

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

**ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, JULY 12, 2005
TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL**

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

MEMBERS ABSENT: None

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

I. Approval of Agenda

Chair Gooze noted that Item II D had been postponed until the August 9th meeting. He also said Item A had been withdrawn by the applicant.

Mr. Smith asked that Items II F and G be reversed, so that the variance request could be heard first. Board members agreed with this.

John de Campi MOVED to approve the Agenda as amended. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings

- A. 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.

This application was withdrawn at the request of the applicant.

- B. CONTINUED 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.

It was noted that all members of the Board had been present for a site walk of the property the previous day at 5:30 pm.

Mr. Kleinmann spoke before the Board. He said that at the previous ZBA meeting, he had said there were similarities between the variances he was asking for and what had recently been allowed on other properties in the subdivision his property was part of. He

said that he as well as Board members had reviewed Town files concerning this.

He said the project that had the most similarities to what he was asking for was Lot 5, the Jackson property. He said in that case, the owners were allowed to construct a house with a first floor living area of 1630 s.f., the same square footage he was asking for. He provided additional details on the dimensions of the Jackson property as compared to his. He said the house on this property was 35 ft. from the water, while his house would be 58 ft. from the water. He said the Jackson house was 3 ft. from the side property line, while his property would be 26 ft. and 28 ft.

Mr. Kleinmann said the project at Lot 5 encroached further into one of the side boundaries during construction, but said his house would not encroach further toward the side or the water. He said he believed his situation was unique, as his property was part of a 5-lot subdivision with about 15 acres of common land sitting between the five lots and Durham Point Road. He said the 5 homes could not be seen from any road, in any season, and said the common land contained 5 septic leachfield easements, 3 of which were presently in use. He said 2 of the 5 lots had recently completed major construction projects, and were the bookends of the subdivision.

He said he believed what he was asking for was consistent with what was recently allowed by the ZBA to Lot 5. He said his total footprint would be smaller than this project, and further from the water and side boundaries. He said the first phase of his project had been the complete redesign and relocation of the septic system to conform with the most recent code requirements, and noted it was put back about 800 ft. from the water. He said all the abutters supported his plan.

Mr. Gooze asked when the subdivision for the properties in the area had been done.

Mr. Kleinmann said it was done in the early 1950's. He said he had a handout of all the information on the properties, and where he had obtained this information.

Mr. Gooze agreed the Town should have a copy of this for the file.

Mr. Smith noted there were 15 acres of undeveloped land, and asked if this land was protected from development.

Mr. Kleinmann said it was not protected, but said a good portion of it was covered with leachfield easements.

Mr. Gooze asked if any members of the public wished to speak in favor of the request for variance.

Robert Herriott, 267 Durham Point Road, (Lot 3), said he supported the Kleinmanns' plans wholeheartedly, and said what was proposed for the property was very restrained. He said there would be minimal impact on him as an abutter, and probably minimal impact on other abutters. He said he also supported the request as 1/5 owner of the common land in the subdivision.

Mr. Gooze asked if there was anyone else who wished to speak for, or against the

application. Hearing no response, he closed the public hearing.

Mr. de Campi said in his research of Town files, he had found there was a substantial difference between the Jackson property and the Kleinmann property. He said the Jackson lot was very narrow, with water frontage on two sides, making it difficult to do anything and observe the setbacks. He said the owners couldn't have moved the building back substantially and built where they wished. He said the Chase property was set farther back, about 100 ft. from the high water line.

Mr. de Campi said the Kleinmann property on the other hand, while narrow, had a great deal of depth (100 ft. by approximately 300 ft.) He said from the site walk, he had come to believe that this situation was similar to the Paine property the Board had reviewed a few years ago, where it had determined that the owner could build, but the house needed to be further back from the water.

He said he believed the present applicants needed some relief, and said he didn't have a big problem with the variance request for the side setback. But he said he did have a big problem with the water setback, especially because the owners planned to take down the existing house entirely and build a larger structure. He said he thought the building should be moved 100-125 ft. back, and said the house might have to move closer to Mr. Harriot's lot line to save the trees on the south side behind the present house. He said removal of the trees was probably not terribly serious, and said it was more important to move the house back. He said he believed granting the variance concerning the shoreland setback would be against the spirit and intent of the Ordinance.

Mr. Smith said the proposed distance from the water would not change as a result of this project, and said he also had questioned why the house couldn't be built further back. He noted 125 ft. was what the Ordinance required. He said he was not a big fan of comparing properties, and liked to look at them individually as much as possible. He said the Board was being asked to approve a plan with a very inadequate lot size, inadequate shore frontage, a tripling of the size of the footprint, and with the same shoreland setback. He said in this context, he echoed what Mr. deCampi had said, that the building should be placed further back, and said 100 ft. would be a fair distance.

Mr. Sievert said that on the site visit he had seen that the majority of the lot in the back was wooded. He said he didn't have a real issue with the request for variance, noting the lots were created in 1952, when the current ordinance was not in front of them. He said he didn't know that the logic that he had heard from other Board members really applied. He said if the applicants could expand the building without going closer to the water, the building was an acceptable distance, and met the regulations as best as they could based on the minimal lot size of the 1950's, the Board should look at this situation in terms of how to protect the shoreland.

