

**DRAFT**

**ZONING BOARD OF ADJUSTMENT  
Tuesday, May 13, 2014 at 7:00 p.m.  
Town Council Chambers - Durham Town Hall  
15 Newmarket Road, Durham, New Hampshire  
MINUTES**

**MEMBERS PRESENT:** Chair Sean Starkey  
Vice Chair Robbi Woodburn  
Chris Sterndale  
Jim Lawson  
Tom Toye  
Alternate Mike Hoffman  
Alternate Ruth Davis

**MEMBERS ABSENT:**

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

**I. Call to Order**

Chair Starkey called the meeting to order at 7:00 pm.

**II. Roll Call**

The roll call was taken.

**III. Seating of Alternates**

No alternates were seated.

**IV. Approval of Agenda**

Chair Starkey said agenda items A through I had been postponed to the next meeting at the request of the attorney representing Young Drive LLC. He said items VI J and K would therefore become items VI A and B on the agenda.

*Chris Sterndale MOVED to accept the agenda as amended. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.*

**V. Election of Officers**

*Chair Starkey MOVED to nominate Robbi Woodburn as Vice Chair of the ZBA. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.*

*Chair Starkey MOVED to nominate Chris Sterndale as Secretary of the ZBA. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.*

***Robbi Woodburn MOVED to nominate Sean Starkey as Chair of the ZBA. Tom Toye SECONDED the motion, and it PASSED unanimously 5-0.***

Chair Starkey said the Young Drive site walk would be rescheduled to take place at June 10<sup>th</sup> at 5 pm.

**VI. Public Hearings:**

- A. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article IX, Section 175-29(B)(1-4) of the Zoning Ordinance to allow for the construction of a new single family residence with parking in the wetland and shoreland districts. The property involved is shown on Tax Map 4, Lots 42-9, is located at 10 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- B. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XI, Section 175-46(F)(1 or 2) of the Zoning Ordinance to allow for the construction of a parking area within the front yard setback. The property involved is shown on Tax Map 4, Lot 42-9, is located at 10 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- C. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article IX, Section 175-29(B)(1-4) of the Zoning Ordinance to allow for the construction of a new duplex residence with parking in the wetland and shoreland districts. The property involved is shown on Tax Map 4, Lots 42-10, is located at 6 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- D. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XI, Section 175-46(F)(1 or 2) of the Zoning Ordinance to allow for the construction of a parking area within the front yard setback. The property involved is shown on Tax Map 4, Lot 42-10, is located at 6 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- E. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article IX, Section 175-29(B)(1-4) of the Zoning Ordinance to allow for the construction of a new duplex residence with parking in the wetland and shoreland districts. The property involved is shown on Tax Map 4, Lots 42-11, is located at 5 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- F. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article IX, Section 175-29(B)(1-4) of the Zoning Ordinance to allow for the construction of a new duplex residence with parking in the wetland and shoreland districts. The property involved is shown on Tax Map 4, Lots 42-12, is located at 9 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- G. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article IX, Section 175-29(B)(1-4) of the Zoning Ordinance to allow for the construction of a new duplex residence with parking in the wetland and shoreland districts. The property involved is shown on Tax Map 4, Lots 42-13, is located at 13 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- H. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XI, Section 175-46(F)(1 or 2) of the Zoning Ordinance to allow for the construction of a parking area within the front yard setback. The property involved is shown on Tax Map 4, Lot 42-13, is located at 13 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- I. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Francis Chase, Beverly, Massachusetts, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article IX, Section 175-29(B)(1-4) of the Zoning Ordinance to allow for the construction of a new duplex residence with parking in the wetland and shoreland districts. The property involved is shown on Tax Map 4, Lots 42-14, is located at 17 Young Drive; and is in the Coe's Corner Zoning District.

Postponed

- J. **PUBLIC HEARING** on a petition submitted by Valerie Shelton, Appledore Real Estate, Inc., Newmarket, New Hampshire, on behalf of Mildred F. Penhale Rev Trust, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from:

**Article IX**, Sections

175-29(D),

175-30(D)(1) and

175-30(D)(3)(c&d);

**Article XII**, Sections

175-40(E)

175-54 and

175-55(B);

**Article XIII**, Section

175-59(2)

**Article XIV**, Sections

175-71(5&6),

175-72, 175-74(A)

175-75.1(A.1, 2 & 5)

**Article XXII**, Section 175-120 of the Zoning Ordinance, to permit the construction of an attached one and one-half story, 26' x 36' addition to a legally non-conforming dwelling within the shoreland, wetland and sideyard setbacks. The property involved is shown on Tax Map 12, Lot 16-14 is located at 15 Edgerly Garrison Road, and is in the Residence C Zoning District.

