

These minutes were approved at the July 12, 2005 Meeting.

ZONING BOARD OF ADJUSTMENT MINUTES

TUESDAY, JUNE 14, 2005

TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL

7:00 P.M.

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

MEMBERS ABSENT: None

OTHERS PRESENT: Tom Johnson, Code Enforcement Officer; Interested Members of the Public

MINUTES PREPARED BY: Victoria Parmele

I. Approval of Agenda

Chair Gooze noted that the applicant for Item II. D had requested a postponement until July. He also said that Mr. Zagieboylo, the applicant for Item II A, had sent an email stating that he wanted to withdraw his application. There was discussion about this. Chair Gooze said he took the email as a request to withdraw the request for rehearing.

Linn Bogle MOVED to approve the Agenda as amended. The motion was SECONDED by Henry Smith and PASSED unanimously 5-0.

II. Public Hearings

A. PUBLIC REHEARING on a February 8, 2005, Zoning Board denial of a petition submitted by Stephen Zagieboylo, Hampton Falls, New Hampshire, for an **APPLICATION FOR VARIANCE** 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.

(Withdrawn)

B. PUBLIC REHEARING on an April 12, 2005, Zoning Board approval of a petition submitted by Winthrop & Carolyn Puffer, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII,

Section 175-54 of the Zoning Ordinance to permit a limited subdivision to create a 5 acre lot. The property involved is shown on Tax Map 17, Lot 50 -1, is located at 172 Packers Falls Road, and is in the Rural Zoning District.

Mrs. Puffer said she had thought that as a result of the previous variance decision, the Board thought it was all right to call the property in question a buildable lot. But she said that because a restriction had been put in the decision, the appraisers for the Nature Conservancy could only consider the land to be nonbuildable, which meant it would not be as valuable to she and her husband in selling it.

She said she had recently walked the property with Duane Hyde of the Nature Conservancy, who was seeing it for the first time. She said not only was he still interested in the property, but was also intrigued by the bog located on the Puffers' property adjoining the 5 acre lot, and she said the Nature Conservancy was thinking of extending the amount of land they wanted to purchase. Mrs. Puffer made note of the June 6th letter from the Nature Conservancy outlining their perspective on the Puffers' property.

ZBA members said they had not received a copy of this letter.

Mrs. Puffer read the letter, which said that the Nature Conservancy was interested in working with her and her husband to acquire the property. It said that if the property was acquired, it would be added to their existing 225 acre Lamprey River preserve, and said a conservation easement would be put on it, which would be held by the NH Fish and Game Department. The letter said residential and commercial development as well as subdivision of the property would be prohibited, and the land would be required to be managed for conservation purposes. The letter said that if the variance request was approved, the property would be appraised, and if both parties were satisfied, the next step would be to begin acquisition of the property.

Mrs. Puffer also noted a letter dropped off by Janice Roberts supporting the variance request.

Mr. Smith received confirmation from Mrs. Puffer that there was not as yet a contract with the Nature Conservancy.

Chair Gooze asked Mrs. Puffer if she and her husband would still sell the property if they didn't receive the variance.

Mrs. Puffer said they would have to think about it because the land was currently in Current Use.

Chair Gooze asked if any members of the public wished to speak

concerning the application for variance.

Vladimir Harris, 154 Packers Falls Road said the neighbors had appreciated being able to use the Puffers' land over the years for recreation, and said the abutters had no desire to diminish in any way the value the Puffers could obtain for their property, especially in regard to the Nature Conservancy. He said they understood that the property evaluation would have to consider any and all encumbrances on it, and that diminution of value relative to a buildable lot could be something that could be considered a taking of value. He said this was not something the neighbors were interested in doing at all.

He said the neighbors would like to help the Puffers maximize the value of the property through the sale to the Nature Conservancy. He said the concern last time was how to get them this, while ensuring the property would in fact be sold to the Nature Conservancy. He said the concern of neighbors was what happened if the Nature Conservancy didn't buy the property, and provided details on this.

Bill Drapeau 4 Sullivan Falls Road said if the Puffers were granted a variance for the property as a buildable lot and sold it to the Nature Conservancy he would be happy, and if they were granted a variance and decided to sell to a developer he probably wouldn't like it but would have to live with it. He noted he had sat on the ZBA for several years, and said his main point in speaking was that the ZBA needed to address the request for variance based on the variance criteria, and not on what the neighbors wanted. Mr. Drapeau noted that the courts had ruled on this repeatedly.

Mr. Gooze asked if any members wished to speak against the application, and there was no response. He asked Mrs. Puffer if she would like to speak in rebuttal.

Mrs. Puffer said they were asking for the variance for a buildable lot because the property was not presently considered a buildable lot because it didn't have road frontage, and planned to sell it to the Nature Conservancy and no one else. She said no one else could buy the property and build on it because there was no access to it, explaining that since the Nature Conservancy owned an abutting property, it would have access to the property, and in fact would be the only property owner that had such access.

Mr. de Campi asked if the Nature Conservancy and the Puffers were the only abutters if the variance were granted. Being told there were other abutters, he noted the 5 acre parcel could possibly be combined with another parcel if it were not sold to the Nature Conservancy, so there were other possibilities in terms of getting sufficient frontage. He asked what the total

amount of acreage was that the Puffers owned.

Chair Gooze closed the public hearing.

Mr. Sievert said he had mixed feelings about this application. He noted that the Board didn't know if the lot was buildable in terms of other considerations, such as soils. But he said he felt that the Nature Conservancy was an entity that protected property, so he questioned why it would be built on.