He said there wasn't a lot of slope to the property, so conditions could be put on the approval that would easily protect the shoreland from erosion problems. Mr. Sievert said one thing he did have a question about was how much land was going to be cleared, and noted that if the house was pushed further back, a lot more trees would have to be cleared. He said he was inclined to say the application did meet the variance criteria, and said perhaps some conditions could be included to ensure the protection of the

shoreland, in order to meet the spirit and intent of the ordinance.

Mr. McNitt said the properties in question were developed as camps, which explained the small lots and building footprints. He noted that waterfront real estate was so expensive that people couldn't afford to keep their properties as camps anymore. He described some applications similar to the Kleinmann application, one where the applicant was required to take a building down and build it as far back as possible, and another where the property was moved as far back as possible without putting it into another wetland.

He said he shared Mr. deCampi's opinion that moving the house back was the most reasonable action, and noted that the entire existing building was going to be taken down anyway. He said the question was how big a footprint there should be, and how far back it should be moved. He said that expanding the building at the present site was an option that could be used if there was no other alternative, but he said there was a very good alternative – to set it slightly back. He said this wouldn't hurt the utility of the house or the view, and would result in a marked difference in meeting intent of the shoreland protection ordinance.

Mr. Bogle said with the Jackson property, there was no depth away from the shoreland, and a long shoreline frontage, and said he did not believe the property could have been set back 100 ft. from the water on that lot. He said the Chase property was 125 ft. from the high tide line, so that the house was set back that distance. He said the lot the Kleinmanns owned was 300 ft. deep, so there was considerable depth that could be utilized. He also said the house could be situated so that it didn't infringe on the side yard setbacks, because the lot was 100 ft. wide.

Mr. Bogle also noted that with the proposed footprint, a number of trees would have to be removed in order to fit in the breezeway and the two car garage, and said he remembered that with the Chase application, those same trees were part of the buffer zone the Chases had cited in asking for their sideyard setback. He said this was a significant fact.

He said that especially in light of what had been done concerning the Paine property and another property, he thought the Board could reasonably ask that the applicants observe a 125 ft. shoreland setback. He said with a property of 300 ft. in depth, it was not an imposition or a hardship. He said to put the house where the footprint of the current camp now was, with a tripling to a quadrupling of that footprint, would be contrary to the spirit and intent of the Ordinance.

Mr. Gooze asked whether the placement of the well, located right behind the house, was a consideration.

Mr. Bogle said if the 125 ft. shoreland setback were observed, the well would actually be in front of the house.

Ms. Eng agreed the new house should be placed 125 ft. back from the shoreland, especially if a cellar was to be dug for the house. She said she would not be in favor of leaving the house where the current footprint was with a dug cellar, and said this would

be contrary to the spirit and intent of the Ordinance, and the public interest.

Mr. Gooze said he agreed for the most part with Mr. Smith, Mr. deCampi, Mr. Bogle, Mr. McNitt and Ms. Eng. But he noted that Mr. Sievert had said these lots were created as small lots, and also noted the tax issue, making it hard to keep the properties as just camps. He said he had been thinking that in a way that seemed to be a hardship.

He read through information on area variances and hardship, concerning special conditions of the property. He said it had been well stated that this house could be moved further back, so it didn't meet this hardship criterion, as other properties in the area might have. He also said he believed that the proposed size of the property didn't meet the spirit and intent of the ordinance if it stayed where it was. He said for those two reasons, he felt the variance request didn't meet the variance criteria.

There was discussion among Board members as to the specific number that should be required for the shoreland setback.

Mr. McNitt suggested that the applicant work with Mr. Johnson on a number in the 100-125 ft range, if possible.

Mr. deCampi outlined the Board's options, but said he thought it should deny the request for variances, and invite the applicant to see if he could find something he could live with and still meet the Board's concerns.

Chair Gooze agreed this was the proper way to proceed.

Mr. Smith said the number suggested by Mr. McNitt - 100-125 ft., was a sound suggestion.

Mr. Gooze noted that the actual distance would depend on a number of factors.

Mr. McNitt said this shouldn't be a hard and fast number because the Board didn't have all the facts needed to determine this.

Mr. Bogle said Mr. de Campi's suggestion was right, and said the applicant could take it from there.

John de Campi MOVED to deny the 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, because it was not in the public interest, did not meet the spirit and intent of the Zoning Ordinance, and did not meet the hardship criteria.

Mr. Smith said granting this would be contrary to the public interest because of what the Board was being asked to approve.

Linn Bogle SECONDED the motion, and it PASSED unanimously 5-0.

C. PUBLIC HEARING on a petition submitted by Mill Pond Center for the Arts,

Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 **regarding the size of a permanent, free-standing sign**. The property involved is shown on Tax Map 6, Lot 9-8, is located at 50 Newmarket Road, and is in the RB, Residence B Zoning District.

Tom Sharfe, Executive Director of the Mill Pond Center, spoke before the Board. He first noted that the Historic District Commission had granted approval relative to the proposed sign. He said the sign size being requested had to do with the existing conditions on the roadway, Newmarket Road. He explained that there were two curves in the road at the location of the proposed sign, coming from either direction, and also said there was an elevation change in this area. He said the existing sign was therefore hard to see as one approached the property, and also noted there were occasional minor accidents that occurred there.

Mr. Sharfe also said there was a sign for the Mill Pond Professional Building in the location, as well as a warning sign for cars at the intersection of Laurel Lane, both of which made it difficult to see the Mill Pond Center's sign. He said what was being requested was a modest increase in the overall size of the sign, to make it more visible, in order to make the Mill Pond Center easier to find, and to allow more time for breaking and signaling, and turning into the driveway. He also said the sign should be offset slightly from the road to make it easier for people to see traffic coming from the north as they left the property.

