

D-R-A-F-T

ZONING BOARD OF ADJUSTMENT MINUTES TUESDAY, JULY 20, 2004 TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL 7:00 P.M.

MEMBERS PRESENT: Chair Henry Smith, Jay Gooze, Ted McNitt, John deCampi, Linn Bogle, Myleta Eng

MEMBERS ABSENT: Sally Craft

OTHERS PRESENT: Interested Members of the Public

MINUTES PREPARED BY: Victoria Parmele

I. Approval of Agenda

There was discussion among Board members as to whether Item C, concerning the petition submitted by Christopher Mulligan for an Appeal of Administrative Decision, should be excluded from the Agenda because the application had not been submitted in time.

Attorney Springer said he believed the application had in fact been submitted in time. He asked the Board not to remove this Item from the Agenda, pending his ability to verify this.

Chair Smith proposed hearing the Agenda items in the following order: Chase, Burns, Sawyer, and Mulligan, and said that whether to hear the Mulligan application could be decided at that time.

Myleta Eng noted that the 30-day time limit for submitting the application fell on a Sunday.

Ted McNitt MOVED to amend the Agenda to reflect the order for hearing applications as proposed by Chair Smith. The motion was SECONDED by Jay Gooze and PASSED unanimously.

II A. 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; (heated)
- 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.

Chair Smith opened the public hearing.

David Chase, co-trustee of the M.J. Chase Revocable Trust, spoke before the Board. He presented a document that described the pertinent issues as well as the specifics concerning the variances he was requesting, and read it into the record. A summary of this statement is included here.

He said the applicants had previously applied to the ZBA for variances on June 21, 2002, requesting to construct and obtain approval for an attached two car garage, connecting breezeway, enclosed porch, and to obtain a sideline setback variance, and a lot area variance. He said these variances were approved unanimously.

He said a second building permit application was submitted and approved to construct a two car garage, with viewing loft, breezeway, enclosed screen porch, and porch. He noted that construction proceeded in accordance with plans provided to the Board, plans which showed a two-story structure over the garage.

Mr. Chase also provided details of subsequent building permits that were issued on February 25, 2003, concerning a construction foundation; completion of a loft and loft accessory apartment; and construction of two "A" dormers to the pre-existing home. He noted that this final request resulted in a ZBA public hearing, and the withdrawal of that request.

He said that based on the original variance received, the applicants assumed the changes to the plan were done in accordance with the spirit of the original variance, and were authorized by various building permits. He said that essentially the applicants understood that the original variance was the authority to use a footprint, and that the alterations to the envelope were strictly a matter of meeting the standards of the Ordinance addressed under Dimensional Controls.

Mr. Chase also said he believed that paragraph 175-15 concerning nonconforming uses applied, and said he believed that the additional work proposed and completed, subject to the

original variance, issuance of subsequent permits and compliance with community standards and the building code was within the purview of the bylaw and the variance. He said he was unable to find a requirement to submit an application to the ZBA to essentially modify the building envelope while not making any change to the approved footprint.

Mr. Chase went through in detail the specific variances being requested that evening. He also said he had attached the facts supporting the variance requests.

Mr. Gooze asked how many bedrooms were in the existing house before the addition of the accessory apartment, and how many there were now. He was told there had been 3 bedrooms before, and there would still be 3 bedrooms, since one former bedroom was being made into a dining room, and another lower level space would be made into a computer room.

Mr. Bogle said the applicants had not addressed the shoreland setback issues associated with the house.

Mr. Chase said the house was outside the 125 ft mark.

Mr. Bogle noted that the setback distance from the high water mark had varied in the various papers submitted over the months. He noted that in the original variance request, the shoreland and wetland setbacks were two of the four issues that the Board had to consider.

Mr. Chase said the original depictions had been scaled by himself, and said he had had a professional engineer re-do it, and had determined the setback was 125 ft. He noted this had been done since his last appearance before the Board because concern had been expressed about this.

