

These minutes were approved at the April 13, 2004 meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, JANUARY 13, 2004
TOWN COUNCIL CHAMBERS--DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Henry Smith, Robin Rousseau, Myleta Eng,
John deCampi, Ted McNitt, Linn Bogle

MEMBERS ABSENT: Jay Gooze

OTHERS PRESENT: Tom Johnson, Code Enforcement Officer;
Interested Members of the Public

MINUTES PREPARED BY: Victoria Parmele

I. Approval of Agenda

John deCampi explained that Item II A had been withdrawn, and there had been requests to continue Items III A and C. He noted that Board members had sufficient data to consider Items III A and C if they wished to consider these two requests for rehearing.

Ted McNitt MOVED to amend the agenda to remove Agenda Item II A, and leave on the agenda the discussion of whether to hear Items III A and III C. The motion was SECONDED by John deCampi and PASSED unanimously.

II. Public Hearings

- A. PUBLIC HEARING** on a petition submitted by Michael Lynch, Durham Public Works Department, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-95 of the Zoning Ordinance to allow for a non-conforming sign on town property. The property involved is shown on Tax Map 16, Lot 1-3, is located on 100 Durham Point Road, and is in the R, Rural Zoning District.

This Item was removed from the Agenda.

- B. PUBLIC HEARING** on a petition submitted by Marc & Karen D'Amours, 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 renovate the roof and add a dormer on a nonconforming lot. The property involved is shown on Tax Map 4, Lot 41-5, is located at 6 Bayview Road, and is in the RA, Residence A Zoning District.

Chair Smith OPENED the public hearing.

Karen D'Amours spoke before the Board and explained that she wanted to put in an upstairs addition because she had a growing family. Asked by Board members to describe the addition, she said she wanted to increase the number of bedrooms upstairs to four and add a bathroom, with storage under the eaves. She said the plan was to raise the back roofline so they could put windows on the back of the house.

Linn Bogle asked if the plan was to maintain the bedrooms on the first floor and Ms. D'Amours explained that these rooms would no longer be bedrooms, but instead would be opened up as living space. In answer to a question from Mr. deCampi, she said the footprint of the building would not change and was purely a vertical expansion of part of the house.

Mr. McNitt said the sketch of the proposed addition did not show the front setback, but since Code Administrator Johnson had not mentioned it in his letter to the applicant, he assumed it was sufficient.

Chair Smith CLOSED the public hearing.

Chair Smith designated Linn Bogle as a voting member on the issue.

John deCampi noted that the only reason the applicant was there was because she had a nonconforming lot. He said the addition would not change the footprint, and he would be happy to vote to grant the variance.

Chair Smith asked Code Administrator Johnson if there were any issues with the application, and he said there were none.

Robin Rousseau MOVED to approve the APPLICATION FOR VARIANCES from Article IV, Section 175-25(B) and from Article III, Section 175-16(A) of the Zoning Ordinance to renovate the roof and add a dormer on a nonconforming lot. John deCampi SECONDED the motion.

Ted McNitt said rarely does the Board get a request for variance that meets the criteria as well as this application

The motion PASSED unanimously.

- C. **PUBLIC HEARING** on a petition submitted by Lee & Kelly Harvey, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article X, Section 175-83(A) of the Zoning Ordinance to allow for construction of a new single family residence with accessory apartment within 100 feet of the shoreland. The property involved is shown on Tax Map 11, Lot 11-6, is located on Dover Road, and is in the LBD, Limited Business Zoning District.

Shannon Alter represented the Harvey's and explained that Mr. Harvey was unable to attend the meeting because he was out-of-town.

Chair Smith asked Mr. Alter if he had brought a written statement from the Harvey's authorizing him to speak on their behalf. Mr. Alter said he worked with Mr. Harvey, who was an architect, but had no written statement from him.

Chair Smith told Mr. Alter that it was not possible to proceed without this authorization, and decided that a continuance should be granted.

Ted McNitt MOVED to continue to the next meeting the APPLICATION FOR VARIANCE from Article X, Section 175-83(A) of the Zoning Ordinance to allow for construction of a new single family residence with accessory apartment within 100 feet of the shoreland, pending written permission for Mr. Alter to represent Mr. Harvey, or Mr. Harvey's attendance at the meeting. John deCampi SECONDED the motion.

Mr. Alter said that Mr. Harvey would most likely be at the next meeting. He apologized for the inconvenience to the Board.

The motion PASSED unanimously.

III Board Correspondence and/or Discussion

- A. REQUEST FOR REHEARING** on a November 18, 2003, decision of the Zoning Board of Adjustment to deny 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. **Note: If request for rehearing is granted, a public hearing will be scheduled for the next regular meeting.**

Chair Smith designated Linn Bogle as a voting member on this issue.

