D-R-A-F-T

ZONING BOARD OF ADJUSTMENT
TUESDAY, NOVEMBER 18, 2003
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT:	Chair Henry Smith. Jay Gooze, Robin Rousseau., Myleta Eng, John de Campi, Ted McNitt, Linn Bogle
MEMBERS ABSENT:	None
OTHERS PRESENT:	Tom Johnson, Code Enforcement Officer; Interested Members of the Public
MINUTES PREPARED BY:	Victoria Parmele

Chair Smith introduced members of the Board and Code Administrator Johnson, and took special note of new alternate member Myleta Eng.

I. **Approval of Agenda**

Chair Smith said Items IV, V and VI would not be heard that evening because the applicants had asked for postponements.

Jay Gooze MOVED to approve the agenda as amended. John de Campi SECONDED the motion, and it PASSED unanimously.

II. **PUBLIC HEARING** on a petition submitted by Gale S. Teeri, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article I, Section 175-6 to have five unrelated people residing in a single-family home with an accessory apartment. The property involved is shown on Tax Map 11, Lot 28-1, is located at 66 Piscataqua Road, and is in the RC, Residence C Zoning District.

Attorney Bill Tanguay represented Gail Teeri, and explained that Ms. Teeri was seeking a variance to continue the use allowed at her property since 1977. He said no new buildings or construction were being requested. He noted the house was viewed by the Town as a single-family house with an accessory apartment, and said he disagreed with this, but they were not at this meeting to discuss that issue. He said they were at this meeting to seek a variance because of the uniqueness of the property and its environment, and the reasonableness of the request of the proposed ongoing use.

Attorney Tanguay spoke in detail about how the definition of hardship had changed substantially over the years. He quoted the court decision in the Simplex case, and said that before Simplex, in order to establish a hardship, an applicant had to show that a Zoning Ordinance unduly restricted the use of his land. He said that for the hardship to exist, the deprivation resulting from applying the ordinance had to be so great as to effectively prevent the owner from making any reasonable use of the land. He explained that after the Simplex case, the hardship could be said to exist

when the special conditions of the land rendered the use for which the variance was sought to be reasonable.
Attorney Tanguay said the Teeri property was in a unique setting from various standpoints. He said the property was essentially isolated because it was bounded on one side by a narrow strip of land that separated it from a creek/marsh just beyond the Water Treatment Plant. Further, it was bounded on the east by a small cape rental property that was a non-conforming use and was bounded on the north by Route 4. He said there was no neighborhood, no neighbors to disturb, and the area was not attractive or suited for a family, so the property was not attractive for the use contemplated by the Zoning Ordinance.

He said it was also unique from an historical standpoint, because it was built in 1964, an apartment was legally added in 1977, and the property had been a two family apartment house since that time. He said even if the house was viewed as a single-family house since1977, five unrelated people had been allowed to live there. He noted the use of the property as a two family apartment house had never been abandoned, and also noted the property had been taxed as a two family property.

Attorney Tanguay also said that from a legal perspective, the property assessment card said it was a two-family property. He said before the house was purchased, the Code Enforcement Officer was contacted and confirmed the five-person occupancy limit, and shortly after it was purchased, the Tax Assessor noted the occupancy of five people on the tax card.

He noted the primary dwelling had adequate square footage for three occupants, and the basement apartment had adequate square footage for two occupants. He said the present use was not only a reasonable use, it was the only effective and practical use, and he also said it would have been a good candidate for hardship even prior to the Simplex decision. He noted the purpose of the 3 unrelated person provision of the Zoning Ordinance was to keep student housing out of neighborhoods, but did not apply here.

John de Campi asked Gail Teeri how long she had owned the property, and she said she had purchased it in February of 2000.

Robin Rousseau asked Attorney Tanguay to describe the design of the property, and asked if there were separate entrances for the two apartments.

Ms. Teeri described the layout of the building, noting the upstairs had two entrances, and the basement apartment had a separate entrance. She said there was 1100 sq. ft. on the first floor, and 450 sq. ft. in the basement, and there were shared laundry facilities in a separate room in the basement.

Jay Gooze asked if there was a building permit for the construction of the apartment, and also asked what was in the permit.

Code Administrator Johnson clarified that the building was not a single-family house any more, but was considered an unrelated household. He said that in a previous case, he wrote a letter that it was a single-family house with an accessory apartment that had been illegally enlarged without additional permits. He noted a permit had been given to enlarge a family room, but additional work was done illegally at some point.

Ted McNitt asked for clarification on the history of the occupancy of the building, saying he wanted to be clear on what was permitted in 1977.

Attorney Tanguay said five unrelated persons was the permitted occupancy going back to 1977, based on the zoning ordinance at that time. He said he did not have detailed information on whom, or how many people lived there, and when.

Jay Gooze said he thought what Mr. McNitt was trying to get at was clarification on the number of unrelated people occupying the building over time, because the requirements on this had changed over the years.

Chair Smith noted a letter from Mr. William Edney, the former Code Enforcement Officer in July of 2000, saying the property might be over-occupied.

Attorney Tanguay explained that Mr. Edney had been looking at the wrong property, which in fact was over occupied. He said Mr. Edney then came to the conclusion the property was not over-occupied. Ms. Terri provided additional details about this.

Ms. Rousseau asked why the owner would not have reasonable use of the property with 3 as compared to 5 unrelated people living there.

