

DRAFT

DURHAM ZONING BOARD OF ADJUSTMENT MINUTES TUESDAY SEPTEMBER 14, 2004 TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL

MEMBERS PRESENT: Chair Henry Smith, Jay Gooze, Ted McNitt, Linn Bogle, Myleta Eng, Sally Craft

MEMBERS ABSENT: John deCampi

OTHERS PRESENT: Thomas Johnson, Zoning Administrator; Interested Members of the Public

MINUTES PREPARED BY: Victoria Parmele

Chair Smith called the meeting to order. He noted that there would be five voting members.

I. Approval of Agenda

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

II. Public Hearings

Chair Smith noted that an alternate would be chosen to vote on each Item, because of John deCampi's absence. He also said it had been suggested that Items II E and II F be reversed, since the discussion on Item II E regarding political snipe signs could take a long time.

Board members discussed this. Mr. McNitt said he was not eager to make the change, and said he did not think this was appropriate.

Mr. Johnson explained that the request to postpone Item II E had been made by some Durham citizens who would like to speak, but were still working at the polls.

Board members agreed this was a worthwhile reason to reverse the agenda Items.

Ted McNitt MOVED to approve the Agenda, including the reversal of Items II E and II F. The motion was SECONDED by Jay Gooze and PASSED unanimously.

- A. CONTINUED PUBLIC HEARING** on a petition submitted by Elizabeth Barnhorst, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from May 18, 2004 and June 29, 2004, letters from Zoning Administrator Thomas Johnson regarding the occupancy of the Single Family Home with Accessory Apartment. 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 designated Sally Craft as a voting member for this Item.

There was discussion as to how to proceed with the hearing. Board members agreed this was a continuation of an Item that had already been discussed. It was decided that the Town Attorney's opinion on the Item should be read out loud, and Ms. Barnhorst would then have the opportunity to rebut.

Chair Smith asked if anyone wished to speak for or against the petition. Hearing no one, he said he would leave the hearing open for the time being.

Mr. Gooze said the response from Mr. Mitchell made two points, one under the old Zoning Ordinance and one under the Revised Zoning Ordinance. He noted that Mr. Mitchell had said that under the new Zoning Ordinance, there was no question that there were some definition problems for dwelling units. But he said Mr. Mitchell pointed out another provision in the Ordinance that took care of this. He said this provision said that when someone was renting part of a structure, it was an unrelated household, so fell under the three total unrelated.

Mr. Gooze said that provision was not in the old ordinance, which just spoke to dwelling units. But he said Mr. Mitchell also had said that historically, the Board had always made the interpretation that it considered an accessory apartment as integral to the main house, for occupancy purposes, and therefore limited occupancy to three total unrelated.

Chair Smith read the concluding statement in Attorney Mitchell's response: "therefore under the terms of the new Ordinance, use of the property is restricted to three unrelated individuals, or a family in the main house with two unrelated individuals in the accessory unit renting from the main house family".

Mr. Gooze noted that the addition to Ms. Barnhorst's house was built under the old ordinance. He said Attorney Mitchell had said, "this structure was permitted and built as an accessory apartment under the old Ordinance, not as a duplex. Therefore, using the terms of that ordinance, and historical interpretations by your office and the ZBA in earlier cases, occupation of the property is limited to three unrelated individuals, or a family in the main house and two unrelated individuals in the accessory apartment."

Ms. Barnhorst reviewed her previous discussion with the Board over this matter. She then read through the definitions of dwelling unit and accessory apartment, under the current zoning ordinance. She said her apartment met all the criteria for a separate

dwelling unit. She also reviewed the definition of dwelling unit in the old Zoning Ordinance. She said she had two dwelling units, which should each allow three unrelated on each side. She said she felt that denying her Administrative Appeal would cause her to experience hardship, and then read through the powers of ZBA officials, as they related to consideration of hardship. She said she had applied for a three-bedroom apartment; it was always the intent to rent to three unrelated; and said she had been told she could rent to three unrelated persons.

Ms. Barnhorst said that because the Zoning Ordinance was unclear and could be interpreted in different ways, she believed she should be able to continue to rent to three unrelated, for which she had been granted an occupancy permit. She read through the Annual Report as to the duties of the ZBA, especially concerning being diligent about maintaining the quality of residential neighborhoods. She said she didn't believe that renting to three instead of two unrelated people would impact the quality of her neighborhood. She also said she didn't agree with the approach of the letter she had received from Mr. Johnson, which suggested that she might be renting to more than three unrelated. She noted there were problematic properties, but said in this case, she should be grandfathered.

Mr. Gooze noted that the original plans described a garage with an apartment above it, and did not indicate a duplex, but rather a single-family home with an accessory apartment. He referred to the fact that the plans indicated no third bedroom was planned, and asked Ms. Barnhorst why this was.

Ms. Barnhorst said she applied for three bedrooms, but the designer who created her first plan mistakenly omitted the third bedroom. She said she then amended this plan, and clearly intended three bedrooms.

Mr. Bogle asked Ms. Barnhorst if there was a certificate of occupancy or anything in writing that said three renters were permitted.

Chair Smith said there was nothing in writing that he was aware of.

Ms. Barnhorst said she had tried to do everything above board, and never tried to hide how many people she rented to. She said she was not sure it was her job to make sure there was something in writing about three renters, and said she tried to follow the code. She said she felt that because she had not documented that she had an occupancy for a three-bedroom apartment, that she was being made to feel she had done something wrong.

Chair Smith said he didn't see anything in the letter to her from Mr. Johnson that accused Ms. Barnhorst of doing something wrong.

