

These minutes were approved at the June 15, 2003, Meeting.

**ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, JUNE 10, 2003
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Henry Smith, Chair; Ted McNitt, Jay Gooze, John De Campi, Linn Bogle, Alternate

MEMBERS ABSENT: Robin Rousseau

OTHERS PRESENT: Tom Johnson, Code Enforcement Officer; Interested Members of the Public, Barbara Stoddard, Recording Secretary

Chair Smith called the meeting to order at 7:00 p.m. and designated Linn Bogle a full voting member due to the absence of Robin Rousseau.

I. Approval of Agenda

The following corrections were made to the agenda. Correct the spelling in Item V. to Harriet Fishman. Item VII. Change Article IV 175-26(B) and change Residence A to read Residence B Zoning District. Items VIII, IX, and X should read Article I instead of Article IV.

Ted McNitt MOVED to approve the agenda as corrected. The motion was SECONDED by Jay Gooze and PASSED unanimously.

II. **CONTINUED PUBLIC HEARING** on a petition submitted by Katharine D. Paine, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article III, Section 175-16(A), Article V, Section 175-39(A), Article V, Section 175-41(A), Article VII, Section 175-58(A-D), Article X, Section 175-83(A), Article X, Section 175-84(D-E), Article X, Section 175-85(B), and Article X, Section 175-86(A-C) of the Zoning Ordinance to demolish a waterfront camp and build a two-bedroom dwelling with a two-bedroom septic system on a nonconforming lot. The property involved is shown on Tax Map 11, Lot 35-1, is located at 51-53 Durham Point Road, and is in the RC, Residence C Zoning District.

Ted McNitt recused himself from this deliberation.

Chair Smith opened the public hearing at 7:05 p.m.

John Ahlgren spoke for Katharine Paine. He acknowledged the Board's site walk on June 3, 2003. Mr. Ahlgren summarized his presentation for the Board. This is a 50-

acre lot on Durham Point Road. The current structure is in disrepair and the applicant would like to replace the existing structure on the same footprint. The applicant received one letter in opposition from an abutter, Ann Lemmon. Addressing the abutter's concern of increased traffic, Mr. Ahlgren stated that the applicant has no intention of renting the property and that traffic flow will be the same as it has been historically. He also stated that the application meets the five criteria. Mr. Ahlgren stated further that the contractor, Arnie Taylor was present to answer any questions from the Board.

In response to a question from Jay Gooze, Mr. Ahlgren stated that it is the same footprint but that the applicant will rebuild the foundation.

There was no one else to speak in favor of or in opposition to the application. Chair Smith closed the public hearing at 7:30 p.m.

John de Campi stated that a variance needed to be granted but that he was uncomfortable with leaving the structure 25 – 30 ft. from the high tide mark. He felt the structure could be placed 75 – 100 ft. back toward the parking lot.

Jay Gooze stated that the applicant has the right to replace the structure but he felt that placement was a threat to the shoreline. He would like to see it moved back at least 85 – 90 ft.

Linn Bogle stated that he was in general agreement that the structure should be set back and not enlarged.

Chair Smith asked for clarification of the statement that the new structure was essentially the same as the current footprint. Mr. Ahlgren stated that he used the qualifier of essentially due to previous comments about the window bump outs. Mr. Smith also stated that he would be comfortable with the structure being placed 75 ft. from the high tide mark.

Mr. Ahlgren asked the Board to consider moving the structure no more than 60 – 65 ft. back.

Arnie Taylor, contractor for the applicant, stated that while there was some flexibility to move the structure, there were also some constraints. The constraints included parking and tree lines. He further stated that 50-ft. back from current location puts the structure right at the tree line and would lose some trees due to roots.

John de Campi stated that maybe the 75-ft. was too harsh but would prefer at least 65 ft.

Jay Gooze stated that it should be put back as far as possible and that parking could be between trees. He felt that granting the variance with setback conditions would meet all the necessary criteria.

Linn Bogle stated that he could agree with 65-ft. but that it needs to be as far from water as possible.

Jay Gooze MOVED to accept the application for variance on the condition that the front of the building be placed 65 ft from the high water mark. The motion was SECONDED by John de Campi and PASSED unanimously.

Ted McNitt returned to the table at 7:37 p.m.

