These minutes were approved at the March 9, 2004 meeting.

ZONING BOARD OF ADJUSTMENT
TUESDAY, FEBRUARY 10, 2004
TOWN COUNCIL CHAMBERS--DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT:	Chair Smith, John deCampi, Jay Gooze, Robin Rousseau, Linn Bogle, Myleta Eng
MEMBERS ABSENT:	Ted McNitt
OTHERS PRESENT:	Tom Johnson, Code Enforcement Officer; Interested Members of the Public
MINUTES PREPARED BY:	Victoria Parmele

Chair Smith noted that ZBA member Ted McNitt was absent, and an alternate would therefore be designated as a full voting member for each agenda Item. He also said that Item II D- the Application for variances submitted by Carrie Ann Garland, had been withdrawn from the agenda.

Robin Rousseau MOVED to amend the Agenda, and put Item II V A Other Business, at the beginning of the agenda.

Code Administrator Johnson recommended that the topic she wished to discuss should be moved to the beginning of the agenda, but since there were several other issues under Other Business, these should be discussed later in the meeting.

The motion was SECONDED by John deCampi.

Ms. Rousseau said she wished to discuss the proposed revisions to the Zoning Ordinance and how they should be applied to the cases that evening.

Chair Smith said the concern was specifically the date the ordinance was posted as compared to the date on which the applicants filed their applications.

The motion PASSED unanimously.

John deCampi MOVED to approve the amended agenda. The motion was SECONDED by Linn Bogle, and PASSED unanimously.

Ms. Rousseau said in looking at each of the cases and researching them with the current 1999 ordinances, and also realizing there had been a series of proposed revisions to the ordinances, the question arose as to which version of the ordinances the Board should use when considering these cases.

She said she called Ben Frost at the Office of Energy and Planning, who told her that which package of ordinances was used was determined by the application date, so Board members needed to look at the date of posting of the ordinance vs. the date of application to see which version of the ordinance was in place for each particular case. She also noted that Board members didn't have the most recent package of Zoning Ordinance revisions.

Ms. Rousseau said she didn't ask specifically about how to address re-hearings, but said she would think the ZBA would rehear an application based on the version of the ordinance in effect at the time the case originally came before it. But she said she might want an opinion on that.

Mr. Gooze asked Mr. Johnson which ordinances he had been using when responding to applications.

Mr. Johnson said that in reviewing building permit applications, he used the current 1999 ordinance. He noted with the Myers case, the legal opinion at the time was that Board had no jurisdiction on the posted ordinance, which was why the revisions were not brought to the Board, to avoid confusion. He said the latest revision of the proposed Zoning Ordinance, dated January 23rd, 2004, was recently approved by the Planning Board at the latest public hearing, and had been sent on to the Town Council.

Ms. Rousseau said again that posting was the determining factor, even if the ordinance had not yet been approved by the Town Council. She said the date stamp on the application would determine which ordinance version they would use, so that applications that had come in since the most recent posting had to be considered in reference to that posted version of the ordinance.

Chair Smith agreed, noting he had talked to Ben Frost who said that when the ordinance was posted, it became law at that point.

There was discussion about the fact that some sections of the Zoning Ordinance had been revised and posted, but other sections had not yet been revised.

Mr. Bogle noted that this situation might require major changes for an applicant if the ordinance changed to the detriment of that applicant, who would have to go through the application process all over again.

Ms. Rousseau said most people in Town knew the zoning rewrite process was taking place, but as applicants applied to the Town, they should be made aware that the zoning ordinance was in transition.

Mr. Gooze asked Mr. Johnson if he would be aware of zoning postings as they came along so he would know how to apply them relative to the various applications. He noted Board members only would know this information about applications if Mr. Johnson brought it their attention.

Ms. Rousseau asked Mr. Johnson if he was aware that every case on the Agenda, other than II G, was not impacted by revisions to the Zoning Ordinance that had been posted since 1999.

Mr. Johnson said he had not looked at all of the cases relative to the January 23rd posting, because some of them had history.

There was additional discussion about this, and it was stated by Board members that they had to rely on Mr. Johnson's judgment concerning this, and make their best informed decision based on information they were provided with.

Ms. Rousseau noted that the application for Item E was dated January 26th, which was after the most recent posting of the ordinance. She asked whether there were any revisions in this most recent posting that related to this application.

Mr. Gooze said he had been following the zoning rewrite process, and said he did not believe so.

Ms. Rousseau said she would recuse herself from cases where she did not feel she had the appropriate law in front of her to make a decision.

A. **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 District.

Shannon Alther of TMS Architects represented the applicants and explained that they were asking for a variance to allow a 100 ft setback instead of the required 125 ft setback. He noted the variance would not decrease the value of surrounding properties, explaining that by changing the setback, they would actually be increasing the side yard setback from the adjoining property, which would improve the view and reduce crowding for the adjoining lot. He also said granting the variance would not be contrary to the public interest because the site had public sewer and water.

Mr. Alther said not granting the variance would result in unnecessary hardship to the owner because the 125 ft. shoreland setback allowed only 70 ft. of usable width for the important solar and view façade. He explained that by allowing the building to be moved 25 ft. forward, they could actually orient the house so that the main solar gain was on the south side of the house, so the house could be more energy efficient, and thus economical, and they could also better capture the views. Concerning the variance criterion that the use must not be contrary to the spirit and intent of the ordinance, he said that since the structure was a single family residence, slab on grade house with no foundation, the building would sit relatively lightly on the land, also noting that in moving the house 25 ft., they would not be disturb many of the existing trees.

Mr. deCampi asked if a house of this square footage of living space could be put on the property if the 125 ft. setback was observed.

Mr. Alther said it could, but the particular design with the orientation needed to achieve the desired solar gain would not be possible. He also referred to a letter from an abutter – Ira Lefkin, which said that the proposed location of the building would actually enhance his property values, because the houses wouldn't be as crowded.

Chair Smith asked if a smaller house was possible, and Mr. Alther said yes, but the issue was the way the garage and the house related. He said if the design were changed, there would be less efficient use of the interior of the house.

Mr. Bogle said the design looked like three stories were planned, and Mr. Alther explained that the third story tower was part of the bedroom, and was somewhat of a loft. He said the tower was like a cupola, as a kind of separate structure, apart from the governing ridgeline of the building.

Chair Smith appointed Linn Bogle as a voting member for this Item, and asked if any other members of the audience wished to speak for or against the application.