Mr. McNitt said part of the negative reaction Ms. Barnhorst might appear to be seeing from the Town was that the ZBA had administered the three unrelated provision for 20 years. He said there had been some abuse of it over that time, but noted there had been

a great many cases on it. He said what Ms. Barnhorst was asking the ZBA to do was something different in her case, as compared to the others. He said that there may have been circumstantial reasons in her situation, but said the issue was not that Ms. Barnhorst had done something wrong, but being fair to the whole town.

She said there were circumstances that made her situation different, noting the hearing had to be continued because of confusion about the definitions and the different provisions under the new and the old Zoning Ordinances.

Mr. McNitt said that is what the ZBA had to deliberate on.

Chair Smith closed the public hearing.

Mr. Gooze said that suppose the original permit said three bedrooms was ok, the Board would have to make a decision as to whether it could overturn the previous administrator's decision, because it didn't think the permit was the right thing to do.

He said that he personally felt Ms. Barnhorst may well have been told three bedrooms was ok, and said he didn't believe she was trying to hide anything. But he said that unfortunately there was nothing on this in writing. He said there had been many discussions concerning duplexes, accessory apartments, and said there was no question Ms. Barnhorst had an accessory apartment. He said the problem had been the definition of dwelling unit.

He said Attorney Mitchell had answered his questions concerning this appeal, and said he was reluctant to allow it based on this response. He said the only question was whether it was fair to Mrs. Barnhorst, who went into this without hiding anything and was told something that turned out not to be true. He suggested the idea of grandfathering the use for a period of time, which would at least reflect that the Board had some feeling for what had happened.

Chair Smith said he agreed, and noted he had never felt Ms. Barnhorst was trying to hide anything. He said this wasn't the issue, and said the real issue was now much clearer, based on Attorney Mitchell's opinion.

Mr. McNitt said he agreed with Mr. Gooze, and noted he had seen many applications over time, essentially throughout the whole town, where this kind of situation had been turned down. But he said that because Ms. Barnhorst had already made commitments for the school year, there could be a short-term hardship if the appeal was denied. He said he therefore liked the idea of allowing her a temporary concession.

Ms. Craft said this was a tough situation, because it sounded like Ms. Barnhorst thought that everything she did was the right thing to do. But she said overturning the Administrative Appeal would be a difficult precedent to set, especially given the Town Attorney's comments. She said allowing a temporary concession was a good idea.

Mr. Bogle said the plan as submitted said three rooms, but said the number of bedrooms didn't control the number of renters. He said both ordinances were clear on this. He also said that if the Board granted the variance, this went with the property, not the owner, so it might be sold to someone who wanted to use it as a rental property, and who might say there could be three renters in each part of the house, in effect creating a duplex.

Mr. Bogle said another question was whether the Zoning Administrator had the authority to permit what was not permitted in the Ordinance. He said he didn't think there was, or should be such authority, and noted that the Ordinance stated this. He said he would be willing to see something worked out with the applicant until next year, but said he could not go along with approving three renters in an accessory apartment.

Chair Smith said the Town Attorney's opinion was quite clear, and said in his (Chair Smith's) opinion, granting the appeal would be against the public interest, and would not be in keeping with the spirit and intent of the Ordinance. But he said he was thinking about the idea of granting a concession to the applicant.

There was discussion about what three unrelated meant, if there were family members involved.

Ms. Eng said she would like to see a concession made, but cautioned that they might be setting a precedent with this as well.

Mr. McNitt said there were some understandable reasons why this situation had occurred, and noted that over time, the Board in many cases had extended a decision so people could live out the year or semester. He called the question on the primary issue.

Mr. Gooze said if the Board did make a concession in this situation, it needed to be careful about this.

Zoning Administrator Johnson said RSA 674:33 allowed the ZBA to amend an Appeal of Administrative Decision, and to put conditions on it.

Mr. Gooze received clarification that there were four unrelated persons in the building at present, and there could be no more than three.

Linn Bogle MOVED to deny the Appeal of Administrative Decision from May 18, 2004 and June 29, 2004, letters from Zoning Administrator Thomas Johnson regarding the occupancy of the Single Family Home with Accessory Apartment. Ted McNitt SECONDED the motion.

Jay Gooze MOVED to amend the motion, being that from the present time until June 1st 2005, the number of unrelated that would be allowed would be four. Sally Craft SECONDED the motion.

Mr. McNitt said that this amendment was acceptable to him, noting there was justification for it on the basis of hardship. He said Ms. Barnhorst had made commitments to her renters on a straightforward basis.

Chair Smith agreed that this was done in good faith.

The original motion as amended PASSED 5-0.

- B. PUBLIC HEARING** on a petition submitted by Christopher P. Mulligan, Bosen and 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 additional sideyard 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 said he would recuse himself from this Item because he was not present for the previous hearing on the application. He appointed Mr. Gooze as Chair for this Item.

Attorney John Springer, representing the applicant, said he did not believe proper notice for the rehearing was filed. There was discussion about the noticing of the rehearing.

Mr. Springer said he was willing to go forward, but said he believed the Board had made the correct decision the first time it had heard the application.

Attorney Springer noted that the property in question was located in the Central Business District, and was a permitted use in that zone. He said more important was the fact that there were no sideyard or frontyard setback requirements in that zone. He provided some history on the property, and explained that traditionally, the adjacent bank had leased parking area from Gamma Theta.

He said the bank had recently purchased that area and a lot line adjustment was required so the upper corner of the area would be part of the bank property. He said Gamma Theta went in front of the Planning Board for this, and at the time the Board approved it, one of the conditions was to provide a layout of parking. Attorney Springer said a plan was created to show this, and included 39 legal spaces, but he said the intent of the plan was not to show every possible legal parking space on the lot.

