

These minutes were approved at the June 14, 2005 Meeting.

**ZONING BOARD OF ADJUSTMENT
MEETING AGENDA
TUESDAY, APRIL 19, 2005
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Henry Smith; Ted McNitt; John de Campi; Linn Bogle;
Jay Gooze; Myleta Eng

MEMBERS ABSENT: Michael Sievert

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

MINUTES PREPARED BY: Victoria Parmele

I. Approval of Agenda

Chair Smith noted this was a continuation of the April 12, 2005 ZBA meeting.

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

II. Public Hearings

A. PUBLIC HEARING on a petition submitted by Stephen Weglarz Jr., Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIV, Section 175-75(B)(3) and Article IX, Section 175-30(A) of the Zoning Ordinance to permit the building of an addition within the sideyard setback on a nonconforming lot. The property involved is shown on Tax Map 12, Lot 1-20B, is located at 19 Cedar Point Road, and is in the Residence Coastal Zoning District.

Mr. Weglarz spoke before Board. He said he hoped to enlarge his home, noting he had a growing family, and it was not a large house to begin with. He said he would like to increase the size of the small room adjacent to the garage, in order to maximize the use of the space for a growing family. He said he didn't think this would have a big impact on the lot, noting it was a large lot for the neighborhood.

He also explained that his garage was presently built on concrete slab that was cracked, and said he didn't know if this was dangerous. He said he would like to replace the garage to eliminate possible safety issues.

Mr. Weglarz said most of the homes in the neighborhood didn't meet the setback requirements, and also said he also owned the property next to him, where the setback from the property line was in question, so it didn't seem that anyone would be put out by an addition. He also said it would not affect anybody's view, and in fact would improve the view from the street. He said the roof line would shift 189 degrees, noting it would be a peaked roof that would be perpendicular to the road.

In answer to a question from Mr. Gooze, Mr. Weglarz said he and his wife owned the property to the left of them, and said it was a 0.13 acre lot.

Mr. Bogle noted there was a small house on the property, and asked if it was a rental property.

Mr. Weglarz said that it was.

Mr. Bogle said the Weglarz' lot was quite deep, and said instead of encroaching into the 50 ft. setback with the proposed addition, they could go back a considerable distance on their lot instead.

Mr. Weglarz said the plan that had been designed actually did create a deeper structure on the lot than was there now, so it would sit back further as well.

Mr. Bogle said the property could go back a long distance without encroaching into the 50 ft. setback.

Mr. Weglarz explained that he had previously invested in a new septic system for 4 bedrooms which was placed behind the house. He also said he had done some landscaping in the back so it was now level, and provided a yard for his kids to play in. He said he would like to leave it that way.

Mr. Bogle asked where exactly the septic system was located.

Mr. Weglarz said it was directly behind the house. He said a line could be drawn straight across from the shed to the front of the leach field and provided additional details on the system's location.

Mr. Gooze asked how close the property on the left was to the side setback.

Mr. Weglarz said it was 10-15 ft. away.

Mr. deCampi asked what the access and parking easement was on the site plan.

Mr. Weglarz said this was drawn in to provide access to a third lot in back of the house where the septic system now was. He noted this lot would not be built on now, so they looked at it all as one lot.

Mr. Gooze asked if the lot in the back was a separate lot now, and Mr. Weglarz said it was now all one lot.

Ms. Eng asked if any trees would be taken out because of the addition.

Mr. Weglarz said the area around the shed was mostly shrubs, and also provided details on trees he had planted on his property.

There was additional discussion about the trees on the property.

Mr. McNitt said in essence, Mr. Weglarz planned to cover about 2/3 of the old two-car garage footprint, and go out beyond that.

There was discussion about the garage, and about the location and size of the bays for the cars. It was clarified this would still be a two-car garage, and the breezeway would be widened to allow for a family room. Mr. Weglarz said the present living room was 13 ft. by 14 ft, and was too small for the family.

Mr. McNitt said he saw windows in the sketch of the design, and asked if there would be a finished room upstairs.

