

D-R-A-F-T

**ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, OCTOBER 12, 2004
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
6:30 P.M.**

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

MEMBERS ABSENT: Linn Bogle, Sally Craft

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

MINUTES PREPARED BY: Victoria Parmele

Chair Smith called the meeting to order at 6:30 pm. He noted that two Board members were absent, so alternate Myleta Eng would be voting on all of the Agenda Items.

I. Approval of Agenda

John deCampi noted that the September minutes had been deferred to later in the meeting, under Item V.

John deCampi MOVED to approve the Agenda as amended. The motion was SECONDED by Jay Gooze, and PASSED unanimousl 5-0..

II. Approval of Minutes

July 20, 2004 Minutes

Page 3 ,1st paragraph, should read “....to the approved footprint.”

Page 6, under #1, should read “...there were other ways to do the accessory apartment within the context of the ordinance.”

Page 7, under #7, second paragraph, should read “...was what led Mr. Gooze to believe was oversized and impossible to determine from the plan.”

Also same page, 3rd paragraph from bottom, should read “...Mr. Gooze....if one looked at this in a reasonable way..” Also, eliminate bolded wording at end of that paragraph.

Also same page, 2nd paragraph from bottom, should read “...and was within 125 ft.,.....so there was no likely encroachment on the Little Bay waterfront.”

Also same page, bottom paragraph, should read “...would accept the condition...”

Page 8, 5th paragraph, should read “...where were the two stories of the apartment?”

Page 9, motion toward bottom of page should read “**Ted McNitt MOVED...**” Also eliminate extra space in the motion.

Also same page, 2nd paragraph under B should read “...was more than 35 feet from the property line.”

Page 10, 5th paragraph from bottom, should read "...Schoonmaker next described..."
Also, 4th paragraph from bottom, should read "...asked if there were other ways.....on setbacks."

Also, 3rd paragraph from bottom, should have a period at the end.

Page 11, **NEED TO CHECK WITH KAREN ON NAMES**

6th paragraph should read "...said she had been..."

7th paragraph, should read "...from UNH could be heard..."

Page 12, 3rd par from bottom, should read "He said the addition to the building..."

Same paragraph, should read "... in the RC zone in the previous, as well as the current ordinance. He said..."

Page 13, top paragraph, should read "...did not by her order legitimize the location."

Same page, 2nd paragraph from bottom, should read "...someone who bought the veterinary property in the future, but he said he couldn't really see someone else there who would have an affect."

Page 14, 5th paragraph, should read "...that in most circumstances where property was subdivided, he had a problem with self- imposed hardship. But he said that in this situation, there was essentially one use of both properties."

Page 15, 2nd paragraph, should read "...was important because it was a permitted use..... no side or front setbacks ..."

Also, last paragraph, should say "**Jay Gooze MOVED....**"

Need to include time of adjournment as approximately 10:30 pm.

Ted McNitt MOVED to approve the minutes of July 20, 2004. The motion was SECONDED by John deCampi, and PASSED unanimously 5-0.

August 10, 2004 Minutes

Page 1, - Myleta Eng and Linn Bogle should be listed as absent from the meeting.

Page 2, bottom paragraph, should read "...when it was right to have 3 bedrooms in an accessory apartment."

Page 5, strike one Thomas Johnson from the motion toward the top of the page.

Page 6, 2nd full paragraph, should read "...error by you the applicant, as the ZBA does not do site..."

Page 7, under corrections of minutes: under Page 7, should read "...to become a health hazard:..."

Ted McNitt MOVED to approve the August 10, 2004 Minutes. The motion was SECONDED by Jay Gooze, and PASSED unanimously 5-0.

III. Board Correspondence and/or discussion

A. REQUEST FOR RE-HEARING on a September 14, 2004, decision of the Zoning Board of Adjustment to deny the petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an **APPEAL 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.

Mr. Gooze said he was willing to rehear the Item because the definition of an accessory structure/shed was not clear. He also noted information provided to Board members concerning the State building code as it related to the application, and said he would like to hear more about this.

There was additional discussion about this by Board members. Chair Smith said he was not in favor of rehearing the appeal because he did not see any new information concerning it. Mr. McNitt said the Board might have made a mistake. Ms. Eng said her previous vote to deny the administrative appeal had been a difficult one to make. She said the issue was still confusing, and so would like to rehear the case.

