. Welsh said it would change the view from the road.

Ms. Davis said that was a good point, but noted that the ZBA had already said there could be a garage there.

Mr. Welsh said to build an open room that one had to walk to was odd.

Mr. Starkey agreed, but said he would rather see this than see the applicants expand their current home.

Mr. Welsh said he was leery of giving a variance to allow an accessory apartment if the Board didn't have to.

Mr. Starkey said the applicants were entitled by right to have the accessory apartment. He said if a new buyer wanted to subdivide the property and do something that was not permitted, he would have to come to the ZBA.

Mr. Welsh asked why the Board needed to give a variance for this.

Chair Woodburn said the variance was being given because of the footprint and volume issues.

There was further discussion on what to include in the motion.

Sean Starkey MOVED to approve a petition submitted by Valerie Shelton, Appledore Real Estate, Newmarket, New Hampshire on behalf of Peter T. Logan Rev Trust and Pamela W. Logan Rev Trust, Durham, New Hampshire for an APPLICATION FOR VARIANCES from Article XII, Section 175-54, Article IX, Sections 175-28(D), 175-30(A)(C) & (D)(3)(c&d) and Article XX, Section 175-109(C)(2&3) of the Durham Zoning Ordinance to permit the construction of a 24' x 34' detached accessory structure, which increases the cumulative building footprint by more than 15%, increases the cumulative building volume by more than 30% and encroaches a maximum of five (5) feet into the frontyard setback. The property involved is shown on Tax Map 20, Lot 1-0 is located at 595 Bay Road, and is in the Residential C Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

(THIS WAS ORIGINAL ITEM II F)

- C. **PUBLIC 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 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.

Attorney Bruton represented the applicants. He noted that in January of 2010, the ZBA had granted a variance for the property located on Meadow Road, which was in anticipation of subdividing the property located on Meadow Road. He said a condition suggested by the applicants at the meeting was that the variance could be conditioned upon the building on the new property being a single family home. He said the intent of the applicants at the time, which was reflected in the Minutes, was that the lot would be utilized for a family household.

He noted that the Board sometimes dealt with applications concerning allowing more than three unrelated persons, but said the Browns' application proposed to be limited to being a single family household. He said the intent of the applicants at the time was to say that they didn't want the benefit of the three unrelated rule, and didn't want students to live in the new house that would be built.

Attorney Bruton said at the time, the applicants suggested that it would be an owner occupied single family home, but said the intent was that it be a single family home use. He said there was a family household definition in the Zoning Ordinance, and said the intent of the applicant was not to permit student housing. He said the applicants had been residents of the neighborhood for decades, and were committed to maintain the neighborhood as a neighborhood.

He said it hadn't been artfully presented how the restriction should be crafted when the original application was heard by the ZBA. He said they should have referred to what existed in the Ordinance, which was a definition for family household. He said by limiting the variance to that, as a condition, they would have accomplished the goals expressed that evening. He said the exception being requested now was therefore more of a drafting issue, and said the applicants weren't changing their intent or the intent of the Board at that time.

Attorney Bruton said what had been prepared was a deed restriction, and said it would comply with the definition of family household in the Zoning Ordinance. He said the applicants were suggesting now that the definition of family household should be a condition of the variance that was granted in 2010. He said this was exactly what the applicant had suggested, and said it was believed that this is what the Board understood at that time. He said it precluded an unrelated household scenario, and said it was believed that this was a benefit to the community.

He said having the wording "owner occupied" had made it really difficult to market the property. He said it meant that a professor going on sabbatical couldn't rent the property for a period of time, but said with the family household definition, the property owner would have to rent to a family and not to an unrelated household. He said what was proposed fit with the Ordinance, but allowed for the marketability of the property.

Ms. Davis asked Attorney Bruton to describe the difficulties the applicants were having in trying to sell this property with that restriction on the deed.

Attorney Bruton said there had been an offer, but then when the due diligence was done, the owner occupied portion of the restriction did create a problem, and the offer was withdrawn. He said there hadn't been offers where the potential buyer didn't care about the language. He also noted that there was a current offer on the house. He said this was happening with the expectation that the language provided to the Board this evening would be applicable, and said the potential buyer was comfortable with it.