- III. **CONTINUED PUBLIC HEARING** on a petition submitted by David E. & Ireen S. Vallery, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article X, Section 175-83(A), Article V, Section 175-41(A), Article X, Section 175-86(A) and from Article III, Section 175-16(A) of the Zoning Ordinance to allow further construction on a nonconforming lot and within the shoreland and wetland setbacks. The property involved is shown on Tax Map 20, Lot 1-0, is located at 595 Bay Road, and is in the RC, Residence C Zoning District.

Chair Smith opened the public hearing at 7:38 p.m.

Chris Boldt spoke for the applicant. Mr. Boldt thanked the Board for making a site walk on the property. He stated that the applicant has made changes to their first proposal due to the concerns and recommendations made by the Board. The first proposal keeps the septic system at a previously approved location. Two driveways currently service the property. The driveway to the east is currently used due to proximity to the current house. Both proposals would have the driveway for the new structure to the west for safety concerns. The first proposal has some encroachment within the 100-ft. setback, but the bulk of the house is beyond the 100-ft setback. Option B (second proposal) addresses issues raised at the site walk. The applicant torqued the building so that all of it is beyond the 100-ft. setback. They will have to move the septic system for which they anticipate approval but do not currently have. Both options will no longer impact on the 75-ft. setback. The new structure on the non-conforming lot will be within the 125 ft. shore line protection set back requirement. The deck will be behind 100-ft. set back.

In response to a question from Ted McNitt, Mr. Boldt stated that the applicant would like to keep the existing shed. He stated that they would be removing all the yard equipment so that there was no longer a pollution threat, but that the applicant wanted to keep the shed as access to the lake.

In response to a question by Ted McNitt, Mr. Boldt stated the current house with porch and deck is 1162.7-sq. ft. and that the new structure with garage, porch and deck is a total of 2012.4-sq. ft. He further stated that the structure would be moved away from the water and that everything is beyond a 100-ft. setback.

There was no one from the public to speak in favor of or opposition to the application.

Chair Smith closed the public hearing at 7:50 p.m.

John de Campi stated that he would be happy with Plan B contingent upon the tin building and the shed being taken down. He suggested the applicant could build a pier.

Jay Gooze stated that he had a problem with the size of the garage. He also questioned if the Board had the right to require the applicant to remove the shed.

Mr. Boldt stated that if the Board approved of Plan B, the applicant would be willing to remove the shed. He further stated that the R Ordinance allows access point and that the applicant would not have to come before the Zoning Board to create the access point.

Linn Bogle stated he would accept Plan B if the shed were gone.

Ted McNitt commented that this is a 2000-sq. ft. structure in the shoreland and is a major expansion but he felt that on balance Plan B was the best that can be done, as this is a unique lot.

John de Campi MOVED to grant the variance to build a house as described by the applicant as Plan B conditional upon the removal of both of the existing structures. The motion was SECONDED by Linn Bogle and PASSED unanimously.

- IV. **PUBLIC HEARING** on a petition submitted by Charles Hoyt Design, Inc., Newmarket, New Hampshire on behalf of Jeff & Trina Morton, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-26(B), from Article III, Section 175-16(A) and from Article I, Section 175-6 of the Zoning Ordinance to re-build a garage with an accessory apartment on a nonconforming lot. The apartment would exceed the maximum size of 25% of the total floor space of the dwelling in which it is located. The property involved is shown on Tax Map 10, Lot 10-8, is located at 75 Dover Road, and is in the RB, Residence B Zoning District.

Chair Smith opened the public hearing 8:06 p.m.

Charles Hoyt, representing the applicants, stated that the applicants wished to turn a dilapidated garage into an in-law apartment. He stated that the apartment they wish to create exceeds the maximum size of 25% of the total floor space by 8%. The building sits 25 ft. from the setback and is a non-conforming use as well. He stated the structure would bring property value up and that they would not be increasing the square footage or height.

In response to a question from Jay Gooze, Mr. Hoyt stated there would not be a garage but that there is ample parking on the site.

In response to questions from Linn Bogle, it was stated that the half floor on top would be used for storage and that there would be pull down stairs for access.

In response to questions from John Gooze, Mr. Hoyt stated this was the same footprint as the present garage. They would also be using the same foundation but would plan to put a bond beam on top and bring the grade up.

In response to a question from John de Campi regarding bedrooms, Mr. Hoyt said that the second bedroom in the house would not be converted to a study.

Mr. Hoyt presented the Board with a letter from the parents of Jeffrey Morton stating they plan on moving into the in-law apartment.

Chair Smith asked for abutters speaking in favor of the application.

