

D-R-A-F-T

ZONING BOARD OF ADJUSTMENT MINUTES

TUESDAY, NOVEMBER 9, 2004

TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
7:00 P.M.

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

MEMBERS ABSENT: None

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

MINUTES PREPARED BY: Victoria Parmele

I. Approval of Agenda

Chair noted that Item II C had been withdrawn from the Agenda.

The Agenda as amended was approved 5-0.

II. Public Hearings

- A. PUBLIC HEARING** on a petition submitted by Craig A. & Georganne G. Zelinske, Durham, New Hampshire, for an **APPLICATION FOR EQUITABLE WAIVER FROM DIMENSIONAL REQUIREMENTS** regarding the 100 foot buffer zone within a cluster subdivision. The property involved is shown on Tax Map 18, Lot 18-28, is located at 46 Ross Road, and is in the Rural Zoning District.

Chair Smith appointed Myleta Eng as a voting member since Board member Jay Gooze had not yet arrived at the meeting. He then opened the public hearing.

Attorney Chris Wyskiel explained that he was present on behalf of the applicants, and then provided detailed background information on why the application for equitable waiver had been submitted.

He explained in detail how this situation had developed, and described what was proposed in order to remedy it. He described documentation he had provided, and also read through RSA 674:33-a, Equitable Waiver of Dimensional Requirement, as it related to this situation. He said four conditions were met relating to this, and went through these.

Mr. Wyskiel presented the following Equitable Waiver document to the Board:

The Stagecoach Farms cluster subdivision, approved by the Durham Planning Board in May,

1988, depicted a 100 foot protective buffer along the rear portions of Lots 28 through 38, as shown on the original approved plan recorded at the Strafford County Registry of Deeds as Plans 34-22 and 34-23. The successor developer of Stagecoach Farms intended to disencumber said Lots 28 through 38 of the 100 foot protective buffer by obtaining an abutting 100 foot wide easement to the rear of said lots, as shown on "Easement Plan" recorded at the Strafford Registry as Plan 48-11, said replacement easement being granted by deed dated October 20, 1995, recorded at Strafford Registry Book 1840, Page 36.

In acknowledgment of the replacement 100 foot wide protective buffer, Applicants' Equitable Waiver from Dimensional Requirements is GRANTED with the further condition that Applicants, their successors in title to their property, need not apply to this Zoning Board of Adjustment for any further equitable waiver from dimensional requirement if they intend to further improve their property with structures or improvements located within said original 100 foot buffer, so long as said improvements or structures are located to otherwise comply with relevant building and wetland setbacks from said lots' property lines.

This Equitable Waiver, with the above stated condition, is further intended to apply to Lots 28 through 38 as shown on the original subdivision plans recorded as Strafford Registry Plans 34-22 and 34-23.

Chair Smith asked when the violation had first occurred.

Attorney Wyskiel said this was probably when the house was built, 1980, and provided additional details on this.

Chair Smith said he had asked this question because Item II in the Statute said the violation had to have existed for 10 years or more. There was discussion about this, and Attorney Wyskiel noted that the statute did not require that the violation had existed for 10 years or more, it read that if the violation had existed for 10 years or more, only two of the four conditions had to be proved. He said the applicant could prove all four conditions. There was additional discussion about this.

Mr. deCampi asked if the words "property line" should be plural in the document, in order to meet all of the setbacks from all of the property lines, and it was agreed that this change should be made.

Mr. McNitt asked what property(s) had given up the 100 ft. easement.

Mr. Johnson said it was the Nature Conservancy. He said the organization had purchased the lot after the developer gave up the easement. He said property was presently owned by the NH Fish and Game, and would be used as open space. He said if the agency had had any real issues with this waiver request, their representative would have been present that evening. Chair Smith asked if there were any members of the public who wished to speak for or against the application for equitable waiver.

Scott Morrison, 44 Ross Road, said he owned an adjacent lot, and said he wished to speak in support of the application.

Jeanine Richie, 48 Ross Road, said she also owned one of the affected lots, and said she wished to speak in support of the proposal.

Chair Smith asked if anyone else wished to speak for or against the application, and hearing no answer, he closed the public hearing.

Mr. deCampi said this situation appeared to justify granting the equitable waiver, and also said it seemed logical to grant it for all the lots involved. He said the draft document that had been developed seemed reasonable, although noting it was unfortunate that Board members hadn't seen it before the meeting.

Mr. Bogle said he had no problem with granting this, with the conditions suggested. He said the Zelinskis were blameless, noting the Town had signed off on all of these things. He said that they and other property holders should be assured that they would not have similar problems with their properties in the future.

Ms. Craft said she concurred with the other comments that had been offered by Board members.

Ms. Eng said she had nothing to add, but said she would like to have the document read out loud.

Chair Smith said he had no serious problem with the request for equitable waiver. He read the document out loud.