Ted McNitt MOVED to accept the Request for Rehearing on a September 14, 2004, decision of the Zoning Board of Adjustment to deny the petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an 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 Gooze, and PASSED 4-1, with Chair Smith voting against the motion.

- B. REQUEST FOR RE-HEARING** on a September 14, 2004, decision of the Zoning Board of Adjustment to approve with conditions the 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.

Mr. McNitt said what was being asked for was a substantial change in the structure and in the amount of parking, and the Board should therefore rehear the application.

Ted McNitt MOVED to accept the Request for Rehearing on a September 14, 2004, decision of the Zoning Board of Adjustment to approve with conditions the 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 motion was SECONDED by Jay Gooze.

Mr. deCampi said he agreed the application should be re-heard, but said he had difficulty with not notifying abutters in this situation, since the variance being requested had gotten larger.

It was clarified that there was no requirement for notifying abutters for a rehearing, and there was additional discussion about this.

Chair Smith noted that abutters present at the previous hearing on this matter spoke in favor of granting the variance, with conditions.

Mr. Gooze asked Mr. Johnson if the abutters would be informed of the outcome of a rehearing.

Mr. Johnson said if the rehearing was granted, and the variance was ultimately granted, all the abutters would be notified of this outcome.

The motion PASSED unanimously 5-0.

IV. Public Hearings (not to begin before 7:00 pm)

- A. CONTINUED 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. Sparks introduced Kevin Farley, the financial consultant for Hickory Farms Inn, for the last six years. She said it had been agreed at the previous Board meeting that she and Board members would research the history of the property, and the various decisions and approvals concerning it. She noted the timeline that had been put together on this.

Chair Smith referred to Fire Chief O'Keefe's statement in Board members' packets. There was discussion about this, and Mr. Gooze said this information was pertinent to the discussion, although it had not been incorporated into the timeline.

Mr. Johnson said Ms. Sparks would still have to go before the Planning Board, after coming before the ZBA.

Ms. Sparks said she had been approved for septic and water, pending a water test to be done the next day.

Mr. Gooze asked Ms. Sparks what this facility would be called.

Ms. Sparks said she would like the facility to remain an inn. She said although food would be served, it would not be a restaurant that would be open to the public at all times. She also said it would not be a banquet facility, and said it would definitely not be a hotel. She said she would like to be able to serve dinner Wednesday through Saturday.

Mr. Gooze said this establishment no longer fit the definition of inn found in the Zoning Ordinance. He said it was an important distinction as to what Ms. Sparks intended the facility to be, and said he would like her to be more specific on this, so that there could be a rationale discussion.

Ms. Sparks said didn't want the facility to be called a hotel.

Mr. deCampi said Ms. Sparks seemed to want the facility to be a restaurant and function facility. He said if the Board deemed that was acceptable, she then would have to go before the Planning Board for a Conditional Use permit to be sure that those uses were acceptable, and the way the facility was designed was acceptable. He said he wished it could be decided at the Planning Board level whether the facility should be allowed.

Chair Smith asked Ms. Sparks about her desire to use the facility as a conference center.

Ms. Sparks said she would like to use the facility as a conference center in the sense that people staying at the inn could have work sessions, about two or three times per month. She also said she would like to be able to hold functions like bridal parties.

Chair Smith said the idea of a conference center represented an expansion of the use of the facility. He also noted that in her application, Ms. Sparks said there would be increased occupancy as a result of the proposed changes, and asked her what she meant by that.

Ms. Sparks explained that the occupancy of existing rooms presently ran at about 40% on a yearly basis, and said she would like to improve this.

Mr. Farley provided clarification that it was not Ms. Sparks' intent to create a conference center, but instead to respond to the desire of clients to sometimes have small gatherings for work related purposes, while staying at the Inn.

Ms. Sparks explained that holding conferences at a larger scale would actually detract from the ambience for her guests, and said the gatherings she would like to have would be relatively small, for 18-20 people. She noted that the dining room would only have 25 seats, and said the expansion of service referred to being able to serve lunch and dinner. Ms. Eng asked where the meeting rooms were located, and Ms. Sparks said the dining room was where the gatherings were held. She said the goal was to locate a kitchen closer to the dining room.

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

Mr. Gooze reviewed the timeline on the property, and provided details on approvals that had been granted, noting that some of this work was never done. He said that practically everything had gone through the Planning Board, and asked Mr. Johnson whether, if this application went directly to the Planning Board, the applicant would still need to get a variance.

