

These minutes were approved at the March 8, 2005 Meeting.

**Zoning Board of Adjustment
Meeting Minutes**

**TUESDAY, FEBRUARY 8, 2005
TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL
7:00 P.M.**

Chair Smith noted that alternate ZBA member Sally Craft had resigned due to professional obligations, and that Michael Sievert had joined the Board as an alternate member.

Chair Smith introduced the Board members. He noted that Mr. Sievert was a resident of Durham, and was the principal of MGS Engineering, based in Newmarket. Chair Smith also said that Board members Ted McNitt and Myleta Eng were not present that evening.

I. Approval of Agenda

John deCampi MOVED to approve the Agenda. The motion was SECONDED by Jay Gooze, and PASSED unanimously 4-0.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Stephen Zagieboylo, Hampton Falls, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow more than three unrelated occupants to reside in a single family home. 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.

Chair Smith opened the public hearing.

Mr. Zagieboylo spoke before the Board, and said that because his wife was confined to a wheelchair, they had decided they could not live in their house in Durham anymore, and now owned another house in Hampton Falls. He said he had tried to sell the house in Durham, but had so far been unsuccessful. He said he had then received bad advice concerning renting to college students, and hadn't known about the more than 3 unrelated rule when he rented out his house. He said the house itself had 3000 sq. ft. and 8 bedrooms, and he had unknowingly entered into an agreement for the school year with the students living there.

Mr. Zagieboylo said he would like to get a variance to allow him to rent the house to up to 8 people. He said he had spoken with the Fire Marshal, and had agreed to address his concerns. He said it would be a significant hardship if he had to change the situation at present, noting he had almost been looking at bankruptcy because he couldn't afford to have both houses and not rent the

house in Durham out in this way. He said the present use of his house didn't dramatically alter the neighborhood, noting there were already college students walking through and living in that area. He also said there were a couple of boarding houses in the neighborhood.

Mr. deCampi asked if something could perhaps be arranged to allow the tenants to stay in the house until the end of the school year, if Mr. Zagieboylo would be willing to revert to the no more than 3 unrelated tenants after June 1st.

Mr. Zagieboylo said that although he would prefer that the house be permanently allowed to have more people, he would agree with what Mr. deCampi had suggested. He said allowing all the students to stay until the end of the school year would alleviate his financial hardship, and said he would be selling the house this year.

Mr. deCampi said he would like to see this matter continued, to see if Code Enforcement Officer Johnson and Mr. Zagieboylo could come up with some kind of temporary solution, if the rest of the Board was in agreement on this.

Mr. Gooze said he was not in agreement with this, and said he felt the application should be discussed that evening. He asked Mr. Zagieboylo what types of residences were located right around his property.

Mr. Zagieboylo said the immediate abutters were single-family residents.

Chair Smith received clarification that the house could accommodate 8 people.

Mr. Zagieboylo said there were presently 7 people in the house, but there were rooms for 8.

Mr. Bogle said he thought the number of tenants had been pared down to 3.

There was discussion about this. Mr. Zagieboylo spoke about the appeals process he had been going through, noting that his administrative appeal had been denied, and he was now asking for a variance.

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

Paul McIsaak, 26 Mill Rd. said he had purchased his house in October, and had been unaware at the time of the problem concerning the number of people living in Mr. Zagieboylo's house. He said he was not in favor of living in his single family home and having his neighbor's house become a permanent rental property. He said allowing 3 unrelated people to live in the house was reasonable, although he would prefer that it be a single family home. Mr. McIsaak also said it would be fine with him if the renters remained at the house through the end of the school year, noting that their behavior was not a problem.

Jeannie Allen, 41 Mill Road, said she lived across the street from the property in question. She said the girls living there were nice, but said she was concerned about the idea of the variance, because it went with the property. She

said she was not opposed to the temporary solution suggested, as long the applicant did not receive a variance.

Chair Smith noted that on occasion, the ZBA granted variances with conditions.

Malin Clyde, 51 Mill Road, said she was also against granting the variance. She said there were single-family homes on the street, and said it would be a real disappointment to see a permanent variance for this property. She said the renters hadn't been a real problem, although noting there were a ton of cars at the property.

Mr. Gooze asked Ms. Clyde how she would feel if the applicant was granted until the end of May to decrease the number of people living there.

Ms. Clyde said she had mixed feelings about this. She said it appeared that the system was being used for the profit of the requester, through the appeals process.

Bill Schoonmaker, 24 Mill Road, said although he was not a direct abutter, he knew of Mr. Zagieboylo's personal situation. He said he was sympathetic to the fact that he and his wife needed to find other accommodations because their house was not suitable. He also said he sympathized that Mr. Zagieboylo was probably not aware of the more than 3 unrelated provision.

He suggested that if the cars were an issue, there could be a condition that they would have to be parked somewhere else, and at the end of May, there would no longer be more than 3 unrelated students allowed to live at the house. He said he believed this was a fair thing to do, and said he did not believe that Mr. Zagieboylo had intended to circumvent any criteria.

Chair Smith closed the hearing.

Mr. Bogle said he thought the Board had previously resolved this issue, and also said it was his understanding from talking to some of the tenants that the number of students living at the property had been reduced to 3. He said it was disconcerting to hear that there were still 7 people living there, and said he would not be in favor of granting the variance, because it would go with the house.

He said that as far as other boarding houses in the area was concerned, he knew of nothing like this out Mill Road beyond Faculty Road, and said the neighborhood in question was all single-family residences.

He quoted from the Zoning Ordinance under the Table in Section 175:7 which contained the no more than three unrelated provision. He said he would not be in favor of granting a variance, but said if an agreement could be worked out allowing occupancy by the existing students at the property until May, he would not be against that.

Mr. deCampi said he agreed with all the points Mr. Bogle had made.

Mr. Gooze said he would go through the variance criteria, regardless of the fact that the students had leases.

