

*These minutes were approved at the February 11, 2014 meeting*

**ZONING BOARD OF ADJUSTMENT  
Tuesday, December 10, 2013 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  
Secretary Kathy Bubar  
Chris Sterndale  
Mark Morong  
alternate Thomas Toye

**MEMBERS ABSENT:**

**OTHERS PRESENT:** Tom Johnson, Director of Zoning, Building Codes and Health

**I. Call to Order**

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

**II. Roll Call**

The roll call was taken.

**III. Seating of Alternates**

No alternates were seated, since all of the regular members were present.

**IV. Approval of Agenda**

*Robbi Woodburn MOVED to approve the Agenda as amended. Kathy Bubar SECONDED the motion, and it PASSED unanimously 5-0.*

**V. Public Hearings:**

- A. **CONTINUED PUBLIC HEARING** on a petition submitted by EZT Holdings LLC, Dover New Hampshire, on behalf of Theodore Finnegan, Durham, New Hampshire and by BAA Realty Acquisitions LLC, Dover, New Hampshire, on behalf of Kostis Enterprises, LLC, Dover, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-53 and Article XIII, Section 175-59(A)(d)(2) of the Zoning Ordinance to permit a portion of the front wall of the principal buildings to be set back up to 28' from the front property line and to permit the construction of a mixed-use

building within the 75 foot wetland setback. The properties involved is shown on Tax Map 2, Lot 12-5 and Lot 12-6, are located at 15 Madbury Road and 8 Mathes Terrace, and are in the Central Business Zoning District.

Chair Starkey said this application had been withdrawn by the applicant.

B. **PUBLIC HEARING** on a petition submitted by Orion, UNH LLC, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-41(F)(1, 5, 7 & 8) and Article XII, Section 175-53 and Section 175-54 of the Zoning Ordinance to permit:

- residential units on all floors of three of the six proposed buildings
- two of the **six** proposed buildings to exceed 35 feet
- 4 parking spaces and dumpster behind/beside the 5 buildings fronting on Main Street, in front of Building B at the rear of the lot.

The properties involved is shown on Tax Map 5, Lot 1-6, 1-7 and 1-8, are located at 25-27 Main Street, 29 Main Street and 35 Main Street, and are in the Central Business Zoning District.

Ms. Woodburn recused herself for this application.

Attorney Tim Phoenix of Hoefle, Phoenix, Gormley and Roberts spoke before the Board, and noted that applicant Bill Fideli and architect Adam Wagner were also present. He said Allen and Major had done the site work, and noted that the site plans for the project that could be referred to if needed. He said the property in question was one of the properties Orion had purchased from the Varsity portfolio, and said since that time, Orion had tried to be a good neighbor in terms of managing its properties and managing the students who lived in them.

He said Orion saw a pretty rundown property suffering from demolition by neglect, and said wanted to redevelop it in a way that was welcomed and approved by the Town and that fit in well with the Town. He noted photos of what the project would look like when completed, as compared to the property as it now existed. He said the project would maintain the integrity of the Historic District by saving two historically significant buildings; putting in two new buildings that fit with the old buildings and the entire Historic District; and creating something that met the overall goal of the Zoning Ordinance to provide both residential and commercial uses.

He said this location was in both the Historic District and the Central Business District, and was a transition zone. He said the applicant had gone through a very lengthy process with the Historic District Commission (HDC) and was now in the midst of a lengthy review process with the Planning Board. He said the facts to consider were the condition of the existing buildings and the location of the site, including its location within the Central Business District and Historic District.

Attorney Phoenix also said there were economic considerations driving this. He noted Orion's original intention to demolish all of the buildings, build a building for 250

students, and still meet the Central Business District requirement of putting nonresidential space on the first floor. He said the HDC didn't like that proposal, so Orion and the HDC came up with the present proposal, which provided buildings of an appropriate scale while still allowing the project to proceed from an economic perspective.

Attorney Phoenix began his discussion of the variances being requested. He said the first variance would allow nonresidential uses in three of the buildings, but not all on the first floor. He noted the analysis he had provided in writing on the extent of residential and nonresidential space proposed for each of the buildings. He provided an update on this, explaining that some changes were made to it as a result of discussion with the HDC and Economic Development Committee (EDC).

He explained that originally with this configuration of buildings, the applicant proposed that two of the buildings would contain nonresidential space and the rest of the project would be residential. He said after meetings with the Planning Board and EDC, they decided to put nonresidential space in the two old buildings in addition to the two new buildings between them.

He said as a result of further discussions, that layout was revised and it was now proposed that the front of Building A would have commercial space on all floors, while the back portion would be all residential. He noted that previously this building was proposed to be all residential. He said Building C and Building D, the new buildings that both faced Main Street would still be all nonresidential. He said the two old buildings would be rehabilitated and would remain residential, instead of being nonresidential as was previously proposed. He noted that Mr. Johnson would prefer this as compared to trying to bring these buildings up to code as commercial buildings.

Attorney Phoenix said the applicant didn't think commercial entities would want to be on the first floor of the back buildings that would have students over them. He also noted that this configuration was a result of the parameters of the HDC approval involved with saving two of the buildings on Main Street. He said the applicant was taking the best of the new buildings and making this space nonresidential, and leaving the rest as residential. He said they thought this was reasonable because of the location of the site and because parking was an issue.

