

These minutes were approved at the April 9, 2013 meeting.

**Zoning Board of Adjustment
Tuesday, February 12, 2013 at 7:00 pm
Town Council Chambers – Durham Town Hall
15 Newmarket Road, Durham New Hampshire
MINUTES**

MEMBERS PRESENT:

Chair Robbi Woodburn
Carden Welsh
alternate Chris Sterndale
alternate Thomas Toye
alternate Mark Morong

MEMBERS ABSENT:

Vice Chair Ruth Davis
Secretary Sean Starkey
Kathy Bubar

OTHERS PRESENT:

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

I. Call to Order

Chair Woodburn called the meeting to order at 7:01 pm.

II. Roll Call

The roll call was taken.

III. Seating of Alternates

Chair Woodburn appointed all alternates to sit in for the meeting, although noting that for the Peak application, she would need to recuse herself.

IV. Approval of Agenda

Chris Sterndale MOVED to approve the Agenda as submitted. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

V. Public Hearings

A. **Public Hearing** on a petition submitted by Christopher I. Boldt, Esq, Donahue, Tucker & Ciandella, PLLC, Exeter, New Hampshire on behalf of Keith Remillard, Durham, New Hampshire, for an **Application for Variance** from Articles XX, Section 175-109(c)(3) of the Zoning Ordinance to permit the construction of an accessory dwelling unit which exceeds the square footage allowed. The property involved is shown

on Tax Map 17, Lot 34-6, is located at 11 Kelsey Drive, and is in the Rural Zoning District.

Attorney Sharon Somers said she was representing the applicant, in place of Attorney Boldt. She said the application was concerning a proposal to construct an accessory residential dwelling on a lot of approximately 2.75 acres, which currently contained one dwelling. She said a barn-like structure with two bedrooms was proposed, and said it would comply with the setback requirements. She said the accessory dwelling unit would contain 1458 sf, where 916 sf was allowed.

She said two of the abutting properties were on the market, and said attempts to contact the owners were not successful. She said Mimi Bravar, 16 Kelsey Way, had given verbal support of the application. She said no opposition had been expressed by abutters.

There was discussion about whether the variance application was just for the heated portion, or was in regard to the size of the accessory dwelling that was proposed. Attorney Somers said it was for the floor area. She said her understanding was that heated space was determined based on this.

There was discussion, and it was noted by Mr. Johnson that the Ordinance allowed an accessory structure in this zone, but it could be no more than 25% of the square footage of the existing house on the property. He said the applicant was asking for approximately 38%.

Attorney Somers summarized from the discussion that the building footprint wasn't the issue with this application, and it was the size of the dwelling unit that was the issue.

She reviewed the variance criteria and how they were met with the application.

The proposed use will not diminish surrounding property values.

Attorney Somers said because of the improvements planned for the property with the barn-like structure, property values would perhaps be enhanced. She noted that the new building would be placed toward the back of the lot, and would be surrounded by woods so would not be visible to abutters, and certainly wouldn't be more visible than a barn closer to the road. She also noted that a letter from realtor Justin Kelcourse had been submitted, affirming that there would be no diminution in the value of surrounding properties.

Granting the variance will not be contrary to the public interest.

Attorney Somers noted that a variance was contrary to the public interest only if it "unduly, and in a marked degree conflicted with the ordinance such that it violated the ordinance's basic zoning objectives." She said Section 175-109(C) of the Durham Zoning Ordinance, Performance Standards, contained no statement of purpose, and noted that the variance application implied that perhaps the purpose was to control the size of student housing.

But she said this property was situated in a more remote section of town, so what was proposed was not contrary to the public interest unduly or to a marked degree. She noted again that what was proposed would comply with the setback requirements and other aspects of the performance standards, and said she didn't believe that any aspect of the project would alter the essential character of the neighborhood, or impact its health, safety or welfare. She said the public interest criterion was therefore met.

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship

Attorney Somers reviewed the special conditions of the property that distinguished it from other properties in the area. She noted the size, shape and topography of the property, and its location in a heavily wooded, rural section of Town. She also said the property was zoned in such a way as to allow the structure of the proposed size or larger as a matter of right. In addition, she said the proposed structure and unit would be placed in such a way as to comply with all applicable setback requirements toward the rear of the 2.75 acre property, and would be of minimal visibility from the roadway and residences on adjacent parcels.

She said no fair and substantial relationship existed between the general public purpose of the ordinance provision in question, and its specific application to the property. She noted again that there was no stated purpose, and said at best, the purpose might be to check the creation of additional larger student housing units in the denser areas of Town. But she said the future use of the structure and the unit would also continue to comply with the other provisions of the section of the Ordinance.