- He said granting the variance would be contrary to the public interest, if the public interest was to keep partying, traffic, noise, etc. down.
- Concerning the hardship issue, he said a question was whether it was a use or area variance. He said the way area and use variances were defined in the Boccia case, a use variance allowed the applicant to undertake a use which the ordinance prohibited. He said an area variance, in contrast, authorized deviations from restrictions related to a permitted use. He said it wasn't clear which applied in the current situation, and said he would therefore go through both sets of criteria for hardship.

He said if it was a use variance that applied, the first criterion that had to exist in order to grant the variance was that special conditions of the land rendered the proposed use of the land reasonable. He said this application involved a large house, so one could say that was a special condition.

Concerning the second hardship criterion, that no fair and substantial relationship existed between the general purpose of the Zoning Ordinance and the specific restriction on the property, he said the application didn't quite meet this. He said the purpose of the Ordinance was to keep the noise, etc. down, so the size of the house was not relevant.

Concerning the third hardship criterion for a use variance, he said the use would injure the private rights of others. Mr. Gooze said he therefore didn't feel the application met the hardship criteria, as a whole, under the use variance.

He said that concerning area variance hardship, the criteria said special conditions of the property made an area variance necessary, in order to allow the applicant to construct a development as designed. He said that didn't have anything to do with this situation, and said it was hard to call this an area variance.

- Mr. Gooze said the proposed use did not meet the spirit and intent of the Ordinance, which was to keep parties, traffic, etc. down, and said this was the reason for the Ordinance provisions in the first place. He said the Town started out allowing six, then five, then three unrelated people, and the courts had upheld the Town's Ordinance concerning this for some time.
- He said the application did not meet the substantial justice criteria.
- He said the application didn't meet the criteria of not diminishing the value of surrounding properties.

Mr. Gooze said the application didn't meet all five variance criteria. He also spoke about the fact that the Board at times had made arrangements to extend the time frame for occupancy, and said in the situations where the Board had done this, it was because as a Board, members thought a decision might not

prevail in court. But he said he didn't think there was any question that the decision to deny matter would have difficulty if it went any further.

He said he didn't think the Board should extend the time frame in this situation, because if it said the applicant's renters could stay until the end of the school year, other applicants would also ask for this.

Chair Smith noted that on rare occasions, there were situations where the Board granted variances with a condition attached, allowing a time extension. He said this was sometimes a recognition of a good faith effort made by an applicant. There was discussion about this.

Chair Smith said he was troubled by this present situation. He said it was unfortunate that Mr. Zagieboylo had gotten bad advice on his property, but said the Board tried to hold the line on the more than 3 unrelated occupants provision, which was so important for the Town. He said the request flew in the face of the spirit and intent of the ordinance. He said he agreed this was a use variance issue, and said it did not meet the hardship criteria. He said for these reasons, he was not in favor of granting the request for variance.

Mr. deCampi said he was against granting the variance, but said he was comfortable that Mr. Zagieboylo had not done this intentionally. He said that throwing out the other tenants seemed dead wrong. He said he understood that Mr. Gooze was opposed to the idea, but said he would like to continue this matter to see if an agreement could be reached on an administrative level.

There was discussion among Board members as to how this could be handled.

John deCampi MOVED to continue the matter to the next meeting, and to see if it could be handled administratively in the interim. Linn Bogle SECONDED the motion.

Mr. Gooze asked if the Board did this, was it saying to the Town: work something out, and the Board would then accept this.

Chair Smith said he didn't know, noting he was not in favor of the motion.

There was discussion about the motion.

Mr. deCampi said if an agreement was reached, Mr. Zagieboylo would withdraw his application and it would not come to a vote, and if an agreement were reached, the application would be voted on by the Board at the next meeting. He said this seemed to be a way of settling this in a reasonably painless way.

Mr. Bogle asked Mr. Johnson if he had any suggestions.

Mr. Johnson said if an agreement were reached with Mr. Zagieboylo, it would only be to allow 4 tenants, because under the state fire code, the property was considered a rooming/ boarding facility, if it contained more than 4 people. He noted that the fire marshal had required sprinklers in the property by February of 2005.

Mr. deCampi said this was something the Board had no control over, and was not a zoning matter.

Mr. Johnson said he could not enter into an agreement which would supercede the state Fire Marshal's orders.

The motion FAILED 1-3, with Mr. deCampi voting for the motion.

Jay Gooze MOVED to deny the APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance to allow more than three unrelated occupants to reside in a single family home, because none of the five variance criteria are met. The motion was SECONDED by Linn Bogle.

Mr. deCampi said he would still like to see some way to grant the students continued tenancy to the end of the school year, although noting he wasn't trying to supercede the Fire Marshal's concerns.

The motion PASSED unanimously 4-0.

- B. PUBLIC HEARING** on a petition submitted by Paul MacIsaac, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to allow for the building of an addition within the 10-foot sideyard setback. The property involved is shown on Tax Map 6, Lot 3-11, is located at 26 Mill Road, and is in the Residence A Zoning District.

Mr. MacIsaac spoke before the Board. He explained that the existing one car garage on the property had been partially converted to a family room about 14 years back, leaving an approximately 8 ft. square storage area. He noted that from the street, the property still looked like it had a one-car garage.

He said the proposal was to bring the garage forward, in line with the main part of the house, making it deep enough to put a car into. He said a two-car garage would be more suitable for his family. He said as proposed, the garage would be 23 ft. wide, and provided details on this. He said this would put him over the 10 ft setback on the backside of the house, but said if he had to stay within the setback, it would make the garage much less useful.

He noted that his property was located on a corner lot, and said UNH property was located behind the property. He said although he would be infringing on his neighbor, Mr. Zagieboylo's property, by going beyond the setback, he didn't feel that cosmetically this would be a problem.