Mr. Weglarz said there might be a game room or storage, but said it would not be living space.

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

Mr. de Campi said he saw two things with this application. He said the first was that in that part of Town, houses tended to be close to the property lines. But he said it did seem that this project could have been designed to stay within the 50 ft. side setback. He said this design didn't seem to represent the minimum reasonable relief that could be asked for, and said he was comfortable about this. But he acknowledged this was a situation where most of the properties in the area were small, and said he doubted whether many met the 50 ft. setback requirement.

Mr. Bogle said he agreed with Mr. de Campi. He said what was being requested was less than 260 sq. ft. of encroachment into the setback, and said he felt there was ample room toward the back to incorporate that within the setback. He noted the house was already encroaching into the 50 ft. setback on the opposite side. He said in terms of the Ordinance, the Board would be increasing a violation if it granted the variance, and shouldn't do that if could avoid it. He said because there was ample room toward the back, he didn't think the variance request met the hardship criterion, and also said granting it would be contrary to the spirit and intent of the Ordinance, when there was ample room for the addition within the setback areas.

Ms. Eng said she agreed with what others said; that there was room in the back that she believed could be used to reconfigure the garage. She said she would be hesitant to approve granting the variance, and said it was the hardship criterion that was the issue. She said she didn't see this application met this because there was an alternative

Mr. Gooze said he would take the opposite position on this. He noted this was an area variance, so the criteria were a bit easier than for a use variance. He said the reason he was concerned about saying no was based on the spirit and intent of the ordinance and the substantial justice criteria was that there were 4-5 properties in that area with fairly large pieces of land, and where the homes encroached on the setbacks. He said this made it hard to say this one property wouldn't be allowed.

He also noted that the Weglarz family owned the abutting property, so they would suffer the consequences if they sold the property.

Mr. Gooze said for these two reasons, he was leaning toward granting the variance

Chair Smith noted someone later on owning the property would suffer the consequences. He also said in granting the variance, the Board would be increasing the violation when it was not necessary to do so.

Mr. Gooze said this seems like a logical place to go with the enlargement, and said because there were other properties in the area that were encroaching on setbacks, that was the lay of the land down there.

Mr. McNitt asked when the Weglarz's house was originally built.

Mr. Weglarz said it was built in 1955.

Mr. McNitt said he supported Mr. Gooze, under the Simplex principal, and said virtually every other house in that area was already out of compliance. He said the setback went from 20 ft. to 50 ft. around 1985, and said many of the lots became nonconforming at that time. He said the applicant had designed an attractive addition that would improve the neighborhood, and said he was not doing anything substantially different than what already existed there. He said the incursion in the setback would be a lot less than many others in the neighborhood. He said he felt the variance request was reasonable, and would tend to support the application.

Chair Smith said granting this variance would increase the violation. He said there was room for the addition in the back, and said in that spirit, the setback requirement did not interfere with the reasonable use of their property. He said it was stretching things to say the request met the hardship criteria. He said this was the RC district, which the Board was concerned about. He said he tended to think granting the variance would be contrary to the spirit and intent of the ordinance, and said he could probably not support the variance request at that point.

Mr. de Campi said there were two reasonable sets of views presented by the Board, but said he found himself opposed to the variance request. He said if the Town was going to create greater setbacks, the Board couldn't chisel them away when there was no valid reason to do so, even though several properties in the area didn't meet the setbacks now. He said if the Town was going to become more strict, the Board was going to have to protect those setbacks, when an applicant had another reasonable way to go.

Mr. Gooze noted that Board members against this were saying there appeared to be another feasible way to design this, by going back further on the lot. He said he had not seen the back of the property, and said before making a decision, he would like to see this. He said it was not fair to vote without doing so, and he proposed that the Board conduct a site walk.

Mr. de Campi said he was fine with the idea of having a site walk. But he said he didn't think the only option was to go back further with the garage. He suggested

the garage could perhaps be moved forward, noting part of the building already came forward. But he said he was happy with the idea of the site walk.

