

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

**ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, AUGUST 9, 2005
TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL**

MEMBERS PRESENT: Chair Jay Gooze; Henry Smith; Ted McNitt; Michael Sievert; John deCampi (arrived late)

MEMBERS ABSENT: Linn Bogle; Myleta Eng

OTHERS PRESENT: Code Administrator Tom Johnson; Victoria Parmele, Minutes taker

I. Approval of Agenda

Chair Gooze noted there was not a full Board. He said alternate Mike Sievert would be a voting member, and said for the time being there would be a total of 4 voting members, noting at least 3 were needed for a quorum. He said applicants would have a choice as to whether they wanted to proceed with their applications, given the fact that the full compliment of ZBA members would not exist for at least an hour of the meeting, until Mr. deCampi arrived. He also noted there was a lengthy agenda, and that there could be no new business after 10:00 p.m. He said if the meeting were going to be continued, he would let applicants know this as early as possible that evening.

Chair Gooze said there was a request for rehearing from Mr. Kleinmann, dated August 8th 2005, and said the Board needed to decide whether to rehear the application. He then read Mr. Kleinmann's letter out loud.

In the letter, Mr. Kleinmann said he received instructions from the ZBA during the 7/12/05 meeting to work with Tom Johnson to determine how far to move the new home back from the water. He said he attempted to do this, and since the ZBA meeting, had staked out various setbacks from the water, and met with Mr. Johnson on the site to discuss next steps. He said Mr. Johnson believed additional guidance was needed from the ZBA, and suggested a process he could follow as part of this.

Mr. Kleinmann stated in his letter that the existing house on the site was in a clearing, and approximately 90% of the proposed house would be in this clearing according to the current plan. He said moving the house back from its present location would place it in an area that was 100% wooded, and said cutting the trees would remove the entire buffer between the two abutting structures. He said the house would then be located at the shortest possible distance between a 40 ft. long garage on the Herriott property side and a garage (new addition) and

driveway on the Chase property.

Mr. Kleinmann stated that he and the neighbors believed this did not benefit the public interest, and would greatly reduce the privacy that could otherwise be maintained. He said moving the house to an area that was presently 100% wooded did not meet the spirit of the ordinance since this would have the greatest negative environmental impact on the land because many trees would need to be removed. He also described some hardships of the land, including the fact that it sloped upward as one moved toward the back of the property, while noting that the clearing around the house was flat. He said this slope presented challenges that would also contribute to an increased negative environmental impact.

Mr. Kleinmann said that hopefully with a site visit, he and Mr. Johnson could obtain enough guidance from the ZBA to identify the best location for the new house. He said that assuming the ZBA granted the appeal, he would then update his plans, and present them at the next ZBA meeting.

Chair Gooze said the Board could grant a rehearing if it thought it had made a legal error, or there was new evidence to consider.

Mr. McNitt said the Board's discussion at the last meeting on moving the building back came fairly late in the process, and said this might well justify looking at the application again.

Mr. Sievert said he didn't think the Board had made an error concerning the application, but said if there was more information to be presented to show other options, it was worth looking at the application again.

Chair Gooze said he felt one of the reasons the Board gave for not allowing the variance was that there were other areas the building could be placed. He said if the applicant could show the Board those areas, it would be reasonable to have a rehearing on the application.

Mr. Smith said what Mr. Kleinmann had provided to the Board could be considered new evidence, and said he therefore would not be opposed to granting a rehearing.

Ted McNitt MOVED to grant a rehearing to the Kleinmanns for reconsideration of the decision the ZBA made at the July 12th 2005 meeting on their lot located at 269 Durham Point Road. Henry Smith SECONDED the motion and it PASSED unanimously 4-0.

Mr. Johnson noted that Item B had been withdrawn, explaining that the size of the sign had been scaled down so it did not need a variance. He also said the applicant had worked out an approval with the Historic District Commission.

Mr. Gooze said there was a request for a site walk from some of the abutters of the property on Riverview Court (Items H and I). He said the Board could decide on this, and would then continue the case to the next Board meeting.

Mr. McNitt said this was one of the most complex shoreland applications he had

ever seen, and said he thought a site walk would be very justified.

Chair Gooze said he agreed

Mr. Smith said he agreed, noting the issues involved were very important.

Mr. Sievert said he would recuse himself on this application.