Donna Brown said she and her husband were happy with this definition of family household, and said it achieved what she and her husband had hoped to achieve. She said they did not want this lot to become a student rental. She said between 1974 and 2010, they lived in three houses that directly abutted this lot. She said on four occasions, they went on sabbatical, and rented to people who were responsible members of the neighborhood. She said on one occasion, they swapped houses with a man from the west coast. She said she hoped the person living in the house on the new lot would have the ability to do that.

She said they had lived in that neighborhood for 38 years, and loved living close to the University. She said she would be pleased if a faculty member was interested in doing this. But she said with the current restriction, it was highly unlikely that any faculty member would look at this lot. She said there were a couple of offers on the lot, but when the restriction was found, they weren't interested any more. She said in both instances, the people wanted to build the house and live in it. She said there had been no interest in the lot for any kind of rental purpose.

Ms. Brown said there was currently a sales agreement with a builder who planned to advertise the lot and offer to build a traditional cape house on it, within the \$300,000-350,000 range. She said it would be in keeping with the neighborhood, but said the sales agreement was counting on the ZBA changing the restriction. She said she and her husband supported the family household restriction.

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

Jay Gooze, 9 Meadow Road, said he was a former neighbor of the Browns and said he bought his first house from them. He said he was in complete support of what was proposed, and said he thought it did everything that the ZBA wanted. He said it followed the Zoning Ordinance well, and met the variance criteria. He noted that it was a smaller lot, which made it unique. He said what was proposed met the public interest, etc.

Jahnay Pickett, 34 Edgewood Road, said she owned the property from which the lot in question was split off. She said once the applicants got the variance, the house was put on the market, and she purchased it. She said one of the terms advertised was that this would be an owner occupied lot. She said she had looked at how the lots had been sliced before buying the property, and had talked to her realtor about how the other lot would be in her face. She said she was told that the risks were less because it would be owner occupied.

She said she had no idea what her legal rights were now, but said this needed to be considered because now the ZBA was a part of this if it backed out of this. She said this was the third time she'd had to testify. She said she loved the house, but said the owner occupied contingency was an important contingency.

She said she thought Mr. Johnson had stated that if the owner occupied restriction was lifted, multiple units could be built there.

Mr. Johnson said he didn't recall the discussion, but said whether it was owner occupied or family occupied, it could be a single family home with an accessory apartment with three students in it.

Ms. Pickett said Marcia and Bill Johns had been very vocal about changing the restriction at a previous meeting, and said they were out of town. She asked that Mr. Johns' conversations from the last two ZBA meetings on this property be read in, noting that he had spoken at previous hearings and provided his objections concerning why the owner occupied requirement should be retained.

Therise Wilkhom, 24 Meadow Road, said she loved the neighborhood and bought the property because there were families. She said she applauded the Board and the Browns for the original variance with the owner occupied restriction. She said she wasn't against people going on sabbatical, but wanted to advocate that the neighborhoods be maintained. She said she was confused right now that that the restriction was being taken off but it would still be guaranteed

that a family would live there. She asked that the Board continue to preserve family neighborhoods.

Mr. Gottsacker questioned how what was proposed would not accomplish that. He said the language in the proposal was taken out of the Zoning Ordinance

Chair Woodburn told Ms. Wilkhom that a family would be living there, but they might not own the property. She said in terms of students, there could be brothers, cousins, etc. living there.

There was discussion that this was no different than the situation with any other single family home in Durham. Chair Woodburn said this seemed like a good compromise.

Mr. Starkey said a builder would have to meet the local regulations, and was looking to build a small cape. He said lifting the owner occupied restriction meant the owner didn't have to own the property. He noted that as things stood now, if a professor living there went on sabbatical, the house would have to sit empty.

Mr. Gottsacker asked Ms. Wilkhom if she'd rather see the property vacant for three years, or see a family living there. He said what was proposed actually strengthened the position of the neighborhood.

Attorney Bruton said he was glad there had been this conversation, and said he'd wanted everyone to understand how simple this could be. He noted that with this proposed restriction, the two abutters who had spoken could rent to students, and the Browns could not. He spoke further, and said the only occupants of this house would be a family.