He noted that his neighbors had two car garages, so his plans would not be unusual. He said not having the garage would decrease the value of his property and others in the area, if cars had to be parked on the street. He also said the feeling in his neighborhood was that having single families living there was preferable to student housing. He noted that the sellers of the house had

told him they had a problem selling the house because it did not have a garage, noting the garage was beneficial to families.

He said the garage would be 23 ft. by 34 ft, outside dimensions. The designer provided details on this.

Mr. Bogle asked if the intention was to keep the family room. There was discussion of the dimensions of the garage, and how the placement of the garage related to the existing family room in the house.

Mr. Gooze asked if the driveway would be wide enough to allow one to make a turn. He said this was a concern he had when he looked at the property, noting this was one of the reasons for having setbacks. It was clarified that this wasn't a problem.

Chair Smith asked if any members of the public would like to speak for or against the request for variance.

Mr. Zagieboylo, 28 Mill Road, said the area in question was less useful than other portions of his property, noting the hill there was too steep for kids to play on. He said the infringement on the setback was not a problem for him.

Bill Schoonmaker, 24 Mill Road, said he had no problem with what Mr. MacIsaac had requested. He said the building would still be 8 feet from the property line, and said the driveway would be some distance from that. He said the previous occupant of the building felt a one car garage was appropriate, but said this didn't suit the current lifestyles. He noted there were other two car garages in this area. Mr. Schoonmaker said he would much rather see the car garaged than sitting out on the driveway.

Jeannie Allen, 41 Mill Road, said she would like to see the cars housed in the garage as well.

Chair Smith closed the hearing.

Mr. Gooze said this was an area variance that was being requested, and said it met all the variance criteria. He said the special conditions of the property made the area variance necessary, and said the applicant could not achieve the same benefit by some other feasible method that would not impose undue financial burden.

Mr. Gooze said the application also met the criteria of not being against the public interest, and the spirit and intent of the Ordinance. He said the application met all five variance criteria.

Mr. deCampi said he agreed with Mr. Gooze, and said this was a reasonable submission. Mr. Bogle and Chair Smith said they also agreed with this.

John deCampi MOVED to grant the APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to allow for the building

of an addition within the 10-foot side yard setback because it meets all five criteria for a variance. Linn Bogle SECONDED the motion, and it PASSED unanimously 4-0.

Recess from 8:00 to 8:05 pm

C. PUBLIC HEARING on a petition submitted by Charles Ward & Pamela Wright, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-42(C) of the Zoning Ordinance to allow for an accessory apartment to be located within an existing, detached garage. The property involved is shown on Tax Map 11, Lot 9-3, is located at 22 Old Piscataqua Road, and is in the Limited Business Zoning District.

Chair Smith opened the public hearing.

Mr. Ward spoke before the Board. He said his property had been built in 1796, and was an interesting historic property, which contained a couple of acres. He said there was a detached garage that sits about 85 ft away from the house, and said he would like to turn it into a small two bedroom apartment.

He said he had looked at different options to create some kind of structure to attach the garage to the existing house, in order to meet the Zoning Ordinance. But he said this hadn't worked very well, and didn't make a lot of sense in terms of preserving the property, including its historic nature.

Mr. Ward said he needed to look at some kind of income producing option, and also noted he had aging parents who didn't navigate the narrow stairs and doorways well. He said he had been looking at various options that would allow him to keep and maintain his property, and said he didn't see any adverse impacts from this proposed change.

Mr. Bogle said what the applicant had applied for pertained only to the two-car garage already there. But he said the plan Mr. Ward was showing the Board indicated that the building would be converted to a breezeway, with an additional garage. He said essentially what Mr. Ward wanted to do was to build a separate second home on his property, rather than an accessory apartment. He said this could not be an accessory apartment in his understanding because it had to be integral to the main house, although it might be an accessory dwelling unit. He also said it was not clear if two structures were permitted on the same lot in the LBD zone.

Ms. Wright said the intention ultimately was to give up the garage, and down the line, if they got the variance for the apartment, there would be a breezeway and a garage in addition to the apartment.

Mr. Bogle said that for all intents and purposes, it would function as a second home, because the next owner might want to use it differently.

Chair Smith said it appeared the applicant wanted to take the existing garage, make it into a two bedroom apartment, and connect a breezeway to a new garage.

Mr. Ward said that at some point they would like to do that with the garage, and it was clarified this would be farther away from the house than the garage was at present. Mr. Ward said he had more than enough room to attach an apartment to his house, given the present zoning. But he said this didn't go with the historic nature of the property, noting that the house had some interesting features, and adding to it would take away some of its street appeal.

He said he had looked at the possibility of building some kind of arbor system that could attach the two structures. But he said there were some nice features in his yard, including a sitting area, and said this would be disrupted with that kind of design. He said this could be done, but said it seemed to make more sense to work with the existing garage, with its full basement and wooden floor which didn't lend itself to parking cars on it.

He said he wanted to do something to help support his ownership of the property. He said with a two-bedroom apartment on the ground floor, his mother could navigate on one floor, or if he wanted to rent the apartment out, he could get income from it. He said the idea was for the building to look like an outbuilding.

Chair Smith said a conceivable option would be to attach an accessory apartment to the house. He said what confused him was whether this detached structure might be used as a rental apartment.

Mr. deCampi asked if the septic system would be tied to the system for the house, and was told the property was on Town water and sewer.

Mr. Bogle asked what the dimensions of the current garage were, and was told it was 28 ft. by 24 ft.

Mr. Ward said putting a shed-type roof on the front of the garage would make it 32 ft. by 24 ft. He said this additional 4 ft. on the front would help break up the mass, architecturally, and would also make the footprint a little bigger for working out the rooms.

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

Mr. Sievert asked why it mattered whether Mr. Ward would be attaching the addition to the existing house, or building it somewhere on the property.

Mr. Gooze said the definition of accessory dwelling unit was different than the definition of an accessory apartment. He said that the Table of Uses in the existing Ordinance said an accessory dwelling unit was not allowed in the LBD District.