Mr. Bogle said he would very much like to see the Nature Conservancy get this land to add to the parcel it already had, but he questioned whether the ZBA had the legal authority to declare a piece of backland like this with no frontage a buildable lot, and said perhaps this should be done by the Planning Board or the Town Council.

Code Administrator Tom Johnson said he couldn't answer the legal question, but said the applicants had to go to the Planning Board for subdivision approval, where conditions might be placed on the application. He said the current application before the ZBA concerned the fact that the property had no frontage.

Mr. Bogle asked about the precedent that could be set concerning backlands being declared buildable lots.

Mr. de Campi said he didn't think the property could be declared a buildable lot as it now sat, with no frontage, but he said he didn't have a problem allowing the variance on the condition that it be sold to an abutter who could provide entry to it. He said the Nature Conservancy didn't want to build on it, but he said he didn't think a buildable lot could be created that was allowed to be sold to anybody, without having some sort of access.

Chair Gooze said the variance criteria needed to be considered concerning this. He said when the Puffers had previously been granted a variance, Board members were adamant about making a condition of granting this that the property be protected from development. He said that they agreed the application met the variance criteria based on the fact that a condition concerning protection from development was included in the approval motion.

Mr. de Campi said what the Board had said last time in its ruling was that a 5 acre lot could be created, but was not really buildable. But he said what the Puffers needed the Board to say now was that this was a buildable lot. He said he didn't think it could be a buildable lot without some kind of condition added to it, and said he didn't think there was any intent in the Zoning Ordinance to allow buildable lots that had no access. He noted the

Board had previous 14 granted variances when they went specifically to allow a property to be sold to the Nature Conservancy, but said this didn't suit the Puffers' needs. But he said he thought the applicant could be granted a variance to say the lot was buildable as long as it was sold to an abutting property owner who could provide access.

Mr. McNitt said the Zoning Ordinance stressed the importance of conservation, but he said that on the other hand, if the variance were granted the Board would be declaring something strictly contrary to the Ordinance in terms of a residential buildable lot. He said he didn't see how anything could be done while the ownership status of the property was in limbo. He noted he would consider things entirely differently if he was assured there was no other way the property could go, other than permanent conservation.

Mr. Smith said he would like to see this property pass to the Nature Conservancy, but said there was no assurance that the property would be sold to them. He said he therefore had a serious problem with making this into a buildable lot, and said granting the variance would be contrary to the spirit and intent of the Ordinance. He also said he didn't see how conditions could be attached that were legally binding. He said a serious question as to whether the Board could or should make this property into a buildable lot.

Ms. Eng said her sentiments were similar to those of Mr. Smith. She said although this was a very unique property, she felt the Board would be setting a terrible precedent in calling this a buildable lot when it had no frontage. She also said she would like to ask the Town Attorney if the Board could legally make this a buildable lot, and said it didn't seem to her that it could.

Chair Gooze said he didn't think the request for variance met the spirit and intent of the Ordinance, and set a dangerous precedent, noting there were many properties in Durham that didn't have frontage. He also said granting the variance would be against the public interest, stating he didn't think there was anything special about the property that meant it would meet the hardship criteria. He said he was very much against granting this variance.

Mr. McNitt said he didn't know enough about the land to know whether, even if there were frontage, the property would be buildable. He said this had not been discussed, noting this was a Planning Board function, but definitely was part of determining whether a property was buildable or not.

Chair Gooze said the reason the Puffers came back to the ZBA was because of the technicality of not having 5 acres plus or minus on the decision, instead of the 5 acres that was in the decision. He said nothing had now been presented that was any different. He said his feeling was they could

simply change the acreage number and nothing more.

Mr. Sievert said he wasn't sure that the hardship criteria was met, but noted what the applicants were presenting that there were special conditions to the property, including a bog and a kettle hole that should be preserved.

Chair Gooze said he didn't feel there were special conditions and provided details on this. There was discussion about this with Mr. Sievert.

There was detailed discussion on the frontage situation, and what the options were for the 5 acre parcel.

Mr. De Campi noted Board members had heard things about the property such as the bog which brought into question whether it was buildable from a land capability perspective. He also noted that the problem was that a variance ran with the land, and once the lot was called buildable, this was permanent. He said he had a problem with this if it turned out the Nature Conservancy didn't buy it.

Chair Gooze said he didn't see the special conditions that made the parcel buildable. He said a bog didn't make the property buildable.

Mr. Sievert said he was talking about special conditions for preservation, and Chair Gooze said the Board had already addressed this with the previous decision on the property.

Mr. Bogle said in the original hearing and decision, the bog didn't come into question because it was not included in the parcel. He said if the property was enlarged to include it, this would increase the acreage. He said the original application said they wanted a buildable lot, and a 5 acre plus or minus designation. He said the Board approved a 5.0 acre lot, and did not designate the lot as buildable, which was why the Puffers were back before the Board.

Ms. Eng asked if there was something that could be put in the motion that said the property could be used exclusively by the Nature Conservancy.

Mr. de Campi said the Board could do this, but said this would defeat the goal of getting a higher appraised value from the Nature Conservancy. There was discussion about this.

Ted McNitt MOVED to deny the APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to permit a limited subdivision to create a 5 acre lot, because it would be contrary to the spirit and intent of the Ordinance and to the public interest if it was granted. The motion was SECONDED by John de Campi.

Chair Gooze asked what happened to the first variance approval, if this one was denied.

Mr. Johnson said it would stand.