John de Campi MOVED to grant an APPLICATION FOR EQUITABLE WAIVER FROM DIMENSIONAL REQUIREMENTS regarding the 100 foot buffer zone within a cluster subdivision, with the conditions stated in the verbiage from Mr Wyskiel. Linn Bogle SECONDED the Motion, and it PASSED unanimously 5-0.

The Board provided clarification to residents who owned affected lots in the subdivision that this waiver would be automatically added to the files for all of the affected lots.

- B. **PUBLIC HEARING** on a petition submitted by Troy Hartson, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XX, Section 175-109(D) of the Zoning Ordinance to allow for three accessory structures on a property. The property involved is shown on Tax Map 18, Lot 11-12, is located at 3 Simon's Lane, and is in the Rural Zoning District.

Chair Smith designated Sally Craft as a voting member for this Item.

The applicant, Troy Hartson, spoke before the Board, and explained that he was seeking a variance for a garden shed. He said that including the shed, there were presently three accessory structures on the property, but said that if the shed were just a couple of feet smaller (the shed was 10 ft x 14 ft) it wouldn't have required a permit. He said he had not realized that he could not have all three accessory structures on his property. He explained that the other two structures were a barn and a playhouse.

Mr. Hartson said the garden shed added to the property, and did not stand out, noting that his property was somewhat secluded. He said the shed was used to store his lawn mowing equipment. He said he believed his application met all of the variance criteria.

Chair Smith asked how the shed had been built without the applicant realizing he could not have a third accessory structure.

Mr. Hartson said he did not know it was not allowed. He noted he had not built the shed, but had ordered it.

Mr. Bogle asked why the barn on the property couldn't be used to store the lawn mowing equipment.

Mr. Hartson explained that his barn was used to store cars, and for woodworking.

Mr. deCampi asked if it might be practical to build an extension onto the barn to accommodate the lawn mowing equipment, or perhaps to do away with the playhouse, in order to keep the number of sheds on the property to two.

Mr. Hartson said the playhouse was a fairly large structure, and had been turned into extra living area. He also said it was used for storage, and noted that he had a home business.

Ms. Craft asked how big the playhouse was, and it was clarified that it was bigger than the shed.

Chair Smith said his question was also if the playhouse could be removed.

Mr. Hartson said it could be, but said this would be detrimental because he needed the storage space.

Chair Smith said these questions were being raised, because people sometimes came to the Board after a violation had occurred, and the Board looked for possible alternatives to address a problem.

Mr. Hartson noted that if the garden shed were just a couple of feet smaller, it would not be regulated. He acknowledged it was his mistake that he hadn't ordered a smaller shed.

Mr. McNitt asked if the shed would be located in the position where it was marked in the drawing that had been provided. He explained that he had looked at the shed, from Simon's

Lane, and had the impression that it was much more visible from the street than the picture had indicated.

Mr. Hartson said it was visible from the street, but not from other properties on Simon's Lane. There was discussion as to whether it was visible from across the street.

Ms. Craft asked if the shed was sitting on cinder blocks.

Mr. Hartson said it was, and could easily be moved. He said it was a cedar shed, and the neighbors liked it.

Chair Smith asked Mr. Hartson if he had received any comments from neighbors, or any requests to remove the shed.

Mr. Hartson said the comments he had received had been favorable.

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

Ms. Craft said she was leaning toward granting the variance. She said it would be a shame to have to remove the garden shed because it was a few square feet too large, but said she was interested in hearing what others Board members had to say.

Mr. Bogle said he was of two minds on this application. But he said he wondered whether room couldn't be found for the lawn mowing equipment in the barn.

Mr. deCampi said it was not clear why the Town had created the two accessory structure limit. But he said that since it had, he therefore had difficulty granting this variance because it seemed the applicant had other options for keeping within the requirements of the law. He said he didn't like asking Mr. Hartson to remove the shed, but said it seemed there would be other reasonable ways of meeting his needs, for example, building onto the barn or the playhouse.

Chair Smith said there was the question of whether the barn could be used for storage, as well as whether there were other options available to the applicant.

Ms. Eng said that perhaps by reworking what was in the barn and in the playhouse, Mr. Hartson could fit the tractor into it. She said it seemed like only two structures should be allowed.

Mr. McNitt said the shed seemed to stick out like a sore thumb. He noted that this was supposed to be a rural area, although he said he recognized that most properties had been developed without this in mind. He said the applicant had made a reasonable case for needing the shed. He said he shared Mr. Bogle's reluctance to grant the variance, noting that by doing so, the Board was pushing the intent of the Zoning Ordinance, and the two accessory buildings provisions. He said he perhaps could be convinced either way, but said he was not particularly for granting it.

Chair Smith said that Mr. McNitt's concern was also his concern, and said he would rather not grant this variance. He said perhaps this situation could fall under ignorance of the law, but said he felt fairly strongly that some adjustment should be made to allow the barn and/ or the playhouse house to the lawn mowing equipment.

