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**ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, NOVEMBER 12, 2002
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL**

MEMBERS PRESENT:

Bill Annis, Chair; Jane Towle; Robin Rousseau; Henry Smith; Robbi Woodburn, Alternate; Linn Bogle, Alternate; Ted McNitt (arrived at 7:07 P.M.)

MEMBERS ABSENT:

John deCampi

OTHERS PRESENT:

Tom Johnson, Code Enforcement Officer; Interested members of the Public

Chair Annis called the meeting to order at 7:04 P.M.

I. Approval of the Agenda

Linn Bogle MOVED to adopt the agenda. The motion was SECONDED by Henry Smith and was unanimously APPROVED.

Ted McNitt joined the meeting at 7:07 P.M.

II. CONTINUED DELIBERATION on a petition submitted by Paul R. Martin, Dover, New Hampshire, on behalf of Frances & Dorothy Manock, Dover, New Hampshire, for an Application for Variance from Article IV, Section 175-26 © of the Zoning Ordinance to allow horses to graze on land where the keeping, boarding or training of animals is not a permitted use. The property involved is shown on Tax Map 10, Lot 8-6, is located off Dover Road on the Madbury Town Line and is in the RB, Residence B Zoning District.

Robin Rousseau referred to an E-mail from John Davis, 2 Maple Street, regarding the Board's voting procedures. She asked if a Board member had an obligation to vote down a motion to approve a variance if the member believed the motion did not meet the Board's five conditions, or does the Board go by majority vote on each motion. She stated she believed the Board was currently voting both ways.

Jane Towle stated if a Board member voted against one of the conditions, then they should take special heed when voting.

Robbi Woodburn read from the Standards of Review, which affirmed that for the motion to be legally granted "all of the following five conditions must be present."

Linn Bogle stated that Robert's Rules calls for a final vote on a motion and people should keep in mind that if they voted against one of the conditions, they therefore must vote no on the motion.

The Board members agreed they would take special heed when voting.

Ted McNitt recused himself from the rest of the discussion on the matter.

In response to a question from Robbi Woodburn, Robin Rousseau stated the Board still has not received clarification on the procedure for voting on the application.

Jane Towle stated the matter is automatically put on the agenda as a continued item.

Chair Annis stated the application called for a non-permitted use in that zone and the matter should be heard by the Board.

Jane Towle stated if the Board approved the application, it would still have to pass through the Planning Board. She stated the Board could still approve the application without the applicant's being at the meeting but more information was needed.

Robbi Woodburn MOVED to table the application until the Board had further documentation from the applicant. The motion was SECONDED by Jane Towle and was APPROVED with a vote of 4-1 (Robin Rousseau voting against.)

Ted McNitt returned to the meeting.

III. PUBLIC REHEARING on a September 17, 2002 decision where the Durham Zoning Board granted a petition submitted by David Meyer, Durham, New Hampshire to approve an Appeal of Administrative Decision so as to prevent the building of a duplex on a lot. The petition for a request for rehearing is submitted by Roger G. Burlingame, Cleveland, Waters & Bass, P.A., Concord, New Hampshire on behalf of Madmack, LLC, Bedford, New Hampshire. The property involved is shown on Tax Map 2, Lot 8-6, is located at 5 Madbury Court and is in the RA, Residence A Zoning District.

Jane Towle recused herself from discussion of the matter.

Chair Annis opened the public rehearing.

Roger G. Burlingame, attorney for Madmack, stated while the Board, in September, reversed its favorable decision for his clients, no evidence was ever presented in the petition from David Meyer that showed why the Board should do so and it did not assert that the Board had made a mistake. He stated there were issues raised by Mr. Meyer's attorney that were not in the application for rehearing and should not have been considered by the Board.

Mr. Burlingame read from the Zoning Ordinance regarding nonconforming lots and gave an overview of the property. He stated the property was a nonconforming lot and that duplexes were allowed in the RA Zone as long as it met all of the conditions and the duplex going on the property would meet all the conditions.