Valerie Shelton of Appledore Real Estate represented the applicant, and said Tom Penhale, one of the trustees of the Trust was also present. She said the property was under contract and the potential buyer was present.

She noted the buildable portion of the lot on the plan, and said there was over 200 ft of waterfront along Little Bay. She said there was a right of way piece of land that abutted the property and went down to a neighborhood dock. She said the reason for the variance requests was that the proposed addition, which was to put a 26 ft by 36 ft garage and mud room/laundry in the back, would encroach 20 ft into the sideyard setback. She said the current existing garage was far from the main house, and said a portion of it was within the wetland buffer zone. She said the proposed addition wouldn't encroach into the wetland buffer or shoreland setback, but said because the main house was in both of these areas, the applicant had needed to include variance requests for this.

Ms. Shelton said the current footprint of the house was 1776 sf, and said a 53% increase in the footprint was proposed while a 15% increase was allowed, so a variance was required for this. She said it was a fairly small house right now for the size of the lot. She said the volume of the house would expand if the area over the garage was finished later. She said the house currently contained 3 bedrooms, and noted that a variance was received last year to install a Clean Solutions septic system for a 3 bedroom house. She noted the current third bedroom location in the house next to what would be the addition, and said there was the potential to move this third bedroom to the attic space. She said the basement consisted only of an area for the furnace and hot water heater, and said there was no storage space there.

She said other variance requests having to do with the shoreland and wetland overlays had to do with vegetation removal. She said there were three trees to potentially come down and provided details on this. She said one couldn't see the house from the street, noting that the property, including most of the shoreland area, was heavily vegetated with trees. She said the gravel driveway for the property was located in the sideline setback, and said there was a heavily vegetated buffer along the driveway.

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

No decrease in the value of surrounding properties. She said no decrease in the value of surrounding properties would be suffered because the addition to permit an attached garage and additional living area would be consistent with surrounding properties, and would not be readily visible from any abutting property due to the heavy vegetation along the boundaries and the sloping topography of the subject parcel. She said there would be no noise, light or other environmental impacts once the proposed improvements were completed. She said the applicants were working with the abutters to insure that the proposed addition would not adversely impact their property.

Public Interest. Ms. Shelton said granting the variance would not be contrary to the public interest. She quoted the purpose of the RC district: "...to protect the water quality of the

community's principal surface waters and to preserve the rural character and scenic beauty of these coastal areas including the view of the shore as seen from the water. In this district, all development will be carried out in a manner that preserves the natural and scenic environment of the district. Residential development will be limited to housing that is designed so that the character of the district is maintained, the scenic quality of coastal areas is protected, and a significant amount of open space is permanently preserved."

She said the proposed addition would be situated within an area of the property that was well buffered from both the bay and the abutter's house. She said this location would require minimal tree removal. She noted that two of the trees were currently cabled together to minimize one from falling onto the existing house. She said the addition would be located as far as possible away from the wetland on the opposite side of the parcel, and would not be visible from the street due to the sloping topography of the lot. She said it would be minimally visible from the bay since it would be located in the front of the house.

Hardship – Ms. Shelton said owing to special conditions of the property that distinguished it from other properties in the area, denial of the variance would result in unnecessary hardship. She said there was no fair and substantial relationship between the general public purpose of the Ordinance provision and the specific application of that provision to the property because the parcel was 2.35 acres, much of which afforded limited use under the existing regulations due to the very irregular shape and existing conditions.

She noted that the house was not centered on the lot and was close to the side setback line. She said positioning the addition on the other side of the house would encroach on the wetland setback. She said the existing structure size, architecture, lack of basement area, location, drilled well, utility lines, soil conditions, topography and wetlands on the site created a hardship for the applicant to achieve their proposed objectives without the variances. She also said the size of the house rendered it grossly disproportionate to the land value, noting that it was assessed at over 63% of the total assessed value, which made it difficult to sell due to the disproportionate taxes on the land vs. the house. She also said the low ceilings, cape style design with steep roof pitches and crawl space basement greatly limited the ability to add usable finished area.

Ms. Shelton said denial of the variance for the proposed addition would create an unnecessary hardship for the owner of the property. She said the property had been on the market for many months and had undergone several price reductions, and said the market had been rejecting the property primarily due to its lack of finished living area, interior layout, lack of an attached garage and lack of any basement storage.