He reviewed Town goals that this project met:

- Clean up blight
- Draw students from the residential neighborhoods outside of the downtown, and from Dover and Newmarket
- Create a pedestrian and bike friendly place to live, so students can walk to businesses downtown and walk to the UNH campus. There are 50 parking spaces on the site now, and all but 4 would be eliminated, in order to encourage residents who didn't need to have cars to live there. Fewer cars means less traffic.
- Provide for commercial uses – about 9,000 sf for commercial use, compared to about 3,000 sf today. There is about 9,000-10,000 sf of commercial space available

downtown right now that is not being utilized. Attorney Phoenix referred to the study done that said the Town was seeking 25000-30,000 sf of commercial space in the next 10 years. He said Orion would put up 9,000 sf of this space, and he also said 50,000-80,000 sf of nonresidential space would be available over the 5-10 years. He said the mix Orion proposed to provide, including residents who would patronize local businesses, made sense.

- Create properties that fit in with the Historic District and the downtown. There is no question that this project will accomplish this
- Encourage new construction and expansion.

Attorney Phoenix said because the site was in a transition zone, the applicant should be granted some relief from the strict requirements. He said the primary requirement the applicant needed relief from was that all buildings needed to have first floor commercial space, which he said didn't make sense for this project.

He said a second variance was requested concerning building height, and said he had applied for this out of an abundance of caution. He said the variance request applied to Building B and the back of Building A, which were 35 ft or less in height, depending on how this was measured. He noted that the Ordinance allowed the Planning Board to permit a height up to 50 ft, and said if Mr. Johnson confirmed that this was the case and the Board agreed, this application could be withdrawn.

He said the third variance request was concerning the Zoning requirement that parking and dumpsters were not permitted in front of a principal building. He showed the proposed locations for the parking and dumpsters in front of Building B, and said he didn't consider Building B to be a principal building, although it was big. He said the location of the parking and dumpsters met the intent of the Ordinance provision, which was to not have unsightly parking and dumpsters out front where people could see them.

Attorney Phoenix said he would review how the criteria were met for all three variances, taken together. He first said granting the variances would not be contrary to the public interest and also said the spirit and intent of the Ordinance would be met, noting that there were a number of cases where the Supreme Court had related these criteria to each other.

He quoted from the Malachy Glen case, where he said the Supreme Court had said that "The requirement that the variance not be contrary to the public interest is "related to the requirement that the variance be consistent with the spirit of the ordinance...to be contrary to the public interest . . . the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives."

Attorney Phoenix said the Supreme Court said another way to determine whether basic zoning objectives were violated was to determine whether granting a variance would alter the essential character of the locality, or threaten the public health safety or welfare.

He said the height, parking and dumpster clearly didn't conflict with the Ordinance, given their proposed location and given the amount, and said they didn't threaten the public health, safety or welfare. He noted that Planning Board review of the project was taking place, where all of the site issues, including parking, were being addressed.

Attorney Phoenix said the Zoning requirement for nonresidential use on all of the first floors was somewhat arbitrary, and said in this case granting a variance from this requirement in no way would conflict with the Ordinance's basic zoning objectives, especially when there was so much current and planned commercial space in Durham.

He said granting the variance would not alter the essential character of the locality, and said in fact, the development would fit in very well and would create the Historic District character. He said getting rid of old blighted buildings that were not up to code, rehabbing two buildings and getting them up to code, and putting up new buildings would in fact help the public health, safety and welfare.

He said granting the variances would not diminish surrounding property values. He said the parking and dumpster couldn't be seen, and said the development would bring up the entire area. He said property values in the area were likely to be enhanced.

Attorney Phoenix said the hardship criterion was met with these variance applications, first stating that there were special conditions that distinguished the applicant's property from others in the area. He said its location at the end of Main Street at the gateway to the Town before it became one way the other way was a special condition. He said more important was that it was a special location because it was affected by Historic District as well as Central Business District requirements.

He noted again that if the property wasn't subject to these requirements, all of the existing buildings could be taken down and the applicant could build something that included all of the nonresidential space that was required. He also noted that if the property wasn't in the Central Business District, the applicant wouldn't need to put in 30% nonresidential space.

Attorney Phoenix said it was a very special location, physically and as a result of being in these two zones. He said it was also special because of the existing buildings on the site, and the HDC requirement that two of the buildings needed to be saved, which in turn drove the design parameters for the whole project in terms of where other buildings could be put, how big they could be, how many beds there could be, and how much commercial space there could be.

He said there was no fair and substantial relationship between the general public purposes of the Ordinance and its specific application in this instance. He said it didn't make sense in this transition area to require all of the first floor space to be nonresidential, because businesses in the back would be off the beaten path and students would be living all around them.

He said the applicant had provided the best mix by making the three new buildings facing Main Street commercial uses. He said the applicant felt strongly that there wasn't a basis for the required percentage of commercial space given this property's location and the fact that other commercial space was available now in Town that wasn't being used. He also noted that there were additional commercial projects coming down the pike. He referred to the Golden Goose mixed use project, which the ZBA had granted relief to concerning the percentage of commercial space proposed for that project.

Attorney Phoenix also said in regard to the hardship criterion that the proposed use was reasonable, and said his previous words had spoken to this.

Attorney Phoenix said substantial justice would be done in granting the variances. He quoted again from the Malachy Glen case: "...any loss to the individual that is not outweighed by a gain to the general public is an injustice." He said if the variances were denied, the project wouldn't go forward, which would be a loss to the applicants and also to the Town.