Attorney Tanguay said that would suggest it was a single-family house, and said that if only 3 unrelated people were allowed to live there, the owner would not be able to make reasonable economic use of the property.

Ms. Rousseau asked for additional explanation of why 3 people living there was not a reasonable use.

Attorney Tanguay said the property was not in a family area, there was no reasonable use of that property if only 3 people lived there, and said 5 occupants were needed in order to make the property financially viable.

Ms. Rousseau questioned why there would not be a market for a house that rented to 3 people, but there would be a market for a house that rented to 5.

Mr. McNitt asked where Ms. Terri got the impression that 5 people could live in the building. Ms. Terri said the real estate person who had sold her the house said that she had checked with the Town and was told this was allowed.

Chair Smith asked if the house itself was not attractive for a family if they wanted to purchase a house. He was informed that that the house was isolated. Chair Smith noted that some people found that to be an attractive quality. He also said it could not be assumed that this isolated location would continue in the future. He said he was thinking of what the neighborhood could become.

Attorney Tanguay said that because of the factors he had described, there was no neighborhood to "become", given Route 4 and the marsh.

Linn Bogle asked if there were other houses on the other side of the road, and also said he had recently seen seven cars parked outside the property.

Chair Smith asked if Ms. Teeri had ever occupied the house. She said she had not, but said one of her family members had lived there.

Hillary Scott, 20 Davis Avenue, said she had concerns about the request for the variance. She said she had had lived at this property from 1984-1999, in an accessory apartment, and noted her mother had owned the property. She said the property was uniquely situated, in a fragile neighborhood that should be maintained. She said there were now at least three student rentals properties along that corridor, and said her concern was that it should not be occupied with more student housing. She noted there were often many cars in the driveway of the property. She said from her experience living at the house, it was basically considered a single-family home with an accessory apartment, and said that conceivably four people could live there, but five was too many.

Attorney Tanguay said it sounded from what Ms. Scott said that the building had not been occupied by an owner since 1985, and had been two separate apartments since that time, with no owner occupancy.

Mr. de Campi asked for clarification concerning owner occupancy of the building over the years.

Chair Watt closed the public hearing. He noted only voting members of the Board would discuss this Item.

Jay Gooze said he agreed with the point Chair Smith made that some people liked an isolated setting. He noted that when referring to the Simplex case, it could get to the point where one could say anything was reasonable, and said each application had to be considered in its unique setting. He said he believe this house could be sold as a family home or a rental property, and that it was just as reasonable to rent to three people as it was to rent to five. He said his only question was whether the property was grandfathered to four unrelated people versus the present three, and said he would listen to hear what others had to say.

Robin Rousseau said this kind of application had come before the Board before, and noted previous discussions about basement apartments. She said she did not see anything tremendously different in this situation regarding basement apartments, and said she wanted to remind Board members of these previous discussions, which determined that the basement apartment was subordinate, and was considered an accessory apartment in a single-family home. She said that was her opinion concerning the present building, and also said she believed Ms. Teeri had very reasonable use of the property with three people living in it.

Mr. McNitt said there seemed to be a history that less than five people lived in the building, so the idea of grandfathering was very questionable. He said his subjective opinion was that the building could not meet the code as a duplex, although he could not say for sure. He also said he thought there was a limit to applying "reasonable use". Mr. McNitt said he seriously questioned that the isolation of the property was sufficient justification to expand the reasonable use beyond three unrelated people, and certainly beyond four people, which was the code that existed at the time the house was built.

Mr. de Campi said he agreed with what had been said by other Board members. He said the evidence was that the density there from 1984 to 1989 was less than what was being asked for now, so there would be a step up in density from what was before. He said the property was in an unusual

location, but probably was so when it was built, and there had been no substantial change in the area that justified a change of use. He said he understood that Ms. Teeri wanted to maximize the value of her property, but said it was not necessary for the Board to be responsive to that. He said he might be willing to consider four occupants, but not five.
Chair Smith said he agreed with other Board members on this matter. He said the word "reasonable" was subject to interpretation, but it was hard to see why renting to three people was not reasonable. He noted it was unfortunate that the real estate agent was incorrect, but also said the Town had a hard time controlling the number of unrelated people living in properties, and the Board therefore needed to be conservative in order to maintain the integrity of the ordinance.

Mr. Gooze said he was against allowing five unrelated people to occupy the building, but said he was not sure about allowing four unrelated people to live there.

Robin Rousseau MOVED to deny the petition submitted by Gail Terri for an Application for VARIANCE from Article I, Section 175-6 to have five unrelated people residing in a single-family home with an accessory apartment. The motion was SECONDED by John de Campi.

Ms. Rousseau read through the variance criteria. She said granting the variance would be contrary to the public interest, noting that the Board had gotten strong guidance from Town Councilors to be very vigilant with this particular ordinance, and also that there was strong public interest in maintaining it. She said she also had concerns about surrounding property values if they allowed the property to be over-occupied with renters. She said she did not believe there was an unnecessary hardship, and said the owner would have reasonable use of the property as a single-family home with accessory use. She said granting the variance would be contrary to the spirit and intent of the ordinance.

Mr. Gooze read the variance criteria, explaining why he was against granting the variance, and among other things said doing so would cause a decrease in the property value of surrounding properties. But he said he wanted to make it clear he was not against renting this property.

Chair Smith, Mr. McNitt and Mr. de Campi said they agreed with the other Board members.

The motion PASSED unanimously.

