

D-R-A-F-T

ZONING BOARD OF ADJUSTMENT MINUTES TUESDAY, JUNE 8, 2004 TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL 7:00 P.M.

MEMBERS PRESENT: Chair Henry Smith, Jay Gooze, Ted McNitt, John deCampi, Linn Bogle, Sally Craft

MEMBERS ABSENT: Myleta Eng

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

MINUTES PREPARED BY: Victoria Parmele

I. Approval of Agenda

Chair Smith noted that Linn Bogle had been elevated to the status of a regular member of the ZBA, and also welcomed Sally Craft as a new alternate member.

He said that Item II H would be continued until July. There was discussion about moving the July meeting from the 13th to the 20th. Code Administrator Johnson said he would not be available until July 25th.

John deCampi MOVED to approve the Agenda, with the exception of deletion of Item II H, and to change the meeting date to July 20th. The motion was SECONDED by Ted McNitt and PASSED unanimously.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Maria Millett, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a May 11, 2004, letter from Zoning Administrator, Thomas Johnson, regarding the possible use of a kennel on a property. The property involved is shown on Tax Map 18, Lot 12-4, is located at 5 Stagecoach Road, and is in the R, Rural Zoning District.

Maria Millett, said she had lived at this location since 1988. She said her dogs were all pets, and said she was not running a kennel. She said her dogs included a 15 year old lab; a 10 year old pit bull, which she had had since 1992; and a female she had had since 1994. She said the rest were younger dogs, and said all the male dogs except two had been neutered.

She said that in 1999 when she had more than 2 dogs, she asked former Code Enforcement Officer Richard Hunsberger what she needed to do to be in compliance. She said he stated that as long as she did not put up any structures, she was fine. She said her property had 150 ft runs, with one dog up front, and some in the back, and said the dogs were never off leashes, and were well maintained. She said there had been no incidents of fighting, and also said there had been many children on her property over time. She said she had a letter from the Town Clerk, and said she was confused because she felt she had done everything right with licensing and that the dogs were well maintained

She said she was very concerned that no one in the neighborhood came to speak to her about this issue. She said she ran an herb business, with people in and out all of the time. She said she was very conscious of her neighbors, and said the dogs outside didn't bark, except at feeding time.

Chair Smith asked Ms. Millett about how many litters her dogs usually had per year. Ms. Millett said there was usually one per year. She provided additional details about this, and explained that there would not be any selling of the puppies.

Mr. deCampi asked what revenue, if any, Ms. Millett received from selling or boarding dogs. He said this was pertinent under the new Ordinance. Ms. Millett said she did not receive any revenue. She said she did not want to run a kennel.

Chair Smith asked if anyone wished to speak for or against the Appeal of Administrative Decision.

John Caswell, 19 Stagecoach Road, said these dogs had never caused any problems. He said they were pets and nothing more.

Sherry Caswell, 19 Stagecoach Road, said she had lived in this neighborhood for 30 years. She said Ms. Millett's dogs were pets, and had never caused any problems. She said she had sheep, and the dogs had never come after them, and also said she had had many other animals, so knew what it was to have a pet. She said she didn't understand how someone in the neighborhood could write a notice like that about what people could and could not do in their yards. Ms. Caswell said she had been to Ms. Millett's property, and saw how well she took care of her dogs. She noted that the dogs were moved around for training purposes, and said they were wonderful dogs.

Pat Cowhig said she had a professional relationship with Ms. Millett, and that any time she had gone on the property, there had never been a problem with the dogs. She said she had never seen any type of kennel being run on the property, and said the dogs were just pets.

Mr. Caswell asked how someone a mile away could talk about dogs barking.

Rhonda Peeva said she did business with Ms. Millett, so had been on the property a lot. She said her son had played with the dogs, and said they were hooked outside when she drove on to the property.

Chair Smith asked Ms. Millett if she brought all the dogs in and night. Ms. Millett said some came inside, but some lived outside in dog houses.

Paul Runcy, 2 Meader Lane, said there might be some confusion about the word kennel in the Zoning Ordinance. He also said he knew of a dog that was injured by one of Ms. Millett's dogs, and said that it was sometimes uncomfortable when he walked by with his dog, because of all the dogs on the property. He said his concern was that this should not be a commercial kennel, but said it sounded like it was not a kennel.

Jeff Paquette, explained that the Homeowners Association had sent out the memo, but not to the community at large, and said the association tried to keep an eye on what went on in the neighborhood. He said the cul-de-sac area was a good place to walk dogs, so he had been seeing a lot of dogs in this area. He also said he had seen the word kennel being used, so was reacting to this, and said that perhaps an apology was in order.