John deCampi said he would be willing to rehear the application, even though there was no indication that the Board had made an error when it had been heard the application the previous time. He said he had not looked at the property, and said the issue involved was grandfathering, but noted there were a number of new pieces of information, including some economics arguments that were not in the original hearing. He also said the issue of grandfathering, based on the 1977 ordinance, might be worthy of reconsideration.

Chair Smith noted that the Board had heard arguments considering the grandfathering issue at the previous meeting, so this issue was not new.

Ted McNitt said he was not eager to rehear the application, but information on economics and some other things had been added to the application. He said that out of fairness, the Board should therefore rehear it.

Linn Bogle questioned the economic analysis, saying it was not based on the owner's equity in the house but on a hypothetical situation that didn't apply to the situation.

John deCampi said he too had difficulty with the economics argument but that perhaps the applicant could justify it.

Mr. Bogle said he didn't see new evidence that would change his vote.

Robin Rousseau said she didn't wish to rehear the application. She said the document from the McNeill law firm argued with the Board's reasons for not granting the variance, but did not provide any reasons why these arguments were insufficient. She said in terms of the economics, the Board didn't need to have facts and figures to back this up, but simply had to think through it from a reasonable person's standpoint. She noted there were several other variance criteria that the Board considered.

Myleta Eng said the economic information was helpful but the applicant could skew it any way the applicant wanted to.

Ted McNitt said the applicant was trying to argue that if this house was in a different area, he could make more money out of it, but the reality was that it was not in a different area.

Chair Smith said he didn't see that the applicant had provided anything new that needed to be considered.

Robin Rousseau noted the applicant's argument said the Board did not consider the Simplex criteria, and if it had done so, would have found hardship. She said the Board had gone through the criteria in detail. She said the argument didn't meet the Fischer v. Dover criteria concerning new information.

Ted McNitt MOVED to deny the REQUEST FOR REHEARING on a November 18, 2003, decision of the Zoning Board of Adjustment to deny 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 Linn Bogle, and PASSED 4-1 with John deCampi voting against the motion.

- B. REQUEST FOR REHEARING** on a November 18, 2003, decision of the Zoning Board of Adjustment to deny 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 a bedroom 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. **Note: If request for rehearing is granted, a public hearing will be scheduled for the next regular meeting.**

Chair Smith designated Myleta Eng as a voting member for this item.

Ted McNitt said the applicant was making the point that she was not given the opportunity to provide evidence on a number of items, and in her opinion, these items could affect the decision of the Board.

Chair Smith said the applicant did appear to have some new information, and also appeared to be making some important concessions in order to have the Board hear her application.

John deCampi said he had some sympathy for this woman, and noted she needed to make the changes to her house for her mother. He said whether the Board was comfortable with these changes would need to be considered, but recommended rehearing the application.

Robin Rousseau said the applicant's document was mostly an emotional appeal, and said this was a land issue. She said she saw nothing new from the applicant, nor were there any errors identified in the Board's judgment that would justify rehearing the application.

Myleta Eng said she would be willing to rehear the application. She said although the role of the Board was land-use based, they were also human beings. She said the applicant was in a tough spot, and was willing to work with the Board. She also said her work to protect the Lamprey River was worth noting, and showed she very much cared about the surrounding area, and would be very willing to comply with the regulations.

Chair Smith said he had begun to appreciate the applicant's efforts and agreed that the Board should allow the application to be reheard.

John deCampi said he did not disagree with Robin Rousseau's analysis, but said hardship was very much a factor in considering granting of a variance and perhaps it deserved different weight than the Board gave it the previous time the application was heard.

Robin Rousseau discussed the definition of hardship and read through the various criteria involved. She said this application represented a property based issue and the issue was whether the applicant had reasonable use of her property, given its unique setting, and not the circumstances concerning what they wanted to do with the property. She said everyone was equal under the law and the law should be applied fairly, regardless of an applicant's financial and emotional situation.

John deCampi MOVED to rehear 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 on a nonconforming lot. The motion was SECONDED by Myleta Eng.

Robin Rousseau said this was a very bad precedent to set.

Chair Smith said the applicant was willing to make some significant concessions and was also willing to restore a piece of the property by planting appropriate vegetations. He said these things meant something to him.

Ted McNitt said there appeared to be disagreement among Board members over whether there was additional information worth considering and the only way to resolve the disagreement was to rehear the application.

The motion PASSED 4-1, with Robin Rousseau voting against it.

- C. **REQUEST FOR REHEARING** on a November 25, 2003, decision of the Zoning Board of Adjustment to deny 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. **NOTE: IF REQUEST FOR REHEARING IS GRANTED, A PUBLIC HEARING WILL BE SCHEDULED FOR THE NEXT REGULAR MEETING**

Chair Smith designated Linn Bogle as a voting member on this issue. The Chair noted the Board had received a new design, with some new proposals on it, including a new driveway location.