Attorney Springer said Mr. Johnson's opinion was that because the parking spaces were not shown on the plan, they couldn't be allowed. He noted that at the previous hearing he had submitted letters going back to the 1970s saying that this lower area had regularly been used for parking. He also noted that Mr. Johnson had said in his email that this parking was probably grandfathered. Attorney Springer said he thought that was the end of the issue, and the ZBA made a decision in July that it was grandfathered.

He said he would like to address an issue that had arisen since the July meeting, when the ZBA had been told the applicant had a pending application before the Planning Board. He said the intent of that application was to give up some of the parking spaces and put some landscaping in, as a good neighbor, in order to improve the aesthetics of the area. He said it appeared that the ZBA thought this was good idea, and said it therefore didn't seem to make much sense to go back before the Planning Board regarding this, because no building permits were needed, and the applicant could voluntarily agree to do the landscaping. He said Mr. Campbell, the Town Planner, appeared to think this was a good idea.

Attorney Springer said his July 22nd letter indicated there didn't appear to be a need to go through the pending formal application, and said the application would therefore be withdrawn. He noted that this landscaping had in fact been done, and provided details of the work. Attorney Springer made reference to Code Administrator Johnson's email, and said he wanted to make it clear that he and his client had not done an end run around the Planning Board.

Chair Gooze asked if anyone wished to speak for or against the application. No members of the public wished to speak.

Mr. McNitt asked if the Fire Department had provided an opinion concerning the parking along this road.

Mr. Johnson said there were no comments from the Fire Department on this when the boundary line adjustment was done.

Mr. McNitt said that at the previous hearing on this application, he didn't have enough of a picture of where cars would be parked. He said he had seen the landscaping the previous week, and said there was unlikely to be a problem with the parking, except possibly blocking fire department equipment. There was discussion about this.

Mr. Johnson said if historically this had been a problem, the Fire Department would have noted this when the boundary line adjustment was done.

Ms. Eng asked how many spaces would be in that area, and was told six to seven cars could fit there.

Mr. Johnson commended the applicant, Jonathan Hutes, for the wonderful improvements to the property, and said it was now one of the most cooperative fraternity houses in town. He explained that when he issued his cease and desist letter, he was trying to get the error on the applicant's part corrected easily, by essentially asking them to go back to the civil engineer to get a new plan to show the parking, and get this approved by the Planning Board as an amended plan.

He said that under the initial request under staff review, he had asked that all parking on the lot be shown on the plan, along with drainage, dumpster screening, etc., so that there

would be an accurate legal drawing of the property, going forward from 2004. He said that although the boundary line adjustment done by the Planning Board was a legal document, at present what it showed limited the applicant to 39 parking spaces. He noted that he said the parking on the side was probably grandfathered so that the applicant didn't have to come in for a building permit, explaining that a parking space was considered a structure.

Mr. Johnson said the problem here now was the process. He noted he wasn't present for the previous hearing on the application, but said that site plan review should not be done by the ZBA, and instead should be done by the Planning Board. He said the Ordinance also spoke about continuation of a nonconforming use, and legal action, and said the boundary line adjustment was legal action, which created the legal document in 2004, although it was incorrect because they wanted more parking than the 39 spaces they were required to have.

Mr. Johnson noted that four of five ZBA members said he had made the right decision, but the Board had then upheld the appeal based on site plan review. He said that this was not their jurisdiction. He recommended that the appeal be denied, with the condition that the applicant get a revised parking plan, and submit it to the Planning Department as part of the permanent record.

Mr. Bogle asked whether, when the lot was revised, the grandfathering disappeared.

Mr. Johnson said he believed, although he was not an attorney, that because the applicant sold part of their property that had part of their parking on it, that portion of the lot would lose its grandfathering.

Mr. Bogle said the parking area in question was a grassy area, and had not historically been a parking area in the way it would now be used. He said he had a problem with the area being grandfathered as a parking area. Mr. Bogle also said he had seen eight cars along the fence the previous week, rather than six cars, which had been discussed at the previous meeting. He asked Mr. Hutes if the fraternity house rented parking spaces.

Mr. Hutes said a lot of people went in and out of that house, and used those parking spaces. There was discussion about this.

Mr. Gooze said there seemed to be a question about the grandfathering issue when the lot line was changed.

Mr. Johnson said the minor subdivision created a smaller lot, necessitating reconfiguration of the parking.

Mr. Gooze asked if there was a specific provision in the Zoning Ordinance that spoke to this, and Mr. Johnson provided details on this.

Attorney Springer said the plan was for a boundary line adjustment, and was not a plan for parking.

Chair Gooze closed the public hearing.

Ms. Eng said that if the Board had acted improperly at the last meeting, it needed to remedy the situation. She questioned whether the Board had jurisdiction over this. She said she was not sure how the Board should proceed, and asked whether this would go back to the Planning Board if the appeal was denied.

Mr. Johnson said the appeal could be amended, and a stipulation could be put on the denial that the applicant provide a revised plan showing all the parking, and submit it to the Planning and Zoning office.

Ms. Eng said she would like to see all the parking spaces on the plan, noting that Mr. Bogle said he recently saw eight cars parking in that location, when the Board understood six were allowed.

Mr. Bogle said he agreed that the Board should uphold Mr. Johnson's denial, and should have the applicant submit a new plan on which the spaces should be marked. He said that the way the area was presently configured, seven or eight cars could be there. He said there should be six well demarcated parking spaces at the upper end of the lot, and the landscaping should be adjusted a little further up the lot.