Attorney Somers also said the proposed structure was a reasonable use, since a structure of this size was allowed as a matter of right, as was a small dwelling unit within the structure. She said it was only the size of the dwelling unit that was at issue, and said given the size of the existing 4 bedroom house on the property, the size and location of the property and the placement of the structure on the property, the applicant's request was reasonable.

By granting the variance, substantial justice would be done.

Attorney Somers said there was a clear loss to the applicant that was not outweighed by any gain to the community, if the variance was denied. She said the variance would allow the applicant to construct a proposed structure and dwelling unit that would enhance the value of the property and the neighborhood. She said the structure had been designed to appear as an historic era barn, and would be placed in such a location as to comply with all applicable setback requirements.

The variance is consistent with the spirit and intent of the Ordinance

Attorney Somers said the variance was consistent with the applicable purposes of the Zoning Ordinance. She said the Chester Rod & Gun Club and Malachy Glen NH Supreme Court cases indicated that this variance criterion was related to the public interest variance criterion. She also said a variance was contrary to the spirit of the

ordinance only if it unduly and in a marked degree conflicted with the ordinance such that it violated the ordinance's basic zoning objectives.

She said the variance application was consistent with the spirit of the Ordinance because it would allow the construction of the proposed structure and unit in a way that conformed to the applicable setback requirements, and would not alter the character of the neighborhood or adversely affect health, safety and welfare.

Chair Woodburn noted that the special conditions of the property that had been stated, including the size, shape and topography could be conditions of other properties in the general area. She said she therefore didn't see that there were special conditions of the property.

Attorney Somers said this lot was located in a small subdivision, and said some of the other lots in it were also wooded. But she said the area adjacent to the subdivision wasn't wooded, so the applicant's property was unique relative to the general area because it was wooded. She said the wooded area would provide a buffer from other properties.

Mr. Welsh said he had the same question as Chair Woodburn concerning whether there were special conditions of the property. He said there had to be something specific about the land that made it special and different. He said he had driven over to the area, and said all the properties there were wooded. He said he didn't see a lot of difference between the applicant's lot and those around it.

Attorney Somers said the area surrounding the subdivision wasn't wooded. She also said the fact that the applicant proposed to put the accessory structure in the corner of the lot should be considered, especially given that the use was allowed by right. She said the configuration of the lot lent itself to having that structure way back in the corner without impacting the other neighbors.

There was discussion that the topography went down at the back of the lot.

Mr. Morong said he wasn't sure he agreed that the intention of having the 25% requirement had to do with students, and said he thought it had to do with meeting the spirit of the Ordinance concerning the lot by making sure that they didn't end up with two homes on one property.

Attorney Somers agreed, and said the applicant didn't want to create a second principal dwelling. But she said the Board should consider the particular location of this property in Town. She said the accessory dwelling unit was proposed on a lot that contained almost 3 acres, and said the principal dwelling unit was almost 4,000 sf. She said in regard to what was an appropriate accessory structure to that, what the applicant proposed, although higher than the 25% amount allowed, wasn't higher to the point that it deviated from that amount to a marked degree.

Mr. Morong said there were many principal dwellings in Durham that were not as large as the accessory structure that was proposed. He also noted that the septic plan included in the application said the existing septic system would be used, and that it was designed for a 4 bedroom house and an in-law apartment. He questioned whether it was designed for seven bedrooms.

Attorney Somers said she didn't have the answer for this, and also said it was an issue for the building inspector.

There was discussion about whether this was something the ZBA needed to consider as part of the application. Board members agreed to pass on the issue.

Mr. Sterndale said he wondered if the intent of the 25% requirement was to prevent a de-facto multi-unit housing set up on a lot. He said the building proposed would be nearly the size of the original house and would be 30 ft away. He said this didn't seem to be an accessory use to him, and seemed like a stand-alone apartment unit.

Chair Woodburn noted that it was just the living space, and not the size of the building that they were considering. She spoke further in some detail on this.

Mr. Welsh said every other property in the district was subject to the 25% requirement. He said there had to be something different about the property itself in order for the ZBA to grant the variance.

Attorney Somers said the lot was so large that it could accommodate the proposed structure well within the setbacks. She also said that regarding the concern about de-facto multi-unit housing, the applicant would not be allowed to have more than 3 unrelated people living there. She said they would be happy to stipulate this as a condition of approval. She also said concerning the special condition issue that the size of the lot needed to be taken into account, along with the fact that the structure could be placed in a portion of the lot where the added size of the accessory unit wouldn't really affect the abutters.

Mr. Toye said it was his understanding that there were restrictive covenants in that neighborhood concerning rental housing. There was discussion, with Attorney Somers stating that she would be surprised if that was the case. She also said it was a family situation at the applicant's property.

Chair Woodburn said the fact that there were family members involved could be a temporary situation, and noted that the variance ran with the land.