Mr. Smith noted the motion said nothing about a buildable lot.

Mr. de Campi said although the word buildable didn't end up in the motion, clearly it was critical to what the Puffers were trying to accomplish.

The motion PASSED 5-0.

- C. **PUBLIC HEARING** on a petition submitted by Elizabeth Barnhorst, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to permit the occupancy of more than three unrelated people within a single family home with an accessory apartment. The property involved is shown on Tax Map 1, Lot 12-13, is located at 1 Emerson Road, and is in the Residence A Zoning District.

Attorney F.X. Bruton, representing Ms. Barnhorst, said the applicant was currently involved in an action pending in Superior Court, as a result of a denial of Ms. Barnhorst's appeal of administrative decision. He said without waiving the claims in that case, the applicant had brought forth the variance request as an alternate way to resolve the matter.

Attorney Bruton provided background information on the property and the issues involved. He said it was a single family home with an accessory apartment built above the garage in 2000, and said the apartment currently had 3 bedrooms. He said the code officer felt the apartment should be limited to renting to 2 unrelated people, which in combination with the single family home would meet the no more than 3 unrelated person's requirements. Attorney Bruton said the applicant was asking to be allowed to have three unrelated persons in the accessory apartment. He provided details on the history of the addition to the property.

Attorney Bruton said granting the variance would mean no diminution of property values, noting the property had been used for approximately four years with one family living in the single family dwelling and 3 unrelated persons living in the apartment without incident or complaints. He said a unique aspect of the property was that a single family lived in the single family residence, and said as a condition of approval, the applicant had agreed to the restriction that a single family as defined in the Ordinance would have to remain in the structure. He said the apartment complemented the aesthetics of surrounding properties, and noted that since the addition had been built, property values in the area had increased, and said allowing

the continuity of this use would therefore not result in a decrease in property values.

He said granting the variance would not be against the public interest because it would allow continued, reasonable use of the property, given the sufficient amount of habitable living space, and the fact that the accessory apartment had all of the qualities of a separate unit. He also said it would be in the public interest to grant the variance because it would allow use of the applicant's property consistent with the building permit that had been issued.

Attorney Bruton said denial of the variance would result in unnecessary hardship. He said under the Simplex test, they believed this was a use variance, and said it was believed the property was unique in its setting, as a single family home, with an accessory apartment with separate facilities. He said the accessory unit had the amount of living space required under the Ordinance, which suggested it was unique from other applications before the Board with similar requests.

Attorney Bruton noted that prior to the Simplex case, it was believed that financial hardship could not be considered concerning a variance application. But he said since Simplex, the courts had said Boards could consider this. He said that the addition of the accessory apartment was based on a return expected in light of three people living there, and noted Ms. Barnhorst had described the financial hardship she would suffer if only 2 tenants were permitted, which was approximately \$8,000. He said under Simplex, this should be considered.

He said it was believed there was no fair and substantial relationship between the general purpose of the Zoning Ordinance and the specific restrictions on the property, since the general purpose of the Ordinance with respect to this particular restriction was to prevent overcrowding. He said that given the specifics of the construction of the apartment and the use of the property without incident, it could be said that there was no overcrowding. He also noted that the applicant's agreement to a restriction that a family would have to reside in the single family dwelling meant that the property would be limited in its use, and therefore would not result in future overcrowding.

Attorney Bruton said substantial justice would be served by approving the variance because it would allow use of the property in a fashion that had taken place over the last four years, based on the applicant's good faith reliance upon what she had been told by the Code Enforcement Officer.

He also said granting the variance would not be contrary to the spirit and intent of the Ordinance, given the amount of habitable square footage in the accessory apartment, the existing use of the property with three unrelated

people without incident, and the fact that there would be no negative effect on the aesthetic landscape of the surrounding properties.

Attorney Bruton asked the Board to approve the request for variance, and said if it did so, the pending litigation would be resolved.

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

Chair Gooze said the key issue that made this property unique was that it was being used in a legal sense, like an accessory apartment. He said he had researched accessory apartment applications that had come before the ZBA over several years, and had found that their subordinate use was key, where there was a family in the building and the apartment was being rented. He said this was the whole purpose of the provisions, and said the 3 unrelated part was to keep accessory apartments like that, and not to wind up using them as duplexes.

He noted that at the time the addition was built, it could have been built as a duplex, but the applicant had requested an accessory apartment, and was given permission for this. He said the apartment was certainly large enough to hold three unrelated people. He also noted there had been some confusion about the definition of dwelling unit, which related to this application, but said this had been cleared up. Chair Gooze said he didn't think the Board would see this kind of situation very often. He said the addition was done legally, and said he believed the request for variance would meet all the criteria.

Mr. de Campi said the Board had heard the case twice before, and he noted that the second time, Mr. Edney in his letter had defined the situation as he saw it. He said the Board at that time felt Mr. Edney had misread the Ordinance, and had turned the variance request down. Mr. de Campi said it had bothered him, and said it had seemed that Ms. Barnhorst was being punished for Mr. Edney's mistake. He said he had come to regret that the Board had turned it down on the second hearing.

Mr. Bogle said he still had reservations about this situation, He said he felt Mr. Edney had misinterpreted the code.

Mr. Johnson suggested that the Board limit their discussion to the variance request and not possibly complicate the court case currently pending concerning the property.

Attorney Bruton noted the case had been continued to August.

Mr. Bogle said he didn't see there was a hardship, and said granting the

variance would be contrary to the spirit and intent of the Ordinance. He said he had reservations about granting the variance.

