

DRAFT

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

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

I. Approval of Agenda

Chair Smith noted that Agenda Item A had been withdrawn, and Item H had been postponed until the May 11th ZBA meeting. He also said there would be a discussion, under III. C. Board Correspondence and/or discussion on a request from David Meyer for a rehearing.

*Jay Gooze **MOVED** to approve the Agenda as amended. The motion was **SECONDED** by Robin Rousseau, and **PASSED** unanimously.*

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.

Withdrawn

- B. **CONTINUED 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, and 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.

John deCampi said he would recuse himself since had not heard the first hearing on this application, and also did not go on the site walk. Chair Smith appointed Linn Bogle as a voting member.

Spencer Groen spoke for the applicant. He summarized that the application was a request to re-install a deck that had been on the building when the current owners bought the building approximately 7 years ago. He said the deck had been removed, and the applicant now was proposing to replace the deck with some modifications. He said the deck would be about four feet back from the edge of the roof, and would have 46-inch high railings. He said the deck would be constructed of mahogany, would be very well designed and elegant, and would retain a nice appearance over the long term. He also noted that although the building currently met fire safety code for egress, the deck would give the occupants of the third floor apartment access to a fire escape on the opposite end of the building, and said the fire escape would be extended up to the deck level. He said that presently the fire escape extended up to the second floor.

Jay Gooze noted that the conditional use permit for the property said no alcohol was allowed, and received verification that the property was still alcohol free.

Robin Rousseau questioned whether the nonprofit status of the property, as well as the alcohol free status would hold up, if the property passed to another owner.

Mr. Gooze asked if the Lighthouse Student Ministries was a nonprofit organization, and Mr. Groen said it was.

Myleta Eng noted that in the conditional use permit, Item 6 indicated the hours when the student center could operate. She asked where the student center was, and Mr. Groen explained it was a lounge on the main floor that had been designated as the student center, and was open to residents.

Chair Smith asked if instead of a deck, the applicant could install a sturdier ladder for egress. Mr. Groen said this could be done, with a wider, cage around it, but said the egress issue was only one of the benefits of the deck. He said the applicant wanted to build the deck for residents, so they would have a private area off the lawn. He noted the property had a small lot.

Chair Smith said in theory he would want to approve this application, but said a big question was what the property would become if it were sold. Mr. Groen said they had thought about that, and said if the building was sold and passed to a buyer without the same requirements, it could be abused. But he said that one could see students all over Durham on roofs that were not as safe as the roof on this building, because they were steeper and did not have escape ladders off the roof. He said their opinion was that students would be on that roof anyway, without the benefit of 4 ft. high rails and a reasonable safe deck, so even if the property went to other hands, it would be a safer situation.

Chair Smith asked if anyone wished to speak for or against the application. No members of the public came forward, and he closed the public hearing.

Mr. Bogle said there were no guidelines in the ordinance to direct them. He said the deck was a permitted use up until the time it was removed, and said there had been no complaints about this group in this building. He said Lighthouse had been a good

neighbor in that location, and he would be inclined to allow them to build the deck, which would be smaller than the previously deck so hypothetically was a little safer than the previous deck.

Ms. Rousseau said that looking at the conditions of approval for the conditional use permit, it appeared that the property had basically been a dormitory space in the past. Noting their decision was far reaching, she said if the property passed hands, the owner might sell it to someone who might not want to maintain the non profit status, and no drinking on the premises. She said the conditions of approval were very specific to this organization, so the property would revert back to a dormitory space if the property changed hands. She said she could not make a far reaching decision on this knowing that someone might jump off that building/deck again, if the property changed hands. She said she couldn't live with that decision, and also noted she had problems with some of the other variance criteria.

Chair Smith said the stipulation that alcoholic beverages would not be allowed on the premises would be continued with the new buyer, but would be difficult to enforce.

There was discussion as to whether a new buyer would have to get a new conditional use permit. There was also discussion as to whether the current use of the property would have to continue if someone else bought the property, or would instead revert back to being a dormitory.

Ms. Eng said she too had concerns about what would happen to the property if it changed hands, and questioned whether it was in the public interest to have a deck where people could party and make a lot of noise in a Residence A area. She said the owner would still have reasonable use of the property if the deck were not put on, and said the deck was an enhancement of the property, but not a necessity.

Jay Gooze said he also had problems with the application because of what the property might become. He noted that the conditions of approval indicated that the Planning Board had concerns because of the residential character of the district, and required that the use be less deleterious to the neighborhood. He said he questioned whether the deck would be more or less deleterious to the neighborhood. Mr. Gooze also said he was disappointed that the Board hadn't heard from abutters, and said the fact that they weren't there made him wonder who the neighbors were who would be affected by this. There was discussion about the neighborhood.

Mr. McNitt said he had spoken with a neighbor, who said she had no objections, and was pleased with the current owner of the property.

Mr. Gooze asked whether, if they allowed the deck, a condition could be put on it that the building would have to be alcohol free.

There was discussion as to whether the present conditional use permit would remain in force if the ownership changed hands.

Code Administrator Johnson said if the ownership changed and they operated the same type of occupancy, an office building with residential use, the permit would probably stay,

and the conditions would stay. He said that if it involved a change of use, it would come back before all of the boards.

Ms. Rousseau questioned the likelihood of finding this type of owner again.

Mr. Gooze said if the new use didn't meet the present conditions, and reverted back to a dormitory, he would want to see conditions put in place concerning this. He said if it reverted back to dormitory space and then had to go before the Boards, he didn't have any problem with that.

Mr. McNitt said if the use changed, it would have to be a conditional use.

Mr. Johnson said the previous use as exclusively a dormitory had been abandoned, so any other use would have to go before the boards, and probably the Council as well, for a conditional use permit, and said the deck on the roof would be part of the considerations at that time.