She said there was currently a contract to purchase the property, and said the buyer was only willing to complete the sale if a permit to add the proposed addition could be obtained. She said not granting the requested variances would have an adverse material impact on the value of the house when compared to other waterfront properties which 1) had an existing attached garage or the ability to add an attached garage through previously granted variances, or 2) would be permitted by zoning due to the house being constructed after the current setbacks were adopted, with consideration given to siting the house on a lot to meet the current setbacks and are much larger in design and volume permitting the ability to expand.

~~THIS SOUNDS AWKWARD BUT IS WHAT MS. SHELTON READ FROM.~~

Ms. Shelton noted that a purpose of the Ordinance was to protect the water quality of the surface waters and the scenic qualities of the RC zone, and that last year the Penhales made

a very significant investment to replace the original septic system with a new state-of-the-art environmentally friendly Clean Solution septic system. She said buffers from the street and bay had been retained and could continue to be retained. She said the proposed project would not conflict with the purposes of the Ordinance and in fact would further support them versus requiring an owner of the property to clear substantial buffer areas in order to relocate the structures outside the setbacks and buffer zones closer to the road, or to build an addition that would not be consistent with the current architecture of the home.

She said the proposed use was reasonable. She explained that the applicant and her late husband, Bill Penhale, built their retirement home on the property in 1974 and had paid property taxes for 40 years. She said Mrs. Penhale would turn 99 this year and was now living in a retirement home. She said it was a hardship on the family to continue maintaining a vacant house and paying the high waterfront real estate taxes on the property, and said they would like to sell the property to support the financial needs of Mrs. Penhale's Trust.

She said the proposed addition was a reasonable use for the existing 3-bedroom home. She said it was both inconvenient and unsafe for owners to access the house during inclement weather. She said there was a detached outbuilding located over 60 ft from the house entrance that served primarily as storage and a workshop area. She said vehicles were typically parked on the gravel surface closer to the house. She said parking within an attached structure would provide greater protection of the groundwater by reducing the potential of vehicles leaching oils and gasoline onto porous gravel when parked.

She noted that several neighboring properties had large attached garages and additional outbuildings. She said there was no feasible method to attach the addition to the existing house outside of the setbacks that would not have a negative impact on the architecture of the house or access to the front door. She said even if the driveway was relocated to the opposite side of the house, a significant number of trees would need to be removed, and there would be an encroachment into the 125' wetlands buffer. She said the proposed location was also the most reasonable because the entrance from the garage into the existing home could be through an enclosed mudroom area. She said the finished area of the addition would also be used to relocate a laundry and second bathroom, which in their current location were functionally obsolete.

Ms. Shelton said owing to special conditions of the property that distinguished it from other properties in the area, the property could not reasonably be used in strict conformance with the Ordinance, and a variance was therefore necessary. She said the property was a steep sloping irregular lot on the upper portion by the road, with limited level area towards the lower waterfront portion. She said it was encumbered by the existing well and house locations and a wetland area as shown on the plan. She said there was a limited building envelope within the 2.35 acre parcel and said the existing structures on the lot were all non-conforming in regard to the current setbacks. She said it would be unreasonable to make the applicant locate the proposed addition within the limited building envelope, and said this would result in a dramatic negative impact to the front of the house and access to the front door.

Substantial Justice. Ms. Shelton said in granting the variance, substantial justice would be done because this would- allow the sale of the property to the current buyer to be completed in a timely fashion, and a future owner would have the opportunity to construct an addition. She said this addition would provide for a home which was more consistent in size with neighboring properties; would provide safer ingress/egress from

the house during inclement weather and greater convenience for the owners; would be beneficial to the environment by allowing vehicles and other equipment to be housed within a garage; would reduce visual impacts on abutters and the public by housing vehicles and equipment indoors versus outside; and would retain the visual perspective to the front entry of the residence. She said granting the variance would allow a more functional design and use of the 3-bedroom waterfront home.

Spirit and Intent of the Ordinance. Ms. Shelton said the use would not be contrary to the spirit and intent of the Ordinance. She said in 2013, the owner went to great expense in obtaining permits and installing a state-of-the-art Clean Solutions septic treatment system to protect the water quality of Great Bay. She noted that installing a much less expensive and less environmentally sensitive treatment system would have required substantial clearing of trees and other native vegetation. She if the variances were granted, there would be no impact on the visual buffer from the surface water or the road.

Ms. Davis asked if the driveway would be paved and Ms. Shelton said she didn't know. She noted that the driveway was within the sideline setback but not within other setbacks. Mr. Johnson said there was no restriction concerning the driveway and said the restriction was just concerning parking. Ms. Davis asked if the lot was roughly the same size as neighboring lots. There was discussion, and Ms. Shelton said the lot appeared to be somewhat larger than abutting properties. There was discussion on the topography of nearby properties.