There was discussion as to whether the application was being heard under the old or new Zoning Ordinance, and it was determined it was being heard under the new Ordinance.

Mr. Sievert said he believed the request met the spirit and intent of the Ordinance, and also met the other variance criteria. He said the apartment fit the new Ordinance.

Mr. McNitt reviewed the history of the addition to Ms. Barnhorst's house, and said the original application was for a single family house with an apartment over the garage, and was referred to as an accessory apartment. But he said there was no reason the code officer would have refused to allow an applicant to exceed the requirements of an accessory apartment. He noted the original drawing which indicated 2 sleeping spaces. But he said he thought there might have been some confusion by Mr. Edney. He noted duplexes were allowed at the time, and said Mr. Edney might have been thinking in terms of 3 occupants.

He said the only thing one could say was that there had been a clear misunderstanding, which was not the fault of Ms. Barnhorst. He said he was not sure how he stood on this application yet. He said it was a use variance being requested, and reflected all the problems concerning what the Town wanted to happen in that neighborhood.

Mr. Smith said in his mind this was a very unusual 3 unrelated person issue primarily because of the history of the structure since 2000. He said Ms. Barnhorst had proceeded in good faith with the addition, involving a lot of expense, based on her understanding from Mr. Edney, which Mr. Smith said he believed was incorrect. He said this had been an ordeal for her. He said theoretically, granting this would be contrary to the spirit and intent of the ordinance, but said there was this unusual history and present situation. He said it was important to note that it was a well run rental unit and there had been no incidents there.

He said he had voted to turn Ms. Barnhorst's request down previously, but said he had re-thought the situation, and had thought about what the Town Attorney had said, and said he would reluctantly, as a special case, be in favor of granting the variance, if two conditions were attached: that there would be a maximum of three people in the apartment, and that there be a requirement that a family live in the main house.

Ms. Eng said there was really nothing different than what had been presented in the previous case, if one looked strictly at the application. She

asked whether, if the requirement was put in the motion that a family be living in the main house, that would run with the property. She said she didn't know if that could be enforced.

Chair Gooze said if someone decided to rent the single family home portion, the accessory apartment would no longer be a subordinate use, so it would revert to a single family house, which would limit it to 3 unrelated people. He said that was the key issue, the subordinate nature of the accessory apartment. He noted that the current Zoning Ordinance would not allow this apartment to be built, because it would have to be an integral to the house, and would be limited to 3 unrelated people for the whole house.

Ms. Eng said if the condition about a family living in the house was included in the motion, she would have no problem with granting the variance.

Mr. McNitt asked what other Board members thought would happen to the property if it were sold.

Chair Gooze said it would be either limited to what was granted in the variance, or if it was used as a rental, it would go to a total of 3 unrelated people for the whole house.

There was discussion about this, including whether it could be used as duplex.

Mr. McNitt said he would reluctantly vote in favor of the request for variance, on the basis that the situation was fuzzy, that the addition was built big enough to hold three people whether it was intended for three or not, and that it would never be considered anything but a single family house with an accessory apartment.

John de Campi MOVED to grant the APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance and that it would be permitted to have not more than 3 unrelated people in the accessory apartment so long as a family as defined by the Durham Zoning Ordinance occupies the main portion of the house. The Zoning Board of Adjustment feels the request meets all five variance criteria. Henry Smith SECONDED the motion.

Mr. McNitt said the record should show clearly that the key, mitigating reason for granting the variance was the fact that Ms. Barnhorst apparently was misled by a town official at the time the addition was built.

Chair Gooze said he agreed this was one of the reasons the application met the criteria for granting a variance.

The motion PASSED 4-1, with Linn Bogle voting against it.

- D. PUBLIC HEARING** on a petition submitted by Sandra Wattendorf & Debra McCosker, Remax Central Edge, Durham, New Hampshire, on behalf of Rockingham Properties LLC, Belmont, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to place a non-conforming, free-standing sign on the property. The property involved is shown on Tax Map 11, Lot 8-0, is located at 56 Dover Road, and is in the Limited Business Zoning District.

(Postponed at the applicant's request)

- E. PUBLIC HEARING** on a petition submitted by Patrick & Theresa Walker, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to permit the building of a barn within the side yard setback. The property involved is shown on Tax Map 14, Lot 36-4, is located at 62 Bennett Road, and is in the Rural Zoning District.

Theresa Walker explained that the variance was needed in order to be able to build a barn on their property, because a 50 ft. side setback was required while their odd shaped nonconforming lot only had 33 ft. She said there was an historic barn foundation on the property, noting the house was the Bennett House on Bennett Road. She said the barn would be about half the size of the previous barn on the property, and would be used strictly for storage, noting they presently had no garage or attic. She said the existing driveway and leachfield made it difficult to go any other place on the property.

Mrs. Walker noted there was a letter of support from the Horrigans, the direct abutters to the sideyard in question, and from whom they had bought the house. She said she appreciated their support.

Mr. de Campi said it looked like the applicants had options to put the barn elsewhere so it would still be on the foundation of the old barn and would be within the sideyard setback.

There was discussion about this.

Mr. and Mrs. Walker said the proposed location was the best, most level, accessible location for the new barn. In answer to Mr. de Campi, Mrs. Walker said the existing shed would be taken down. She said this barn would be smaller in scale than other barns in the area. She also noted that the property was nonconforming when they bought the house. In answer to a question from Mr. McNitt, she said they lived in the house the Horrigans had lived in and there were no houses beyond where the barn was.

Mr. Smith asked how tall the building would be, and was told it would be about 28 ft..