Mr. Bogle said Board members should be careful about making assumptions about surrounding properties, how they were approved, etc. He also noted that in the immediate area of the property, there were camps, although noting the Board had approved an enlargement of the property across street. He said he was in favor of doing a site walk.

Chair Smith said there would be a site walk April 26th, at 5:00 pm, and said this Item would be continued to the May meeting.

- B. **PUBLIC HEARING** on a petition submitted by Stephen Kalvelage, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article IX, Section 175-30(A&C) of the Zoning Ordinance to permit the expansion of a previously granted variance to now include building of a second floor addition on the previously approved attached garage on a nonconforming lot. The property involved is shown on Tax Map 12, Lot 2-8, is located at 2 Cedar Point Road, and is in the Residence Coastal Zoning District.

Mr. Kalvelage said he had come before the Board in May of 2002 for a variance, which was approved by the Board. He said this variance was approved, and granted him permission to attach a garage to his home.

He said there were some administrative issues at the time, but said the main thrust of his previous variance presentation was the need for storage area in his home because there was no basement. He said he thought he made it pretty clear at that time, but said something appeared to have gotten lost. He said his interpretation was that going up with the loft wouldn't increase the violation for the setback, and wouldn't be an issue.

He said he went to Afghanistan some time after this, and said when he got home, he applied for a building permit in March of 2004. He said the permit included a second floor for the garage, and was denied. He noted that in May of 2004, the new Zoning Ordinance kicked in that allowed for an increase in an existing structure, and would have allowed the building permit he had requested.

He noted the builder said the house had a twelve pitch roof, so the garage needed to match that. He said that would mean there would be a lot of room up there, so it didn't make sense not to turn this into a livable area. He also said as a main storage area, it needed regular stairs to allow access.

He said the garage had already been approved, and said he was proposing that when the garage was built, that the Board would allow a normal second floor structure above it. He said this would result in no change to the footprint, setbacks, foundation construction, height, or impervious runoff area. He said there was no other reasonable way of getting storage, and no other place to expand on the property. He said he would simply be putting up one wall upstairs, and said the gable end would need to be adapted somewhat.

Chair Smith received clarification that Mr. Kalvelage was not planning on having any rental units.

Mr. Gooze asked what percentage increase there would be in the size of the house.

Mr. Kalvelage said there would be 22.3% increase in volume, when the Zoning Ordinance allowed a 30% increase.

Mr. Gooze asked whether, if this had been built with the variance, prior to the new zoning ordinance, the applicant would have to come back before the Board now.

Mr. Johnson said probably not.

Chair Smith noted Mr. Johnson had said he would not approve conventional stairs, because that would increase the violation.

Mr. Johnson said the original variance granted was just for a one story garage, so anything other than a pull down ladder or hatch was not allowed, and would have to come back before the Board.

Mr. Kalvelage said from the front of the structure, there would be no visible change. He said from the water side, one could possibly see the change, but said there was a large tree between the garage and water line to obscure the view.

Ms. Eng noted that in the letter, the applicant spoke about using the second floor as living space

Mr. Kalvelage said he would like to use the area as living space. He said it didn't make sense to say he only wanted to use it for storage. He said he and his wife were specifically requesting that it could be used for this.

Mr. de Campi asked whether the septic system could tolerate this.

Mr. Kalvelage said it was a two-bedroom home, and said this would not change.

Mr. Bogle asked if plumbing was proposed.

Mr. Kalvelage said he wouldn't do that, but said he wouldn't rule out that a future resident might want to do this.

Mr. Bogle asked if Mr. Kalvelage had thought of putting a doorway through from the second floor of the house.

Mr. Kalvelage said he wouldn't rule that out, but said he would not be increasing the number of bedrooms.

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

Mr. McNitt said the Board made the decision on this two years ago. He said this was a small lot, with a small house, and said the garage was put in as inconspicuous place as possible on the lot. He said he thought the decision to do what he now said he wanted to do was a matter of degree that could have been in

the concept at the start, and said he would have approved it then. He said on that basis, the Board should probably go ahead with it.