Chair Starkey received confirmation from Ms. Shelton that getting the variances was a contingency of the sale of the property.

Ms. Woodburn noted the chart of volumes that had been provided, and said it seemed that the variances requested were a blanket to cover building every available part of the proposed building. Ms. Shelton said doing just the laundry/mudroom would add 13% more volume, and said her understanding was that no variance would be needed for this. She said if they finished a third bedroom in what was now an attic with a dormer or no dormer, doing just that would also fall under the allowed volume increase. She provided further details, and said she'd calculated everything in order to be able to determine what the build-out potentially would be. Ms. Woodburn asked if the variance would be for the total build-out and Ms. Shelton said yes.

Ms. Woodburn noted the request for relief from the shoreland protection overlay provisions for the existing driveway, and asked why this was needed if the driveway already existed. Mr. Johnson said that variance wasn't needed.

Ms. Woodburn said it seemed that in an effort to cover all the bases, more variances were being requested than were actually needed, so the list could perhaps be edited down. Mr. Johnson explained that the variance application came in the day of the deadline, and he told the applicants to go through the Ordinance and put everything in, and that those things that didn't apply could be retracted later. He noted that when the deadline for submittal of an application was coming up, he didn't always have time to review the application.

Ms. Shelton noted that these things were all in the denial letter from Mr. Johnson. Mr. Johnson said the denial letter was simply based on what the applicant had asked for. Ms. Shelton confirmed that if a variance request was removed from the list, this meant it wasn't needed.

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

**Malcolm McNeill, Colony Cove Road**, said he was present with his wife Vie, who owned the abutting property southeast of the applicant's property. He said he had his wife purchased their two lots in 1983, and said the lots were part of a 1970's subdivision done by the Chase family. He said one of the lots contained their house.

He said he supported the variance requests for a number of reasons. He said granting the variance wouldn't decrease the value of surrounding properties, noting that his wife was a semi-retired real estate broker. He said most of the houses along the water were built before there were shoreland and wetland regulations, and said no one could have contemplated having to cope with these kinds of regulations. He said the ZBA had to assess the fairness of strict application of these regulations, and whether in the context of the spirit and intent of the ordinances, this proposal crossed the line.

Mr. McNeill said that concerning the hardship criterion, the property had some uniqueness, noting that the upper part was steep and that with the overlay regulations at the state and local level, there was limited opportunity to make a house similar to what the neighbors had. He said many of the houses in the neighborhood were much larger than the applicants' house, and had attached garages. He said the house proposed was reasonable and was consistent with all of the constraints they had to deal with concerning the property.

He said granting the variances would be consistent with the spirit and intent of the Ordinance in terms of honoring the setbacks and not causing environmental impacts. He said it appeared that the Penhales were conscientious regarding the septic system so there was nominal impact concerning this. He said to him, the spirit and intent of the Ordinance was to allow them to make reasonable use of their property. He said if there was no harm there was no foul. He said he didn't think there was any harm, including any environmental harm from what was proposed.

Mr. McNeill said when the ZBA dealt with the Shoreland Protection Act as well as the shoreland protection overlay and the wetland protection overlay in Durham, it was incumbent upon them to consider the context of the expenditures people had made prior to these regulations, which made so many properties along the waterfront nonconforming. He said reasonable expansion of nonconforming uses was contemplated in the law as long as there were no adverse effects. He said in this case, there would be no adverse effects.

**George Rief, 14 Edgerly Garrison Ave**, said he supported the variance application. He said the topography of the applicants' property was unique, noting that the upper portion was steep and the only flat area was at the lower portion of the lot, where the house was sited. He said he'd been neighbors with the Penhales since 1974 when they built their house, and noted that they didn't expand beyond a two person residence in the years they lived there. He provided some details on the buying and selling of the properties in the subdivision over the years, and said while some got additions and modifications, the Penhale house remained as it originally was built. He said there was now an opportunity to bring the house up to modern standards and increase the occupancy so it would be viable for a family. He said he supported the idea of viewing the variances collectively, and said the application should be approved.

**Vie McNeill, Colony Cove Road**, said she didn't believe granting the variance would decrease the value of surrounding properties and instead believed that by making the property more conforming with the neighborhood with this addition, this would help the other properties.



Chair Starkey asked if there were any members of the public who wished to speak against the application or had other comments concerning it.

**Councilor Robin Mower, Faculty Road**, said she was not against the application, but suggested that if there was no rush, the ZBA could delay deliberating on the application until the applicant could meet with the Conservation Commission and there could be a site walk to evaluate the impact of removal of the three mature trees in the shoreland overlay. She said she didn't know specifically where these trees were, but said she'd appreciate it if the Board would consider her suggestions.