John deCampi said there was some new data, although he didn't find it terribly substantial. He said that one way or another, some use of the property was going to have to be granted, or it would simply be lost to subdivision. He said he had become sympathetic to the use of the garage for horses - the first phase of what she wants to do, noting he had more difficulty with allowing 27 horses, based on site issues and economic concerns. He said he realized this was not truly the way the Board should consider rehearing an application.

Linn Bogle said he was willing to rehear the application, noting the applicant had indicated making adjustments to the entrances to the property and other things. He also agreed it would be wise to keep the 47 acre parcel as open space. But he said that as part of the rehearing, the Board should stipulate that the applicant should provide information on plans to provide manure management on the property, along with hydrological information about the area. He said this was especially important because the major residential development across the road was not located on high, dry land and had some marshy areas. Mr. Bogle said it would be important to know the hydrology of the property because of the possibility of manure leachate and consequent contamination of the water table, noting the houses in the residential development were not on town water.

Robin Rousseau said the major reason the application for variance should not be granted was that boarding horses was not a permitted use the Residential B zoning district, even with a Conditional Use Permit. She said there was a higher bar to get over and she was not willing to go over it. She noted she had reviewed the McNeill law firm memorandum and said that it presented nothing new. She pointed out that the memorandum referenced the revised version of the Zoning Ordinance and the Master Plan, and said they could not be considered at this point because the ordinances were

not currently in line with the Master Plan. She said the Board should not jump over such a high bar just to keep what it thought was open space, noting the property could change hands. She said she liked to stay within the criteria of the law.

Ted McNitt said he was not a horse person but had seen that some of the most desirable neighborhoods he had seen in various suburbs throughout the country were in proximity to horse farms. He agreed that the information Linn Bogle had requested on leachate and hydrology was important, and said that based on these facts, as well as the number of horses that were planned, the Board should make its decision.

Chair Smith said he agreed with this.

Robin Rousseau asked if this were a chemical plant that was being proposed, would the Board look at the application differently. She said reconsidering this application was jumping above and beyond how the Zoning Ordinance was structured.

Ted McNitt said that if the application was reheard, the Board should take a clear look at the Rancourt case, because it was very relevant here.

Myleta Eng said although she would love to see the property kept as open land, she still had a problem with conversion of the garage to a stable, especially because there was no timeline or business plan.

Robin Rousseau MOVED to deny the request for rehearing of the 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 an equestrian center for the boarding and caring of horses. The motion was SECONDED By Ted McNitt, and FAILED 2-3, with Robin Rousseau and Ted McNitt voting for the motion.

John deCampi MOVED to grant the request for rehearing of the 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 an equestrian center for the boarding and caring of horses. Chair Smith SECONDED the motion, and it PASSED 4-1, with Robin Rousseau voting against the motion.

Code Administrator Johnson asked if there were any stipulation tied in with the motion.

Linn Bogle said the applicant should come in with more detailed information on the number of horses planned, manure management, and the hydrology of the area. He noted that some of this information could probably be obtained from the University.

Chair Smith said the applicant did say they would have someone coming in to talk about manure management on the property.

Myleta Eng's concerns about the importance of having a timeline for the project were also noted.

John deCampi and Chair Smith modified the motion to include the stipulations that had been discussed.

John deCampi MOVED to amend the previous motion to include the following stipulations: 1. a manure management plan, 2. a phasing or timeline of the project construction, 3. the specific number of horses to be boarded, and 4. a report on the hydrology of the area which includes substrate, water table, drainage and wetlands. The motion was SECONDED by Chair Smith and PASSED unanimously.

Code Administrator Johnson asked if it made sense to grant the applicant 3-4 months to come back, since it would be difficult to get hydrological data until well into the warmer weather.

Linn Bogle said he was willing to give them up to 6 months.

John deCampi said it made sense to leave the time period up to the applicant, based on how much time they actually needed in order to provide the requested information

Code Administrator Johnson suggested the Board could invite them back for the next month's meeting and then could continue the hearing until a later date.

IV. Approval of Minutes

November 18, 2003

Page 3, 5th and 11th paragraphs, should be Ms. Teeri, not Ms. Terri

Page 4, 2nd paragraph, should read, "She said she had lived at this property." Also, 5th paragraph should say "Chair Smith closed the public hearing."

Page 13, 5th paragraph from bottom should read "Christopher Dennen spoke before the Board..."

Page 14, 4th paragraph from bottom should read "...she would stay with two bedrooms total by reducing the number..."