Mr. Gooze asked whether, if someone wanted to put a deck on a property in a zone in Durham where dormitories were allowed, if they would have to get special permits to do this. Mr. Johnson said yes, because they would be adding a fourth floor to the building.

Mr. Bogle asked if the deck were denied, whether that would impose any obligation on the owners to extend the current stairway up to roof to replace the steel ladder now there, which might not be the safest way to get off the roof. Chair Smith said he believed what was there now was approved.

Mr. Johnson said the existing ladder was grandfathered, and its present state was based on anticipation of approval of the deck. He noted it was the owner's responsibility to maintain the stairway in a safe state, and said if they came in for a minor permit to repair the ladder, he would require that it be up to code, and would include a requirement for a 3 ft. by 3 ft. platform on the roof with guard rails around it.

Mr. Bogle said his reason for asking this was that the apartment upstairs was rented to a young couple with a baby, and the ladder didn't look to him to be a safe way off the roof.

Robin Rousseau MOVED to deny 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. Chair Smith SECONDED the motion.

Mr. McNitt said he wanted to be clear what variance was being given. Ms. Rousseau said it was for increasing the nonconformance of a nonconforming building. Mr. McNitt said the deck was being restored, so he questioned whether this would increase the nonconformance.

Mr. Johnson said the previous deck had been abandoned for seven years, so they had lost the use of it. He said a mixed use, dormitory/office was not permitted in that zone, and

they were looking to create a fourth floor, for outdoor use, that could be used 24 hours a day, 7 days a week.

Ms. Rousseau Robin went through the reasons for denial. She said granting the variances would be contrary to the long-term public interest, noting the Town had not done well with student partying on exterior parts of buildings, and that someone had jumped off this particular property. She said perhaps this particular organization was not an organization that allowed drinking, but the variance went with the property, and could potentially be a problem if it changed hands.

Ms. Rousseau said she didn't think it was a hardship to the owner if the deck were not allowed, and said they already had very reasonable use of the property with the conditional use permit. She said denying it in no way restricted their use of the property. She also said allowing the variance could be contrary to spirit and intent of the ordinance in the longer term, based on the conditional use permit language the Planning Board used, which wanted to make sure the property would not disturb the neighbors.

Mr. Gooze said he agreed with Ms. Rousseau, noting it was a residential area. He said the conditional use permit specifically did not want the property to be more deleterious to the neighborhood, and said the property with the deck would have the potential to be more deleterious. He also said he did not think there was a hardship involved here.

Chair Smith said because of his concern about the long-term public interest, granting the variance would be contrary to this. He also said there was not a hardship because the owner would have reasonable use of their property if the application was denied.

The motion PASSED 4-1, with Linn Bogle voting against it.

- C. **PUBLIC HEARING** on a petition submitted by Elizabeth Brockelbank, Newmarket New Hampshire on behalf of Brian & Diane Hackley, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article I, Section 175-6, Article IV, Section 175-28(B), Article III, Section 175-16(A), Article V, Section 175-41(A), Article XI, Section 175-87; and proposed Zoning Ordinance Sections 175-109(C)(2) and Section 175-86(C) to enlarge an accessory apartment on a nonconforming lot. The property involved is shown on Tax Map 17, Lot 34-5, is located at 15 Kelsey Drive, and is in the R, Rural Zoning District.

Chair Smith noted a letter from an abutter, and opened the public hearing.

Elizabeth Brockelbank said she and her husband had made an offer to purchase the property contingent upon receiving the variances to allow them to enlarge the existing accessory apartment attached to the back of the garage. She said they didn't have blueprints yet, but did have an architect. She noted that the square footage indicated on the application was somewhat inaccurate, and explained the reason for this.

She said they were fortunate that had the opportunity to live in a house together with their parents and children, and said if they thought that enlarging the accessory apartment would cause problems of any kind, they would not have made the offer to purchase the property,

and request the variances. She said they believed granting the variance would support family values in the community, and said the Board's decision would have substantial bearing on their decision whether to purchase the property.

Ann Marie Gray, the mother of Ms. Brockelbank, provided background information on their plans, including photos and a sketch of the proposed addition.

John deCampi returned to the board. He asked what the square footage of the house and the proposed addition to the apartment would be. There was detailed discussion about the square footage numbers.

Mr. Bogle asked if the figures included the basement family room under the accessory apartment. Ms. Brockelbank said it did not.

Mr. Johnson said he had not measured the property, but had the tax card information. He provided this information:

- 2692 sq. ft. – first floor
- 988 sq. ft. – framed garage
- 288 sq. ft. – screened porch
- 1008 sq. ft. – second story
- 224 sq. ft. – patio
- 988 sq. ft. – unfinished attic
- 2116 sq. ft. – unfinished basement

Board members asked if the unfinished basement was located under the house or the apartment, and Mr. Johnson said it was under the main house and also said part of it was under the accessory apartment, which was built a few years ago. He said one of the rooms in the basement had been finished and was accessible only from the garage.

Mr. Bogle asked if the current owners came before the ZBA for the previous expansion. Mr. Johnson said the original addition for the family room never came before the ZBA, and said he did not know why.

Ms. Brockelbank said the addition was made in 1999, and was 1,000 sq. ft., 25 ft. x 40 ft, and they wanted to increase it up to 2,000 sq. ft.

There was detailed discussion about what the 75% of non-accessory apartment square footage/floor space of the building included. Ms. Rousseau read the definition of gross floor area in the ordinance – the sum of all floor areas of a building, as measured from the exterior dimensions, but not including cellars, attics, porches, garages.

Mr. deCampi said the application did not contain enough specific information to work with, and was poorly presented.

