

# **DRAFT**

**ZONING BOARD OF ADJUSTMENT  
TUESDAY, MARCH 9, 2004  
TOWN COUNCIL CHAMBERS--DURHAM TOWN HALL  
7:00 P.M.**

**MEMBERS PRESENT:** Chair Henry Smith, Jay Gooze, Ted McNitt, Robin Rousseau, Linn Bogle, Myleta Eng

**MEMBERS ABSENT:** John deCampi

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

**MINUTES PREPARED BY:** Victoria Parmele

Chair Smith noted that ZBA member John deCampi was absent, and an alternate would therefore be designated as a full voting member for each agenda Item.

## **I. Approval of Agenda**

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

## **II. Public Hearings**

- A. **PUBLIC HEARING** on a petition submitted by Joan & Keith Mistretta, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-28(B), Article III, Section 175-16(A) and proposed Zoning Ordinance Section 175-54 to install a new septic system on a nonconforming lot. The property involved is shown on Tax Map 14, Lot 6-0, is located at 375 Packers Falls Road, and is in the R, Rural Zoning District.  
Mistretta

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

Ms. Mistretta explained that the existing septic system on the property was failing, and said she and her husband would like to install a new system. She said the system was very old and her family was putting more stress on it than the previous owners, so that it now had to be pumped every few weeks.

Ms. Rousseau asked to see a diagram of where the existing system was and where the proposed new system would be located.

Ms. Mistretta said the plan was to put the new system in the same place as the old one. She explained that the lot was not that deep, and also said that when the soil scientist had checked another portion of the lot further out, there was too much clay in the soils there. She said it was not clear if there had been a leach field as part of the existing system.

Mr. McNitt asked Ms. Mistretta to speak in more detail about the proposed septic system.

Ms. Mistretta said the system would have two tanks.

Mr. McNitt asked Mr. Johnson if he knew anything about the proposed system, and Mr. Johnson said the design had not been completed yet. He said the day they did the test pit, it was difficult because of the frost, and he said that rather than destroy the existing system to see how it was constructed, a new state of the art two-tank system was being designed.

Ms. Eng noted that one of the plans said there were three bedrooms in the house, but the letter said there were four bedrooms.

Ms. Mistretta said there were three bedrooms in the house, and they wanted to put in a four bedroom septic system.

Ms. Rousseau asked if the applicant had plans to expand the building, and Ms. Mistretta said the design was for four bedrooms in case they wished to expand the house in the future.

Mr. Bogle said it appeared the new system could be placed further to the left and forward, so it would not have to be within the setback.

Ms. Mistretta explained that the soil was not good in that location.

Ms. Rousseau noted the lot was in the Rural Zone, and determined that it was 0.72 acres.

Mr. Bogle said that a similar variance request had been granted recently on a property nearby. He noted that both properties sat on a stratified drift aquifer, and it was therefore crucial that they both have adequate septic systems. He said he had no objections to the application, although the system would be close to the back property line, but noted that the abutter, the Fogg Trust, had not spoken against the application.

Ms. Rousseau asked if the applicant had any documentation regarding the proposed septic system, and also said that typically, an applicant would bring a professional to speak about the technical aspects of a septic system design, especially when it was so close to someone else's property.

Ms. Mistretta said she had not realized that the septic designer should be at the meeting. She said she had confidence in his understanding of the site issues, noting he was president of the Granite State Septic Designers and Installers Association.

Chair Smith said the more documentation the application could provide, the better. There was additional discussion on this.

Ms. Mistretta said she could get more documentation in writing if needed, but stressed the urgency of the situation.

Mr. Gooze asked what Ms. Rousseau's concerns were, and she said she wanted to know what the alternative options were, because of the closeness of the proposed location of the new system to the property line.

Ms. Mistretta asked if it would help if she had a letter from the Foggs.

Chair Smith said specific documentation about the system would be beneficial.

Code Administrator Johnson said that when the test pit was done, the soil scientist and the septic designer agreed the new system should be put in the same spot as the old one because the soils in the surrounding area were suspect. He noted they said the soils in this spot were non-virgin anyway, and by upgrading to the two tanks, four bedroom system, this would be better in this particular location.

Chair Smith asked if any one wished to speak in favor of or against the variance application. There being no one speaking to the application, Chair Smith closed the public hearing.

Mr. Gooze said that until he heard Mr. Johnson speak, he had thought the hearing should be continued so that more information on the proposed septic system and its location could be provided. He said Mr. Johnson had answered his questions, and he no longer had a problem with the application.

Ms. Rousseau said she would move to continue the hearing, and would prefer to speak with professionals about the system or have information in writing as to what options were available to the property, given that the proposed location of the system was so close to the property line.

Mr. Bogle and Ms. Eng each said they did not have a problem with the application.

Mr. McNitt said the new system would essentially be a replacement of the existing system. He said he agreed with Ms. Rousseau that better documentation would have been preferred. But he said that considering everything, what Mr. Johnson had said, the fact that alternative sites were probably considered by the professionals as well as the urgency of the situation, he did not have a problem with the application.

Chair Smith received clarification from Code Administrator Johnson that all the appropriate professionals were on site with him when the test pits for the new septic system were dug.

***Jay Gooze MOVED to accept the application for variances from Article IV, Section 175-28(B), Article III, Section 175-16(A) and proposed Zoning Ordinance Section 175-54 to install a new septic system on a nonconforming lot. The motion was SECONDED by Ted McNitt.***

Ms. Rousseau said she would not vote in favor of the application because the Board had not done proper due diligence in this case. She said she would hope the Board would not approve a septic system within 12 feet of her property without looking at serious alternatives. She said there was a lack of documentation, and would like to hear from professionals, explaining that when they were questioned, alternatives sometimes came up.