III. **PUBLIC HEARING** on a petition submitted by Omnipoint Holdings Inc., East Providence, Rhode Island, for an **APPEAL OF ADMINISTRATIVE DECISION**, to recommend the denial of a site plan review application to install a personal wireless service on the UNH water tank because of its location on a nonconforming lot. The property involved is shown on Tax Map 2, between Lot 3-9 and Lot 4-0, is located off of Edgewood Road, and is in the RA, Residence A Zoning District.

Jay Gooze recused himself. Chair Smith appointed Mr. Bogle as a voting member of the Board in his place and then opened the pubic hearing.

Attorney John Springer gave a brief description of the project. He noted this was the second time the applicant had come before the Board, and said most people were probably familiar by now with the details of the project. He said the proposed access for the facility was off Stratford Ave., and the utilities would come off that way as well. He noted a parking space had been designated for T-Mobile/Omnipoint for monthly servicing of the facility and said there would be a fence around the

equipment to restrict access. He said they expected there would be one or two trips per month to service the facility.

He said the reason they were at this meeting was because Mr. Johnson had determined that the UNH water tank was a nonconforming structure, because the lot it was located on did not meet the current minimum requirement of 100 ft. feet of frontage. He said Mr. Johnson was correct that the lot the tank did not have this frontage, but said they felt he was wrong that the applicant could not get the site plan approval. He noted the use was permitted under the Zoning Ordinance and would be the exact type of facility using the exact type of existing structure which the ordinance required them to use.

Attorney Springer handed out a lengthy memo to Board members, and said he would be submitting the same report to the Planning Board.

Chair Smith said it was not appropriate that Board members have to read this document at that moment, and asked Attorney Springer to briefly describe its content.

Attorney Springer said when they were in front of the Planning Board, the Board was told that he had made misrepresentations to the ZBA. He said he wanted to be clear about the fact that this was a permitted use and was the kind of structure the town said it wants. He gave some history of previous problems with siting of towers in Durham, which he had been involved with. He said a report that was developed during this time, with participation from UNH and the Town, proposed alternate sites for antennas than on new towers. He said one of the alternate sites indicated in this report was the UNH water tank.

Attorney Springer said they believed Mr. Johnson was incorrect, and that if they had insufficient frontage, that meant they had a nonconforming lot, not a nonconforming structure. He said this meant that they could therefore use the lot as long as they were not planning to change that nonconformity. He also said that even if that argument was rejected, and the frontage issue made the water tank a nonconforming structure, they still prevailed because the Telecom provisions of the Zoning Ordinance had two sections which addressed this. These sections made it clear the antennas could be placed on a nonconforming structure. He also said placement of the antennas did not represent a change in use, noting a previous application for a siting on the Foss Farm water tank did not have to come before the ZBA concerning a change in use.

Code Administrator Johnson clarified that the telecom provisions that Attorney Springer was referring to had not changed as part of the zoning rewrite process.

Mr. McNitt noted there had been objections from of abutters concerning access through their back yard. He also clarified that the antennas would not exceed the height of the water tank.
Attorney Springer said they had agreed with the Planning Board that access would be from Stratford Ave., not Edgewood Ave., for construction and maintenance.

Mr. McNitt also asked if the Planning Board put any restrictions on them concerning radio frequencies, and was told this had not been done yet because they were in the middle of the site plan review process. Mr. McNitt asked if any system for monitoring frequencies had been worked out, and Attorney Springer said they would meet whatever was in the ordinance.

Ms. Rousseau asked the status of the application before the Planning Board.

Attorney Springer explained that the Planning Board had accepted the application, but the site plan review was on hold until after the ZBA decision.
Linn Bogle noted there was a noise question regarding cooling fans for the equipment at the base of the tower, when the application was before the Planning Board, and that residents had concerns about this. He asked if these fans ran all year.

It was clarified that they ran more in the hot weather than the cold weather, and that the noise the fans made would meet all requirements. Deb Couch of Omnipoint said the Planning Board hired someone to review their information and this consultant agreed that Omnipoint would meet these noise requirements.

Ted McNitt asked what the decibel level of the fans would be. Attorney Springer said it was 38 decibels.

Robin Rousseau note that the ZBA was not there to discuss the site plan, they were there to deal with the nonconformity issue.

John de Campi said he was comfortable with what he had heard from the applicant, and said he would like to hear from the public.

Jay Gooze, as a member of the public, asked if the antennas would have any effect on radio reception and was told they would not.

Patrick Shannon, an abutter to the water tank property, said he was there to support Mr. Johnson's decision. He noted the lots that would be combined as part of this application had very different uses, and adding the antennas would allow a third use to the property. He also noted the ground stations would change the footprint of the lot and this change would alter the nonconformity, and also said UNH planned on offering the site to other vendors, which would further alter the nonconformity. Mr. Shannon also spoke about the Federal Telecommunications Act, and said it did not prevent ZBAs from denying applications for these kinds of facilities. He noted as he had previously done that the proximity of the antennas to his house was his chief concern.

Hillary Scott, 20 Davis Avenue, spoke in support of the Administrative Decision. She said that by adding the antennas to the tower, the applicant would be increasing the nonconformity. She also said she was concerned that the antennas would lower property values in the area She also noted she had spoken before the ZBA previously on this application, and asked Board members to check her previous comments and also those of other people not present that evening.