Ms. Brockelbank said they had put a lot of work and thought into the application, and had tried to provide as much support as they could, along with numbers from the Town. She said the gray area was that they didn't have a blueprint for what they wanted to add, noting

they had not bought the house yet. She said their architect was present if Board members had questions.

Mr. Gooze asked her what she thought the square footage of the house was, based on the definition that had just been read. Ms. Brockelbank took numbers from the tax card, and said there was a gross living area of 3,700 sq. ft., and a gross area of 8,304 sq. ft.

Mr. Gooze asked if the 3,700 sq. ft. included the accessory apartment there now, and she said it did, but did not include the 725 sq. ft. of finished basement or the garage.

Ms. Rousseau said the 8,304 sq. ft. did include the garage, which it shouldn't.

Mr. Johnson noted that the assessor's definition was different than the zoning definition.

Mr. Gooze summarized that even taking 3,700 sq. ft., and adding 725 sq. ft. for the finished basement, there was 4,400 sq. ft. of living space, with 1,000 sq. ft. of that as an accessory apartment. He said they would like to enlarge this to an approximately 2,000 sq. ft. apartment, so the apartment would be approximately 40%, rather than 25% of the floor space.

Phillip Kendrick, the architect for the applicants, spoke before the Board.

Mr. Bogle noted there were two septic systems, and both were located within the setbacks. He said the plans they had been provided with showed only one septic area.

Ms. Brockelbank showed this location on the drawing. She noted the planned expansion would not increase the number of bedrooms, so would not affect the septic system.

Mr. Bogle noted that a letter had been received from Michael Libby concerning the application. Mr. Johnson said Mr. Libby asked that the letter be read into the record.

Mr. McNitt asked for additional clarification about the proposed addition.

Mr. Kendrick said the expansion would continue the existing apartment out, the shape would be somewhat different architecturally, and the screened porch would be removed. He said the expansion would not exceed 1,000 sq. ft. on one floor, and said there would be a cathedral ceiling for a portion of the apartment.

Mr. deCampi asked if 2000 sq. ft. was really necessary in order to meet the number of rooms desired. Mr. Kendrick said they believed this was reasonable, but said quite possibly they would be under this. He said the problem with the existing apartment was that it was laid out for an individual who was disabled, so everything was made convenient for that. He said there was a very small living space, which they wanted to make into a dining area, and wanted to then create another area for living space. He said the bedroom in the apartment had its own bath, and they wanted to create some home office space as well as a half bath for guests.

Mr. deCampi said some kind of plan on what existed and what was planned would have been helpful.

The present owner, Diane Hackley, spoke, and explained that the accessory apartment was built because her mother had ALS, and said it had been very much needed. She also said she was glad that another multigenerational family wanted to live there in this home.

Mr. Gooze read the letter from Mr. Libby, the abutter. Mr. Libby said he was approached a month ago to sign petition supporting variance approval and at the time was told by the owner that they were merely replacing the existing sunroom with a children's playroom to hasten the sale of the property. He said on more recent discussion with other abutters, and having viewed the plans, it seemed he was deceived about the nature of the project. He said over the five years he had lived there, there had been numerous and large changes to the building on this property. He requested that the variances not be approved.

Christine Tolf, 16 Kelsey Drive, said the view from her sunroom was the side of the building with the garage and the accessory apartment. She said she felt the variances should not be granted for several reasons. She said there were protective covenants that the neighbors on Kelsey Drive were given when they bought their properties. She said she didn't know if they were legally enforceable, but said they had already been completely breached by the adding of the accessory apartment in the past.

She said she had had no ability to protest this at the time it was built, about five years ago, because neighbors did not communicate with her, and said the first she knew about it was when the modular home was brought in. She said she called the building inspector, and was told it was completely permanent and legal and she should just adjust to it. She said she did adjust it, and understood the reason why the apartment was needed, and felt it was better not to saying anything.

Ms. Tolf said another issue was the aquifer protection overlay and septic system concerns. She said she and the other original owners of the houses in the subdivision did not know about the aquifer overlay, but explained that a meeting some years before this addition was added had indicated that some families who owned empty lots on the street might not be able to build on those lots. She said it therefore upset her greatly to know that this accessory apartment was allowed, with the septic system, while other people who had owned lots might be told they could not build on their lots. She noted that since that time, it had been determined that the lots were buildable, within certain constraints.

She also said she was uncertain as to whether both Durham and Newmarket needed to permit the septic system, noting that town lines meant nothing as far as the aquifer was concerned. She said she had always felt the septic system of the property in question was too close to her.

She also said if another half bath was added, along with office space, there was no reason that might not become another bedroom. She said although the finished basement was only accessible from the garage, it made sense to her that this basement was really part of that accessory apartment, and noted a real estate ad that appeared to indicate this.

She also said she was concerned that the property could become a rental duplex, so there would be double density on the lot. She said she didn't believe this was within the character of the neighborhood, as expressed in the covenant for the subdivision, whether enforceable or not. Ms. Tolf said she thought it was very possible that the property could be rented at some point, and allowing the apartment to be enlarged would be setting a very poor precedent. She said she was concerned that already the value of her property had been diminished because of the expansion that had occurred next door.

Ms. Brockelbank said she was sorry about what she had heard from the abutters. She said she had spoken with the abutters about issues and concerns, and said at that time that if there were problems, they would not move forward with this. She said Ms. Tolf had conveyed to her that they could work things out, which is why they had proceeded.

She said she didn't know where Mr. Libby got the misunderstanding, and said she felt badly that he felt deceived. She said she and her family had been very upfront, and tried to reach out to people. She said they weren't responsible for past actions and hurt feelings, but were looking at what the intended use for the property was, and they felt they would be using it for its intended use. Concerning the possibility of the property becoming a rental property, she said the property did not make sense economically as an investment rental property.