He said the buildings would remain as they were, there would be less commercial space, students wouldn't be pulled out of the neighborhoods where their lifestyles were currently interfering with the lifestyles of families, and students wouldn't be pulled out of Dover and Newmarket so wouldn't have the opportunity to walk and bike to UNH. He said it would be substantially just to grant the variances, and said it would be an injustice to everyone if the variances weren't granted.

There was discussion about the portion of Building A that would be commercial space. Chair Starkey confirmed that all floors of the front of Building A, and all floors of Building C and D would be commercial space. He asked what percentage of all of the space in the project that commercial space encompassed.

Attorney Phoenix said the total building floor area was a little under 85,000 sf, and the total ground floor area was a little under 27,000 sf. He said Orion proposed that the total ground floor commercial space would be about 3,500 sf, which was about 13% of the total ground floor square footage. He said the total amount of commercial space for all floors would be just under 9,000 sf, which was just under 10.5% of the total floor area proposed. He noted that supplemental calculations were submitted on November 26<sup>th</sup>, 2013, after the commercial/residential layout had changed.

Chair Starkey confirmed that the back buildings would have 3 stories. Attorney Phoenix noted that this had been the subject of some discussion.

Architect Adam Wagner said Building A was a three story slab on grade building with no basement. He said Building B, because of the way the grades worked, had a daylight basement. He said there would not be a walkout from it, but there would be windows on the lower level. He said this design was reviewed with Mr. Johnson, and said by definition it was a three story building with a basement.

He said the basement units would be on the back side only, and said the front would read as a three story building. He said Orion had worked closely with the HDC on tucking the third story into the roof line, in order to make the building look much smaller.

Chair Starkey confirmed that the parking was proposed behind Buildings C and D, in front of Building B, and that there would be just 4 parking spaces. Attorney Phoenix said there was ongoing discussion with the Planning Board on the parking issue, and he explained that the applicant's intent was to rent to people who didn't need the parking, but to provide some parking for loading and unloading, etc. He said they had to work their way through this issue.

Mr. Sterndale asked what was envisioned for nonresidential space, noting that "commercial" and "nonresidential" had been used interchangeably in the presentation. He asked what the applicant considered was viable in that location.

Attorney Phoenix said that remained unknown. He said it could be offices, including some of Orion's offices. He said there would be bike storage under one of the buildings. He noted that there was commercial space in the existing commercial space on the site that hadn't been rented. Bill Fideli of Orion provided details on this. He said he would let the market dictate the commercial uses in the development. He said he would love to have a professional organization lease it, but said they would find out soon who would do this.

Mr. Sterndale said the spirit and intent of the Ordinance was that there be commercial space and not bike and shovel storage for Orion. Mr. Fideli agreed and said something like a dentist office was what Orion was looking for. Attorney Phoenix noted that bike storage would be provided at the bottom of a residential building.

Chair Starkey asked members of the public who wished to speak in favor of the variance applications to come forward.

**(Councilor) Jim Lawson, Deer Meadow Road**, said he was a member of the Town Council but was not speaking on behalf of the Council. He also said he was the Council rep to the Planning Board but noted that alternate Council rep Julian Smith would be voting on the Orion application currently before the Planning Board. He said he had also served on the EDC for three years.

He said while he could speak about the extraordinary design and community benefits of this project, he would speak specifically about the variances requested. He said this project was consistent with the spirit and intent of the Ordinance. He said there had been significant redevelopment downtown since the Zoning was changed in 2008. He noted Council discussions as these changes were being made. He quoted from the August 18, 2008 Town Council Minutes:

"Chair Niman said there was some confusion about what this proposed Zoning change was trying to accomplish. He said the idea was to motivate landlords to redevelop their properties, and create a better downtown with less student turmoil associated with it. He

said the rationale behind this proposal was that if students were in better living situations, and felt they were getting more value for their dollar, they would perhaps be better behaved...”

Councilor Lawson said that Zoning amendment had passed unanimously. He said this development was consistent with what the Council was trying to do at that time, and said that was the metric he used regarding the spirit and intent of the Ordinance. He said there was clearly the intent in the Ordinance to create nonresidential commercial space, and said this project was doing this where it was most viable, on Main Street in the new buildings, which could best accommodate vibrant commercial activity.

He said this project was consistent with the public interest, noting that this was an area of the downtown where there was a compelling need for redevelopment. He said this redevelopment had to be and was consistent with the Historic overlay district. He also said there was a compelling need to set a higher bar for redevelopment in the downtown, and said this project did exactly that.

Councilor Lawson noted Council deliberations over the past two weeks on the 2014 Budget, and said one watching this would reasonably conclude that there was a compelling need to expand the tax base with responsible and thoughtful redevelopment, which was exactly what this project did. He said he didn't believe this project would cause a decrease in surrounding property values.

He noted that in the November 15<sup>th</sup> Friday Update, the overview of the reassessment showed an overall decrease of 1%, but the assessments in the core downtown were up over 6%. He said he concluded from this that redevelopment in the downtown was enhancing property values there, and said he therefore had no concern about a decrease in property values as a result of granting these variances.

Councilor Lawson said the Ordinance adequately addressed the noncommercial requirements for a single mixed use building in the Central Business District, where typically every square foot of lot area was maximized. But he said the Ordinance didn't address mixed use projects, with multiple buildings, sideways, green spaces and other public benefits. He said he found it ironic that when the community had looked at options for Mill Plaza, many of the ideas proposed would have had to come to the ZBA.