Annemarie Harris said she sat on the Planning Board during the time this property was originally subdivided, and explained that the property has been before the Planning Board several times for one kind of variance or another. She said that as a long time member of the Planning Board, and having listened to the intentions of the Master Plan and the Zoning Ordinance revisions, she wanted to call to ZBA members' attention that the setback of 125 ft., if changed, would set a precedent for other applications coming forward in the future. She noted there was a very long driveway and turnaround, and if contracted, the house and garage could fit easily within the existing setback.

She said she was not convinced that there couldn't be an adequate design that could have adequate passive solar characteristics and orientation, and said it appeared the house had been designed before they took into account the 125 ft setback that was required for very good reasons. She said incredible concessions had been made concerning this property over time, and further concessions would not be appropriate.

Mr. Alther noted that the owners of the adjoining lot 11-11 went before the ZBA and were denied, and eventually, through legal appeal, were allowed a 50 ft. setback. He said the applicant knew this and could have potentially applied for the 50 ft. setback themselves, but didn't want to do this, in part to minimize removal of trees.

Chair Smith asked how many trees were planned for removal, and Mr. Alther said approximately 5-6 evergreen trees would have to be removed, some of which were damaged, and perhaps a few small hardwoods would have to be taken out.

Chair Smith closed the public hearing.

Mr. deCampi said he had difficulty with this application because it was certainly possible to locate a house of that size on that lot without a variance, so it was hard to see that there was a hardship. He said it seemed to him that the applicant had a responsibility to the community to ask for the least possible variance that could still allow a reasonable use for the property, so for that reason he was inclined not to favor granting the variance.

Ms. Eng said she agreed with Mr. deCampi, noting that the applicant's paperwork indicated the house could easily fit on the lot without a variance.

Mr. Gooze said he agreed with other Board members, and referred to the comment from Mr. Alther about the case concerning the 50 ft setback on an adjoining lot. He said he had gone over this case because he found it hard to believe the Court had upheld that case. He said he was not sure why the Town had not appealed the case, but said that regardless, it concerned a different situation - having to do with the odor of the treatment plant - than this present application. He said the fact that in that situation the applicant was allowed a 50 ft. variance was not related to this application. Mr. Gooze said there appeared to be nothing that made it essential that the house be located within 100 ft. of the shoreland, and said he did not think the situation met the hardship criteria at all. He also said granting the variance would not meet the spirit and intent of the ordinance.

Mr. Bogle said he agreed with what had been said, and said the two lots were completely different, since the house in the present location was not going to be built next to a sewage pump house. He said the Court decision concerning the adjoining lot should have no influence on this present lot, and also said there appeared to be sufficient room to move the house back 25 ft. He also said he was curious what use would be made of the accessory apartment over the garage, and whether it would be for family purposes or for rental purposes.

Chair Smith said the application noted it would be an in-law apartment.

Mr. Bogle noted this description was often used even though no in-laws would be moving in, so it could be planned as a rental property. He also said he was concerned about setting a precedent for adjacent lots. He said the claim of hardship was not justifiable because it had solely to do with the orientation of the house to achieve greater solar efficiency, and said he would not favor granting the variance.

Chair Smith said he agreed with other Board members, and said he was concerned about setting a precedent by granting this variance, noting that the shoreland was a precious resource. He said it seemed that the house could fit on the lot without the need for a variance, so it was incumbent upon the applicants to pursue a different design. He said he didn't see any true hardship, and said he agreed that the other case was not related to this application, one reason being that the Board had misstated a criterion on that previous application. He said he was not inclined to approve the request for variance.

Ms. Rousseau said she remembered that previous case as well, and remembered the conversation about the case as it related to the variance criteria. She said the judge took various comments out of context, and the court's decision was questionable. She said

this was one more reason to have more exact minutes, because the judge might not look at the videotape to see how Board members elaborated on their comments. She said in looking at this case, the Board really needed to state the reasons they did or did not feel the application fit the variance criteria.

She said she would not be in favor of granting this variance, and read through Article 175:82, the purpose and intent of the shoreland protection zone provisions of the Zoning Ordinance. She noted she was doing that so a judge would have no question about the Board speaking to the spirit and intent of the ordinance. She said she did not feel that the present application fit the purpose and intent of that ordinance.

Ms. Rousseau also said there was clear language in the Master Plan which spoke to the public interest, and read the portion of the Master Plan which expressed a very strong public interest concerning granting variances in the shoreland. She noted that Section 4.2. said the Town had an obligation to protect water quality, and also noted a 1998 Master Plan survey which showed that one third of residents did not know whether the shoreland was being adequately protected. She said over half of those answering the survey did not feel the level of protection was adequate due largely to the management of land by private landowners. Ms. Rousseau noted the Master Plan also said that allowing variances to Town ordinances was seen as a threat, which spoke to the public interest. She also pointed out that Section .4.2 said that the ZBA did not do enough to protect the shoreland, and granted too many variances.

Ms. Rousseau said there should be no question that Board members took these matters into consideration. She also said the applicant could have reasonable use of the property by switching their design slightly. She also said the application did not meet any of the hardship criteria.

Jay Gooze MOVED to deny 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, because the Board does not feel there is a reasonable hardship; granting the variance does not meet the spirit and intent of the Zoning Ordnance, and doing so would be contrary to the public interest The motion was SECONDED by John deCampi.

Ms. Rousseau said the public interest was to be strict in granting variances on the shoreland, and said the application was contrary to the public interest as outlined in the Durham Master Plan Section 4.2. She said she did not feel the applicant met all of the hardship criteria, and said she did not feel that denying the variance would interfere with the reasonable use of the property. She also said that by not granting the variance, the Board was keeping within the spirit and intent of the Zoning Ordinance to protect the shoreland area, and also sent the message to others in the area that this was an important issue, and that there could be a problem if everyone disregarded the buffer zone.

The motion PASSED unanimously. (5-0).

B. PUBLIC HEARING on a petition submitted by David S. Duplessis, Rye, New Hampshire for an **APPEAL of ADMINISTRATIVE DECISION** from a December 29, 2003 letter from the Zoning Administrator, Thomas Johnson, regarding the occupancy of the dwelling. The property involved is shown on Tax Map 14, Lot 1-17, is located at 1 Griffith Drive, and is in the R, Rural Zoning District.

Mr. Duplessis thanked the Board for hearing his appeal, and explained that the issue was clear-cut, and had to do with how much habitable floor area was in the house he owned. He said he was aware that there had been some bad tenants in the dwelling and he was trying to take care of that and not renew their lease as soon as he could. He noted it had been tough to measure the floor area correctly before because the apartment was messy, but said he had recently re-measured the apartment floor area, and found that it measured 1251 sq. ft., from baseboard to baseboard. He said that with 1200 + sq. ft., he had the opportunity to rent to two additional unrelated occupants if he chose to in the future, noting the ordinance said that a 300 sq. ft minimum was required for each unrelated occupant.