Mr. Johnson said the ZBA's role in this situation was to decide if the use could expand beyond a Bed and Breakfast facility.

Mr. Gooze said that based on the records for the property, it appeared that the Planning Board had looked at this kind of issue in the past. There was discussion among Board members about the past decisions concerning the property.

Mr. deCampi said his general reaction to this application was that, considering the fact that no one had spoken in opposition to it, and that there would only be a small eating area relative to an Inn of this size, the request was not unreasonable.

He said that if the rest of the Board agreed with him, it should be approved, although with some conditions, including a review concerning compliance with the State Fire Code. Mr. deCampi noted the applicant would still be required to go to the Planning Board for a Conditional Use Permit regarding the changes that would allow them to function as a restaurant and conference facility. He also said he was not entirely comfortable with the divided responsibility between the two Boards concerning this property.

Ms. Eng said it was not clear as to whether it was the ZBA or the Planning Board that should be deciding on this. She also said it seemed that what was being asked for was a big expansion.

Mr. Gooze said the Board seemed to be saying that this should be called an expansion of an inn, and said Board members would have to decide what made it an expansion of an inn, and not a conference center, which would make it more than an inn.

He said he thought Ms. Sparks should be able to expand the kitchen and have a restaurant for the Inn, and should be allowed to hold meetings in the breakfast room, but he said he had trouble with going beyond this. He said doing so went beyond what an inn should be, and therefore was not permitted. He said he thought that just breakfast should be served in the dining room, but said he was willing to listen if other Board members were comfortable with allowing lunch and dinner to be served.

Chair Smith said he essentially agreed with Mr. Gooze, but said that serving lunch and dinner should also be allowed.

Mr. McNitt asked Ms. Sparks how often functions were held at the Inn, and Ms. Sparks said there were about two per month. She said she was presently not doing any advertising regarding this possible use, and noted it was hard to get conferences because clients had to bring their own food in. She said she needed to be able to hold more than two such functions per month in order for the Inn to succeed financially.

Mr. McNitt provided some history on Board decisions that had been made concerning the property, and said the Planning Board had given permission for the expansion to 20 bedrooms. He said it was his understanding that for the past 5-6 years, small functions had been held at the Inn on a reasonably consistent basis. He noted that when the Planning Board allowed the expansion of the number of rooms, this had not changed the services that could be offered.

He said he saw that there were two questions that needed to be answered, and said the first was whether the Board was in favor of converting a porch to a kitchen, for serving Bed and Breakfast customers. He noted that a key problem for the Inn was that the kitchen presently there was located on the wrong side of the house relative to the dining room. Mr. McNitt said the second question was whether the expansion of the use of the Inn should be allowed.

Chair Smith said his concern was the expansion of the use of the Inn, and whether it should be used for guests only, or for others as well.

Mr. Gooze said that 20 rooms was beyond the number of rooms that would be found in a normal bed and breakfast inn. He said this property was more like a small hotel, although it functioned like a bed and breakfast. He said he still felt comfortable allowing meals to be served only to guests, and to allow the small convention facility use. But he noted that if lunch and dinner were served, it was harder to be clear on who would be served.

Mr. deCampi said Mr. McNitt had stated the case well. He said he believed the facility was big enough to be considered a small hotel, and said it therefore made sense to should allow the Inn to serve all three meals, which most small hotels provided.

Mr. Gooze said other Board members had made some good points. He said that in reality, the situation at the Inn was unique, in that if the application for a 20-room facility came before the Board, it would say that it was not a permitted use in that zone. But he said it was already there as a 20 room facility, so given that, he would be more inclined to go with limiting the restaurant area to 25 seats, which did limit what can go on there.

Chair Smith noted that the ZBA had never approved the 20-room facility.

Ms. Eng said she would like to restrict the facility to serving meals only to guests, and not to the general public as a restaurant, in order to keep traffic down.

Mr. McNitt said the Planning Board had already approved the 20 room facility. He said that as a bed and breakfast establishment, it was presently permitted to serve breakfast, and said the kitchen should be allowed because the present situation represented a hardship. But he said the second question was how far the Board should go in terms of the use of the facility. He said he would go along with serving meals and dinners for signed-up people, but not to people coming in for dinner. He said he thought the facility should be able to serve meals for functions, but not as a restaurant.

There was discussion with Ms. Sparks as to when she would like to serve meals. Ms. Sparks said she definitely did not want to have a walk-in restaurant, but said she would like to plan a function such as Valentine's Day dinner by reservation only. But she said if the Board said no to that idea, she of course would not do that.