Mr. Gottsacker noted that he had a lot for sale, and a builder, but said the builder said he wouldn't buy the lot until he had a buyer. He said his hunch was that with the Brown's property it was also the case, which meant that the builder wouldn't build a spec house.

Mr. Starkey said household was defined in two ways in the Zoning Ordinance; as a family household and as an unrelated household, which was three unrelated people.

Mr. Gottsacker said there were very few if any lots in Durham that had this restriction.

Attorney Bruton said there were probably none, and noted that this situation was the complete opposite of the first case before the Board that evening. He said what was proposed now was to solidify what the applicants meant in 2010, which was to refer to this definition in the Ordinance that restricted the use to a family use only, and precluded renting to an unrelated person.

Ms. Pickett said the Browns had made a deal with her, and she asked what had happened to integrity. She said the Browns had made a deal, and came to the ZBA and said owner occupied. She said the Board said good. She said the Board was now saying they were forgetting that.

Chair Woodburn said the reason there was this public hearing now was that an applicant could ask for a rehearing, and could get the rehearing if there was new information presented, or the

Board was shown that it had made a mistake. She said Attorney Bruton had brought new information, which was that there was a definition in the Zoning Ordinance that allowed the restriction to be amended to take some of the restriction away from the homeowner and still go to the intent of what was originally discussed.

She said after the original denial by the Board, the applicant had come back saying that what they had been granted wasn't working. She said the ZBA said goodbye, but the applicants then brought new information. She said the Board was hearing this now, and would decide on it. She said this was what they had to do as a Board.

Mr. Gottsacker said the integrity was that the applicants had the right to do exactly what they were doing, and the ZBA had the obligation to hear them.

Ms. Pickett said she got that, but asked if they saw her point.

Mr. Starkey asked Ms. Pickett if having anything other than the owner occupied restriction would be unacceptable to her.

Ms. Pickett said that was correct.

Mr. Gooze said he didn't see how what was proposed would do any harm, and said it would be more protective than what was allowed before. He noted that he lived on the street where the property was located.

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

Chair Woodburn said the Board didn't need to discuss the variance criteria, since the variance itself had already been granted.

Mr. Starkey said he thought this was a language issue, which was why the Board accepted the idea of having a rehearing. He said the intent was that there should be a family of some kind living there, and not students. He said having reviewed the tape of the meeting where the original variance requested was heard, this was what the Board was trying to protect. He said it was a smaller than average lot, and said this proposed language protected the integrity of the neighborhood. He noted as others had that if the restriction had remained as owner occupied, and a professor living there went on sabbatical, the house would have to remain vacant.

Ms. Davis said the process had been contentious, but the objective was to have a family living in the house that would be built there. She said she thought this language would achieve that, and would protect the neighbors against undue student unrest.

Mr. Welsh said someone had bought a house based on saying owner occupied, and being owner occupied meant the same family would be there all the time, and no new people would be coming in. He said some people might think that was better, and would provide more stability for the neighbors, and he asked how the Board was supposed to think about that.

Ms. Davis said if a family from another state bought the house because their daughter or son was going to UNH, it would be owner occupied. There was discussion that this could happen under the family household definition too.

Chair Woodburn said the restriction put on the property owner had to balance the impacts on the neighborhood. She said by making this adjustment to allow more leeway to the owners, the question was whether this was incrementally more unjust to the neighbors.

Mr. Starkey said in granting this, the Board would be giving the applicant no more rights than the neighbors, and in fact would be giving them fewer rights.

Mr. Gottsacker described some owner occupied situations that could occur in Durham. He also said he had a parcel of land on the market right now, and knew that targeting \$350,000 didn't work for a rental property. He also said the Capstone project meant that he would never take that risk as an investor.

There was further discussion about whether an owner occupied restriction would provide better neighbors than the family household restriction. Mr. Starkey noted that the owner occupied deed restriction meant that the buyer wouldn't be able to put the property into a real estate trust. He said that alone was a good enough reason to change the deed restriction to family household

Mr. Gottsacker said what was proposed was an elegant solution to a sticky problem.