Mr. Smith asked what the age of the current sign was, and Mr. Sharfe said it was more than 10 years old.

Mr. de Campi asked if the temporary sign was still in place on the property, and Mr. Sharfe said it was gone. Mr. de Campi asked Mr. Sharfe if there were plans to hang anything from the sign to announce upcoming events, for example. Mr. Sharfe informed Mr. de Campi that he was correct. Mr. de Campi asked if the Mill Pond Center felt the need to advertise individual events, and Mr. Sharfe said the Mill Pond Center would be advertising through other media.

Mr. Johnson noted the sandwich board sign was gone, but said a day camp sign had appeared on the property.

Mr. Sharfe said this was an Audubon Society sign, and said he would speak to them about this.

There was discussion about the current size of the sign, and there was detailed discussion about the dimensions of the proposed sign.

Mr. Gooze asked if there was anyone who wished to speak for or against the request for variance. *There being none, Chair Gooze closed the public hearing.*

Mr. McNitt said he agreed the sign was needed to identify the location. He also said brush clearing 5-6 ft. back would help enormously in increasing visibility along this section of road, and said this would actually be better than forcing a bigger sign, and would help avoid some accidents.

He said the variance request was reasonable considering the need, and noted that the HDC had approved the sign. He said the nature of the business and the location justified special consideration on the size of the sign. He said he had no problem with the request, but said he thought the brush clearing was the more important action to be taken.

Mr. Bogle asked whether the width of the sign could be decreased somewhat, and said he thought the current sign would appear quite large there. He said looking at the numbers, the sign would still come to about 8 ft., 3 inches, and asked if the sign could be scaled down a bit, if not to the 2 x 3 ft. that was currently allowed.

Ms. Eng said she agreed the proposed sign was too big, and said she would like to see it scaled down. She said it was almost three times the allowed size, and said the height was 2 ft. over what was allowed. But said she wanted to make sure it was visible from the road, noting the slope of the land had to be taken into consideration.

Mr. de Campi said he recognized the need for a sign for the Mill Pond Center, but said he was inclined to think this sign was too big, in a zone that allowed a 6 s.f. sign. He suggested that if the picture of the barn was taken off, the lettering could remain the same size it currently was. He said he didn't think the current sign was big enough, but said the proposed sign was a bit much.

Mr. Smith said the proposed sign would triple the existing sign, and said going from a height of 5 ft. to 7 ft. was a substantial increase. He said there would be other means to promote the Center. He agreed that clearing brush away was a good idea, and said a bright new sign, scaled down in size- even to what was allowed in the Ordinance, would be appropriate.

Mr. Sievert said he didn't see that the sign was oversized. He said a 6 s.f. sign at that location, with the speed and curved road, was extremely small, and noted that it was easy to miss. He said it looked like moving the sign to the north, it dropped about two feet anyway, so it might appear the sign would be about the same height. He agreed the brush could be cut to make the sign more visible. He said the height presently being asked for would be adequate, about 7 ft. based on the top of the post. He said he didn't see how the request didn't meet the variance criteria. He said the Center had to advertise, and people had to be able to find it. He said it certainly was a well done sign, and said it would be a shame not to allow it.

Mr. Gooze said he agreed with what others had said. He said the sign needed to be more visible than it currently was, but said he had a problem with it meeting the hardship criteria, in that there were other ways to design the sign, - for example, that the size be cut down somewhat from what was requested. He said the sign needed to be bigger than it presently was, but said what was proposed was too large. He said he felt the height was all right because of the slope of the location, but said he would like to see a 10 or 12 s.f. sign.

He said a 3 x 4 ft. sign would make him more comfortable about meeting the spirit and intent of the Ordinance, and meeting the hardship criteria. He said this still gave the applicants a quite visible sign without going overboard. He said that given the special

conditions of where the sign would be, and that it was a unique property in that area, he would be comfortable with these numbers. He asked if other Board members had another number to recommend.

Mr. McNitt asked if they were talking about the size of the sign on one side only, noting the sign would be visible in two directions. There was discussion about this, and it was agreed they were talking about what could be seen from one side.

Mr. Smith asked Chair Gooze what he thought was acceptable for the total height of the sign, to the top of the posts, and Chair Gooze said the proposal of 7 ft. was acceptable.

Mr. de Campi said 12 s.f., excluding the posts, and a total of 7 ft. to the top of the posts was entirely reasonable, and was twice what the Ordinance allowed.

John de Campi MOVED to grant the Application for VARIANCE from Article II, Section 175-7 regarding the size of a permanent, free-standing sign, to be limited to a 12 s. f. (3 ft. by 4 ft. sign), not counting the area of the posts, and a maximum height of 7 ft. for the posts, above grade.

Mr. Johnson asked the Board to possibly amend this to address a few things. He explained that the applicant had spoken about relocating their driveway at their last hearing, and the question had come up as to whether the sign would be in the way of this. He said another issue was that the previous application spoke about lighting the sign, but this was not mentioned in the present application. He suggested this should be on the table so the applicant didn't have to come back for these things.

Mr. Gooze said the Board could say the sign would be no closer to the road than the existing sign, which would allow the applicants to move the sign further back if they wanted to.