Mr. de Campi said that cell phones were a fact of life and said he though the water tower was a sensible place to put them. He said the Zoning Ordinance was clear on this and intended that antennas be allowed on existing, nonconforming structures to prevent having to build additional towers out in the woods. He said he was sympathetic to people living in the neighborhood, but said the applicant was making a sincere effort to minimize intrusion in the area, and keep the antennas as low as possible.

Chair Smith noted it had come up at the previous ZBA hearing on this item that there might be better locations in Durham for the antennas. He said the question was not whether antennas should be allowed in Durham, but where they should be placed.

Linn Bogle said he did not feel other possible sites for the antennas had been looked at sufficiently, and made reference to the Smokestack, the tower at T-Hall, Stoke Hall, etc. He said another concern was the values of adjacent properties. He said he felt they would be significantly impacted by the water tower, and that anybody trying to sell his property would have problems doing so. He said he would not want to move into that neighborhood if he had small children because of the radio frequencies.

Robin Rousseau said this was a nonconformity issue, and whether other sites were being looked at was not the ZBA's business. She said the issue of other possible sites as well as various technical issues would be addressed by the Planning Board. She said she had looked at the ordinance provisions concerning wireless facilities and it was clear the Town wanted these services to be put on these types of facilities. She said she did not see why antennas would affect the character and integrity of the water tower, and said she would vote in favor of overturning the Administrative Decision.

Chair Smith asked how Ms. Rousseau would respond to the assertion that the ground stations would alter the nonconformity of the lot by changing the footprint. Ms. Rousseau said she did not believe they would.

Mr. McNitt said that the nonconformity issue had to do with frontage, and the building of the antennas certainly would not change the frontage. He also said the telecommunications provisions were clear that the structures planned would not increase the nonconformity of the existing structure.

Chair Smith said that from the beginning, there was the question of whether the installation of the antennas would change the footprint. He said there was also the question not of whether, but where the antennas could be located in Durham, and said there might be sites that were further away from residential areas. He said he was inclined not to overturn the Administrative Decision.

Code Administrator Johnson explained it would have been easier to deal with this application if it had been for a variance, and noted the situation at hand basically did require a variance. He said this appeal was strictly related to the frontage issue, and did not deal with the use, or deal with frontage through the parking lot.

Robin Rousseau MOVED to grant the appeal of an Administrative Decision submitted by Omnipoint Holdings as outlined in Agenda Item III, dated November 18, 2003 to recommend the denial of a site plan review application to install a personal wireless service on the UNH water tank because of its location on a nonconforming lot. John de Campi SECONDED the motion.

John de Campi agreed it would have been easier if the application had been for a variance, and would have been easier to grant. He noted all three lots involved were owned by UNH, and looked at together would provide plenty of frontage. He said that based on what was in the Zoning Ordinance, he could not see how not to grant the appeal.

The motion PASSED 3–2, with Linn Bogle and Chair Smith voting against the motion.

IV. **REQUEST FOR REHEARING** on an August 26, 2003, decision of the Zoning Board of Adjustment **to deny an APPEAL OF ADMINISTRATIVE DECISION** from a March 25, 2003, decision of the Zoning Administrator, Thomas Johnson, **regarding the status of the dwelling at 60 Edgewood Road**. The property involved is shown on Tax Map 1, Lot 14-1, is located at 60 Edgewood Road, and is in the RA, Residence A Zoning District.

This request is postponed at the request of the applicant.

V. **PUBLIC REHEARING** on an August 26, 2003, decision of the Zoning Board of Adjustment **to deny an APPEAL OF ADMINISTRATIVE DECISION from a March 25, 2003, decision of the Zoning Administrator, Thomas Johnson, regarding the status of the dwelling at 60 Edgewood Road**. The property involved is shown on Tax Map 1, Lot 14-1, is located at 60 Edgewood Road, and is in the RA, Residence A Zoning District.

This request is postponed at the request of the applicant.

Chair Smith noted the large number of items on the evening's agenda, and said that the items not covered that evening would be heard at a continuation of the ZBA hearing the following Tuesday evening. He said item IV, V and XIII would be continued to the next week, and there might be others as well that would be continued.

VI. **PUBLIC HEARING** on a petition submitted by William T. Bryon & Dale S. Tock, Eastern Marketing Services, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article III, Section 175-16(A), Article IV, Section 175-30(D), Article X, Section 175-83(A), Section 175-86(A) and Article II, Section 175-10(B, C & D) to enlarge a basement window and relocate the front door on a commercial building currently encroaching on the Shoreland Protection buffer zone. The property involved is shown on Tax Map 10, Lot 20-4, is located at 40 Dover Road, and is in the LBD, Limited Business Zoning District.

Chair Smith opened the public hearing.

William Bryon said he was before the Board to get a variance in order to make modest modifications to a commercial building. He explained he and his partner wanted to enlarge the basement window to provide easily accessible exit from the break room. He said the work would require modest grading, and the building of a small retaining wall 8-10 ft long to retain the slope on the uphill side of the window. He noted that Millside Groundworks had studied the site and their recent assessment had determined that the landscape work would not change runoff patterns. Mr. Bryon also explained that they wanted to move the front door toward the garage.

There was discussion about the appropriate provisions of the Zoning Ordinance that related to this application, as well as the next application by the same applicants.

Mr. Gooze asked if there was any other place in the building where a break room could be built, and was told there was not any other place.

Chair Smith closed the public hearing.

Mr. de Campi said he had no problem except with the intent to disturb 50 feet of earth, and said he felt the disturbance should not exceed 15 feet. He suggested this could be dangerous, and could potentially put silt into the water.

