

*These minutes were approved at the February 22, 2005 meeting.*

**ZONING BOARD OF ADJUSTMENT MINUTES  
TUESDAY, JANUARY 11, 2005  
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL  
7:00 P.M.**

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

**MEMBERS ABSENT:** Sally Craft

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

**MINUTES PREPARED BY:** Victoria Parmele

**I. Approval of Agenda**

*John deCampi MOVED to approve the Agenda, as written. The motion was SECONDED by Ted McNitt, and PASSED unanimously 5-0.*

**II. Board Correspondence and/or discussion**

- A. **REQUEST FOR REHEARING** on a November 16, 2004 denial by the Zoning Board of Adjustment 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 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.

Mr. Gooze referred to the lengthy Request for Rehearing letter submitted by Attorney Bolt, dated Dec 14<sup>th</sup>. He said he had looked carefully over all the points made in the document, to see if perhaps the Board had made some kind of legal mistake.

He noted that the letter said that the Board's decision as reflected in the Notice of Decision, failed to state any ground or reason for the decision. He said that might be the case in terms of the written decision itself, but said the Board had had cases before that had gone to court, where the judge had looked at the minutes.

Mr. Gooze also said he had checked the minutes, and had found that the people who voted to deny the appeal, except one, talked specifically about the fact that they were doing so because they felt this was an accessory apartment, not a duplex. He said that Mr. Bogle did talk about the accessory apartment, and did vote to deny. He said this was all very clear in the minutes, and noted that both Mr. Chorlian and his attorney were present at the time.

Mr. Gooze also noted that page 3 of Attorney Bolt's letter stated that "the adoption and application of the definition of accessory dwelling unit was as an illegal attempt to impose an innovative land use control on this pre-existing structure, and use without complying with the adoption procedures of RSA 674:16." Mr. Gooze said he had gone over these provisions, and the regulations said the power to adopt a zoning Ordinance "...expressly includes the power to adopt innovative land use controls which may include but are not limited to the methods contained in RSA 674:21."

Mr. Gooze said each of the other points in Attorney Bolt's letter could be gone through in the same way, but said he felt each had been answered adequately already. He said the Board's main point in its decision was that this was an accessory apartment, not a duplex, and that the accessory apartment was subordinate to the use of the house. He said he did not feel the Board had made a mistake, and therefore didn't feel it should rehear this appeal.

Chair Smith said he thought it was possible that the Board might have been somewhat at fault by not stating the reasons for the denial clearly enough before voting, and said perhaps it therefore could have been interpreted that the Board had made a mistake. He also noted the offer of compromise from the applicant, and said this would be beneficial for the Board to think about.

Mr. Bogle said he may have been the Board member who did not specifically state his reasons for voting to deny the appeal, but said it would bother him very much if Attorney Bolt's interpretation prevailed, because this would make every single home with accessory apartment potentially a duplex. He said he didn't think that had ever been what the Town intended with its ordinances, also noting rulings on the ZBA and in the courts for the last 2 \_ years he had been on the Board. He said he would therefore be very reluctant to have that interpretation upheld.

Chair Smith noted the Board was only deciding on whether to rehear the case.

Mr. Gooze referred to the end of the letter from Attorney Bolt, which stated that the applicant was open to compromising on this issue, and said he did not think this related to whether the Board should grant the rehearing.

Chair Smith said the rehearing could conceivably be granted in order to consider a compromise offered in good faith, which would be beneficial to the Town.

Mr. Gooze said he still didn't think it could be a reason for rehearing.

Chair Smith said he thought it perhaps could, noting the Board had granted re-hearings before on thin lines.

Mr. deCampi said he generally felt that when there was any doubt, the Board should rehear an application, but said he didn't have any real doubts about the Board's previous decision in this case. He also noted this was an Appeal of Administrative Decision they were talking about, not a variance, and said he therefore didn't see how a compromise concerning this

situation could be developed. But he said if any Board members felt the Board should rehear this appeal, he would vote for this.

Chair Smith noted again that it was possible the Board didn't state the reasons for denial clearly enough before voting.

Mr. Gooze said he believed it was very clear in the minutes why the Board voted the way it did.

Ms. Eng said she agreed with Mr. Gooze that the minutes indicated that it was very clear to Board members that the property was never a duplex. She said she didn't think the Board made an error in upholding the Administrative Decision, and would therefore be against re-hearing the appeal.