Sandra Smith, 50 Ross Road, said that use of the word "kennel" in the petition/memo was extracted from the public record, and said the homeowners' association did not come up with the word. She said she would like to reassure Ms. Millett that the neighborhood was not against her, if she didn't want to run a kennel on her property. Ms. Smith said she wanted to make sure that anything coming out of the meeting didn't use the word kennel.

Ms. Smith also noted that of 40-50 households that had voiced their concerns about the property being used as a kennel, three of the owners had been on the property to do business but had been scared away by the dogs. She suggested that perhaps Ms. Millett could have an open house so the neighbors could get to know the dogs.

Linn Bogle asked if dogs had been loose when one of the neighbors had been on the property and had been scared by the dogs. Ms. Smith said the dogs were on runs, but were not loose, and said it was the energy of the dogs that scared her friend. She said it was a matter of perception, and said this could impact Ms. Millett's business.

Charlene Houston asked about the genesis of the word kennel, and said she had made an inquiry about this with Code Enforcement Officer Johnson. She asked if there was a limit on the number of dogs that could be on the property at one time.

Doug Baker, 1 Stagecoach Road Hickory Farms Inn, said he had been a neighbor of Ms. Millett for 11 years, and said he had tried to have a "live and let live" attitude about the property. He noted that the dogs had gotten loose a few times and had gone on to his property, and said the problem was they were supposed to be tied up, but broke their leashes. He said the dogs shouldn't be out there on hot days, and also said they scared people away from doing business with Ms. Millett.

Jane Brown Sparks said she was the general manager, and also the potential new owner of the Hickory Farms Inn. She said she was happy to hear the property would not be a kennel, but said she shared others' concerns about the number of dogs there. She asked the Town to make sure that Ms. Millett kept the dogs tied well, and perhaps to get her to bring them back

from the road a bit, noting that it was scary to walk up that road sometimes. She said Ms. Millett needed to be able to keep her pets.

Ms. Millett thanked neighbors who spoke on her behalf, and showed the Board the bolts she uses to fasten the dogs so they would not get loose. She said that she was conscious of joggers and walkers, and waited until the time of day when they were gone before letting her dogs out.

Chair Smith asked how many times the dogs had broken loose. Ms. Millett said this had happened on two occasions.

Chair Smith received clarification that there were 10 dogs presently on the property, and asked if Ms. Millett intended to get any more dogs. Ms. Millett said she didn't intend to get any more dogs, and noted that two of the ten dogs were older animals.

Chair Smith closed the public hearing.

Mr. deCampi said this seemed to be a narrow matter, and said whether the dogs were good neighbors didn't seem to be relevant. He said the issue was whether Ms. Millett was running a kennel, within the definition of the Durham Zoning Ordinance. He noted that she had testified that she believed she was not, based on a conversation with Mr. Hunsberger, while Mr. Johnson had concluded she was, based on the Ordinance.

Mr. deCampi said the new Zoning Ordinance passed on May 10th had revised language concerning kennels, defining them as facilities for boarding for compensation or breeding for sale. He said that in context, Ms. Millett was correct that the property did not qualify as a kennel. He said this did not mean that the dogs would not occasionally be a problem, but said it was not the ZBA's role to deal with this aspect of the issue. He said Mr. Johnson's administrative decision was probably correct when it was rendered, but was not correct now.

Jay Gooze said he agreed with Mr. deCampi, and that under the new Ordinance, the application would not have to come before the Board. He said he saw no reason not to give Ms. Millett the benefit of the doubt in this case because of the new Ordinance, and said he wouldn't consider the previous Ordinance, and whether the Town had or had not previously said this kind of land use was a kennel. He noted that the Board was deliberating on an administrative appeal, and also pointed out that the wording in the appeal was not worded very specifically. He said his decision was that this was not a kennel, and said he would therefore support Ms. Millett's appeal.

Mr. McNitt said he agreed with the comments of other Board members, and also noted that apart from the definition, there was a common understanding of what a kennel was, and this was obviously not a kennel.

Mr. Bogle said he agreed that under the new Ordinance this was not a kennel, since there was no commercial activity there, and said he supported the appeal of the administrative decision.

Sally Craft said she agreed that this was not a kennel because they were dealing with the new Ordinance, but noted that if the Board had been using the old Ordinance, they would have had to deliberate more on the application.

Chair Smith said he agreed with other Board members, and said his only concern was that Ms. Millett did not increase the number of dogs she had, and that the dogs got along with the neighbors.

Mr. Gooze noted that Code Administrator Johnson's decision was appropriate, under the old Ordinance, and said he had made the best decision possible considering the wording in that Ordinance.

Mr. deCampi described various ways in which the Board could proceed on this application, and asked Mr. Johnson what his preference was.

Mr. Johnson said he would prefer that the Board approve the request for appeal of the administrative decision, so this issue would become part of the public record.