Diane Hackley explained that she told neighbors that the Brockelbanks intended to put a family room on, but did not call it a playroom.

The listing realtor for the property, said she had advertised the property, and explained her reasons for advertising it the way she did. She also noted that the Brockelbanks had hired a soil scientist.

Ms. Tolf said she felt badly about the situation, but said it was important for all of these issues to come to light in the neighborhood. She stressed that if the variance were allowed, she would be good neighbor. She said she was concerned that the apartment could be rented, especially if it was a larger size. She said she would like to have quiet enjoyment of the property she had lived in since 1988.

Mr. Bogle asked if all the lots in the subdivision had been sold, and Ms. Tolf said that two were vacant. He asked if any of the five properties had added accessory apartments.

She said she didn't think so, and thought this was not permitted. She said only one dwelling unit per lot was permitted, and lots could not be subdivided. She said she realized the lot had not been subdivided in this case, but said essentially the same result was created, with two homes on an allotment for one home.

Mr. Bogle said he was looking at the covenants, and said that they said that lots shall be used for residential purposes limited to a single-family dwelling. He noted the Board did not have the authority to protect these covenants on properties such as this.

Chair Smith closed the public hearing.

Ms. Rousseau said looking at the application, it was quite confusing what variances the applicant was asking for. She provided details on this, and there was discussion. She noted the applicant was asking for a variance from 175:6, which was not specific enough; and said concerning the request for variance from 175:B – there was no reference. **She said that therefore there were only two variances that the Board could consider – the proposed regulations, which was the 25% and the nonconforming issue, based on what they submitted. PLEASE HAVE THE BOARD DOUBLECHECK THIS**

Mr. Gooze said he was not sure that the addition didn't affect the surrounding properties, noting that the area was meant to be a subdivision of single-family homes, with certain restrictions. He said he was having a hard time determining why this would be a hardship if denied. He said he did feel granting the variances would be against the spirit and intent of the ordinance because the expansion would be too big, and was essentially two houses on one lot. He said the allowance of an accessory apartment didn't mean, if one had a 4-acre lot, an accessory apartment to comprise 40% of the floor space should be allowed. He said the proposed addition was way out of whack with the spirit and intent of the ordinance.

Mr. deCampi said he was sympathetic to the concept of a family wanting to have their parents nearby. He said the problem was what would happen after the Brockelbanks and Grays moved on, when there would be a house with two large dwelling units, one with 3,400 sq. ft. and one with 2000 sq. ft. He said he didn't see any way to require the property to remain a single-family home for all owners, and was concerned about the problems this could create.

Robin Rousseau MOVED to deny an APPLICATION FOR VARIANCES from Article I, Section 175-6, Article IV, Section 175-28(B), Article III, Section 175-16(A), Article V, Section 175-41(A), Article XI, Section 175-87; and proposed Zoning Ordinance Sections 175-109(C)(2) and Section 175-86(C) to enlarge an accessory apartment on a nonconforming lot. The motion was SECONDED by Jay Gooze.

Mr. McNitt said he understood the desire to join the two families together, but said this house, since originally crammed into a cul de sac development, just within the setbacks, had been expanded two or three times. He said that when this proposed expansion was completed, the expansions would be substantially more than the original house. He said this property was out of character with the neighborhood, and would be even further out of character if the expansion occurred. He said granting the variances would be contrary to the interests of the neighborhood as a whole.

Chair Smith said he agreed that granting the variances would be contrary to the public interest given the long-term possibilities of what the property could become, since it would almost be like two separate houses. He said this would affect the public interest negatively, and also said the owners would have reasonable use of the property even if the Board denied the request.

Ms. Rousseau said she would like to read into the record the purpose of the Rural District, so it would be clear why the Board was saying granting these variances was not within the

spirit and intent of the ordinance. THE TAPE RAN OUT HERE AND I DIDN'T REALIZE IT. I BELIEVE THIS WAS READ FROM THE MASTER PLAN.

The motion PASSED unanimously 5-0.

The Board took a 5-minute recess at this time.

- D. PUBLIC HEARING** on a petition submitted by Geoff Sawyer, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article IV, Section 175-27(B) and Article III, Section 175-16(A) to build an addition on a commercial business within the side-yard and rear-yard setbacks. The property involved is shown on Tax Map 6, Lot 11-7, is located at 27-35 Newmarket Road, and is in the **RC, Residence Coastal Zoning District**.

Chair Smith said a letter had been received from an abutter, Dr. McKearnon, who spoke in favor of the application,

Geoff Sawyer, owner of Great Bay Kennels, explained that he was proposing to extend his kennel 14 ft. out, because after being in business for several years, the business had outgrown the reception area and other parts of the kennel. He said he would like to create a more ample reception area, noting people came in with dogs and cats, and the area had gotten shop worn, and could get rather hectic at times. He said this area hadn't been improved in ten years. He said he also would like to enlarge the staff's kitchen area, and to build a room for exotics, noting there was quite a demand for boarding of these animals, mainly birds, and right now they had to be boarded in the cat room.

Mr. Sawyer said he would like to construct a second rest room, and a private office, and said they were also severely in need of storage. He said they would also like to add some cat condos, remodel the grooming room, and add an apartment for the manager. He said he believed the construction would make the business look considerably better and more professional, and this would add value to the Town, because the business provided a valuable service. He said he felt strongly that if the application were denied, it would be a hardship.

Mr. deCampi asked when the property line which had the setback problem was split off, creating the adjacent lot. Mr. Sawyer said it was subdivided 3 years ago, so the veterinary hospital could be built there. He said both facilities worked well together.