He said this project had found a workable intersection point of a commercially viable and vibrant redevelopment that was consistent with the spirit and intent of the Ordinance, at the edge of the Central Business District and in the Historic overlay district. He said that had to be the definition of hardship. He also said there was justice to be done in granting the variances because the project would benefit the applicant and everyone in the community.

Councilor Lawson noted that he had been working with Town staff over the past month regarding re-architecting how parking was done in the downtown. He said he didn't want parking for businesses and commercial space located on Main Street, and

said he wanted to apply the smart growth principle that said people parked once and walked.

He noted that some of the smaller, vibrant downtowns in the state, like Milford, Peterborough, and Exeter did not have a sea of parking available around the downtown businesses. He said people parked in municipal spaces available and then walking and hopefully patronized multiple businesses downtown. He said he had spent a lot of time thinking about parking downtown, and said he had no concern about the parking proposed with this project. He provided the Board with documentation of the information he had provided.

**Andrea Bodo, Newmarket Road**, said she was on the HDC, and she provided some background on the HDC's role in the design of the Orion project. She said Orion originally came in with a massive 4 story building such as one might see at the mills in Newmarket, and said at the first HDC meeting on the project, the public came out in force. She said there was no way the HDC would have approved the design.

She said Orion worked with the HDC and by fall there was another iteration. She said the buildings in the back had still been high, and the HDC was still uncomfortable with this because they wanted a small village consistent with the streetscape as one looked up Main Street toward the site. She said it was hard to get all of the pieces of the puzzle together.

She noted that Orion could have demolished all of the buildings on the site, but said the HDC wanted them to keep #25 and #35 because of their historic significance, and Orion was willing to do this. She said deStefano Architects designed the two new buildings between them, and said the five buildings facing on Main Street would be colorful and vibrant, with small paned windows, and there would be courtyards and landscaping, resulting in a lovely pedestrian experience. She said the student housing building in the back wouldn't be seen much.

Ms. Bodo said the result was something that preserved the character of the downtown. She said it would be beautiful, and she noted that there were now letters of support concerning the project. She said she strongly supported the variances being requested. She said if the variances weren't granted, and the project wasn't done, those buildings would deteriorate further.

She said Orion had been wonderful to work with, and said she thought they cared about the Town. She spoke about the barn behind #35 that people hoped could be moved and preserved, and said Mr. Fideli was currently working with the interested parties on this. She said this involved a lot of extra work on his part.

**Catherine Meeking, 3 Foss Farm Road**, said she was there as an HDC member and a resident. She said she respected the fact that the ZBA had its own purview to consider in its deliberations. She said it would be a missed opportunity if the project was dropped because it didn't include enough commercial space, and she encouraged

the Board to allow the variances. She said Orion had put an inordinate amount of time into the project, and said the positive impact the project would have on the Town was immeasurable. She said it really couldn't be compared to any other project in the Town's recent history.

She said it would transform the corridor into Town in a positive way by keeping the essential bones of the Historic District and further enhancing it with aesthetically pleasing and well thought out additions. She said for many, supporting the project was a question of civic pride, in that it would clear out the blighted buildings on Main Street. She said the likelihood of having this opportunity again was remote. She said if ever there was a project worthy of a variance, it was the Orion project.

**Peter Stanhope, 37 Dover Road**, said he was the Chair of the HDC/Heritage Commission. He noted that he had spent several years on the ZBA in Goffstown, and had also testified before ZBAs. He said he appreciated the role of the ZBA to grant relief when appropriate.

He said this proposal was repeatedly reduced in size, mass, and number of student beds to meet all the requests of the HDC, which was the controlling overlay regulation. He said the HDC had achieved preservation and enhancement with this proposal with the restoration and addition of reproduction buildings to address the blight presently in place. He said removing these buildings changed the gateway and enhanced what they wanted to achieve downtown, which was a colonial, user friendly pedestrian environment.

He noted that a purpose of the Durham Ordinance was "... to preserve historic sites and structures; and to ensure that development is commensurate with the character and physical limitations of the land. Further, this chapter is designed to ensure that the timing, location and nature of new development takes into account the immediate and long-range financial impacts of proposed uses and enhances the achievement of the town's economic development goals."

Mr. Stanhope said granting these variances would not in any way go against the goals the Town had laid out for the district. He said in granting them the Board would ensure that the Historic District was preserved, which spoke to the purpose of the Zoning Ordinance. He said preservation required compromise that addressed this purpose, but said the proposal went beyond preservation and enhanced the district. He said the applicant had sacrificed some productivity by complying with the preservation goals.

He went through the variance criteria and how they were met. He said there was nothing in what was proposed that was contrary to the public interest. He said the project was an appropriate compromise because of the conflicting overlay districts. He also said granting the variances would not be contrary to the spirit and intent of the Ordinance.

He said substantial justice would be done in granting the variances. He said it would be justice to the applicant but would also be justice to the Town and what its goals were. He said the compromises asked of the applicant meant they had sacrificed while the Town had benefited, in many different ways.

Mr. Stanhope said there was no factual basis for saying that granting the variances would decrease the value of surrounding properties. He noted that he got paid to argue about this variance criterion, but wasn't being paid right now. He also noted that an abutter across the street from the applicant's property recently came before the HDC, and openly stated a commitment to address deficiencies in his historic building if the Orion project was approved.

He said a goal of the Town Council, which he had been a member of, was to address a lot of slum student housing in the Town, and the influx of students into the neighborhoods. He said while there was no easy solution for the latter issue, there was an easy solution for dealing with slum student housing, which was to create quality housing for students to live in.