Chair Smith asked Mr. Johnson if he had a sense that there were possible alternative locations for the septic system.

Mr. Johnson said the professionals thought this was the best location because they couldn't guarantee the soils would be adequate in other portions of the site, and because a system in another location would be more costly. He said the soils in the location where the old system was were considered to be adequate for a new design.

Ms. Rousseau asked Mr. Johnson if he had asked the septic designer if another location was possible, and Mr. Johnson said there had been discussion about putting it behind the garage, across from the driveway. There was additional discussion about the possibility of alternative locations.

Chair Smith said he would approve the application because of testimony from Code Administrator Johnson, as well as the fact that Mr. Fogg did not object to it, although he said he would have preferred to see better documentation concerning the septic system.

Ms. Rousseau said it could not be assumed that the Foggs did not object, but were simply not at the meeting.

Ms. Mistretta said she could try to contact Mr. Fogg during the meeting to get his statement that he did not have a problem with the location of the septic system. She also noted that even though the system would be 12 feet from the property line, there would be almost 20 acres between it and the Fogg's house.

Ms. Rousseau noted this did not take into consideration their future plans for the property. She restated that her concern was that the Board did not do due diligence and get a professional opinion. She said a statement from Mr. Fogg would not change her opinion on this.

Mr. Johnson said he was at Adam Fogg's house that day, which was located behind his father's house. Mr. Johnson said he asked Mr. Fogg, who is a septic designer, if his father was coming to the ZBA meeting, and was told he and his father didn't have a problem with the proposed system because it was just like the one next door.

Mr. Gooze said if the Board voted to approve the application, the Foggs would still have 30 days to come forward to protest the approval, if they were against it.

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

- B. PUBLIC HEARING** on a petition submitted by The Nature Conservancy, Concord, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-95 to install a 6 foot tall and 8 foot square, free-standing sign. The property involved is shown on Tax Map 17, Lot 49-0, is located at 150 Packers Falls Road, and is in the R, Rural Zoning District.

Chair Smith appointed Linn Bogle as a voting member for this agenda item.

Joanne Glode, ecologist for Great Bay Stewardship, explained that her organization would like to install a small sign at the Lamprey River Conservation Preserve to identify the property. She held up the sign to Board members, and said the plan was to put the sign where people most frequently accessed the preserve, at a small parking area just off of Packers Falls Road.

Mr. Gooze asked how far in the sign would go, and Ms. Glode said the sign would be 100 ft. in, directly to the right of the gate, and up against the trees.

Mr. McNitt questioned whether a permit was needed to put a sign on a private road. There was discussion about this.

Mr. Johnson explained that when the original permit application came in, the sign was approved with a stipulation that it be, per the ordinance, a ground sign, and had to be of a certain size. He said the applicants wanted it to be somewhat bigger, so were told they would have to come before the Board.

Board members noted the sign was well away from the public road, and there was discussion about the Board's purview over this matter, when the sign would be put in what was a private driveway. They reviewed the sign provisions of the Zoning Ordinance and determined that it applied to any proposed sign.

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

Annemarie Harris, 56 Oyster River Road, said the Town was fortunate to have the Nature Conservancy providing them with recreation land, and it would be good if the citizens of Durham could read the sign for the property from 100 ft. away. She asked the Board, if it was within their purview, to grant a variance for a slightly larger sign than usual.

Chair Smith closed the public hearing

***Robin Rousseau MOVED to approve the application for variance from Article XII, Section 175-95 to install a 6 foot tall and 8 foot square, free-standing sign. The motion was SECONDED by Linn Bogle and PASSED unanimously 5-0.***

- C. **PUBLIC HEARING** on a petition submitted by the Durham Unitarian Universalist Fellowship, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII. Section 175-102(F & G), Section 175-95 and proposed Zoning Ordinance Section 175-133(G) to install a free-standing sign and four wall signs. The property involved is shown on Tax Map 4, Lot 17-0, is located at 20 Madbury Road, and is in the RA, Residence A Zoning District.

Chair Smith designated Myleta Eng as a voting member for this agenda item, and opened the public hearing.

John Macri spoke before the Board. He said a large ground sign was on the property at present, and recently was damaged beyond service. He noted that his application for a new sign had been denied because signs were not allowed in that area, so a variance would be needed. He also said that it was determined that there were no permits on record for any of the signs on the building, which belonged to service providers who rented approximately 25% of the building. He noted these existing signs were attractive and were not visible from Madbury Road.

He said the Fellowship wanted to replace the large ground sign with a smaller, more attractive sign, and described it to Board members, noting that the biggest difference would be that it would face in both directions in order to increase the visibility of the fellowship, and also would contain a message board. He said the location of the new sign would be essentially the same as the present sign, but would be set back another 5 ft.

He said the fellowship had been in the location for a long time, had a tidy property, and provided valuable services to the community.

Ms. Rousseau asked what the graphic would be, and Mr. Macri pointed this out on some letterhead within the packet.

Mr. McNitt asked if the wall signs would not be changed, and Mr. Macri said that was correct. It was clarified that there was a permit for the construction of the offices in the building, but no permit for the signs that were put outside the offices.

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

***Robin Rousseau MOVED to approve the APPLICATION FOR VARIANCES from Article XII. Section 175-102(F & G), Section 175-95 and proposed Zoning Ordinance Section 175-133(G) to install a free-standing sign and four wall signs. The motion was SECONDED by Jay Gooze.***

Mr. Gooze said this was a perfect example of grandfathering of the wall signs, noting that even though there was not a permit for the signs, they had been around long enough, and were in clear sight so the Town would have known about them. He pointed out that another sign on Madbury Road was turned down because it would be quite a bit larger than the old sign, and was a different height and in a different position.