Bill Schoonmaker said he was serving as Mr. Sawyer's architect. He described the present layout of the kennel, and said that at the time of the subdivision, they didn't know the Sawyers would need to be expanding. He said the current configuration of the kennel was that the administrative portion was the portion closest to the property lines. He said adding the addition would put it within the setbacks of the property lines.

Mr. Gooze asked if any expansion could be done without encroaching more on the setbacks. Mr. Schoonmaker described other features on the property, and said the logical place to expand was in the front. He said the addition was 14 ft. x 40 ft. across the front, and said the two setbacks were exceeded by 7 ft. and 13 ft respectively.

Mr. Bogle noted this would be a two-story addition, but the current building had a shed roof, and was one story. He said it appeared the plan was to build a 14 ft. wide, 2-story structure, 40 ft. long. He asked about the ultimate dimensions of the second story of the building.

Mr. Schoonmaker provided more detail about the layout of the proposed addition, and noted the second floor would include the apartment and an area for boarding the cats. He said the current area downstairs for the cats would become storage. There was discussion as to whether this would represent an increase in the cat space, and Mr. Schoonmaker said there would be a small increase.

Mr. Gooze asked if the number of animals would increase, and Mr. Schoonmaker said there would be room for eight more cats, no room for more dogs, and a small room for exotics downstairs. He said this represented approximately a doubling of the cats. He said there were 42 pens for the dogs.

Mr. Bogle said if dormers were put on the building, it would essentially be a 3-story house. Mr. Schoonmaker said that was true, but at present was planned as storage. Mr. Schoonmaker said currently from Newmarket Road, one could see the roof of the building, so with the increase of approximately 9 ft., one could see the gable end of the building.

Chair Smith asked if any members of the public wished to speak in favor of the request or in opposition to the request.

John Turcotte, said he was an attorney representing Dr. Congdon, who lived at 25 Newmarket Rd, next door to the property. He asked that his letter be included in the record.

Chair Smith noted the Board had just received it, and asked him to summarize it for them.

Mr. Turcotte congratulated Mr. Sawyer on his successful business, but said that this success was the crux of the problem. He noted the building in question was located between the veterinary hospital and his client's house. He said the veterinary lot was created by the applicant in 1999, when he had established the lot lines and consequently the setbacks, from which he was now seeking a variance.

Mr. Turcotte said the present use was permitted in the district, but said his client objected strongly to granting the variance because it would constitute a nuisance to his peaceful enjoyment of his property. He said there was a constant barking of dogs that could be heard from his property, and also said the successful business was generating a lot of traffic on Newmarket Road, which his client felt was a safety hazard. He said that during rush hour, cars stacked up and blocked access to and from his client's property.

He said the proposed expansion was inconsistent with the character of the residential neighborhood, and to the extent there was a hardship for the applicant if the application

was denied, this would be because he created it when he created these internal lot lines, when the subdivision took place.

He said his client felt granting the variance would be contrary to the public interest because of the public safety issues created by the traffic generated by the commercial use. He said they also felt the expansion would not be in concert with the historic district, noting the expansion was not within district, but the expansion would affect the historic district because of the noise and traffic that would be generated in the district. He also said the noise would impact the aesthetic value of this area.

Mr. Turcotte said there was not an unnecessary hardship, and the hardship was self-created. He said there was clearly established case law that the applicant bore a much greater burden in proving hardship in this kind of situation. He said denying this application would not affect the current status of the business, and also noted the two lots were separate, and although complimentary now, might not work in concert in the future.

He said granting the variances would not be consistent with the spirit of the Ordinance, noting the expansion of this commercial use in the residential neighborhood violated its character, was an expansion of an already nonconforming building, and would exacerbate traffic flow problems at the site. He said it was not in keeping with the standards of the historic district, or the purpose and intent of the residential coastal district. He said what was being talked about here was intensifying a commercial use.

Attorney Turcotte said substantial justice would not be done by granting the variances, noting that the business had been expanded incrementally over time, and the question was, when it would stop. He said the line had to be drawn somewhere, and noted that the residential neighbors had consistently opposed this expansion.

He also said granting the variance would diminish the value of surrounding properties, noting that the noise, traffic, and other problems were not in keeping with the residential character of the neighborhood, and would have a substantially adverse impact on the values of surrounding residential properties.

Ms. Rousseau asked Mr. Turcotte when his client purchased his residence, and he said it pre-dated the kennel, and also noted he had opposed the kennel.

Mr. Gooze asked if the kennel had been an approved use in that zone, and was told it was permitted in the RC zoned.

Mr. McNitt asked how the existing building was nonconforming.

Mr. Johnson said he didn't know the history of the subdivision, but said the kennel was there, and then the subdivision was done that put the hospital in. He said he was surprised it didn't come to the ZBA. He also said the parking spaces were considered structures and would have to meet the setback requirements, etc. so were probably nonconforming.

Sharon Griffin, 28 Newmarket Road, Mill Pond Trust said she lived across the street from the property, and said there were several reasons why she was against granting the

variances. She said Mr. Sawyer had previously applied for two variances in the past five years, and each time, had proposed one thing and done something quite different. She provided details on this. She said it would be dangerous to grant a third variance, because based on past experience, she believed he would over-expand within this variance, and create further problems for the neighborhood.

She said the business had already created several problems for the neighborhood, and expanding would only make them worse. She said the property had gone well beyond light commercial development, and was now full commercial development. She said the use violated what she understood should take place in the historic district, and noted that she had protested this at the Historic District Commission, but had not been successful, noting Mr. Schoonmaker was the Chair of the commission.

Ms. Griffin said she was certain that the kennel was seriously depressing property values in the neighborhood because of traffic and noise. She noted her organization and the Mill Pond Center were trying to preserve open fields and protect the quality of life in town and in the historic district, yet this kennel was right across the street. She also said the application was too vague, and was nervous about this.