**Tom Penhale** said if people could see the property, they would realize that it was heavily wooded. He said the family had hung on to the three trees but said one was weakened. He also said there were a lot more trees around the house. Ms. Woodburn confirmed that the trees to be removed were outside of the 100 ft vegetative buffer, at about 150 ft.

**Chris Sterndale** *MOVED to close the Public Hearing. Tom Toye* **SECONDED the motion, and it PASSED unanimously 5-0.**

Ms. Woodburn said the applicants were asking for variances concerning the proposed area of the footprint [Section 175-30 (D.3c)]; concerning the proposed volume being greater than the 30% allowed [Section 175-30 (D.3d)]; and concerning incursion into the sideyard setback [Section 175-40(E), 175-54 and 175-55(B)].

She said that concerning the nonconformance issue, the structure was presently nonconforming and still would be with what was proposed. There was discussion that expansion of a nonconforming use was something the Board did need to look at. Mr. Johnson said the idea was to not make an existing nonconformity worse. [Section 175-29(D) and Section 175-30(D.1).]

Ms. Woodburn said there were three large trees in the 250 ft shoreland zone that the applicants proposed to remove, and said variances were needed for this. [Section 175-71(A.1, 3, 5&6)] and [Section 175-120].

She said Section 175-59(2) of the Ordinance was concerning incursion into the wetland buffer. She said the existing structure was already in it, so she didn't think this variance was needed.

She said that concerning Section 175-72 regarding conditional uses permitted in the shoreland overlay district, the driveway was already in the setback so no variance was needed for it.

She said that concerning Section 175 -74(A), the existing building was within the 125 building setback for the shoreland district, but the proposed addition would not be, so no variance was needed for this.

Chair Starkey reopened the public hearing briefly, and Ms. Shelton received confirmation that the record of the meeting would indicate the three variances that were not actually needed.

Ms. Woodburn said she agreed that there was no harm with what was proposed so there was no foul. She said granting the variance would not decrease the value of surrounding properties. She said she didn't think granting the variances would be contrary to the public interest. She said that concerning the comment concerning the three trees, because they were so far away and were out of the setbacks even though they were in the shoreland overlay zone, and because a lot of the

property was covered with vegetation, she didn't think the suggestion concerning the Conservation Commission applied.

She said that concerning the hardship criterion, there were unique conditions of the property that lead to the need for variances, and said the requests were reasonable. She also said substantial justice would be done in granting the variances, given all of the things that would be gained, including allowing the property to be used in the same way as surrounding properties. She said granting the variances would not be contrary to the spirit and intent of the Ordinance.

The other Board members concurred with Ms. Woodburn. Chair Starkey suggested that with future applications like this, it would be good if applicants would consider going to the Conservation Commission. He said this would help the ZBA in its consideration of such applications.

***Robbi Woodburn MOVED to approve a petition submitted by Valerie Shelton, Appledore Real Estate, Inc., Newmarket, New Hampshire, on behalf of Mildred F. Penhale Rev Trust, Durham, New Hampshire for an Application for Variances from Article IX, Sections 175-29(D), 175-30(D)(1) and 175-30(D)(3)(c&d); Article XII, Sections 175-40(E), 175-54 and 175-55(B); Article XIV, Sections 175-71 A (5&6), 175-75.1(A.1, 2 & 5); and Article XXII, Section 175-120 of the Zoning Ordinance to permit the construction of an attached one and one-half story, 26' x 36' addition to a legally non-conforming dwelling within the shoreland, wetland and sideyard setbacks, as delineated in the packet and plans dated April 25, 2014. The property involved is shown on Tax Map 12, Lot 16-14 is located at 15 Edgerly Garrison Road, and is in the Residence C Zoning District. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.***

- K. **PUBLIC HEARING** on a petition submitted by Michael Sievert, MJS Engineering PC, Newmarket, New Hampshire on behalf of Cicely T. Buckley, Durham, New Hampshire, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article IX, Section 175-29 and Article XIII, Section 175-65(F) of the Zoning Ordinance to allow for the construction of a new single family residence in the wetland and shoreland districts. The property involved is shown on Tax Map 6, Lots 2-20, is located on Orchard Drive; and is in the Residence B Zoning District.

The Board briefly reviewed the Special Exception provisions of the Zoning Ordinance.

Mike Sievert of MJS Engineering represented the applicant. He apologized for not providing the plans until the meeting, but noted that he had provided colored plans. He said he represented the potential buyer and also noted that the owner of the property was present. He said she had owned the property since 1972 but had never built on it. He said the property contained approximately 1.5 acres, had approximately 300 ft of frontage on Orchard Drive, and abutted the Oyster River. He said there was a high knoll to the southwest, and said the lot dropped off pretty steeply to the east and northeast. He said there was a drainage swale that picked up all of the drainage from the upper side of Orchard Drive and said the water drained in a northerly direction into the Oyster River.