Ted McNitt noted the level of the parking lot had been maintained in the landscape design, but said he recognized there would be land disturbance for a period of time.

Dale Tock, the co-applicant, described how the design that was planned would prevent runoff problems because the grading would make the slope more level, and also said the area would be reseeded, without using chemicals.

There was additional discussion between Board members and the applicants concerning the landscaping design, and potential runoff problems. Mr. Bryon said the change in slope would be very gradual, over a span of 50 feet, so would actually allow more infiltration of water into the ground than a steeper slope over a shorter distance.

Mr. Gooze said he was comfortable with that explanation, and said it seemed to be a better drainage situation this way. He went through the various criteria for granting a variance, and said he would be in favor of granting one.

Ted McNitt said he agreed with Mr. Gooze that the grading design over the long-term would be advantageous.

Robin Rousseau said she wanted to be clear what the Board was voting on. It was clarified that that they were voting concerning Sections 175-83 (A) and 175-16 (A) of the Zoning Ordinance. She said she had no issues concerning either provision.

Jay Gooze MOVED to grant a variance from 175-16 (A) and 175-83 (A) to enlarge a basement window and relocate the front door on a commercial building currently encroaching on the Shoreland Protection buffer zone. The motion was SECONDED by Robin Rousseau.

Chair Smith said the applicants appeared to have gone to great lengths to insure there would be no runoff problems from the renovations that were planned, and said it appeared the project would benefit all concerned.

The motion PASSED 4-1, with John de Campi voting against the motion.

VII. PUBLIC HEARING on a petition submitted by **William T. Bryon & Dale S. Tock**, Eastern Marketing Services, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION from an October 1, 2003, l**etter of the Zoning Administrator, Thomas Johnson, regarding the classification of a commercial business. The property involved is shown on Tax Map 10, Lot 20-4, is located at 40 Dover Road, and is in the LBD, Limited Business Zoning District.

Chair Smith opened the public hearing.

Mr. Bryon said he was appealing the change in classification of his business from a professional office to a business service. He described the history of the business at this location, and said he believed the business was arbitrarily reclassified as a business service. He said it was unreasonable

to overturn the ruling of the previous Town planner who had classified the business as a professional office, and noted it was undue hardship if the reclassification occurred because any changes to the building would require a conditional use permit.

Jay Gooze asked for clarification concerning various business categories, as defined in the Zoning Ordinance.

John de Campi asked for clarification on what the business did, and was told the applicants did design, with no printing and no direct mail. He said this clearly sounded like an advertising firm, and appeared to be a business service, not a professional office.

Robin Rousseau said there was a difference between advertising/mailing companies and design companies, and also asked Mr. Johnson why, when precedent had been set by a previous Findings of Fact, the business classification was being changed.

Code Administrator Johnson explained that he did this because he was supposed to take the most conservative approach. Ms. Rousseau asked if based on his knowledge, there had been any actual change in the type of business done by the company since the Findings of Fact were developed in 1994. Mr. Johnson said he did not know what was represented to the Board in 1994, so could not say.

Mr. Gooze said he could see how this business use could be considered professional office use, even though design firms were not specifically listed in the zoning ordinance. He agreed that Mr. Johnson was right in taking the conservative approach up front.

Chair Smith asked the applicant what the problem would be in going before the Planning Board, and the Town Council for a conditional use permit.

Mr. Bryon said that if they did this and were turned down, they would not have a home. He also said he had accepted the ruling of the previous planning director and did not see why, when they were still performing the same functions, that they could be redefined out of existence.

Ted McNitt said the definitions of businesses in the Zoning Ordinance were not exact, and that Code Administrator Johnson had done the right thing in taking a conservative approach But he said the present use was grandfathered no matter what it was called, even if did not quite fit the definition.

Robbie Woodburn, 6 Cormorant Circle, noted this business was somewhat similar to hers (landscape architecture), and said she supported their appeal.

Chair Smith closed the public hearing.

Jay Gooze MOVED to grant the appeal of administrative decision* from *an October 1, 2003, letter of the Zoning Administrator, Thomas Johnson, regarding the classification of a commercial business. The motion was SECONDED by John de Campi.

Mr. de Campi said the grandfathering argument was persuasive, and made sense.

The motion PASSED unanimously.

The applicant for Item XI (Paquette) said the applicant would like to postpone the hearing on this application until the November 25th ZBA meeting. This Item was therefore removed from the agenda.

VIII. PUBLIC HEARING on a petition submitted by Frederick & Roberta Woodburn, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-27(B) and Article III, Section 175-16(A) to build shed on a nonconforming lot within the 50-foot side yard setback. The property involved is shown on Tax Map 11, Lot 16-19, is located at 6 Cormorant Circle, and is in the RC, Residence C Zoning District.

Chair Smith opened the public hearing.

Robbi Woodburn explained that her lot contained 1.8 acres, and was designed in the late 1980's, as a pie shaped lot. She said they would now like to locate a shed on the property and that the options for doing this were limited because of the shape of the property, so this represented a hardship. She noted the proposed location would be within 15 feet of the property line, and said the shed would not be built on a foundation. She also noted there was question as to whether the shed was considered a structure.

Ms. Woodburn said the shed would not affect adjacent properties, She described the shed's location relative to abutters and said not being able to locate a shed on a two acre parcel was restrictive.