John deCampi MOVED to uphold the Appeal of Administrative from a May 11, 2004, letter from Zoning Administrator, Thomas Johnson, regarding the possible use of a kennel on a property. The property involved is shown on Tax Map 18, Lot 12-4, is located at 5 Stagecoach Road, and is in the R, Rural Zoning District. The motion was SECONDED By Jay Gooze, and PASSED unanimously.

- B. **PUBLIC HEARING** on a petition submitted by Christopher T. Regan, Bamford, Dedopoulos & Regan, Durham New Hampshire, on behalf of Joyce Tawney, Wilmot, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7, Table 11-1 of the Zoning Ordinance to increase the occupancy of a dwelling. The property involved is shown on Tax Map 4, Lot 18-0, is located at 10 Woodman Road, and is in the RA, Residence A Zoning District.

Attorney Chris Regan spoke before the Board, and said the applicant was also present. He noted that Mrs. Tawney had been before the Board previously asking for an appeal of an administrative decision on this property. He said this time they were asking for a variance from the requirements of the dimensional tables, specifically, the limitation of one unrelated occupant per 300 square feet of a single attached dwelling. He said the request was to allow 4 unrelated persons to occupy the dwelling.

Attorney Regan again provided history of the property for the Board. He said it had been in continuous use since 1984, and said this predated the "more than 3 people" provisions. He said that Mr. Johnson had calculated 1,021 sq. ft. of habitable area in the building, and provided details as to why the correct habitable area figure was 1,366 sq. ft. He said the dwelling had at least 4 legal bedrooms, and the issue came down to what was considered the habitable square footage in the building.

Attorney Regan spoke about several conditions the applicant was willing to meet in connection with the variance, and then outlined the factors that justified granting of the variance.

Mr. Gooze asked when the Tawneys bought the property. Attorney Regan responded that the Tawneys bought the property in 1984. Mr. Gooze also asked if changes were made to the house after the Tawneys bought it, and Attorney Regan spoke about a room in the basement, and also provided additional details about other work done in the house.

Mr. Gooze asked Mr. Johnson if the work that had been done met the code. Ms. Tawney responded that the work should meet code as she had someone come in and do all of the plumbing and electrical work that was requested by Code Enforcement Officer Johnson.

Attorney Regan said if there were any remaining questions about the electrical or plumbing being to code, the applicant would be willing to comply with any required codes.

Mr. Bogle noted that the applicant was requesting a variance to allow 4 people to rent apartments in the building.

Ms. Tawney said it was not financially feasible to run the house with only 3 people renting there.

Chair Smith asked if anyone wished to speak for or against the application. There was no response, and he closed the hearing.

Mr. McNitt noted that the building was grandfathered concerning the more than 3 unrelated people provisions of the Ordinance. He said he had clarified in his own mind the area problem, and was satisfied that they met the area requirements for a total of 4 people.

Mr. Bogle said he could accept the 4 unrelated people on the basis of the square footage, as calculated by Mr. Johnson. He noted he did not think the basement should be included as habitable area.

There was discussion as to why the Board had previously turned down an administrative appeal concerning the same matter, and it was clarified that the appeal was related to the area problem, not the grandfathering issue.

Mr. Gooze asked Mr. Johnson to describe the configuration of the rooms in the building, and asked if the extra amount of space being requested was considered habitable area. Mr. Johnson said the Zoning Code would allow this area to be called a “habitable” area. However, under the Building Code, it is not considered a habitable area. He explained the reason for the differences between the two code definitions.

Mr. Gooze said that looking at the variance criteria for this application, a hardship probably existed concerning the area. But he said he was not sure that habitable area could not be increased without undue expense. He said he would rather see that happen, so that the

application would not meet the hardship criteria. He said he didn't have a problem with the other variance criteria. Mr. Gooze said he wanted to hear what other Board members said before making his decision.

Mr. deCampi said he was inclined to favor this request for variance, noting that the house had at least 4 good solid bedrooms, so it seemed unreasonable to require less than 4 residents, although he said he did not think 8 bedrooms were reasonable.

Chair Smith said Mr. Gooze had raised a legitimate point, but said it wasn't known what this would cost. He noted that the applicant agreed to comply with electrical codes, and would permit inspection of the property every semester, along with several other conditions, if the variance were granted. He said that given this, and the fact that the building had been used in this way for a long time, he was in favor of this request.

Mr. McNitt noted Mr. Johnson's comment about opening up the study as a safety precaution, and said that should be a condition.

Attorney Regan said the applicant would agree to comply with this additional condition.

Mr. Gooze said he could be persuaded that the application met the variance criteria, and said that if the closet door between the master bedroom and the study on the second floor were removed, he would be comfortable with approving this application.