Chair Smith clarified that Mr. Duplessis had done the sketch of the layout.

There was discussion about the "more than 3 unrelated occupants" provisions of the Zoning Ordinance as they related to this application. Code Administrator Johnson clarified that this rule had not been applied to the Rural District until the most recent, posted zoning revisions, and said his letter to the applicant was written before this change.

Chair Smith asked if other members of the public wished to speak for or against this application.

John Macri, 309 Packers Falls Road said he strongly suggested that the Board should lean to Mr. Johnson's more conservative measurement of the floor area, and limit the occupancy, because there had been so many problems with the property. He said there was an absentee landlord, and it was a very poorly managed property. He said the risk of four occupants was greater than the risk of three, and said that two occupants might be even better. He said there was no better illustration of the justification for limiting occupancy than the recent fire at this property, which was caused by carelessness. He listed other factors which had formed his opinion.

Chair Smith received clarification that the Fire Department stated that the recent fire at this residence had been caused by carelessness.

Joy Winston, 16 Griffiths Drive said she lived on the same street, and said there were clearly eight people living in the house, if the number of cars were counted, even if eight names were not on the lease. She said protection was needed against something like this, noting there were cars all over the lawn, and on the street.

Bobbi Jean Wyler, said she had formerly lived on Griffith Drive, on the west side of the property in question. She said she supported John Macri, and hoped the Board would

stay with the most conservative measurement of the floor area. She said she experienced the same problems with this house that others did. She also said that the cars clearly were parking in the wetland, noting that she was a wetland scientist. She said it was definitely a situation of an absentee landlord, and having those kinds of tenants posed a threat to the neighborhood.

Annmarie Harris, 56 Oyster River Road said this was clearly an issue they struggled with in Durham, and the Zoning Rewrite committee was considering whether there should be some regulation concerning rental housing in family neighborhoods that would include only allowing it with owner occupancy, so there would be oversight. She said she rented a house of similar size under the legal occupancy limits, and said Mr. Duplessis' house could be rented at $1,800-2,000 a month to a nice family, and the property would be well maintained and compatible with the neighborhood.

Mr. Duplessis said he understood the neighbors' concerns, and noted they had contacted him regarding these concerns. He said unfortunately he had a lease with two tenants, and could not be there to control how many people slept there. He said he relied on the neighbors to let him know if more people than were permitted were staying there, so something could be done about it. He said the decision before the ZBA had to do with square footage, and noted Mr. Johnson had said he couldn't measure the floor area accurately properly because of clutter. He said he welcomed Mr. Johnson to come in and re-measure the floor area.

Mr. deCampi asked when Mr. Duplessis bought the property, and was told it was in August of 2003. It was clarified that the troublesome tenants were people Mr. Duplessis had rented to. Mr. deCampi asked how many people he thought he had rented to, and Mr. Duplessis said he thought he had rented to two, possibly three people.

Mr. deCampi said Mr. Johnson said it looked like there were approximately 6-7 beds, and also noted several residents said there was evidence there were 6-8 people living there. He said this didn't speak very highly of Mr. Duplessis' management ability for the future, if he thought he was renting to 3 people.

Mr. Duplessis said he would love to get a family in the house, but unfortunately for the time being, the ordinance should stand, in terms of how many people were allowed to live in the house.

Mr. Bogle noted a letter from Mr. Macri who said calls to the landlord had been ignored. He asked Mr. Duplessis if as the owner and landlord, he had the right to periodic inspection of his property, as well as the obligation to control what was going on at the property, especially given the complaints from neighbors.

Mr. Duplessis said he had explained to the neighbors that the only thing that could be done was to call the police.

Mr. Bogle said it appeared to be disingenuous that Mr. Duplessis said he had rented to two to three people, and had no idea they were bringing in more students. He said this

appeared to be a classic case of absentee landlordism, and noted that a purpose of the Master Plan and the Zoning Ordinance was to maintain Durham's neighborhoods and not allow this sort of thing.

Mr. Duplessis said he understood, and would not want to live next to such a house. He said his preference was to rent to a family, but he couldn't promise he would just rent to families, because he couldn't let the building stay empty for two to three months.

Chair Smith designated Myleta Eng as a voting member on this Item.

Annemarie Harris asked if the owner had a lease with a termination date, and stipulations that if there was inappropriate behavior – like fires, over-occupancy, etc., that he could evict the occupants. She also asked if Board members had documentation that proved Mr. Duplessis could not do something else.

Chair Smith closed the public hearing.

Mr. Gooze said the Board could really only discuss one thing, - the square footage. He said if this was sufficient for four people he didn't see how they couldn't overturn the administrative decision. He asked what they were really deciding on – just the square footage, and how many people could be in the building, or were they deciding this case based on the proposed revised ordinance that would not allow more than 3 unrelated people in a dwelling in the Rural Zone.

Mr. deCampi said he thought they were stuck with the square footage issue because that was the issue that controlled at the time, and said the discrepancy in square footage of the floor area was something that had to be resolved so the Board could make a decision. But he said if the decision was that 4 occupants were allowed, the Fire Marshall's letter applied, and Mr. Duplessis would have to install a sprinkler system, smoke detectors, as well as meet other specifications.

Robin Rousseau MOVED to deny the request for an appeal of administrative decision from a December 20, 2003 letter from Zoning Administrator Thomas Johnson regarding the occupancy of a dwelling. The motion was SECONDED by Myleta Eng.

Ms. Rousseau said the applicant had brought no proof of the square footage, noting that a professional needed to sign off on the sketch to show supporting evidence that was different than that of the Code Administrator, who was an official of the Town and had experience measuring square footage. She said she would tend to stick with Mr. Johnson's measurement for the time being.

There was discussion about the date of the appeal for administrative decision as it related to the most recent posting of the zoning ordinance (which included new provisions for not allowing more than 3 unrelated people in the Rural zone).

Ms. Rousseau said the original administrative decision itself predated the posting so the Board should look to the Zoning Ordinance as it previously stood. She said that if there

were changes, they would be applicable to the applicant's property and would be dealt with elsewhere. She said she did not feel the applicant had provided any supporting evidence for his appeal.

Mr. Gooze said he agreed with Ms. Rousseau, and said a certified letter was required to verify the accuracy of the measurements in the drawing.

Chair Smith said he had no way of knowing who had done the sketch, and whether the data in it was accurate. He said he would tend to go with Mr. Johnson's more conservative figure.

Mr. deCampi asked if Mr. Johnson was confident of his numbers.