He noted the Town's 125 ft shoreland setback on the plan as well as the 75 ft wetland setback off of the swale area. He showed the 3600 sf of buildable area on the lot. He said the proposal was to construct a single family residence on a nonconforming lot of record, and said a Special Exception was needed for this (under Article IX Section 175-29 of Zoning Ordinance, building a

structure or septic system on an existing vacant lot within the Wetland Protection Overlay district of Shoreland Protection Overlay district can be permitted by special exception.)

He also said the structure and septic system couldn't be constructed on the subject parcel to meet all of the required setbacks within the Wetland Conservation Overlay District. He said the building would meet the 75' setback from the edge of wetlands but the septic system couldn't be constructed to meet the 125' required setback from wetlands. He said the lot was ~~non~~-non-buildable for a septic system given today's standards. He said the house footprint could fit in the buildable area, and said the driveway could fit without much encroachment. He said one corner of the leach field in front of the house would be within 50 ft of the wetland, and noted that this would require a waiver from NHDES.

Mr. Sievert said a Clean Solutions system was proposed. Chair Starkey asked if NHDES had approved the system, and Mr. Sievert said not yet. Chair Starkey noted that one of the criteria for granting a Special Exception under Section 175-29 was that at the time of the application, all state and federal approvals required for the septic system had been obtained.

There was detailed discussion on whether to continue with the application now. Chair Starkey said he was happy to hear more on the application, but said there should be discussion on how to proceed. Board members agreed that they would like to hear more about the application. Mr. Johnson suggested that getting the septic system could be a condition of approval, and Chair Starkey said he didn't think the Board could do this because it was a special exception application. Ms. Woodburn said Mr. Sievert and the applicant could get a sense at this meeting of where things were going, as a result of further discussion on the application.

Mr. Sievert said the applicant would be using this system to make sure effluent was treated to the higher standards prior to discharge to the leach field, which was a stone and pipe system. He said given the soils on the site, this type of leach field would be better and also said it would last longer. He said three test pits had been done, and said the seasonal high water table was at about 10 inches. He said the soils were a fine silty clay loam. He said the reason the leach field was larger than what was required was based on his experience with other designs in Town on this type of soil. He provided details on this, and noted that there was a very slow infiltration rate. He said the limit of grading for the leach field would be pretty close to the wetland.

He provided details on the grading and the extent of fill for the site development. He said the site was open but wooded throughout. He said the location proposed for the septic system was better because there was less existing slope than in other portions of the site. He explained that it would be better if the system was closer to the wetland than if it was put in a steeper sloped area, where a breakout of effluent would go directly into the river. He said if the effluent broke out near the wetland, there could be additional treatment there. He also said while the septic system could be put closer to the property line, that would mean that the driveway would have to be close to the wetland, and said there could be impacts to the wetland from maintenance of the driveway.

Asked whether a chambered septic system could go under the driveway so the system would be further from the wetland, Mr. Sievert said yes, but said he wasn't sure the grading for that would work. He said he was trying not to have to get a waiver concerning the water table, even though with this system a waiver would be allowed. He said there

weren't the best soils for this where the system was proposed. He said there would be superior treatment provided with the proposed system, and noted that it did some nitrate reduction. He spoke in some detail on this. He said the system would be able to support a 4 bedroom house.

Ms. Woodburn asked Mr. Sievert if thought had been given to going to the Conservation Commission with the plan. There was discussion. Mr. Johnson noted that the Conservation Commission had been notified concerning the application, as required in the Zoning Ordinance: "At the time of submission of the special exception application to the Zoning Board of Adjustment, the Conservation Commission, the Health Officer, and the Planning Board shall be informed of the application for special exception."

Ms. Davis asked Mr. Sievert if he had experience with this type of system close to wetlands. Mr. Sievert said yes, and said with one such system, the edge of the leach field was 5 ft from the wetland. He provided further details on other systems he'd installed near water and wetlands, including one for his own house. Mr. Johnson said this was the system that was used up and down Cedar Point Road. There was further discussion.

Mr. Toye asked if there was any reason not to rotate the leach field in order to keep it out of the 50 ft wetland setback. Mr. Sievert explained that the best way to disperse the effluent was parallel to the land contours, and also said he was trying to keep the house grade down and not have to use too much fill. He spoke further. There was additional discussion about the grading proposed for the site.

The Board started to go through the four criteria in Section 175-26. Special Exceptions.