Mr. McNitt explained that his reasoning was that once the Planning Board allowed the property to become a 20-bedroom facility, certain other functions became almost inherent

to it. But he said a restaurant was not one of them. He said the Board was essentially implementing what the Planning Board had approved several years ago.

John deCampi MOVED to grant the new kitchen applied for by the applicant, and further to grant permission to hold occasional functions at the facility for groups not to exceed 49, and further to grant the applicant permission to serve lunch and dinner in addition to breakfast to guests at the Inn and members of groups attending functions at the Inn. Applicant is not to construct a group, but the group may come to the inn already formed. It is not the intent that this facility be used as a restaurant. Ted McNitt SECONDED the motion.

Mr. McNitt said it would be an economic hardship for a facility with 20 rooms not to be allowed some of these functions, but said it was important not to go beyond this to allow a restaurant. He said this decision reflected previous Planning Board decisions.

Mr. Gooze said the spirit and intent of the Zoning Ordinance was really the only variance criteria in question, and said the previous approval indicated it had not been violated.

The motion PASSED unanimously 5-0.

- C. PUBLIC HEARING** on a petition submitted by James & Linda Andreski, North Salem, New York, on behalf of The Nature Conservancy, Concord, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article X, Section 175-10(B)(2) of the Zoning Ordinance to use a barn that is within the frontyard setback as a stable for horses. The property involved is shown on Tax Map 16, Lot 5-1, is located at 125 Longmarsh Road, and is in the Rural Zoning District.

Mr. Johnson noted that the Agenda should read Article X, Section 175-109, (B) (2) of the Zoning Ordinance.

Madiha Farag spoke for the Nature Conservancy, and provided background on the property. She said the barn was 70 ft from the road, while the Zoning Ordinance required 100 ft., and was located on a Town maintained dirt road. She provided details on abutters, including the Town of Durham and the Nature Conservancy itself. She said the barn had been designed and used in the past for horses, and said it was located in a rural area, which meant that allowing the variance would enhance the use of the rural area.

Ms. Eng asked when the barn had last been used, and Ms. Farag said it had been over 10 years since the barn was last used.

Duane Hyde, also representing the Nature Conservancy, said there were 4 stalls in the barn, and 4 horses had been housed there in the past.

There was discussion concerning who actually owned the property, and it was clarified that the Nature Conservancy was the present owner.

Mr. deCampi asked whether the Nature Conservancy expected to retain the property.

Ms. Farag said the organization was planning to sell the property. She explained that obtaining the variance would make the property more sellable, noting that prospective owners had asked if the barn could be used.

Chair Smith said he had been out at the property, and had noted that some sheds were supposed to have been removed, but appeared to still be there.

Mr. Johnson explained that the shed shown in the drawing Chair Smith had used as a reference had since been taken down, and said another shed on the property belonged with the residence.

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

Mr. Gooze said he had no problem with this application, and said the **only question concerned _____ across the road PLEASE HAVE JAY CLARIFY THIS** He said he believed that if this was taken into account, the application for variance met all five criteria.

Mr. deCampi said he was inclined to agree with Mr. Gooze, but recommended that the approval should limit the barn to housing of 4 horses, so there would be no allowance for expansion of the use.

Ms. Eng, Mr. McNitt and Chair Smith agreed that the variance should be approved, with the condition stated by Mr. deCampi.

Jay Gooze moved that the APPLICATION FOR VARIANCE from Article X, Section 175-109(B)(2) of the Zoning Ordinance to use a barn that is within the frontyard setback as a stable for horses, with the condition that no more than 4 horses be housed in the barn. John deCampi SECONDED the motion, and it PASSED unanimously, 5-0.

- D. PUBLIC HEARING** on a petition submitted by Charles Parrish, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to increase the occupancy of a single family home from three unrelated persons to five unrelated persons. The property involved is shown on Tax Map 6, Lot 6-27, is located at 12 Valentine Hill Road, and is in the Residential A Zoning District.

Chair Smith opened the public hearing, and asked if there were members of the public who wished to speak in favor of the request for variance. Hearing none, he asked if anyone wished to speak against the variance request.