Mr. Johnson said he measured the floor area the morning after the fire, and was confident of the numbers, considering the condition the house was in.

The motion PASSED 4-1, with John deCampi voting against it.

Mr. deCampi said he voted against the motion because he felt the Board should have authorized another measurement, although the result would probably be the same.

C. **PUBLIC REHEARING** on a November 18, 2003 decision of the Zoning Board of Adjustment to deny an **APPLICATION FOR VARIANCES** submitted by Sally Craft, Newmarket, New Hampshire, from Article IV, Section 175-28(B), Article II, 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.

Chair Smith designated Linn Bogle as a voting member for this Item.

Ms. Craft thanked the Board for granting a rehearing on her application for variances. She explained that she had reworked the design of the proposed addition, and said she was proposing to build a 12 ft. x 12ft. breezeway attached to a 22 ft. x 24 ft. two car garage with a bedroom above it. She said if the variance were granted, she would be combining two existing bedrooms to make one as part of the renovation, so there would be no increase in the number of bedrooms.

She said a new septic system would be installed which would be up to code, noting that the location of the system would be the farthest possible location on her property away from the river, so this would not represent further encroachment on the shoreland, and would be a major environmental gain. Ms. Craft said the existing cesspool and two dry wells would be removed, and said a two-car garage would be installed, which would be another environmental gain. She said just a few trees would need to be removed in order to install the septic system, and this would not impact the shoreline.

She said the addition would not be viewable from Route 108, so it would not impact the rural feel of the neighborhood. She said the house could be seen from the river, but the orientation of the addition would be perpendicular to the river, so it would not be very visible. She also said an existing shed 46 ft. from the river would be removed, and that Mr. Johnson would make sure that the addition was up to code.

Ms. Craft said the hardships concerned lot size, which was constricted. She said the location of the addition was on the side away from the river, and said if there were another layout that would work, she would be interested. She said she didn't think it was an unreasonable request to have the entryway and two-car garage, but said she had no intention of renting out part of the property.

She said her mother's health was a hardship, noting she presently could not live in either of the two available bedrooms because of the medical equipment she needed. Ms. Craft also said she needed to keep a controlled environment for her mother. She said there was a financial hardship because she had invested $ 2,000 with NH Soils for the new septic system.

She noted that the shed was somewhat of an eyesore and removing it would beautify the shorefront. She also said that by returning the waterfront area to its natural state, she would be creating a riparian buffer zone, which would be valuable not just aesthetically but also would provide habitat and minimize runoff problems. She said she planned to terrace the pathway down to the water in order to slow erosion, and to plant vegetation that would cool the water along the shore and provide other benefits.

She also noted her extensive commitment and work patrolling the Lamprey River and educating residents and the public about the importance of protecting it.
Ms. Craft read Article 175:86 A and B, and said she believed she met all of the provisions there, and would conform to all of the regulations by hiring licensed contractors, insuring all permits were in place and by having appropriate inspections.

Chair Smith asked if anyone wished to speak in favor of the application.

Roland Marcee, 304 Newmarket Road said he was a neighbor 300 ft down the river. He said the renovation would provide a proactive septic upgrade which was important, given the location of the house on the river, and said he appreciated that Ms. Craft was willing to spend a significant amount of money to do this. He said the variance would in no way have a negative impact on the rural character of the area, noting that his neighborhood would be the only houses impacted, and he and the rest of the neighbors supported Ms. Craft. Mr. Marcee said the renovation would probably enhance property values. He said Ms. Craft was a responsible owner, and also said he wanted to see her monitoring and protection activities concerning the Lamprey River continue. He said the hardship case concerning Ms. Craft's mother seemed valid, and asked the Board to please consider those factors when considering the variance.

Dan Hudson, 306 Newmarket Rd – said Ms. Craft was a model citizen, noting he and his wife were active members of environmental organizations and appreciated her local

efforts concerning the Lamprey River. He said he fully supported what she was trying to do in renovating her house.

Kevin Tonkin, direct abutter to the north, said he was familiar with the current septic system on Ms. Craft's property, and said the new septic system would be much better, and said he was in favor of necessary improvements to the house.

Michelle Colgan, 310 Newmarket Rd, abutter once removed said she agreed with what had been said about Ms. Craft and said she totally agreed with the plan to improve her property. She said she trusted Ms. Craft implicitly, and did not want to lose her as a neighbor.

John Colgan, 310 Newmarket Road, said he wholeheartedly wanted to keep Sally as a neighbor. He said he agreed with her plan to improve her property, and said he hoped the Board would give her permission to do this.

Chair Smith asked if anyone had come to oppose the request for variances, and hearing none, closed the public hearing.

Mr. deCampi said there were four issues concerning the property, two of which related to the septic system because it did not meet setback requirements. He noted that the new septic system would be much better than the old system, so waiving those requirements should not be difficult. He said the next issue concerned the fact that the lot size was smaller than what was allowed by the current ordinance. He noted the existing use was grandfathered, but any increase required a variance. He also said a variance was needed because the addition would have a 25 ft setback, when 50 ft was required.
He said he agreed that the location proposed was a sensible one, and noted the building was legal when built, but the zoning was now more restrictive. He said it seemed unreasonable to force Ms. Craft to move, especially considering the fact that the proposal would provide a new septic system and the disposal of a shed that was clearly within the watershed of the Lamprey River.

Ms. Eng said she saw several positive changes had been proposed, and also said she didn't see any other place Ms. Craft could put the addition. She said the support of neighbors indicated there wouldn't be any decrease in the value of surrounding properties, and in fact, property values might increase. She said she didn't see that granting the variances was contrary to the public interest, and in fact it was very much in the public interest to do the upgrade. She said she would be in favor of granting the variances.

Mr. Gooze said Ms. Craft's plans were well presented, but said he would like to keep the emotional issues out of consideration because they did not bear on the variance issues. He said he could push for this situation meeting the hardship criteria on a unique property. He said the request seemed reasonable, especially considering the way hardship had lately been interpreted**.** He said the addition appeared to be in the public interest because there were a number of things that needed protection, and noted that the

neighbors were in favor of the addition. He said he could not vote against any of the five variance criteria.

Ms. Rousseau said she would be in favor of moving the septic system further away from the river, but said she would not be in favor of allowing the expansion of the property because it was located in the rural zone, and had less than an acre, when 120,000 sq. ft. minimum lot area was required in this zone. She noted that the previous time they had heard Ms. Craft's application, she had said the purpose of the rural zone was to maintain open spaces, and personal circumstance should not be considered regarding hardship.

