

*These minutes were approved at the September 27, 2005 meeting.*

**ZONING BOARD OF ADJUSTMENT MINUTES  
TUESDAY, JUNE 21, 2005  
TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL  
7:00 P.M.**

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

**MEMBERS ABSENT:** Ted McNitt

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

**MINUTES PREPARED BY:** Victoria Parmele

Chair Gooze introduced the Board members, and said alternate Board member Myleta Eng would serve as a voting member that evening in place of regular Board member Ted McNitt.

Chair Gooze said before opening the public hearing, he would like to note that the Board had recently gotten a packet from Alpha Gamma Rho, and was not sure that everyone on the Board, as well as Mr. Johnson, had received copies of it. There was discussion about this.

Chair Gooze also said that in reading through the packet, he was concerned that what was now being requested was essentially what had been requested when the Board voted on the applicant's request in January. He read through the Board's previous decision in January of 2005, and noted that after a ZBA decision, an applicant had 30 days to appeal this for rehearing. He noted this was required by State statute.

He said the Board, and the courts had been very strict on this. He noted that the present Agenda item included reference to Mr. Johnson's May 13, 2005 letter to the applicant, but said he didn't see anything new in this other than an answer to the questions that were the reason the Board denied the previous application. He said he didn't see how this was different than a request for rehearing from the original decision, and said it was way past the 30-day time limit for this.

Chair Gooze said he did not feel the Board should hear this application. He said if it did hear it, that opened it up to a possible rehearing request after 30 days. But he said he would like to talk with Board members about this.

Mr. Smith said the appeal of administrative decision in January was denied, and said that evening the applicant was requesting the exact same thing, which he said he thought was very inappropriate. He said the applicant should drop this application, or could ask for a variance, but he said he didn't see any other choices.

Mr. de Campi said he was willing to let the applicant speak to the issue, but was inclined to agree with Chair Gooze and Mr. Smith. He said the appeal of administrative decision had been decided on absolutely when the 30-day period expired, but he said the applicant could still ask for a variance. But he said they had not asked for this, and were requesting an appeal of administrative decision.

Mr. Bogle and Ms. Eng both said they agreed with Mr. de Campi.

Chair Gooze said if the Board would like further explanation of the situation from the applicant, it could ask the applicant to speak without opening the public hearing. He asked if that was the will of the Board, and also asked the applicants if they understood the Board's position on this.

Shawn Jasper representing, Alpha Gamma Rho, said as a former selectman, he understood where the Board was coming from, but he said in this case, the fraternity hadn't asked for a rehearing because it would have had to pay the \$100. He said the Board had wanted more information, and the fraternity was taken aback with where it ended up. He said Mr. Johnson had indicated to Al Smith that if there was information that the fraternity had boarders in 1969, he might have another opinion.

He said it had taken awhile to develop that information, and they continued to have discussions with Mr. Johnson. He said based on all the information they brought forward, Mr. Johnson denied them at that time. He said they were trying to figure out what the Town wanted in order to have a successful case, and hoped it would not be necessary to come back before the ZBA. He said they could not accomplish what was asked for within the 30 day time period, and that was why they had not asked for a rehearing. He said based on Mr. Johnson's second letter to the fraternity, they had requested an appeal of administrative decision, and said this application was accepted by the Town, and involved no small expense for the fraternity.

Chair Gooze said the problem he had with this was that it would set a bad precedent to have an applicant come back to the Board several months later to ask essentially the same thing, and to have the Board hear an application again. He noted it was the Board, not Mr. Johnson, who determined whether it could hear or not hear an application.

John Rattigan, the attorney for the applicant, said the May 13, 2005 letter from Mr. Johnson was different than his previous letter to the applicant, and was based

on a different submittal presented to him. He also noted that the courts wanted ZBAs to resolve these things at the administrative level first. He said he realized the January decision was not appealed in a timely manner, but he said it was a different administrative decision that was now being appealed. He said it was a different record, with different information in it, and said it was a distinction that could be made.

Mr. de Campi said it was very easy to ask Mr. Johnson the same question with different supporting documents and get the same answer.

Attorney Rattigan said there was not any prejudice for the Board to rehear this, and said otherwise, the applicant would have to apply for a variance, and that they were going to file a declaratory judgment action because that was another way to get recognition of their rights. But he said they would prefer to handle this at the local level. He said the materials submitted were clear about the history of the Ordinance, and said it was a reasonable decision to make the distinction that the Code Enforcement Officer had made two decisions. He said in his dealings with other towns, this kind of situation was not uncommon, where information came in from applicants in fits and starts. He said that administratively, it would be more efficient to hear the appeal instead of going to Superior Court.

Mr. Smith said the Board was being asked to do the same thing they had denied in January. He said the choice here was for the applicant to ask for a variance, and said the Board should not hear the same thing again.