Mike Mangan, Garden Lane said he had moved into the neighborhood five years back, and had seen some changes to the area since then. He said five houses had become student rentals, and said that one of the properties had become a nuisance. He said there had been some negative changes to the neighborhood, including more cars, beer cans, and

people walking through residential properties at 2:00 am. He said a prime concern was that there were young families living in this area, and children liked to play in the street. He said that if the variance were granted to allow the unrelated people in the house to increase from 3 to 5 people, this would set a precedent, and the neighborhood would then see more of the same,

Andrew Colby, 11 Thompson Lane, said he moved into the neighborhood in 1999. He said he was against granting the variance, especially because of the issue of traffic flow, noting there were conflicts between cars, people walking, kids riding bikes, etc. He said he would like to see some traffic signs installed to slow traffic. He also said the only benefit of increasing the occupancy to 4 unrelated people was the monetary benefit for the applicant.

Doug Webb, 10 Valentine Road, said he lived next to the house in question. He said he had a small family, and was concerned that granting this variance would set a precedent that would mean that the character of the neighborhood would continue to change for the worse. He said the property in question was for sale, and the owner simply wanted to maximize its value by allowing 5 unrelated people there. He said traffic was a key issue in this neighborhood, and said he hoped the Board would vote against granting the variance.

Mr. Webb also read a letter from a neighbor, **Martha Anderson, 6 Chesley Drive**. Ms. Anderson's letter stated, among other things, that allowing this variance would tip the existing delicate balance toward a rental neighborhood.

Deb Hersh Meyer said she agreed with what others had stated. She said there were several houses in the area that were rented to students, and noted that she sometimes had to call the police because of problems in the area. She noted the problems had been getting much worse in recent years, and asked if there was some place in Town where she could request signs.

Mr. McNitt asked if anyone knew whether the applicant lived in the house.

A member of the public said Mr. Parrish's daughter, a student, presently lived there, and noted there were always 4 cars in the driveway.

Paul Matzuda, said he had moved into the neighborhood two years ago, and said he was very concerned about the fast traffic in the area. He said there were also littering and consistent noise problems, and asked the Board not to accept the variance request.

Karen Hazelwood, Garden Lane said she agreed with everything else that had been said.

Doug Bencks, 6 Valentine Road said he and his family lived in the neighborhood, and said he was against allowing this variance and any future variances of this kind. He also said he was disappointed that Mr. Parrish was not present, and asked why this was the case.

Mr. Johnson explained that at the time he started the enforcement action, he told Mr. Parrish he would probably lose his case. He said the application was being heard simply to delay the enforcement action so Mr. Parrish could get through to the end of the semester. Mr. Johnson said Mr. Parrish was planning to sell the property, and hopefully a family would buy it.

Jean McPeak, Glassford Lane said houses in the area were being taken over, and said a decision to allow this variance would affect many neighborhoods in Town.

Annamarie Harris, said she would love to figure out way to avoid this process. She said she did not think that exemptions should be allowed so landlord could keep students in place until the end of the semester. She said the rules were clear, and had been clear for several years.

Mr. Johnson explained the reasoning as to why applicants went through this process, as a delaying tactic. He suggested that the Zoning Rewrite could address the 10 day requirement. There was a brief discussion among Board members and Mr. Johnson as to how the current process could be improved.

Mr. Bencks provided a letter from neighbors, **John and Katherine Mulhern**, which said they had lived at 7 Valentine Hill Road for 46 years. They said they had been pleased to see a family neighborhood develop in the area in the past few years, but noted there were no sidewalks, and a steep driveway with poor visibility. They said this was definitely an area where additional student cars could be a menace.

Tim Runk, 9 Valentine Hill Road, said he agreed with everything else that had been said.

Chair Smith asked if there was anyone else who wished to speak against the application. Hearing no one, he closed the hearing.

Mr. Johnson noted for members of the public that they could bring their issues up the following day at a meeting where the Zoning Rewrite would be discussed, and also said it could be useful to attend meetings of the Rental Housing Commission and provide input there. He said the next meeting of the Commission would be held on Nov 16th at 4:00 pm.

Mr. deCampi read through the five variance criteria, and said this application failed to meet all of five of them.

John deCampi MOVED to deny the APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance to increase the occupancy of a single family home from three unrelated persons to five unrelated persons. The motion was SECONDED by Ted McNitt.

Mr. Gooze said he agreed completely with this motion. He said granting the variance would be against the public interest, as witnessed by comments made by residents of the neighborhood. He said surrounding property values would also be affected negatively. He said the applicant's situation did not represent a use hardship, and also said that under the old hardship criteria, there was nothing about the situation that indicated it was such a hardship. He said substantial justice would be served by maintaining the neighborhood and restricting traffic, and said doing so would also be in keeping with the spirit and intent of the Ordinance.