Mr. de Campi said lighting hadn't been asked for in this application, and said he was not inclined to volunteer it. There was discussion about this, and whether something on lighting could be added to the conditions for the variance request. Mr. deCampi said he was uncomfortable with adding anything to an application that hadn't been included in it.

Mr. Smith said he agreed with this.

Mr. Bogle agreed as well, noting he had previously objected to adding things that hadn't been requested in applications. He said the lighting was appropriate to have, but said it should not be added.

The motion was restated as follows:

John de Campi MOVED to grant the Application for VARIANCE from Article II, Section 175-7 regarding the size of a permanent, free-standing sign, to be limited to a 12 s. f. (3 ft. by 4 ft. sign), not counting the area of the posts, and a maximum height of 7 ft. for the posts, above grade, and no closer to the road than the existing sign. The motion was SECONDED by Linn Bogle, and PASSED 5-0.

- D. PUBLIC HEARING** on a petition submitted by Classic Signs Inc., Amherst, New Hampshire, on behalf of Mark & Earle Henderson, Madbury, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XXIII, Section 175-133(E) regarding **the size of a projecting sign**. The property involved is shown on Tax Map 4, Lot 1-0, is located at 1 Madbury Road, and is in the CBD, Central Business Zoning District.

This item was postponed until August 9, 2005 at the request of the applicant.

- E. PUBLIC HEARING** on a petition submitted by Woodburn & Company, Newmarket, New Hampshire, on behalf of Richard Horan Jr., Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Sections 175-73, 175-74, and 175-75(A,B,D&H) of the current Zoning Ordinance and Article XIV, Section 175-75(A&B) of the proposed Zoning Ordinance regarding the building of a shed within the sideyard setback and the landscaping of property within the shoreland setback. The property involved is shown on Tax Map 11, Lot 31-9, is located at 14 Riverview Road, and is in the RC, Residence C Zoning District.

Roberta (Robbi) Woodburn spoke before the Board. She said the applicant had bought the property the previous fall with the intention of renovating the house and surrounding yard area. She said these plans included a small addition to the side of the garage for storage. She said the land on the property hadn't had much maintenance in previous years, and said the lawn in particular needed renovation. She said the property was heavily wooded, and said tree removal was a part of the current plan for the site.

Ms. Woodburn said the lot was 37,000 s.f., which was small for the RC zone. She said there were 50 ft setbacks on the sides and front of the house, noting the front of the property faced the road. She said the 125 ft shoreland setback ran all the way to the front of the house, and also noted a 75 ft. setback where there could be no land disturbance within 75 ft. of the high tide line. She said this was listed under Agriculture in the Ordinance.

She said she was familiar with both the old and revised Zoning Ordinance, and had questioned whether the applicant would be able to do what he wanted to do with the property, given this new 75 ft. setback provision. She said she had met with Code Administrator Johnson and Town Planner Jim Campbell on the intent of this, and had said to them that what could be done with a lot of the landscaping was not clear, based on this provision. She said she had asked if the applicant needed a variance in order to do lawn renovations and removal and replacement of plant material, and was told yes. She said she had had subsequent conversations on the intent of this wording.

Ms. Woodburn explained that the Ordinance also said planting of native plants could be done within the 125 ft. setback, and said this was proposed for some areas. But she said some of the plantings on the water side of the house within the 125 ft. setback were not native, so the applicant was asking for relief from this.

She described the site plan and landscape plan in detail. She noted the applicant wanted to screen in a patio, which was not a variance issue. She also said there was an existing small stone wall running along the back of the house that they would like to replace, which was permitted, and said they would like to place it 3-4 ft. closer to the water than

it presently was.

She also said they would like to raise the grade of a rundown lawn area beyond the two sliding doors off the basement, and provided some details on the landscaping proposed for the area. She said when this was completed, the height of the retaining wall would rise by about a foot.

Ms. Woodburn said the applicant would like to remove 11 living trees greater than 6 inches in diameter, noting the property was very wooded and dark, and several trees were too close to the house. She said this had been discussed during a site walk with the Conservation Commission. She provided details on why particular trees needed to be taken out, noting especially that the applicant enjoyed a river view property, and would therefore like, to the extent possible without compromising the canopy, to thin some of the trees out.

She said that the Ordinance stated that where there was existing lawn on a shoreland property, the Town would like there to be 25 ft. of naturally vegetated buffer adjacent to high tide line. She said in this case, this would result in a great impact on a very shallow lot, and said they were instead suggesting that a planting be done of low bush blueberry and rhodora, both of which were native plants. She said they would like this natural buffer to be 17-18 ft instead of the 25 ft. required by the Ordinance, because the additional 7-8 ft. would take away from the lawn.

She said access to the water would be by an existing wooded path along the eastern half of the property that led to a proposed dock. She provided additional details on plans for the site, and said most of what was planned was typical landscaping that would be done on any house. She noted there would be erosion control measures put in place on the site.

Ms. Woodburn said the improvements that were planned would enhance the value of the property and also surrounding properties. She said because of the small size of the lot, the existing setbacks totally impacted the applicant's ability to enjoy his property. She said she didn't believe the Ordinance had the intent of not wanting homeowners to do the landscaping around their homes, but she said because of the specific nature of this site, those setbacks played greater havoc with the homeowner's plans than normally would be the case.

Chair Gooze said he had to leave the meeting for a few minutes to take a call, and asked Mr. McNitt to serve as Chair in his absence.

Mr. Bogle noted the proposed shed would be within the side yard setback, and asked what was on the other side of the property line.