Mr. McNitt said he agreed with Mr. Gooze and Ms. Rousseau, and said the applicant was merely replacing and upgrading the existing sign. He said this did not represent a further violation of the ordinance, and was within the intent of the sign ordinance.

Chair Smith said the sign would be further back from the road and smaller, and he had no problems with the request.

***The motion PASSED unanimously.***

- D. **PUBLIC HEARING** on a petition submitted by David Meyer, Newmarket, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article IV, Section 175-25(B) to change a dwelling from a single family home to a duplex. The

property involved is shown on Tax Map 2, Lot 8-2, is located at 8 Madbury Court, and is in the RA, Residence A Zoning District.

Chair Smith appointed Linn Bogle as a voting member. He noted there was a letter from an abutter, and opened the public hearing.

Attorney Craig Salomon spoke for the applicant. He noted the matter had been remanded to the ZBA from Superior Court, where he had represented the applicant.

He explained that the applicant was before the Board in June 2003 when there were two matters on the agenda relating to the property. He said one was an appeal of an administrative decision that the property was not a grandfathered duplex, and the other was a request for variance. He said at that time the Board didn't hear it, he filed a motion for rehearing on both issues that went to Superior Court, and now the variance request had been remanded to this Board.

Attorney Salamon described the current situation at the property, describing it as a substandard lot that did not meet the necessary frontage requirement for a duplex and other dimensional requirements under the old ordinance, which was in effect at the time the appeal was filed.

He said there were two apartments in the building, the first one consisting of two bedrooms in what used to be the garage, and all of the ground floor with the exception with two rooms in the front. He said the second apartment consisted of the upstairs and the two rooms downstairs. He said he had a schematic that he would submit, and noted he was not sure what Mr. Meyer had originally submitted.

Attorney Salamon said neither of the dwelling units as presently configured was less than 25% of the square footage of the living area in the total property, which related to the definition of whether or not there was an accessory apartment or two units. He said that before the applicant purchased the property, a real estate listing sheet in 1996 characterized the property as a duplex. He also noted that Mr. Meyer had indicated to the Board that before purchasing the property, on his realtor's advice he had further investigated this, and had confirmed with Town officials that it was a duplex.

Attorney Salamon also said an appraisal was done of the property at that time which described it as a duplex, which he said was pertinent, because the appraisal characterized it as a legal nonconforming use. He also noted that the lender had the applicant execute a 1-4 family rider on the mortgage, which inferred that the lender had determined that the property was a duplex at that time.

He said that later in 1996, after Mr. Meyer purchased the property, he had applied for a building permit, asking to convert the garage to a living space and attach it



to the main house. He said that work was done, and noted Mr. Meyer had testified that the work was inspected on a regular basis. Attorney Salamon also said that the language in the application was not inconsistent with the position Mr. Meyer was now taking, and also said it was his understanding there was a sketch in the building department file that showed the utilization of the downstairs as being different than what was there now, but this difference was not inconsistent with a two family use.

Attorney Salamon spoke about the mixed character of the neighborhood, which included a single family home, a newly constructed duplex, and an apartment complex. He also noted a letter from Mr. Lavoie addressed to Mr. Meyer and the ZBA that spoke about being friendly with the family that lived in the upstairs apartment from 1968 to 1972.

He next went through the criteria for granting a variance, as they applied to the application. He said that based on the existing character of the neighborhood, granting the variance should not affect property values, and also said that rightly or wrongly, the use had existed since at least 1996, and the impact on property values was there now. He said granting the variance would not be contrary to the public interest because this was a de-facto situation that had been there since 1996, and said he did not believe Code Administrator Johnson had observed any health or safety issues related to the property.

He said the hardship test was met because this was a reasonable use which was consistent with the neighborhood, noting the property was located in a rather unique setting for the RA zone, at the end of a dead end street, with a duplex, a multifamily house and student housing nearby. He also spoke about the issue of whether there was fair and substantial relationship between the ordinance, in general, and its application to this property, and said the definition of the purpose of the RA zone fit this property. He said the third prong of the Simplex test was the question of whether public or private rights would be affected, and noted he had already covered this issue in addressing the previous variance criteria.

Concerning the substantial justice criterion, Attorney Salamon said that based on Mr. Meyer's information about the property, he honestly believed he was buying a two family house, and the building permit reflected this. Attorney Salamon also said substantial justice would be to look at all of the facts and circumstances surrounding this situation, and say the variance should be granted. He said this perhaps went beyond substantial justice, to the concept of municipal estoppel, a legal concept he said he would not argue to the Board, but which might have relevance at some point.

Attorney Salamon said granting the variance would not violate the spirit and intent of the ordinance because at the time the variance was sought in 1996, two family homes were legal in the zone. He said that when Mr. Meyer bought the

property, he believed it was a grandfathered use, and said the spirit and intent of the ordinance was to protect grandfathered uses.

Attorney Salamon noted that the minutes of the June 2003 ZBA meeting talked about Mr. Meyer's burden of proof. He said this was true, but said it was also true that there was not a lot of contradictory evidence brought forth in the Town file. He said in the absence of such records that contradicted Mr. Meyers' testimony, this had to be given some weight. He also acknowledged there were some holes in the evidence.