Ms. Craft received clarification that if the shed had been 8 ft. x 10 ft., it would not be considered an accessory structure.

Mr. Johnson said that based on past practice of the Board, an 8 ft. x 10 ft. was not considered a structure.

Ms. Craft said it seemed there was still some wiggle room, and said this was a shed that was just a little too big.

Mr. deCampi said he was willing to continue the case and do a site visit, noting he might feel differently after seeing it.

Ms. Eng agreed this was a good idea, noting she hadn't seen the property. She also said she would not like to see the equipment stored outside, because this would be more harmful to the environment.

Chair Smith asked Mr. Hartson where he had stored this equipment before he got the shed, and Mr. Hartson said he had stored it outside. He said he had a severe storage problem.

Mr. Johnson said Mr. Hartson had developed a home occupation at this location, and said the business was legal, and he had been complying with no outside storage requirements.

There was discussion among Board members as to whether the definition of shed should be addressed.

Chair Smith said doing a site visit seemed reasonable.

Mr. McNitt said that if Mr. Hartson would be storing this equipment outside, under tarps, his objection to the shed disappeared, because the tarps were more objectionable.

Linn Bogle MOVED TO continue the case to the December meeting, pending a site walk. The motion was SECONDED by John deCampi, and PASSED unanimously 5-0.

It was agreed that the site walk would be done on November 16th at 3:00 pm.

Board member Jay Gooze arrived at the meeting at 7:55 pm.

- C. **PUBLIC HEARING** on a petition submitted by Kecia Hartmann, Durham, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from an October 25, 2004, letter from Zoning Administrator, Thomas Johnson, regarding the height of a proposed structure. The

property involved is shown on Tax Map 12, Lot 1-21, is located at 18-20 Cedar Point Road, and is in the Residential Coastal Zoning District.

This item was withdrawn by the applicant.

- D. **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 basement under a previously approved kitchen within 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 explained that her application, after speaking with Town staff, was to keep the proposed basement within the existing footprint. She explained that a crosswall for the kitchen was needed in order to comply with regulations, which meant there was not much space for storage, so a basement was an important addition to the property. She said a stairwell would also be needed to get down to this basement, and noted that this could not be a bulkhead. She said they were trying to keep the aesthetics of the Inn intact, and noted at present, there was no basement, and there was a small slab for part of the old part of the building.

In answer to a question from Chair Smith, she said the planned stairwell was exterior. She said although the desire was to keep within the footprint, if it was put inside, it would take needed space away from an already small area. She provided details on the proposed design. She said the basement would provide more storage, and also would allow access to the equipment for the elaborate septic system that was being put in. She said that the stairwell would not be visible from the street.

Mr. deCampi asked what the chairs in the kitchen were for. He asked if she was building a kitchen and a dining room, and said it seemed the kitchen was an eat-in kitchen. He said it seemed that in order to be able to allow a room that was large enough to serve guests, she wanted to put the stairwell someplace else than that kitchen area, and thus would be expanding the footprint. He said he didn't have a problem with the basement, but said expanding the structure beyond the porch that had originally been asked for, simply because she wanted to have an eat-in kitchen, didn't seem reasonable.

Ms. Sparks explained that the Inn had a homey atmosphere, and said what she was trying to achieve with the kitchen was a place where guests would feel comfortable sitting, and eating if they felt like it.

Chair Smith said that the addition of the stairwell would expand the existing footprint, and said he was troubled by this.

Mr. Bogle said he had looked at the decision of the ZBA concerning this property in October, and said the use was now being changed. He said the design for the kitchen showed that the kitchen itself took up roughly half of the area for the porch, while the rest was an eating counter.

Ms. Sparks noted that golfers at the facility would come into this kitchen area from time to time. She said she trying to not make the area look commercialized, and instead wanted it to look like a kitchen, so that people would feel they were coming into her home. There was discussion about this with Board members.

Mr. Gooze asked Ms. Sparks if she had had anyone look at whether there could be a design to get to the basement from a stairway built on the inside, not the outside.

Ms. Sparks said she would have to give something up in order to do this.

Chair Smith asked if anyone wished to speak in favor or against this application. Hearing no one, he closed the public hearing.

Mr. Bogle said he didn't object to this coffee bar concept, as opposed to having a formal dining room, and said it sounded like a nice situation. But he said the application was for the basement, and the question was whether a revised application was needed in order to accommodate the enlargement for the cellar stairs, which involved an increase in the footprint.

Mr. Gooze said he agreed with these questions. He said he would not go through the various criteria, because he didn't think this was an appropriate application. He said he felt the Board should deny the application on that basis.

Mr. deCampi said asking Ms. Sparks to come back with an amended application was ok, but said if she was not going to get the additional square footage attached on to the building, it didn't make sense for her to revise the application, and then have the Board turn it down.