Ted McNitt moved to have a site walk on the Hartmann property (Item H and I), and to continue the application until the September ZBA meeting. Henry Smith SECONDED the motion and it PASSED unanimously 3-0.

Chair Gooze said it seemed it would be a good idea to do a site walk for Item G, noting some Board members already knew the Flaherty property, but some didn't.

Michael Sievert MOVED to do a site walk concerning Item, the Gary Flaherty application. Ted McNitt SECONDED the motion, and it PASSED unanimously 4-0.

The Board agreed the site walk would be held on Tuesday, August 23rd, at 4:00 p.m. It was then decided that the Riverview property (Items H and I) would be viewed at 4:00 p.m.; the Kleinmann property would be viewed at 5:00 pm; and the Bay Road property (Item G) would be viewed at 6:00 p.m. Chair Gooze said all of these applications would be on the Sept. 13th Agenda.

Mr. Johnson noted the Board might be able to hear Item G at the present meeting if there was time, and other Board members agreed.

Henry Smith MOVED to adopt the Agenda as amended, with Item B eliminated, and Items H and I continued to the next meeting pending a site walk. Ted McNitt SECONDED the motion, and it PASSED unanimously 4-0.

II. Public Hearings

- A. PUBLIC HEARING** on a petition submitted by Robert E. Herriott, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XIV, Section 175-72(A) and 175-75(A&F) of the current Zoning Ordinance and Section 175-74(B) of the proposed Zoning Ordinance to locate a new septic system within the shoreland setback. The property involved is shown on Tax Map 20, Lot 16-3, is located at 267 Durham Point Rd., and is in the Residence C Zoning District.

The applicant, Robert Herriott, said he would like to get a variance in order to have an approved plan for replacement of a 50-year-old septic system if this replacement was needed in the future. He said the proposed tank would be located 20 ft. further from the shoreland than the existing tank. Mr. Herriott said Jed Shepard, a soil consultant, was present to describe the plan, and also noted an abutter, Mr. Kleinmann, was present.

Mr. Shepard said the variance was being sought for the septic tank, but not for the leachfield. He said the leachfield would be located in an existing easement area,

and would be in excess of 200 ft. from tidal waters. He said the existing system was located in back of the house, and said he had tried to find a reasonable location for a new tank, which would have a pump, but had not wanted to put it in the front yard in case someone wanted to put in an addition in future years. But he said locating it 150 ft. from the shore would mean the tanks would have to be put in a location behind the garage, and said in order to get gravity flow, the top of the tank and pump would have to be 6 ft. below the ground. He said this would be a construction nightmare, and also would make it hard to maintain the tanks and pumps, etc.

Mr. Shepard said he didn't feel that placing the septic tank 108 ft. from the Bay, which would actually be a greater distance from the water than the old leachfield, would pose a problem. He said he didn't see anything to be gained that would be worth the problems that would result, from both a construction and maintenance viewpoint, as a result of meeting the requirement of placing the tank 150 ft. from the shore.

Mr. Gooze asked if the applicant had any problem with the fact that there were only 4 Board members present, and Mr. Herriott said he did not.

Mr. Smith asked for clarification as to how far the leachfield for the new system would be from the high tide mark.

Mr. Shepard said it would be about 225 ft. plus from the high tide mark.

Mr. Sievert asked if the existing garage and toilet, which were currently connected to the existing septic tank, would be tied into the new tank.

Mr. Shepard said ultimately yes.

Chair Gooze asked if it was correct that there was no proposal to do anything to the house itself.

Mr. Herriott said it was correct, noting there was no anticipation of a change. He said he and his wife were fine with the present situation as long as he didn't have to anticipate failure of the septic system. He said his system hadn't yet shown any signs of failure, but noted Mr. Kleinmann's system had failed two years ago, and was built at the same time, and perhaps by the same builder, as his system.

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

Ralph Kleinmann, 269 Durham Point Road, said he was an abutter, and totally supported the new septic system. He said Mr. Shepard had designed his system, which was similar to the one proposed here.

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

Mr. Sievert said he had a procedural question. He asked why the variance was being requested from 175-72(A) when these provisions related to setbacks for

more or less a vacant lot. He noted 175-75 (A) spoke specifically about procedures for existing uses, which the tank was since it was 50 years old. He also noted the provision said the use could continue if it was not further expanded to encroach on the shoreline, which in this case, it wasn't. He also said 175-75 (F) said the existing use must be made to comply as nearly as possible with the Ordinance, and noted Mr. Shepard had just explained why the proposed design was needed, so it appeared the design had been made to comply as nearly as possible with the Ordinance.