Mr. Gooze said he remembered from a previous time they had discussed this property that Mr. Meyer had said he had letters from the Town concerning the property, but had not been able to produce them. Mr. Gooze asked if Attorney Salomon could explain this.

Attorney Salomon said he had asked Mr. Meyer about this, and was told he simply did not have them, but recalled seeing them.

Chair Smith quoted a letter from Mr. Meyer to the ZBA that spoke about a letter from the seller, on Town of Durham letterhead, stating the property was grandfathered as a duplex. Chair Smith asked if this letter existed.

Attorney Salamon said he did not know, but had not seen it.

Ms. Rousseau asked if there was a signed appraisal concerning the property, noting the one that had been submitted to the Board had not been signed. She said the mortgage company relied upon this appraisal to determine its requirements, which was what he was using as supporting evidence.

Attorney Salamon said there was one that was signed, and passed copies of this out to Board members.

Ms. Rousseau also noted that the Board did not consider real estate representation as a legal description of a property.

Attorney Salamon said he wasn't suggesting this was a legal description.

Ms. Rousseau also noted Attorney Salamon had said there were no records to contradict the fact that this property was nothing other than a duplex, but said that when they had looked at this in the past, there was no evidence that it was a duplex. She said it looked like a single-family house, there was no reference to a variance given at any point, and there was no building permit request to add the duplex.

Attorney Salamon agreed that Town records were neutral on the issue, but said the LaVoie letter was some evidence of what was there physically.

Ms. Rousseau noted there were a significant number of illegal apartments in Durham.

Mr. Bogle said Attorney Salamon had referred to Madbury Court as a street, and to a multi family building across this street. He said that building was actually on Strafford Ave, and not on Madbury Court, and also said Madbury Court was not a street, but was a 12 ft. wide fire lane. He said this had figured considerably in the Board's previous discussion because of safety issues.

Mr. Bogle also said Attorney Salamon had said there were no problems with the property, but said Board members had looked at the property, and on more than one occasion, cars presumably related to the building were parked illegally in the fire lane, and excess cars were also parked at the building. Mr. Bogle said this represented a distinct safety issue that was contrary to the public interest. He also noted that the real estate card listed two units, but said there was one heater and water heater, and asked Mr. Johnson if this was typical of a duplex apartment building. Mr. Johnson said it was not.

Mr. Gooze said that the duplex across the street was approved without any great degree of joy, noting it had been a vacant lot and the zoning at the time did not have size requirements to prohibit a duplex. He said that situation in no way related to the situation with Mr. Meyer's property.

Attorney Salamon said he did not suggest it was, but said the spirit and intent test as well as the hardship test looked at what was there, regardless of whether one liked it, or how it got there.

Mr. Bogle said the building was listed as having a full basement, and asked Mr. Johnson if he had seen this basement.

Mr. Johnson said he had not been allowed entry to the building and had no idea what was inside.

Mr. Bogle said it would be important to know this.

Ms. Rousseau said the appraisal provided no evidence that the applicant spoke to anyone at the Town Office to determine the characterization of the property by the Town. She said it looked like the appraiser may have been relying on the real estate broker card, and said just because a broker represented the property as a duplex, this didn't make it one. She also noted the property was characterized as a cape, which she said was a single family home description, and also noted information Mr. Bogle had mentioned that indicated sharing of systems.

Chair Smith said Mr. Salamon had said it was in the public interest to concentrate multifamily housing in this part of town, but said while this might be true, it was

hard for him to conceive of this as multifamily housing when it was his understanding that students lived there.

Ms. Rousseau noted that the appraisal report said there were very few small income properties in Durham, and she said that was probably because there were very few capes in Durham that would be considered duplexes.

Chair Smith asked if anyone wished to speak in favor of the request for variance. Hearing no one, he asked if there was anyone who wished to speak against the request.

Arthur Demambro, 49 Madbury Road, said he was adamantly opposed to granting the variance. He said he lived in a private home that abutted this property, noting Attorney Salamon had not mentioned this. He said at the June hearing on this property, he thought the consensus was that the property in question was a single family dwelling with an apartment. He said he was against the building being a duplex, and said it was not family housing, it was student housing and had been for quite some time. He said several formerly private houses in the area were now student housing, and said it was not true that this had not affected property values.

He described the problems in the area because of student housing, and said that because of these problems, he did not think his property was worth what it previously was, or what it should be. He said there shouldn't be more student housing in these small houses, because the problems this created could not be controlled. He noted the owner of this present property was an absentee landlord, and there were already problems with this property.

There was discussion about the layout of the property, and it was clarified that if the application for variances was approved, there would probably not be any change required to the building.

Annemarie Harris, 66 Oyster River Road, said she had worked on the Master Plan and the Zoning rewrite, and said it was the clear intention of these documents that student housing would not continue to be allowed in this zone. She also noted there would be ordinances in the near future that would help with enforcement issues. Ms. Harris said she knew of this area over time, and said the character of that pocket neighborhood should be protected for the benefit of longtime residents.

Ms. Harris asked if Attorney Salamon could indicate how many bedrooms were in the two apartments, noting she had driven down Madbury Court many times and had seen excessive parking there relative to an apartment that would have 3 occupants. She noted it was not unusual in Durham that if there were 2 bedrooms, they were often occupied by 4 people. It was clarified that there were 3

bedrooms in each apartment, and Ms. Harris said that could easily mean 12 people were living there.

Ms. Rousseau asked if there was a copy of the tax card or something else that the appraisal relied upon that characterized the property as a duplex. Attorney Salamon said he did not have this. There was discussion, and Mr. Gooze noted that the two family label until recently could have meant either duplex or single family with an accessory apartment.