Mr. McNitt asked if there was any other place on the property where the barn could be put.

Mrs. Walker described the site limitations, and said no. Mr. Walker said the barn could be moved 10 ft. to the left, but said this would mean the driveway and stone wall would have to be moved. He said the proposed location was where they would like to put the barn, and where the barn originally was, which was why they were coming in for a variance.

Chair Gooze asked if any members of the public wished to speak for the application.

Bill Drapeau, 4 Sullivan Falls Road, noted he was not an abutter. He said the lot in question was old, and nonconforming in every aspect. He provided details on a previous variance application the Walkers had presented before the ZBA concerning a setback when he was a member of that ZBA, which was denied, but said a compromise had been reached regarding that situation. He said the Walkers were willing to do the best they could to conform to the Ordinance on a nonconforming lot, and said he didn't see any problem with the proposed barn other than the fact that it didn't meet the setback requirement.

Julian Smith, 246 Packers Falls Rd. said he was there to speak in favor of the variance request for a number of reasons. He said he knew the property and had helped with a number of projects there. He said that at the time the Horigans subdivided their property and sold the lot in question to the Walkers, the side setback requirement was 15 ft., but was now 50 ft. He said he hoped the Horigans would have created a different configuration for the lot if they had known this problem would come up.

Mr. Smith said he liked the idea of seeing a barn come back, and of building on old foundations, noting there were two empty barn foundations in the local area because of barn fires. He said he hoped the Board would approve the variance request..

Bill Tanguay, 6 Bennett Road, said the Walkers were good neighbors, good stewards, and were doing the right thing. He said this variance request met the Boccia hardship criteria and would not result in a decrease in property values. He said the proposed barn was the right building in the right place on that street, and provided additional details about the property in relation to the surrounding area. He said the setback requirement was intended to prevent overcrowding, but said this was not a concern. He said the barn was the perfect use for that portion of the property. He said the

variance request met all the criteria, and said he fully supported it.

Chair Gooze asked if there were any members of the public who wished to speak against the application. Hearing no response, he closed the public hearing

Ms. Eng said she recommended granting the variance request, because it would not result in a decrease in property values, it would not be against the public interest, and it would not be contrary to the spirit and intent of the Ordinance. She said and noted this was an area variance being requested based on the special conditions of the property, which was long and narrow. She said there was no other place to put the barn, and said she liked the idea of putting it on the old foundation. She also said the proposed barn would maintain the rural character of the area.

Chair Gooze provided clarification that the barn would not be constructed directly on the old foundation.

Mr. Smith noted that some neighbors of his had renovated a wonderful barn on their property several years ago, and had created something very unattractive. He said the proposed barn was in keeping with the rural character of the land, and said the application met all the variance criteria. He said he didn't have a problem with it.

Mr. McNitt said he agreed with what other Board members had said, and said the variance request met all five criteria.

Mr. de Campi said there were other options for siting the barn, but said there was no harm in a 33 ft. setback in this location.

Mr. Bogle said it was a very nice traditional design for a barn and was proposed for an historic location on the property. He said the barn would enhance the property, and the abutters approved of it, and he said he was in favor of granting the variance.

Mr. Sievert said the variance request met the criteria.

Chair Gooze said he also agreed the application met all the variance criteria. He said he only would have had a problem with it if the Horrigans had questioned it, but he noted their letter supporting the application.

John de Campi MOVED to grant the APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to permit the building of a barn within the side yard setback. The motion was SECONDED by Ted McNitt and PASSED unanimously 5-0.

F. PUBLIC HEARING on a petition submitted by Gregory & Melinda

McMahon, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article IX, Section 175-30(A) of the Zoning Ordinance to permit the enlargement of nonconforming septic system. The property involved is shown on Tax Map 16, Lot 18-0, is located at 248 Durham Point Road, and is in the Rural Zoning District.

Mr. McMahon spoke before the Board, and said he planned to build an addition to his house. He said the initial plan submitted in 2000 did not include finishing the second floor of the addition for financial reasons, but said he now wished to do this. He said it had been determined that a better use of the existing and added space would be to finish the second floor of the addition with three bedrooms, and to use the existing house for workspace. He noted he and his wife worked at home. He said the property contained 6.5 acres.

He explained that the current septic system on the property was for two bedrooms, and was nonconforming. He said the septic designer had tried to find another location for the new septic system, and provided details on this, but said it was determined that the existing location was the only viable place for it to go. He said the new system would be slightly larger than the old one, would be for five bedrooms, and would be placed about 20 ft. from the property line. He noted that the existing system, which was 25 years old, did not comply with the setback, and also said it was bound to fail at some point, so would have to be rebuilt anyway, and would have to be located on that spot.

Chair Gooze noted the Board had received a letter from Lori Poirier, a direct abutter, which said she and her husband owned the property containing the strip of wooded land that was not used, and said she had no issues with the applicants' request.

Mr. Smith asked why the abutting lot with the strip of land was unusable and undevelopable.

Mr. McMahon said it was not unusable, but had been added simply to make their lot big enough to be built upon, and was basically just woods.

Mr. McNitt asked if another type of leachfield would be used for this system.

Mr. McMahon said that was correct, and said several test pits were dug on May 2nd.

The applicants' septic designer was asked to speak about the existing system and the proposed new septic system.