She read through the 2001 *ZBA Handbook for Local Officials*, which said that a hardship did not exist if it just relates to the personal circumstances of the owner. She said health issues, other personal circumstances, and financial issues were therefore not considered under the hardship criteria. She said hardship was considered as strictly a land based issue, where the zoning restriction as applied to the applicant's property interfered with the use of the property. She said she would not be favor of more expansion on a very undersized lot in the rural zone because it did not meet the hardship criteria, and also because it would go against the spirit and intent of the ordinance.

Chair Smith said he agreed this was an expansion of a property on a very undersized lot, but he noted that Ms. Craft said she did not realize when she bought the property that she was buying into such a restricted location. He said he saw some positive actions that Ms. Craft had taken – the agreement to remove the shed from the river's edge, the significant upgrade of the septic system, and her efforts to cooperate with the Board with these changes. He said that although the lot was undersized and near the water, he saw these moves as environmentally sound, and altogether, concerning the property, it did meet the hardship standards because Ms. Craft had no idea when she bought the property that it would be so restrictive. He said that given the improvements she proposed to make, granting the variance would not be contrary to the public interest.

Mr. Bogle said he was torn on this application, because he recalled that Ms. Craft said at an earlier meeting that if she could not enlarge the property, she would have to move, so this seemed to be an all or nothing proposition. He said that on the other hand, he was concerned about the increased incursion in the shoreland setback area. Mr. Bogle noted this application was similar to other applications the ZBA had dealt with on Durham Point Road which were approved, although he had not been enthusiastic about this. He said he would prefer to see the shoreland zone setback restrictions observed, as difficult as that might be in this particular case.

Mr. Gooze noted the Board had voted on a number of cases where they looked very favorably on someone who wanted to fix a septic system, and had granted additions, expansions, or moving of buildings in turn for getting better septic systems, and getting property away from the shoreland. He said he wanted to make it clear that if he did vote to approve the variances, he was not doing this because of the health and economic issues. He said they had to decide the public interest in a different way, and said that for what Ms. Craft wanted to do, the property was unique, and he could justify meeting the criteria through that.

Chair Smith said this had been done for the Vallery property, after a site visit and a long process. He said this present case was somewhat similar, and given the upgrading Ms. Craft was proposing to do, he was in favor of the request for variances.

Ms. Rousseau said if she remembered correctly, the Board had allowed for moving a structure, but did not allow an expansion on a dramatically undersized lot. She said she also didn't see the ZBA was in a horse trading type of position, and also said she did not believe ignorance of the law was good supporting evidence, and said that property owners had the responsibility to know about their properties and the regulations as they related to them. She said in her opinion, this was a dramatic variance for this zone, and the situation did not mirror other applications the Board had seen.

Mr. Bogle referred to two previous applications similar to the present application that were for properties right on the water, which were approved, although he said he was not enthusiastic about this.

Ms. Rousseau asked whether these properties were on dramatically smaller lots, and Mr. Bogle said he believed they were.

Ms. Rousseau said she did not like to set a precedent of allowing expansions on dramatically undersized lots in the Rural zone.

Mr. Gooze said he wondered how the Board would look at it if an application came in for an undersized lot without a septic system problem. He noted each case was different, but said he wondered if, in allowing these variances, the Board would be saying that everyone who had an undersized lot in that district could do this.

Both Chair Smith and Mr. deCampi said they were not saying this, and that each case was different and should be considered as unique in its own right.

Ms. Rousseau said a lot of people used the Board's cases and decisions as precedents for their particular position.

Mr. Bogle noted that the condition of surrounding properties became a factor in some court cases.

John deCampi MOVED that Sally Craft be granted permission to build in accordance with the plans she had submitted, a new septic system and a two-car garage with a bedroom on the second floor and breezeway to a single family dwelling on a nonconforming lot, which involves variances from Article IV, Section 175-28(B), Article II, Section 175-16(A), Article V, Section 175-41(A) and Article X, Section 175-83(A) to build. The motion was SECONDED by Chair Smith.

Mr. Gooze said that after listening to the discussion, he was concerned about the precedent being set here. He said he had changed his mind because the hardship criteria

had really not been met. He said shoreline protection was very important, and he could not approve the application because it involved such an undersized lot.

The motion FAILED 2-3, with Jay Gooze, Robin Rousseau and Linn Bogle voting against the motion.

D. **PUBLIC REHEARING** on a November 25, 2003 decision of the Zoning Board of Adjustment to deny an **APPLICATION FOR VARIANCES** submitted by Carrie Ann Garland, Durham, New Hampshire, 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**.**

Item was not heard, because applicant withdrew application

E. **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 an 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 Coastal Zoning District.

Ms. Rousseau said she would recuse herself for this Item, as well as Items F and G, because she did not feel they were using the appropriate ordinances to make a decision. Chair Smith designated both Linn Bogle and Myleta Eng as voting members for these three Items. He then opened the public hearing.

Kecia Hartmann spoke before the Board. She said she was there to seek a variance to build an addition on an existing foundation. She said the previous owner acquired various permits to bring it to the state it was currently in, and that she and her husband would like to complete what had been started. She said what was there right now was a foundation and four walls. She explained that when she and her husband bought their property they had the reasonable belief that they would be able to complete the work begun by the previous owner, because of the permits obtained from NHDES and the Town, which granted permission for improvements, i.e. replacement of the broken down cottage, adding an improved septic system, movement of the cottage thereby allowing it to be attached to the new septic system, and moving it back away from the shoreline. She also noted there was support from all of the abutters for the work being done.

Ms. Hartmann provided details on the measurements of the rooms in the existing building, and said that by finishing the house there would be another bedroom and bathroom which was needed in order for her family to live there. She said if they were unable to improve the building, it would be unusable to them. She said the addition would not affect the spirit and intent of the ordinance because what had been done to the property in the past had improved the situation by moving the property further away from the shoreline and attaching the cottage to an improved septic system. She said they were

not asking to change what had been done, but only to finish what had been started. She said granting the variances would not adversely affect any other property abutting theirs, would not interfere with aesthetic interests of the general public, and if anything, would improve the look of the neighborhood.

She said it would be an injustice not to grant the variance because she and her husband saw that what had taken place previously had been permitted for building by NHDES, and the Town in Sept 2000 had been permitted for further building, with full knowledge of the property's history. She said the permit expired a year later due to the owner's failing health and inability to finish the project. She said Mr. Johnson informed her that after the permit expired in 2001, he granted the previous owner a verbal extension of 6 months to finish his project, again being aware of the past history. She said in 2002, the previous owner gave up on the project because of his wife's fears for his health, and sold the property to them.

