

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

**ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, FEBRUARY 17, 2004
TOWN COUNCIL CHAMBERS--DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Smith, Myleta Eng, Linn Bogle, Jay Gooze

MEMBERS ABSENT: Ted McNitt, Robin Rousseau

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

MINUTES PREPARED BY: Victoria Parmele

Chair Smith noted the meeting was a continuation of the meeting from the previous week, because there had not been time to complete the agenda.

I. Approval of Agenda

The agenda was approved

II. Public Hearings

- A. CONTINUED 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), Article III and 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 in the RA, Residence A Zoning District.

Attorney Alex Nossiff asked for a continuance of the public hearing, noting he had heard the Board's concerns at the last meeting, and realized there might be need for more than one variance for the property. He said the applicant would prefer to come in and have the Board look at all of the variance issues together at the same time.

Mr. Gooze asked if the applicant wanted a continuance until March, and Attorney Nossiff said April would be better. Chair Smith said this would be possible.

Mr. deCampi said if the applicant would be altering and/or adding to the application substantially, it would seem to be more appropriate to withdraw the application, and submit a new one that was more comprehensive. He said if the

application was not going to be substantially enlarged, he had no problem with granting the continuance.

Chair Smith asked Code Administrator Johnson for his perspective.

Mr. Johnson said it made more sense to do a continuance, because there was the potential for an enforcement action because the original approval was for 7 units and 17 tenants, and they had 7 units plus two additional illegally created units and approximately 20 students. He said the issue was already being dealt with legally through the ZBA, so to avoid the enforcement action and get the situation straightened out, it made sense to continue the current process. He said that meanwhile, he would schedule an inspection and would find out how many variances would actually be needed. Mr. Johnson said that this way, when the application came back to the ZBA, all the variance issues would be on the table to resolve.

Mr. Gooze asked if continuing an application and then adding to it had been done before by the ZBA. There was additional discussion about this.

Chair Smith said they didn't really know how much different the application would be at that point, so the continuance was probably the better way to proceed. It was clarified that the April agenda would include the present variance request for the property, as well as other variances.

Mr. deCampi said that as long as the hearing was advertised again, and abutters were informed of the change in the scope of the application, he had no problem with the continuance.

Mr. Bogle asked if the inspection of the property had taken place yet.

Mr. Johnson explained that there had been some confusion about what was going to be inspected – just the two illegal units or the entire property, and the applicant therefore did not have enough time to notify the tenants.

Jay Gooze MOVED to continue 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 until the April 13th 2004 meeting, with any additional variances deemed necessary by the Code Enforcement Officer. The motion was SECONDED by John deCampi and PASSED unanimously.

- B. **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.

John deCampi recused himself from the Board for this Item because it involved his property.

Chair Smith designated both Linn Bogle and Myleta Eng as voting members, and declared the public hearing to be open.

Mr. deCampi spoke about the property, explaining that he and Mrs. deCampi acquired the property in 1992, with the intent of building a house for their retirement, and moved in as of January 2000. He said they were not aware there was a private road when they bought the property, and had to get a variance in order to build on the road. He said it turned out that they actually owned the road, and explained that the Kent family had retained the road until they sold off their last parcel, to the deCampi's.

Mr. deCampi said he and his wife had found the taxes to be higher than anticipated, and decided they would subdivide off a lot, if this could be done legally, and would sell that parcel and invest this money to help with their taxes. He said he had thought that based on the previous zoning ordinance, except for the private road issue, that they would be permitted to subdivide. But he said that when he submitted the subdivision plans in November of 2003, he was advised that the Planning Board would soon be posting additional changes to the Zoning Ordinance which would substantially change the zoning as it affected his property.