Mr. Burlingame stated he realized some residents were concerned about the duplex being rented to UNH students. He stated that while the duplex may be rented to students, it could be rented to anyone and that the Board could not discriminate on the use of property by who lives there.

Mr. Burlingame stated the Town would have to find another place to plow snow as it may have been placing snow on the property but the Town has no right to leave its snow there since it is private property.

In response to a question from Linn Bogle, Mr. Burlingame stated general provisions never preempt specific limited provisions.

In response to a question from Ted McNitt, Mr. Burlingame stated that the property was the same lot that existed prior to zoning in Town. Since the adoption of Town zoning, the property has never been owned by anybody who owned abutting property to it.

Jay Gooze, 9 Meadow Road, spoke against a duplex being developed on the lot.

Marcel Lavoie, 43 Madbury Road, spoke about the property regarding abutters.

Roger Burlingame stated that the property may be abutting other properties but that they are not contiguous.

Annmarie Harris, 56 Oyster River Road, stated that she was concerned about the increase of traffic on the property the duplex may provide. She stated there were accessible driveways to the property from Strafford Avenue that could be used and the property owner could purchase an easement which would protect the neighborhood and allow for the duplex.

Roger Burlingame stated the RA Zone is designed in the Zoning Ordinance for high intensity dense residential development. He stated it was not for large lawns and “sleepy” neighborhoods.

In response to a question from Robin Rousseau, Annmarie Harris stated she had been speaking as a citizen and not as a member of the Zoning Re-write Committee. She stated that the use of a duplex stays with the land after the family has moved on and often homes in Town become something other than what they were intended for.

Chair Annis closed the public hearing.

Robbi Woodburn stated she believed that at the September meeting Board members were swayed by the public and that the Board must vote using only the ordinance.

Henry Smith read from the 2000 Master Plan regarding the preservation of air and water quality and from the Zoning Ordinance regarding the RA District. He stated he believed the Board should uphold the appeal.

Ted McNitt stated he could not see any way around the Code Enforcement Officer's decision.

Robin Rousseau stated she believed the ordinance was clear in the matter and that the Board was not deciding on a variance, and all the Board could decide on was if a duplex was an allowed use on a nonconforming lot in the district or not. She stated the applicant has shown it will complete the duplex under the criteria of the law and that they have a legal right to use their property but the neighbors have not shown evidence or made any convincing legal arguments showing that the applicant is in violation of the ordinance.

Ted McNitt stated the concern with the ordinance was that it gave privileges to the lot since it has gone untouched for 40 years while things took place around it but nothing in the ordinance excluded the lot from everything the Town requires for health and safety.

Robin Rousseau MOVED to deny a second appeal of an administrative decision by David Meyer and confirm the decision of the Code Enforcement Officer to allow a duplex on the property located at 5 Madbury Court, Tax Map 2, Lot 8-6, located in the Residence A Zoning District. The motion was SECONDED by Robbi Woodburn.

Henry Smith stated he believed the Board had discretion in the matter and that he had seen enough ambiguity to be opposed to the motion.

Robin Rousseau stated she believed the Board had little discretion when it came to an administrative decision and that the ordinance was clear.

The motion was APPROVED 4-1. (Henry Smith voting against.)

Chair Annis declared a recess at 8:30 P.M.

The Board reconvened at 8:37 P.M.

IV. PUBLIC HEARING on a petition submitted by Stanley & Janice Aviza, Durham, New Hampshire, for an Application for Variances from Article IV, Section 175-25 (B) and from Article III, Section 175-16 (A) of the Zoning Ordinance to permit the building of a deck on a nonconforming lot. The

property involved is shown on Tax Map 6, Lot 6-1, is located at 3 Faculty Road and is in the RA, Residence A Zoning District.

Chair Annis opened the public hearing.

Janice Aviza spoke in favor of the application.

Chair Annis closed the public hearing.

In response to a question from Henry Smith, Stanley Aviza stated the deck had been built.