She said they came in for permission to replace the fallen in roof due to the snow the previous winter, and this was denied, and they were told to start from the beginning because the permits had expired and the walls were considered to be non-existing, although the foundation was still in tact. She said they took Mr. Johnson's advice, and said it would now be an injustice not to approve the addition because it had been previously permitted by the Town. She said not allowing the variances would be an injustice to the neighborhood because she and her husband would be forced to turn it into a rental property, noting there were already a couple of rental properties in the neighborhood already.

Mr. Gooze asked what the building on the left part of the property was, and was told it contained an osmosis system for purifying water which was installed by the previous owner.

Chair Smith asked if members of the public wished to speak in favor or against the application.

Steven Weglers, **Cedar Point Road– directly across street** said he and his wife were in favor of the improvements as long as they were made on the original dimensions of the original building. He said the addition was made larger than the original cottage that was a separate building, and then the Town allowed the previous owner to attach it. He said he and his wife were confident the new owners would maintain the integrity of the property, and the only objection was that the existing addition should never have been built, and was built illegally, with the permit applied for 2 months after construction had begun.

He said that wrong should be made right, noting that when they invested in their property, the only assumption they made was that the neighborhood would be protected from illegal or uncontrolled development, especially in the shoreland protection zone. He said their fear was that their property's value would be negatively affected by future expansions, developments, and said again that what was being proposed for the building

was reasonable, if the addition was made to the original dimensions of that cottage, which was technically smaller than what was there now.

Mr. Gooze asked for clarification about the buildings on the site and how they had changed, in location and size, over time.

Myleta Eng said the original building was 13 ft. by 16 ft, and when it was moved, it was made 16 ft. by 25 ft., and Mr. Weglers wanted it to be the original 13 ft. by 16 ft,

Linn Bogle summarized, (with clarification from Mr. Weglers) that the original building was 13 ft. x 16 ft., set off toward the property line, and was spoken of as a dwelling. He said Mr. Gentile enlarged the building to 16 ft. x 25 ft. which was illegal. He said Mr. Gentile was granted a permit to move the structure and attach it to the existing main house, but never finished the project.

Chair Smith asked if the building was now further back from the water than the other one was, and was told it was. He then asked if there was anyone who wished to speak against the request for variances.

Dorothy Oliver, Cedar Point Road– asked that the Board review her letter of November 18, 2003, and said the issues in it still stood. She urged that any addition to the current building be of the same square footage as the previous building Mr. Gentile removed, so it would be in compliance with the footprint provisions in the shoreland protection act. She noted that Ms Hartmann said she (Ms. Oliver) had a vendetta against Mr. Gentile, but said that was not the case. She said she had been disappointed in the deteriorated condition of the property, but they were congenial neighbors. She said the last time she talked to him, she asked him to take care of a drainage problem that had had a negative impact on her property.

Chair Smith asked Ms. Oliver if she was objecting to the expansion, and she said she was, because it was done in the dead of night, and whoever gave Mr. Gentile the permit did not look at the size of the original building, and it was permitted to be moved.

Ms. Hartmann noted the abutters had received a letter from the previous owner noting he was increasing the size of the building, and they did not object to this at that time. She said she felt that was the time to object, but they did not, and he was granted a permit for the structure. She explained that to meet side yard setbacks, they moved the building and attached it to the other building, and also were able to attach to the new, conforming septic system. She said it must have been clear to everyone what the size of the original building was, and he was allowed to continue building, and to tear down the cottage inside the new structure.

Chair Smith asked if it would be possible to do the addition of the original size on the same footprint.

Ms. Hartmann said what concerned her was the foundation there, - what it would take to rip that out, and what this would do to the property and the shoreland area.

Ms. Oliver said she did receive notice of the larger cottage, which she decided was acceptable, but never received notice they were going to take that cottage and move it next to the house. She said it was her memory that the cottage was further back from the water. She said moving the property next to the main house doubled the size of the house, which was not acceptable.

Mr. Wegler said they probably would have objected to the work that was done if they had known it would take so long to complete it.

Chair Smith closed the public hearing.

Mr. deCampi said the biggest issue to wrestle with was whether the 16 ft. x 25 ft. footprint had been grandfathered, and said he did not think it was. He said that because the construction was abandoned, and all permits had expired, they should view it as starting with a fresh sheet of paper. He said that did not work to the Hartmann's advantage because he saw no justification for enlarging the size to 16 ft. by 25 ft when starting with a fresh sheet of paper. He said the 13 ft. by 16 ft cabin appeared to be grandfathered, and said he couldn't imagine requiring them to move it back to where it was. He said there should be a grant of relief to allow the construction of a 13 ft. by 16 ft. addition to the house.

Mr. Bogle noted that when Mr. Gentile got his permit, it was for a 2-story structure, which he never undertook to build. He said the issue here involved activities in the shoreland protection zone, with the complicating factors of illegal actions that were approved by the Town. He said he would be inclined to disallow the structure (attachment), assuming that the permits had expired and had no bearing now.

Mr. Gooze said the present structure was not grandfathered because it had been abandoned. He said the question therefore was, would the Board generally allow the expansion of a building in this area, and said that to be consistent, this application did not meet the criteria for it. He did note that even with the expansion, the property would still be one of the smaller structures on the road. He said he could not see what the hardship was that would allow an expansion of the building, and noted he did not think it was in the public interest, and went against the spirit of the ordinance for water protection reasons.

Ms. Eng said she agreed with what Mr. Gooze had said, and said she thought they were working with a clean slate. She noted Mr. Johnson's letter on Nov 5th said the current lot size requirement was 120,000 sq ft., and also said the lot did not meet the frontage or side and rear yard setback requirements. She said she would not be in favor of granting the variances.

Chair Smith said if considering consistency, and the importance of the shoreland protection zone, he did not see how this application could meet the hardship criteria, and could be in the public interest. He said he wavered between allowing the structure in its original size, 13 ft. by 16 ft, but did not know what that would entail. He said that after

hearing the arguments and thinking about it, and thinking that granting the variances would be contrary to the spirit and intent of the zoning ordinance, he had decided he would not approve the request for variances.

Mr. deCampi said he could accept the arguments that had been made, and didn't have a problem with them, but he said he would be more lenient, and was just giving the applicants credit for the cabin that was grandfathered.

Linn Bogle MOVED to deny 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 an addition on a single family dwelling on a nonconforming lot - because it did not meet the hardship requirement, and because granting it would not be in the public interest and would go against the spirit and intent of the ordinance. The motion was SECONDED by Jay Gooze.

The motion PASSED unanimously.

Chair Smith told the Hartmanns they had 30 days to appeal the decision, or could come back with an alternate proposal at some point. He also noted that because it was almost 10:00 pm, Item II G would not be heard that evening. Board members agreed to continue the meeting until the following Tuesday to hear this Item.