Mr. Gooze MOVED to approve the application for variance on a petition submitted by Christopher T. Regan, Bamford, Dedopoulos & Regan, Durham New Hampshire, on behalf of Joyce Tawney, Wilmot, New Hampshire for an APPLICATION FOR VARIANCE from Article II, Section 175-7, Table 11-1 of the Zoning Ordinance to increase the occupancy of a dwelling, specifically allowing a maximum of four unrelated individuals, with the 5 conditions as stated in the applicant's appeal, plus the additional condition that the closet door between the master bedroom and the study room on the second floor will be removed. The property involved is shown on Tax Map 4, Lot 18-0, is located at 10 Woodman Road, and is in the RA, Residence A Zoning District Linn Bogle SECONDED the motion, and it PASSED unanimously.

- C. **PUBLIC HEARING** on a petition submitted by Vincent & Anne Avery, Andover, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XX, Section 175-109(C)(2) of the Zoning Ordinance to approve an accessory apartment which is greater than 25% of the total living area of the dwelling. The property involved is shown on Tax Map 1, Lot 18-2, is located at 27 Bagdad Road, and is in the RA, Residence A Zoning District.

Chair Smith noted letters from two abutters, one for and one against the application.

Architect Bill Schoonmaker noted a letter from the applicants authorizing him to speak, since they were unable to attend the hearing. He said the Averys had purchased the house in 1990 to be their future home, and were looking forward to retiring in Durham. He said they been

renting their house to students since 1990, and said their plan was to live on the first floor and rent the second floor to students.

Mr. Schoonmaker said the area they planned to use as an accessory apartment was greater than 25% of the square footage of the whole building. He said they realized they had the choice of either decreasing the size of the apartment or increasing the size of the house, but said they felt neither option was appropriate, providing details of why they felt this way. He said they were therefore asking for a variance for a modest overage of 85 sq. ft.

He noted that one of the neighbors had some concerns about parking; about a shared driveway easement and where that line fell; and about making sure that any foundation work did not encroach on the side yard setback. Mr. Schoonmaker said that the improvements were internal, and that there would be no expansion of the outside of the house. He said he would be happy to talk with her about this, and also said the work that was proposed would take place on the opposite of the house from her property. Finally, he said that parking details could be made condition of the approval.

Chair Smith asked when the Averys planned to retire.

Mr. Schoonmaker said he did not know, but noted that part of the first floor was presently available for their use, when they came to Durham occasionally on weekends. He said the Averys had never rented to more than 3 people.

Mr. Gooze asked if the accessory apartment would be brand new.

Mr. Schoonmaker said they were dedicating the second floor as an apartment. He showed the plans for the building to Board members, and described the proposed second floor layout, and how this floor would be closed off from the first floor.

Ms. Craft asked how many tenants the Averys expected to have, and Mr. Schoonmaker said two. He noted they had offered quality spaces to tenants in the past, and had had good luck renting to students.

Mr. Bogle said that if they had to, the Averys could shut off one of the bedrooms and put two people in one bedroom.

Mr. Schoonmaker said the Averys would rather try for the variance so they could have two bedrooms, one for each tenant.

Chair Smith asked if any members of the public wished to speak for or against the application. Hearing no response, he closed the hearing.

Mr. Gooze said he was very much against this application, noting that there were plenty of places that rented to only one student. He said he believed it would be a mistake if the Board arbitrarily said it would go over the limit established by the Ordinance. He said he felt strongly that there was not enough reason to grant the variance in this circumstance. He went

through the variance criteria, noting especially that granting the variance would be contrary to the spirit and intent of the Ordinance. He said the 25% provision shouldn't be waived simply to make it easier to rent a property.

He also said he believed not granting the variance would be doing substantial justice because there was no reason to grant this, other than an arbitrary request.

Mr. McNitt asked what the purpose of the 25% limit was, and there was discussion about this. Mr. Gooze said it was not up to the Board to question whether the limit was correct or not.

Mr. McNitt said this was an arguable application on all the variance criteria, but said they were not making something new; the space was there already, and they were just using it. There was discussion about this between Mr. McNitt and Mr. Gooze.

Mr. deCampi said he found this to be a reasonable request, and said it would punish the applicants without purpose if the variance were denied, since they would be renting to 2 people, when the ordinance actually allowed 3. He said the Averys could cut down the size of the apartment, but said this would serve no useful purpose.

Chair Smith said it was possible to reduce the percentage, and to have two students, and said this would be in keeping with the Ordinance.

Mr. Bogle said that in general he would like to stick to the 25% provision, but said 85 sq. ft. was not a great deal of space. He said that presumably, the Averys would be living there and therefore keeping control of the situation. He also said that even if the variance were granted on the 85 sq ft, the building could not become a duplex, since under the new Ordinance this would not be allowed. Mr. Bogle said it did not make sense to wall off a portion of the bedroom as dead space. He said he therefore came down in favor of granting the variance, in this specific instance, and said it would be an acceptable unit with two renters.