Attorney Somers said if there were in fact covenants in place that prohibited rentals in the subdivision, the property owner was bound by them. She said the ZBA couldn't enforce covenants, but she said it would be appropriate to have a condition of approval that acknowledged that the covenants existed, so there would be the expectation that there wouldn't be a rental situation.

Gerald Kwasnik, 12 Tall Pines Road, said he was an abutter one street over, and said he was not notified about the project. He said he was against granting the variance. He said there were covenants for his subdivision. He said the properties in it were heavily wooded, and said his own property contained 5 acres. He said his covenant said he couldn't build a structure on his property. He said as time went on and the in-laws were gone from the applicant's property, it would be a rental property.

Mr. Kwasnik said he was shocked to know that a structure this large was allowed by the Zoning Ordinance, on a tract that was only 2.57 acres in size, when there was a large structure there already. He said it was the 3 dimensional look of the building that was large, besides the footprint, and said it wasn't really suited for the location where it was proposed on Kelsey Road.

There was discussion about this area of Town, and Mr. Morong asked Mr. Kwasnik if his subdivision was the same as the one where the applicant's lot was.

Mr. Kwasnik said Cheney owned both subdivisions, and said his subdivision was developed a few years prior to the other one. In answer to a question from Mr. Toye, he said he was shocked that the second structure was allowed, based on the covenants he had to go by, and was also shocked about its size.

Mr. Toye noted that the applicant could build a barn there as a matter of right, and that this barn could be a large size.

Mr. Kwasnik said if the variance was granted, theoretically everyone including himself could do the same thing. He said the ZBA would be setting a precedent for that area of Town.

There was further discussion. Mr. Johnson noted that Mr. and Mrs. Kwasnik were in fact notified about the ZBA meeting.

Bonnie Bryant, 8 Tall Pines Road, first noted that the applicant had left her a voice mail about discussing this matter. She said her property contained about 5 acres and was heavily wooded, but said it got less wooded, the closer one got to the property line she shared with the applicant. She said the new structure would be very visible to the abutters at the back.

She questioned the specialness of the applicant's property, noting that some abutting properties were much larger and more wooded. She said the applicant's property wasn't so wooded anymore, since the house was put in. She said she understood that the accessory structure was allowed there, and said putting a barn, etc. there to store things was one thing. She said in her opinion, what the applicant was doing was subdividing the lot and putting another property on it.

Attorney Somers said in regard to the concern about the building morphing into a rental property over time, that both the structure and the use were allowed as a matter of right. She said the objections were misplaced, and said just because the structure would be larger than what was allowed, this didn't mean that it would be rented. She said the rental issue would be addressed by the particular homeowner association, and said it was an enforcement issue for the ZBA

Chair Woodburn said if ZBA members knew that there were protective covenants that didn't allow rentals, this would play into their decision. But she said they didn't know this, and so would be looking at the variance criteria without that information in mind.

Attorney Somers said this application was not being presented as a rental proposal, and said it wasn't the Board's purview to speculate on this.

Chair Woodburn said it was the ZBA's job to protect the value of properties, so the rental question was part of their purview.

Attorney Somers said rental of the proposed structure could happen if it was 900 sf in size.

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

Chair Woodburn noted the letter from a realtor that the property values wouldn't be diminished if the variance was granted. She said the Board didn't really have a lot to go on concerning this variance criterion.

Mr. Toye said an abutting property had an accessory dwelling unit on it, and the property had been for sale for quite a while. He said he thought granting the variance would be a positive thing for the property and immediate neighbors, but noted that the abutters in back were concerned about how the variance would affect them.

Mr. Toye said he didn't think granting the variance would be contrary to the public interest. He said the applicant's attorney had done a good job of outlining the pertinent court cases, and said the mere fact that what the applicant proposed conflicted with the Ordinance wasn't enough. He said it had to be proved that there would be a conflict with the spirit and intent of the Ordinance.

Chair Woodburn said she didn't think granting the variance would alter the essential character of the neighborhood, and also said there wasn't a threat to health, safety and welfare.

Mr. Welsh said granting the variance would have a minor negative impact on the Rural district, and said it wouldn't conflict with the Ordinance unduly and to a marked degree.

Concerning the hardship criterion, Chair Woodburn noted the argument made by the applicant concerning the size and shape of the property, and the fact that it was heavily wooded.

Mr. Sterndale said he thought the hardship criterion wasn't met. He said if a barn had already been built, that would be condition that was unique to the property. He said noting the topography and the fact that the lot was wooded wasn't enough.

Mr. Morong said in that neighborhood, he didn't see that the applicant's property was particularly different from any other property there. He noted that, logically speaking, he didn't have a problem with the use and the structure, but said he didn't see a case for hardship.