Chair Smith noted that Mr. Chase had said the breezeway was enclosed. There was discussion about why the space was called a breezeway, and it was clarified that the area was now a computer room attached to the main house.

Mr. McNitt said that one of the documents that had been submitted talked about total area, and noted the building was clustered at the time it was built. He asked what the ownership was of the common land Mr. Chase referred to.

Mr. Chase explained that the common land was owned by Bay Corporation, and said the Trust was one of the owners of the properties. He said the corporation controlled the common land.

Mr. Gooze asked if the loft living area was included in the accessory apartment square footage, and Mr. Chase said that it was.

Mr. Gooze said the enclosed breezeway was no longer really a breezeway, and Mr. Chase said it had been enclosed pursuant to the permit granted by the building inspector.

Mr. Gooze asked if there was access to the first floor computer room from the main house.

Mr. Chase said such access was proposed, but did not exist at the present time. He said he could close it off, but noted that it would be prudent to leave it open.

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

Mr. deCampi said this was one of those unfortunate situations where something didn't get followed adequately as it was being done, but said he did not have a problem approving what had been done. He said it appeared to include fairly minor variations from what the applicant applied for a year ago.

Ms. Eng said there were several issues to consider. She said she did not have a problem with allowing a total of 3 bedrooms. She asked whether the proposed porch on the end was built at this point, noting that Code Administrator Johnson's letter called it a proposed porch.

Mr. Chase clarified that it had been built, was enclosed, and was heated. He said it was built on a four-foot crawl space foundation.

Mr. Gooze said one of the things the ZBA was looking for was that the number of bedrooms remains the same, and said it looked like this was the case. He said much of the work on the building had been pieced together, involving things that could have been built in different ways. He noted that part of the downstairs library could be part of the accessory apartment, which might make it bigger than they would want it to be. He said it wasn't clear how things were going to end up if these variances were approved, noting that a lot of the things that had been approved had subtle changes to them.

Mr. Gooze said he was basically not against this application, but was bothered by the piecemeal approach. He said he would like to be sure that the first floor room was part of the house, not part of the accessory apartment. He also said the porch shown on the original submission plan was not specifically in the decision as anything other than a screened porch, and said there was a big difference between a screened and enclosed porch. He said he would like to hear what other Board members had to say before making his decision.

Mr. McNitt said his first knowledge of the situation was very recent, since he had not been at the previous hearings. He said he went to look at the property, and said that the project had grown into a two-car garage with an apartment upstairs, and a so-called breezeway had been turned into another room. He said that every time a change was proposed, there seemed to be a lack of communication or an error, although noting he was not saying there was any malice in this. He provided additional details as to how the project seemed to have grown.

He said this represented a lot of changes from a normal process of applying for building permits, and said it seemed that the Town had been asked for one thing and got something else that was almost unrecognizable. He also said he could not imagine that if these present requests for variance were approved, that this would be the end of it.

He said it was his impression, reading the minutes, that at the time the previous variance was approved, the ZBA did not believe there would be any occupancy in the space that was approved. He noted that former Board member Robin Rousseau had said at the time that the only reason she was voting for the variance was that there would be no increase in occupancy. But he said in reality, there certainly had been an increase in occupancy.

Mr. Bogle said he had sat on the ZBA for the original application in 2002, where a 2-car garage had been approved, along with a breezeway on the back, on sono-tubes. He said the porch on the other end of the house was not part of the decision - was not mentioned in the variance, the discussion or the minutes of the meeting, although it was shown on a diagram.

He said that through a series of permit applications, there had been subtle wording changes. He noted the original building permit that was denied asked for a two garage and breezeway, a foundation, frame, concrete floor, and windows. He said this was denied, came before the ZBA and was then granted, and said he agreed that Robin Rousseau's vote to approve the variance was predicated on the fact that there would be no increase in occupancy.

Mr. Bogle said there was another building permit submitted on November 7th where the "viewing loft" was introduced, noting there was no definition of loft in the Ordinance. He said the porch idea also came in at this time, and was proposed for an area of the house previously noted as possibly encroaching on the wetland. He said these proposed changes should have come back to the ZBA, and should not have been approved.