Attorney Salamon said that when Mr. Demambro had spoken, he had described the present character of the neighborhood, which, like it or not, reinforced his own argument about the character of the neighborhood.

Ms. Harris asked the Board to consider health and safety concerns.

Chair Smith closed the public hearing.

Ms. Rousseau asked if it could be confirmed that there was no history of applying for a variance or a building permit for a two family dwelling on this property.

Mr. Johnson said the file indicated that the owner in the 1960s built the detached garage, and got no variance for that, and when Mr. Meyer bought the property in 1996, he applied for a building permit to connect the house and garage, and to convert the garage to living space. He said a floor plan was provided at this time, which contradicted the floor plan in Board members' packets.

Ms. Rousseau asked if there was documentation indicating that Mr. Meyer was applying for a single-family home, and Mr. Johnson said it only indicated a plan to connect the garage to the main house. Mr. Johnson also said it would be useful to know if Mr. Meyer had ever lived at the property, noting that he would not have been able to do the electrical work himself if it was a duplex.

Mr. Gooze went through the variance criteria, and said the property value issue was significant, and as indicated by Mr. Demambro, allowing the duplex characterization would decrease the value of surrounding properties. He said the substantial justice issue didn't hold weight because there were no records to indicate that this was a duplex, and said he could not imagine not having these records. He said although there would be some economic loss if the property was not considered a duplex, this was not a relevant hardship issue. He also said granting the variance would be contrary to the spirit and intent of the ordinance.

Chair Smith agreed it was difficult to see how granting the variance would be within the spirit and intent of the ordinance

Ms. Eng said she agreed with Mr. Gooze that granting the variance would decrease the value of surrounding properties, and would also be contrary to the

spirit and intent of the ordinance. She said she therefore would not be in favor of granting it.

Mr. McNitt said he could not see how granting the variance would be in the public interest, noting that as the concentration of students increased, there was an increase in health and safety problems. He said the Madbury Court area was already too crowded, so granting this would definitely be a step in the wrong direction, and also noted the guiding policy of the Town was to discourage duplexes in all areas.

Mr. Bogle said they were starting with a clean slate here, and said the property did not meet any of the area requirements or setback requirements. He also said it appeared from what he had heard that considerable renovation to the property had been made illegally, and also said he saw very distinct safety issues regarding the property. In terms of the hardship criteria, he said if the variance were denied, this would not interfere with reasonable use of the property. Concerning the property value issue, he said he agreed that granting the variance would have a distinct negative impact on the values of surrounding private homes. Mr. Bogle also said that because of safety issues, granting the variance would be contrary to the public interest for those living along the fire lane.

Ms. Rousseau said the Board needed to be careful about setting policy concerning student housing. She said that in considering the characterization of the property, the supporting evidence that it was a duplex was insufficient, and noted that the appraiser had to go to other Towns to get comparables, which was proof that not many small capes in Durham had legally been made into duplexes. She said that based on the Town's records, there was no supporting evidence that the property had been changed to a duplex legally.

Ms. Rousseau said that testimony from single-family homeowners in the neighborhood indicated that granting the variance would have a negative impact on property values. She also said granting the variance would be contrary to the public interest, noting the Board had received a memo from the Town Council to enforce occupancy limits. She said this memo said they could look to the Master Plan recommendations concerning limiting occupancy to preserve residential neighborhoods, for guidance on this.

Ms. Rousseau said it was not a hardship for the applicant if the property was not a duplex, noting he still would have full use of the property, and could still have two unrelated individuals living there. She also said granting the variance would be contrary to the spirit of the intent of the ordinance, which was to maintain single-family neighborhoods.

Chair Smith said that granting the variance would result in a decrease in surrounding property values, and would be contrary to the public interest because

of safety issues. He also said there was no hardship here, and that granting the variance would be contrary to the spirit and intent of the ordinance.

***Robin Rousseau MOVED to deny the APPLICATION FOR VARIANCE from Article IV, Section 175-25(B) to change a dwelling from a single family home to a duplex. Ted McNitt SECONDED the motion.***

Mr. Gooze asked if Board members all agreed this application would not meet any of the five variance criteria, and Ms. Rousseau said the minutes would reflect their position.

***The motion PASSED unanimously.***

Break 8:50-9:00 pm

Mr. McNitt noted he was taking over for Chair Smith, who was not feeling well and had left the meeting.

- E. **PUBLIC HEARING** on a petition submitted by Diana Nguyen, North Andover, Massachusetts, for an **APPEAL OF ADMINISTRATIVE DECISION** from a February 13, 2004, letter from Zoning Administrator, Thomas Johnson regarding the occupancy of the dwelling. The property involved is shown on Tax Map 1, Lot 20-6, is located at 84 Madbury Road, and is in the RA, Residence A Zoning District.

Mr. Gooze noted Board members had received an email concerning the property which was a copy of a police report.

Michael Nguyen, the son of the applicant, spoke before the Board. He said that when his mother had purchased the house, she had not done so through a real estate agent, but had purchased it directly from the previous owners. He said they had not said anything about the fact that no more than 3 unrelated people could live in the house. He said that when he and his mother moved to New Hampshire, they had no background on the local regulations. He said they were present to try to increase the permitted occupancy by two, so they could have five occupants for the property.

Ms. Rousseau clarified the process the applicant needed to go through as part of an administrative appeal, as compared to a variance, noting they were basically saying Mr. Johnson had made an error in his decision that the applicant had a single family home. She asked Mr. Nguyen what the supporting evidence was that Mr. Johnson had made this error.

Mr. Nguyen did not offer any evidence to this effect.