He said he did not disagree with Mr. Johnson's findings, and was seeking a variance concerning the following:

- 1) the issue of the private road
- 2) the issue of lot size. Mr. deCampi noted that 150,000 sq. ft. was needed, after subtracting out deductions, and the property could meet that, but not after subtracting out deductions. He said he believed it would be difficult for anybody with shorefront property to meet this requirement, because so much of this land was the kind that was to be deducted.
- 3) the issue of the septic system. He said there was now going to be a setback requirement of 125 ft. from poorly drained soils, and noted that their system met the previous setback of 75 ft, but did not meet the 125 ft. setback. He said he had asked NH Soils to look at the plan and make sure an environmentally sensitive septic system could be developed as part of the plan. Mr. deCampi asked that this system be judged under the old ordinance instead of the revised ordinance.

Mr. deCampi said he was seeking an area variance, not a use variance, and was not asking for a variance from anything in the old ordinance other than the issue of the private road. He said that all the other requirements of the old ordinance could be met.

He said the Nature Conservancy had expressed interest in the property as conservation land, but said that in order to be able to sell the land, and receive the fair market value from them as a building lot, the lot needed to be buildable. He said he could not guarantee that the property would be sold to the Nature Conservancy, but said he was interested in continuing discussions with them.

Mr. deCampi next went through the five variance criteria. He said the property was isolated, so it would be unlikely to bother anybody and have a negative effect on property values, and also said he did not see how granting the variances would be contrary to the public interest. He said denial of the variances would be a hardship, noting they had spent \$12,000-15,000 on the subdivision plan, and would not have done so if they had known the ordinance was going to change. Mr. deCampi said that if they were forced to live with this revised ordinance, it would interfere with the use of their property.

He said that granting the variances would meet the spirit of the Zoning Ordinance, which he said he thought was to have Durham developed in an orderly, uncrowded and environmentally sensitive way. He said he thought the proposed subdivision plan would accomplish this.

Mr. Bogle said that under the revised Zoning Ordinance, the lot was unbuildable. He noted that in a previous ZBA case concerning a property on Route 108, the Board had allowed a variance on a property because there was assurance that the Nature Conservancy would buy the property and it would remain vacant. He asked if there was any way the Board could get that kind of assurance concerning the deCampi property.

Mr. deCampi said he had invited a person from the Nature Conservancy to come to the ZBA meeting because he thought his comments would be appropriate, but noted he had not come to the meeting.

Chair Smith said it had to be said that the property was in limbo as far as the Nature Conservancy was concerned, as there had been no commitment from them.

Mr. Bogle noted that the acreage figures on the plan that had been provided appeared to be incorrect, and there was discussion about this.

Chair Smith asked Mr. deCampi if he knew what the square footage of the parcel would be if the deductions were subtracted out.

Mr. deCampi said he had not done the engineering, but said a septic system would be impossible, and the square footage would make the lot unbuildable.

Chair Smith clarified that according to the new Zoning Ordinance, the deCampi's would not be able to build anything else on their property.

Mr. Bogle asked what the building and septic system locations were expected to be on the proposed lot. Mr. deCampi said that presumably the building would be located on the top of the knoll, and would meet all the setbacks.

Chair Smith asked if there were any members of the public who wished to speak to the application.

Ed Valena, 9 Bagdad Road – said he was there to speak against the application for variances, for a number of reasons.

1) He noted that when the deCampi's sought a variance in 1996, they said they would not further subdivide their land. He said that if the variance granted then did not incorporate the deCampi's letter to this effect, as a condition of the variance, he was sure the Board had taken the spirit of the letter into consideration, in considering granting the variance. He provided a copy of the letter to Board members.

2) Mr. Valena said he did not believe the property faced hardships now. He said in 1966, it was truly a different story because at that time the property was vacant and there were existing houses on nearby parcels. He said it would have been unfair to deny the deCampi's the right to build on their land at that time. He said he did not speak against the variance at that time, although he was well aware that construction would dominate an untouched section of Little Bay that overlooked his wife's family farm where they lived. But he said the property was now improved with a four bedroom, 4 _ bath dwelling, that the Town Assessor rated as luxurious. He said to argue that this land now had an economic hardship was absurd, and said many would argue that the current improvements had maximized any economic potential for the entire parcel.