There was discussion about abutters and their proximity to the applicant's property.
Robin Rousseau said the definition of structure had been debated before, and the Board had decided a shed that did not have a fixed location on the ground, or was not attached to something with a fixed location on the ground was not considered to be a structure.

There was additional discussion as to how the shed should be classified.

Ted McNitt asked if there would be screening, and asked why she wanted the shed. Ms. Woodburn said there would be screening, and explained she wanted her garage back.

Chair Smith closed the public hearing

Jay Gooze commented that if he were an abutter and he would have to look at a shed that would be close to his property line, that this might affect his options for his property. He said he did not see a problem with putting the shed there now, but noted things could change later on.

Chair Smith said that was why abutters were notified concerning ZBA hearings, and observed that no abutters had come forward.

John de Campi said he had no problems with the application.

John de Campi MOVED to approve the APPLICATION FOR VARIANCES from Article IV, Section 175-27(B) and Article III, Section 175-16(A) to build shed on a nonconforming lot within the 50-foot side yard setback. The motion was SECONDED by Ted McNitt.

Robin Rousseau said Ms. Woodburn should be given her money back, because sheds did not meet the definition of a structure. She said she would abstain because she did not feel the application needed to be heard.

John de Campi said the applicant had chosen to come in, and Ms. Rousseau noted she did not have any choice. There was additional discussion on whether it was appropriate to hear the application.

Ted McNitt said he would approve the application, but asked, in general, how big a shed should be allowed.
Jay Gooze said he agreed with all the variance criteria, because there was no abutter objecting.

The motion PASSED 4-0-1, with Robin Rousseau abstaining.

VIII. **PUBLIC HEARING** on a petition submitted by Christopher Dennen and Sarah Larson, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-28(B), Article III, Section 175-16(A) and Article I, Section 175-6 to build a septic system within the 50-foot rear setback on a nonconforming lot. The property involved is shown on Tax Map 14, Lot 5-0, is located at 367 Packers Falls Road, and is in the R, Rural Zoning District.

Chair Smith opened the public hearing.

Christopher Dennen spoke before Board and said he needed a variance because he wanted to put a structure (a septic system) on a nonconforming lot, to replace an old, failing system that was not up to code. He explained that his home was a nonconforming structure because the lot it was located on did not meet the minimum lot area requirements and the front yard setback requirements.

He said the location proposed appeared to be the most suitable location, but said the back portion of the leach field for the system that had been designed did not meet the setback requirement. He noted the existing leach field was located under the driveway, and the septic tank was between the house and the driveway. He said the tank had to be pumped once a year, and there were only two people living in the house, and also noted the replacement tank would be 1000 gallons.

It was clarified that the land beyond the leach field was wooded, and the neighbor's house was at a considerable distance.

Mr. de Campi asked if they had considered putting the system on the other side of the driveway, which would involve less nonconformity, and the applicant said they did not because doing so would involve a lot more excavation.

Chair Smith closed the public hearing.

Ted McNitt said not allowing the variance would constitute unnecessary hardship, because the applicant had a unique situation. He noted a high tech septic system had been designed, so the applicant was doing everything he could to do the right thing concerning this. He said granting the variance would therefore not be contrary to the spirit of the ordinance, and also said there would be no impact on surrounding properties.

Jay Gooze said the application met the variance criteria. He said it seemed that the septic system could be put on the other side of the house, but said he had no problem with putting it in the proposed location.

Chair Smith noted there would be a sophisticated septic system installed, which certainly would be an improvement over the existing system.

Ms. Rousseau asked if the applicant had spoken about this with her neighbor. The applicant noted she had done this because they were her next door neighbors, and the neighbors said they had no problem with the application.

John de Campi said the application and the design seemed like a reasonable approach to take, and would result in improved environmental protection.

Ted McNitt MOVED to grant approval of the APPLICATION FOR VARIANCES submitted by Christopher Dennen and Sarah Larson from Article IV, Section 175-28(B), Article III, Section 175-16(A) and Article I, Section 175-6 to build a septic system within the 50-foot rear setback on a nonconforming lot. The motion was SECONDED by Jay Gooze and PASSED unanimously.

X. PUBLIC HEARING on a petition submitted by **Sally Craft**, Newmarket, New Hampshire for an **APPLICATION FOR VARIANCES from Article IV, Section 175-28(B), Article III, Section 175-16(A), Article V, Section 175-41(A) and Article X, Section 175-83(A) to build a new septic system and to build a two-car garage with bedrooms on the second floor and breezeway to a single-family dwelling on a nonconforming lot.** The property involved is shown on Tax Map 18, Lot 7-3, is located at 300 Newmarket Road, and is in the R, Rural Zoning District.

Chair Smith opened the public hearing.

Ms. Craft said she noted her lot was non-conforming because it did not meet the minimum lot size, frontage and setback requirements. She said that her mother needed to come live with her, so she needed an addition to allow this so there would be enough room.

She said she would like to upgrade the septic system while doing the upgrade in order to do all the excavation at the same time. She said some of the driveway parking area would have to be reduced to accommodate the septic system, and said she wanted to construct a 12 ft. by 12 ft. breezeway attached to the side of the house and to a two-car garage, so a bedroom could be built above it. She said there were currently two bedrooms in the home, and she would stay with two bedrooms by reducing the number of bedrooms in the present house.

Ted McNitt noted the house probably should not have been built in the first place. There was discussion on the history of the house and additions that were added to it.