1. That the use will not be detrimental to the character or enjoyment of the neighborhood by reason of undue variation from the kind and nature of other uses in the vicinity or by reason of obvious and adverse violation of the character or appearance of the neighborhood.

Mr. Sievert said there would be a single family home with architecture similar to adjacent properties, and said the septic system would probably be better than other septic systems in the neighborhood, which were older, standard systems.

2. That the use will not be injurious, noxious and thus detrimental to the neighborhood by reason of any of the causes stated in Part B. of this chapter (175-29(B)).

Mr. Sievert noted that he had addressed seven of the eight criteria in 175-29(B) in the submittal:

1. A copy of the deed has been submitted with the application.
2. The lot contains approximately a 3600 sq. ft. buildable area using a 75' setback from the wetlands and side property line, which is adequate for a building footprint. The 125' setback required for the septic system eliminates any use of the lot. Therefore, there is no area on the lot outside of the setbacks from the wetlands that meet the requirements for construction of the septic system.
3. Due to the provisions of the WCO District, construction on the lot is not feasible, therefore there is no reasonable or economically viable use of the lot.
4. The location of the building will be placed within the required setbacks. The design of the septic system will insure that the best technology is used and the maximum setback is met with respect to the topography, soils, flood zones and wetlands. This design will incorporate the AOS "Clean Solution System" and will provide improved wastewater treatment.
5. The design and construction of the septic system will meet the requirements of this article

- based on the design location and advanced technology use for the wastewater treatment.
6. The proposed septic design to the maximum extent possible, will not create a threat to individual or public health, safety and welfare or the degradation of ground or surface water because the most advanced technology is being used which treats the effluent within the septic tank and discharges cleaner effluent to the leach field. Given the soil conditions and the proximity to the wetlands and surface water, this system provides the highest level of treatment prior to discharge to the ground surface therefore, minimizing the risk to surface water, groundwater or surrounding properties.
  7. *A state of New Hampshire DES subsurface disposal system approval will be provided to the Zoning board.*
  8. Site review by the planning board is not required for construction of a single family residence.

He said putting the Clean Solutions system in would result in better treatment, including increased nitrogen reduction, so there wouldn't be an impact on surface waters and groundwater .

3. That the use will not be contrary to the public health, safety or welfare by reason of undue traffic congestion or hazards, undue risk to life or property, unsanitary or unhealthful emissions or waste disposal or similar adverse causes of conditions.

Mr. Sievert said the septic system would do a better job than was currently the case with most of the other septic systems in the area.

4. As to all nonresidential uses subject to site review by the Planning Board or Technical Review Committee pursuant to RSA 672 through RSA 677, that written approval by the Planning Board or Technical Review Committee of the applicant's site plans must be on file with the Board of Adjustment.

Concerning #1 under Section 175-26, "That the use will not be detrimental to the character or enjoyment of the neighborhood by reason of undue variation from the kind and nature of other uses in the vicinity or by reason of obvious and adverse violation of the character or appearance of the neighborhood", Ms. Woodburn asked if there were any building elevations, and Mr. Sievert said no. He said the building footprint was 1178 sf, minus the garage. He said the second floor would be about 576 sf . There was discussion that there would be a total of 2200-2300 sf for the house. Ms. Woodburn said this would seem to be in keeping with the rest of the neighborhood. She said the Board should think about whether they should require elevations or not.

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

**Meryl Craig, 23 Orchard Drive**, said she was an abutter, and wanted the Board to know that there was running water flowing through the applicant's property. She said the brook ran into a gully, and said it belonged to her and the applicant's lot. She said it concerned her that a house or especially a septic system would be built on that land, which was very wet. She said the brook had been there for long time, and had carved the gully between the lots that was as deep as she was tall. She said the wetland had already been compromised several years ago when the front was filled in with a load of boulders and soil was put on top of it. She said she was concerned about the brook that emptied into the gully between the properties.

Ms. Woodburn said looking at the culverts and an aerial photo, it looked like there was running water on the property because of the drainage culverts under the road. Mr. Sievert said that was correct, and spoke about the gully. He also said there was a 30 ft drop down to the Oyster River, and said that was a reason for locating the septic stem as proposed.

Ms. Woodburn said she didn't see an extension of the brook on the other side of the street, so it looked like the flow was man-made from the drainage culverts. There was discussion. Mr. Johnson said he didn't think there were named brooks, and noted that drainage from properties at Foss Farm and Surrey Lane worked its way down. He said two culverts were put in to handle this drainage. There was further discussion.