Chair Smith noted Ms. Griffin had said Mr. Sawyer had gotten a permit for a shed and it became a doggy day care center, with an office and a chain link compound. He questioned why someone didn't step in to stop this. There was discussion about the permit for the shed.

Chair Smith asked if someone would like to provide rebuttal to the two previous speakers.

Mr. Sawyer said they had done everything they could do keep the noise down, and be good neighbors. He noted a special meeting was called because neighbors said they were too noisy. He said Ms. Griffin and Mr. Congdon took them to court over this, and were found not to be violating noise ordinances, so their petition was rejected. He said the dogs barked occasionally but not constantly.

He also said there was a bit more traffic, but nothing compared to the volume of traffic on Route 108. He said they were pre-zoned to build a boarding kennel, and said none of what they did was in the historic district except for some of the daycare area, and said the fence was allowed. He provided details on the modular classrooms that were used for the doggy daycare, etc.

He said they had never applied for a variance before, noting that when the hospital was created, that went through the Planning Board. He said he had tried to be a good neighbor, and most people who knew their reputation as a business would verify that.

Mr. Schoonmaker said at the time the hospital was put in, the driveway was widened to ease any traffic crunch, noting that originally there had been an issue with cars stacking up on Route 108, waiting to exit the single car driveway coming down off the hill. He said that if there was a backup, it was in large part due to the traffic volume on Route 108.

He said there were generally one to two cats per condo, with a maximum of two. He said the doggy day care building sat well out of the Historic District area, so had been of no interest to the Historic District Commission. He also said the fence was not deemed to be a structure by the previous building inspector, so was not brought up by the Commission.

He noted that while as Chair of the Commission, as a rule he would recuse himself if a client came before the Commission, and said he couldn't remember specific incidents where he had to wear two hats. He noted he represented Dr. McKearnon regarding the veterinary hospital, but had nothing to do with the doggy daycare.

Mr. Schoonmaker said that when the kennel first opened, there were open runs, and about seven years ago, some additional runs were put on, which the Planning Board gave approval for. He said there was considerable concern about noise being generated, and Duane Hyde, the Planning Director at the time, got Mr. Sawyer together with the neighbors, and came up with the solution where Mr. Sawyer agreed to completely close over the pens with a roof. He noted there were already solid walls on all sides of the pens.

Chair Smith asked if a car wanted to turn into the kennel, coming from Durham, if other cars could get by, going south. Mr. Schoonmaker said it probably could not, but not because of traffic generated by the applicant's business, because of traffic on Route 108.

Anita Pilar, 26 Newmarket Road said she was an abutter, although her name was not included on the abutters list. She said although there was a lot of traffic on Route 108, the business had added significantly to it. She said her house had a clear view of the driveway and there were cars constantly going in and out. She said the cars did back up, and when cars tried to go around them they sometimes went a bit onto her property.

There was discussion as to why Ms. Pilar, as an abutter, did not receive legal notification of the meeting.

Mr. Gooze read a letter from the Mill Pond Center, which asked the Board to delay the decision regarding the Sawyer property application for variances. The letter said the Board of Directors met once a month, and had received notice after their April meeting. It said the Board would like more detail as to the nature of the use and its potential effect on traffic, and would like to consider their position on the proposed variance at their May meeting.

Chair Smith closed the hearing.

Mr. deCampi said the kennel was clearly a permitted use in the zone, and said most of the objections heard didn't relate to the addition, but to the fact that the property was a kennel. He said it seemed to him that this issue had been decided, and these objections were not reasonable in relation to the planned addition. He said he had been at the kennel and veterinary hospital on occasion, and they both ran good businesses. He said they didn't seem terribly noisy, and said while he agreed there was a potential problem with Route 108 traffic, he didn't think it was fair to hold this against the applicant.

He said his initial reaction was that this was a self-created hardship, because of the way the lot lines were drawn. But he said he became less concerned about this because if the Board decided the addition couldn't be built within the setback, the building would probably still be built, but along the side instead of in front. Mr. deCampi said he was inclined to think this application was not unreasonable, but said he was interested to hear what others had to say.

Mr. Bogle said it seemed when he looked at the plan that it was a fairly large addition, and wondered if it could be cut down a bit. He also asked if it could be added on the side instead of in the front, as proposed. He noted he had taken his dog to this kennel and it was a good business.

Mr. Gooze said he was in favor of the application. He said as he went through the letter from Mr. Turcotte, he could come up with a different view point for each of the points that were made, because the things that were being complained about were already there. He said there would be no appreciable noise or traffic increase. He said the hardship issue was tricky, but said because the use was already there, and was working, he would be able to say there was a hardship if the application was denied.

He said concerning consistency with the spirit of the ordinance, the kennel was a permitted use at the time it was built. He also said he didn't agree that substantial justice would not be done by granting the variance. Mr. Gooze said he might have changed his mind if more dog kennels were planned, but said what was planned would not affect the situation enough to make a difference.

Ms. Rousseau said she questioned whether Mr. Bogle and Mr. deCampi should sit on the Board if they were regular customers of the applicant. There was discussion about this.

Mr. Bogle said his dog had died six years ago. Mr. deCampi said if he had felt that having used the kennel would have any impact, he would have recused himself. He also said that sometimes, knowing more about something could give one a clearer vision of a situation.

Ms. Rousseau said she wouldn't be prepared to make a decision about the application without a site walk.

Ms. Eng said she would like to hear what the Mill Pond Center Board would have to say about this. She suggested that perhaps the hearing could be continued to the next meeting, and perhaps the site walk could also be done before the meeting.