Chair Woodburn said in general, the arguments for having a bigger accessory unit made sense. But she said when she looked at the variance criteria, she was having difficulty with the hardship criterion.

Mr. Welsh said he couldn't see that there were special conditions of the property. He said he had thought that perhaps there was the fact that the property slanted back. But he said this meant that some abutters could see it from their lot. He said the Board had to follow the criteria, or else everyone would be asking for variances. He said the Zoning Ordinance was there for a reason.

Chair Woodburn said she thought that the application met the substantial justice criterion. She also said she didn't think it unduly, and in a marked degree, conflicted with the Zoning Ordinance such that it violated the Ordinance's basic zoning objectives.

Mr. Welsh summarized that he thought the application met all of the variance criteria except the hardship criterion.

Carden Welsh MOVED to deny the petition submitted by Christopher I. Boldt, Esq, Donahue, Tucker & Ciandella, PLLC, Exeter, New Hampshire on behalf of Keith Remillard, Durham, New Hampshire, for an Application for Variance from Articles XX, Section 175-109(c)(3) of the Zoning Ordinance to permit the construction of an accessory dwelling unit which exceeds the square footage allowed. The property involved is shown on Tax Map 17, Lot 34-6, is located at Kelsey Drive, and is in the Rural Zoning District. Mark Morong SECONDED the motion, and it PASSED unanimously 5-0.

B. Public Hearing on a petition submitted by Joseph Persechino, P.E., Tighe & Bond, Portsmouth, New Hampshire, on behalf of Peak Campus Development, LLC, Atlanta, GA (applicant), Chet Tecce Jr., Durham, New Hampshire, John & Patricia McGinty, Durham, New Hampshire and the University of New Hampshire, Durham, New Hampshire (property owners), for an **Application for Variance** from Article XIII, Section 175-60 of the Zoning Ordinance to permit the filling of a portion of wetland in the Wetland Conservation District for the construction of a multi-use path. The properties

involved are shown on Tax Map 13, Lots 6-1, 10-0, 3-0UNH, 4-0UNH, 1-0UNH and 3-1UNH, are located on Mast Road and are in the Office Research/Light Industry Zoning District.

Chair Woodburn recused herself for the application.

Jeff Githens, Vice President of Peak Campus Development LLC, was first asked if he wanted to go forward with the application, given that there were only 4 voting members. After some explanation and discussion, he said he would like to proceed.

Mr. Githens said a variance was requested to fill a small wetland in order to allow construction of a path to and from the apartment project. He noted that this path was a condition of the approval of the project by the Planning Board in November 2012. He said the requirement that there be a path was something that Peak was in favor of, so there would be a safe pedestrian and bike access from where the current path terminated on Mast Road all the way down to the entrance of the apartment community, and across from Bryant Park West.

He said the path was needed because there was a high number of students in the area, and a lack of safe access to the area other than the road shoulder. He also said there was no alternative location to place the path that would be any better than what was proposed. He said Peak had worked closely with UNH and had also gotten Planning Board input.

Mr. Githens said they had been able to avoid mature trees as much as possible, and were limiting wetland encroachment as much as possible. He also noted that the path would stay away from nearby stone walls. He said there was no way to avoid the wetland without being impractical. He said there would be a fairly low impact from the path and said it was a small area of encroachment. He said he thought the path would be good for all the constituents that it would serve, including surrounding properties and the people who parked at the West Edge lot.

Project engineer Joe Persechino provided details on the properties on which the path would run, and also spoke in some detail the wetland areas that would be impacted. He also described the present and proposed drainage of the area.

Mr. Johnson noted that path would only be on University property. He also noted that because of the wetland impact, the construction of the nature trail required a condition use permit from the Planning Board, in consultation with the Conservation Commission, so the ZBA wouldn't be the only board looking at what was proposed.

Mr. Welsh noted that the letter from the Conservation Commission suggested a different solution for the path.

Mr. Johnson said the ZBA was a quasi-judicial board, and said if it approved this application with conditions, and the Planning Board then wanted Peak to move the path,

it would have to come back to the ZBA. He suggested that the ZBA let the Planning Board deal with the possible solutions proposed by the Conservation Commission.

Mr. Persechino noted that he had met with the Conservation Commission in December, and also said a member of the Conservation Commission was at the recent Technical Review Committee meeting that was held in preparation of the Planning Board meeting. He also said the Commission's comments and recommendations had been provided to DES, so they along with the wetland permit application were at DES now.

There was discussion. Mr. Johnson noted that DES might have a third opinion concerning the path.

Mr. Githens began to review the conditional use permit criteria and how they were met, which were a part of the current application before the Planning Board. He then reviewed how the variance criteria were met. He said there would be no decrease in the value of surrounding properties as a result of granting the variance. He also said granting the variance would not be contrary to the public interest, because the path extension would provide a safe and convenient pedestrian/bike alternative that did not currently exist in that part of Durham.