Mr. McNitt said his previous vote on the application had hinged on not being aware that the grandfathered parking was on a grassy area. He said he had assumed the parking was on the road, which related to his concern about Fire Department access. But he said where it was now was perfectly reasonable, whether grandfathered or not. He said what the applicant had proposed was in accordance with the Zoning Ordinance, and was simply about making everything legal. He said what was proposed was a new plat showing all the parking that would provide a legal record.

Ms. Craft said such a plat seemed reasonable, and said she didn't understand the applicant's reluctance to create this legal document.

Mr. Gooze said the Board did not have the Conditions of Approval in front of them at the last hearing on this, which was the reason the Board had voted to have the rehearing. He said seeing these conditions now, they didn't require that all the parking spaces be shown, but he noted that all the spaces this document said were required were shown on the plan. He also noted the conditions said that landscaping should be shown on the plan. But he said the question of how many spaces could safely be put there should be worked out with the Planning Board, and should be on file.

Attorney Springer said the reason the applicant agreed to put landscaping in, and eliminate four to five spaces was to try to get away from this issue. He said his client

didn't want to be limited to six spaces, noting that the parking area was fairly large, and there was room for eight spaces.

Mr. Gooze asked whether these things could be worked out without the applicant having to go before the Planning Board.

Mr. Johnson said the engineer could reconfigure the parking, and he provided details on how the plan could be amended.

Mr. Gooze asked what the consensus of the Board was on this. He said he believed a mistake had been made with regard to open ended grandfathering, and said he would like there to be something on record to show what was allowed for the property. He said he would vote to deny the Appeal of Administrative Decision, and said Attorney Springer could then decide what to do next.

Attorney Springer said this the Board shouldn't be putting the applicant in a position where it had to go to the Planning Board. He said the Board had said this parking area was grandfathered, and asked what had changed. He acknowledged it was a grassy parking area, but said the grass was very worn.

Mr. Gooze said although the parking was grandfathered, the Board would like to get a sense of how many parking places could be there.

Attorney Springer spoke privately with his client, and then said he would be willing to agree to a condition that no more than six cars would be parked in that area. He said that way, the applicant wouldn't have to go back before the Planning Board with a new plan. He said that seemed to be a fair compromise.

Mr. McNitt asked if it would be permissible for the engineer to simply say this on the plan. There was discussion about this.

Mr. Gooze said if the ZBA made a decision with a condition that said no more than six cars, that was official, and became part of the record for the property.

Mr. Johnson said having everything on the plan, as a legal document, would make things clearer down the road, especially if there was an enforcement action. He provided details on how this should be done.

Mr. Gooze said that this should not be made part of the present decision.

Jay Gooze MOVED to uphold the Appeal of Administrative Decision from a May 27, 2004 letter from Zoning Administrator Thomas Johnson, regarding additional sideyard parking on the property, with the condition that no more than six cars/parking spaces be allowed along the fenced area nearest the Bank, closest to the street, with landscaping nearest the street. Myleta Eng SECONDED the motion.

Mr. Bogle suggested there should be six marked spaces and there was discussion about this.

Mr. Hutes said that seven spaces could easily fit there.

Mr. Gooze said it was not the job of the ZBA to determine the overall plan, and said that anything else that happened was between the Planning Board and the applicant.

Mr. Johnson stated he had spent three years dealing with properties with inaccurate records and improper plans, and said in this case as well, five years down the road, someone would look at this plan, and would wonder what happened. He said it wouldn't be clear from the plan.

Mr. Gooze said someone could read the minutes, and said he didn't feel Mr. Johnson's recommendation was appropriate.

The motion PASSED 4-1, with Sally Craft voting against it.

- C. **PUBLIC HEARING** on a petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an **APPLICATION OF ADMINISTRATIVE DECISION** from a June 16, 2004 memo from Zoning Administrator, Thomas Johnson, regarding the definition of a structure. The property involved is shown on Tax Map 11, Lot 11-4, is located at 8 Old Piscataqua Road, and is in the Limited Business Zoning District.

Ms. Eng was designated a voting member on this Item.

Robbie Woodburn, representing Great Bay Rowing, described the organization that was created in 1997. She said its boats were currently housed at the UNH Boat House at Jackson's Landing, and said the organization was growing significant, so needed more space for its boats. She said their ultimate desire was to build a community boat house, but in the mean time, needed a temporary tent at the present location to house some of their boats. Ms. Woodburn said that Code Administrator Johnson had determined that because the tent would be there longer than ninety days, it could not be considered a temporary structure.

Ms. Woodburn went through the requirements for a structure in the Zoning Ordinance, and said that some of these requirements didn't appear to apply to a tent. She said there would be no floor, no foundation, and a zipper for a door. But she said that if the ZBA determined the tent was in fact a structure, her organization would then ask for a variance.

Mr. Gooze asked when the original structure was built, and Ms. Woodburn said 1978. He asked her if there were any conditions imposed at that time, and she said a row of trees were required in order to soften the view.

Mr. Gooze asked if there was a permit for this, and there was discussion about this.

Chair Smith said the trees shielded the boathouse nicely.

Ms. Woodburn said it had purposely been planned that the tent would be tucked under the trees.

Ms. Woodburn said that on Town land, in theory one didn't have to comply with local zoning regulations. There was discussion about this. There was also discussion about the conditions on the original permit, and about building code issues related to the tent.

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

Arnett Taylor **NOT SURE ABOUT NAME** said he was an abutter, and said he was supportive of the rowing club. He also asked if the tent were dismantled every 90 days, whether it could be considered a temporary structure. There was discussion about this.

Katie Paine said she was an abutter across the river. She said she had no objection to the tent as long as there was some time limitation on how long it could be there. She said it would not be good if it were there for 10 years.