Ms. Woodburn said there was another property, and said the house was far away, with a leachfield in between. She said the abutter had not expressed any objection to exceeding the side yard setback.

Mr. Bogle asked how much further forward the retaining wall would be moved.

Ms. Woodburn said it would be moved 3-4 ft, and provided details on this. She said it would be about 63 ft. from the high tide line when completed.

Mr. Bogle noted that the landscape plan said that both the low bush blueberries and rhodora buffer area, and an area for future ferns would be mowed yearly, in the fall.

Ms. Woodburn said this referred to the blueberries, not the ferns. She said they would like to have the option to do this, so the plants could flush back

Mr. Bogle asked if that might be contrary to the idea of wanting to keep the 25 ft. buffer as undisturbed native vegetation.

Ms. Woodburn said the applicant would be agreeable if the Board made it a condition that this would not occur.

Mr. de Campi asked how many trees would remain if the 11 trees were removed.

Ms. Woodburn said less than 10% of the trees would be removed.

Mr. McNitt asked what the plans were for use of pesticides fertilizers, etc, especially behind the stone wall and between the wall and the natural buffer.

Ms. Woodburn said nothing would be done concerning this within 75 ft. She said some natural grasses would be included there.

Mr. McNitt asked what kind of wall would be constructed, and was told it would not be mortared, to allow for drainage.

Mr. Sievert noted he was a neighbor to this property although not a direct abutter, and therefore said he was not sure he should make comments on the application.

Mr. McNitt said he and Mr. Bogle had looked at the trees in detail, and said his feeling was that those trees could be removed with no problem.

Mr. Bogle said he too was comfortable about what was proposed concerning the tree removal.

Mr. Gooze returned to the meeting, and assigned Myleta Eng to vote in his place since he had been absent for the previous discussion on this application.

Mr. Smith asked Ms. Woodburn to describe the small seating area.

Ms. Woodburn said once the trees were removed and the pruning was done, this area would be a perfect place for a crushed stone circle with a stone edge around it, and a couple of chairs. She said this was part of the master plan for the site, and was work to be done over time.

Mr. McNitt asked if there were any members of the public who wished to speak for or against the application. Hearing no response, he closed the hearing.

Mr. Smith said he had seen the property with Ms. Woodburn, and said one thing that

bothered him was the idea of removal of trees, especially healthy oak trees. He noted a few of the oak trees he would like not to be removed.

Mr. Gooze asked for details on the shed and the setback issue, and Ms. Woodburn provided an elevation of the shed for Board members to look at. There was discussion on this.

Mr. Smith said it would be a good idea if there were no mowing of the buffer area, and said this part of the Ordinance should be upheld.

Mr. Bogle said he and Mr. McNitt had looked at the trees on the property, and had no problem with the trees that were proposed for removal. He said a major concern he had was the proposed decrease in the waterfront buffer zone to 17-18 ft.

Ms Woodburn said what existed there at present was grass, and said they wanted to put the natural plants in there, but thought that doing this for 25 ft. was a lot, considering the size of the lot.

Mr. Bogle said this would mean a one third reduction in the size of the natural buffer. He said he agreed with Mr. Smith that he would prefer to see that buffer zone not mowed annually, although noting this was not a provision of the Ordinance. He said he otherwise was comfortable with what was proposed.

Ms. Eng asked if the garage addition could be put on the back of the house rather than on the side, which would eliminate the side yard violation. She said she didn't have a problem with the trees being removed, and agreed there should not be any mowing of the natural area. She said she had a concern about the planting within the 75 ft. setback from the high water line, along the retaining wall area. She said there was supposed to be no tilling of the soil in the area, and said her concern was fertilizers, etc. leaching into the Oyster River and potentially the estuary.

Ms. Woodburn said there would be disturbance of the soil in doing the retaining wall. She said the combination of shrubs below the wall would not need much in the way of fertilization, and should be able to self-maintain.

Mr. Sievert said he walked by the site frequently. He said it was a wooded, small lot, and said he was having a hard time with the idea that the applicant shouldn't be able to plant within the 75 ft. buffer on a small lot like this. He said it seemed absurd that the Board wouldn't want to see more vegetation put on the lot. He said this was a new regulation, and said he didn't think it was intended to be a detriment to people increasing the amount of planting in their yard, noting that the proposed landscape plan meant the overall vegetative buffer would be increasing. He said he was having a hard time figuring out why the Board was even worrying about a landscaping plan, and putting more vegetation between the house and the water, especially on an existing lot.

It was noted that the provision in question was 175 – 73 C and D. There was discussion about what no tilling meant.

Mr. McNitt said he believed the concern was what was used when the planting occurred,

in terms of pesticides and herbicides.

Mr. Sievert said he could understand this.

Ms. Woodburn noted she had spoken with Town staff on what the Ordinance said concerning this, and they had said the applicant should go for a variance.

Mr. Sievert said he didn't think a variance was needed for planting.

Mr. deCampi said he had listened to people from the State speak about shoreland protection, - what the goal was and how it should be accomplished. He said a key goal was to stop runoff to the greatest extent possible, and said the landscaping plan accomplished this. He said his concern was the patio, and said he would rather see this as stone set in sand, and not in concrete, because the concrete was an impervious surface.

Ms. Woodburn provided clarification on this.

Mr. deCampi said he didn't have a problem with any of the landscape plans, other than that they were not according to the Ordinance, and said he was not quite sure what the thinking behind the Ordinance was. He said he had no problem with the garage, or taking some trees down. He noted he had not seen the site, but said this plan seemed to reflect the goals set by the State concerning landscaping for shoreland protection.