3) He said it was the decisions the deCampi's had made concerning their house which had resulted in an economic burden in the form of taxes, and said it could be argued that the personal hardship they now felt was self created. Mr. Valena said he understood that the Board did not take personal financial situation into account, and this issue was therefore moot.

4) He noted that the deCampi's were also seeking relief from the new zoning requirement of 150,000 sq. ft. of useable area, as well as from the new 125 ft. setback requirement for septic systems. He said he would be surprised if this lot would not also require future relief from the newly proposed ordinances requiring 24 inches to the water table and 5 ft. to ledge, over a 5,000 sq. ft contiguous area, judging from the soils found on Durham Point. He said that the rewrite of the Zoning Ordinance was a response to a Town wide initiative prompted by the recent work on the Master Plan, and noted one of the goals coming out of this process was to restrict residential development to those areas that could support it. He said if a variance were granted in this case, the ZBA would be undermining

this initiative, and would bring the Town of Durham to the top of a very slippery slope.

5) Mr. Valena said in their application, the deCampi's had hinted at the possibility of selling the subdivided property, if created, to the Nature Conservancy. He said he would see no public benefit in forcing a non-profit organization to use its valuable and limited resources to protect land which was already conserved by the very fact that it could not be developed.

He said he believed that little had changed since the granting of the original variance, and although there were different ZBA members now, and the lot in question now overlooked fields protected by a conservation easement, thus making this building site more valuable on the real estate market, the ability for the lot to support further development had not changed.

Emma Rous, 50 Adams Point Road addressed various issues relating to the application for variances. She said the application to create a second building lot at 55 Adams Point Rd. must be considered in light of the Zoning Ordinances' statement of purpose, and said that unfortunately, the application did not fulfill this purpose, and could not meet four of the five conditions for legally granting a variance. She said the Adams Point area had long been recognized as an extension of the wildlife corridor stretching from Horsehide Brook to Adams Point, and said the applicant's site was bordered by a nationally known marsh and estuary, and bracketed on three sides by conservation land.

Concerning the claim that denial of the variance would result in unnecessary hardship, she said she believed the application did not meet the hardship standard, because the owners had purchased the land as a single lot, and had made full use of it as such.

Concerning the variance criteria relating to substantial justice, she noted the Board had historically recognized the special nature of the Adams Point area and road, by explicitly or implicitly restricting development on this non-town road. She said the Board had granted the applicant a variance in 1996 "after full consideration of the evidence submitted", and noted that at that time, the Board expressed concern about the non-town road, and based its decision on representations by the applicant that they would never subdivide the land. Ms. Rous said the Board further recognized the need to limit development on this same road by restricting her ten-acre piece from subdivision in 1982.

She said the most important fact about the Adams Point area was that it had been preserved beyond the zoning restrictions in place. She stated that granting the applicant's request did not meet the substantial justice standard because it would be inconsistent with the Board's historical intent to impose the strongest possible limitations on land use in this area, and would impose different conditions on two identically situated pieces of land.

Ms. Rous also said the use intended was contrary to the spirit and intent of the ordinance. As part of the evidence she provided to support this statement, she addressed the issue of whether the application fell under the old Zoning Ordinance or the revised ordinance. She said she had seen nothing presented which relieved the Board from applying the new regulations, but also said that which ever version of the ordinance was applied, her points concerning the variance criteria should still preclude granting the variances.

Ms. Rous said she and her husband welcomed the applicant's stated interest in conserving the proposed lot, and said that if the Nature Conservancy could guarantee that they would purchase and preserve the parcel, they would have no objection to the subdivision.

Mr. Gooze asked what the document "Decision of the Board" dated 1980 was about.

Ms. Rous said that referred to the decision which restricted her land from further subdivision, and said she offered this information to demonstrate that she thought the ZBA had always considered this area in a different way, not just because of the special conservation requirements, but also because of the road situation.