He noted that the breezeway and presumably the porch were going to be on sono-tubes, but on January 14th, it was indicated that a foundation would be constructed in lieu of sono-tubes, and the screened porch would be enclosed. He said that by putting in the foundation, the footprint of the house was being increased, and noted that there were shoreland setback considerations at the time. He said that the building permit application said that the breezeway would be enclosed to protect the basement area under it, which apparently meant that a room would be built, as part of the building.

Mr. Bogle said that the footprint of the building had been increased, and a room had been added to the dwelling. He said there was no mention in the original variance of an accessory apartment, or in the building permits. He noted again that he still had a question about the 125 ft setback, given the various measurements that had been provided in the past, and said he would like this to be certified. He said the porch on other end of the house was put in on a foundation, which also increased the footprint, and said there was no approval for this, and no mention of it until very late.

He said he had serious questions as to whether the building permits provided a legal basis for the approvals, because these things should have come before the ZBA. He said the work represented a major expansion, and appeared to have been approved by an overworked building inspector. He said that in the shoreland protection zone, which the ZBA might be dealing with here, this expansion was not appropriate, and might even be forbidden because there could not be an increase in the number of dwelling units within this zone. He said he still had a lot of questions, and could not vote to approve this application.

Chair Smith said had thought a lot about this, and had heard about the subtle, perhaps questionable changes that had taken place, - the increase in dwelling units, the variety of numbers quoted for the shoreland setback distance, the viewing loft, the screened porch that was now enclosed, etc. He said the building had become something unrecognizable from the original request, and said he had questions about these changes, and was bothered quite a bit by

them. He said he had so many doubts about it that he didn't see how he could approve all of these things being requested.

Ms. Eng said the only part she felt comfortable with was the dormers, which she agreed were important for safety reasons.

Mr. Gooze addressed the individual variances being requested, and why he could or could not approve each of them based on the criteria.

1. To build an enclosed 14' x 18' breezeway;

He said he couldn't vote for this. He said the original permit did not include the first floor area for an accessory apartment, and said this apartment that now existed would be greater than 25% of the total square footage of the house. He said this was definitely against the spirit of the ordinance, and said there was no hardship because there were other ways to do this. *MIGHT NEED CLARIFICATION*

2. To build a 12' x 14' enclosed porch; (heated)

Mr. Gooze said this could have come to them as a separate variance, and asked whether it was a necessary part of the house, also noting there was a question about the setbacks.

Mr. deCampi said it appeared to be within the setbacks, although there might be other problems with it.

Mr. Gooze said that although it appeared to have been pushed through, he didn't have a problem with the variance criteria concerning it, and would vote yes on it.

3. To revise the size of the garage to 22' x 26' with a 3' connector to the house:

Mr. Gooze said he didn't have a problem with this variance request, and said the extra amount the applicant was asking for was minimal. He noted the garage had previously received the building permit.

4. To allow the proposed garage viewing loft to have one bedroom with a 14' x 18' area over the original breezeway;

Mr. Gooze said he would vote no on this, because it was over the 25% amount, so was against the spirit of the ordinance, and was not a hardship because there were other feasible ways to do this, including not creating the room in the first place.

5. To allow a one-foot encroachment into the previously approved 25' side setback

He said he had no problem with this variance request.

6. To approve the accessory apartment as not being greater than 25% of the total living area

He said he was against this for the reasons previously stated.

7. 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.

Mr. Gooze said he had no problem with this. He summarized that what he was essentially saying concerning the variances requested that the accessory apartment was too big, and there should be some way to bring the size of it down.

Mr. deCampi said the lower level of the breezeway didn't connect directly with the apartment. He said the use of the lower level of the breezeway was what lead Mr. Gooze Jay to believe the apartment was oversized, was impossible to determine from the plan. He said it was a room, it connected to the house, there was a door that would allow one to go from the apartment to that space, but it wasn't exclusive to that space.