Mr. McNitt said he tended to agree with Mr. Gooze, that the addition would not change the situation. He said he thought there was a measure of hardship in not being allowed to expand, noting Mr. Sawyer was trying to operate his business under difficult conditions. He also said the capacity was not being increased substantially. He noted that a plus of the addition was that the kennel was located in a neighborhood of beautiful old houses, and the kennel was an eyesore visually, so the proposed changes would make it look more like a residence, and the design would improve the appearance of the building. He said he would be in favor of the application, and had done a site visit. He noted there were times he could hear sounds from the Mill Pond Center, but had never heard the kennel.

Chair Smith said he had real concerns about expanding this structure further into the RC district. He said he realized it was a permitted use, but said the Board's concern was whether to grant a variance for an expansion, especially one further into the RC district. He said he tended to think it would be contrary to the public interest, and contrary to the spirit and intent of the Ordinance. He also noted this was a large addition, which could be smaller, and could be moved to the side, which would make it less in violation of the district requirements. Chair Smith said he didn't see an unnecessary hardship in denying the variances, because they could go back to the drawing board and come up with something better.

Mr. Gooze said the variance was for the side setback, and Mr. McNitt said the encroachment was into the setback on the property Mr. Sawyer created in 1999.

Chair Smith said he had misunderstood this

Mr. deCampi said putting the addition on the side, toward the cemetery would make it more obvious from the road and less attractive.

Chair Smith asked if Mr. deCampi saw it would be a true hardship to move it around to the side. Mr. deCampi said it was a less logical way of building, so would force a less optimum use of the building footprint. He said to that extent, it might be a hardship. He also said he was trying to look at it from the point of view of what was desirable for the community, and said it would be more desirable for the community to build the addition as proposed.

Chair Smith said he still could not see this denial as being an unnecessary hardship because the applicant had other options.

Mr. Gooze said he didn't need a site walk, had been there and understood the traffic problem. There was discussion about the need for a site walk, and Ms. Rousseau said she seemed to be the only Board member who would like one.

Mr. deCampi MOVED to grant the APPLICATION FOR VARIANCES from Article IV, Section 175-27(B) and Article III, Section 175-16(A) to build an addition on a commercial business within the side-yard and rear-yard setbacks. The property involved is shown on Tax Map 6, Lot 11-7, is located at 27-35 Newmarket Road, and is in the RC, Residence Coastal Zoning District. The motion was SECONDED by Jay Gooze.

Mr. Johnson said the variances under consideration were regarding setbacks for the addition, but said the applicant would also have to meet zoning requirements related to parking, a residential septic system, and said there were also questions about the modular buildings that were added. He said the Board would have to decide on multiple variances, and said the applicant would also be going before the Planning Board for site plan review.

There was discussion about why all the variances needed weren't listed on the agenda. Mr. Johnson said the application came in the day before the deadline, and his office did

not have the complete site plan yet, so he did not have the chance to review all the issues regarding the site.

Mr. Gooze asked if they were limited to making a decision based on what was on the agenda. There was discussion about this. Mr. Bogle asked if the Board should perhaps vote this down and have the applicant reapply.

Mr. Johnson said if the application were continued to May, this would give the applicant time to clarify some of these other issues, and give the Town time to review the history of the kennel and details of the site.

Mr. Bogle said he saw no point to vote on this if there were multiple variances that were still required.

Mr. deCampi said he willing to withdraw the motion and continue the hearing, but like Mr. Gooze, saw this as one issue, whether the applicant could violate the 50 ft. setback. He asked if the applicant would like another month to see if the application needed to be broadened, or would he prefer that the Board vote on the one issue.

Mr. Gooze said he agreed with Mr. deCampi that they should ask the applicant, but said otherwise he would feel very uncomfortable not voting on this one issue, and basically pulling the rug out from underneath the applicant.

Mr. Bogle said it didn't seem that the application should have come to them. He said it was submitted too close to the meeting date, and the Code Enforcement Officer didn't have time to write a letter to them and lay out what variances were needed. There was discussion as to who was to blame for the confusion.

Chair Smith asked if Mr. Sawyer would be willing to continue this for another month. Mr. Sawyer said he would leave the decision in the Board's hands. He said they were hoping to start construction as soon as possible. He said he didn't think parking was a problem because there were spaces added to the site plan. He also said he had contracted with NH Soils to do another plan for the septic system if needed, but said the existing system was built larger than necessary, so there was quite a bit of reserve room. He said if there was a problem with the system, they were prepared to add to it.

Mr. Schoonmaker said he would not be available at the next meeting.

Mr. deCampi said he was willing to withdraw the motion, but Mr. Sawyer had said he would like the Board to consider it. He said he would therefore ask for the vote.

The motion FAILED 2-2-0, with, Chair Smith and Ted McNitt voting against the motion, and Robin Rousseau abstaining.

Mr. Schoonmaker asked what additional information would be required in order for the applicant to come back. There was discussion about this.

Chair Smith said because it was past 10:00 pm, the remaining applications would be heard on April 27th.

III. Board Correspondence and/or discussion:

- A. **REQUEST FOR REHEARING** on a February 10, 2004, decision of the Zoning Board of Adjustment to deny a petition submitted by David S. Duplessis, Rye, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a December 29, 2003, letter from 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.

Chair Smith said there was a letter from Mr. Duplessis to go ahead even though he could not be there. Chair Smith asked the Board to put aside the nature of the language of the letter, and stick with the essence of the issue, which was that there had been nothing professional documented from Mr. Duplessis indicating what the dimensions were.

Mr. McNitt said he would recuse himself because he was not at the meeting where this application was heard.

Chair Smith appointed Ms. Eng as a voting member.

Mr. deCampi said the applicant made the suggestion that the measurements Mr. Johnson had were not correct, and said he was now contending that he had re-measured the dimensions, and they really were different. He suggested Mr. Johnson should re-measure the dimensions and decide whether to rehear the application based on what the measurements were.