Mr. McNitt asked whether there would be any excavation or concrete construction for the tent, and Ms. Woodburn said there would not. She also said the tent could be taken apart, although not easily.

Mr. Bogle asked how stable the tent would be, and Ms. Woodburn said it was pretty stable, and would also be tucked in away from major winds.

Ms. Craft asked for clarification as to whether the period of time the tent would be there was the key issue.

Ms. Woodburn provided some background information on why the tent was needed, and what was planned beyond this. She explained that fundraising would be needed in order to build a new structure, and said although they would be happy if the whole process took less than five years, they needed a five year time frame just in case. She also said a key question in considering future plans was whether it made sense to put a new building on a river that wasn't there anymore.

Mr. Gooze asked if the ZBA granted a variance, if the applicant would have to go through building code review. Mr. Johnson provided details about this.

Chair Smith said he would not want to uphold the Appeal of Administrative Decision if a time frame was not clarified, and said that five years was a long time.

Mr. McNitt said what the Board was deciding now was whether the tent was a structure. He read from the definition of structure in the Zoning Ordinance, and said the tent was obviously more than a flagpole or a fence. He said he appreciated what the rowing club was doing, but said the question was what the ZBA could do about this.

Mr. Johnson said there was no definition for accessory shed, and suggested that due to the uniqueness of the equipment for the rowing club, the Board could play with that idea.

Ms. Eng read the definition of building on page 6 of the Zoning Ordinance, and said to her the tent was a building because it was intended to shelter boats. She said she didn't see any other way around this.

Ms. Craft said she was having a hard time with the idea that the tent was a structure if it left there, but if taken down after a period of time, it was not. She said she was having a hard time calling the tent a building.

Mr. Bogle said Mr. Johnson had laid out a case that the tent was a structure. He said the Board should uphold this, and go on to consider granting a variance for the tent.

Mr. Gooze said he agreed, while noting that there always seemed to be something that fell through the cracks with definitions. He said this was a big piece of property, and said he did not think the Board should overturn Mr. Johnson's decision, but instead should follow the Zoning Ordinance, and instead should consider granting a variance for the applicant.

Mr. McNitt called the question.

Chair Smith said the tent was large, and structural. He said Mr. Johnson was correct, and said he was in favor of upholding his administrative decision.

Ted McNitt MOVED to deny the Appeal of Administrative Decision from a June 16, 2004 memo from Zoning Administrator, Thomas Johnson, regarding the definition of a structure. The motion was SECONDED by Jay Goose and PASSED 5-0.

- D. PUBLIC HEARING** on a petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an **APPLICATION FOR VARIANCE** from Article XIV, Section 175-72(A) of the Zoning Ordinance to locate a structure within the Shoreland setback. The property involved is shown on Tax Map 11, Lot 11-4, is located at 8 Old Piscataqua Road and is in the Limited Business Zoning District.

Ms. Craft was designated as a voting member for this Item.

Ms. Woodburn said the structure was located within the shoreland zone and thus required a variance. She described issues of concern for structures located in the shoreland zone, including the extent of impervious surface, and possible erosion resulting from land

clearing and construction, and impacts to abutters. She said that although the tent surface area was adding impervious surface to the site, there was gravel surrounding the tent, so very little rainwater would run off. She said that when rain hit the structure, it would simply percolate down into the soil, so there would be no more runoff than at present,

Ms. Woodburn said the tent would be tucked behind the existing trees, and would be gray or green in order to camouflage it as much as possible. She said it was good to see that the abutters were not against it. She then went through the variance criteria.

She said the tent would not affect surrounding properties, and said it would not be contrary to the public interest because it would help provide greater access to the Oyster River for Durham residents. She said not granting the variance would be a hardship because the Ordinance as it presently existed restricted the potential growth of the club, which was a water related activity. She said the storage tent would be set on gravel and would not significantly affect the shoreland. She said the use of the tent would not be contrary to the spirit and intent of the Ordinance because the Ordinance was intended to protect the river and the abutters, and the tent would not impact this.

Chair Smith noted that no time period was specified as part of the variance request.

Ms. Woodburn said the Planning Board would go over this during Technical Review of the application.

Mr. Bogle asked if there would just be boats, and specifically non-polluting boats housed in the tent, and Ms. Woodburn said that was correct.

Ms. Eng asked how the tent would be secured. Ms. Woodburn said the tent was made of a very heavy vinyl, and would have a padlock, but she said someone could get in if he wanted to.

There was discussion about the choice of tents, and whether one was better than another in terms of storm runoff.

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

Ms. Craft asked if the tent were allowed by variance, if this meant the tent could stay there forever. Board members said a condition could be put on this.

Mr. Bogle said he agreed there should be a condition concerning the length of time the tent could stay there, but said he would like to support this request for variance. He said the program was a valuable one for the community, and noted that its predecessor program had produced some high-quality athletes. He said the structure would be well camouflaged, would cause no pollution problems, and said that even the runoff would not be a problem because of the gravel.

Mr. Gooze said he agreed the Board should grant the variance. He noted this was an area variance, and quoting from the new criteria, he said he agreed that an area variance was needed to enable the applicant's proposed use of the property given the special conditions of the property. He also said he agreed with the other criteria, and said the only criterion he might have trouble with was the one concerning the spirit and intent of the Zoning Ordinance. He said anything put along the shoreline could be considered as being against this, but said the tent wouldn't impact the area.

But he said two conditions should be placed on the approval, the first being that strictly non-powered boats could be housed in the tent, and the second that the tent could remain at the location for no longer than five years.

Ms. Eng said she agreed, and also noted that the rowing program was a good one. She also suggested a five-year limitation.