Mr. McNitt asked Mr. Johnson to give some background on his decision. Mr. Johnson did so, and said by appealing his decision, the applicant was essentially trying to gain some time to get through the end of the semester.

Mr. McNitt said there appeared to be a language problem with the applicant, and said he was sympathetic. He asked if anyone wished to speak in favor of the appeal of administrative decision. Hearing no one, he asked if anyone wished to speak against the appeal.

Kitty Marble, 82 Madbury Rd, said she had lived in this area, off and on, for many years, and said there had been numerous disruptions caused by students there over the years. She said the last landlord who owned 80 Madbury Rd had tried to keep kids in line, but had not succeeded. She said she had no personal disregard for the Nguyens, but was tired of the disruptions caused by students.

Judy Coburn, 85 Madbury Rd., said she had lived in the Madbury Road area for over 40 years. She said there had been many problems with students in this area, and residents were tired of these problems. She did not feel residents should have to put up with this. She said she had called Mrs. Nguyen, and had also contacted the previous owners, and was told to notify the police. She said they would continue to call the police to stop the disruptions there.

Ms. Rousseau said the issue before the Board was whether the property was a single family home or not, and noted they could be there all evening listening to problems about the neighborhood.

Mr. McNitt said he understood why people were there to protest about the problems, but asked if anyone was present to discuss other aspects of the appeal of the administrative decision.

Members of the audience said they wanted to emphasize how many of the neighbors had been affected by the disruptive behavior in the neighborhood.

Mr. McNitt said he recognized there were a substantial number of people there who were concerned about this application. But he said the question before the Board was if Mr. Johnson was correct in making his administrative decision.

Sandy Martin, 81 Madbury Road, said he had served on the Master Plan committee, and Chaired the Public Safety committee as well as the Public Utility committee. He said as a certified appraiser and mortgage banker, he understood mortgage property values as well as appraisal values. He said the issue here was the law, which said that no more than 3 unrelated parties could live in the house. He said he felt sorry for the buyer, who was not given complete information about the property, but this was a buyer beware situation.



Mr. Gooze asked if there was anything in Town records that gave permission for this house to be anything other than a single-family house, including a single-family house with an accessory apartment. Mr. Johnson said he did not believe so.

Ms. Rousseau asked if Mr. Johnson checked this prior to inspecting a property and writing a decision. Mr. Johnson said he looked through the map and lot files and did not recall finding anything on this one.

Eric Olson, 85 Madbury Road, asked if the applicant was not abiding by the ordinance, and only 3 people could live there, how long it would be before this would be enforced. He said he hoped to complete the semester without having to move, and was concerned he wouldn't be able to find another place to live.

Mr. McNitt said the Board had to decide if Mr. Johnson had made a mistake, and once that was decided, the enforcement part came into play.

Mr. Johnson said the applicant could ask for a rehearing in 29 days if they had some new arguments, and if this was denied, they could come back 30 days later and request a variance to increase the occupancy. He said if this was denied, they could come back to ask for a rehearing on the variance, and if denied, could take this to the Superior Court. He said his hands were tied until all legal channels were exhausted.

Mr. Gooze said perhaps something could be worked out with the Mr. Johnson.

Mr. Johnson noted the neighbors would probably hang him if he negotiated something with the applicant.

Robert Femenau, 84 Madbury Road, asked if the appeal was just based on whether Mr. Johnson made a mistake or not, and noted the people who had spoken against the appeal did not say anything pertinent to the appeal.

Mr. Gooze said one person had said something pertinent.

Ms. Rousseau explained that they had the right to speak their peace, but the Board would decide whether to use this as supporting evidence.

Chair McNitt closed the hearing.

It was clarified that all Board members present would be voting members on this application.

***Robin Rousseau MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION on a petition submitted by Diana Nguyen, North Andover, Massachusetts, from a February 13, 2004, letter from Zoning Administrator, Thomas Johnson regarding the occupancy of the dwelling.***

She said the applicant did not provide any kind of supporting evidence for their appeal.

***Jay Gooze SECONDED the motion.***

Mr. Gooze said he agreed with what Ms. Rousseau had said.

There was discussion about life and fire codes as they related to the property, and Mr. Johnson said depending on what happened with this application, the Fire Department would then get involved because under the fire code, the property was a boarding house.

Mr. Bogle asked if there was any stipulation about when the excess occupants had to vacate the property.

Mr. Johnson said his letter said immediately, and the applicant had appealed this. He said they were now in the court system, which held up any enforcement from his office.

***The motion PASSED unanimously 5-0.***

Chair McNitt suggested the applicant work with Mr. Johnson on further steps to take.

- F. PUBLIC HEARING** on a petition submitted by Groen Builders, Rochester, New Hampshire, on behalf of Lighthouse Student Ministries, Dover, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-25(B), Article III, Section 175-16(A) and proposed Zoning Ordinance Section 175-54 to build a deck on a nonconforming building. The property involved is shown on Tax Map 6, Lot 3-16, is located at 10 Mill Road, and is in the RA, Residence A Zoning District.

Mr. Groen said in 1997 the current owners removed an existing deck, in order to repair the roof, but at that time did not have the funds to replace the deck. He said they now were proposing to replace the deck that was there before, with some modifications, which would make the deck about four feet in from the edge of the roof. He said they also would like to re-roof the building. He said the deck would be very well designed and elegant, and therefore would not diminish property values. He also noted the deck would give the occupants of the third floor apartment access to a fire escape on the opposite end of the building, explaining that that fire escape would be extended up to the deck level. He said that presently the fire escape extended up to the second floor.