He said the question was what did you call this. He said Mr. Gooze might be right, and it wasn't known what the Chases would do once they moved in. But he said the lower level clearly was not dedicated to the apartment.

Mr. Gooze said he agreed with this, and said he would allow variances 1, 4 and 6 if a condition were put in that the first floor was clearly not to be part of the accessory apartment.

Mr. de Campi said one condition should be that the plans should be put in the file, and should not be fooled with.

Mr. Chase called for a point of order regarding the plans being looked at. There was a lengthy discussion about what was on the different plans that had been provided over time, and what had been approved.

Mr. deCampi said he understood everyone's concerns, because of the way the project had grown, but said the Zoning ordinance allowed accessory apartments to be built in most zones in Town. He said he understood Mr. Goose's concerns, but if one looked at this situation was looked at in a reasonable way, the accessory apartment was within the 25% limit, depending on how one configured the rooms.

MIGHT WANT MORE DETAIL ON THIS

He said the Town had some responsibility to mitigate the Chases problems, since they had permits to do what they had done. He said some of the fault for this process probably rested with the Chases, but they had permits to do what they had done, so he would have difficulty not approving the variances. He noted that the part of the house that was closest to the setback was not being altered, and was within 125t ft., and said the additions were substantially back from this, so there was no likely encroachment to the Little Bay waterfront.

Mr. Gooze asked if Mr. deCampi would accept condition that the lower breezeway would definitely be part of the house, and not the apartment.

Mr. deCampi said he didn't have a problem saying that the building should be configured according to the plans they had in front of them, nothing more and nothing less. He said if the Board did approve the variances, they needed to be sure that there were some controls so it didn't get out of hand again. He recommended citing the appropriate documents and abiding by those.

Mr. McNitt said the question was where they went from here, not what had happened in the past. He said that with the accessory apartment, the property would still be a single-family house, and said that would have to be made clear.

Mr. Bogle noted that the Chases had previously stated that one would live on one side of the house, and one would live on the other, which were two dwelling units. He also said the plans showed a deck, or open platform, with stairs that hadn't been brought up yet. There was discussion about this.

Mr. Gooze said there had been no specific connection between the apartment and the room below it in the plans. He said based on this particular plan, he agreed with Mr. deCampi that the first floor was not included in the accessory apartment, so even though he didn't like the way this had come about, he could vote for all of the variances requested. He said he didn't think that conditions needed to be placed on the variance because the plans showed that the accessory apartment was set up adequately.

Mr. Bogle noted the reference to a two-story accessory apartment in the variance. He said if the room was eliminated, where was the two stories of the apartment.

Mr. Gooze said he agreed, but the plans did not indicate a two-story apartment. There was additional discussion about the different wording concerning the variances requested in different documents. He said the condition could be left in that there be a second floor accessory apartment.

John deCampi MOVED to grant the variances applied for in Item II A of the Agenda for July 20th, 2004, conditional upon the construction conforming completely and exactly to the plans submitted by the applicant, which have been stamped as received by the ZBA this evening, July 20th, 2004.

Mr. deCampi said that if there were other conditions other Board members would like to add, he could leave the motion open.

Mr. Gooze said he still had a problem about the two story apartment description in the applicants' document.

The motion was SECONDED by Jay Gooze.

Ms. Eng noted that on the Agenda, the fifth line down should read Article XIV, 175-72(A).

Chair Smith said that given all he had heard, this was a huge amount for the Board to accept, and said he could not support the Motion as stated, because doing so would be contrary to the spirit and intent of the Ordinance.

The motion PASSED 3-2, with Chair Smith and Linn Bogle voting against it.

Mr. Chase asked whether, as long as they stayed within the footprint, if the Board expected them to come back for any further variances for partitions, etc.

Mr. deCampi said that if any change whatsoever were planned, the ZBA would want to know this, because the project had previously gotten out of hand.