Mr. Gooze noted that on occasion, the Board made exceptions concerning the more than 3 unrelated provisions. He provided some detail on reasons why this would happen, but said it occurred relatively infrequently. He said those reasons did not exist in the present circumstance, and said this was a clear-cut case.

Mr. McNitt said he agreed with Mr. Gooze. He said the application had failed to justify a use variance because it was not a unique property. He said that in his opinion, granting the variance would injure the public and private rights of neighbors. He also said the Master Plan reflected the strong feeling in Town that concentrations of rental housing had lead to a number of disturbances to the neighborhoods they were in.

Ms. Eng said she totally agreed with what other Board members had said.

Chair Smith noted that the application for this variance stated there were no safety issues involved. He said he totally agreed with this, and said he was opposed to granting the variance because it did not meet any of the variance criteria.

The motion PASSED unanimously 5-0.

Mr. Johnson explained to members of the public why the Board had provided such detailed justification for denying the variance. He said it was important to discuss the finer points of the issue so if the case went to court, it wouldn't be thrown back at the Board.

- E. PUBLIC RE-HEARING** on a September 14, 2004, decision of the Zoning Board of Adjustment to deny the petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an **APPEAL 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.

Robbi Woodburn, representing Great Bay Rowing, said this application related to what the definition of an accessory shed was. She also said there was a hardship element to the situation, because if the building was considered a structure, the approval process would be much more involved. She said the current definitions in the Ordinance provided the Board with some leeway. She said the tent was to be temporary, would not be used for a commercial enterprise, and was of appropriate size.

She said if the applicant had to comply with the State Building Code, it would need to meet a variety of criteria, and she also outlined what would be involved in having to go through the site plan review process. She noted that in other towns she had been in, this tent was not considered a structure, and asked the Board to look at the tent in a different way. She said it would be a hardship to the nonprofit organization if the tent was considered to be a structure. She also noted she had met with Katie Paine, whose property was directly across the river, who said she was not against the tent. Ms. Woodburn said the Board would not be setting a precedent by granting this appeal.

At the request of Board members, Ms. Woodburn described what the tent was comprised of .

Mr. deCampi said the tent didn't look like a structure to him, but said he would like to hear Mr. Johnson's perspective on this.

Mr. Johnson said the basic issue was the time period during which the tent would be located on the property. He said anything more than 180 days was not considered temporary. He explained that with a "permanent" tent, the issue then was whether it was a structure, and said that because it was not residential, and was commercial, it fell under the State Building Code.

Mr. deCampi noted that the Board had looked at applications for accessory sheds in neighborhoods and was willing to allow some flexibility as to whether they were structures. But he also noted that the tent was bigger than a shed.

Annamarie Harris said this was a situation where there should be some leeway, in order to make things easier for this worthwhile organization.

Chair Smith asked if there was anyone else to speak for or against the appeal. Hearing no one, he closed the hearing.

Mr. McNitt said the issue of human occupancy of the tent of people going in and out of the tent, should be considered.

Mr. Johnson said the State Building Code was not enforceable in one and two family dwellings, but did apply here because it was commercial, and Town owned.

Mr. Gooze said the key question was whether protection of humans was an issue here, and whether there was danger to people in using the structure. He said he felt more comfortable calling the tent an accessory structure, because he didn't believe it would endanger anyone.

Mr. McNitt noted the door to the tent would generally be wide open, and there would be no storage of fuels that might otherwise cause a fire.

Mr. Gooze said the variance would still include conditions to deal with things like that.

Chair Smith said the organization was of great benefit, and was expanding rapidly. But he said he believed the Code Administrator made the right decision in making the Administrative Decision. He said as he read the definitions, and the tent to him was a structure.

Mr. Johnson said he also thought he had made the right decision, noting he was paid to read the law. But he said he wouldn't have any problem overturning this decision. He said this was a accessory structure to the main building, and the Town didn't define accessory structure, so the ball was in the Board's court.

Ms. Eng said she didn't believe the tent fit the definition of a structure, and said she saw it more as a shed, detached from principal building, subordinate to it, and with no foundation.

Mr. deCampi said the Board had typically used the absence of a foundation as the criteria as to whether or not something was a building, and the tent clearly lacked a foundation. He also said because of the impact, he would tend to define the tent as not being a structure.