He said that concerning the hardship criterion, there was no better location for the path than the one proposed, and said there was no alternative to encroaching on the wetlands. He said the request was reasonable, given what Peak was trying to do in providing a safe alternative for pedestrians and bicyclists.

Mr. Githens said if the variance wasn't granted, there would be no other viable alternative to provide pedestrian access down the corridor. He said Peak was against allowing residents to use the road shoulder, and said the Planning Board had agreed that the location now proposed for the path was where it should go, and would be a natural thoroughfare once built.

Mr. Githens said granting the variance would be consistent with the Durham Zoning Ordinance. He said Peak was trying to get something approved that was a condition of approval required by the Planning Board, and also said it would be a good thing for the project.

Mr. Welsh asked for details on what putting in the path would do to the wetland.

Mr. Persechino said they would lay out the entire pathway, and would walk it with various parties. He said in doing this, they would make sure that the path location was adjusted in the field to reflect trees and minimize wetland impacts. He noted that they had already walked the proposed pathway with Conservation Commission Chair John Parry, who worked for the Forest Service.

He also said when the excavation work for the path was done, erosion control barriers made of stump grindings would be installed. He spoke further on how the pathway would

be put in, and noted that a culvert would be installed. He said fill would be brought in to make the pathway, and said it would then be paved.

Mr. Welsh asked if there would be a culvert for the small drainage ditch area, and Mr. Persechino explained that a catch basin and culvert would be put in in order to get the water under the path. He said this water would then flow to another culvert, and would then go out into a wetland complex.

Mr. Sterndale asked if it would be dry enough there to become a footpath at that location if something wasn't actually built there.

Mr. Githens said it was dry enough, and Mr. Johnson said the kids out there would make a path if Peak didn't make one.

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

Chris Sterndale MOVED to close the Public Hearing. Tom Toye SECONDED the motion, and it PASSED unanimously 4-0.

Mr. Morong said it sounded like the application met all of the variance criteria. He said that concerning the public interest criterion, the path would be a good thing for everyone. He said there was a lot of traffic in that area, and said the path would be of benefit to existing and new traffic. He said it looked like a piece of the wetland was up against the road anyway, and said it didn't look like a terrifically important wetland in terms of drainage and habitat for ducks.

Mr. Toye agreed that the variance criteria were met.

Chair Welsh referred to the note from Conservation Commission member Derek Sowers, who said impacts on many small areas of wetland had a substantial cumulative impact, and also said if the walkway was built, this should be done on pilings. Chair Welsh said the ZBA could grant the variance but impose a condition that the path needed to be on pilings.

Mr. Johnson said the ZBA ran the risk of DES and/or the Planning Board not agreeing with that. He said the Planning Board would wrestle with Peak, the University and DES about the correct design of the path.

There was discussion. Chair Welsh said perhaps the ZBA could say that it recommended that the Planning Board listen to the Conservation Commission, and do the path project in a way that would have the least impact

Mr. Johnson said that was much like the wording in the Ordinance concerning a conditional use permit application, which the Planning Board would review in

consultation with the Conservation Commission. It was noted that there were some wetland experts on the Conservation Commission.

There was further discussion.

Mr. Sterndale said he was comfortable deferring to the Planning Board in regard to the Conservation Commission's recommendations concerning the path.

Chris Sterndale MOVED to approve a petition submitted by Joseph Persechino, P.E., Tighe & Bond, Portsmouth, New Hampshire, on behalf of Peak Campus Development, LLC, Atlanta, GA (applicant), Chet Tecce Jr., Durham, New Hampshire, John & Patricia McGinty, Durham, New Hampshire and the University of New Hampshire, Durham, New Hampshire (property owners), for an APPLICATION FOR VARIANCE from Article XIII, Section 175-60 of the Zoning Ordinance to permit the filling of a portion of wetland in the Wetland Conservation District for the construction of a multi-use path, as submitted on February 12, 2013 at the ZBA meeting. The properties involved are shown on Tax Map 13, Lots 6-1, 10-0, 3-0UNH, 4-0UNH, 1-0UNH and 3-1UNH, are located on Mast Road and are in the Office Research/Light Industry Zoning District. Tom Toye SECONDED the motion, and it PASSED unanimously 4-0.

- C. PUBLIC HEARING** on a petition submitted by Philip Noury, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Zoning Ordinance to permit the construction of a caretaker's apartment within a commercial business. The property involved is shown on Tax Map 11, Lot 23-1, is located at 1 Morgan Way, and is in the Residence C Zoning District.

Chair Woodburn returned to the table.