- II B. PUBLIC HEARING** on a petition submitted by John & Carol Burns, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54, to build a garage and porch within the 30-foot front yard setback. The property involved is shown on Tax Map 6, Lot 7-36, is located at 39 Mill Pond Road, and is in the RA, Residence A Zoning District.

The applicant provided details of the application. He said they wanted to have a porch so there would be a handicap ramp toward the entrance of the house, and also wanted to construct a two-car garage. He said they had recently changed the detail on the plan so the wall of the porch would not go all the way to the ground, so it would only be the overhang that was within the setback. He noted that the existing building was more 35 feet or more from the property line.

There was discussion about the plan.

Chair Smith asked if anyone wished to speak for or against the variance request. Hearing no response, he closed the hearing.

Mr. Gooze said the application met all of the variance criteria. Other Board members agreed they had no problem with this variance request.

Ted MOVED to approve Item II B, an APPLICATION FOR VARIANCE from Article XII, Section 175-54, to build a garage and porch within the 30-foot front yard setback based on the proposed change to page 5 of the plan submitted on 7/16/04. The motion was SECONDED by Jay Gooze and PASSED unanimously 5-0.

- II. C. 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.

There was a detailed discussion at the beginning of this application as to what variances were to be discussed at the hearing, and whether it was appropriate to hear any changes to this that the applicant was requesting. It was agreed the applicant's lawyer could proceed,

Attorney Christopher Wyskiel provided details for the variances that were being requested, including how the requests differed slightly from the wording on the agenda.

He said the doggy day care building was already there, and the request was to allow it to remain at the present location, noting this did not conform to the setback requirements for an accessory structure. He said the building was accessory to the kennel, and said that because of topography as well as some ledge, the unit couldn't be moved from that location.

Chair Smith asked if this was in writing, and Attorney Wyskiel said it was not.

Concerning the request to build parking areas, he said his reading of the Ordinance was that there was no need for a variance for this, and said this was essentially a matter of providing screening, which would come up with the site plan application. He provided details about this, noting that the practical effect of encroaching on the setback was that the Veterinary Hospital was fine with this, and it did not impact the other abutters.

He also noted the request for an accessory, caretaker apartment, and said it was a reasonable use in the RC zone because the property had no water view, and was wooded. He also said that if the variance were granted, the Planning Board could attach conditions to the site plan review application to ensure the reasonableness of the use.

Attorney Wyskiel noted that he was asking for a use variance for the apartment, and area variances for the addition to the building, the different configuration for the parking, and to allow the doggy day care building to stay where it was because it couldn't be moved.

There was detailed discussion about this, as well as about the setbacks.

Mr. Bogle noted that the fence for the play area ran almost along the property line, and asked if there was some kind of easement that allowed that. There was discussion about this, as well as about how high the fence was.

Attorney Wyskiel noted there were two fences, one for screening, and the other one put up because of a court order.

It was noted that there was a letter from Dr. McKiernan, which said he stood by his support of the variance requests.

Architect Bill Schoonmaker net described what was planned for the renovation of the facility.

Mr. Gooze asked if were other areas ways the changes could be made without encroaching on setbacks

Mr. Schoonmaker said the setback violation appeared to be closest to the Veterinary Hospital, who had the least problem with this plan

Mr. McNitt asked if the building was designed so it would look like a residence.

Mr. Schoonmaker said that driving down Route 108, one would see only the top story of a two-story house.

Mr. Gooze asked what the history was of the doggy day care area, and Attorney Wyskiel provided details of this.

Mr. Gooze said that in other words, after the fact, the applicant wanted the Board to approve the location of the trailer.

There was discussion about the parking planned for the facility. Mr. Schoonmaker said there were currently two spaces directly in front of kennel, and said those would go away. He described the configuration for the proposed new parking, and said 24 parking spaces were proposed, when 23 were allowed.

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

Jennifer Brown said she knew the applicants, and had done a lot of research on dog kennels and doggy day cares all over the state. She said there was not another kennel that came close to the care provided at this facility. She said it was not noisy, noting that if the dogs barked, it was only because someone had entered the property. She said the traffic in the area was not caused by the people coming to the facility, and said the facility was doing a great service for the community.