Mr. McNitt said since this was an Appeal of Administrative Decision, the question of hardship did not come into play, and said the Board's job had simply been to decide whether Mr. Johnson had erred. He noted that he had made the motion to deny, and said his basis for doing so was that there was an overwhelming amount of evidence that the building was built as a single-family house with an accessory apartment. He said at the time of the change of use in the 1990's, it would have been completely out of order to change the building to a duplex. He said he was willing to be convinced otherwise by Board members, but said as of that evening, he couldn't conceive of Mr. Johnson's decision as being an error.

Chair Smith said he could agree with this, but said there was still a shadow of a doubt that the Board gave clear enough reasons for its denial of the appeal.

Mr. Gooze said if there was a compromise to be worked out, this would be up to the Code Enforcement Officer to address, perhaps even without a variance. He said it would be wonderful if this issue could be resolved in an amenable way to avoid litigation, but said the decision itself would stand up, based on the minutes. He said he believed the Board felt strongly that it had made the right decision.

Chair Smith noted again they were simply deliberating on whether to allow a rehearing.

***Jay Gooze MOVED that the Board DENY the REQUEST FOR REHEARING on a November 16, 2004 denial by the Zoning Board of Adjustment 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 and October 26, 2004 letters from Zoning Administrator, Thomas Johnson, regarding occupancy. Ted McNitt SECONDED the motion, and it PASSED 4-1, with Chair Smith voting against the motion.***

### **III. Public Hearings**

- A. **PUBLIC RE-HEARING** on a November 16, 2004, denial by the Zoning Board of Adjustment 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.

This application was not heard, based on the decision made in **Agenda Item II A.**

- B. **PUBLIC HEARING** on a petition submitted by Alpha Gamma Rho, Barrington, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from a November 29, 2004 letter from Zoning Administrator Thomas Johnson, regarding the occupancy of a fraternity. The property involved is shown on Tax Map 2, Lot 8-12, is located at 6 Strafford Avenue, and in the Residential A Zoning District.

Chair Smith opened the public hearing.

Shawn Jasper, Chapter Advisor and member of the Board of Directors of Alpha Gamma Rho, spoke before the Board. He said the Board's case was not that Mr. Johnson had erred in making his Administrative Decision, but rather that he didn't have all the relevant facts in making this decision. He provided background information on how it had happened that the question concerning possible boarders at the property had recently come up.

Mr. Jasper said the fraternity had been located at this address since 1924, and had owned the property during this time. He noted that the use of the property was considered to be conforming until the zoning changed in the mid 1980s. He said in the fraternity's opinion, the use was grandfathered, noting the building had been used as a summer house since 1974, and probably before. He said that the original house on the property had burned in 1973, so the records for the property went as far back as 1974.

Mr. Jasper said the fraternity occasionally rented out rooms in the building to boarders in the spring and fall, but said it had run a summer house of male and female boarders on a continual basis. He said this was the only way they could operate the house, noting the property taxes were currently approximately \$20,000 a year. He noted the building could house approximately 28 occupants, when full.

He said they had received a Conditional Use Permit in the early 1990's to put in a house mother's room, which actually made the use more conforming, because it reduced the capacity of the house. He said the only way a use could be given up was to be abandoned, or to be changed substantially, and said he believed the fraternity had done neither of these things. He asked the Board to allow the fraternity to continue what it had done for at least 30 years.

Mr. Bogle asked how many members of the fraternity were housed in the building at present.

Mr. Jasper said the number fluctuated, but said there were between 19-25 people, and said it had been many years since the property was up to the full capacity of 28. He explained the building was unlikely to reach capacity because of other, more spacious living conditions in Town. He said there had been 19 fraternity members and one border living at the house for the fall semester.

Chair Smith asked how many members there were in the fraternity, and Mr. Jasper said there were 35 members. Chair Smith asked why the house wasn't full, when there was this number of members.

Mr. Jasper said it was a matter of preference, noting that some of the rooms were not conducive to being occupied by two people.

Mr. Gooze asked what the longest time period was when there had not been renters in the building.

Mr. Jasper said the building had never gone a full year without a border, and said in the summer, the building was filled closer to capacity.