Mr. Sievert asked what the garage had to do with any of this, and other Board members agreed it wasn't the issue in this application.

Mr. Bogle said his main concern was that the Board had turned down similar requests in the past, for non-integral accessory apartments. He said he didn't see how the Board could make an exception in this case, without violating what it had done previously.

Mr. deCampi asked how Mr. Johnson would have viewed this as an application.

Mr. Johnson said it would be an accessory dwelling unit because there was one lot, about 75,000 sq. ft. He noted that if the proposed zoning changes were approved, this area would be rezoned to RC, and the accessory dwelling unit would be a permitted use.

Mr. Bogle said the Board at present had to deal with this property as being in the LBD zone.

Mr. deCampi said that helped a great deal, because if the Board turned down the variance, and presuming the new zoning passed, the applicant would have the ability to do this addition.

Mr. Johnson said if the new zoning didn't pass, he couldn't come back and ask for this.

Chair Smith said he could come back and ask for something else.

Mr. Gooze said this was a use variance that was being requested. He said he would go through the variance criteria.

He said if the rule were that the Town didn't want accessory dwelling units on a property in this zone, granting the variance would be contrary to the public interest.

He said that for use hardship to exist, special conditions of the land had to render the proposed use reasonable. He said the fact that the farmhouse was that old could possibly persuade him that this was the case. But he said he couldn't go along with there being no fair relationship between the general purpose of the ordinance and the specific restriction on the property. He said granting the variance would not hurt the private interests of others, but said that overall, he didn't feel the variance could be granted based on hardship.

He said granting the variance would be contrary to the public interest, and would be against the spirit and intent of the ordinance, stating that provisions concerning not allowing accessory dwelling units was there for a reason. He said he did not feel that substantial justice would be done in granting the variance, but said he did not feel granting the variance would diminish the value of surrounding properties. He said the application did not meet all five criteria under the present Zoning Ordinance.

Mr. deCampi said he agreed with this strict interpretation, given the present ordinance. But he said that in view of the fact that there was a proposed Zoning Ordinance that would allow, as matter of right, having an accessory dwelling unit on a property of this size, the proposed ordinance weighed heavier on his mind. He said he could grant the variance based on the fact that the use would become a matter of right if the ordinance passed. He noted that in recent memory, proposed ordinances had passed.

Chair Smith said he agreed with Mr. Gooze and Mr. Bogle. He said the request didn't meet the second criteria for hardship, that there be no fair relationship between the general purpose of the ordinance and the specific restriction on the property. He also said it was contrary to the spirit and intent of the ordinance, noting the Board had denied applications like this before, and needed to be consistent in this case. He said he hoped the applicants could meet their goal in the future, but said he would not be in favor of this request for variance.

Mr. Ward asked whether, based on the fact that there was a good chance that the district would change to RC, if he could withdraw his petition.

Board members told him that certainly might make sense.

Mr. Ward said he would withdraw his request for variance. He asked the Board when the possible rezoning to RC would happen.

Mr. Johnson said this would most likely happen in the next few months.

D. PUBLIC HEARING on a petition submitted by Kecia and Andrew Hartmann, Greenland, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54, Article XIII, Section 175-65(A) and Article XIV, Section 175-72(A) to build a second story on an addition for a single family home on a nonconforming lot. 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.

Chair Smith noted he had a letter from an abutter, and would like to read it before opening the hearing.

Mr. Gooze said this letter should be read out loud, in fairness to the Hartmanns.

Mr. deCampi, as Secretary of the ZBA, read the letter, which was from Mary and Steven Weglarz. The Weglarz said they stood by the Board's last decision to keep the cottage as a one story house, as agreed by all the parties in May 2004. He said their only objection continued to stem from the fact that the original addition was illegally built during the Christmas week of 1999. He said this addition should not be considered part of the original grandfathered footprint, and said he questioned whether the addition legally existed.

He said he bought his property assuming the neighborhood would be protected from illegal and uncontrolled development, and said he feared his property

values would be negatively impacted by future development across the street. He said he believed anyone in his position would feel the same way, but noted he had been supportive of the original plan, to finish off what was there. Mr. Weglarz said perhaps a reasonable compromise would be to allow the upward expansion over the original footprint, and he referred to previous documentation concerning this.

Chair Smith opened the public hearing.

The applicant, Tricia Hartmann said she and her husband were requesting a variance in order to be able to build a full attic, but not a two-story structure. She provided details on her dealings with the Town in the past few months, which had resulted in the property not being worked on.

She said she had told Mr. Johnson she wanted a full attic, and asked how high the roof could be. She provided details on her dealings with the Town, and the fact that there was a discrepancy between what she was originally told by Mr. Johnson concerning what the height of the building could be, and what he ultimately told her, - that the building could be no higher than 15 feet.

Ms. Hartmann said she asked him where it said this, because no specific limit was put on building height in the variance decision. She said Mr. Johnson said this was subject to interpretation, and said there could only be a 15 foot peak, because this was the peak of the original cottage. She said he said if she wanted anything else, she would have to come before the Board. Ms. Hartmann said at this point she had spent several thousand dollars on plans, based on what she was originally told she could do, and said these were essentially useless.

She said she asked Mr. Johnson how high the building could be, and was told the maximum height was 30 ft. in that zone. She said she asked for more specifics, and provided details on this. She said Mr. Johnson recommended that she go for the two-story house, but also said he would look over the tape of the previous ZBA meeting on this, and would let her know.

Ms. Hartmann said she then got a letter from Mr. Johnson stating that the Board had only approved a one story house, 16 ft. by 25 ft, and that the house couldn't have a roof higher than 15 ft. She said she went to file an administrative appeal, but decided to rescind it, because she decided to take Mr. Johnson's advice and resubmit plans. She said rough drawings were submitted, to save money, but said these were considered unacceptable, and said she was told she could not build higher than 15 ft. She said she got a building permit for this at that point.