Mr. Gooze said if they did want to go ahead with this, they should go through the variance criteria. He said because this had previously been approved, this became an area variance. He said one of the criteria under this was hardship, and said the applicant did not meet this under Section B under hardship, because the applicant could achieve the same benefit by some other method.

He said the other variance criteria were pretty much met, noting that if they granted it before on these criteria, they still applied.

Mr. deCampi said that his own reasoning had come to the same conclusion. He said he had no problem with the cellar, as long, but said that this did not justify the 80 square foot extension. Ms. Craft said she agreed, and said it was not unreasonable for the applicant to be asked to build the stairway within the existing footprint.

Mr. McNitt said the kitchen was essentially what was approved the previous time. He said the drawings indicated the applicant wished to make a substantial improvement over the existing porch. He said he had no problem with the existing porch, but said the question was whether the Board agreed to an extra 80 ft. on an expansion the Board had previously agreed to rather reluctantly.

Ms. Eng said she had been under the impression that the footprint would not change. She said the previous approval was just for the kitchen, and said she would like to see the stairwell placed within the existing kitchen.

Chair Smith said he had nothing additional to add to comments of other Board members.

Jay Gooze MOVED to deny the APPLICATION FOR VARIANCE from Article VII, Section 175-53 of the Zoning Ordinance to build a basement under a previously approved kitchen within an existing Bed & Breakfast Inn.

Mr. deCampi said he thought the Board should grant the variance, but with the condition that it did not exceed the footprint of the existing porch.

Mr. Gooze withdrew his motion.

John deCampi MOVED to grant the APPLICATION FOR VARIANCE from Article VII, Section 175-53 of the Zoning Ordinance to build a basement under a previously approved kitchen within an existing Bed & Breakfast Inn, with the continuing condition that the footprint not exceed that of the existing porch. The motion was SECONDED by Ted McNitt.

Mr. McNitt noted again that the stairway could be placed somewhere in the interior of the building, and not necessarily in the kitchen.

Mr. Bogle said that given this amended motion, he would vote in favor of it. He also noted he personally didn't have a problem with expanding the footprint a few feet. But he said the only problem he had was that they were being asked to approve a change of use, and an expansion of the use. He noted that the Board continually ran into this kind of thing when it didn't get key information on an application before the meeting. He said that under these circumstances, he would vote for the motion, but said he would have wished there was an amended application.

Mr. deCampi said the Board could vote on this motion, and there then could be another motion, if desired.

The motion PASSED unanimously 5-0.

There was discussion among Board members as to whether it was appropriate to have another motion.

Mr. Bogle said he would like to propose a motion to allow the stairwell, as shown on the plan, which would mean there would be an 80 sq. ft. increase in the footprint.

Board members discussed whether there should be such a motion. Chair Smith said this motion, which would override the previous motion, was not appropriate.

- E. **PUBLIC HEARING** on a petition submitted by David Kemmerer, Quakertown, Pennsylvania, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of

the Zoning Ordinance to allow three unrelated occupants to reside in a single family home of less than 900 square feet. The property involved is shown on Tax Map 4, Lot 58-0, is located at 10 Cowell Drive, and is in the Residence A Zoning District.

The applicant, David Kemmerer, said he had purchased this house for his daughter to live in, in 2003, and said he presently lived in Pennsylvania. He provided details on who lived in the house at present.

He provided details on how he had willingly complied with various town safety codes. He said that when he had first looked into buying the house, there were four people living there, so he proceeded with the assumption that this was allowed. He said he took responsibility for not checking the Zoning Ordinance on this.

He said he was interested in making improvements to the property, and expected to retire in four years and to move to Durham, so was not going to be a long term landlord. He said he was actively involved in managing the property, and said the dimensions of the house were 700 sq. ft. minus the closets.

Chair Smith asked Mr. Kemmerer if he had a professional measure the square footage.

Mr. Kemmerer said he did not, but noted that he had experience with buildings.

Mr. deCampi asked what the dimensions of the rooms were, and Mr. Kemmerer provided this information.

Chair Smith noted a letter from Mr. Johnson to the previous owner, and asked Mr. Kemmerer if he had looked at this letter.

Mr. Kemmerer said he had not seen this letter previously.

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

Marco Dorfsman, said he lived in this neighborhood. He said that one of the things that made Durham the place it was, was the zoning that allowed neighborhoods near downtown. He said he lived in such a neighborhood. He said the spirit and intent of the Zoning Ordinance was to keep these neighborhoods intact. He said he didn't have major problems with the applicant's house, but he said that as houses turned into student housing, they stopped being neighborhoods. He said his concern was that the downtown area would cease to be a neighborhood.

Susan Herold, said she lived in the applicant's neighborhood. She said there were a number of small houses in this neighborhood that would lend themselves to having students in them, and said she worried that some people might thinking of leaving the neighborhood. She said she worried about the precedent that would be set if the Board granted this variance.