F. **PUBLIC HEARING** on a petition submitted by Sumner Properties LLC, Durham New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-25(C&D), and Article III, Section 175-16(A) to add two units to a nonconforming, multi-unit dwelling. The property involved is shown on Tax Map 2, Lot 8-9, is located at 37 Madbury Road, and is located in the RA, Residence A Zoning District.

Alex Nossiff represented the applicant and gave the history of the property. He said in 1974, the Planning Board gave approval for 7 dwelling units, for a maximum of 17 residents. He said they knew that 20 years after this approval, the then owner, Cutter Properties, filed a document which disclosed that there were 9 units in the building, so two units had apparently been added to the building between 1974 and 1994.
He said one of these units was in the basement, and the second unit was created by dividing a third floor apartment unit into two units. He said there was no evidence that there was a permit for those two units. He emphasized that Mr. Davis of Sumner Properties, who purchased the property in 2001, had nothing to do with the creation of these two units.

Mr. Nossiff said that after receiving a cease and desist letter from Mr. Johnson concerning using the two units, Mr. Davis took steps to abandon their use, and noted these units were now vacant. He pointed out that the Fire Department had recently inspected all 9 units, and found they had no major violations, and posed no threat to health and safety. He said the basement had two means of going in and out, and said the other unit had a sturdy fire escape attached to it.

Mr. Nossif said Mr. Davis understood the issues concerning absentee landlords, and as the sole owner of the property, wanted to be a cooperative and responsible landlord even though he did not live in Durham. He said Mr. Davis maintained staff at 37 Madbury Road who were devoted to keeping track of his properties in Durham.

Mr. Nossiff said granting the variance would be in keeping with the existing neighborhood. He said it was understood what the minimum lot size requirement was for the property, but noted this was an area where there were other multifamily buildings on undersized lots. He said granting the present owner the use of the two units would not require additional building, with the exception of minor changes to the electrical system. He also noted the owner would probably have to get a separate variance for the number of occupants.

Mr. Gooze asked if the applicant would be addressing parking issues, and Mr. Nossiff said he would take this issue to the Planning Board for site review.

Mr. Johnson said parking was certainly also an issue, and Mr. Davis would need a variance for this and for the number of occupants, and would also have to go to the Planning Board for site plan review. There was discussion about the number of parking spaces currently available at the property.

Chair Smith asked if anyone wished to speak in favor or against the application. Hearing no response, he closed the public hearing.

Mr. deCampi said he seldom found himself agreeing with allowing more rental units into a building, but said in this case it was not the fault of the current owner. He said there was a need for student housing in Durham, and the building was located in a part of town that was appropriate. He said he was inclined to grant the use of the two additional units, but said it also needed to be considered how many occupants could live in these units.

Mr. Bogle said one issue this came down to was whether the Board would be legitimizing an illegal expansion by granting the variances, and he had a problem with accepting the use of the two units because of this.

There was discussion about the fact that an earlier document had listed 9 units. Mr. Johnson said it resulted from a landlord registration policy that existed at that time.

Mr. Gooze said he would like to agree with Mr. deCampi because there was space for the two units, and they had been used for such a long period of time, but he also realized the units were put in illegally. He said given the area the building was in, it would be hard to say granting the variances did not meet the spirit of the ordinance. He said having two more units did not affect the public interest, and said they would not cause any decrease in surrounding property values.

He said the question came down to whether there was a unique hardship particular to the property, as it was in amongst the other properties that had several units, and the space

was there and was up to code. He said the parking issue would have to be handled separately, and he received clarification that the units couldn't be occupied until the parking and occupancy issues were resolved. He said that going through these criteria, he could really say the variances should be denied.

Chair Smith said the fact that the two units were illegal, and the Town found out about this after the fact, would make allowing them contrary to the spirit and intent of the ordinance. He said this was not a good thing, and legitimizing it would not be good. He said unfortunately the current owner had inherited the problem, but said 7 units seemed to be a reasonable use of the property, so it was hard to see this would create hardship. Chair Smith said he was therefore inclined not to be in favor of granting the variances.

Ms. Eng said she had a problem with the illegality of the two units. She received clarification from Board members that the use was not grandfathered since it was illegal at the time. She also said economic issues could not be considered hardship, and said she therefore would not be in favor of granting the variances.

Mr. deCampi said there appeared to be a reasonable hardship because the owner bought the property in good faith. He said the building would not change by not allowing him to use the two units, so the Town would not be gaining anything by depriving him of the use of the units. He also said he was impressed that the owner had not rented these units.

Mr. Gooze said if the situation was looked at without the illegality issue, and someone came forward wanting to put in two units in this particular area and building, in its unique setting, he would see it as an acceptable usage there. But he stressed that he was not condoning the illegality that had taken place.

Mr. deCampi noted that it needed to be kept in mind that the applicant couldn't use the building until the occupancy and parking issues were addressed.

John deCampi MOVED to grant the applicant relief to have the two additional units already in place, as requested by the APPLICATION FOR VARIANCES from Article IV, Section 175-25(C&D), and Article III, Section 175-16(A) to add two units to a nonconforming, multi-unit dwelling. The motion was SECONDED by Jay Gooze.

Mr. Bogle said it would be advisable to have Mr. Johnson look at the property before permitting expansion into these units.

Mr. deCampi said that other variances would be needed, so even if this motion were approved, Mr. Johnson would be involved anyway prior to occupancy.

Board members agreed that the motion should be tabled pending an inspection by Code Administrator Johnson, and the application could be addressed at the meeting to be held the following week. There was discussion about what this inspection should include.

Linn Bogle MOVED to table the previous motion, pending an inspection of the property by Code Administrator Johnson. The motion was SECONDED by Myleta Eng.

Chair Smith asked when the inspection would take place, and, hearing Mr. Johnson's schedule, said it made sense to have the inspection before the Board met the following Tuesday.

The motion PASSED unanimously.

G. **PUBLIC HEARING** on a petition submitted by Robin Watson DeCampi Trust, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-27(B) of the current Zoning Ordinance; and Section 175-54 and Sections 175-139 through 142 of the posted Zoning Ordinance to allow subdivision and construction upon a lot on a privately owned road. The property involved is shown on Tax Map 20, Lot 11-2, is located at 55 Adams Point Road, and is in the RC, Residence C Zoning District.

This Item was continued to meeting the following week

III. Board Correspondence and/or discussion

Ms. Rousseau returned to the table.