Caroline Carson, Durham, stated that she felt it was great that Jeffrey Morton was bringing his parents to live in the apartment. She asked for clarification with the addition of the accessory apartment that this would remain a single dwelling and is limited to 3 unrelated people in the dwelling.

Tom Johnson stated that duplexes are no longer allowed and that this would remain a single dwelling with an accessory apartment and would be limited to 3 unrelated people in total regardless of who owned the property.

There was no one from the public to speak in favor or opposition to the application.

Chair Smith closed the public hearing at 8:17 p.m.

Jay Gooze asked if the new structure could be built on the same foundation. Mr. Hoyt stated that in his professional opinion they could build using the existing foundation. Mr. Gooze stated he was in favor of the variance.

Linn Bogle, John de Campi, and Ted McNitt all stated they had no problems with the variance.

Jay Gooze MOVED to accept the variance based on the plans presented. The motion was SECONDED by John de Campi and PASSED unanimously.

- V. **PUBLIC HEARING** on a petition submitted by Edward Hennessy & Harriet Fishman, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-28(B) and from Article III, Section 175-16(A) of the Zoning Ordinance to add dormers and renovate a single family dwelling on a nonconforming lot. The property involved is shown on Tax Map 17, Lot 56-14, is located at 5 Cold Spring Road, and is in the R, Rural Zoning District.

Chair Smith opened the public hearing at 8:21 p.m.

Jeff Coburn, representing the applicants, stated that the applicants are seeking a variance to make interior renovations, build dormers and a family room over the garage. The use or function of the house is not changing, as it will still be a single family home.

Tom Johnson stated that the property does not meet the sideyard setbacks. Mr. Coburn stated that additions are being made to the front of the house.

Applicant Harriet Fishman stated that she received verbal support from abutters and had one letter of approval from an abutter.

There was no one to speak in favor or opposition to the application.

Chair Smith closed the public hearing at 8:30 p.m.

John de Campi stated that he is not opposed to the application, as it does not change the current setbacks. Ted McNitt agreed with Mr. de Campi.

In response to a question from Linn Bogle regarding wetland issues, Mr. Hennessey stated the area was dry and that there are no culverts.

Jay Gooze stated that as long as the renovations are to the front it would meet the criteria for the variance. Mr. Gooze further stated for the public that applicants should bring plans to the Board and have written letters from abutters if possible.

John de Campi MOVED to approve the application for variances. The motion was SECONDED by Jay Gooze and PASSED on a vote of 4-0-1. Linn Bogle abstained.

Chair Smith called for a 5 minute recess at 8:40 p.m.

Chair Smith called the meeting back to order at 8:45 p.m.

- VI. **PUBLIC HEARING** on a petition submitted by Maynard & Brenda Jackson, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from the decision of Zoning Administrator, Thomas Johnson, to deny a building permit to demolish a dwelling and build another dwelling on the same footprint on a nonconforming lot. The applicant maintains that a previous Zoning Board of Adjustment approval for variance for a garage, breezeway, shed and screen porch should have included an approval for the new dwelling as well. The property involved is shown on TaxMap 20, Lot 16-5, is located at 263 Durham Point Road, and is in the RC, Residence C Zoning District.

The Chair asked the Code Enforcement Officer Tom Johnson to clarify the issue before the Board.

Mr. Johnson stated that in September 2002 the Board directed the applicant to make changes to clarify the application. The applicant returned in October of 2002 with better plans and a better application. At that time the Board granted the variances on a vote of 5-0. In May 2003, the applicant presented a building permit to the code enforcement officer. Mr. Johnson reviewed the Board's approval and found that the motion that was signed in October of last year was to build a 2-car garage with a breezeway, a shed and screened porch on a non-conforming lot. The construction drawings presented to Mr. Johnson in May were to tear down the existing residence and build a new foundation on the same footprint and all the additions that were in the motion.

Mr. Johnson rejected the building permit application, as the decision from the Board did not include a new house on a new foundation. He informed the applicant that they needed to file an appeal of an administrative decision. Listening to tapes of the meeting when approval was granted, Mr. Johnson discovered that there was testimony at the meeting for a tear down of the existing house and foundation, a new foundation and a new one-story dwelling on the existing footprint in addition to the garages, shed and porch.

Mr. Johnson stated that he could not issue a building permit because the Board's decision in writing does not clarify permission. A new decision of the Board has been drafted to include the statement "The existing residence is to be demolished and a one story residence to be rebuilt with a new foundation on the original existing footprint."