Chair Smith noted that the other situations concerning sheds were residential in nature. He said the tent was large, and was also not simply in someone's backyard.

Mr. McNitt said that having read the definitions, this tent was neither fish nor fowl. He said he did not want to bypass safety concerns, and also said Mr. Johnson was right in making his original administrative decision. But he said this was a situation where the Board should consider the possibility of other avenues to make it feasible for the organization to move forward, - something proportionate to what it was trying to do with the property. He said if the tent was called a structure, various laws protecting public buildings came into play, for a situation where he doubted it was worth the trouble to apply all of them.

Jay Gooze MOVED to grant the APPEAL OF ADMINISTRATIVE DECISION from a June 16, 2004, memo from Zoning Administrator, Thomas Johnson, regarding the definition of a structure, realizing that this is a difficult decision, and thanking Mr. Johnson for his diligence in upholding the Zoning Ordinance. Ted McNitt SECONDED the MOTION.

After discussion among Board members, Mr. Johnson and Ms. Woodburn about whether the variance request would still have to be heard, it was decided that it would not.

Mr. Gooze said he would therefore withdraw the previous motion. Mr. McNitt said he would withdraw his second of that motion.

_____ MOVED that the Zoning Board of Adjustment approve the petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham for an APPEAL OF ADMINISTRATIVE DECISION from a June 16, 2004, memo from Zoning Administrator, Thomas Johnson, regarding the

definition of a structure. The accessory building will not be considered a “structure” as defined by the Zoning Ordinance and the following four conditions shall apply: 1.) The accessory shed will be used only for storage of non-mechanically powered boats and accessories, 2.) The accessory shed will be in place no longer than five (5) years, 3.) The accessory shed will be no larger than 46’ x 16’ and 4.) The applicant has agreed to the nullification of the variance granted September 14, 2004. The motion was SECONDED by _____.

Chair Smith said he did not see the tent as an accessory shed, and wanted to be consistent about this.

The motion PASSED 4-1, with Chair Smith voting against it.

F. PUBLIC RE-HEARING on a September 14, 2004, decision of the Zoning Board of Adjustment to approve with conditions the 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. Woodburn withdrew her request for this variance.

V. Other Business

A. September 14, 2004 Minutes

Page 2- , 5th paragraph, should read “He said this provision stated thatso the whole structure fell under the three total unrelated.”

Page 6, the motion should say “***The motion as amended PASSED 5-0.***”

Page 11, 5th paragraph, should read “...he didn’t feel Mr. Johnson’s recommendation was pertinent.

Same page, under Item C, 3rd paragraph, should read “...was growing significantly,.....”

Also, same paragraph, should read “...but in the meantime, needed....”

Page 12, 4th paragraph, should read “Ms. Woodburn said that on Town land, in theory the Town didn’t have to...”

Same page, 6th paragraph, the name Arnett Taylor is correct.

Page 13, 2nd paragraph, should read “...no definition for an accessory shed..”

Same page, 4th paragraph, should read “..a structure if left there..”

Same page, motion toward bottom of page should read “...by Jay Gooze...”

Page 19, 4th paragraph, should read “...antagonistic to the democratic...”

Page 20, 5th full paragraph, should read “Ed Guadano..”

Page 21, 1st paragraph, should read “..went way too far,”

Page 23, 3rd paragraph from bottom, should read “..adhering to what the Board decided.”

The minutes as amended PASSED unanimously 5-0.

Mr. Gooze said he would not be at the November ZBA meeting. He also asked Mr. Johnson if there had been any action by the Planning Board or Town Attorney on cleaning up the wording concerning an accessory apartment being a dwelling unit. He suggested that perhaps accessory apartment could be called “living space” instead of a dwelling unit.

Mr. Johnson said that according to the definition of dwelling unit, a lot of accessory apartments were dwelling units.

There was additional detailed discussion about this issue. Mr. Johnson said the ZBA should review the Zoning Ordinance and suggest minor changes like this to the Zoning Rewrite Committee while they were still working on the Ordinance

Mr. Gooze said he would try to work out some wording, including what “integral” meant in this context, before the next Zoning Rewrite meeting.

John deCampi MOVED to adjourn the meeting. The motion was SECONDED by Jay Gooze, and PASSED unanimously 5-0.

Next Regular Meeting of the Board: **November 9, 2004****
Adjournment