Carolyn Witlock, 239 Baboosic Lake Rd, Merrimack, NH, said she was not presently a resident of the neighborhood, but said it did have a lot of history for her. She provided details on this, and said she still owned property in this area. She said the houses in this neighborhood were all built for young families, and said it was always special because it was so small that everyone knew each other.

She said she had not heard from the applicant that this was a hardship case. She said he had made the choice to have this house, and to have an income property. She said that granting the variance was against the Zoning Ordinance, and would begin to change the tenor of the neighborhood.

Susan Richmond said she lived in this neighborhood, and said that the more the houses in the neighborhood were potential income houses, the more their values would go up, which became a vicious economic cycle.

Chair Smith asked if anyone wished to offer a rebuttal to what had been said. There was no response.

Jean McPeak said her question to Mr. Kemmerer was why seven cars were always parked in the driveway of his property.

Mr. Gooze said he was considering whether this was an area variance or a use variance request. He said that either way, he did not feel the application met the criteria.

He said this was a self imposed hardship, so the applicant did not meet any of the variance criteria for either a use variance or an area variance.

He said that granting the variance would be against the spirit and intent of the Zoning ordinance. He said there was no question that renters were allowed in a single family house, but the ordinance was very clear on square footage, and about the number of unrelated people allowed. He said the purpose of the ordinance was to address possible extra noise, cars, and activity. He said that similarly, denying the variance would protect the public interest.

He said substantial justice would not be done by granting the variance.

He went through various aspects of the hardship criteria, under Bocci for area variances, and Simplex for use variances, and said they did not apply.

He said it was questionable whether allowing the variance would diminish the value of surrounding properties, and said that in fact, the property values could go up because a property owner could make more money from a rental property.

Mr. Gooze said he would vote against granting this variance.

Mr. deCampi said he agreed with Mr. Gooze. He said the ordinance attacked this present situation in that a property could not be rented unless there was 300 sq. ft. minimum per

resident, which was a safety, health and welfare issue. He said this application had a problem concerning the area.

Ms. Craft said this situation seemed cut and dried, especially when the 70% gross floor area was applied. She said the property was just at the 2 person occupancy, based on this calculation, and said she would definitely not be in favor of allowing 3 persons to live there.

Mr. Bogle said this was a distinct pocket neighborhood of single-family homes that had existed for years. He said the neighbors were being confronted with houses being bought, students being put in them, and absentee owners. He said he could understand that people wanted to buy these houses for their children, and have them become money makers. But he said this was a short term view of the house. He noted that if the Board granted the variance, it would go with the property, and said the Board shouldn't grant this kind of variance under these circumstances.

He said the other issue was size, and said that 588.7 livable feet was really only enough for one person. He questioned whether even two people were appropriate in this house, and noted there was no second story. There was discussion about the measurements of the property.

Mr. Bogle said he agreed with Mr. Gooze concerning the variance criteria, and said that granting this variance would be contrary to the spirit and intent of the Zoning Ordinance, which was to maintain neighborhoods. He said allowing single family homes to become student housing dragged down neighborhoods. He also said this would be contrary to the public interest, noting that the neighbors were mostly families.

He noted the comment about the value of surrounding properties being maintained, but said that perhaps there were other values than simply the monetary value, such as the value of the kind of neighborhood it was. He said that perhaps the variance criteria applied only to monetary value.

He said the hardship concerning the properties was self imposed, and was not one that was put on the buyer. He said he did not feel he could vote to approve the variance.

Ms. Eng said she agreed, and said granting this variance would be very contrary to the public interest because of crowding and safety issues, and would also be contrary to the spirit and intent of the ordinance. But she said she would like there to be some discussion as to whether a condition could be included about the person being able to stay until the end of the semester.

Mr. McNitt said he agreed with other Board members on this, and also said he agreed with Ms. McPeak's comment about the number of cars at the property. He said these additional cars were a safety issue, in addition to representing a violation of the Zoning Ordinance.

Chair Smith said he agreed with other Board members, and also spoke about the fact that the variance, if granted, went with the property. He said he felt strongly that granting this variance would fly in the face of the spirit and intent of the ordinance.

Mr. Gooze noted that saying allowing student rentals would be contrary to the ordinance was not correct, noting it was the number of people that was the issue. He also said that concerning allowing the applicant extra time, this was a situation where the applicant had sufficient evidence that he was in violation. He said he did not feel that extra time should be granted.

Mr. deCampi said he had no problem with the idea of granting the third person occupancy until the end of the semester. There was additional discussion about this.

Jay Gooze MOVED to deny the APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance to allow three unrelated occupants to reside in a single family home of less than 900 square feet. The motion was SECONDED by Ted McNitt, and PASSED unanimously 5-0.