Mr. Jasper said the fraternity was not going to ask for a variance because it believed it had rights, and to ask for a variance was to say it didn't have those rights. He said the Board was putting them all in a situation where it was going to cost them a lot of money to go to court over this, when the fraternity said it believed it was doing exactly what it was told to do, and couldn't accomplish this in 30 days. He said they had believed they could solve this internally, based on what was told to them, so the 30 days wasn't even a concern.

***Henry Smith MOVED to decline to hear the same appeal of administrative decision as was heard in January. The motion was SECONDED by John de Campi.***

Mr. de Campi said it was unfortunate that Alpha Gamma Rho had been caught in this situation, but the current appeal was simply too much like the first appeal.

Attorney Rattigan said the administrative decision itself said it could be appealed.

Chair Gooze said someone could certainly look at this further up, but he said that from the Board's stand point, it felt uncomfortable about hearing this second appeal of administrative decision.

Mr. de Campi said he disagreed with the applicant concerning the idea of applying for a variance.

***The motion PASSED unanimously 5-0.***

## **II. PUBLIC HEARINGS**

**J. PUBLIC HEARING** on a petition submitted by Alpha Gamma Rho, Barrington, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from a May 13, 2005, letter from Zoning Administrator, Thomas Johnson, regarding the occupancy of a fraternity. The property involved is shown on Tax Map 2, Lot 8-12, is located at 6 Strafford Avenue, and is in the Residential A Zoning District.

(Not heard)

**K. PUBLIC HEARING** on a petition submitted by Ralph & Elisabeth Kleinmann, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XIV, Section 175-72(A), 175-75(C3) and 175-73(D&E), and Article XII, Section 175-54 of the Zoning Ordinance to permit the demolition of a camp and the building of a single family home within the shoreland setback. The property involved is shown on Tax Map 20, Lot 16-2, is located at 269 Durham Point Road, and is in the Residence C Zoning District.

Mr. Kleinmann described the location of the property in question and surrounding properties, and provided detailed information about the subdivision that his parcel was a part of. He said what he was asking for was consistent with what had been recently allowed within this particular five-lot subdivision. He said the first phase of the project was a redesign and relocation of the septic system to conform to the code, and said what he was now asking for was to go ahead and finish the project. He said the addition would not encroach further toward the side boundaries or the water and he said the abutters supported his plan.

Chair Smith asked if the addition would involve an increase in the footprint, and if so, by how much.

Mr. Kleinmann said there would be an increase in the footprint.

Mr. Bogle said the current camp on the property was 665 sq. ft. and the proposed square footage was 2,232 sq. ft, including a house, a breezeway, and a garage. He said a back porch and front porch brought it to 2,584 sq. ft. He said there would essentially be a quadrupling of the square footage. He said there would be more than a tripling of the

footprint of the house in the shoreland overlay district.

Mr. Bogle said a site walk was necessary for this property. He also said there should be some consideration of what had happened with other properties in the subdivision.

Mr. de Campi asked if the house could be set further back, noting the property looked like it could accommodate this.

Mr. Kleinmann described the existing septic system size and location. He said if the house were moved back, this system would pretty much have to be re-done.

Mr. de Campi agreed there should be a site walk.

Mr. Smith noted that the application said that two outbuildings would be removed, and Mr. Kleinmann provided details on this.

Chair Gooze asked when the easement for the leach fields had been completed, and Mr. Kleinmann provided details on this. Chair Gooze noted he was asking the question because it seemed like these systems were put in with the expectation that they would be upgraded to a full fledged unit. There was discussion on this. Chair Gooze said he was trying to see what the approvals for the septic systems were based on - with the intention that they would be upgraded, or something else. He said he would like more information on this. He also said he thought a site walk was appropriate, and said he would also like to see information on the easements.

Mr. de Campi said he would like to see information on ZBA action concerning two properties in the subdivision. There was discussion on this.

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. Bogle proposed a site walk, and it was agreed that the site walk would be held on Monday, July 11th at 5:30 pm.

There was discussion about whether to discuss that evening the previous applications for some other properties in the subdivision. Mr. Bogle provided some details on the Chase and Jackson applications.

Chair Gooze said he would like to know if the footprint had changed for these properties, and asked Mr. Johnson if he could provide

information on this.

Mr. Johnson said Board members would have time to review the files on these properties before the next meeting. He then spoke in some detail about both the Chase and the Jackson applications.

***Linn Bogle MOVED to continue the application to the July 12<sup>th</sup> meeting. John de Campi SECONDED the motion, and it PASSED unanimously 5-0.***

### **Adjournment**

***Henry Smith MOVED to adjourn the meeting. The motion was SECONDED by John de Campi, and PASSED unanimously 5-0.***

**Adjournment at 8:00 pm**