He said the new developments in Town were well managed, and weren't tolerant of some of the behavior that had been seen in slum student housing in Durham. He said this project would increase property values substantially in the Central Business District and the Historic District, because it would set an example and would result in competition within the district.

Mr. Stanhope said the proposed use met the hardship criterion, and said the hardship issue spoke to what the applicant had to craft in order to address the concerns of the EDC, HDC and the underlining Zoning in the Central Business District. He said this was a unique location, and said in creating this design the applicant had given up some productivity. He spoke further on this, and said he had often thought that if the Historic District was expanded further downtown, this kind of project could be accomplished there.

He noted that the height of the back buildings had been lowered so that a pedestrian walking by wouldn't see them towering over the front buildings. He also said the Grange property received greater variance relief concerning the percentage of commercial space than the applicant was asking for. He said the applicant's plan was reasonable, and said he strongly hoped that the ZBA thought the variances were essential and appropriate.

Ms. Bodo read a letter from **Beth Olshansky, Packers Falls Road:**

“Orion has worked closely with the HDC to redevelop a stretch of Main Street that we can all be proud of, Thus I believe this project is of benefit to the community. Also, I am pleased that Orion took the advice of the EDC to determine which buildings would be best used for commercial space.

I would like to express one concern however. The variance request regarding the dumpster is vague at best. Since this project is within the Historic District, I do not believe we should permit dumpsters to be in view from Main Street. Thus I think the language in the variance, if granted, should be revised as the phrase "behind/ beside" is of little value. Should you grant this variance, please make sure the dumpster location is not within view of Main Street. Either way, given the quality of this project, the dumpsters should be attractively screened. Please include this as a condition of approval."

**Town Planner Michael Behrendt** said with a complex project like this, the context was very important. He said the applicant had worked with several boards in Town over the past year, and said members of those boards had now spoken to the ZBA on the project. He said this was an excellent project and design, especially compared to what was there now and other possible designs for the site. He said the Town was very fortunate that deStefano architects had become involved with the design, noting that there was another architectural firm originally for prior iterations of the design.

He said the developer had been patient and had persevered, and he noted among other things that they tried to save the barn; were receptive to the optimal design; planned to save and restore the best buildings on the site; and fit in the additional new buildings in a very harmonious way that would have the best impact on Main Street and would also have a minimal impact on the residents on Faculty Road who would have to look at it.

Mr. Behrendt said there were also discussions with the EDC, whose purview was to maximize the amount and quality of commercial space. He said some changes came out of this discussion. He said Orion had also been working with the Planning Board for a few months and was making good progress. He noted the emails the ZBA received indicating support for the project.

He spoke about the variance the ZBA had granted for the Grange property, and said no harm was done as a result of this. He said that project was now the gold standard for redevelopment in Durham, and said the Orion project was similar to that project. He also said the variances granted for Madbury Commons. The Grange and Rosemary Lane were very appropriate and beneficial, as granting the variances for the Orion project would be.

Mr. Behrendt said the hardship criterion was met, especially given the changes in the Supreme Court 's view of hardship over the past several years. He said there were only six lots in both the Central Business District and Historic District, and three were encompassed by Orion. He said their property was the only one that was large enough to do a project with multiple buildings, and said the other lots weren't likely to be redeveloped because there were significant buildings on them. He said the Orion property was also located at the end of the Central Business District, so the feasibility for commercial space was a bit different than it was for properties located in the heart of the Central Business District.

He said having commercial space on the first floor was appropriate for smaller lots and a singular rectangular building fronting on the street. He said commercial space would not be workable for the back buildings, and said the Zoning Ordinance couldn't anticipate every situation.

He said the other variance criteria were met, noting that the project had been vigorously vetted by the community and several other boards. He said without a variance, the Town would be left with what was on the site now.

Chair Starkey noted letters of support from:

Daniel Day, 89 Bagdad Road  
Steve Burns, 20 Newmarket Road  
Suzy Loder, 38 Oyster River Road  
Carol Tuveson, 11 Watson Road  
Elaine Fink, 11 Fellows Lane  
Doris Erwin, 4 Moharimet Way  
Ann Knight, 40 Bennett Road  
Colleen Fuerst, 220 Newmarket Road  
Charlie Forcey, 12 Thompson Lane  
Nancy Webb, 23 Woodridge Road  
Ted Howard, 12 Burnham Ave  
Phyllis Heilbrenner, 51 Mill Pond Road  
Elaine Pasternak, 97 Mill Road  
Ellen Karelitz, 113 Madbury Road  
James Dreher, 220 Newmarket Road  
Cathy Frierson, 38 Mill Pond Road  
John Lowy, 17 Thompson Lane  
Pat Terrill, 11 Fogg Drive

Chair Starkey asked if there were any members of the public who wished to speak against the variances requested, and there was no response. He then asked if the applicant had anything more to say.

Attorney Phoenix said those who spoke were much more eloquent than he had been. He noted that the plan submitted had the dumpster out of site, which met Ms. Olshansky's concern. He said if it was moved, the applicant would have to go to Mr. Johnson to determine if another variance was needed.

He said the usual circumstance with a large project was that people who were against it came out in droves. He said he had seldom seen people so passionately in favor of a project, both in person and in their letters to the ZBA, and said this spoke volumes.