Mr. Smith noted the stumps would remain on the site, which would be better than uprooting them.

Mr. Gooze said he agreed that a bed of flowers didn't seem to be the same thing as tilling the soil. He said the Ordinance was, however, specific about no herbicides and pesticides.

Mr. McNitt said if the plantings were ones that took a lot of chemicals, such as a lawn, there would be a basis for objection.

Henry Smith MOVED to grant the APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article XIV, Sections 175-73, 175-74, and 175-75(A,B,D&H) of the current Zoning Ordinance and Article XIV, Section 175-75(A&B) of the proposed Zoning Ordinance regarding the building of a shed within the sideyard setback and the landscaping of property within the shoreland setback, with the condition that there would be no mowing of low bush blueberries and rhodora in the proposed buffer zone.

Mr. Bogle said he would prefer that the 25 ft. buffer be maintained, noting other Board members might feel differently.

Mr. McNitt said there was a very short distance there, and if a buffer of 25 ft. were required, there wouldn't be much space between the retaining wall and the natural vegetation.

Mr. Bogle said the vegetation would be low, so this wouldn't affect the sight line from

the patio. He said he would prefer to see the full 25 ft. but said it was fine if others disagreed with this.

Mr. de Campi asked what the impact of this would be on the landscape plan.

Ms. Woodburn demonstrated this, said it would decrease the lawn area to 30 ft.

Mr. McNitt noted Ms. Woodburn had called the grassy area a lawn while the sketch called it grass, and said there was an enormous difference between the two.

Ms. Woodburn said it would be grass. She said it was a very shaded area that would not be fertilized.

Mr. Smith agreed that requiring the 25 ft. buffer was a good idea. The motion was restated as follows.

Henry Smith MOVED to grant the APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article XIV, Sections 175-73, 175-74, and 175-75(A,B,D&H) of the current Zoning Ordinance and Article XIV, Section 175-75(A&B) of the proposed Zoning Ordinance regarding the building of a shed within the sideyard setback and the landscaping of property within the shoreland setback, with the condition that there would be no mowing of low bush blueberries and rhodora in the proposed buffer zone, and that this buffer zone extend 25 ft. back from the mean high water line. Linn Bogle SECONDED the motion.

Mr. de Campi said approving this request for variance would not be contrary to the public interest, and would not depreciate property values.

Mr. Smith said the application met all of the variance criteria.

Mr. McNitt said he agreed with the conditions that had been added.

The motion PASSED 4-1, with Ms. Eng voting against it.

Mr. McNitt said he thought Ms. Woodburn and the applicant had done an excellent job on the proposal in terms of the landscape design, and the interpretation of the Zoning Ordinance.

- F. PUBLIC HEARING** on a petition submitted by Karyn A. Krause, Durham, New Hampshire for an **APPLICATION FOR SPECIAL EXCEPTION** from Article XIV, Section 175-72(A) regarding the replacement of a currently existing septic system within the shoreland setback. The property involved is shown on Tax Map 6, Lot 3-1, is located at 70 Mill Road, and is in the RA, Residence A Zoning District.

(The request was withdrawn by the applicant because Item II G PASSED).

- G. PUBLIC HEARING** on a petition submitted by Karyn A. Krause, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XIV, Section 175-75(E) regarding the replacement of a currently existing septic system within the shoreland setback. The property involved is shown on Tax Map 6, Lot 3-1, is located at 70 Mill Road, and is in the RA, Residence A Zoning District.

Sandy Breton of NH Soil Consultants spoke before the Board on behalf of the applicant. She explained that the residence abutted the Oyster River, contained 0.68 acres, and she described surrounding properties. She noted a letter from one of the abutters urging the Board to approve the variance request.

She said the current septic system, a 750-gallon septic tank, was approx 35-40 ft. from the high water mark of the river. She said it was the original system, noting the house was approximately 100 years old. She said the applicant was selling the home, and was putting in a new system that complied with State regulations. She said the variance was needed because the system lay partially within the Town's shoreland protection area.

Ms. Breton said the system that was proposed was a tube system that was a pump system, and would sit 75 ft. back from the river, which complied with State regulations. She said the location for the system was chosen because the back portion of the property had ledge anywhere from 3 inches to 10 inches. She said the area proposed for the system was a flat area off the side of the driveway, and said this would not infringe on any of the abutters' rights. She said the system could not be placed on the east side of the property because the water line came through there, because of the property line setback, and because of ledge issues.

She said the current leach field currently lay at a very low point, and it would be brought up 16 ft., and back from the river. She said the system had been approved by the State, and said the only waiver asked for from the State was concerning a 2:1 slide slope grading. She provided details on this, and said this slope had been there since the lot had been developed.

She said there would be no decrease in value of surrounding properties as a result of the system being upgraded. She said granting the variance request would not be contrary to the public interest because the applicant was making a less than perfect situation better. She said moving the septic system further away from the Oyster River was in keeping with the spirit and intent of the Ordinance, and said denial of the application would result in unnecessary hardship, noting there was no other place to put a septic system. She said there would be substantial justice in granting the variance, in making the existing situation better.

Chair Gooze asked if the Board had any questions concerning the application, and there were none. He then asked if any members of the public wished to speak for or against the application. Hearing no response, he closed the public hearing. He asked if Board members had any problem with this variance request.