Mr. Johnson stated that if the Board approves the new decision and the Chair sign it then a new building permit can be issued.

Chair Smith stated that he wants it clear that there is no expansion. The Board agreed to add the term “with the same dimensions” at the end of the motion.

Jay Gooze MOVED that the Zoning Board of Adjustment accept the petition submitted by Maynard and Brenda Jackson, 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 build a new shed for a boat; and additions for a two-car garage with breezeway and a screened porch onto the existing residence footprint. The existing residence is to be demolished and a 1-story residence is to be rebuilt with a new foundation on the original existing footprint with the same dimensions. The motion was SECONDED by Ted McNitt and PASSED on a vote of 5-0.

Chair Henry Smith signed the decision on June 10, 2003.

- VII. **PUBLIC HEARING** on a petition submitted by Stephen Burns and Andrea Bodo, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-26(B) and from Article III, Section 175-16(A) of the Zoning Ordinance to re-build a barn on a nonconforming lot. The property involved is shown on TaxMap 6, Lot 9-3, is located at 22 Newmarket Road, and is in the RB, Residence B Zoning District.

Chair Smith opened the public hearing at 8:50 p.m.

Bill Schoonmaker representing the applicants stated that the barn that the applicants are seeking variances for is behind the second house on the property. The existing barn is in a state of significant disrepair. It is the applicants desire to rebuild the barn and use it for storage and as a workshop. The intention is to build a new barn over the existing footprint. In addition the applicant received approval from the Historic District Commission.

Mr. Schoonmaker stated that there will be a change in appearance and that the new configuration will look more like the original barn that was built before the current barn. The new barn will be a story and a half. The lot does not conform to square footage and is within 3.5 – 4ft. of the property line.

In response to a question from John de Campi, Stephen Burns stated that he has spoken with the abutter Bruce Mohl and that he approved of the plans as long as it was not higher than his barn. Mr. Schoonmaker stated that the structure will go up 6-7 ft. but that it is still below the Tucker/Mohl barn and that it will look more like the original barn.

In response to a question from Ted McNitt, Mr. Schoonmaker stated the current toilet will be kept and that there is no intention of making this a dwelling unit. Tom Johnson stated that a kitchen is needed to qualify as a dwelling unit.

In response to a question from Chair Smith regarding expansion, Mr. Schoonmaker stated that the new barn would be a foot wider going toward the house because of the skewed footprint.

Chair Smith asked for members of the public to speak in favor of the application.

Pam Weeks Worthen, a neighbor spoke in favor of the application. She stated that it was a vast improvement over the current structure. She also stated that Stephen is a wonderful project person and needs the work space. She further stated that the neighborhood is excited.

As no one spoke in opposition to the application, Chair Smith closed public hearing at 9:01 p.m.

In response to a question from Tom Johnson, Mr. Schoonmaker stated that the side elevation is not on the abutter's side. The wall on the abutter's side is about 3.5 ft. off the property line. Mr. Johnson stated that the wall would need a one-hour rating because it is within 5 ft. of the property line. He further stated that if it is within 3 ft. that no windows are allowed to be changed to openings. Mr. Schoonmaker stated there were no windows on that side.

Linn Bogle MOVED to approve the application for variances. The motion was SECONDED by Ted McNitt and PASSED unanimously.

- VIII. **REQUEST FOR RE-HEARING** on a May 13, 2003, Zoning Board of Adjustment decision to deny the petition submitted by Emtex Realty Trust, Manchester, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article I, Section 175-6 to change the number of occupants living in an apartment unit from three unrelated to six unrelated individuals. The property involved is shown on Tax Map 2, Lot 10-3, is located on 32 Madbury Road, and is in the RA, Residence A Zoning District. (9:04 p.m.)

Attorney Craven stated that he was representing Emtex Realty along with Donald Eaton and Nancy Sherman from Eaton Management Company and they were available for questions.

Jay Gooze stated that at the time of the original discussion about the application the Board was not sure if they had the authority to put conditions on an application and the Board denied the petition. A directive has come from the State since that time

that the Board is allowed to impose conditions. He suggested that the Board grant the re-hearing and proceed to Item IX on the agenda.

Board members stated they felt comfortable granting a re-hearing as the State has said the Board can add conditions.