Mr. McNitt said he agreed with the others, and said the only problem was aesthetics. He said the current boathouse was an eye sore, and the tent wouldn't help with this. But he said he understood that trees couldn't be placed in front of the buildings, when one needed to be able to get the boats out.

Chair Smith said he agreed the variance should be granted, and that the two conditions should be included with it.

Ms. Craft asked what would happen concerning the building code issues if the variance were approved.

Mr. Johnson said they might come back to the local building code board of appeals.

Jay Gooze MOVED to approve an APPLICATION FOR VARIANCE from Article XIV, Section 175-72(A) of the Zoning Ordinance to locate a structure within the Shoreland setback, with following two conditions attached: the structure will be used only for storage of non mechanically- powered boats and accessories, and the structure will be there no longer than five years. The motion was SECONDED By Linn Bogle.

Mr. McNitt asked when the five-year time period would start.

Board members agreed it would be five years from the date of approval.

The motion PASSED 5-0.

- F. PUBLIC HEARING on a petition submitted by Jane Sparks, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article VII, Section 175-53 of the Zoning Ordinance to build a kitchen/restaurant onto an existing Bed & Breakfast Inn. The property involved is shown on Tax Map 18, Lot 12-1, is located at 1 Stagecoach Road, and is in the Rural Zoning District.**

Ms. Eng was a voting member for this Item.

Jane Sparks introduced herself as the new owner of the Hickory Pond Inn, and thanked Board members for visiting her property. She said she wished to clarify that she was not building an addition, but simply wanted to renovate an existing porch, which had been called a golf porch. She said the kitchen presently on the property was not located in the right area of the building, and was far from the dining room. She said she wanted to install a commercial kitchen as part of the renovation, but said the idea was to keep it small and intimate.

She said she hadn't had the ability in the past to serve cooked meals to guests, and would like to be able to do so. She also said she would like to be able to cater to small business meetings. She said it was imperative to her business plan to be able to add this kitchen, so that she could offer enhanced services to her guests.

Mr. McNitt asked if Ms. Sparks had a floor plan of the ground floor of the inn.

Ms. Sparks said she had submitted a sketch with the application, and it was clarified that the sketch was only for the proposed kitchen area.

Chair Smith asked if the food service would be only for guests.

Ms. Sparks said she would like to be able to market to other customers, for example, for families for family reunions, wedding parties, etc.

Mr. Smith said that sounded like more of a conference center, where businesses and other groups came in. He said business services, and a conference center weren't allowed in that zone, and also said they were not in the application.

Ms. Eng asked if the restaurant would only be open to guests, or also to non-guests.

Ms. Sparks said it would not really be a restaurant, and said she would only like to be able to serve to guests. But she said she would like to be able to bring people in for occasions such as Valentine's Day, and other theme dinners. She noted there were people who came to the Inn for several days for business meetings, and said she wanted to take this one step further by catering food for these meetings.

Chair Smith noted again that in the new Ordinance, conference centers were not allowed in this zone.

Ms. Sparks said that was why Mr. Johnson said she needed a variance. But she said she was trying to continue an existing building and business, and just enhance it a bit.

There was discussion about the existing kitchen. Ms. Sparks said it would not be feasible to enlarge this existing kitchen, given the setbacks, and the septic system needed, and also noted it was far away from the dining room.

Mr. Gooze asked why the applicant would need a variance.

Mr. Johnson said there would be an expansion of service, from just providing continental breakfast to providing other meals.

Mr. McNitt asked what the status of the property was. He noted that the property had come before the Planning Board at least five times in the past.

Chair Smith asked if the current kitchen was used for guests.

Ms. Sparks said it was not. She said a continental breakfast, mostly consisting of store bought items, was served from a small kitchenette.

Mr. McNitt said there had been small gatherings there for some time, asked if these events were catered from the outside.

Ms. Sparks said she believed they were.

Ms. Eng asked if a new septic system would be needed for the kitchen, and Ms. Sparks said yes. She said the goal was to keep the existing leach field, and to add a third tank, which would provide special treatment for food wastes. She said the plan had been prepared by NH Soils, and was ready for approval.

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

Libby Baker said she was a former owner of the Bed and Breakfast property, and said she totally supported what Ms. Sparks wanted to do. She said this would be something she personally had always wanted to do. She said Ms. Sparks and her son were excellent chefs, and said the food service would be great for visitors. She noted especially for those guests who arrived late in the day, it would be good to know they could get food at the inn.

Chair Smith asked if anyone wished to speak against the application, and hearing no one, closed the hearing.

Mr. Gooze asked if this was a conforming use.

Mr. Johnson said a bed & breakfast was allowed there, but not one of that size.

Mr. Gooze said this came closer to the Zoning Ordinance's definition of a hotel. He said if the Board felt the facility did meet the definition of hotel, the applicant was asking for a

change of use from a bed and breakfast to a hotel. He asked if a hotel was permitted in that zone.

Mr. Johnson said he would need time to review this.

Mr. Gooze said it would be useful to see what previous Boards had called this facility, and said he wouldn't feel comfortable allowing the expansion without knowing this.

Mr. Johnson said the Board could continue the meeting, and Board members could take a look at the files for the facility.

Mr. McNitt said this facility was a bed and breakfast that had expanded from six to twenty rooms, and said it seemed the applicant was asking to become more than a bed and breakfast. He said this should go before the Planning Board.

Mr. Johnson said the applicant was planning to do this.

Chair Smith said it was quite clear that the applicant was expanding beyond a bed and breakfast. He said this concerned him, and said he saw more in the statement provided that evening than he had in the application, and has serious concerns about this.