Mr. Bogle said he had no problem with the request for variance. He said he couldn't see what else they could do, and said they were upgrading an old system and putting in a modern system.

Mr. McNitt said the variance request met all five variance criteria.

Ted McNitt MOVED to grant the APPLICATION FOR VARIANCE from Article XIV, Section 175-75(E) regarding the replacement of a currently existing septic system within the shoreland setback as per the proposed plan, and that all five variance criteria were met. The motion was SECONDED by Linn Bogle, and PASSED unanimously 5-0.

H. PUBLIC HEARING on a petition submitted by Ted & Shelley Mulligan, SEJ Properties, LLC, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a May 3, 2005, letter from Zoning Administrator, Thomas Johnson, regarding the occupancy of a fraternity. The property involved is shown on Tax Map 4, Lot 16-0, is located at 10 Madbury Road, and is in the RA, Residence A Zoning District.

Shelley Mulligan spoke before the Board, and said the administrative decision concerned housing non-fraternity members at the house. She quoted from Article 175, Section 7 of the Zoning Ordinance, which said that a fraternity /sorority house was defined as “a building used primarily to provide lodging facilities for the members and employees of a fraternity or sorority”.

She said this wording was ambiguous with regard to what the word “primarily” meant, and said this could be interpreted as allowing non-fraternity boarders, provided that the majority (more than 50%) were fraternity boarders. She said that at the time of the violation, the house had 14 fraternity members and 3 borders, and said she believed this was consistent with the Zoning Ordinance, since the house was used primarily for housing fraternity members. She said they therefore felt they were in compliance.

She said she had a handout on previous zoning ordinance definitions going back to 1971, and said the language hadn’t changed substantially over the years. She also said that from conversations with Greek affairs personnel, other property owners, students, etc., it had been fairly common practice to have borders in fraternity houses on a very limited basis. She said the reason was that fraternity membership fluctuated, for academic reasons, etc.

She said to her knowledge, there had never been a formal complaint to town officials concerning this issue. She said this was indirect information but did support perhaps that the Ordinance had always been interpreted that “primarily” meant primarily, and not 100%.

Chair Gooze asked if Board members had any questions, and there were none. He then asked if any members of the public wished to speak for or against the application. Hearing no response, he closed the public hearing

Mr. de Campi said this could be read in either of two ways, with the word primarily referring either to the use of the building, or the residents of the building. He said it wasn’t clear what primarily modified. He said the issue the Board was faced with was how it should choose to interpret this sentence. He asked Mr. Johnson how he saw this, since it was his opinion that was being challenged.

Mr. Johnson noted there had been two previous cases like this. He said there were a lot of multi-unit buildings in town, and said as far as he was aware, they were strictly apartment buildings. He said on the other hand, a fraternity/sorority house by nature had a lot of unique uses in it besides lodging, such as large kitchens for meals, social halls (sometimes used as nightclubs), large meeting rooms for chapter events, etc. He said his interpretation of the word primarily was therefore that it referred to primarily for lodging, and a house could have these accessory type uses as well, which were not found

in a multi-unit house.

He said he agreed that this definition should be cleaned up, and said he was waiting for an applicant to come in for a variance request so some kind of relief might be granted for a situation where there were borders in a fraternity/sorority house. He said people had been appealing his administrative decisions instead of going for variances, and said the precedent had been set by the Board in regard to two of these other administrative decisions, neither of which had gone on to Superior Court.

Chair Gooze said he would like to see the administrative decision upheld, and then the applicant could make a decision concerning going for a variance. He said the Board should try to remain consistent in its ruling on this.

Mr. de Campi said he agreed, noting that if primarily meant that 49% of lodgers could be non-fraternity members, this wasn't a fraternity house. He said he would be inclined not to overturn the administrative decision, because otherwise the 49% was a possibility if it was read that way. He said he didn't think that was the spirit of the Ordinance, although it was difficult to know.

Mr. McNitt said most of the fraternities allowed non-fraternity boarders in the summer, so probably had higher percentage of this at that time of year. There was discussion about this.

Ms. Eng thanked Mr. Johnson for putting together the history on the Ordinance concerning fraternities. She said the current Ordinance could be cleaned up so there was no question about what primarily meant, but said the history indicated there was no question that the fraternity house was to be used specifically for members of the fraternity.

Mr. Bogle said the ZBA's charge was to take the strictest interpretation of the Ordinance. He agreed the wording probably needed to be cleared up, but said until then, he would adhere to a strict interpretation of that wording.

Mr. Smith said he agreed with treating this situation with the strictest interpretation possible. He said he was in favor of upholding the administrative decision.

Mr. Sievert said he agreed, looking at the history over many years.

Mr. Gooze said he agreed with what others had said, and said Ms. Eng had made a very good point, in looking back at the history of this issue.

Ted McNitt MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION from a May 3, 2005, letter from Zoning Administrator, Thomas Johnson, regarding the occupancy of a fraternity. The motion was SECONDED by Linn Bogle, and PASSED unanimously 5-0.

III. Approval of Minutes

May 10, 2005

Page 1, should say Tom Johnson, Code Administrator, under OTHERS PRESENT

Page 2, 3rd paragraph, should read “..20 ft. and lower than.....reduced from 6 ft. to 5.1 ft.” Bottom of page, should read “..with signs larger than the proposed...”