Sandy Breton said a system had been designed that would conform as much

as possible with the setbacks. She noted the addition was lower on the site than the existing building and leachfield. She said a test pit was dug in the low area and ledge material was found at about 18 inches, off of the side of the driveway, which was within the 50 ft of the setback. She said they were trying to stay away from the driveway so it could remain as a driveway. She provided additional details on soils on the property, noting ledge in the front and some wet areas in the back. She said the best location was found to be where the current system was. She said they worked hard to keep it out of the 75 ft. setback.

Ms. Breton provided additional details on the septic system design. She said it would be similar to what was there now, because the design had worked well, but said the leachfield had been flipped so instead of running parallel to the house, it would run perpendicular to it. She said the current system was 875 sq. ft. and 1,133 sq. ft. was required. She said the system that had been designed was 1,200 sq. ft. She provided details on surrounding properties, and said there wouldn't be any impact on property values or public safety from the septic system.

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

Mr. Sievert noted that the area to the east was ledge, and said it seemed that other options for putting the septic system outside of the setback had been explored. He said he didn't see a major problem with the variance request, and said it met the variance criteria. He noted that the system would meet the State setback requirements.

Mr. Bogle said he took at face value what had been presented to the Board, and said he agreed with Mr. Sievert.

Mr. de Campi said the variance request seemed reasonable, and met the variance criteria.

Mr. McNitt said he also agreed with what others had said, and said he believed the request met the variance criteria.

Mr. Smith said the applicants had explored other options, and had found that the only other area to place the septic system was to the east, which was ledge so was not practical. He said he felt the request for variance was reasonable, and met the variance criteria.

Ms. Eng said she had nothing more to add.

Chair Gooze said he believed the application met the variance criteria because the McMahon's property abutted the strip of land. He said that otherwise, he would have considered this a self imposed hardship, and

would be hesitant to approve this. He said when one looked at the property, it was apparent there really wasn't much else that could be done.

Henry Smith MOVED to approve the APPLICATION FOR VARIANCE from Article IX, Section 175-30(A) of the Zoning Ordinance to permit the enlargement of a nonconforming septic system because it meets all of the variance criteria. John de Campi SECONDED the motion, and it PASSED 5-0.

- G. PUBLIC HEARING** on a petition submitted by Eva H. Reed, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to permit a septic system within the rear yard setback. The property involved is shown on Tax Map 12, Lot 1-16, is located at 25 Cedar Point Road, and is in the Residence C Zoning District.

Susan Faretra of NH Soil Consultants spoke for the applicant concerning the variance application, and provided details on the analysis done to determine the best location for the septic system. She noted that the surrounding lots had already been developed, and showed the well radii on a site plan. She said the proposed design met all of the State criteria, and said the goal had been to come as close as possible to meeting the Town's setback requirements. She said the plan met the Town's 30 ft. frontyard setback and 50 ft. rear set back. But she said that because the width of the lot was only 100 ft, it was impossible to meet the 50 ft. side yard setbacks. She described the proposed location for the leachfield and said it was the only place on the lot that could respect the well radii of surround properties.

Ms. Faretra then read through how the request for variance met the variance criteria.

Mr. Smith said the application said the applicant's septic system should not be held to a higher standard of conformance than other recent systems in the neighborhood. He asked if these systems were approved for houses that were already there.

Ms. Faretra provided details on this.

Mr. Smith received clarification that the applicant was asking for approval of a septic system for a house that did not yet exist.

Ms. Faretra said they were asking for this, and were also asking for relief from the sideyard setback of 50 ft. for the proposed structure.

Mr. Johnson read an email he had received from Ms. Faretra asking about other things the applicant needed to request a variance from. He said he had

responded by email that 175-54, the Dimension Table, covered all proposed structures on the property not in conformance. He said his email response was saying that the septic system, house and garage all had to comply with the Table, but he said the application was only asking for a variance concerning the septic system.

Mr. de Campi said based on the dates of the correspondence, it appeared that no attempt was made to add the additional issues to the application. He said the present application didn't mention the house, and provided no information on it.

The Board determined that there was a hypothetical house at present, and the applicant would not be building it.

Chair Gooze suggested that the applicant could withdraw this application and come back with a variance application that included everything, noting this was her choice.

Ms. Reed said she agreed with this and withdrew the application.

Chair Gooze said the Board would accept this, and would wait to discuss this matter until the applicant presented another variance application.

Five minute break 9:11-9:16 pm

H. PUBLIC HEARING on a petition submitted by Michael H. Martin, Exeter, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article IX, Section 175-30(D) of the Zoning Ordinance to permit the building of a porch within the side yard setback and the alteration of a nonconforming building within the Shoreland Overlay District. The property involved is shown on Tax Map 12, Lot 1-5, is located at 37 Cedar Point Road, and is in the Residence C Zoning District.

Michael Martin said he had built the house in 1987 for his parents who had lived there for 10 years, and then rented the property. He said he planned to move into the house, and would like to renovate it. He said the house had a poured concrete foundation, and said he would like to raise the house 3 ft so he would have a full basement. He explained that he needed a reverse osmosis water system so needed the extra height for the utility area.

He said he also wanted to change the existing porch to a farmer's porch that would run toward the front, and would be 5 ft. wide. He also said there was a small deck in the back of the house that was 6 ft. by 8 ft., and said he would like to enlarge it to 10 ft. by 12 ft.

Mr. Martin said that as far as he knew, the abutters had no problems with the proposed changes. He said because of the lot size, whatever he did, he

would have to come before the Board because he didn't meet the new setback requirements. He said he didn't feel the work that was planned would decrease the value of surrounding properties, and in fact would improve the values. He said there would be no significant change in the amount of living space, so it didn't seem to be against the public interest.