**Cicely Buckley, 36 Oyster River Road**, said in addition to all of the water on the property, it was also a beautiful nature preserve, or hopefully would be a nature preserve someday. She said there was a lot of new growth there as well as an old apple orchard that could be used as an orchard again. She said it was a limited space, and said she hoped that whatever happened with the property, the flora and fauna there would be protected. She said she was sure the University would be very interested in bringing students to this area, and she spoke about putting a very contemporary, solar house there, which could be an example of what could be done in Durham. Ms. Buckley noted that she lived on a tributary of the Oyster River, and said she could see this beautiful land across the river.

Mr. Johnson noted that there was a deed restriction on the property concerning a scenic view easement. Mr. Sievert said it applied to the portion of the property down back by the river, and wouldn't be affected by the development. Mr. Johnson noted that the scenic view easement applied to all of the properties bordering the Oyster River. Mr. Toye said he'd read through the easement and didn't see how it would be affected by this application.

There was discussion about whether to close the Public Hearing. Chair Starkey noted that it had been suggested that the Conservation Commission could weigh in on this application. There was discussion on issues the Commission would consider and whether their input was needed

Chair Starkey noted again that the applicant wouldn't meet the criterion right now concerning getting all State approvals. It was noted that the Conservation Commission would be meeting this week. Mr. Johnson said since the Commission had been noticed concerning this application, hopefully it would address it. There was discussion about whether the applicant would have State approval for the septic system by the time of the June ZBA meeting.

Mr. Toye said the sale of the property was contingent upon all of this, and said the applicant was taking the proper steps. He said if the Conservation Commission wanted to weigh in on the application, it could do that. Others agreed. Ms. Woodburn said she didn't feel comfortable voting on the application now contingent up getting State approval for the septic system.

***Robbi Woodburn MOVED to continue the public hearing to the next ZBA meeting. Jim Lawson SECONDED the motion, and it PASSED unanimously 5-0.***

Chair Starkey summarized that the Conservation Commission had been noticed on the Special Exception application, and said hopefully they would provide findings on it for the ZBA. He also said the State approvals were needed, and said it would also be helpful if building elevations could be made available.

Mr. Lawson noted that there was an eclectic mix of homes in the area. Ms. Woodburn said what the Board might think was acceptable in an eclectic way might not be what got built. Mr. Lawson said what was most important to him was the proposed size of the house, and whether this was generally consistent with what was in the neighborhood.

Ms. Woodburn said even with the footprint the applicant had, the building could be very tall and not a pleasing house, or instead could look like it fit. She said the purpose of looking at the elevation was to make sure that within the context of the footprint, the massing of the house would fit the character of the neighborhood. Chair Starkey said this issue had come up before with special exceptions, especially with nonconforming lots.

Mr. Sievert said he could provide an elevation. He noted the wording in criterion #1 under Section 175-26, and said he was fitting the house itself in, and that the special exception was needed concerning a nonconforming lot because the septic system didn't fit on the lot. Mr. Sterndale noted that the end of criterion #1 talked about appearance. He also said he thought the ZBA's bar was pretty low concerning providing an elevation. Mr. Sievert said he would provide an elevation and as part of this could look at some of the other house sizes out there.

## **VII. Approval of Minutes**

March 11, 2014

***Chris Sterndale MOVED to approve the March 11, 2014 Minutes as presented. Robbi Woodburn SECONDED the motion, and it PASSED 4-0-1, with Jim Lawson abstaining because he wasn't on the ZBA at the time of the March 11, 2014 ZBA meeting.***

April 8, 2014

Page 23, the motion should say "Jim Lawson", not "Jim Campbell"

***Chris Sterndale MOVED to approve the April 8, 2014 Minutes as amended. Chair Starkey SECONDED the motion, and it PASSED unanimously 5-0.***

## **VIII. Other Business**

Chair Starkey said there would tentatively be a site walk at Young -Drive prior to the June ZBA meeting at 5 pm. He said he and Mr. Johnson had met with Town attorney Laura Spector Morgan concerning the Young Drive applications, and said she and the principal at the firm would provide a letter for the ZBA prior to the June meeting as privileged information. He said she would make a presentation on this when the applicant came forward. He said the ZBA's questions were being addressed, and also said Attorney Spector-Morgan would address them during the public portion of the meeting. It was noted that she had a copy of the Minutes of the April ZBA meeting, where the applicant's

attorney had spoken. Mr. Hoffman recommended doing a drive by of Young Drive late at night on a Thursday, Friday or Saturday.

**IX. Adjournment**

*Robbi Woodburn MOVED to adjourn the meeting. Chair Starkey SECONDED the motion and it PASSED unanimously 5-0.*

Adjournment at 8:58 pm

Victoria Parmele, Minutes taker