Mr. Bogle said this went way beyond the definition of bed and breakfast. He noted that the applicant stated in her application that she would like to provide enhanced services to guests and to the public. He said his original impression was that what was wanted was to start a restaurant in association with the inn and the golf course. He said he would like to get clarification of the whole situation, and suggested that perhaps the Board should continue the hearing to the next month, so the file could be reviewed, and Board members could see what previous Boards had actually granted on this property.

Chair Smith said this would seem to be a very reasonable thing for the Board to do, given the questions that had been raised that evening.

Sally Craft MOVED to continue this Item to next month's meeting. Ted McNitt SECONDED the motion.

Mr. Gooze said it was hard to make a decision concerning a variance until it could be determined what had been done before. He said he would like to see the hearing continued.

The motion PASSED unanimously 5-0.

- E. PUBLIC HEARING** on a petition submitted by Gerald L. Smith, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from an August 19, 2004 letter from Zoning Administrator, Thomas Johnson, regarding the location and

number of political snipe signs. The property involved is shown on Tax Map 12, Lot 3-2, is located at 1 Backwater Road, and is in the Residential Coastal Zoning District.

Board members discussed whether to continue the meeting to the following Tuesday, because it was almost 10:00.

Mr. McNitt said that because of the timeliness of the situation, it should be heard that evening and other Board members agreed.

Chair Smith designated Sally Craft as a voting member on this Item, and opened the public hearing.

Gerald Smith spoke before the Board, and said his appeal was non-political. He read a letter he had written into the record. It said the ordinance in question was antagonistic to their democratic form of government, and said it eliminated his ability to support the number of candidates he wanted. He asked the Board to overturn this part of the code, because it limited his freedom of speech, which was a first amendment right under the Constitution. Mr. Smith also said the number of signs permitted was arbitrary and discriminatory. He said the interpretation by the code officer was flawed because the code itself was flawed. Mr. Smith provided letters to the Board from other citizens who wished to express their opinions on this issue.

Chair Smith asked people who wished to speak at the hearing to be brief, given the late hour.

Mr. Johnson read an email letter into the public record from **Tim Ashwell** who said he was in favor of the appeal of administrative decision. The letter said that political signs were political speech, and represented a robust political discussion that should be encouraged, not discouraged.

Carol Tuveson, an abutter, asked why the Town would wish to limit signs, and also asked if the Town had the right to make Mr. Smith choose which candidates he could support with signs. She said she hoped the Town would move quickly to address this issue, and said the regulation should be suspended until the Town had reached a decision on it.

Peter Smith said he supported Mr. Smith's position, and said the statute with respect to signs was unconstitutional. He said the sign ordinance imposed three limitations, one for duration, one for size, and the third for the number of signs. He said there was no question that Mr. Smith was not in compliance, and said this was therefore not an issue of interpretation of the wording of the Ordinance.

Mr. Smith said it had been clear for some time that the sign ordinance needed to be rewritten in order to remove provisions that were clearly unconstitutional. He noted that the Planning Board had been busy reviewing the entire zoning code for the past few years, and the sign provisions hadn't come up yet. He said the matter would not be

resolved by Town legislation prior to Election Day, and Mr. Smith would therefore be in violation if the Board upheld the administrative decision.

He stated that Board members all signed an oath of office – that they would support the constitution. He said in his view, with a statute that was facially unconstitutional, if the position of the Zoning Administrator were supported, ZBA members would be in violation of their oath of office. He said this was a very, very clean case. He said for the statute to be constitutional, the court would have to say that Mr. Smith would have to completely eliminate his right to engage in political speech for a series of candidates. He said the provision was squarely against several Supreme Court decisions.

He noted that this was an unusual situation, but said it was straightforward. He said the Town could not afford to deprive Mr. Smith of rights that were facially guaranteed by the First Amendment, and asked the Board, for reasons of unconstitutionality, to uphold the Administrative Appeal.

Ed Valena, Bagdad Road noted that he had moved from a residence in the RC district to one in the RA district, so based on the sign provisions, now had less opportunity to express his opinions. He said it appeared he had to decide between using signs for state or federal elections.

Marjorie Smith said she was present to stand in support of Mr. Smith's appeal, and said it was essential that every citizen have the opportunity to express political speech. She said that perhaps if there were more opportunity, the Town would have seen a better turnout in the Primary that day.

Ed Guadoano sp.?? - said he believed the sign ordinance provision should be suspended until this issue could be addressed, and meanwhile, the Town should support free speech.

Chris Regan, 16 Little Hale Road, noted that he was an attorney, but was speaking personally on this issue. He said he thought there was a real question as to what the ZBA should do. He said he realized it was not in a position to overrule the Town Council or even to decide if this was a good ordinance or not, and simply was faced with the appeal in front of it. He said he served on the Compensation Appeals Board for the State of NH, and occasionally heard constitutional challenges.

He said he had recently gotten advice that when considering possible unconstitutionality of a regulation, if there was any reasonable construction of the ordinance that said it could be constitutional, this should probably be deferred to, but if faced with something plainly unconstitutional, there was the opportunity and obligation to say it could not be enforced because it was unconstitutional.

Mr. Regan said that without political speech, citizens didn't have the other rights flowing from the First Amendment. He also said that whenever a Town had an ordinance or law that burdened political speech, the Town had the burden of showing substantial

justification for this. He said the sign provision went way to far, and could not be justified.

Peter Smith said the Attorney General's office had, in writing, stated that it was not now enforcing RSA 664:17 because of its concern that it was unconstitutional. Mr. Smith said that provision was less unconstitutional than the one being spoken about that evening.

Mr. Johnson said the Zoning Rewrite Committee would be dealing with the sign ordinance at their meeting on the following day, and urged everyone to come to that meeting and voice these same opinions.

Chair Smith closed the hearing.