Mr. deCampi asked how many rooms were in the building, and was told that there were 14 rooms with double occupancy, the house mother's quarters, and the sleeping deck. He said some of these rooms were somewhat small.

Mr. Gooze said the issue with this application revolved around what the zoning was when the building was built, and said this would have to be looked at more carefully.

Mr. Jasper said allowing boarders had been a well known use, noting this had been advertised, and said the fraternity had not thought that it was something it could not do.

Chair Smith asked if the Town or University knew about it.

Mr. Jasper said the Fire Department was well aware of the use, noting that there were occasionally false alarms in the summer, when the property was co-ed.

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

Mr. deCampi said the issue here came down to whether the use was conforming in 1973, when the structure was built. He said if it was, he thought the applicant was right, and had the right to continue to have boarders. But he said he didn't know the zoning in effect at that time. He said by definition, a fraternity house existed to serve its own members, but said if there was a grandfathered situation, that was different.

Ms. Eng said she had difficulty with this because the Board didn't have much information to go on, aside from what had been presented. She said she would like to see more information on the property itself, and on the zoning.

Mr. McNitt said the Town's current zoning and 1990 zoning used the word "primarily", not solely, so the law did not insist on absolute exclusivity. He said his feeling was that this was also the case in 1973, although he did not have the specifics on this.

Mr. deCampi said that unless Mr. Johnson had this information, the Board would have to continue the hearing so it could get the information.

Mr. Johnson said he didn't have any information that went back to 1924, but noted that in the spring of 1995, the owners came before the Planning Board for a Conditional Use Permit. He said he would suggest the applicant came before the Board as a fraternity house, and Board members would have looked at the zoning in effect at the time, including the definitions in effect for fraternity. He noted the wording said ".....principally used, designed or adapted for use primarily for the provision of lodging, social and dining facilities, for members and pledges of the fraternal order." He said it said nothing about mixed use, co-ed, etc.

Board members discussed the fact that the word "primarily", in this provision of the Zoning Ordinance could be interpreted in more than one way.

Mr. Gooze said the more restrictive interpretation was that the provision meant the property was only to be used by fraternity members.

Mr. Johnson said if the Planning Board at that time read the definition that way, it would be looking at it as a fraternity house where the fraternity wanted to create an apartment, or mixed use. He said a permit condition was that the apartment would be limited to a house parent apartment, but said there was nothing that said if there wasn't a house parent, the fraternity could rent to anyone.

Mr. Gooze asked why the fraternity would have had to apply for a Conditional Use Permit, if it had been legally using it for other people than fraternity members.

Mr. Jasper explained that the reason the fraternity came before the Board at that time was that the University had developed a policy that all recognized fraternities and sororities had to have a live-in house parent. He said the fraternity came in for a building permit, and was told it was a nonconforming use, even though it would actually be lowering the capacity, in having a house mother, so needed a Conditional Use Permit. He said there was no talk at that time about boarders, etc. He also said the fraternity was not trying to get a mixed use with the house mother apartment, and noted the idea of the house mother was Durham's requirement.

Chair Smith asked if the Planning Board at that time was aware that the fraternity rented to boarders.

Mr. Jasper said that was not an issue at the time, and said to the best of his recollection, that question never came up, and had never been an issue.

Chair Smith asked if the fraternity currently had a house parent, and Mr. Jasper said it did not.

Mr. deCampi asked what the maximum number of boarders/non-fraternity members the fraternity would expect to rent to in an academic year.

Mr. Jasper said this number had fluctuated. He said in the spring, they didn't expect any boarders, but in the summer house, there were normally 5-10 fraternity brothers, and 10-25 boarders.

Mr. deCampi said he suspected the 1973 Ordinance would probably say "primarily", and said if that was the case, he thought the grandfathering was a reasonable claim, as long as the building was occupied primarily by members of the fraternity. He said primarily would mean more than half of these would be members of the fraternity.

Mr. Johnson said he would argue that the intent of the word "primarily" was to mean primarily a house with rooms/bedrooms for fraternity members. He noted that a lot of these fraternity houses had additional rooms - assembly rooms, a kitchen for serving the full brotherhood, etc. He said the fraternity houses traditionally had nightclub activities sanctioned by the University, but the house was primarily for bedrooms for fraternity members.