Mr. Noury said he was requesting a variance to allow him to reside at One Morgan Way. He said the property was located in a residential neighborhood, and noted that when he bought it, it had been a church. He said he got approval from the Town to change the property into a commercial use as an office space for his photography business, and said it was a pretty low impact business.

He said there was a kitchen and 2 half baths in the building, and said he proposed to convert office space into a bedroom. He said there was currently also a multimedia room, and said this could be used as a living room. He said his business would remain in the building, and noted that he was already there 12-14 hours per day, so the impact from vehicles with what he was now proposing would be negligible. He said instead of leaving in his car at night, he would stay there.

Mr. Johnson noted that a change of use back to residential would run with the property. He also said Mr. Noury didn't want to change back to residential, given that the housing market was slow, and such a change would mean the commercial viability of the property would be lost. He said one couldn't sleep in a professional office building, and also said the Ordinance didn't allow caretaker apartments in that zone.

He said with what was proposed, a commercial property owner/employee would be allowed to live there, and the next owner of the property would be allowed to do the same if he/she was running a business. He note that the building would need some renovations to make it suitable as a residence, and said he would need to make sure that the basics for a dwelling unit were met.

Mr. Welsh asked whether the problem was that it was a commercial building in a residential area, and if this was a commercial zone, a caretaker apartment would be allowed.

Mr. Johnson said a caretaker apartment wasn't allowed in the RC district.

Mr. Morong said normally, a commercial building wouldn't be allowed in that zone unless it was grandfathered. There was discussion that the building had been a church, which had been converted to an office.

Chair Woodburn asked that Mr. Noury go through the variance criteria and how they were met.

Mr. Noury said he didn't believe that granting the variance would decrease the value of surrounding properties. He said he didn't believe that granting the variance was contrary to the spirit and intent of the Ordinance. He said he believed that the use proposed fit nicely into the residential area it was surrounded by.

Concerning the hardship criterion, he said what made his property unique was that it was a commercial property that was located in a residential area.

Chair Woodburn agreed that it was a unique situation. She said the proposed use was reasonable, and also said it would be better to have someone there in off hours because it was in a residential area.

Mr. Noury said he thought there would be a minimal impact from what he proposed. He also explained that the property had been on the market for some time, and said granting the variance might add some marketability to the property.

Concerning the substantial justice criterion, Chair Woodburn noted that the application said granting the variance would mean the owner's usability of the property would be increased, and the chance of resale would also be increased.

Mr. Toye noted that a condition of approval of the 2003 site plan approval was that no expansion of the building would be permitted. He asked if this meant no expansion of uses was allowed, and Mr. Johnson said it meant there could be no expansion of the building itself.

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

Mr. Johnson noted that caretaker apartments were allowed in 8 of 13 zones in Durham.

Mark Morong MOVED to close the Public Hearing. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Johnson noted in response to questions from Mr. Welsh that the applicant was asking for a variance to allow a use that was more conforming with the RC zone. He also said “caretaker apartment” meant that the owner or employee of a business could live there. He said the Board could limit the dwelling area size, and also said the employee could be married, and there could be a rental situation. There was discussion about the size of the building.

Board members agreed that granting a variance would not decrease the value of surrounding properties. Mr. Welsh said if the property was sold and a different business came in, the question was what the worst situation could be, and if this would impact property values.

Mr. Morong said there were plenty of restrictions in the RC district already, and Mr. Sterndale agreed.

Mr. Toye said granting the variance would not be contrary to the public interest, stating that it would make the property less nonconforming.

Chair Woodburn said the hardship in this instance was the nature of the building itself, which was a special condition. She also said the proposed use was reasonable.

She said substantial justice would be done in granting the variance, because the situation would be better for the owner and also safer for the neighborhood.

Board members agreed that granting the variance would not be contrary to the spirit and intent of the Ordinance.

Tom Toye MOVED to approve a petition submitted by Philip Noury, Durham, New Hampshire, for an Application for Variance from Article XII, Section 175-53 of the Zoning Ordinance to permit the construction of a caretaker’s apartment within a commercial business. The property involved is shown on Tax Map 11, Lot 23-1, is located at 1 Morgan Way, and is in the Residence C Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

D. PUBLIC HEARING on a petition submitted by Kelly L. Cullen, Durham, New Hampshire, for an **Application for Variance** from Article XII, Section 175-54 and Article XXIV, Section 175-139 of the Zoning Ordinance to permit the potential location of a non-compliant septic system on the east side of the property as part of a two-lot

subdivision. The property involved is shown on Tax Map 15, Lot 23-0, is located at 13 Longmarsh Road, and is in the Residence B Zoning District.

Ms. Cullen said she owned the property, which contained 3.77 acres and was located in the RB district. She said the lot was unusually large for the neighborhood, and said she would like to subdivide the lot into two lots, each of which would larger than the 1 acre lot size that was required. But she noted that there was ledge on the property.