Ms. Hartmann said there were three reasons why she felt she should be granted relief from the 15 ft. height requirement. She said the first was that the abutter had an unfinished attic, and the building was much higher than her house, yet it was designated as a one-story house. She also noted another property nearby like this, and also spoke about another home in the area that had two stories, with an attic. She provided pictures of these properties to Board members.

She said the main reason she and her husband needed a full attic was that they needed to put a furnace up there. She explained that there presently was only a crawl space in the basement, and said the basement flooded from rain and snowmelt. She said the existing furnace on the property had shut down eight times in recent months, and said a sump pump was presently running in the basement. But she said there were still problems with the furnace.

Ms. Hartmann said a third reason she was requesting a variance for the attic was the need for storage. She said that the people presently renting the house had to rent a storage facility for many of their belongings.

Mr. Gooze asked how high the proposed attic would be compared to the original cottage.

Ms. Hartmann said the original height was 15 ft., so it would be higher than that. She said the building would still be relatively smaller than the homes next to her. She noted her neighbors, the Weglarz, had a full basement, and said Ms. Oliver appeared to have a full stand up attic. She said this would not result in a decrease in the values of surrounding properties, but an increase. She said it complied with the spirit and intent of the Ordinance, and was set by precedent of other homes in the neighborhood. She said it would be an unnecessary hardship not being able to keep heat in the house, and to use the house at its present size.

Ms. Hartmann said she would like to be able to have a walkup stairway, as opposed to a pull down ladder to get to the attic, because it would be much safer. She also said that although she didn't put the two-story request on the application, but she would prefer it. She said the addition of another floor would grant her relief, and would allow her to use this building as a single-family home.

Mr. Gooze asked if the other homes in the area were built originally with these heights, or instead got variances for them.

Ms. Hartmann noted that the Oliver home was originally two cottages, which were later joined. She also showed pictures of the Weglarz' house, which showed how it was built up

Mr. Bogle said what he was hearing the Hartmanns wanted to do was to build a full attic, with standup headroom over a full building (the original building, plus the addition that had been allowed,) with a walkup stairway, and 3-4 gable windows. He asked what the actual standup height within the attic would be.

Ms. Hartmann said she didn't know what the maximum that would be allowed for this.

Mr. Bogle said he assumed that the maximum height was 30 ft., based on the Ordinance. He said the attic was not proposed to be used for living space at this time, but said this would set the house up for rooms in the future. He asked if it was permissible to have a furnace upstairs, and Mr. Johnson said it was.

Mr. Bogle also noted that what the applicant was asking for in the petition was to put an attic on the addition, not the full house, but in the presentation, she was asking for an attic over the full house.

Ms. Hartmann said what was typed up was incorrect, and provided details on this.

Mr. Bogle said the Board had been confronted with this kind of issue before, where someone said he only wanted an attic, but in the end, it became a full additional living floor. He said this property had come before the Board several times, and the Board had gone pretty far in terms of legalizing illegal construction. He noted the Board had not allowed a second story in the previous meeting on this property, and said he wanted to know what the Board was actually voting on in this instance.

Mr. deCampi asked what the height of the total structure would be.

Ms. Hartmann said she would ask for a maximum of 25 ft.

Chair Smith asked if an attic over the addition would suffice for the furnace and storage.

Ms. Hartmann said this would allow enough room for the furnace, but not for storage. She also said she did not feel the addition would impact the views of her neighbors, and showed pictures to demonstrate this.

Chair Smith asked if anyone wished to speak for this application.

George Drost, the renter of the property in question, said that as Ms. Hartmann had stated, any time it rained, he needed to use the sump pumps, and said this was a constant battle. He said there were other houses on the street that were a lot bigger, and closer to the waterfront. He said the property presently looked funny compared to the rest of the homes in the neighborhood, and said he was very much in favor of the proposed variance.

Rob Martel said he was the designer of the proposed project. He said he would like to recommend that the Board consider that the roofline should be the same for the entire building, as compared to just for a portion of the building. He said this would be much better, in accommodating the needs of the Hartmann's, as well as from an aesthetic perspective. He also asked whether the height would be the peak, or the mean of the roof, as defined by the building code.

Mr. Bogle asked what the distance would be from the floor to the peak of the attic, as designed by Mr. Martel.

Mr. Martel said it would potentially be about fourteen feet, depending on the roof pitch that was put on.

Chair Smith asked if there was anyone who wished to speak in opposition to the request.

Dorothy Oliver, 22 Cedar Point Road, said it was a mixed community, with large and small homes. She said the neighbors were very worried about the water levels, which seemed to be going down, and also said her well water continued to deteriorate. She also said she was concerned that if the square footage was expanded, they were expanding the room for more rentals. She also noted the poor state of the property since 2000.

Mr. Gooze asked Ms. Oliver if her property was originally a cottage.

She said it was originally two cottages, and said the work was done before the new footprint law went into effect. She said she didn't know how high her building was, but said one couldn't stand up all the way across in attic, although one could stand up in the middle of it.

Steven Weglarz, 19 Cedar Point Road, said some of the photos Ms. Hartmann had shown were not correct, and provided details on this. He said his main concern was that there was excessive development on a small waterfront lot. He said Mr. Bogle had expressed his own concern about where this all would end.

Mr. Weglarz said he had been in favor of the original request, by the previous owner, to get the property completed, but said this had been a frustrating process over five years. Regarding the flooding, he said the soil had a lot of clay, and said all of the residents in the area had this problem. He provided details on this.

Chair Smith asked if Mr. Weglarz had flooding in his basement that affected the furnace.

Mr. Weglarz said the basement got wet, but said he had not had problems with his furnace.

Greg Gentile, the previous owner of 20 Cedar Point Rd. said that Ms. Oliver also rented her property, yet she was speaking of rentals as a problem. He provided details on his development of his property, and said he had been a good neighbor, and had not blocked the Weglarz views of the water.