Ms. Craft said that by granting the variances, the property values would improve, and noted the improved septic system would be a good thing for that portion of the river.

It was clarified that the system would be further back from the water than the present system. Ms. Craft noted that if the approval for the addition was not granted, it did not make sense for her to invest in the septic system, because she would have to make other plans about where to live.

There was discussion about how close the abutter's house was from the setback. Jim Knowles, the abutter, representing Lamprey I LLC, said the setback was 23.5 ft.

Ms. Craft said she had an agreement with this neighbor that the height of the addition would not exceed 30 ft. to the peak of the roof

Mr. Knowles noted his land was quite a bit higher than Ms. Craft's land, and there was good screening, so he no objections to her plans as long as the height did not exceed 30 feet. He also said he had no objection to the 23.5 setback.
Linn Bogle asked for more detail on what the addition would include, and Ms. Craft said if she got the approval, she would be hiring an architect to deal with this.

Tom Johnson asked if there was enough of a buffer so the proposed septic system would not impact any proposed septic located on Mr. Knowles' property.

Kevin Tonkin, 298 Newmarket Road, said he was an abutter to the north, and had no objections to the update of the septic system or the home improvement.

Chair Smith closed the public hearing.

Jay Gooze said the septic system upgrade was good, and he endorse it, but said he had a great problem with enlarging a structure that was entirely within the shoreland setback. He said it did not meet the variance criteria, including hardship, and said it was not a hardship if a building could not be expanded.

John de Campi said the 125 ft shoreland setback line ran through the garage, and said the applicant was limited in terms of choices for where to put an addition. He said an addition, if not done in flagrant violation of environmental concerns, was something he did not have a problem with.

Robin Rousseau said she had no problem with the septic system, but did have a problem with the addition. She noted that when that house was put on that lot, on a _ acre lot, the house got an extreme variance to be in the rural zone in the first place. She said she also had a problem with the shoreland setback issue.
Ted McNitt said no matter how they felt about the house today, it was a legal lot when it was done. He noted the site was very constricted, and the Town would gain substantially by the moving of the septic system. He also said he felt the garage expansion was being planned for the least harmful place on the lot.

Ms. Rousseau said she was very protective of the rural quality of the community, and that applications like this chipped away at this. She said not allowing the density to increase in a rural zone preserved the rural quality of that zone, which spoke to the spirit and intent of the Zoning Ordinance. She also said that allowing the density to increase here would set a bad precedent.

Chair Smith agreed that moving the septic system was a good idea, but he said the addition was too large on this very small lot in the shoreland setback, and within the wetland buffer. He said he also felt granting the application was against the spirit of the Zoning Ordinance.

Ted McNitt said that since the Town agreed to put a house here, it was not reasonable to not allow a modest expansion, which would involve no new bedrooms. He noted there would be a garage, which was good for environmental reasons, and said he tended to support the application.

John de Campi said this had been presented as a package deal, so that if the expansion was not approved, the septic system would not be upgraded. He said it would be unfortunate to have to ask someone to have to find a new home because their mother was coming to live with them. He noted a better septic system and shoreland protection would come out of the project, and said he would find it difficult to be opposed to it.

Ms. Rousseau said they did not have to make a deal with the applicant, and that the original acceptance of this house probably had to be negotiated, because of the small size of the lot. She said this was an extreme variance situation.

Mr. Gooze said he did not think this application met the "reasonable" criteria concerning hardship.

Ted McNitt MOVED to approve the APPLICATION FOR VARIANCES from Article IV, Section 175-28(B), Article III, Section 175-16(A), Article V, Section 175-41(A) and Article X, Section 175-83(A) to build a new septic system and to build a two-car garage with a bedroom on the second floor and breezeway to a single-family dwelling, resulting in no additional bedrooms, on a nonconforming lot,. The motion was SECONDED by John de Campi and FAILED 2-3, with Robin Rousseau, Chair Smith, and Jay Gooze voting against

XI. **PUBLIC HEARING** on a petition submitted by the Paquette Family Rev Trust, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-28(B), Article III, Section 175-16(A) and Article V, Section 175-41(A) to build an addition on a single-family dwelling on a nonconforming lot. The property involved is shown on Tax Map 18, Lot 18-50, is located at 41 Ross Road, and is in the R, Rural Zoning District.

Postponed at the request of the applicant.

XII. **PUBLIC HEARING** on a petition submitted by John Cerullo, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-28(B) and Article III, Section 175-16(A) to build a mud-room addition, to renovate a bathroom, to renovate the front walk and steps, to build a carport and to build a second floor extension on a single-family dwelling on a nonconforming lot. The property involved is shown on Tax Map 18, Lot 11-11, is located at 7 Simon's Lane, and is in the R, Rural Zoning District.

Postponed at the request of the applicant.

XIII. **PUBLIC HEARING** on a petition submitted by Andrew & Kecia Hartmann, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-27(B), Article III, Section 175-16(A), Article V, Section 175-41(A) and Article X, Section 175-83(A) to build a roof over an existing, unapproved addition on a single-family dwelling on a nonconforming lot. The property involved is shown on Tax Map 12, Lot 1-21, is located at 18-20 Cedar Point Road, and is in the RC, Residence C Zoning District.

Postponed at the request of the applicant.

XIV. **PUBLIC HEARING** on a petition submitted by Carrie Ann Garland, Durham, New Hampshire on behalf of Joyce Schow & Martha Garland, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-26(B&C) and Article III, Section 175-16(A) to convert a garage to a stable for owner's horses and to build a equestrian center for the boarding and caring of horses. The property involved is shown on Tax Map 13, Lot 15-1, is located at 110 Mill Road, and is in the RB, Residence B Zoning District.