Mr. Sievert also asked why the tank couldn't be moved back 15 ft. to meet the 125 ft. setback requirement in the proposed Zoning Ordinance, in which case a variance wouldn't be needed. He noted the tank would only be about 2 ft. below grade, at that distance.

Mr. Smith said the tank would still be within 150 ft., so would still be in violation and would need a variance.

Mr. Sievert said the Title of 175-75 addressed procedures for existing uses, and this use met them, so why go backwards to 175-72(A) on an existing lot. He also noted that if this were a vacant lot, 175-75 wouldn't apply.

Mr. Johnson explained why the various provisions had been included for the application. He said because of the Zoning Rewrite process, there was the current Ordinance, which was the law, and also the posted proposed Ordinance, which was almost law. He noted the current Ordinance said the shoreland setback was 150 ft., while the setback in the proposed Ordinance was 125 ft. He also said the application involved taking an existing camp with a 2 bedroom septic system, and expanding it to a 4 bedroom system, although nothing was being done to the camp itself.

Chair Gooze noted that when there was an existing, as well as a proposed Ordinance to take into consideration, the Board usually went with the stricter ordinance, which in this case was the 150 ft. setback in the existing Ordinance. He also said this was an expansion that was being proposed, because the applicant was going from a 2 bedroom septic system to a 4 bedroom system, so potentially could lead to other things down the line. He said for all these reasons, a variance was needed.

Chair Gooze asked the Board to look at the application in terms of whether it met the variance criteria, and then could have additional discussion on the issue Mr. Sievert had raised.

Mr. McNitt said the proposed system would be an improvement over the existing system, and said without question, it was in the spirit and intent of the Ordinance. He also said an improvement over a 50 year old system was definitely in the public interest. He said the request for variance met the variance criteria, although noting there would not necessarily be a hardship situation unless the current system failed. He said he had no problem whatsoever with granting the variance.

Mr. Smith said the Board had approved a similar measure 2 years ago, with a

neighboring property, and said he thought this proposed system would be an improvement. He also noted Mr. Sievert had raised a good question. He said given the presentation by the applicant's soils specialist, it was clear that although this system would probably be in violation, he was in favor of granting the variance.

Chair Gooze said the Board had been consistent in its decisions on these kinds of applications, where septic systems were moved further away from the shoreland, and were better systems than the ones they replaced. He said another 10 ft. wouldn't make that much difference. He said the application met all of the variance criteria, and said he was in favor of granting the request.

Mr. Sievert said notwithstanding what he had previously said, he thought the application met all the variance criteria.

Chair Gooze said Mr. Sievert had made a good point which probably would come up again at some point in the future.

Mr. McNitt said the most important thing here was where the leachfield was located, not where the tank was located.

Ted McNitt MOVED to approve an APPLICATION FOR VARIANCES from Article XIV, Section 175-72(A) and 175-75(A&F) of the current Zoning Ordinance and Section 175-74(B) of the proposed Zoning Ordinance for the future relocation of a new septic system at 267 Durham Point Road, in accordance with the drawings the Board was shown. Henry Smith SECONDED the motion, and it PASSED unanimously 4-0.

Mr. de Campi arrived at the meeting.

- B. 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 Central Business Zoning District.

(Withdrawn)

- C. PUBLIC HEARING** on a petition submitted by The Hotel New Hampshire, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XXIII, Section 175-133(E) to permit the construction of a projecting sign larger than 20 square feet. The property involved is shown on Tax Map 4, Lot 50-0, is located at 2 Main Street, and is in the Limited Business Zoning District.

Mr. Sievert recused himself from this application.

The applicant, Paul Berton, noted that the Hotel New Hampshire had recently opened, and said the project had come together even better than it looked on paper. He explained that he was requesting that the only sign on the property be 40 s.f. instead of the 20 s.f. which was permitted. He said the sign would be located right near the front entrance, projected out toward Main Street. He noted that he had experimented with having a 32 s.f. sign, but had decided the scale wasn't right.