Jane Towle MOVED to approve the Application for Variance from Article IV, Section 175-25 (B) and from Article III, Section 175-16 (A) of the Zoning Ordinance to permit the building of a deck on a nonconforming lot. The motion was SECONDED by Ted McNitt and was unanimously APPROVED.

- V. PUBLIC HEARING on a petition submitted by Stanley & Janice Aviza, Durham, New Hampshire, for an Application for Variances from Article IV, Section 175-27 (B) and from Article III, Section 175-16 (A) of the Zoning Ordinance to permit the building of a second floor addition on a nonconforming lot. The property involved is shown on Tax Map 12, Lot 4-2, is located at 6 Watson Road and is in the RC, Residence Coastal Zoning District

Chair Annis opened the public hearing.

Janice Aviza read from the application regarding why she and Stanley Aviza were pursuing a variance and why it should be granted.

Lorraine Morong, 117 Piscataqua Bridge Road, Madbury, stated she lived next door to the Avizas and had no objection to the project but described how she would like the addition to the house to be designed. She stated she was willing to sell the Avizas part of her land. Ms. Morong stated that should make a difference in the Board's decision and it would make a difference regarding any concerns she has about the project. She stated if the Avizas bought the land, their property would become more conforming but it would still be nonconforming.

Jane Towle stated she believed the Board could not make it a condition that the Avizas buy the land from Ms. Morong.

Chair Annis closed the public hearing.

Jane Towle stated the applicant had to fall within a 30 foot height requirement and cautioned the Board in determining what style the addition would be.

Robin Rousseau stated the Board could continue the discussion until the applicant had architectural plans to present to the Board.

Jane Towle stated the Board could vote on the variance without the plans and if the applicant wanted to do anything else with the property they would have to come back to the Board. She stated the applicant was limited in what it could do regarding design.

Henry Smith MOVED to continue the discussion until the Board saw a site plan. The motion was SECONDED by Robin Rousseau and FAILED 2-3 (Chair Annis, Jane Towle and Ted McNitt voting against.)

Jane Towle MOVED to approve the Application for Variance from Article IV, Section 175-27 (B) and from Article III, Section 175-16 (A) of the Zoning Ordinance to permit the building of a second floor addition on a nonconforming lot and the approval would be conditional upon continuing on the same footprint with no further infringement upon sideline setbacks. The motion was SECONDED by Ted McNitt.

The Board reviewed the following criteria, which must be met before a variance can be granted:

No decrease in value of surrounding properties would be suffered. ***AGREED 4-0-1 (Robin Rousseau abstaining.)***

Granting the variance must not be contrary to the public interest. ***AGREED 3-0-2 (Robin Rousseau and Henry Smith abstaining.)***

Denial of the variance would result in unnecessary hardship to the owner seeking it. ***AGREED 3-1-1 (Henry Smith voting against and Robin Rousseau abstaining.)***

By granting the variance substantial justice would be granted. ***AGREED 3-1-1 (Henry Smith voting against and Robin Rousseau abstaining.)***

The use must not be contrary to the spirit and intent of the Ordinance. ***AGREED 3-0-2 (Henry Smith and Robin Rousseau abstaining.)***

The motion was APPROVED with a vote of 3-1-1 (Henry Smith voting against and Robin Rousseau abstaining.)

- VI. PUBLIC HEARING on a petition submitted by Stanley & Janice Aviza, Durham, New Hampshire, for an Application for Variances from Article IV, Section 175-27 (B) and Article IV, Section 175-21 (B) (2) from the Zoning Ordinance to permit the placing of a septic system within the required 50-foot side yard setback and within an area greater than 30% of the required yard.

The property involved is shown on Tax Map 12, Lot 4-2, is located at 6 Watson Road and is in the RC, Residence Coastal Zoning District.

Chair Annis opened the public hearing.

Robbi Woodburn stated that on the engineer's plans the proposed septic tank is within the 75 foot radius of the well, which is not allowed by the State.

Jane Towle stated that when a new design is done an engineer will have to design the septic system to be 75 feet away from the well, including the tank.

Chair Annis closed the public hearing.