He said the reason his property had not been completed was that he had gotten sick. He said he didn't see how putting a roof on the building would be a deficit, and said this would add value to everyone's property. He said he was for the request for variance.

Ms Hartmann showed the Board a picture of what was approved originally for Mr. Gentile, and noted it was 34 ft. high. She also said, concerning Ms. Oliver's comment on the property being a rental, that if the house couldn't be finished, she couldn't fit her family in there, and it would always be a rental.

She also said that previous meetings on her property didn't address the roof of the house. She said the question came up as to whether she wanted a one story or two story building at the last meeting on the property, and said she had said

she would take the one story, thinking this would be with the full attic, and wouldn't be limited to 15 feet.

Ms. Oliver said that as part of the last variance decision, she was told something would be done about the drainage problem between the two properties, which had been created previously as a result of work done on the Hartmann's property. She said she hoped this condition would be continued into the present variance, if it passed. She noted that four trees on her property had to be taken down, and nothing had been done yet about the drainage problem.

Mr. Bogle noted this had been a specific condition of the previous variance, and received clarification that nothing had yet been done about it.

Mr. Drost said he had been pumping the water between the two properties with a sump pump.

Chair Smith noted that a condition of the previous variance was that the Public Works Department would mediate concerning this issue. He then closed the public hearing.

Mr. deCampi said he was disappointed the property still looked so poor. He said he had heard complaints that the water situation had not improved. He noted that he wouldn't have been surprised to hear there was an issue concerning the view, but said he hadn't heard this. He said from a purely environmental viewpoint, the property would not be covering more ground, by building up. He also said he guaranteed the second story would be completed at some point, but said he didn't think it would do a great deal of harm. He said it would increase the possible density of people, and effluent in the septic system, but said presumably this system had been designed adequately. He said he would wait to make up his mind.

Mr. Gooze said the consensus of the Board appeared to have been that this would be a one-story addition. But he said that given that, he hadn't really thought about what that could be, but realized it could get quite high, with an attic. He said there was no question that other houses in the area went up pretty high.

He said he didn't think the Board should deviate from the one story addition, but said the question was what constituted a one-story house, and whether the attic could go across and still be a one-story house. He said he would listen to hear what the rest of the Board and Mr. Johnson had to say on this.

Mr. Johnson provided details on the dimensional aspects of the existing and proposed building. He said it did make sense to tie the roof line in all the way across, and said the Board needed to decide what the finished elevation of the house should be.

Mr. Gooze said he believed the Board thought it approved a one-story addition, and said having an attic still made it one story. He said in terms of something being finished off later, that had to do with building code issues, and said it

would be up to the building inspector to look at these things. He said at present, this would be an unfinished living space, to hold a furnace. He said he was not against doing this, but said the only question was what the height should be. He said he couldn't give a number on this, but would listen to others.

There was discussion on what the appropriate height for the building was.

Mr. deCampi said the request was 28 ft, 13 ft above what was there at present, and said that was a lot.

Mr. Bogle said his question to the architect had determined that the roof would have 14 ft. of vertical space inside the attic, which was pretty high. He said he could see a larger attic than was currently on the main building on the attachment, but said he was concerned about creating an attic that was easily convertible to living space, with gable windows, especially considering the long history of the building, the illegal movement of the attachment from one place to another on the property, and the illegal enlargement of that.

He said to have an attic that was usable for the furnace and storage, just putting a steep roof on the original building, with a walkup stairway, would be enough.

Mr. Gooze asked if there was currently an attic in the building.

Ms. Hartmann said the highest point in the attic was a 4 ft. crawlspace.

Chair Smith said it seemed that an attic for the furnace and storage would be reasonable.

Mr. Sievert said it would look poor to put a low roof on one side, and a high roof on the other. He also said he didn't see why, if the maximum height allowed was 30 ft., why the Board would have to give a height.

Mr. deCampi said Ms. Hartmann had been honest that this was essentially a second story being requested. He said there were several issues, and said if they were prone to grant this variance, he agreed the roofs should be the same height. He said what was asked for was a 28 ft ridge, which seemed like a lot, and said for an attic where one could stand up in the center portion, one would need about 20 feet.

Mr. Gooze said he was not quite sure why the Board needed to give a variance for an attic, when this was part of a single story house.

Mr. Johnson said the ZBA's role in this was to put a condition on the original variance, by deciding what elevation it wanted.

Board members noted that 28 ft. was the request from the applicant.

Mr. Johnson recommended keeping the original motion, and changing condition #1 to whatever the Board wanted to add.

There was discussion about this, and it was agreed that a new motion should be made for this application.

Jay Gooze MOVED that the Zoning Board of Adjustment approve a petition submitted by Kecia and Andrew Hartmann, Greenland, New Hampshire, for an APPLICATION FOR VARIANCE from Article XII, Section 175-54, Article XIII, Section 175-65(A) and Article XIV, Section 175-72(A) to add an attic on the entire structure, at 18-20 Cedar Point Road, and that the height to the peak be no more than 28 feet. Further, the attic shall comply with applicable codes, to be used for storage and to hold a furnace, without being living space.

Mr. Johnson noted that if the applicants wanted to finish it as living space, they would have to come back to the ZBA.

John de Campi SECONDED the motion.

Mr. Gooze said he believed the application met the variance criteria because it was not contrary to the public interest. He said he believed it was an area variance, and that the special conditions of the property made it necessary in order to allow the applicant to construct the development as designed. He also said he believed the applicant couldn't achieve the same benefit by some other reasonable or feasible method. He said the spirit of the ordinance was observed, and that substantial justice would be done, in granting the variance, and said granting the variance would not diminish the value of surrounding properties.

Mr. deCampi asked how soon the construction could be done.

Ms. Hartmann said the work could start in March.

The motion PASSED unanimously 4-0.