- F. **PUBLIC HEARING** on a petition submitted by Stephen Zagieboylo, Hampton Falls, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from a September 1, 2004, letter from Zoning Administrator, Thomas Johnson, regarding occupancy. The property involved is shown on Tax Map 6, Lot 3-10, is located at 28 Mill Road, and is in the Residential A Zoning District.

Mr. Zagieboylo said he and his wife had lived at the property in question, but had decided they had to sell the property. He said the plan was to sell the house to a single family, and said the property was on the market for several months but had not sold.

He said the property had 2800 square feet of living area, and said there were eight girls living there. He said there were eight bedrooms in the house and there was enough room, so this was not an area issue. He said he had satisfied the safety requirements, and said he was simply looking to get through this year, until he had the opportunity to sell the house. He apologized for his ignorance of the law.

Mr. deCampi said the applicant needed to give the reasons why the administrative decision was wrong, and said he had not done this.

The applicant did not provide additional information at this point.

Chair Smith asked if any members of the public wished to speak in favor of the requested appeal of administrative decision. There was no response. He then asked if anyone wished to speak against the request.

Morey Borovick, 50 Mill Road, said that to let 8 students live at the property diminished property values all around. He said that Mill Road was going through a transformation, noting that within a one-block area of where he lived, several cases like this had been turned back, with the assistance of Mr. Johnson. He noted he had seen 10 cars at the property the previous day. He said if the students remained there, this would be a hardship to the neighbors. He asked if there was any way to curtail the ongoing process of appeals that the applicant would go through.

Doug Henderson, 45 Mill Road, said he was definitely against this application. He said the situation at the property represented gross negligence on Mr. Zagieboylo's part. He said the area was clearly a neighborhood, and said allowing eight people at that location was ridiculous. He also said to allow them to stay until the end of the semester was wrong.

Mylin Clyde, 51 Mill Road, said it was hard to believe that the applicant didn't know he couldn't have eight people in house, given the fact that Mr. Borovick was the watch dog for the neighborhood.

Jim McCarthy, 47 Mill Road, said the decision to deny occupancy to eight people made eminent sense.

Paul McIsaac, 26 Mill Road said he agreed with Mr. Johnson's Administrative Decision.

There were no additional comments from the public, and Chair Smith closed the hearing.

Mr McNitt said the applicant had obviously faced a problem when his house did not sell, but said there was no question that the decision on the part of the Code Administrator was correct. He said the Board should deny the appeal

Ms. Craft said she agreed the Board should not grant the appeal, noting she couldn't see any area where an error had been made by Mr. Johnson.

Mr. deCampi said the applicant failed to give the Board data to support the appeal, and said he also thought that Mr. Johnson made the right decision.

Mr. Bogle said he agreed with what had been said by others, although noting it was unfortunate that the applicant was between a rock and a hard place. He said that Mr. Johnson had made the right decision

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

Mr. Gooze said he agreed, and Chair Smith also said he agreed.

John deCampi MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION from a September 1, 2004, letter from Zoning Administrator, Thomas Johnson, regarding occupancy. The motion was SECONDED by Ted McNitt, and PASSED unanimously 5-0.

- G. **PUBLIC HEARING** on a petition submitted by Christine Rockefeller, Dover New Hampshire on behalf of Glassford Lane Realty Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow five unrelated occupants to reside in a single family home. The property involved is shown on Tax Map 4, Lot 38-15, is located at 5 Glassford Lane, and is in the Residence A Zoning District.

Chair Smith stated that there were some new documents on the table, a letter from a neighbor, and a petition. He also noted that if this Agenda item went beyond 10:00 pm, the final Item would have to be continued for another night. He opened the public hearing.

Attorney Chris Rockefeller said Brian Cajewski and his grandfather were owners of the property in which Brian was a resident. She submitted copies of the layout of the building, and explained that the situation with this property was a bit different than the previous Agenda items, noting that the applicant was requesting a variance based on the size of the property and other factors. She said if one went strictly on the property/size that was listed, this property would qualify for 6.87 occupants, and provided details on how this was calculated. She said that at present, it was occupied by the owner and three others.

She said renters were clearly allowed in this zone, so the issue was whether the spirit and intent of the ordinance was really density, which said that regardless of the size of the property, a property owner was not allowed to have more than 3 unrelated residents. She said the intent clearly was an anti-density regulation, and said the issue was what this particular restriction being imposed on the applicant's property did for that intent. She said she would suggest it did nothing for the intent because of the very large size of the property involved. She provided details on the layout of the property.

She said the noise issue was something for a different branch of government to enforce. She said another issue was parking, and said there was clearly enough room for occupants to park off the street. She said that whether there were 4 or 5 unrelated persons in the house, as compared to 3 unrelated persons, she didn't believe this had any substantial relationship to traffic. She noted she hadn't seen any particular complaints about the driving of the occupants themselves.