Chair Smith said the applicant had had 60 days to do this, and the Board had received nothing from him other than his letter. He said Mr. Duplessis had every chance to get a professional to measure the dimensions within this time period.

There was discussion as to whether any actual additional information had been presented, and it was agreed that nothing new had been presented.

Mr. Gooze said he didn't believe they had made any legal errors in the previous decision.

Jay Gooze MOVED to deny the REQUEST FOR REHEARING on a February 10, 2004, decision of the Zoning Board of Adjustment to deny a petition submitted by David S. Duplessis, Rye, New Hampshire for an APPEAL OF ADMINISTRATIVE DECISION from a December 29, 2003, letter from Zoning Administrator, Thomas Johnson regarding the occupancy of the dwelling. The motion was SECONDED By Robin Rousseau.

Mr. deCampi said he would vote against the motion. He said if Mr. Duplessis was correct, the fact that he had presented his information in a sloppy way shouldn't be held against him, and the Board should give him the chance to have a re-measurement, whether done by Mr. Johnson or an outside professional.

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

- B. **REQUEST FOR REHEARING** on a February 10, 2004, decision of the Zoning Board of Adjustment 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. The property involved is shown on Tax Map 12, Lot 1-21, is located at 18-20 Cedar Point Road, and is in the RC, Residence C Zoning District.

Mr. deCampi said he had come to question his decision on this, because the house was painfully small as it presently was, and he doubted that some extension would jeopardize the shoreland. He said he was inclined to think they should have granted some extension to the house. He said he was willing to rehear the application, but noted he didn't think the Board made factual errors in the decision.

Chair Smith noted the letter from the Attorney for the Hartmanns.

Mr. Gooze said the letter referred to the tax card as saying the total living area was 1,049 sq. ft. There was discussion as to whether this was new information, or reliable information. Both Mr. Gooze and Ms. Rousseau said they didn't see anything new or interesting that the Board needed to reconsider.

Mr. McNitt said part of the problem was that the people doing the expansion on the site were inept, and had annoyed the neighbors. He said he agreed with Mr. deCampi's point, and noted that almost every other house on Cedar Point Road had been expanded. He said he had sympathy for the situation the current owners faced.

Ms. Eng said it wasn't the current owners who had moved the house, and said the Hartmanns bought the property after the construction was done, so they shouldn't be held responsible for how the neighbors were feeling,

Board members discussed the recent history of the site and what work had been done there.

Ms. Rousseau said it was not a good idea for the Board to question its judgment, given the same information that had been presented previously.

Board members discussed in detail what the proper grounds for rehearing an application were, and Ms. Rousseau asked for a legal opinion on this.

Mr. McNitt MOVED to grant the REQUEST FOR REHEARING on a February 10, 2004, decision of the Zoning Board of Adjustment 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. The motion was SECONDED by John deCampi. The motion PASSED 3-2, with Jay Gooze and Robin Rousseau voting against it.

- C. **REQUEST FOR REHEARING** on a March 9, 2004, decision of the Zoning Board of Adjustment to deny a petition submitted by David Meyer, Satellite Beach, Florida, 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.

Mr. deCampi said he would recuse himself, since he was not present the last time this matter was heard.

Chair Smith appointed Linn Bogle to be a voting member.

Ms. Rousseau asked Mr. Johnson to provide some background information on why the Board was seeing this again. Mr. Johnson provided this detailed history to the Board, and said if the rehearing were denied, the applicant would roll everything into one court case on June 3rd.

Ms. Rousseau asked if there was any new evidence, noting she hadn't seen anything new. Mr. Johnson said there was some tax card information the applicant thought was important.

Mr. Gooze said what was being called new evidence was information the Board had already considered. He also said the claim was made that the Board's decision was unreasonable, and was prejudiced against student housing, and said he disagreed with the statement.

Ms. Rousseau said she saw nothing new, and did not see any errors in procedure, so would vote against the request for rehearing.

Mr. Bogle said the letter showing that someone was living upstairs in the 1960's didn't indicate to him that this was a duplex. He also questioned when Mr. Meyers split the main house into two parts. He said there were no permits to do this, and provided additional detail as to why the property should not be called a duplex.

Mr. McNitt MOVED to deny the REQUEST FOR REHEARING. Linn Bogle SECONDED the motion and it PASSED unanimously.

IV. **Approval of Minutes** – March 9, 2004

It was agreed by consensus to postpone this until the April 27, 2004 meeting.

V. **Other Business**

Mr. Gooze noted the Board received a lot of information, some of which came in right before the meeting, and said he sometimes found himself reading through this information while people were talking. He said he was reluctant to ask for a continuance in situations like this, especially

when the information came from protesters, because it was a punishment to the applicant, but noted that if an applicant did this, he would be more willing to continue a hearing.

Mr. Bogle asked if there was some way to have a cut off date, to avoid seeing incomplete applications. He said he had felt for some time that this was a problem, and suggested they should have a cutoff for the presentation one week before the meeting. There was discussion about how to handle this.

Ms. Rousseau agreed to develop a draft motion to amend the ZBA rules to deal with this situation, and it was agreed that Board members could discuss this motion and improve upon it if necessary.

Mr. Johnson noted that the January 2004 minutes had been amended concerning the horse barn on February 17, but said these minutes as amended had never been approved by the Board.

John MOVED to approve the amended January, 2004 minutes. The motion was SECONDED by Jay Gooze and PASSED 4-0-1, with Robin Rousseau abstaining.

VI. Adjournment

Chair Smith said there was a State Planning conference on May 8th, and urged ZBA members to attend it.

He also said there would be an additional ZBA meeting on April 27th, and also said a new Chair and Vice Chair would need to be elected in May.

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

The meeting ADJOURNED at 11:05 pm

Myleta Eng, Secretary