Ted McNitt stated that the system would be on high clay soil and that it would have to work hard. He stated the Board would be expanding the size of a system that was put in on the property 30 years ago and should be replaced but he was concerned that the Board would be trying to do something on a lot that was not large enough and the applicants could move the system down the hill and not be in the setback.

Jane Towle stated if the Board wanted to protect the environment, it should expand the septic system.

Ted McNitt stated the Board should expand the system but should look for other alternatives besides granting a variance or find a way to place it on a larger lot.

Jane Towle stated no matter what was done, the size of the lot would not change.

Robin Rousseau MOVED to continue the discussion until the next meeting and to have the applicant bring in the engineer who designed the septic system to help the Board make a decision. The motion was SECONDED by Jane Towle and was unanimously APPROVED.

VII. PUBLIC HEARING on a petition submitted by James Swisher, Durham, New Hampshire, for an Application for Variance from Article IV, Section 175-27 (B) and from Article III, Section 175-16 (A) of the Zoning ordinance to permit the building of an extension of a deck on a nonconforming lot. The property involved is shown on Tax Map 12 Lot 9-4, is located at 9 Mathes Cove and is in the RC, Residence Coastal Zoning District.

Chair Annis opened the public hearing.

James Swisher stated the extension he wants had been done 13 years ago but he never got a variance. Mr. Swisher stated that he remembered he needed a permit after selling his property and he saw on the listing statement a question that asked if any work was ever done on the property without a permit.

Ted McNitt MOVED to approve the Application for Variance from Article IV, Section 175-27 (B) and from Article III, Section 175-16 (A) of the Zoning Ordinance to permit the building of an extension of a deck on a nonconforming lot. The motion was SECONDED by Robbi Woodburn and was unanimously APPROVED.

VIII. Approval of Minutes

In response to a question from Robin Rousseau, Tom Johnson stated that he would follow up on a request by the Board, stated in the minutes on page 3, that Frances Manock, 5 Hayes Lane, Dover, would be submitting a statement to the Board confirming that Paul Martin was authorized to represent the applicant's interest.

The following changes were made to the October 8, 2002 Minutes:

Page 5, 10th paragraph which begins "Robin Rousseau MOVED" the word "Madnack" was changed to "Madmack."

Page 6, 2nd paragraph which begins "Ms. Rousseau stated" the words "words with" were deleted.

Page 6, 1st paragraph which begins "Ms. Rousseau stated" the words "she stated" were inserted in front of the third sentence and the word "arguments" was changed to "decisions."

Page 6, 2nd paragraph which begins "Ms. Rousseau stated" the words "that ordinance" were changed to "its criteria for a permitted use."

Jane Towle MOVED to adopt the October 8, 2002 minutes as amended. The motion was SECONDED by Robbi Woodburn and was APPROVED with a vote of 4-0-1 (Ted McNitt abstaining as he did not attend the meeting.)

IX. Other Business

A. Discussion of possible Training Dates

The Board scheduled Tuesday, January 21, 2003 to receive training from the State Department of Environmental Services regarding wetlands.

In response to a question from Henry Smith, Jane Towle stated that an applicant does not have to be at a meeting for the Board to hear an application, and if the Board chose not to hear the application, the Board could not use the argument of the applicant's not being at the meeting as a reason for denial of the applicant's request.

Ted McNitt stated that in order to continue a hearing where the applicant is not at the meeting, the Board must have a clear cut lack of information that stops it from making a decision.

Tom Johnson stated that amendments have been made to the proposed Zoning Ordinance and the Planning Board will be having a public hearing on them before bringing them to the Town Council.

Mr. Johnson passed out handouts from the 2002 Municipal Law Lecture Series regarding nonconforming uses and vested rights.

Robin Rousseau stated that the handouts are in the Planning Office for any interested citizens.

B. Next Regular Meeting of the Board: December 10, 2002

Chair Annis ADJOURNED the meeting at 9:58 P.M.

Michael Bornstein, Minute Taker

Henry Smith, Secretary
Zoning Board of Adjustment