Mr. Sterndale asked if the language on where the nonresidential space was going to be could be tightened up. Chair Starkey said it was going to be in Building B, Building C, and the front of Building A. Attorney Phoenix noted his letter from November that had an attachment that said Building A had 1,472 sf on the front - on

the first and second floors, which would be devoted to commercial space. He said he thought that was adequate to define the commercial space. He also said Building C and D would be all commercial.

Mr. Morong asked if consideration had been given to putting the dumpster in something that looked like a carriage shed or garage, where it would be totally hidden. He said a lot of the screening he had seen around Town wasn't much more attractive than the dumpster it was hiding. He asked if there could be something more architecturally pleasing that went better with the buildings.

Mr. Wagner noted the site plan indicated that the dumpster enclosure would have 1" by 4" cedar edge trim and 1" by 4" cedar slats.

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

Chair Starkey said Mr. Toye was a voting member on the application.

Chair Starkey suggested that the Board go through the 3 variance requests individually.

Building height – exceeding 35 ft

Ms. Bubar asked if this variance was needed. Mr. Johnson said the Planning Board had some flexibility concerning the building height, but said there was no harm in the ZBA granting a variance for a building height between 35 – 50 ft. Chair Starkey agreed, and said the Planning Board could decide on the height. Ms. Bubar said she didn't have a problem with exceeding 35 ft, in looking at how the height had come down so visually one wouldn't really see the buildings in the back.

Chair Starkey noted that quite a few people had mentioned other approvals the ZBA had done concerning sight lines. He asked about the special conditions of the property.

Mr. Toye noted that the dimensional table in the site plans indicated that the applicant was only planning to go to 36.6 ft as a maximum building height. He said the Board could approve the variance as presented in the plans.

Ms. Bubar noted that the property dropped down in elevation at the back. There was discussion. Chair Starkey said there was a sloping down at the back of the property, and also said the fact that the property was located in the Central Business District and Historic overlay district were special conditions. There was discussion that the back of Building A and Building B would be taller than the four other buildings on Main Street, but would not be visible walking on Main Street.

Parking and dumpster variance requested

Mr. Morong said the dumpster would be screened pretty well, and also said he thought some parking was needed. He said he tended to agree that having less asphalt for parking, and focusing on pedestrians and bikes worked better for the Town. He said he wasn't sure how well this would work for the businesses.

Chair Starkey said he was glad to see the u-shaped entrance and exit, and said he hoped the Planning Board would make it a one way in and out. He said a concern had been that there were already people who liked to park on Main Street and there was no breakdown lane there, so the egress in and out of the property for loading eliminated some of his concerns about this.

He said there were special conditions of the property, including the size of the property as well as the fact that it was located in the Central Business District and Historic District. He also said there was hardship in trying to accommodate student housing and nonresidential space that fit with both of these districts. He said he had no problem with the dumpsters. He said he was a little concerned about having only 4 parking spaces, but said he understood why the applicant was doing this and wasn't trying to create a parking lot. He said it was more or less a loading/unloading area.

Mr. Sterndale said the variance pertained to parking and the dumpster in front of the principal building, and said he didn't think the large building was the principal building. He said the principal buildings were the prominent ones on Main Street.

Chair Starkey confirmed that Board members had no concerns about the other variance criteria for the parking spaces and the dumpster.

Variance to permitting residential space on all floors of two of the five buildings.

Chair Starkey spoke about the proposed location of the nonresidential space in the front of Building A, and all of Building C and D. He said he agreed with the applicant that this space would probably be used for professional offices rather than as retail, food type uses.

He said he went back to the hardship criterion, and noted that working with the EDC, HDC and given the location in the Central Business District, the applicant was trying to find the best use and maintain the integrity of the property. He said the applicant had cut way back and come full circle from what the original design looked like. He said they were making the best possible use of the property and were trying to retain the architectural integrity and incorporate certain buildings at the request of the HDC.

Mr. Morong said he didn't think the Zoning Ordinance addressed projects like Golden Goose or this project. He said the applicant was providing a lot of public, nonresidential space for plazas and other public spaces, and said he thought they

should be given some leeway in doing this. He said this was a different project than one that was further downtown, on a square lot.

Ms. Bubar noted that one of the large buildings proposed didn't front on Main Street. She also said that because there wasn't going to be a lot of parking, it would be ridiculous to say that all of the first floor needed to be commercial because nobody would lease that space. Chair Starkey noted that the Board had discussed previously that space off of Main Street or Madbury wasn't necessarily what the Zoning provision was written for, and said it was intended more to address space that was facing the street.

Mr. Toye noted that the applicant was committed to putting nonresidential space on the second floor of some of the other buildings.

Mr. Sterndale said other property owners would be looking at getting out of providing commercial space. He said it was important to highlight the overlap between the Historic District and the Central Business District, and the lots this overlap applied to, which indicated that finding another situation comparable to what the applicant's property had would be virtually impossible. He also said the depth of the property was unique in the Central Business District.

He noted that the Board had discussed the issue of creating hardship by merging lots with some prior cases, and said while this property was three lots, if they were broken down into individual lots, it would be even more difficult for the applicant to meet the spirit and intent of the Ordinance.

Mr. Sterndale said he wanted to be clear that what was not a justification for granting this variance was that the commercial space wouldn't be viable. He also said how bad the original proposal had been was not a justification. He said the improvements in the project spoke to the public interest criterion, but to little else.

Chair Starkey said they had to deliberate on applications on a case by case basis.