Linn Bogle Moved to approve the request for re-hearing on a May 13, 2003, Zoning Board of Adjustment decision to deny the petition submitted by Emtex Realty Trust, Manchester, New Hampshire, for an application for variance from Article I, Section 175-6 to change the number of occupants living in an apartment unit from three unrelated to six unrelated individuals. The property involved is shown on Tax Map 2, Lot 10-3, is located on 32 Madbury Road, and is in the RA, Residence A Zoning District. The motion was SECONDED by Jay Gooze and PASSED unanimously.

- IX. **PUBLIC RE-HEARING** on a May 13, 2003, Zoning Board of Adjustment decision to deny the petition submitted by Emtex Realty Trust, Manchester, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article I, Section 175-6 to change the number of occupants living in an apartment unit from three unrelated to six unrelated individuals. The property involved is shown on Tax Map 2, Lot 10-3, is located on 32 Madbury Road, and is in the RA, Residence A Zoning District. Chair Smith opened the public re-hearing at 9:10 p.m.

Attorney Jason Craven presented a brief explanation of the application. He stated that the unit in question has 1600-sq. ft. of space of which 1262 sq. ft is habitable. The Zoning Board requirement is 1.5 persons per 300-sq. ft. of space, which would allow for 6 people in the space. The applicant is not looking for approval of 6 but is back looking for approval for more than 3 and less than 6, preferable 5 individuals. There is adequate parking and it is the most dense zone in town. Attorney Craven offered examples of single family homes that have less square footage than the unit in question.

There was no one to speak in favor or opposition to the application.
Chair Smith closed the public re-hearing at 9:14 p.m.

John de Campi stated his concern that there is only one bathroom. He could agree to 4 but uncomfortable with 5.

Jay Gooze stated that he is uncomfortable to go above 4. The size of the apartment is not important but that the intent of the 3 unrelated person law is clear but that he felt this was an unusual circumstance and could approve 4 but not 5.

Ted McNitt agreed with Jay but is concerned with the concentration of students in the area. He hesitates to allow more than 3 but could agree to 4.

Linn Bogle stated that he does not approve of more than the 3 unrelated individuals. He stated that granting this variance sets a precedent especially on Madbury Road. Houses are being converted to student residences with nonresident landlords. He felt the granting the variance would violate the spirit of the ordinance. He also stated that he felt the property is too close to the middle school.

Chair Smith stated he was concerned with the proliferation of the student population in downtown Durham. He further stated it was not a hardship to the applicant and that it is contrary to the spirit and intent of the ordinance.

Jay Gooze stated that he would have no problem turning down other applications for more than 3 unrelated people. He stated that he felt this was an unusual situation. He further stated that the house was already approved as an apartment building, and no abutters spoke against the application. In addition he referred to the decisions the owner made concerning Lundy Lane.

Chair Smith stated that the intent of the ordinance is to prevent the packing of apartment houses with more students.

John de Campi felt that 4 was reasonable and was not worried about setting a precedent.

Jay Gooze MOVED to approve the variance with the condition of a maximum of 4 occupants. The motion was SECONDED by John de Campi SECONDED and PASSED on a vote of 3-2-0. Linn Bogle and Henry Smith voted against the motion.

Chair Smith declared that the application had been approved.

- X. **PUBLIC HEARING** on a petition submitted by Emtex Realty Trust, Manchester, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article I, Section 175-6 to change the number of occupants living in an apartment unit from three unrelated to no more than five unrelated individuals. The property involved is shown on TaxMap 2, Lot 10-3, is located on 32 Madbury Road, and is in the RA, Residence A Zoning District.

The applicant withdrew the application for variance.

- XI. Approval of Minutes – January 21, 2003 (9:29 p.m.)

Tom Johnson stated that the minutes needed to be acted on now, as requests for corrections have not been received.

Ted McNitt MOVED to approve the minutes of January 21, 2003 as written. The motion was SECONDED by John de Campi and PASSED on a vote of 4-0-1. Jay Gooze abstained, as he was not a member of the Board in January.

Chair Smith signed the approved minutes as he was secretary of the Board in January.

XII. Other Business

A. Tom Johnson reported that the Slania Enterprises court cases have been scheduled. One is scheduled for August 5, 2003 and the other for September 11, 2003.

B. Next Regular Meeting of the Board: **July 8, 2003**

Chair Smith stated that he would not be at the meeting on July 8, and that Ted McNitt will reside.

XIII. Adjournment

Jay Gooze MOVED to adjourn. The motion was SECONDED by John de Campi and PASSED unanimously.

Chair Smith adjourned the meeting at 9:36 p.m.

Jay Gooze, Secretary