Mr. Welsh agreed, but said the neighbors gave up a little something.

Mr. Starkey said he didn't disagree that abutters gave up a little something, but said the Board would not be granting something that the abutters already have themselves, which is the ability to keep the home a family residence versus an owner occupied residence.

Sean Starkey MOVED to approve the change to a deed restriction for 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 deed restriction will now read that the parcel will be restricted to a family household versus an owner occupied household, as defined by the current Durham Zoning Ordinance. 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.

D. (THIS WAS ORIGINALLY ITEM II C)

PUBLIC 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 Madbury Road, and is in the Professional Office Zoning District.

There was discussion that no one had showed up concerning this application.

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

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

III. Board Correspondence and/or Discussion

- A. **REQUEST FOR REHEARING** on a September 13, 2011 denial of a petition submitted by Alexander & Alexandra Bakman, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Zoning Ordinance to create one additional house lot from an existing residential property 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.

Chair Woodburn said the Board had to determine, from reading Attorney Hogan's statement, that that it had either erred in its finding or had been presented with new information.

Mr. Welsh noted the wording in the statement "...the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion."

There was discussion. Mr. Welsh noted that Attorney Bruton in his paperwork for the previous application made the point that ZBAs could correct their own mistakes or accept new evidence.

Mr. Gottsacker read from page 4, section 4 of the ZBA Handbook. "The coming to light of new evidence is not a requirement for the granting of a rehearing. The reasons for granting a rehearing should be compelling ones; the board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created."

There was discussion that the quote from Attorney Hogan came from RSA 677.2

Mr. Starkey also quoted from the ZBA Handbook.

Mr. Gottsacker said he thought the document from Attorney Hogan rehashed many of the same arguments the Board had heard before.

Chair Woodburn said the exception to this was on page 3: "Board members expressed concern that whether or not this particular Light Manufacturing user would be an appropriate use of the property, other users might purchase the property or otherwise locate in the barn structure that might be sufficiently different from the current proposed user, and could present concerns that couldn't be addressed now by an approval by the Board. To address this concern, the Applicant would be

agreeable to a condition of approval that would restrict the requested variance to the current identified user and its specific manufacturing use. The current proposed user would be required to obtain Site Plan approval from the Planning Board, which approval could be similarly conditioned.”

Mr. Welsh said if the Board was able to do this, it would have done this with many other applications. He said he believed the Town attorney had questioned this.

Mr. Gottsacker noted that this had come up with a previous application.

Chair Woodburn noted that this was being presented as a condition by the owners and attorney, and said the question was whether this was new information that would be a basis for rehearing.

Mr. Gottsacker said variances traveled with the property, and it was difficult to limit this. He said the Town attorney said if the Board tried to limit it, it was opening up a can of worms.

Mr. Starkey said the Board had discussed this at a previous meeting. There was further discussion on this same point.

Board members said they didn’t see any new information.

Sean Starkey MOVED to deny the Request for Rehearing on a September 13, 2011 denial of a petition submitted by Alexander & Alexandra Bakman, Durham, New Hampshire, for an Application for Variance from Article XII, Section 175-53 of the Zoning Ordinance to create one additional house lot from an existing residential property 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. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

IV. Approval of Minutes – September 13, 2011

Page 1, include “alternate” after Kathy Bubar and Edmund Harvey

Sean Starkey MOVED to approve the September 13, 2011 Minutes as amended. Chair Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

V. Other Business

A.

Mr. Gottsacker said he would be gone from Durham until the Spring, and sent a letter to Administrator Selig and Chair Woodburn about this. He said the option was to resign, become an alternate, or take a sabbatical from being a regular member.

Chair Woodburn she supported the idea of Mr. Gottsacker taking a sabbatical.

She also said the ZBA needed to find another alternate. She said she had talked with Mr. Harvey, who said if the Board could find someone who could attend meetings more regularly, he would step aside.

B. Next Regular Meeting of the Board: ****December 13, 2011**

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

Adjournment at 10:32 pm

Victoria Parmele, Minutes taker

Sean Starkey, Secretary