Kim _____ said she had have been associated with the applicants for 4 years, and said they did a wonderful job with the animals, and the facility was not harming the neighbors. She said if the neighbors were concerned about the noise from the facility, then UNH should be shut down. She said any traffic problems were caused by people trying to leave, when there was a lot of traffic on Route 108

_____ said she was the night caretaker for the facility. She noted the noise coming from UNH that could be heard in that area, and said the dogs could not be heard. She said the traffic problems were more noticeable at the intersection of Durham Point Road. She said the applicant and staff had gone out of their way to make the proximity to the facility as pleasant as possible for abutters, and said that the Sawyers had gone above and beyond what was requested.

Elizabeth Manchester said she had been a client for 10 years, and would not take her pets anywhere else. She said it was nice to know that someone would take really good care of them, and said this wasn't just a job for the Sawyers, it was their life. She said they did a great service for Durham, and were good for the economy by hiring young people to work there.

Chair Smith asked if anyone wished to speak against the application.

Paul Dubois, Trustee of the Mill Pond Trust, noted that it was not clear that this variance should even be heard, because there had been some tremendous changes to it. He said what the applicant was looking for was a de facto permit for the doggy day care barn. He said the setbacks were in violation, and also said there was debate about whether the fence was a structure or perhaps a building. He asked why, if the Sawyers had wanted to do this to their property, they had subdivided it. He noted that his objection was not to the business itself.

Elizabeth Klaseon, (Estate of Isabelle Sawyer) said she was an abutter and backed what Mr. Dubois had said, and also what Attorney Turcotte had written in his letter.

Sharon Griffin, Mill Pond Trust, said she would like to affirm what she had said before, that she was in opposition to the continued expansion of the facility, and the doggy day care center being there without any notice to abutters.

Attorney Wyskiel spoke in opposition to those who had spoken against granting the variances, including Attorney Turcotte. He said it had been found in court in the past that the impact to the abutters should be weighed against the positive impact of the facility on the public good. And he said the current changes requested were reasonable, and if allowed, would not result in much of an increase in usage of the facility. He noted especially that having a caretaker on the property was in the public interest, and also said property values would not be negatively affected by the changes.

Mr. Dubois said again that the application for variances was not what he and others had come to hear. He said Attorney Wyskiel had not discussed the setbacks or other things they were requesting now, in order to legitimize things that weren't done before, such as getting a permit for the doggy day care barn.

Chair Smith closed the hearing.

Mr. McNitt and Mr. Bogle said the Board needed to address the question that was still hanging as to whether the Board should accept the revised application. There was a detailed discussion about this. The Board agreed by a 4-1 consensus to proceed with the application with minor revisions.

Mr. de Campi said he did not believe that the doggy day care barn could not be moved, although noting that this might not be inexpensive. He also said he found the internal property lines between the Veterinary Hospital and the pet center somewhat artificial, and simply a legal requirement.

He said he would like to see more on the history of the doggy day care building before voting to allow it to remain there. But he said he was in favor of the other variance requests. He said the addition to building would allow a higher quality of service, and noted that dog kennels were permitted in the RC zone in the previous as well as the current ordinance. He said that there should be reasonable accommodation to allow the Sawyers to improve the quality of their facility.

Mr. Bogle said the barn was the main sticking point, but noted that when the neighbors took the Sawyers to court over this, and the judge found for the Sawyers, the judge said the building did not rise to the level of a nuisance. He asked whether the judge's decision essentially made the barn and play yard legal, as they existed, so that the ZBA could not play with this. Mr. Bogle said that the Board might have some say regarding the use of the barn, noting that the uses had varied over time.

There was additional discussion about this. Mr. Gooze asked if anyone at the hearing had more details about this court case.

Attorney Wyskiel said there was a limited focus to the case in the Trial Court, but said his opinion was that she did not by her order legitimate the location. He also said the building was used to occasionally isolate a dog, and said this was an accessory use to the kennel, which was legitimate. He said the key question was whether the building was in the right place.