Mr. Toye noted that the applicant proposed to restore two historic structures, and said it had been indicated that restoring them to a commercial standard would be more of a challenge than meeting the residential standard.

Chair Starkey asked if there were any concerns about any of the variance criteria being met. No concerns were expressed by the Board.

It was noted that the wording on the agenda concerning the variance request "to permit residential units on all floors of two of the five proposed buildings" was incorrect. It was also noted that the wording on the agenda concerning building height was worded incorrectly. It was agreed that these details in the plans submitted with the application were correct and should be referenced in the motion.

Mr. Johnson recommended that the number of parking spaces shouldn't be specified in the motion, so the Planning Board could address this.

*Sean Starkey MOVED to grant a petition submitted by Orion, UNH LLC, Durham, New Hampshire for an APPLICATION FOR VARIANCES from Article XII, Section 175-41(F)(1, 5, 7 & 8), Article XII, Section 175-53 and Section 175-54 of the Zoning Ordinance to permit residential units on all floors of Building #25, Building #35, Building B and the rear section of Building A; to permit two of the six proposed buildings to exceed 35 feet; and to allow parking spaces and a dumpster behind the 5 buildings fronting on Main Street, as shown on the plans issued for Planning Board review dated September 4, 2013, Exhibit 4, from Allen and Major Associates, and dated September 11, 2013 Exhibit 5 from deStefano Architects, for the properties shown on Tax Map 5, Lot 1-6, 1-7 and 1-8, and located at 25-27 Main Street, 29 Main Street and 35 Main Street, in the Central Business Zoning District. Kathy Bubar SECONDED the motion, and it PASSED unanimously 5-0.*

Break from 8:39 – 8:44 pm

- C. **PUBLIC HEARING** on a petition submitted by David True, Durham, New Hampshire, on behalf of Melbern & Virginia True, East Derry, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIII, Section 175-59(A)(2) and Section 175-65(F) of the Zoning Ordinance to permit the construction of a two-car garage with a one bedroom apartment and the placement of a septic system within the property and wetlands setbacks. The property involved is shown on Tax Map 6, Lot 2-4, is located at 9 Foss Farm Road, and is in the Residential B Zoning District.

Architect Bill Schoonmaker represented the applicant, David True, who is the current resident of the property. He first noted that it had turned out that the property line setback variance wasn't needed. He said a variance was needed concerning a proposed incursion into the 75 ft wetland buffer.

He said the property was fairly steep, and said there was an existing one story dwelling and 240 sf garage. He said the garage was located just off of Foss Farm Road. He said the jurisdictional wetland ran along to the south and said there was a culvert that ran underneath Foss Farm. He noted the area of the lot that was buildable, and showed the location of the existing septic system.

Mr. Schoonmaker said Mr. True wanted to construct a two car garage with a one bedroom apartment over it, and also wanted to tear down the existing house and garage in order to neaten up the site. He said the new garage was proposed in a location that sat down off the road, so from the road it would look like a story and a half or even less than that. He showed the Board a proposed floor plan, and said the building would be 26ft by 26 ft, with an 8 ft by 10 ft deck off of the back. He said the elevations depicted were preliminary.

He said there had been some concern about the existing septic system a few years back because the applicant's property and an adjacent property were on the same system. He said the State said at that time that they wanted this changed, and asked that a new system be designed. He said the neighbors subsequently removed their septic line from the system and put a new septic system on their property, on the other side of the house. He said the State then asked the septic designer to determine if the septic system was fine, and he said it was.

Mr. Schoonmaker said the septic system design was included now because for a project like the one the applicant proposed, an updated septic system design was required. He said it was included now for instructional purposes. He noted that it was an approved system, but said the design could probably be updated because there were newer, smaller systems now.

Mr. Johnson clarified that what was proposed was a one story house with a garage under it. He noted that an accessory apartment in an accessory structure wasn't allowed in this zone. Mr. Schoonmaker said what was proposed was a one bedroom residence over a two car garage.

Mr. Schoonmaker said the new septic system if installed would encroach on the 75 ft wetland buffer. He said the applicant was asking for variance relief, with the understanding that he would make every effort to keep the new system out of the buffer.

He said the building would encroach roughly 16 ft into the 75 ft buffer. He said the existing garage was completely in the buffer and the front yard setback, so what was proposed would make things better. He also said because the existing house was being taken down, the impervious surface area would be reduced by about 2/3, although the impervious surface in the buffer wouldn't be reduced. He said of the 700 plus sf, 420 sf of it would be in the buffer.

There was discussion about the applicant's plans to try to stay out of the wetland buffer if a new septic system needed to be installed. There was also discussion about the fact that the property was on the Town water system.

Mr. Schoonmaker reviewed the variance criteria and how they were met. He said there would be no decrease in the value of surrounding properties if the variance was granted because once the new structure was completed, the existing house and garage would be removed, thereby increasing the value of this property and other properties as well.

He said granting the variance would not be contrary to the public interest because the area was zoned residential, and the new structure would serve as a residence and would be a significant improvement over the existing dwelling in appearance and energy efficiency.

Mr. Schoonmaker said that concerning the hardship criterion, there were special conditions that distinguished the applicant's property from others in the area. He said

because of the 75 ft buffer and the side and frontyard setbacks as well as the steepness of the site and presence of ledge along the north and east property lines, the area left for building the new structure and potential new septic system was severely limited. He said the buffer zone and frontyard setbacks were already compromised by the existing garage. He said granting the variance would eliminate the frontyard setback issues, and result in the maintenance of a nearly 6 ft buffer for 26 ft along the south edge of the new structure.