He said the variance would also allow the hotel to overcome several obstacles in the area, including utility poles and the Cumberland Farms gas pump awning which blocked the view of the hotel site. He provided details on the sizes of other signs in the area the hotel was competing against. He said a 40 ft. sign would allow one sign to give the hotel proper exposure from all three directions. He explained the reason for the bear on the sign, which went with the book, The Hotel New Hampshire. He also noted his sign would not be used to sell beer and gas.

Mr. Smith asked if it was the consensus that 32 ft. was too small, and Mr. Berton provided details on this.

There was discussion about the bear on the sign.

Mr. Smith said he agreed the hotel wasn't competing with establishments selling gas and beer, and said he didn't think the comparison with the signs on these establishments was a good one.

Mr. deCampi asked about the lighting for the sign, and Mr. Berton said it would be lit from above.

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

Pete Chinburg, an abutter across the street, said he wished to speak wholeheartedly in support of the variance request. He said Mr. Berton had done a marvelous job on the building, and said it was a fine addition to the neighborhood and the Town. He said he didn't know the details of the sign, but said he had confidence in Mr. Berton and his people.

Michael Sievert, 28 Riverview Road, (and with MJS Engineering) said he encouraged the Board to approve the variance request. because of how the sign looked. He noted that as one drove up Gasoline Alley, the obstruction to the view was not just the canopy at Cumberland Farms, but also included trees and utility poles. He said the view from the other direction was just as bad, so this sign was needed. He said it was a hardship that the view was blocked, and said the variance request met all the criteria.

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 he thought 40 s.f. would look small in comparison to the red and white signs on the gas station. He said with a building that size, a sign smaller

than 40 s.f. would be lost in the big picture, and also said he had no basis to argue against the sign for aesthetic reasons. He said as far as the intent of the Sign Ordinance was concerned, the sign might require a variance because of its proposed area, but not because of its proportions, appearance, etc. He said granting the variance would be consistent with the spirit and intent of the Ordinance.

Mr. Smith noted that the size of the proposed sign was double what was allowed, but he said it was a nice looking sign, and was in scale with the building itself. He said he was not sure that the restriction to 20 s.f. would interfere with the reasonable use of the property, but said he was willing to grant the benefit of the doubt. He said the variance request met the five variance criteria.

Mr. deCampi said the sign as proposed seemed to be reasonable in light of the neighborhood and the mass of the building. He said he certainly would not want the sign or its supporting structure to protrude beyond the sidewalk, but said he didn't think there was a risk of that. He said he didn't have a real problem with it.

Chair Gooze said he agreed with other Board members that the sign was appropriate because of the size of the hotel project, and said because of the uniqueness of the property, it met the hardship criteria. He noted that the spirit of the Ordinance was to not clutter up the area with signs, but said the area already had large signs, so this sign was appropriate, and also was a well done sign. He said he felt the request met all the variance criteria.

John deCampi MOVED to grant an APPLICATION FOR VARIANCE from Article XXIII, Section 175-133(E) to permit the construction of a projecting sign larger than 20 square feet, with the maximum dimensions of 5 ft. by 8 ft. with signage on both sides, as depicted in the drawings submitted that evening. The motion was SECONDED by Ted McNitt, and PASSED unanimously 4-0.

- D. PUBLIC HEARING** on a petition submitted by Wings Your Way, Durham, New Hampshire, on behalf of Ray Donner, Goffstown, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XXIII, Section 175-131(C) to permit the construction of a business sign containing a registered trademark logo. The property involved is shown on Tax Map 2, Lot 14-3, is located at 13 Jenkins Court, and is in the Central Business Zoning District.

Ray Donner, the owner of the property, said Rudy Nadillo and his son, Cory, who would be the owners of the proposed business, would speak about the application before the Board.

Mr. Nadillo explained that the establishment was allowed to have a 9 ft. by 2 _ ft. sign, but he had gone with a 6 ft. by 2 1/2 ft. sign because he felt the bigger sign would be too intrusive. He said the proposal was to have a small Pepsi logo on the sign, and noted that in terms of scale, the size of the logo would be approximately the size of two digits of the phone number on the sign.

He said the variance would not result in a decrease in the value of surrounding

properties, because this was not a request for a physical change to the building, or a land use variance being requested. He said granting the variance would not be contrary to the public interest because the business would be located in the heart of the business district where there were many signs and business logos displayed.