Mr. Martin was asked if the proposed changes to the house would stay within the existing footprint.

Mr. Martin said yes, and said the building was going up 3 ft.

Chair Gooze asked what the volume of the house would increase by, noting a letter from Mr. Johnson that mentioned this. There was discussion about this.

Mr. Sievert said he had done the calculations on this, and said the applicant met the volume increase requirement.

Mr. Smith asked how high the house was, and Mr. Martin said it was 23 ft. high.

Chair Gooze asked if all the houses in the area were year round, and Mr. Martin said there was perhaps one house that was not, but was not an abutter.

Phillip Sullivan, 42 Cedar Pt Road, said he lived directly behind Mr. Martin, and said he was in favor of anything that improved the properties in the area. He noted that the property in question had become a rental and needed paint, and said it sounded like what was proposed would improve it. He said the height of the house would be lower than his own house and the houses on both sides, so he saw no problem with this, and also said he saw no problem with the farmer's porch.

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

Mr. McNitt said this was a unique situation of historic small lots. He said there would be not encroachment from a bigger foundation, and said he assumed the porch would be built on posts. He said he understood the need for a basement in order to store equipment there. He said he felt this was a reasonable request, primarily under Simplex, given that the whole neighborhood was doing this kind of thing.

Chair Smith asked Mr. Johnson for clarification concerning whether the upward expansion may exceed the requirements for nonconforming buildings.

Mr. Johnson said he hadn't had the actual building dimensions to calculate the actual volume of the structure to see if the applicant complied with the 30% requirement, which is why he had used the word "may".

Mr. Bogle noted that within the shoreland setback, the applicant couldn't excavate down. There was discussion about this.

Mr. Smith said he agreed with Mr. McNitt, and said he was in favor of granting the variance.

Ms. Eng said she agreed, and said she thought this would improve the neighborhood.

Mr. de Campi said the applicant wasn't asking for much, noting the farmer's porch was only 1 foot wider than what existed there at present. He said the porch could be enlarged in the back without any real impact. He said this was reasonable compared to what people had been allowed to do in that area, and said he didn't have a problem with it.

Mr. Bogle said he agreed, and had no problem with granting the variance.

Mr. Sievert said he agreed. He said the request met the variance requirements, and said the upward expansion was necessary because of the water system that was needed. He said he was aware that there were water issues in that area.

Chair Gooze said he had been informed that the volume increase would be just under 30%. He said he thought the variance request met the hardship criteria under Simplex because of the nature of the neighborhood. He said because other properties were doing the same thing, it would be difficult to say this could not be done. He said he believed the application met all five variance criteria.

Ted McNitt MOVED to approve the APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article IX, Section 175-30(D) of the Zoning Ordinance to permit the porch to be within the sideyard setback and the alterations of a nonconforming building to be within the Shoreland Overlay District because it meets all five variance criteria. Henry Smith SECONDED the motion, and it PASSED unanimously 5 -0.

- I. **PUBLIC HEARING** on a petition submitted by Florence Knight, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XIV, Section 175-72(A) and Section 175-75(A) of the Zoning Ordinance to permit the building of a deck within the shoreland setback. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar

Point Road, and is in the Residence C Zoning District.

Evelyn Sidmore spoke for her mother. There was discussion among Board members as to whether Ms. Sidmore could speak for her mother because there was nothing in writing on this in members' packets.

Ms. Sidmore noted she was part owner of the property, which was indicated on the deed, and also had power of attorney for her mother.

The Board agreed to let Ms. Sidmore represent her mother.

Ms. Sidmore said her mother had had a stroke and was confined to a wheelchair, and there were few areas on the property she could go. She said the ramp and deck were put on to allow her mother to have access to the summer cottage, and to keep her out of the wind. She noted that the only existing deck on the property had been at a high level, and in a windy location. She said the building had at one time had a deck on another side of the building, which was taken off, and this was where the new deck had been built.

Mr. de Campi said Board members had a drawing as part of the application, but it was so unspecific that it wasn't clear what was being applied for, what the setbacks were, etc.

Chair Gooze asked how long the new deck had been there.

Ms. Sidmore said the deck has been there since last summer.

Chair Gooze noted that the reason it came to Mr. Johnson's attention was that some electrical work was going to be done.

Ms. Sidmore said that was correct, and said that was when he saw the ramp.

Mr. McNitt asked how long the property had been a cottage.

Ms. Sidmore said she believed it was built in 1949, and provided details on its history.

Mr. Bogle asked what the dimensions of the cottage were, and was told it was 20 ft. by 12 ft. He asked if the deck was intended only for observing, and she said that was correct.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application.

Mr. Johnson said there was a letter from Lois and Thomas Roberts stating they were against the variance request.

Ms. Sidmore said the other abutter was not in opposition to the variation

request.

Chair Gooze closed the public hearing.

Mr. de Campi said he had difficulty voting for this because the application was so unspecific. He also said he had great difficulty with building something that close to the water. He said this seemed too extreme, and said it was not in the public interest to build that close to the water. He said he didn't think the applicant had met the burden of proof of showing what they wished to do.

Mr. Bogle said the proposal should have been more detailed, noting there was no diagram showing the shed, deck or ramp, and nothing that showed the setbacks. He noted that one of the abutters, Mr. Roberts, didn't object to the structure but was unhappy about the way the deck was done, and its closeness to the property line. Mr. Bogle said Mr. Roberts was also concerned it might be enlarged in the future. He said that perhaps a more detailed proposal would be worth considering.