Page 15, 3rd paragraph, should read "...should read.....so he had no objections.." Also, next sentence should read "...he had no objection to the 23.5 ft. setback. Also, 5th paragraph, should read "...and he had no objections.."

Page 17, 6th paragraph, should read "...said he did not feel the Board twenty years ago intended....." Also, 8th paragraph, should read "...which was different than a fraternity..."

Ted McNitt MOVED to approve the minutes as amended. The motion was SECONDED by Robin Rousseau, and PASSED unanimously.

November 25, 2003

Page 4, 3rd paragraph from bottom – “Mr. McNitt said it was part of a cluster subdivision” – take out.

Page 12, 2nd paragraph, remove last portion of sentence “..and said the proposed use sounded like a business situation.”

Page 15, last paragraph, should read “...He noted he had experience with livestock, and also noted...”

John deCampi MOVED to approve the minutes as amended. The motion was SECONDED by Ted McNitt, and PASSED unanimously.

December 9, 2003

Page 6, last paragraph, should read “He said Mr. Gentile was re-siding the original cottage..”

Page 10, first paragraph, should read “He said that was what they therefore wanted to do”; Also, last paragraph, should read “..because the primary use, the multi-unit building, was not....”

Page 11, first paragraph, should read “..she didn’t think a variance was required.” Also, 3rd paragraph from bottom, should read “...and there was probably a way...”

Page 12, first full paragraph, should read “...a letter from the fire marshal’s office..” Also, fourth paragraph from bottom should read “...the Fire Department’s determination..”

Page 13, last paragraph, should read “..Carri Moorehead, Bayview Road..”

Page 14, last paragraph, should read “..Carri Moorehead,...”

Page 15, 2nd paragraph, should read “..Ms. Moorehead..”

John deCampi MOVED to approve the minutes as amended. The motion was SECONDED by Ted McNitt, and PASSED unanimously.

There was discussion about possible ways to improve the minute correction process. It was agreed that each month a different Board member would do the final read of the minutes. Chair Smith asked John deCampi to review the minutes for the meeting that evening.

V.A. Other Business

Code Administrator Johnson noted there would be two term expirations as of March, those of Chair Smith and Ms. Rousseau. He also noted that there was a vacancy for the alternate position.

Ms. Rousseau said she believed she had another year left to her term.

Mr. Johnson told Board members that the Gallant v. Vallery case had been settled out of court, and said there was a draft consent order that once signed by the two property owners, would become conditions of the variance.

Ms. Rousseau asked who, on the town’s end, had decided whether the case would be settled. Code Administrator Johnson said the Town Attorney decided this.

There was discussion concerning who had the appropriate authority to make these kinds of decisions, and specifically what authority the ZBA Chair had in this regard.

Ms. Rousseau said the ZBA Chair was the appropriate authority, not the Town Attorney or the Town Administrator. She said Bill Drapeau should be consulted about this.

Mr. McNitt said that when he was the Planning Board Chair, he had the opportunity to comment on cases before they were settled.

Ms. Rousseau noted the packet for the meeting had contained a notice about a session that had been scheduled that evening before the regular ZBA meeting, which was not open to the public. She said she had asked who called the meeting, and was told the Town Attorney had done so, and had not asked for approval for this.

Code Administrator Johnson said he had had discussions with Walter Mitchell about a case, and Attorney Mitchell had expressed interest in coming before the Board to present information on it. Mr. Johnson said he had told him this would have to be cleared with Administrator Selig's office, because the contract was with the town.

Ms. Rousseau said the ZBA should be consulted about this. She said it might sometimes not be appropriate to go into non-public session, and attorneys were not always correct, so the Board together should make that decision.

Chair Smith said it would be helpful to be consulted by Administrator Selig before such a decision was made, and then the Board could make the decision. He said the procedure for this needed to be clarified.

Mr. McNitt noted that this was similar to procedures for conducting ZBA meetings, in that the Chair spoke for the Board. He said he thought the legal procedure concerning a non-public meeting was similar, so if someone wanted to provide input to or get input from the Board, the request should come to the Chair. He said Board members should then trust the Chair to make the decision.

Ms. Rousseau said Attorney Mitchell could outline his reasons for wanting to go into non-public session in a private document, because there was confidential information concerning a case, and the Board could then decide whether or not to do so, depending on whether they felt it was appropriate. She stressed again that ultimately they were responsible to the public concerning this.

There was additional discussion about this. Chair Smith said he would follow through with Administrator Selig.

Mr. deCampi said he did not disagree with the discussion in theory, but for practical reasons, having heard what the Town Attorney had to say that evening, he found it extremely useful. He also said a good attorney would be pro-active and would try to keep a Board informed and up-to-date.

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

The meeting adjourned at 8:56 pm.

Victoria Parmele, minutes taker