Ms. Rousseau asked if Mr. Groen had authorization to speak on behalf of Lighthouse Student Ministries. She said if this was not available, the hearing could be continued to the next meeting.

Dave Zeely explained that Lighthouse Student Ministries owned the building, and he was on the board of directors. There was additional discussion of the ownership of the property and whether Mr. Groen had been officially authorized to represent the applicant. It was clarified that Lighthouse Student Ministries was a nonprofit organization, and Mr. Groen had authorization to speak.

Mr. Bogle asked if this property was the one where a student fell from the deck, and died.

Mr. Zeely explained that the student had climbed up on the roof and fell from there. He said there were 12 rooms and an apartment in the building, which were rented to students and non-students. He also said there was one business office on the first floor, as well as some ministry offices.

Mr. McNitt asked if the deck was a functional part of the operation and Mr. Zeely said it would make the building a more interesting place to live, but the important function was that it would serve as a fire escape for the third floor.

Mr. Groen said they were very conscious of safety issues, and noted there would be a railing around the deck that was too tall and too thin to sit on, and the posts would be six feet apart instead of the regular eight feet apart to add strength to the deck.

Mr. Johnson said he had not done a building code review, and if the variance were approved, he would check the construction for compliance.

Mr. McNitt asked what the nature of the request for variance was.

Mr. Johnson said this was a mixed use building that was nonconforming, and the request was for a third story outdoor deck on a roof.

Mr. McNitt said to his knowledge this kind of situation was not mentioned in the Zoning Ordinance, and asked if the deck would increase the nonconformity of the building in any way.

Mr. Johnson said it would increase the patio space.

Mr. Gooze asked what was next to the building, and Mr. Zeely said an apartment building was on one side, and a single family home was on the other.

Mr. Johnson noted there had been no response from abutters concerning the application.

Mr. Groen said the deck would not be visible from across the street, and barely visible driving down Mill Road, because it would be behind the roof and set back four feet.

Mr. Gooze asked if the deck would be used mainly as a gathering place for tenants and was told it would be.

Ms. Eng asked if all of the tenants could use the deck and was told that they could.

Mr. Groen said the previous fire escape had narrow, short steps, and was replaced with one that met the code requirements. He said the plan was to continue this up to the deck.

Mr. Gooze asked if this were a conforming, normal size property, the deck would be permitted, if it met the building code, and Mr. Johnson said he didn't look at the situation that way. There was discussion on the roof deck concept, and the fact that it was not specifically allowed or prohibited in the Zoning Ordinance.

Mr. McNitt said he could not see how the deck would increase the nonconformity of the building.

Ms. Rousseau said she could see how it would, but that did not mean a variance could not be granted.

Mr. McNitt asked if there was anyone who wished to speak in favor of the application. Hearing no one, he asked if there was anyone who wished to speak against it.

Annemarie Harris said she had been a member of the Planning Board when the building was approved as a conditional use, to be of a considerably lesser impact on the immediately adjacent RA neighborhood than Acacia. She said the proposal was very limited and noted that as a conditional use, it could not become a greater impact on the RA zone. She said she had heard a lot of noise coming from that building when it was Acacia, and she would be very concerned about having outdoor gatherings on the third floor on this deck, although she said the egress aspect of the deck made sense.

Mr. McNitt asked if she had heard about problems at the property since Lighthouse Student Ministries had taken ownership of the building, and Ms. Harris said she had not, but said the deck would make this impact more likely.

Mr. McNitt asked if Mr. Zeely and Mr. Groen had a response to this.

Mr. Zeely said that when the property had received the conditional use permit, it was approved with the deck. He also noted that the property was alcohol free.

Mr. McNitt closed the hearing.

Ms. Rousseau recommended a site walk, to see how the proposed deck would improve the property, and to get some understanding of the potential impacts that activities on the deck might have. She also said she would like to see supporting evidence of the alcohol free claim, for example, house rules written into leases. She said this could impact the Board's decision, especially because it would be a roof deck, which would be unusual for that area, and because there had been incidents of drunken students falling out of windows around town. She said that because of the public interest, the Board needed to make a good decision on this.

Ms. Rousseau said she would also like to see the conditional use permit, to see how that decision came about, and also said that in addition to the site walk, the hearing should be continued.

Mr. Gooze said his gut feeling was that a third floor deck with parties would be hard to go for, and said that the Lighthouse organization might not own it forever, although noting a condition could be put on an approval concerning this. He agreed a site walk would be good, and that a continuance of the hearing would allow the conditional use permit to be looked at.

***Robin Rousseau MOVED to continue the hearing on the APPLICATION FOR VARIANCES from Article IV, Section 175-25(B), Article III, Section 175-16(A) and proposed Zoning Ordinance Section 175-54 to build a deck on a nonconforming building hearing to the next month's meeting, and schedule a site walk. Jay Gooze SECONDED the motion, and it PASSED unanimously 5-0.***

Board members scheduled a site walk for Tuesday, March 23rd at 3:00 pm.

### **III. Board Correspondence**

### **IV. Other Business**

A. Mr. Gooze asked for reconsideration of the Sally Craft application for variances, explaining that he was in favor of the application at the beginning of the discussion, and changed his mind at the end. He said he had thought about the decision, and said the main reason he had a problem with the application was what it would be doing to the water. He said he had since determined that if a condition were placed on the approval limiting the addition to two bedrooms, this would protect the area if the property changed hands in the future.

Ms. Rousseau encouraged Mr. Gooze to call the Office of Energy and Planning concerning the idea of reconsidering/rehearing the application. There was discussion about the proper procedure to follow on this, and it was agreed that the Board needed a written opinion from the agency. There was additional discussion on the way to proceed.