Mr. Sievert agreed it would be good to see more detail. He said if the deck had been added within the shoreland setback without permits, it didn't sound like it met the criteria, but he said it was hard to know this without any documentation.

Mr. McNitt said the deck was very close to the shore, and very close to the neighbor. He said he didn't think it would have a major impact on the shoreland, but he noted the Board had been quite firm about accepting these kinds of structures close to the shoreland. He said in some cases, the Board had asked that structures be moved further back. He said he agreed with what others had said about the need for more detail, and also said he was concerned that the deck was done before the applicant came in for the variance. He said he would like to know more about it before considering whether to accept it.

Mr. Smith said he found this situation very troubling. He said the deck was built illegally, was very close to the water, and was in violation of the Ordinance. He said the Board tried to be very strict about protecting the shoreline, and said he felt approving the variance request would be contrary to the public interest, and flew in the face of the spirit and intent of the Ordinance.

Ms. Eng said granting this variance would be very contrary to the public interest. She said the purpose of the Ordinance was to protect the Great Bay Estuary and to maintain the shoreland habitat for wildlife, and said there seemed to have been very little regard for this. She said 175-75A clearly stated that structures should not be expanded further to encroach upon the

shoreland, and said this definitely had been expanded. She said she wouldn't have a problem with re-building the deck the same size that it was, but did have a problem with expanding it. She said the construction had injured the private rights of others, noting it was 6-7 ft. from the neighbors' property line and about 20 ft. from the water line. She said this was very contrary to the spirit and intent of the Ordinance.

Chair Gooze noted the old deck was long gone. He said he had a great deal of difficulty with this application. He said he did not believe there would be a huge impact on the environment, but said it was very close to the water and to the abutters. He also said the issue of what it would be used for in the future was a valid point. He said while he felt for the owner, this was a large property, with other places on it to get a good view of the water. He said the deck was asking for too much, and said granting the variance would not be in the public interest, and was against the spirit and intent of the Ordinance. He said he didn't believe denying the variance would be a real hardship because there were plenty of other areas on the property, and said he didn't feel the Board should grant the variance.

John de Campi MOVED to deny the APPLICATION FOR VARIANCES from Article XIV, Section 175-72(A) and Section 175-75(A) of the Zoning Ordinance to permit the building of a deck within the shoreland setback because it was against the spirit and intent of the Zoning Ordinance, and was contrary to the public interest. Henry Smith SECONDED the motion, and it PASSED unanimously 5-0.

Chair Gooze said the remaining two public hearings would be heard by the Board the following Tuesday evening, June 21st..

III. Approval of Minutes

February 22, 2005

Page 2, 3rd paragraph should say "He said they wanted to let..." 6th paragraph, should read "...if it met the RC zone acreage and was informed..."

Page 3, 3rd paragraph, should read "...when the Bubars bought the property, it was..." Bottom paragraph should read "...the second criterion..."

Page 5, 2nd paragraph from bottom, should read "...the second hardship criterion..." Same paragraph, should read "...if the variance was not granted..."

John de Campi MOVED to approve the February 22, 2005 minutes as amended. The motion was SECONDED by Linn Bogle, and PASSED unanimously 3-0-2, with Henry Smith and Ted McNitt abstaining from voting because of their absence from the February 22, 2005 meeting.

April 19, 2005

Page 1, 3rd paragraph from bottom, should read "...space for a growing family."
Bottom paragraph should read "...most of the homes in the neighborhood..."

Page 2, top paragraph, should read "...that anyone would be put out by an addition. Same paragraph, should read "...a peaked roof that would be perpendicular..." Also page 2, 4th full paragraph, should read "...with the proposed addition, ..."

Page 3, 7th paragraph, should read "...ample room toward the back, he didn't..."

Page 4, should read "...that the Weglarz family owned the abutting property,..."

Page 5, applicant's name should be spelled Kalvelage throughout. Also page 5, 4th full paragraph, should read "He said there were some administrative..."
Also, bottom paragraph, should read "...getting storage, and no other place to expand..."

Page 6, 4th paragraph, should read "...zoning ordinance, the applicant would have to..." 7th paragraph, should read "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,..." Also page 6, 8th paragraph, should read "...one could possibly see the change,..." Bottom paragraph, should read "He said this was a small lot,..."

Page 7, 2nd paragraph, should read "Mr. Gooze said the application met the variance criteria, and said it would be improper to turn it down." Same page, under Approval of Minutes, under Page 9, should say "...they would have to go out 4-6 ft."

Ted McNitt MOVED to approve the April 19th, 2005 Minutes as amended. The motion was SECONDED by John de Campi, and PASSED unanimously 5-0.

IV. Other Business

The Board discussed the issue of whether the next step for an applicant, after a variance was denied by the Board, should be a rehearing. Chair Gooze noted that at the April 9th conference in Concord, it was stated that the courts had said they wanted rehearings before they heard an appeal. He said the ZBA's decisions had been implying that applicants could go to Superior Court as the next step. He read through the State statute concerning this, and said he and Mr. Johnson would discuss how to handle this.

Mr. Johnson noted a document he had provided to Board members from a course he had attended, which was taught by several attorneys, and was put on

by Primex, the Town's insurance carrier.

There was discussion that the Barnhorst case would probably not be heard in court based on the finding that evening..

V. Adjournment

John de Campi MOVED to continue the meeting to the following Tuesday. The motion was SECONDED by Ted McNitt and PASSED unanimously 5 -0.

Adjournment at 10:15 pm

John de Campi, Secretary