She said there were two variance requests, and said she hoped she could include the second request that evening. She said the first request was regarding the existing septic system. She said it was believed to be the original system put in 36 years ago, and said it wouldn't pass inspection, if proposed today noting that it was located too close to a wetland area, and was too close to the water table. She said she was concerned about the environment and protecting the water resources in the Longmarsh area.

Ms. Cullen said a number of test pits were dug, and said two of them were successful. She said septic designer Adam Fogg had recommended that a Clean Solutions septic system be installed, which would require a much smaller leachfield. She said this was what she proposed to do, but said a variance was needed because the leachfield would be too close to the lot line.

She began to review how the variance criteria were met. She said the new system would benefit the neighborhood because it would be much more environmentally sensitive, and said granting the variance would not decrease the value of surrounding properties because it was below ground. She said if anything it would increase property values because it was a more environmentally sensitive system.

There was discussion on the existing and proposed new properties, as well as the abutters. It was noted that the proposed septic system was closer to an abutter. Ms. Cullen noted that the 4 abutters had been notified by certified letter. She provided details on the abutters, one of which was a NH Fish and Game wildlife refuge across the street. She said she had had discussions with the other 2 of 3 abutters, and said she hoped she had answered their questions.

Mr. Welsh asked how close the house was to the abutting neighbor. There was discussion. Ms. Cullen said the neighbor's house couldn't be seen when the leaves were on the trees. She said the new house would be on the opposite of the existing house, and wouldn't be visible either.

Chair Woodburn said she had some questions about the location of the proposed new septic system. She said it was inside the setback.

Mr. Fogg said it was a gray area in terms of whether the area in question, which was the fill slope for the septic system was actually part of the system.

Mr. Welsh asked why the new septic system was proposed where it was rather than in the existing location or someplace else.

Mr. Fogg said it was because of the test pits that were dug. He said nine test pits were dug, noting that it was a tough site because of the ledge. He said the existing system was closer to the wetlands than the new system that was proposed,, and didn't meet the criteria, so they were trying to push it further back. He said the location proposed was the best, and was really the only spot on the property. He said the other test pits were much worse.

Mr. Johnson noted that there weren't many applications like this, because there weren't a lot of subdivisions in Town. He said because it was a subdivision proposed, there was a lot of oversight in regard to the selection of the best location of the septic system. He provided details on this, and among other things said that was why nine test pits were done, for the existing lot and for the future lot.

Chair Woodburn said a variance was being requested to allow the replacement septic system in the sideyard setback. She asked what the second variance request was in regard to Section 175-139.

Mr. Johnson noted the criteria in Section 175-39, and said the test pit had failed one of them.

Mr. Fogg said the test pit used to determine the location for the replacement system didn't meet the criterion that required a minimum depth of 24 inches to the seasonal high water table. He said they only got 21 inches, but noted that this was allowed under Section 175-139 of the Zoning Ordinance because the septic system that was proposed was more advanced.

It was noted that Section 175-139 indicated that a special exception was needed in order to approve an innovative septic system for this situation. Chair Woodburn said the application wasn't noted as a special exception application.

Mr. Johnson said the Board could grant the variance to the special exception requirement, and could include those same requirements in the approval. There was discussion.

Chair Woodburn reviewed the criteria for granting a special exception:

Mr. Fogg explained that the septic system for the new lot that was proposed also required a special exception because the test pit found ledge at 24 inches, when a minimum of 48 inches was required. He said putting in a Clean Solutions in this situation would meet the State requirements. He said more fill would be put in, which would create the receiving layer for the system.

Mr. Welsh noted that there was a test pit that found 36 inches to ledge, and asked why this location wasn't therefore used instead.

Mr. Fogg said it wouldn't be advantageous to put the leachfield down slope because of the wetland setback, and said the location proposed would be further from the wetland. There was further discussion on possible locations, with Chair Woodburn noting that the wetland setback line basically surrounded the proposed house.

There was discussion by the Board that there were two new septic systems proposed that didn't meet the Zoning Ordinance.

Mr. Morong noted that approval of the proposed subdivision was conditional on the two septic systems being approved. He said it was only because the applicant wanted to subdivide her property that the variances were needed.

Ms. Cullen said if she didn't subdivide, she could replace the existing system in kind if there were a failure. But she said she wouldn't want to do that because it wouldn't be environmentally sensitive.

Mr. Morong said he was trying to figure out the hardship issue. There was discussion.

Mr. Fogg said a variance would be needed anyway, even if there was only one new system - for the existing lot, because of the depth to water table issue. He said whether a variance was needed for the sideline setback issue was debatable, and was the ZBA's call. He said the only thing that would be within the setback would be the fill.