Mr. Bogle said he would prefer to see a better case developed for overturning Mr. Johnson's decision. He said he didn't think Mr. Johnson's interpretation was wrong, and, barring further information, would vote to uphold the Administrative Decision.

Chair Smith said what Mr. Gooze had said was important - to take the most restrictive approach. He said he was concerned about the precedent that might be set by granting the Appeal of Administrative Decision, and said he thought this would be a bad precedent. He also said he agreed with other Board members that they didn't have much to go on, in terms of information that would allow them to grant the appeal.

Mr. Gooze asked what percentage of residents in the building were fraternity members in the summer, and was told this was about 25%. He said the building certainly wasn't primarily used as a fraternity during this time. He asked Mr. Johnson what the definition was in the past of a building that had multiple rooms.

Mr. Johnson provided details on this, but explained that a fraternity was a unique type of structure because of the functions of the building.

Mr. deCampi said he thought the fraternity had not made its case, and said this would require researching the 1973 Ordinance, which was what the building was built under. But he said he could see that to make the fraternity work, it needed to rent out rooms, and said the harm in doing this didn't seem severe. He said he would be inclined to continue the hearing, and see if the Board could make a more intelligent decision based on more information, including knowing what the 1973 Zoning Ordinance said.

Mr. Gooze noted that the minutes of the 1995 Planning Board meeting might be useful concerning this.

Mr. Johnson suggested that the Board turn down the appeal, and have the applicant request a rehearing. He said the applicant did not have any boarders lined up for the upcoming semester, but noted that this case did have ramifications for other fraternities on campus.

Mr. Gooze said he agreed with Mr. Johnson's suggestion.

Mr. Jasper said the fraternity chapter president had attempted to find out what the zoning laws had been. He also said he would certainly appreciate if the Board could defer this, so he would not have to reapply and pay an additional \$100. He also spoke about the three unrelated rule, as it related to this situation.

Mr. Johnson said the fraternity's chapter president had come to his office, and he said he had discussed the procedures, and went through the files with him at that time. He said his office had provided the information the applicant had requested.

Chair Smith said the Board should uphold Mr. Johnson's decision, and if Alpha Gamma Rho would like to come back, it was their right to do so.

It was noted that there was no additional charge for the request for rehearing, or for the rehearing itself.

***Linn Bogle MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION from a November 29, 2004 letter from Zoning Administrator Thomas Johnson, regarding the occupancy of a fraternity. The motion was SECONDED by Jay Gooze.***

Mr. Gooze said that unlike Mr. Jasper, he didn't see this issue had any relationship to the three unrelated persons rule.

Mr. McNitt said it would be reasonable to continue the hearing in this specific case, explaining that the Board didn't have information to indicate whether Mr. Johnson was correct or not. He also said he felt the word "primarily" referred to what the fraternity was presently doing, and said he couldn't believe that they were not essentially conforming to the ordinance. He said he had a real question as to whether the Board should deny the appeal on that basis.

Mr. Gooze asked Mr. McNitt about the summer boarders, and Mr. McNitt said that was a different thing. But he said it would seem that a continuance would be appropriate for this, noting the organization had been very cooperative.

Mr. deCampi said the fraternity wanted the right to have boarders, and said he admired it for requesting this properly. He said he would be more comfortable continuing the hearing, noting he agreed that the applicant had not done enough research to defend its position. But he said whether this appeal was denied or not, the applicant would have a second opportunity.



Mr. Gooze said the word “primarily” to him meant primarily for members of the fraternity, as compared to primarily for lodging, which was why he would vote to uphold Mr. Johnson’s decision.

***The motion PASSED 3-2, with Mr. McNitt and Mr. deCampi voting against the motion.***

Recess from 8:00-8:05 pm

#### **IV. Approval of Minutes – December 14, 2004**

Page 1, Motion should read “The motion was SECONDED by John deCampi...”

Page 5, 5<sup>th</sup> paragraph, should read “...may not have been allowed, if these interpretations had come before the Board at that time.”

6<sup>th</sup> paragraph, same page, should read “He said that given that, and that the zoning was really difficult to interpret for a number of reasons, it was hard to say that one couldn’t have a legal subordinate accessory apartment and not have a limit of three.”

Page 6, 2<sup>nd</sup> paragraph, should read “...did not actually say Mr. Edney gave permission. Mr. Bogle said that Mr. Edney could not permit what the Code forbade, and said that there should have been a decision from the ZBA on this.”