Chair Smith recommended that only Item E would be heard that evening, and that the remaining Items F and G should be heard at another meeting. There was discussion about this.

Five minute recess 9:35 to 9:40

E. PUBLIC HEARING on a petition submitted by Robert Shappell, Lee, New Hampshire, on behalf of Olga Shappell, Newfields, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a May 28, 2004 letter and a January 5, 2005 inspection from Code Enforcement Officer, Thomas Johnson, regarding building code issues. The property involved is shown on Tax Map 5, Lot 5-2, is located at 5 Old Landing Road, and is in the Limited Business Zoning District.

Chair Smith opened the hearing.

Mr. Shappell presented a letter from his mother allowing him to speak on her behalf. He then read a prepared statement describing the situation with his property. He provided some history of the property, noting that the property was built in 1799, and due to the layout of the house, didn't meet current codes. He said Mr. Johnson wanted the use of the second floor, which had a bedroom,

bathroom and spare room, to be discontinued, and he said this represented an extreme hardship.

He noted the property was converted to a duplex 14 years ago, and before the building permit was issued, the property was inspected and at that time no mention was made about lack of egress or a problem with the stairs. He noted smoke alarms were installed at that time, but apparently they were removed by a tenant. He said the Fire Department had recently re-inspected the stairs situation, and he was issued a letter accepting them. Mr. Shappell noted there were other buildings in Town with old stairs, including the Town Hall, and asked the Board to overturn Mr. Johnson's decision.

Mr. deCampi received clarification that all of the code violations cited in the Administrative Decision had been resolved, except for the stairway issue.

Chair Smith asked if any members of the public wished to speak for or against the application. There was no response.

Mr. deCampi asked how much of an issue the code violation concerning the stairways was.

Mr. Johnson said that stairways were required to be 3 ft. wide, and were 28 inches wide. He also said the treads and risers weren't right, and the guardrails weren't right. He said they appeared to be the original stairs, and said there was no grandfathering concerning this, noting this was an appeal of a building code decision, not a zoning decision.

Mr. Gooze asked whether the property was inspected when it was made into a duplex.

Mr. Johnson went through the paperwork going back many years on the property. He provide details on work that was done at various times, including when the house was turned into a duplex, for which there were building permits, but no officially signed paperwork on inspections or certificate of occupancy.

Mr. Shappell said the inspections had been done when the work was done, although there might not be paperwork available on this.

Mr. Johnson provided additional details about the paperwork, and work done on the property, up to the present time. He said his position was that whoever issued the permit to create the duplex, the construction permit was governed by the 1987 BOCA code, which said one couldn't chop up a building and make something that was not safe.

He noted that two bedrooms and a bathroom were added in the attic when it was a single family home, and the stairs were left. He said nobody made the owners address this back in 1970s. He also said when a change of use occurred when the permit for the duplex was issued in 1989, the stairs issue should have been addressed, but nobody brought it up. He provided details on the configuration of the building at present, and said by closing off the kitchen and

separating off the two units, the person in the right hand unit had a kitchen and living room on the first floor, but the bedroom and bathroom were on the second floor, so one had to use a ladder to get there. He said that based on the 1987 code, this should have been corrected, or the permit should have been rejected, leaving the building as a single family home. He noted the enabling codes regarding this.

Mr. Shappell said his neighbor down the street, Don Cook, had told him he had resided in the upstairs bedrooms when he was growing up, about 40-50 years ago.

Chair Smith closed the hearing.

Mr. Bogle said the stairway appeared to be the only issue with the property. He asked Mr. Johnson if the stairway was original.

Mr. Johnson said there were a number of things that went along with the stair code. In answer to Mr. Bogle's question, he said it perhaps was the original stairway. He said in the 1970s, it was a single-family home, but said the population that rented there now had changed, and there might be safety issues because of this.

Chair Smith noted Mr. Bogle had seen other staircases like this in Town, as had the Fire Chief.

Mr. Bogle said that looking at the stairway and the house, he wondered how the applicant could remedy this.

Mr. Johnson noted that Mr. Shappell was a carpenter. He also noted that if some legitimate stairs were put in, more occupants would be allowed in the house.

Mr. Gooze said Mr. Johnson was right in bringing this issue to the Board, and said the question was whether it should be corrected at that point. He said he didn't feel comfortable simply ignoring the situation, noting there was a good reason for the building codes. He said it might require some work on the applicant's part to improve the stairway.

Chair Smith said the fact that the stairs could be altered was an essential point for him.

Mr. deCampi said he had lived in a 1700 era house that had some funny staircases in it, but got used to them. He noted that the unit had one tenant in it. He agreed that Mr. Johnson had done the right thing to cite the stairway, but said he was more inclined to want to see it, before deciding on this matter. He said it was a major deal to rework a staircase in an old house.

Chair Smith said he had an old narrow staircase in his home, and had to be very careful with it, so this was an issue to consider.

Mr. Gooze said the safety issue concerned him, and said he agreed with Mr. deCampi that it would be good to see the house, before requiring major reworking of the stairway.

Mr. Bogle said he had already gone through the house. He said he had seen other stairs of the same type in other houses, and said although it was important to be careful on them, people had used these kinds of stairways for centuries. He said the railings of the stairway needed to be rebuilt, and also said there were no balusters on it at present. He said if the stairway were allowed to remain, it would still need considerable upgrade.

Mr. Gooze asked if would be all right for the ZBA to ask that the applicant do some work on the existing stairs.

Mr. Johnson said he had done his job, and said if the ZBA overruled him, it would have to sign the certificate of occupancy on this.

Mr. Shappell said he had no problem with upgrading the stairway, but said there was simply no room to enlarge it.

Mr. deCampi said the stairways would definitely need better guardrails on the side, and work on the treads.

Mr. Bogle provided details on what was needed.

Mr. Sievert said he would probably want to see the stairway before making a decision. He asked why this issue had come up, and whether any house in Durham could be checked for code issues like this.