There was discussion about whether the fill was considered to be part of the septic system structure. Mr. Fogg said it was an essential part of the system but was soil as opposed to being the septic system.

Chair Woodburn said for the setback variance being requested for the existing lot, the Board needed to discuss the variance criteria. But she said there special exceptions were needed for the septic systems for both of the lots.

Mr. Johnson suggested again that the special exception criteria could be rolled into the variance from Section 175-139. He said perhaps the need for a special exception could be waived as part of the variance.

There was discussion about whether the Board could do this. Chair Woodburn said the Zoning Ordinance required a special exception in this instance as part of Section 175-39, and said the standards for a special exception were different from variance criteria.

It was noted that the applicant hadn't applied for a special exception, and there was no noticing of a special exception. There was further discussion.

Chair Woodburn said she didn't feel comfortable handling the special exception issue as part of the variance application. There was further discussion.

There was detailed discussion about other possible locations for the septic system on the existing lot, given the test pit data, so it wouldn't be in the setback and therefore wouldn't need the setback variance.

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

Mr. Welsh said Mr. Morong's point that there wouldn't be a problem if there wasn't going to be a subdivision was a good one. There was further discussion.

Chair Woodburn re-opened the public hearing, and Mr. Fogg said it turned out that a special exception was not needed for the existing lot, but was needed for lot 23-1, which was the new lot.

There was further discussion on the self-created hardship issue. The Board then went through the variance criteria for the setback variance concerning Lot 23-0.

Chair Woodburn said granting the variance would not decrease the value of surrounding properties. She also said granting the variance would not be contrary to the public interest because the proposed septic system would be more in compliance than the existing system.

Mr. Welsh said there was hardship given the special conditions of the property, because there weren't a lot of places to put the system because of the existence of high water table and ledge, which varied from property to property.

Chair Woodburn said the variance requested was reasonable because the new system would be better than the one there now.

Chair Woodburn said substantial justice would be done in granting the variance, because environmental impacts would be reduced. She said granting the variance would not be contrary to the spirit and intent of the ordinance, stating that what was proposed would make things better.

Chair Woodburn began to go through the special exception criteria in regard to the septic system for proposed lot 23-1.

Mr. Welsh questioned whether an abutter to the west would believe he/she was noticed properly concerning the special exception issue. It was noted that the notice said: "Application from Article XII, Section 175-54 and Article XXIV, Section 175-139 of the Zoning Ordinance to permit the potential location of a non-compliant septic system on the east side of the property as part of a two-lot subdivision."

There was discussion, and Chair Woodburn said the notice only referred to the septic system on 23-0.

Mr. Johnson said there wasn't another lot yet.

Mr. Morong said he agreed with Mr. Welsh and Chair Woodburn. He said putting in a new system was different than replacing an existing system, and said the abutter to the west might have come to the meeting if this had been noticed. Other Board members agreed.

Ms. Cullen said she was agreeable to re-notifying abutters, and asking for the special exception for the second septic system. She also noted that she had sent a certified letter to the abutter on the west side, and also had a lengthy conversation with this abutter about her plans to subdivide and put in a new house.

Chair Woodburn closed the Public Hearing.

The Board agreed that the special exception for the septic system for the proposed lot needed to be noticed, and that the application would be heard at the next meeting.

It was noted that a special exception would still be needed for the new septic system on the existing lot, even though the 24 inch distance from the high water table was achieved for a test pit, because two test pits were needed. There was discussion that there would be one special exception application for the two septic systems.

Chair Woodburn said the applicant could meanwhile decide whether she wanted the fill area for the leachfield to be moved out of the setback, in which case the sideyard setback variance would not be needed.

Carden Welsh MOVED to continue the application to the March 2013 ZBA meeting. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.

VI. Approval of Minutes

November 13, 2012

Page 7, 2nd full paragraph, should read “..the Board needed to be careful...”

Chris Sterndale MOVED to approve the November 13, 2012 Minutes as amended. Carden Welsh SECONDED the motion.

After discussion, the Board agreed to wait to vote on the November 13, 2012 Minutes because there were only two ZBA members from that meeting at the current meeting.

Mr. Sterndale and Mr. Welsh withdrew their motion and second.

December 11, 2012

Page 7, 2nd full paragraph, should read "...on Bagdad Road was for sale, and..."

***Carden Welsh MOVED to approve the December 11, 2012 Minutes, as amended.
Chair Woodburn SECONDED the motion, and it PASSED unanimously 5-0.***

VII. Other Business

VIII. Adjournment

Mark Morong MOVED to adjourn. Tom Toye SECONDED the motion, and it PASSED unanimously 5-0.

Adjournment at 9:41 pm

Victoria Parmele, Minutes taker

Kathy Bubar, Secretary