3<sup>rd</sup> paragraph, same page, should read “She said she agreed with Mr. Gooze that...”

2<sup>nd</sup> paragraph from bottom, same page, should read “...because he made an error. She said she believed...”

Page 8, 3<sup>rd</sup> paragraph, should read “...going with the land was very strong.”

2<sup>nd</sup> paragraph from bottom, same page, should read “..Ms. Barnhorst...”

Page 9, motion should read “Jay Gooze MOVED to grant the APPEAL...”

Page 10, bottom paragraph, should read “Mr. McNitt asked what use category...”

Page 11, 7<sup>th</sup> paragraph, should read “...said he had no problem with....”

2<sup>nd</sup> paragraph from bottom, same page, should read “Mr. Johnson asked that the Board include the stipulations that any Federal, State, County or local agencies be held harmless;”

Page 12, motion at top of page, take out words in parentheses (and in bad weather...)

Page 14, 1<sup>st</sup> paragraph, should read “..and rounded it up to 600 sq. ft., by including all of the living room area.”

2<sup>nd</sup> paragraph, same page, should read “...was not in favor of re-hearing...”

6<sup>th</sup> paragraph, same page, should read “...it was agreed that the request for rehearing and the potential rehearing should be put on the agenda for January.”

Page 15, bottom paragraph, should read “Mr. Gooze said they were addressing these issues.”

Page 16, 1<sup>st</sup> paragraph, should read “...presenting the revisions of the Zoning Ordinance...”

***Linn Bogle MOVED to approve the December 14, 2004 minutes as amended. The motion was SECONDED by Jay Gooze, and PASSED unanimously 5-0.***

#### **V. Other Business**

Mr. Johnson noted the letter from the Town that it was giving Mr. Smith his money back, in reference to the snipe signs issue.

Mr. Johnson also noted that the Supreme Court had ruled in favor of the Town concerning the Upsalanti Enterprises case.

Mr. Gooze said the Board should discuss written decisions that were sent out, and what kinds of statements should be in those decisions. He said the NH Planning Land Use Regulations said the reasons should be stated in the decision itself.

He said when he first joined the ZBA, there was a lot of discussion on how to approach this. He said as a group, the Board decided to have a good discussion that would be reflected in the minutes. He said the problem with putting everything down on the decision itself, in order not to leave anything out, was that this could be quite lengthy. He also said that if something was left out of the decision, even if it was somewhere in the minutes, there might be a problem if the case went to court. He asked other Board members what they thought.

There was discussion on what was presently contained in the decision document itself.

Mr. Gooze reviewed the way the Board had handled things in the Chorlian appeal, and asked how they could have done this differently. There was discussion about this.

Mr. Johnson said the Board had survived cases based on how things were currently being done, but said the Board had to be careful to continue to list the reasons for how it voted.

Mr. Gooze said it was doubly important that the Board make final statements as to why they were for or against something, so this would be stated very clearly in the minutes.

Mr. deCampi said it was also appropriate to make a summary statement such as “for all the reasons stated in the discussion, the Board was voting to...”

Mr. Johnson said to try to keep this to one page, the decision could reference the official meeting minutes as providing more detail.

Mr. Gooze said that was a good idea, but said he would like to see if it was acceptable to Attorney Mitchell. There was discussion about this.

Mr. deCampi said the pitfalls of trying to summarize the reasons for the decision in 3-4 sentences in the decision itself were far greater than the pitfalls of depending on the minutes.

Mr. Gooze noted that for variances, it was important for each Board member to reference the criteria he/she disagreed with.

Chair Smith said this discussion was good, and said the Board had to be quite clear when it agreed or disagreed with something.

Ms. Eng said she had something from the Planning and Zoning conference, which said that under RSA 676:3, if the ZBA denied an application, it must list the reasons for the denial. There was additional discussion about this.

Mr. Johnson recommended that Chair Smith designate Vice Chair Gooze to do some research on this, and speak with the Town Attorney about it.

Mr. Gooze said he would do this, and would also take a look at what other towns did on this. Chair Smith and other Board members thanked the minute taker, Victoria Parmele, for the good work she was doing on the minutes.

## **VI. Adjournment**

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

Adjournment at 8:36 pm

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John deCampi, Secretary