Mr. Dubois said he didn't disagree with that statement.

A discussion ensued about the fencing for the doggy day care.

Mr. Gooze said the doggy day care did not meet the criteria for variance in that location based on the hardship and spirit and intent criteria, noting it could be put someplace else. He said that everything in the other part of the application – the request for an area variance for parking and the addition, seemed to hinge on whether this was a self imposed hardship. He said the setback requirements existed because of the subdivision that the applicant had applied for, and said if he had not done this, there would not be a problem.

Mr. McNitt said he looked at this as one complex operation, with two owners, with the whole thing together being essentially a kennel operation. He said it should be asked whether the proposed changes were going to make a significant impact on the neighborhood, forgetting about the internal setbacks. He said he did not see any material increase in the burden on the neighborhood over what there had been before.

He said he would be hard put to say it would be a hardship if the area for exotic pets could not be put in, but said he felt the caretaker apartment was good for the business and neighborhood. He said not being able to have one could be considered a hardship. He said that even though it was a complicated situation, if looked at as a total unit, the proposed expansion would not have a negative impact on the spirit of the Ordinance, the neighborhood, or anything else. He said this represented a minor, incremental change, although noting that some things had been done badly in the past.

Mr. McNitt said he would, however, like to see the doggy day care moved.

Mr. Gooze said that Mr. McNitt had made some good points, and had convinced him to change his mind on everything but the doggy day care. He said the main reason he had been concerned about the self-imposed hardship aspect of the situation was what it would do to someone who....., but he said he couldn't really see someone else there.....

NOT CLEAR WHAT HE MEANT HERE; HARD TO SUMMARIZE HIS COMMENT

Chair Smith said the situation was complicated, and the question was what to do with it. He said there were other options for the doggy day care, and said an accessory apartment was appropriate for a residential dwelling but not a commercial enterprise. He said the addition was adding on to what had already been done, which was questioned. He said he could not see that denying the variances would be a hardship, and said that granting the variances might in fact be contrary to the public interest. He said he could not approve this application for variances.

Mr. DeCampi said that Mr. McNitt had said more eloquently what he himself had originally said. He noted that one thing he did not want to see was for the Board to respond to neighborhood pressure, when the Town had decided this was a permitted use within the zone. He said it made sense to allow it in order to improve that use, which was not really expanding the use very much.

Ms. Eng said in listening to the abutters, she had determined that the variance request did not meet the spirit and intent of the Ordinance. She said she was persuaded by the neighbors that the intention in that area was for low residential density, and noted that essentially all the abutters had problems with the application.

Mr. Bogle said he would have reservations about approving the doggy day care barn, especially because of the way it was set up, and said it wasn't clear the barn was necessary. But he said he did not have a problem with allowing the expansion of the main building, despite the setback violations, because the uses of the two properties were related.

John deCampi MOVED to grant the variances as listed in Agenda Item II C, with the exception of the variance requested for the doggy day care barn, which is specifically excluded from the motion; the term "accessory apartment" will be described, in terms of the current ordinance, as a "caretaker apartment". The motion was SECONDED by Ted McNitt.

Mr. Gooze stated that in most circumstance where property was subdivided, he had a problem with self- imposed hardship. But he said that in this situation, there was essentially one use.....

PLEASE CLARIFY THIS - REGARDING POSSIBLE FUTURE OWNERS

Mr. McNitt said that the decision about putting the kennel there was made a long time ago, and was not for the Board to consider.

The motion PASSED 5-0.

II. D. PUBLIC HEARING on a petition submitted by Christopher P. Mulligan, Bosen & Springer, PLLC, Portsmouth, New Hampshire, on behalf of Gamma Theta Corp, Portsmouth, New Hampshire for an APPEAL OF ADMINISTRATIVE DECISION from a May 27, 2004, letter from Zoning Administrator, Thomas Johnson, regarding parking on the property. The property involved is shown on Tax Map 2, Lot 14-2, is located at 66 Main Street, and is in the Central Business Zoning District.