Mr. Gooze said the application met the variance criteria, and said it would be improper to turn it down.

Ms. Eng said she would not have a problem with granting the variance.

Mr. Bogle said it was a perfectly reasonable request, and said he had no problem with it.

Mr. de Campi said he agreed.

Chair Smith said the variance request was reasonable and met all the variance criteria. He said he was in favor of granting it.

John de Campi MOVED to grant an APPLICATION FOR VARIANCE from Article IX, Section 175-30(A&C) of the Zoning Ordinance to permit the expansion of a previously granted variance to now include building of a second floor addition on the previously approved attached garage on a nonconforming lot, according to the plans as amended. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Johnson said if the plans were accurate, he could release them the following day. But he asked Mr. Kalvelage not to put the second floor on for thirty days.

5 minute recess

III. Approval of Minutes

March 8, 2005

Page 3, 5th paragraph, should read "...a stream running through it,..."

Same page, 9th paragraph, should read "...may not be denied just because..."

Page 5, 9th paragraph, should read "Mr. McNitt said the Ordinance allowed it to stay there."

Same page, 11th paragraph, should read "...that if they removed the house,..."

Page 9, 2nd paragraph of Item 2 C, should read "...they would have to go out 4-6 ft."

Page 10, 5th paragraph, - take out wording in parentheses)

Same page, 8th paragraph, should read "...the original proposal incorrectly calculated the structural needs."

Page 11, 12th paragraph, should read "...so she wouldn't have to come back..."

Page 12, 4th paragraph, should read "...which was her living. He said he would..."

Page 13, 3rd paragraph, should read "...said the distance the structure went back was relatively unimportant." Also delete capitalized word at end of paragraph.

Same page, under Board Correspondence and/or discussion, should read “would be going to it, and several of them said they would be attending it.”

IV. Other Business

Mr. Gooze asked if Mr. Johnson had recently checked on the Gale Teeri house, along route 4. He noted the Board had previously denied a variance for more than 3 unrelated, but said when he went by recently, there were eight cars out there.

Mr. Johnson said he would check, but said he believed she had sold the property.

There was discussion about this.

Mr. Gooze said he had recently come across a draft of the letter sent to Jonathan Chorlian, regarding the no more than 3 unrelated situation, and asked if the letter had been sent. There was discussion about this.

Mr. Bogle said he wondered about the Griffith Drive property, noting it looked like nothing had been done yet.

Mr. Johnson said it had taken a long time to do the renovations, noting the house had been restored after the fire. He said he had recently issued a certificate of occupancy.

Chair Smith noted, concerning the decision on the Puffer application the previous week, that the motion itself made no mention of the Nature Conservancy. He read through the motion and asked what should be done about this.

There was discussion about this, and it was agreed the tape should be checked. It was also agreed that whatever was said at the meeting should stand.

Chair Smith said the Board would elect new officers in May, and noted that Vice Chair Gooze would become Chair at that time.

Mr. Gooze noted he had learned at a land use conference that if a ZBA made a decision on an application, the applicant couldn't go to Superior Court unless he went for a rehearing first at the local level. Mr. Gooze said the reason he was bringing this up was that he had seen some ZBA decisions from Rochester and Somersworth that read differently than Durham's.

He said the first paragraph of Durham's decisions implied applicants could go right to Superior Court, even though the second paragraph noted they could ask for a rehearing within 30 days. He said the land use course document said this should be kept at the local level if possible.

Mr. Johnson said Attorney Mitchell had said that an applicant could go directly to Superior Court, but often the judge would say, why not try to solve the issue before the ZBA first.

There was discussion about this.

Mr. Gooze said he would bring the land use course to the next meeting, and the Board could go over this.

Mr. Bogle said the clearer this could be made for the general public, the better.

John de Campi MOVED to adjourn the meeting. The motion was SECONDED by Linn Bogle, and PASSED unanimously.

Adjournment at 8:15 pm.

Victoria Parmele, minutes taker