Mr. Johnson explained that he had been at the property because of a zoning violation, and said otherwise, he couldn't have just walked into the house. He said he had noticed that it didn't meet the 1987 BOCA code while he was there.

Mr. Gooze said he was comfortable allowing the stairway to remain, as long as it was made as safe as possible, with new handrails, proper replacement of treads, etc.

Mr. Johnson said the ZBA would issue the certificate of occupancy.

Jay Gooze MOVED that the ZBA grant the APPEAL OF ADMINISTRATIVE DECISION from a May 28, 2004 letter and a January 5, 2005 inspection from Code Enforcement Officer, Thomas Johnson, regarding building code issues, conditional upon new handrails being installed, balusters for side guards and replacement of broken treads, this work to be inspected by Code Enforcement Officer Tom Johnson, who will report back to the Chair of the ZBA. John deCampi SECONDED the motion.

Board members agreed a site walk at the property was not necessary.

The motion PASSED unanimously 4-0.

F. PUBLIC HEARING on a petition submitted by Christopher & Alex Auty, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from:

- a. Article XIV, Section 175-72(A) of the Zoning Ordinance to allow for the installation of a garage, breezeway and deck within the 125-foot shoreland setback,
- b. Article XIII, Section 175-65(A) of the Zoning Ordinance to allow for the construction of a new septic system within the 75-foot wetland setback,
- c. Article XII, Section 175-54 of the Zoning Ordinance to allow for the construction of a new septic field within the 50-foot sideyard setback,
- d. Article XIII, Section 175-73(D) of the Zoning Ordinance to allow for the tilling of the soil within the 125-foot shoreland setback for restoration and enhancement of the landscaping and planting, and
- e. Article XIV, Section 175-72(B) of the Zoning Ordinance to maintain two existing docks instead of just one.

The properties involved are shown on Tax Map 12, Lots 21-0 & 22-0, are located at 34 Colony Cove Road and 32 Colony Cove Road respectively, and are in the Residence C Zoning District.

Chair Smith said 15 minutes would be allowed for this Item. He opened the public hearing, and noted there were two letters from abutters, which supported the proposal.

Attorney Peter Loughlin noted that the last item (e) in the variance request, concerning the docks, had been removed.

He said this was an area variance being asked for, and was made necessary because of the physical characteristics of the lot itself.

He said granting the variance would increase the value of surrounding properties, noting the neighborhood would become less dense, and there would be a significant decrease in impervious material as a result of the redesign of the driveway. He also said the neighbors using the new private driveway would have a better, more attractive entranceway.

He said granting the variance would promote the public interest because the applicant would be getting rid of two unapproved septic systems and replacing it with one approved system. He also noted that the number of dwellings and the amount of impervious material would be reduced.

He said granting the variance would provide substantial justice because it would allow reasonable use of the property, and would result in a more logical placement of the garage. He said at the same time, it would

increase the zoning conformity, although noting the property still couldn't be conforming because of its history.

He said granting the variance would not be contrary to the spirit and intent of the Ordinance, and noted that the various purposes of the RC District were met by the proposed change.

He said the Autys' property was the largest of the waterfront lots in the neighborhood, and was unique in the neighborhood, and in the Town, in terms of the hardship created by the various setbacks. He said there couldn't be much more in the way of special conditions than that, and said the applicants had to come to the ZBA for this area variance in order to do anything with the property.

He also said the application met the hardship criteria because the benefits couldn't be reasonably achieved by another method. He noted that relocating the garage, or building another septic system anywhere on the property, each would be within a setback of some kind. He said the existing garage was over 100 ft. from the house, and said in terms of safety and practicality, this was not reasonable.

Landscape architect Robbi Woodburn handed out copies of a site plan she said had been slightly modified compared to the previous one. She said it included a refined location for the septic system, and included headlight screening, and reconfiguration of the driveway entrance based on input from neighbors. She said this would change the amount of impervious surface by a small percentage.

She showed the existing and planned configuration of the property. In answer to a question from Mr. Bogle about the two docks, she said they would stay. There was a brief discussion as to whether this was grandfathered, and Ms. Woodburn said the applicant would come back concerning this if necessary.

She showed the resource areas near the site, Great Bay and a small wetland area which was not considered to be a functioning wetland. She said their contention was that if something had to give, it should be the wetland setback. She then showed the various layers of setback requirements, and also showed the well protection zone. She said when it was all put together, anything the applicant wanted to do would require a variance.

Ms. Woodburn spoke about the plan to move the garage to a more convenient, safer place. She showed where the septic system would go, noting test pits had been done at two spots. She said the location near the middle of the site was preferred in order to stay as far away as possible from the woodland area, in order to minimize the removal of trees.

She showed the reconfiguration of the driveway, and also said a deck was planned which would not be considered impervious. She spoke about the proposed landscaping, noting the applicant needed permission for this because of the shoreland overlay district provisions. She said the landscape design included trees to shield the neighbor's house from headlights, and also included additional privacy screening.

She said all of the proposed changes would increase property values, and would result in greater conformity with the Zoning Ordinance.

Paula Joyce, 40 Colony Cove Road, – said the proposed changes would make a significant improvement to the neighborhood. She said the applicant had addressed here two concerns - about car headlights shining at her house because of the configuration of the driveway, and potential blockage of her view of the water. She noted the proposed screening wouldn't actually improve her view, but wouldn't worsen it either. She said she was concerned about maintaining that view on into the future, but said she was not sure what her legal rights were concerning this.

After some discussion, Board members agreed that Agenda Item F would be continued to the March 8th meeting. They decided that Item G would be heard on Feb 22nd.

H. Adjournment

John deCampi MOVED to adjourn the meeting. The motion was SECONDED by Linn Bogle, and PASSED unanimously 4-0.

The Meeting adjourned at 10:40 pm.

John de Campi, Secretary