Chair Smith said the question was whether there was an unnecessary hardship. He noted that decreasing the size of the apartment was doable, and said that in this case, there was therefore not an unnecessary hardship, since the applicants still had reasonable use of the property.

Mr. Bogle asked Mr. Schoonmaker what it would do to the rooms if some space were taken off them. He noted that the rooms were not that big.

Mr. Schoonmaker said if some space were chopped off, the use of some of the windows would be lost.

Ms. Craft said she would tend to want to grant this application, noting it was a shame to take a perfectly good living space, and reduce the available area. She pointed out that this was not new living space, and said if students were jammed into a smaller space, this would be detrimental to the property. She said she would vote in favor of granting the variance.

Mr. Gooze said that the comments were predicated on the idea of renting to two people, but said that some people had accessory apartments that rented to one person, and stayed within the provisions of the Ordinance. He said the applicants did have choices here.

Mr. Bogle said that accessory apartments were considered to be integral to a house, and asked if that meant the Averys would have access to the apartment from within the house.

Mr. Schoonmaker said they would have access only by an exterior stairway in the back of the building, but said there would only be one heating facility, electric panel, water heater, etc. He said the Averys appreciated that everyone wanted their privacy, so had decided an exterior stair for the apartment was appropriate.

Mr. Bogle explained that he had asked that question because if the Averys did not rent one of the bedrooms, they would not have ready access to that room.

Mr. Gooze made reference to previous Board discussions about access to accessory apartments, and there was discussion about this. Mr. Johnson said this accessory apartment was definitely integrated into the house.

John deCampi MOVED to grant the APPLICATION FOR VARIANCE from Article XX, Section 175-109(C)(2) of the Zoning Ordinance to approve an accessory apartment which is greater than 25% of the total living area of the dwelling with the condition that the Averys hire a licensed surveyor to clarify the boundary line. The property involved is shown on Tax Map 1, Lot 18-2, is located at 27 Bagdad Road, and is in the RA, Residence A Zoning District. The motion was SECONDED by Ted McNitt.

Mr. Johnson asked the Board if it wished to address the parking concern that has been raised by the abutter.

Mr. Bogle said there were presently 4 lined parking spaces, one marked as reserved, and asked if this would change.

Mr. Schoonmaker said he did not anticipate any change in the number of parking spaces, but said if Mr. Jacobi was concerned, the applicants would be agreeable to designating parking in any way that was appropriate. He noted that a condition of approval was that the property line be clarified, so it would be clear who was parking where, and said the Averys had no intention of parking on someone else's property.

Mr. Gooze said he was not sure where approving this application would lead, noting it was not up to the Board to change the Ordinance.

Mr. deCampi said that was what the Board was there for, to make this kind of determination when appropriate.

The motion PASSED 3-2, with Jay Gooze and Chair Smith voting against the motion.

- D. **PUBLIC HEARING** on a petition submitted by Peter Bielicki, Exeter, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a May 20, 2004, letter from Zoning Administrator, Thomas Johnson, regarding the size of an accessory apartment. The property involved is shown on Tax Map 10, Lot 12-27, is located at 39 Emerson Road, and is in the RA, Residence A Zoning District.

Mr Bielicki spoke before the Board, and said his property had been built in 1977. He noted there were two bedrooms upstairs, and two bedrooms downstairs, and said that for the life of the building, it had been a duplex. He said he wanted to use the building as a single family home with an accessory apartment, and noted that the tax cards had called the property different things over the years.

Chair Smith asked if anyone wished to speak for or against the Appeal of Administrative Decision.

Katherine Zates, 37 Emerson Road, said her only problem with the application was that she owned a single family home, and paid a certain amount for taxes. She said the applicant's home was listed as a single family with an accessory apartment, and was taxed accordingly, but in actuality was a duplex.

Carina Ziemek, 41 Emerson Road, said she wanted to speak against this application. She said fair was fair, and said calling a building that was split 50-50 an accessory apartment seemed ludicrous to her.

Chair Smith closed the hearing.

Mr. Gooze said the property was grandfathered for four people, and said keeping it as a single family property with an accessory apartment was a good idea, and was commendable.

Mr. deCampi said that because this concerned a request for relief from an administrative decision, it became a narrower issue. He said he did not find that the decision that Code Administrator Johnson made was in error, noting that if this were a variance application, he would have agreed with Mr. Gooze. But he said he perhaps could be persuaded that granting the appeal was appropriate.

Ms. Craft said she agreed with other Board members, but asked if there was a way to reshape the application that had come before them into a request for a variance.