**5 minute break at 9:55 pm**

***Jay Gooze MOVED to have a rehearing on the Sally Craft application that was decided the previous month. The motion was SECONDED by Linn Bogle.***

Ms. Rousseau asked what the reason was for the rehearing.

Mr. Gooze said he felt that his decision was improperly made, because there were other possibilities he did not, but should have considered at the time. He said his error was not thinking clearly enough.

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

Robin Rousseau left the meeting at this time.

**V. Approval of Minutes**

February 10, 2004

**Page 1**, last paragraph, should read “..when considering these cases.”

**Page 2**, 2<sup>nd</sup> paragraph, should read “..she would think the ZBA would..” Same paragraph, should read “..came before it.”

4<sup>th</sup> paragraph, remove “ Mr. Johnson.....WHETHER TO INCLUDE THE FOLLOWING:” Also, take italics off of remaining paragraph.

**Page 3**, 1<sup>st</sup> paragraph should read “Board members would only know....brought it to their attention.”

5<sup>th</sup> paragraph, should read “..in this most recent posting..”

9<sup>th</sup> paragraph, should read “which would improve the view..”

Bottom paragraph, should read, “Concerning the variance criterion..”

**Page 4**, 1<sup>st</sup> paragraph, should read “..they would not disturb many of..”

7<sup>th</sup> paragraph, should read Annemarie Harris.

9<sup>th</sup> paragraph, should read “..the applicant knew this..”

**Page 5**, bottom paragraph, insert paragraph break after “..granting the variance.”

**Page 6**, 1<sup>st</sup> paragraph, should read “..about the case as it related..”

2<sup>nd</sup> paragraph, should read “..she was doing that so..”

3<sup>rd</sup> paragraph, should read “..Section 4.2..”

2<sup>nd</sup> paragraph from bottom should read “***intent of the Zoning Ordinance..***”

Last paragraph, should read “..Board was keeping within..”

**Page 7**, 3<sup>rd</sup> paragraph from bottom, should read “John Macri,....”

**Page 8**, 1<sup>st</sup> paragraph, should read “John Macri..”

2<sup>nd</sup> paragraph from bottom, should read, “Mr. Macri..”

**Page 9**, 2<sup>nd</sup> paragraph from bottom, should read “..noting that a professional.”

**Page 10**, 3<sup>rd</sup> paragraph, should read “..said he had no way..”

2<sup>nd</sup> paragraph from bottom, should read “Ms. Craft..”

**Page 11**, 2<sup>nd</sup> full paragraph, should read “...was on the side away from the river..”

Bottom paragraph, should read “..he wanted to see her..”

**Page 12**, 1<sup>st</sup> paragraph, should read “..he fully supported her..”

**Page 14**, 6<sup>th</sup> full paragraph, should read “..would look at it if an application came in for...”

**Page 15**, 4<sup>th</sup> paragraph from bottom\_\_\_\_ Cedar Point Road

Also, delete next paragraph, in capital letters,

**Page 16**, 2<sup>nd</sup> full paragraph, should read “..had been permitted for building..”

Next paragraph, should have paragraph break after “..neighborhood already.”

**Page 17**, 5<sup>th</sup> full paragraph, need paragraph break after “..the request for variances.”

3<sup>rd</sup> paragraph from bottom, should read “..shoreland protection act.”

**Page 18**, 3<sup>rd</sup> full paragraph, should read “..the size of the house..”

3<sup>rd</sup> paragraph from bottom should read “..complicating factors.....were approved by the Town.”

**Page 19**, 2<sup>nd</sup> full paragraph, remove capitalized text.

Also, motion beginning “*Linn Bogle*...” should remain as is, and capitalized text underneath it should be removed.

**Page 22**, bottom paragraph, should read, “...Meyer v. Town of Durham..”

Also, same paragraph, should read “..recommendation from the Town..”

**Page 23**, top of page, should read “..that involved a posted..”

3<sup>rd</sup> full paragraph, removed capitalized text.

4<sup>th</sup> paragraph from bottom should read “..she said she would be.”

**Page 24**, 7<sup>th</sup> paragraph from bottom should read “..had previously discussed..”

**Page 25**, top of page, motion should read “Myleta Eng MOVED to rehear the Sheehan case, and..” Capitalized text at end of motion should be removed.

#### February 17, 2004

Minutes should have page numbers on pages

**Page 1**, removed capitalized text under Approval of Agenda

**Page 4**, 3<sup>rd</sup> paragraph, should read “He said he thought the proposed..”

5<sup>th</sup> paragraph from bottom, should read “..Nature Conservancy was concerned..”

**Page 5**, 2<sup>nd</sup> paragraph, should read “..asked if there were any.....to speak to the application.

Next paragraph, should read “..Bagdad Road..”

**Page 7**, 3<sup>rd</sup> paragraph from bottom, should read “Mr. Gooze noted a letter....at the building site at that time, he had..”

**Page 8**, 1<sup>st</sup> paragraph, should read “Bacon v. Enfield.”

2<sup>nd</sup> paragraph from bottom, should read “..said he felt the granting..”

**Page 9**, 1<sup>st</sup> full paragraph, should read ..remain open and undisturbed..”

***Jay Gooze MOVED to accept the minutes as amended. Linn Bogle  
SECONDED the motion, and it PASSED 4-0.***

***Linn Bogle MOVED to adjourn the meeting. The motion was SECONDED by  
Myleta Eng, and PASSED unanimously, 4-0.***

The meeting adjourned at 10:30 pm.

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Jay Gooze, Secretary