He said substantial justice would be done in granting the variance because the structure would have a footprint 40% smaller than that of the existing house, and the new structure would be far more energy efficient. He said the removal of the existing structures would greatly improve the neighborhood, and said storing the vehicles in the garage meant far less chance of contamination of the soil. He noted that the current garage couldn't really be used because of the two foot drop off in grade at the entrance.

Mr. Schoonmaker said granting the variance would not be contrary to the spirit and intent of the Ordinance, noting that once the existing garage and house were removed, there would be less impervious material on the site. He also noted that the existing garage sat completely in the frontyard setback and wetland buffer and would be removed. He said the existing garage/shed was 240 sf, and the new structure was 756 sf, but only 420 sf would encroach on the buffer zone. He said all of the structure would observe the front and sideyard setbacks.

Mr. Morong asked if the existing garage had a cement floor and if the house had a cement basement. It was noted that the garage was wood on stone and masonry piers, and there was a dirt floor for the house. There was discussion. Mr. Johnson said as part of the demolition permit, all manmade material including concrete needed to be removed. He said ledge could be used for landscaping, but concrete would need to be hauled out.

Mr. Sterndale asked why the whole thing couldn't be shifted north in order to get out of the buffer. The applicant said there was a berm at his driveway because of former flooding of his yard and house as a result of runoff coming down his driveway every time it rained, because the Town had redone the road. He said with the proposed configuration, where the driveway extended over the berm and around to the garage, he hopefully wouldn't have a flooded driveway. Mr. Schoonmaker said the new building was sited so the drainage wouldn't impact it, and he provided further details on this.

Chair Starkey said the applicant wanted to remove the current structure, which was completely out of the buffer, because of current runoff during heavy rains, and site the new building partially within the buffer. Mr. True also noted that with the proposed location, he would be further away from all of his neighbors.

Ms. Woodburn said even if there wasn't a drainage problem and the new structure was slid further north, it would still be in the buffer, but not by as much. Mr. Schoonmaker said it would be very difficult to make the turn to get a vehicle in. Mr. Sterndale said he'd been thinking the new structure could be rotated to the north and not shifted north. There was discussion.

Ms. Woodburn determined that Mr. True planned to live in the old structure until the new one was built. Mr. Johnson said a condition of the building permit was that the final Certificate of Occupancy wouldn't be issued until the old structure was taken down.

Chair Starkey said there were no members of the public present.

***Chris Sterndale MOVED to close the Public Hearing. Kathy Bubar SECONDED the motion and it PASSED unanimously 5-0.***

Ms. Woodburn said there was an approved septic design, and said it looked like there wasn't much in the way of other possible locations for the system. She said the system was located based on the best of the test pits.

Chair Starkey 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 it was an approved septic system. He said there were special conditions, noting that there wasn't much land to work with and the majority of the property sat within the 75 ft buffer. He said substantial justice would be done in granting the variance, because it was an improved system. He said the spirit and intent of the Ordinance was to make sure that clean effluent went into the ground, and said the septic system would accomplish this

Concerning the variance requested for the garage with the one bedroom dwelling above it, Chair Starkey said he had come to understand why the applicant had proposed this location for the structure. Ms. Woodburn said there was also the deck to consider, in terms of incursion into the buffer. There was discussion that an open deck was considered to be pervious.

Board members agreed that all five variance criteria were met.

***Robbi Woodburn MOVED to grant the petition submitted by David True, Durham, New Hampshire, on behalf of Melbern & Virginia True, East Derry, New Hampshire, for an APPLICATION FOR VARIANCES from Article XIII, Section 175-59(A)(2) and Section 175-65(F) of the Zoning Ordinance to permit the construction of a two-car garage with a residence and the placement of a septic system within the wetlands setback, as illustrated on the plans submitted in this package. The property involved is shown on Tax Map 6, Lot 2-4, is located at 9 Foss Farm Road, and is in the Residential B Zoning District. Chris Sterndale SECONDED the motion and it PASSED unanimously 5-0.***

## **VI. Approval of Minutes**

Ms. Woodburn left the meeting at 9:18 pm.

August 13, 2013

There was discussion about whether Town Councilors speaking at the Public Hearing at this meeting on the Golden Goose variance application should be labeled as Town Councilors. The Board agreed to leave the wording as it was in the Minutes.

***Sean Starkey MOVED to approve the August 13, 2013 ZBA Minutes as presented. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0. (Chair Starkey said Mr. Toye was a voting member)***

September 10, 2013

***Tom Toye MOVED to approve the September 10, 2013 ZBA Minutes as presented. Kathy Bubar SECONDED the motion, and it PASSED 4-0-1 with Chair Starkey abstaining because he wasn't at the meeting.***

October 8, 2013

***Kathy Bubar MOVED to approve the October 8, 2013 ZBA Minutes as presented. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.***

November 12, 2013

***Kathy Bubar MOVED to approve the November 12, 2013 ZBA Minutes as presented. Mark Morong SECONDED the motion, and it PASSED unanimously 3-0.***

**VII. Other Business**

**VIII. Adjournment**

***Chris Sterndale MOVED to adjourn the meeting. Kathy Bubar SECONDED the motion, and it PASSED unanimously 5-0.***

Adjournment at 9:28 pm.

Victoria Parmele, Minutes taker

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Chris Sterndale, Secretary