Chair Smith left the meeting, after appointing Mr. Gooze to replace him for the remainder of the meeting. Ms. Eng was appointed as a voting member.

Attorney Springer provided clarification that the application had been submitted correctly, and Board members agreed to hear it.

Mr. Springer said the area in question was regularly used for parking in the past, so it was not an expansion. Concerning the setbacks, he said that virtually every commercial use parked

right up to the lot line. He said for these two main reasons, the administrative decision was in error and should be overturned.

Mr. Springer said they had submitted the application for site plan review, and would be talking with that Board about plans to pave that area, if needed. He said the lot was located in the CB district, which he said was important because they were a permitted use in that zone, and there were also no side or front setbacks required there. He provided details on some of the history of the site and then explained that the confusion concerning the parking resulted from a mistake on recent engineering plans for the site, which did not show parking planned for the lot in question. He said Code Administrator Johnson had therefore decided that parking there would be an illegal expansion.

Mr. Springer said this area had historically been used for parking and provided several letters from current and former members of the fraternity testifying to this. He also said the reason they believed Mr. Johnson's decision was in error was that there were no side and front setbacks, so that properties in the area parked right up to the lot line.

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

Mr. Bogle said there was evidence that there had been parking there in the past, and said parking there was reasonable.

Mr. deCampi said he didn't think Mr. Johnson was wrong, because he was simply enforcing the plan that had been submitted to him by the applicant. But he noted he did not have a problem with the parking.

Mr. McNitt said there was a lot of space back there at the present time, and said he felt they had an approved parking layout. He said he tended to agree with Mr. deCampi, and said if the fraternity wanted to come back to the Planning Board and say they needed more parking, they could do so.

Ms. Eng said she didn't think Mr. Johnson had made an error in his decision, but she said she believed the error in the plan was an honest mistake. She asked if they could go for an equitable waiver.

Mr. Gooze said he believed that the parking was grandfathered, despite the reference to non-grandfathered parking, based on what he had heard.

Ms. Eng said she agreed with Mr. Gooze.

Myleta Eng MOVED that the ZBA find for Gamma Theta in their Appeal of the Administrative Decision under II D in the amended agenda, and that the parking area in question has been grandfathered. The motion was SECONDED by Myleta Eng, and PASSED 4-1, with Mr. deCampi voting against the motion.

III. Minutes of July 20, 2004

Page 2, 5th full paragraph, should read, “Mr. Johnson noted that there was a private road that did not figure into the setbacks”

Same page, 6th full paragraph, should read “..., so perhaps other owners might want the same kind of work done

Page 3, 3rd paragraph under Item II B, should read “He noted that the application had been denied....”

Same page, 5th paragraph under II B, should read, “... explaining the great difficulty in complying...”

Page 4 and 5

Spelling of Weglars should be corrected throughout document (not sure of correct spelling)

Page 7, 6th paragraph, should read “Mr. Bogle noted that the drainage problem went back to Mr. Gentile, and the Hartmann’s had inherited it. He said it was not fair to the Olivers that the problem persisted.”

Page 8, within decision, should read “further that the certificate of occupancy be contingent upon the corrections.”

Same paragraph, should read “...with three bedrooms total in the house...”

Also, 6th paragraph under Item II C, should read “...extending along Littlehale Creek..”

Page 9, first paragraph, should read “...small trees such as apple, high bush blueberry, dogwood...”

Page 12, motion should read “...study of July 16, 2002...”

Ted McNitt MOVED to approve the minutes for May 25, 2004 as amended, SECONDED by Linn Bogle.

Mr. Gooze noted that the ZBA’s decision concerning the Teeri application had been upheld. He said that as he read through the minutes, he saw that the Board had done a good job of going through the variance criteria. He said they needed to continue to be vigilant about this when making a decision on an application.

IV. Adjournment

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

The meeting ADJOURNED at _____ PM.

John deCampi, Secretary