Chair Smith said the applicant would have to come back with a separate request for a variance.

Mr. McNitt said this was a classic case of a use that had been grandfathered, and was going the way town wanted it to go.

Mr. Bogle asked how the building got a single family designation, and Mr. Johnson provided details about this. Mr. Bogle said he had no problem with this application.

Chair Smith said this seemed to be a fair request, noting the use was grandfathered, and said that if a condition was placed on the approval saying there would be a maximum of four people living in this house, he would be in favor of granting the variance.

Mr. Gooze received clarification from Mr. Johnson that a condition could be put on the granting of an administrative appeal, because it was helping to clarify the decision of the Board.

Jay Gooze MOVED to support the APPEAL OF ADMINISTRATIVE DECISION from a May 20, 2004, letter from Zoning Administrator, Thomas Johnson, regarding the size of an accessory apartment with the clarification that the ZBA finds this to be a single family home with an accessory apartment, and adds the additional condition that there be a maximum of four unrelated people in the entire structure. The property involved is shown on Tax Map 10, Lot 12-27, is located at 39 Emerson Road, and is in the RA, Residence A Zoning District. Ted McNitt SECONDED the motion, and it PASSED 4-0-1, with John deCampi abstaining.

- E. **PUBLIC HEARING** on a petition submitted by David & Lisa May, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XI, Section 175-54 and Article IX, Section 175-30(C) of the Zoning Ordinance to build a detached garage within the 30-foot front yard setback. The property involved is shown on Tax Map 4, Lot 28-0, is located at 45 Woodman Road, and is in the RA, Residence A Zoning District.

David May spoke before the Board. He explained that he and his wife currently did not have a garage, and said having one would allow them to park vehicles and store tools. He said he would prefer to have a two car garage, but realized the property was limited so had designed a one car garage.

He said the garage would improve the value of his property, and would have no impact on surrounding properties. He said the property was located at the end of a dead end street, noting a nearby property had two cemeteries on it, and the back of the garage would face the woods.

Mr. deCampi asked if Mr. May had considered reactivating the current garage as a working garage and building additional living space where he wouldn't require the extensive foundations on some of the sloping property. Mr. May said that in order to do that, it would require tearing down certain sections where the current garage is attached to the main house, as well as requiring extensive foundation work.

Mr. Bogle said the intention was to keep the current garage where it was, and asked if Mr. May had considered renovating that area, and make it a living space.

Mr. May said that would have to happen at another time.

Chair Smith asked if anyone wished to speak for or against the application. There was no response, and he closed the hearing.

Mr. deCampi said there were no good alternatives here, but said that virtually the whole property was right on the lot line. He said he had a problem with this, and was leaning toward voting no on this application.

Mr. Bogle said this was a difficult lot, and noted that the letters from abutters supported the request. He said that even though the property was near the lot line, he didn't have a problem with the request for variances, in this location, with its unique environment.

Mr. McNitt said he agreed with Mr. Bogle that the options were not good, and said that putting a garage here for even one car was not easy. He noted that the abutters were not concerned with the proposed garage and he did not believe it would have any impact on the neighborhood in the future.

Chair Smith said the slope on the property was the real problem, noting he had previous experience with the property, and said he leaned in favor of granting the variance.

Mr. Gooze said the property met the hardship criteria concerning area, because there was no other place to put the garage, but said the question was whether it met the other criteria. He said he thought it did, noting that the abutters were not concerned about the proposed garage, and said he would vote to approve this application.

Ms. Craft said she agreed with Mr. Gooze.

Mr. McNitt said the building was in an odd position on the street, and said that because of this, the garage wouldn't change the appearance of the property on the street very much.

Jay Gooze MOVED to approve the APPLICATION FOR VARIANCES from Article XI, Section 175-54 and Article IX, Section 175-30(C) of the Zoning Ordinance to build a detached garage within the 30-foot front yard setback. The property involved is shown on Tax Map 4, Lot 28-0, is located at 45 Woodman Road, and is in the RA, Residence A Zoning District. The motion was SECONDED by Linn Bogle, and PASSED unanimously.

Zoning Officer Tom Johnson asked if a Board member could make a motion to move Item G up on the agenda to be considered next since he felt it might only be a short item so the Board would still meet its time deadline and start Item F before 10:00 PM.

Ted McNitt MOVED to amend the Agenda to interchange Items F and G. The motion was SECONDED by John de Campi and PASSED unanimously.

Jay Gooze asked if they could extend they could extend the 10:00 cut off time a few minutes if necessary, and Board members agreed to do this.

- F. **PUBLIC HEARING** on a petition submitted by Laurel Milos, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XI, Section 175-54 and Article IX, Section 175-30(C) of the Zoning Ordinance to build a bathroom addition within the 50-foot rear

yard setback on a nonconforming dwelling. The property involved is shown on Tax Map 18, Lot 16-1, is located at 99 Dame Road, and is in the R, Rural Zoning District.