Mr. Bogle suggested that the Board should read out loud the Town Attorney's letter.

Chair Smith noted there were two letters. Mr. Gooze summarized the letter from the Town Attorney to Town Administrator Selig, dated December 9, 2003. He said the letter explained why RSA 664:17 could not be enforced with respect to presidential primaries, but noted that Durham's sign ordinance was not adopted under RSA 664 and had nothing to do with it, and instead was adopted under general police powers, so the exemption applying to RSA 664 did not apply to Durham's ordinance. Mr. Gooze said Attorney Mitchell's opinion also said Durham's ordinance was content neutral and was for the specific purpose of protecting against sign blight, etc.

Mr. Gooze said he felt uncomfortable about the ZBA making a decision to change zoning, based on its powers and duties, and said he didn't see how it could possibly do this. He said he thought a change would have to come through the court system, or preferably, the Zoning Rewrite Committee. He noted that one of the Board's duties was to determine whether an error was made in an administrative decision, and said he did not believe Mr. Johnson had made an error based on current zoning. Mr. Gooze said he didn't personally see how he could decide to overturn the appeal, and said if the applicant felt strongly about this, he should try another approach.

Chair Smith read additional materials from Attorney Mitchell, which said that the Durham ordinance was content neutral, and said it was legal as long as it was narrowly tailored to serve an important governmental interest, and left open alternative means to communicate a message.

Mr. McNitt said the Board was obligated to uphold the law. He said he felt that the limitation on the number of political signs was questionable, but said he thought it was reasonable to say that in accordance with the ordinance, the Board had to uphold the **decision**, but would like to recommend strongly that no enforcement action be taken until the Council could reconsider the ordinance.

Chair Smith noted that the Town Attorney said in his letter that there were other options and alternatives for making political speech. He also said he did not think the Board should be making the recommendation suggested by Mr. McNitt.

Ms. Craft said that people should be able to express opinions, but said this issue went beyond the Board's authority. She said it was clear that the Administrative Decision was correct, and said that to try to change the regulation here was not appropriate.

Mr. McNitt said the Board could ask Mr. Johnson to see that there would be no enforcement action pending reconsideration by the Town Council, which had approved this ordinance.

Chair Smith said he would be strongly against this.

Mr. Johnson suggested that there were other sections of the Ordinance that directed him to turn this over to the Town Administrator and Town Attorney, for prosecution in Court, and said he didn't feel this was fair to the applicant. He suggested that the Board could continue this Item until the second Tuesday of November.

Linn Bogle MOVED to continue the meeting until the second Tuesday in November, 2004. Ted McNitt SECONDED the motion.

Chair Smith said this was a way to avoid making a decision, and said he believed the Board should make a decision.

Mr. Gooze said he agreed. He said this was an important issue, but said he didn't think he wanted to go against a specific zoning law as part of an administrative appeal, and said he didn't think this was the right thing to do. He noted this was a politically charged issue, and also said he was concerned with the precedent that could be set.

Mr. Bogle said he sympathized very strongly with those who had spoken, but said he didn't see that the Board could overturn the appeal. He said he thought that Mr. Johnson had interpreted the law correctly. He said he would withdraw his motion if Mr. McNitt also agreed to do so.

Mr. McNitt agreed that the motion should be withdrawn.

Ms. Eng said she was in favor of upholding the administrative decision, based on the fact that what was being regulated was unrelated to the message on the signs. She said the Board had to follow the Zoning Ordinance and go by what it was charged with, and not make this into something political.

Jay Gooze MOVED to deny the Appeal of Administrative Decision from an August 19, 2004 letter from Zoning Administrator, Thomas Johnson, regarding the location and number of political snipe signs. Sally Craft SECONDED the motion.

Mr. McNitt noted that if the Board simply denied the Appeal, it was not taking any action to indicate that there might be a problem with the sign provision.

Mr. Gooze said it would be up to the applicant to take this further.

Mr. Johnson again invited those who were interested, including ZBA members, to attend the Zoning Rewrite meeting on the following day.

The motion PASSED 4-1, with Ted McNitt voting against it.

Mr. McNitt said there needed to someone on record as opposing the fact that this was automatic.

The applicant, Mr. Smith asked if Mr. Johnson was going to send him another letter.

III. Board Correspondence and/or discussion

Mr. Gooze asked Mr. Johnson if Slania Enterprises had gone to the Supreme Court yet, and Mr. Johnson provided details on this.

Mr. Johnson said the Meyer case would be going to the Superior Court the following day, and there was discussion about this.

Board members discussed the upcoming NH Municipal Association Law Lecture series.

Mr. Johnson noted that the watermark to be added to the tax card had been turned over to the software vendor.

Board members agreed to do corrections to the Minutes at 6:30 pm at the October meeting in order to get caught up. It was agreed that Ms. Eng would read through this meeting's minutes.

Mr. Gooze said he had observed some properties the Board had made decisions on, where the applicants did not appear to be adhering to what the Board decided on. Mr. Gooze asked if there was something that could be done to get more personnel to keep track of this. There was discussion about this. Mr. Gooze said it might be something to bring up to the Town Council.

Mr. McNitt said he was concerned that one of these houses would burn down, with too many kids there.

Mr. Gooze said he would try to be at the Rental Housing Commission to discuss this issue.

Mr. Johnson said he had a number of people keeping an eye on things in different neighborhoods, who reported to him when there were problems. He said they were a big help

IV. Approval of Minutes

July 20, 2004 – postponed until the October 12th meeting, which will start at 6:30 pm so that these and other Minutes can be approved.

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

Adjournment at 10:30 pm

Victoria Parmele, minutes taker

John deCampi, Secretary