Postponed at the request of the applicant.

XV. **REQUEST FOR REHEARING** on an October 14, 2003, decision of the Zoning Board of Adjustment to deny an **APPEAL OF ADMINISTRATIVE DECISION** from an August 26, 2003, decision of Zoning Administrator, Thomas Johnson, regarding the defined use of the dwelling at 17 Garrison Avenue. The property involved is shown on Tax Map 2, Lot 9-4, is located at 17 Garrison Avenue, and is in the RA, Residence A Zoning District.

Attorney Nadeau said the basis for requesting for the rehearing was that they felt the Board had been mistaken in denying the appeal of the Administrative Decision. He said the original approval granted by the Planning Board in 1984 did not condition approval upon having one fraternity on the premises. He said no change of use was being considered here and the same number of occupants were involved, so there was no logic to the present decision.

Linn Bogle said the wording was singular, implying one fraternity.

Attorney Nadeau said he did not fee the Board twenty years ago intended to imply a restriction to one fraternity, and said the other conditions placed on the use at that time were being ignored.

Mr. de Campi said the use of the word "A" fraternity was intentional because that was the way the world was.

Mr. Gooze said he agreed with Mr. de Campi and said he saw no basis for the rehearing.
Attorney Nadeau said he understood fraternity use of a building was usually singular, but in this case there was a holding company that purchased property for a use, which was different that a fraternity buying a piece of property. He noted that the holding company's perspective would be different concerning being able to rent to more than one fraternity.

Chair Smith said this perspective was different, but it flew in the face of the Zoning Ordinance. He said fraternity use should be allowed to continue in this building as long as the house did not become a multi-use, multi-unit building.

There was discussion over whether the Board had officially approved that this fraternity use could continue.

Robin Rousseau said that the presentation did not indicate why the Board was mistaken, and did not present any new evidence as required under Fischer v. Dover. She also said no information had been presented on leases that showed people living in the facility were members of a fraternity.

John de Campi MOVED to deny the REQUEST FOR REHEARING on an October 14, 2003, decision of the Zoning Board of Adjustment to deny an APPEAL OF ADMINISTRATIVE DECISION from an August 26, 2003, decision of Zoning Administrator, Thomas Johnson,

regarding the defined use of the dwelling at 17 Garrison Avenue. Jay Gooze SECONDED the motion, and it PASSED unanimously.

There was discussion about Item XVI. Mr. Johnson clarified that he told the applicant the Board had allowed a postponement, but also told him that this was an enforcement issue, and the case would be heard on Dec 9th whether the applicant was there or not.

XVI. **PUBLIC HEARING** on a petition submitted by Matthew W. Embrey, Plaistow, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from an October 9, 2003, letter of the Zoning Administrator, Thomas Johnson, regarding the occupancy of a dwelling. The property involved is shown on Tax Map 6, Lot 4-22, is located at 36 Garden Lane, and is in the RA, Residence A Zoning District. (The applicant has requested that this application be postponed.)

XVII Approval of Minutes – August 26, 2003

Page 2, 4th full paragraph, Motion, should read Robin Rousseau MOVED to amend the Motion
Page 3, 1st paragraph, should read "the original fraternity in the building in 1934.
Page 5, Motion on this page should read "Jay Gooze moved to grant the Appeal.."
Also, the motion PASSED 4-1, with Robin Rousseau voting against the motion.
Page 6, 5th paragraph should read "…before was consistent with what she would be presenting today,.."
Page 7, 4th paragraph, should read " concerning non-conforming buildings."
9th paragraph, should read "..but until something or someone with higher authority than them told them differently…"
Page 8, 8th paragraph, should read "MR. Johnson said it would not, and said the Board consistently had granted variances for situations where there was a non-conforming lot."
Page 9, 3rd paragraph, should read "Jay Gooze said he did not think granting…"
Page 10, 1st paragraph, should read "..have been over-occupied and mismanaged in the past.."
2nd paragraph, should read "…had been a duplex.."
5th paragraph, should read "..when building permit was issues, the intention was…."
Page 11, 2nd paragraph from bottom should read "..a single-family house with an accessory apartment."
Page 12, 2nd paragraph, should read "..clearly defined at the time and is taken relatively lightly"
3rd paragraph, should read "…could the owners put the number of people in they wanted to?"
5th paragraph, removed the wording at the end which reads "to deny the Appeal of Administrative Decision passed by 4-1, with Jay Gooze voting against.
3rd paragraph from bottom, should read "..was interested to hear.."
Bottom paragraph should read "…was anything but single-family dwelling with an accessory apartment.."
Page 13, 2nd paragraph, should read "…"Fischer v. Dover"
3rd paragraph should read "..had only one way to classify the way the property was used, either as a single-family house or as a duplex."
Page 14, Motion at top should read "Jay Gooze MOVED to deny the REQUEST FOR REHEARING". This motion should also say "..it PASSED 4-0, with Chairman Smith abstaining.

Ted McNitt MOVED to approve the minutes, as AMENDED. The motion was SECONDED by Jay Gooze and PASSED unanimously.

Ted McNitt MOVED to adjourn the meeting. The motion was SECONDED by Linn Bogle, and PASSED unanimously.

_____
Jay Gooze, Secretary