Ms. Milos said she was asking for approval of a variance in order to build an 8.5 ft. x 6 ft. space for a walk-in shower for her mother, who was recovering from surgery. She said this area was essential to her being able to care for her mother.

She said her property abutted conservation land, and was already encroaching on the setback from that property. She said the building encroached more on the setback than the addition actually would (approximately 22 ft.), and also said the expansion would not have a negative impact on the property value of the conservation land.

Mr. Gooze received clarification that it was just the back portion of the building that had the setback problem.

Chair Smith asked if anyone wished to speak for or against the application. There was no response, and he closed the hearing.

Mr. Bogle said he had looked at the property, and said he had no objections to the application because it was straightforward. He said it would only be a 6 ft bump-out from the house, and said the adjacent landowner wouldn't see it.

Mr. McNitt said this was a classic case of a situation that was already nonconforming, and said the addition would not make the property more nonconforming because it was not going further into the setback.

Ms. Craft said this application seemed like a reasonable request, and she had no objection to it.

Mr. deCampi said this addition would aid the family and as long as it doesn't violate the five variance criteria it was the Board's position to grant the request.

Chair Smith said this seemed like a classic case of why the ZBA granted variances.

Mr. Gooze said the application met all of the variance criteria.

John deCampi MOVED to deny the APPLICATION FOR VARIANCES, as outlined in Agenda Item F. SECONDED by Jay Gooze and PASSED unanimously.

- G. **PUBLIC HEARING** on a petition submitted by Melanie Rose, Cutts Realty Trust, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a May 11, 2004, letter from Zoning Administrator, Thomas Johnson, regarding a request for a second accessory apartment for a one room/temporary use. The property involved is shown on Tax Map 8, Lot 1-109, is located at 15 Cutts Road, and is in the RB, Residence B Zoning District.

Chair Smith opened the public hearing and asked to hear from the applicant.

Mr. Smith spoke before the Board for Ms. Rose, who was also present, and explained that they would like to be able to have a secondary accessory apartment, and use it for a one room, temporary use.

Mr. Gooze asked whether what the applicant wanted was an accessory apartment or a room for boarding.

Mr. Smith said this was not really going to be an apartment, but would be a lodging room. He noted that the current apartment was self contained, and was rented permanently, and said there would be no change to that, and said they were just looking to rent the room for some additional income.

Board members asked Mr. Smith how often he rented out the room and for how long in the past year.

Mr. Smith said he had rented it out about 7-8 times, for one or two nights at a time. He said they didn't want to rent it out for longer periods of time.

Chair Smith asked if members of the public wished to speak for or against the Appeal of Administrative Decision.

Paul Brock, 18 Cutts Road, said his primary concern was traffic on the road, especially those people who were not familiar with the road, noting that children sometimes played near the road. He said that residents of the neighborhood knew to slow down, but said if there were multiple short-term residents, they wouldn't be aware of this.

Susan Berry, 16 Cutts Road, said she and her husband lived across the street from the property, and said she was concerned about the precedent that this would set in this nice residential area.

Mr. Smith said the traffic issue was a valid concern, but said there was not likely to be any increase in traffic. He said this was intended to be a limited usage, in a lovely residential neighborhood, and said they were not inclined to rent to students, and instead wanted to rent to their parents. He said they had a quiet life, and didn't want to upset that in any way.

Chair Smith closed the hearing.

Mr. Gooze said he was against overturning this administrative decision, explaining that he didn't think there was anything that justified doing so. He said he didn't think one could take a bedroom and make it part of another accessory apartment, and said he didn't think, even if it was called a rooming house, this would be permitted in that zone.

Chair Smith said he agreed with Mr. Gooze, and said it was clear to him that there was no hardship here, and that this use was something the Board should not allow.

Mr. deCampi said the equity of the matter was not of concern to the Board, and the issue was simply whether Mr. Johnson made the wrong decision. He said there was no question in his

mind that he did not, noting Mr. Smith had provided no evidence of this. He said if this had been a variance, and Mr. Smith came in with plans for the building that showed that he wanted to add this bedroom to the existing apartment, and there would be only one person living there, he might be able to do that. But he said that wasn't the issue they were faced with.

Mr. Bogle said he thought Mr. Johnson made the right decision, and said to even consider a temporary rental room within a main house as related to the totally separate accessory apartment was stretching things extremely. He noted that the new ordinance expressly forbids two accessory uses on a single-family residence and lot.

Chair Smith said he agreed that Mr. Johnson had made a solid decision, and the Board needed to uphold it.