Page 5, under B, should say Stephen Weglarz, Jr...” Also, 2nd paragraph from bottom, should say “Weglarzs”

Page 8, 4th paragraph from bottom, should read “..8 ft. closer than that which was permitted...”

Page 9, 4th paragraph, “Mr. Bogle said...” should start a new paragraph

Page 11, last paragraph, should read “..due to the hardship that no one...”

Page 13, 2nd paragraph from bottom, should read “..didn’t think the Board would be nearly as generous...”

Page 14, under E., should say “Will be heard at June ZBA meeting at the request of the applicant)

Page 15, 3rd paragraph, should read “There was detailed discussion on the letter from the Puffers, concerning the size of the requested lot to be subdivided.” Same page, motion should say “...that there was a shadow of doubt ...”

Ted McNitt MOVED to approve the May 10, 2005 Minutes as amended. The motion was SECONDED by Henry Smith and PASSED unanimously.

June 14, 2005

Page 2, 1st full paragraph, should read “..the property in question a buildable lot.” Same paragraph, should say “..would not be as valuable to her and her husband..” 2nd full paragraph, Page 2, should say “..on the Puffers’ property.”

Page 3, 2nd paragraph, should say “..through the sale to the Nature Conservancy. Same paragraph, should say “..and provided details on this.” 3rd paragraph should say Bill Drapeau, 4 Sullivan Falls Road,..” 2nd paragraph from bottom of page 3 should say “Being told there were other abutters...”

Page 4, bottom paragraph, should read “..had previously granted variances..”

Page 5, 2nd paragraph, should read “..could be attached that were legally binding.”

Page 6, 3rd paragraph, should read “..was buildable...”. Bottom paragraph should read “..end up in the motion, but it clearly was critical to...”

Page 7, 2nd paragraph in Item C, should read F.X. Bruton...” 3rd paragraph in C should say “..3 unrelated persons requirements.”

Page 8, 1st full paragraph, should read “..this was a use variance, and said it...” Next paragraph should read “..prior to the Simplex case, it was believed...” 3rd paragraph from bottom, should read “..no negative effect on...”

Page 9, 5th paragraph, should read “..and not possibly complicate...”

Page 10, remove 3rd paragraph (duplicative) In the new 3rd paragraph, should read “..this was a very unusual 3-unrelated person issue. Same paragraph, should read “..Ms. Barnhorst had proceeded with the addition in good faith..” 2nd paragraph from bottom, should read “nothing different than what had been presented. Also should say, “..if one looked strictly at the application.”

Page 11, paragraph at top should read “..would limit it to 3-unrelated people. 2nd full paragraph should read “Mr. McNitt asked...” The Motion on the page should read “***...of the Zoning Ordinance and that it would be permitted to have....***”

Page 12, top of page, should say “Postponed at applicant’s request” 2nd paragraph under E should say “..while their odd shaped lot...”. Same paragraph, should read “..difficult to put the barn any other place on the property.” 3rd paragraph under E should say “..in question, and from whom they had bought the house.” 4th paragraph from bottom should read “In answer to a question from” 3rd paragraph from bottom, should read “..about 28 ft.”

Page 13, 2nd full paragraph, should read “...noted he was not an abutter.....and nonconforming in every respect.” Same paragraph, should say “..the Walkers...” Next paragraph, should say “..the Horrigans subdivided their property...” 3rd paragraph from bottom should say “..Tanguay, 6 Bennett Road..” Bottom paragraph should read “..in property values, it would not be against...”

Page 14, 2nd full paragraph, should read “Mr. Smith noted that some neighbors of his had renovated a wonderful barn several years ago, and had created something very unattractive.” 4th paragraph from bottom should read “Chair Gooze said he also....”

Page 15, 1st full paragraph, should read “..provided details on this, but he said it was...” 2nd full paragraph should read “..with the applicants’ request.”

Page 16, 3rd paragraph from bottom, should read “..property, it was apparent that there..”

Page 17, top paragraph, should say radii instead of radiuses in two places. 7th paragraph should say “He said his email response was that 175-54, the Dimensional Table, covered all proposed structures.....He said his email response stated that...” 10th paragraph should say “..suggested the applicant could withdraw the application and come back with a variance application...” Last paragraph should read “...agreed with this, and withdrew the application.”

Page 18, top paragraph, should read “..this matter when the applicant...”

Page 19, 6th paragraph, should read “..to see if the applicant complied with...” 9th paragraph should read “..would improve the neighborhood.” 10th paragraph should read “..farmer’s porch was only 1 foot wider...”

Page 20-21 Blanks on page – name to be obtained by Mr. Johnson.

Also page 21, 6th paragraph, remove quotation marks around cottage. 10th paragraph, should say “..was a letter from ...” 13th paragraph, should read “...build that close to the water.”

14th paragraph, should read “..no diagram showing the shed, deck...”

Page 24, remove Motion under Other Business.

Ted McNitt MOVED to approve the June 14th , 2005 Minutes as amended, pending Mr. Johnson supplying the missing name in the Knight application. The motion was SECONDED by John de Campi, and PASSED unanimously 5-0.

IV. Other Business

A. Mr. Gooze said he had not yet talked with Mr. Johnson concerning amending the application so it showed that the next step in the appeals process was a rehearing before the ZBA, and not going to Superior Court. He said he would do this before the next Board meeting.

B. Next Regular Meeting of the Board: August 9, 2005

Ms. Eng said she would not be at the next meeting.

V. Adjournment

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

Adjournment at 10:20 pm

John de Campi, Secretary