Mr. Johnson said the Town had received an order from the court to remand the Myer v. Town of Durham case back to the Board to hear it. He explained that his administrative decision that it was a single-family home with an accessory apartment that involved some illegal conversions had been appealed to the ZBA, the Board upheld his decision, the applicant asked for a rehearing that was denied, and then took this to court. He said that when the Board had denied the rehearing that night, the next case on the agenda was a request for variance to create a duplex for the same property, and based on a prior recommendation form the Town, he had advised the Board not to act on an application that involved a posted zoning ordinance, so the Board did not hear the application that evening.

He said since that time, the Attorney had recommended that the Board hear the case on the variance for the duplex, and if the Board denied that, and a request for rehearing was also denied, then that and the previous case would be rolled in together when they went to court. He said the duplex application would therefore be on the agenda for March.

Mr. Johnson also said the Town got verbal confirmation that day that for the two court cases, the Court ruled in the Town's favor, and he would find out within 30 days if this was appealed to the Supreme Court. He said he would provide Board members with a copy of this decision.

Ms. Rousseau asked if Mr. Johnson could confirm that there were any ongoing cases that the Chair, and not the Town manager, was involved in the negotiations or settlement of. Meyer v. Town of Durham.

Mr. Johnson said there were no cases pending. He also said there were memos concerning 36 Garden Lane and 60 Edgewood Rd.

Ms. Rousseau asked who requested that Attorney Mitchell give an opinion on these cases, and Mr. Johnson said he did. Ms. Rousseau asked if there was a reason for this, because the Board had not asked him to do this.

Mr. Johnson said he anticipated that the Board would want some kind of input from the Town Attorney on these issues.

Ms. Rousseau said she had a problem in general with Mr. Johnson getting an Attorney opinion, and potentially advocating a position, prior to the Board's consideration of an issue before them. She noted it was also a Town expense every time Attorney Mitchell put an opinion in writing.

Mr. Gooze asked if Ms. Rousseau would be comfortable having Mr. Johnson ask the Chair for advice prior to contacting the Attorney, and she said she would be.

Sheehan matter

Chair Smith said he and Ms. Rousseau would recuse themselves from the Board for this discussion, and he appointed Mr. Gooze to serve as Chair in his place.

Mr. deCampi said it seemed Mr. Sheehan's only legal right was to come back and resubmit. There was discussion about this.

Mr. Gooze said the Board needed to decide whether to grant a rehearing. He noted that the letter from Attorney Mitchell said if Board members thought new information had been provided, they could think about rehearing it, but if nothing new had come in, they should not.

Mr. Johnson said Mr. Sheehan's request of January 23rd was to rehear a case that was over 60 days old. There was discussion as to how to proceed. There was also discussion on information that was provided to Board members before they voted on Mr. Sheehan's application at the October meeting, and whether there was some question about this.

Mr. Bogle said he didn't think a rehearing on a rehearing was permitted. He also said he was not at the October meeting, but watched the meeting on TV. He said his recollection was that the information in question was passed out during a break, when something of this importance should be provided a week in advance of the ZBA meeting, so members could consider this information. He said he didn't see that the Board had any legal obligation to do anything at this point.

Mr. Sheehan said he brought the information to the October 14th meeting and gave it to everybody, but there were not enough people to make a decision that evening so his application got put off until the following month, and then got put off until the week after that. He said at that point, the packet didn't get transferred over, so at the last meeting the people who were there to vote on it never looked at the packet, which contained two additional pieces of information. He said he did not know that the Board was not looking at his application plus the two additional pieces of information, but the decision that evening was not based on all the information.

Mr. Sheehan said he was not looking for a rehearing, and just wanted the opportunity to present his case to everybody with all the facts. He said if he had known that the entire packet was not all there he would have been back sooner.

Mr. Gooze said the Board had talked about the information Mr. Sheehan was referring to when they had previous discussed the case.

Chair Smith said he did not believe the ZBA had the authority to rehear a rehearing that had been denied. He said he believed submitting a new application was the way to proceed.

Ms. Rousseau said if at any point in time, the Board saw there was a procedural error in hearing a case, any person on the Board could request that the case be reheard, and take into consideration anything that was missing from the package, or try in some way to make the error right, in fairness to the applicant.

Ms. Eng asked if that were to happen, could new information be submitted.

Mr. Gooze said Board members would get all the information that was available.

Ms. Eng said in all fairness that she did not have all the information at that meeting.

Mr. deCampi said there was nothing new in the information in question, plus the new zoning didn't allow duplexes in that zone, although it might be a grandfathering issue.

Myleta Eng MOVED to rehear the Shaheen case and put it on the agenda for the March meeting. The motion FAILED, for lack of a second.

Mr. Gooze told Mr. Sheehan he could apply for a variance if he wished to do so. There was discussion with Mr. Sheehan about what his options were.

Chair Smith and Ms. Rousseau returned to the table.

Mr. Embrey, 36 Garden Lane

There was discussion about whether the time limit for Mr. Embrey's application had passed, and also about the address that was used to send the Board's decision to Mr.

Embrey. It was determined that the decision was sent to Garden Lane in Durham, while the address on his application was Plaistow, NH, so a procedural error had taken place.

Jay Gooze MOVED to grant a rehearing for Mr. Embrey, for the March agenda. The motion was SECONDED by Robin Rousseau.

Mr. deCampi said the Board had done nothing wrong to justify a rehearing, although he regretted the procedural error.

Mr. Gooze said he was willing to give Mr. Embrey the opportunity to ask the Board for a rehearing, which in fact the Board was presently considering, but said he did not see anything new that would justify granting the rehearing.

Chair Smith read from Mr. Embrey's letter, which said he had not provided all the information he should have. Mr. Smith said that was not the Board's problem.

Ms. Rousseau said the reason for a request for rehearing was to consider new information on a case that perhaps the Board did not have. She said Mr. Embrey's letter was preliminary, not knowing if the Board would consider the rehearing, and said she had no problem in listening to additional information Mr. Embrey wanted to provide. She said there had been a procedural error the Board needed to make right.

Chair Smith designated Myleta Eng as a voting member.

Jay said Mr. Embrey had provided his additional information in his letter. He said he saw nothing new in this information, and the Board had the right to base their decision on this. He said he stood by not granting the rehearing.

The motion FAILED 0-5.

Mr. deCampi said a letter should be sent to Mr. Embrey apologizing for the procedural error, and explaining that the Board did take a vote, and unanimously decided there was not sufficient additional information in his letter to warrant a rehearing.

Chair Smith recommended postponing doing the minutes until the meeting the following week.

The meeting adjourned at 11:15 pm.

Victoria Parmele, minutes taker

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Jay Gooze, Secretary