Mr. McNitt said this use didn't fit with the Zoning Ordinance, and he could not question Mr. Johnson's decision for an instant. But he pointed out that he had people stay overnight occasionally, and so understood the reasoning of what the applicants were asking for.

Ted McNitt MOVED to approve the APPEAL OF ADMINISTRATIVE DECISION from a May 11, 2004, letter from Zoning Administrator, Thomas Johnson, regarding a request for a second accessory apartment for a one room/temporary use. The property involved is shown on Tax Map 8, Lot 1-109, is located at 15 Cutts Road, and is in the RB, Residence B Zoning District. The motion was SECONDED by John deCampi, and PASSED unanimously.

- H. **PUBLIC HEARING** on a petition submitted by Geoff Sawyer, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-27(B) and Article III, Section 175-16(A) to build a doggie daycare barn, to build parking areas, to build an accessory apartment and 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.

This application was not heard.

- I. **PUBLIC HEARING** on a petition submitted by M.J. Chase Revocable Trust, David J. Chase & Malcolm J. Chase, Trustees, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-27(B), Article III, Section 175-16(A) and Article X, Section 175-83(A) of the old Zoning Ordinance, and Article XI, Section 175-54, Article IX, Section 175-30(C) and Article XIV, Section 72(A) of the new Zoning Ordinance to build an enclosed 14' x 18' breezeway, to build a 12' x 14' enclosed porch, to revise the size of the garage to 22' x 26' with a 3' connector to the house, to allow the proposed garage viewing loft to have one bedroom with a 14' x 18' area over the original breezeway, to allow a one-foot encroachment into the previously approved 25' side setback, to approve the accessory apartment as not being greater than 25% of the total living area, and to build two "A" dormers on the front upper level of the existing dwelling on a nonconforming lot within the fifty-foot side-yard setback. The property involved is shown on Tax Map 20, Lot 16-1, is located at 271 Durham Point Road, and is in the RC, Residence Coastal Zoning District.

This application was not heard.

III. Board Correspondence and/or discussion:

Mr. Gooze noted the presentation before the Superior Court on the Teeri case, and said the minutes did appear to consider the variance criteria.

Chair Smith distributed copies of the summary and decision on the Boccia vs. Portsmouth court case.

Mr. Gooze stressed the importance of talking about the criteria during the discussion on an application, and especially before taking the vote. He said an especially important point the court made was that it was important to consider all five criteria, and if one was not met, to voice this and make it part of the decision, especially when denying an application. He said that in the case in question, the Board was very specific as to why it denied the application.

Mr. Johnson noted the new Zoning Ordinance document was out, but did not have copy of the zoning map in it, so Board members should for the time being use the one from the most recent draft ordinance.

Ms. Craft asked if any of the variance criteria were more important than others, and received clarification that if a Board member had a problem with any of the criteria, he/she needed to vote against the application.

Mr. Johnson said it would be useful to keep track of the criteria for applications that were denied, because of this wasn't noted, this detail could not be used in court.

Mr. Gooze agreed that this would be useful information in addition to the minutes.

Mr. Johnson said it would be good to summarize in the minutes individual Board members' reasons for denying variance requests.

Mr. Bogle said a checklist would be useful for considering these criteria.

Mr. Gooze said there were other reasons than hardship why the Board turned it down, and this was in the minutes.

Mr. McNitt said a sketch of applications was very useful for applicants to include. Board members discussed this, and noted several applications that evening provided nothing like this. There was also discussion about the usefulness of photos of properties.

Mr. deCampi said permission for access to properties would be good to have on the application.

IV. Approval of Minutes

May 11, 2004

The following corrections were made to the minutes of May 11, 2004:

Page 2, paragraph at the bottom of the page, last sentence: Remove the word “not”.

Page 4, the motion made by Ted McNitt: Add the word “was” after the word “motion”

Page 4, 8th paragraph, first sentence: Add an “s” to the end of the word “occupant”

Page 6, 2nd paragraph, first sentence: Remove the word “a” before the word
“nonconforming”

Page 6, last paragraph, 2nd sentence: Correct the word “Hr” to be “He” and insert the word
“a” before the word “single family”

Page 9, last paragraph, first sentence: Insert the word “had” before the words “no problem”

Page 12, 4th paragraph, 2nd sentence: Insert the word “with” before the words “a new deck”

Page 16, Item IV Board Correspondence, 1st paragraph, 1st sentence: Remove the word “said”

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

There was discussion about the idea of using a disclaimer on the tax card that said the card not was a legal piece of evidence for ZBA hearings. Mr. deCampi said it was important to push for this, and Board members agreed that this issue came up often.

Mr. Johnson said the Board should therefore ask Town staff to look into doing this.

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

The meeting ADJOURNED at 10:30 PM.

John de Campi, Secretary