Ms. Rockefeller said that renting was allowed, and said the fact that the property was owner occupied as well as being rented out to 4-5 people as compared to 3 people would not materially impact property values. She said there was no evidence that renting to 4-5 as compared to 3 people would have an impact on property values.

She said that the unnecessary hardship for the applicant was that there was no relationship between the space requirements and the anti-density goals of the ordinance, for the property in question. She said it was a fairly large house, and it was an allowable use. She said the spirit and intent of the anti-density provisions was preserved by allowing this, and requested the variance to allow the occupancy, based on the 70%.

Chair Smith asked if anyone wished to speak in favor of the request for variance. There was no response. He then asked if any members of the public wished to speak in opposition to the variance request.

Sam Flanders, Glassford Lane, said he lived across the street. He said a petition had been circulated to residents of the neighborhood, and said all owner occupied residences had signed it. He said the problems with having a number of residents at this property didn't just have to do with noise. He said there were parking problems, traffic, parties, and provided details on

the problems with the property. He said there was a general disregard for the neighborhood. He said he was concerned about the precedent that would be set by granting the variance. He said there was a lot of talk about density being the main criteria, but noted that although the number of people living there was a factor, many of the cars parked there belonged to people who didn't even live there.

Mark McPeak said he was an abutter, and said he believed this ordinance allowing no more than 3 unrelated people, regardless of area, was a fair balance of the rights of the property owner with the rights of members of the community. He said he supported this provision, and said he believed it should be enforced.

Carol Whitlock, 239 Baboosic Lake Rd, Merrimack, NH, said she was against granting variances without hardship evidence. She said her parents lived at this house for 12 years, so she knew it well. She provided details on the size of some of the various rooms, and noted that it was a very expandable property, which was one of her concerns for the future of the neighborhood. She also said she owned a vacant lot abutting this property, and said the owners didn't realize how close the property line was.

Lorie Hopkins and Alexander Massis also spoke in opposition to the variance request.

Chair Smith noted that because it was close to 10:00 pm, Item II H would not be heard that evening. He said a date would be set for the Board to hear this Item.

Marco Dorfsman, noted that essentially the whole neighborhood was present at the meeting, and said he agreed with the concerns that had been expressed. He noted that he had met the kids that lived at this house, and liked them. But he said the neighborhood as a whole was concerned because of what was happening, and what could happen, to it.

Susan Herold, 6 Glassford Lane, said the grandson was a junior at UNH and asked whether the property would still be owner occupied after he graduated. She also said the owners weren't willing to work with the neighborhood on noise and parking issues.

Susan Richmond, 16 Cowell Drive, said the lawyer seemed to be implying that the spirit and intent of the ordinance regarding density should not apply for this property, and implied that this could mean that additional portions of the property could become living area.

Dina Masis, 18 Cowell Drive, said the lawyer had said there was no a real difference between 3, 4 or 5 people. She said there was a difference, especially for the neighbors, and said the more people occupied the building, the greater the possibility it would be a party house, and changing the neighborhood. She said she was against the variance request.

Chair Smith asked if anyone wished to rebut these comments.

Ms. Rockefeller asked what the petition that had been provided to the Board said, and Chair Smith read this out loud.

Chair Smith then closed the public hearing.

Ms. Craft said she didn't see how she could vote to approve this based on current ordinances.

Mr. Bogle noted that there was mention of mattresses coming in and out, and sheetrock taken into the house, in comments from neighbors, and Mr. Johnson provided details about this.

Mr. Bogle asked for clarification as to who the owner of the property was.

Mr. Johnson said that Glassford Lane Realty Trust was owner.

Ms. Rockefeller explained that Mr. Gateman was Brian's grandfather, and said that Brian and his grandfather owned the house.

Mr. Bogle said Ms. Rockefeller was arguing on the basis of square footage, but said Table 2.2 in the ordinance clearly stated that no more than 3 unrelated occupants could occupy the property. He said he took this to override the square footage argument. He said the ordinance as it stood mandated 3 unrelated in a single family home located in the RA district.

Mr. Gooze said that the hardship criteria under the use variance should be considered for this situation. He also said he didn't think he had ever seen more public comments that showed granting the variance would be against public interest. He said that from personal experience with a house near him, a house with five people in it as compared to 3 made a big difference, in terms of the number of guests, noise, cars, etc. He said this spoke to the spirit of the ordinance, which was done originally to control noise, parking, extra people, etc. He said the ordinance wasn't intended to allow - if there was a big enough house - 4 people.

Mr. Gooze went through the hardship criteria for considering a use variance. He said that special conditions of the land were not an issue, noting that when the ordinance was developed, exceptions were not allowed for large houses. He said there was a fair and substantial relationship between the general purpose of the zoning ordinance and the specific restriction on the property. And he said that granting the variance would injure the public or private rights of others.

He said that substantial justice would not be done by granting the variance. He also said that concerning property values, there was some question as to what the impact would be.