Chair Smith asked if there was any rebuttal to the statements made by members of the public.

Mr. deCampi said he did not disagree with the facts cited, but disagreed with some of their conclusions. He said he had forgotten that they had written they didn't ever plan to subdivide the property further, but noted that the ZBA did not place that as a restriction on them at that time. He said they had had no intention to subdivide the property, based on the taxes at that time. Mr. deCampi said he agreed that based on the posted zoning ordinance, a variance was required. He also said he agreed that the road was not a public road, although open to the public, and said he would give the entire road to the Town if it wanted it.

Mr. Gooze noted a letter a from Rob Houseman, and asked Mr. deCampi if when he had looked at the building site at that time, he had looked at the land he now wished to subdivide out as buildable.

Mr. deCampi explained that they had originally thought that if they built on the property, they would do so on the portion they were now talking about subdividing off. He said that when they looked at the location where the house is now built, and realized it was close to the road and a viable septic system location, he realized it would work there. He acknowledged that the letter from Mr. Houseman to the realtor had existed, and said they had bought the property without knowing about the road issue.

Chair Smith closed the public hearing.

Mr. Gooze addressed the hardship situation as he saw it, and read from the recent Supreme Court decision - Bacon v. Enfield. He noted that the ZBA decision was upheld in this case, and read a statement of the concurring judges regarding granting a variance to avoid a negative financial impact on a landowner, which said there must be a showing of an adverse effect of more than inconvenience. He said the Durham ZBA had been fairly consistent about saying that this kind of economic impact could not be a factor in granting variances. He said for that reason, he did not feel this situation was an unnecessary hardship to the owners.

Mr. Gooze said that regardless of the version of the zoning ordinance, granting a variance was not appropriate. He noted that even the older zoning ordinance did not want much building on that road, so it would be contrary to the public interest to grant the variance.

He said that weighing the various factors against each other, he did not think granting the variance would do substantial justice, and said he could not find one variance criteria that the application met. He said he especially felt this way about the hardship criteria.

Ms. Eng said she agreed with Mr. Gooze, and said she realized that economic hardship could not be used to approve a variance.

Mr. Bogle said this was the first case where the Board had come up against the revised Zoning Ordinance. He noted that the new ordinances were very restrictive, and said there would probably be many other instances where people would be precluded from developing their properties further. He said they were intended to limit development severely in the RC zone, and said he would have a hard time voting to allow the variances for this application because it would be setting a precedent for other landowners in the RC district, as well as because of the additional points made by Mr. Gooze.

Mr. Bogle said he would not be in favor of subdividing the lot, and noted there was also a question about the number of test pits dug. He said that unfortunately the application did not meet the standards that had to be applied.

Mr. Gooze said he felt the granting the variances would not be in the public interest because of the deCampi's 1996 application for variance, and their statement that they would not further subdivide the property. He said he thought this statement would have affected those people granting the variance at that time. Mr. Gooze said even though this statement was not in the legal documents, it would be a disservice to the public to go against something like this, and would set a bad precedent.

Mr. Bogle said he disagreed with that interpretation of the language, and said he did not feel the deCampi's promised they would never subdivide, because the wording said "may never be subdivided" and not "will never be subdivided". He

said under the present circumstances, however, that it appeared that the lot was unbuildable. But he noted again that if Nature Conservancy committed to buying the lot, he would feel very differently.

Chair Smith read from the application for the 1996 request for variance, which noted among other things that essentially 86% of the historic parcel of shoreland would remain open and undisturbed. He also said the phrase “may never be subdivided” could be interpreted in various ways, and noted he did not know about this statement before the meeting. He quoted from the revised Zoning Ordinance regarding the RC district, and said that protecting this area was a critical issue.

Chair Smith said he agreed with most of what other Board members had said, - that it was hard to see that denying the variances would result in an unnecessary hardship for the owners because they had already built on a wonderful piece of property; that allowing the subdivision would be a variance that would be contrary to the public interest; and that preserving the public interest, especially in the RC zone, was critical. He also said to subdivide would violate the spirit and intent of the Zoning Ordinance, and would set a bad precedent. Chair Smith said he would therefore not be in favor of granting the variances.

Linn Bogle MOVED to deny the APPLICATION FOR VARIANCES submitted by Robin Watson DeCampi Trust, Durham, New Hampshire 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. The motion was SECONDED by Myleta Eng and PASSED unanimously. 4-0.

Mr. Johnson noted that the new zoning ordinance was not law yet, and was therefore subject to changes in going to the Town Council. He said that what the ZBA had voted on that evening was based on the most recent version of the Zoning Ordinance, and that depending on how the ordinance changed, the applicants might be able to come back before the Board. There was discussion on this.

Mr. Gooze noted that the application also referred to the previous zoning ordinance, and said part of his decision was based on that version, so whatever happened with the zoning revisions, he would still vote against granting the variances, based on the previous version of the ordinance.

III. Board Correspondence and/or discussion

Mr. deCampi returned to the table.

IV. Approval of Minutes

January 13, 2004

Page 2, 1st paragraph, should read "...an upstairs addition..".

Also, 2nd paragraph from bottom, should say "C. PUBLIC HEARING.."

Page 3, 2nd paragraph, should read "Chair Smith told Mr. Alther..."

Also, 4th paragraph from bottom, should read "...but noted there were a number.."

Page 4, 4th paragraph, should read "...any way the applicant wanted to.."

Also, 5th paragraph, should read "...any way the applicant wanted to..."

Also, motion toward bottom of page should read "Ted McNitt MOVED to deny the REQUEST FOR REHEARING..." and "...PASSED 4-1.."

Page 5, 4th paragraph, should read "in the Board's judgment that would"

Also, 5th paragraph, should read "...role of the Board was land use based, they.."

Also, 8th paragraph, should read "...had reasonable use of her property.."

Page 6, 3rd paragraph, should read "The motion PASSED 4-1,..."

Also, 5th paragraph, should read "The Chair noted the Board had received..."

Page 7, 7th paragraph, should read "...and FAILED 2-3,..."

Also, 8th paragraph, should read "...PASSED 4-1,..."

Also, 9th paragraph, should read "Code Administrator Johnson asked if there were..."

Also, bottom of page, should include the paragraph "John deCampi and Chair Smith modified the motion to include the stipulations that had been discussed."

PLEASE INCLUDE THIS MOTION IN THE MINUTES FOR THE January 13th, 2004 meeting.

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.

Page 8, under Approval of November 18, 2003 minutes, should read (STILL NOT CLARIFIED BECAUSE TED MCNITT WAS NOT THERE)

Also, under approval of minutes, should read "...should read....so he had no objections."

Also, next to last sentence on that page should read "sounded like a business situation.."

Page 9, under December 9, 2003 minutes, should read "Carri Moorhead" wherever her name appears.

Also, should read "He said Mr. Gentile was re-siding the original cottage.."

Also, 4th paragraph from bottom of page, should read "...Gallant v. Vallery.."

Also, 7th paragraph from bottom, should read “..would do the final read of the minutes.”

Page 10, 2nd paragraph, should read “..about a session that had been scheduled..”

Also, 6th paragraph, should read “..for conducting ZBA meetings..” and “....He said he thought the legal procedure..”

Also, 7th paragraph, should read “...could then decide whether or not...”

Also, 9th paragraph, should read “keep a Board informed and up to date.”

It was agreed that the January 13, 2004 minutes would be approved once the additional motion and information had been included in them.

V. Other Business

A.

B. Next Regular Meeting of the Board: March 9, 2004**

VI. Adjournment

Jay Gooze MOVED to adjourn the meeting. The motion was SECONDED by John deCampi and PASSED unanimously.

The meeting ended at 8:45 pm.

Victoria Parmele, minutes taker

Jay Gooze, Secretary