Mr. deCampi said he totally agreed with Mr. Gooze's statements on the variance criteria. He also said this was not an issue of density, it was an issue largely of control. He said any claim that this was a density issue was fallacious.

Ms. Eng said she agreed with what had been said by other Board members. She said if five people were allowed, this would almost be a rooming house situation, and said she didn't think they should go there. She said granting this would be very much against the public interest, and contrary to the spirit and intent of the ordinance, and said if this were approved, it would injure the private rights of the neighbors. She said she was against approving this variance.

Mr. McNitt said that through the Master Plan and the ordinances, the Town had expressed its concern about the number of people living in a neighborhood, and about the fact that when there was no control, there could be problems.

Chair Smith said that as he read through the applicant's arguments, he felt strongly that use of the property as residential housing in a way that violated the zoning ordinance was contrary to the public interest. He said that concerning the hardship issue, he did not feel that the density requirement interfered with the reasonable use of the property. He said granting the variance would injure the public and private rights of others, and was contrary to the spirit of the ordinance, for the reasons stated that evening.

John deCampi MOVED to deny the APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance to allow five unrelated occupants to reside in a single family home. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

- H. **PUBLIC HEARING** on a petition submitted by Anthony A. McManus, P.A. Dover, New Hampshire on behalf of Jonathan Chorlian, Dover, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from July 22, 2002, October 8, 2004, October 15, 2004 and October 26, 2004, letters from Zoning Administrator, Thomas Johnson, regarding occupancy. The property involved is shown on Tax Map 6, Lot 2-41, is located at 9 Stevens Way, and is in the Residential B Zoning District.

It was agreed that this Item would be continued to the following week.

III. **Board Correspondence and/or Discussion**

REQUEST FOR REHEARING on a September 14, 2004, denial by the Zoning Board of Adjustment 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 1, Lot 12-13, is located at 1 Emerson Road, and is in the RA, Residence A Zoning District

Mr. deCampi recommended that an alternate be appointed to vote on this. He said he would recuse himself because he had not been present for the original hearing on the application. It was agreed that Ms. Craft would vote on this.

Mr. Gooze noted that in the request for rehearing, there was a letter from Mr. Edney. He said that in order to make a decision, he needed to ask Mr. Johnson whether in the previous Zoning Ordinance, there was a statement that said an accessory apartment was an independent dwelling. Mr. Johnson said he would need some time to research this.

Mr. Gooze said he would be in favor of rehearing this appeal in order to get some more things clarified. He said he would like to see what this letter did to his feelings about the situation.

Chair Smith said one question was whether this letter was new evidence.

Mr. Gooze said the Board knew the applicant had been told something by Mr. Edney, and the letter reflected this. He said this letter raised some questions that there might be some new things.

Mr. Bogle said that Mr. Edney worked under the code effective in 1999, and read from the code concerning the definition of accessory apartment in effect at that time. There was additional discussion on this.

Mr. Johnson said discussion on the merits of the letter was not appropriate at this meeting. He said the letter was new evidence, and was providing the information that was requested. He said the Board should first grant the request for rehearing, and then have this discussion.

Ted McNitt MOVED to accept the REQUEST FOR REHEARING on a September 14, 2004, denial by the Zoning Board of Adjustment 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. Jay Gooze SECONDED the motion, and it PASSED 4-1, with Chair Smith voting against it

It was agreed the appeal would be reheard at the December meeting.

IV. **Approval of Minutes** October 12, 2004

Approval of the October 12, 2004 minutes was postponed until November 17th.

V. **Other Business**

Meyers case: Chair Smith said he was pleased with what he had read. He noted that the Board had worked really hard at addressing the variance criteria in their comments, and said it was a good decision. He said the Board had been winning a lot of cases recently.

Mr. Johnson said the things that the Board was complimented on should be rehashed in other cases.

Mr. Gooze said that everyone should try to get their two cents in concerning the criteria, because the cases showed that if the Board agreed on these, the court took this into consideration. He said it also took into consideration the fact that Board members had done site walks/observation.

There was discussion about trying to clean up the language concerning integral in relation to accessory apartments. He referred to 175-09.c, section 20, p. 119. that discussed accessory apartments and dwelling units, and there was detailed discussion about this. He said this wording needed to be tightened up. There was also discussion as to whether the term “living space”

worked better than “dwelling unit”. Chair Smith suggested that Mr. Gooze develop some proposed changes, and send them out to Board members for their review.

Mr. McNitt said it was important to impress upon members of the Council and/or Zoning Rewrite committee how important getting this corrected was for the welfare of the Town.

Mr. Johnson said he had an appointment on Friday with a reporter from Fosters Daily Democrat, who saw an interesting story in all of this.

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

Adjournment at 10:45 pm

Next Regular Meeting of the Board: **December 14, 2004****

John deCampi, Secretary