He said denial of the variance would result in unnecessary hardship to the owner because the zoning restriction as applied to his property interfered with the reasonable use of the property, considering the unique setting of the property in its environment. He said he believed it was commonplace and reasonable for merchants to display the logo of a major supplier, noting that the ACE Hardware store nearby displayed a prominent "ACE" on the sign even though they carried hundreds of non-Ace items. He said no fair and substantial relationship existed between the general purpose of the Zoning Ordinance and the specific restriction on the property. He also said the variance would not injure the public or private rights of others.

Mr. Nadillo said granting of the variance request would mean substantial justice would be done because Wings Your Way had signed an exclusive deal with Pepsi Bottling of NH, and had received signage for free as part of the contract. He said this was a one-time deal, and said he had no intention of doing any other deals like this that would require additional signage from other companies.

Mr. Nadillo said he believed the variance request met the spirit and intent of the Zoning Ordinance because the Ordinance was intended to reduce the proliferation of vendor supplier logos, while the logo on the sign would be discreet and specific to a major item that would be served at their establishment. He said he had no intention of requesting any other vendor logos for use on the exterior signage.

Mr. deCampi asked if the Pepsi Corporation had required this logo as part of its agreement with Mr. Nadillo.

Mr. Nadillo said no, and explained that the company had said it would put up the signage for free, if the logo were included. He said he would like to get the free signage.

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

There was discussion among the Board as to the meaning and purpose of the provision of the sign ordinance as it related to this application. Chair Gooze said it was clear from the Ordinance that a variance was needed for the Pepsi logo.

Mr. Sievert said in listening to Mr. Nadillo explain how the request for variance met the variance criteria, he agreed the application met them. He said he didn't see how granting the variance would be contrary to the spirit and intent of the Ordinance, and how it would harm anything, especially when it was such a small size.

Mr. Smith said he had recently walked through the Central Business District, and said he was glad the applicant had reduced the length of the sign. He said he didn't think the comparison with the Ace Hardware logo was a good one because that

was actually the name of the business. Mr. Smith said he didn't see a single logo anywhere in the area like the Pepsi logo.

He said he thought this was for a good reason, and said the Ordinance prevented those things from proliferating. He said he felt that if the variance were granted, this would set a precedent, more requests for logos would come in, and there would be the risk that Durham could become anywhere USA. He said granting the variance would be contrary to the public interest, for these reasons, and would be against the spirit and intent of the Ordinance. He also said the request for variance did not meet the hardship standard in any way.

Chair Gooze said Mr. Smith had made some good points as to why the sign ordinance provisions were in place.

Mr. McNitt said he thought everyone in Durham would like to keep the Town from looking like other places, with commercial signs. He said this was a tough application because the variance request was against what the Ordinance said, and its intent, but the applicant was keeping the logo as small as possible and it was not a significant violation. He noted that some logos on signs in Durham were inside the building and were visible from outside. Mr. McNitt said he was a stickler on some things, including decisions that could set a precedent. But he said he was having trouble deciding on this application, so would wait to see what other Board members had to say.

Mr. deCampi said he shared Mr. McNitt's concerns, but was in favor of granting the variance request because the sign was pretty small. He said the issue of precedence didn't concern him because it was so minor. But he said if the Board granted the variance, it would need to be very specific about the size of the logo.

Chair Gooze said Mr. Smith had appropriately pointed out the spirit and intent of the Zoning Ordinance. But he said the sign logo was very small, and said he didn't think granting the variance request was setting a precedent, if the logo was limited in size. He provided additional detail on how he saw this, and said one could say this was a unique situation, compared to what the next situation might be.

Mr. McNitt said the intent of the Ordinance was very fuzzy, and said his personal feeling was that if the logo was a specifically small size, it would not be contrary to the spirit and intent of the Ordinance.

Chair Gooze asked if anyone else then came in with an application asking for this size logo, if that would be ok.

Mr. McNitt said that was what concerned him.

Mr. deCampi said the issue of precedence didn't bother him as much as it did others, and said each case tended to be viewed on its merit.

Mr. McNitt said the establishment was not located on the Main Street, and said the total size of the sign was reasonable, especially given its location. He also noted the logo would comprise a very small percentage of the sign.

Mr. Smith said it would still be in the Central Business District. He asked how the application met the hardship standard.

Mr. McNitt said no fair relationship existed between the general purpose of the Ordinance and the specific restrictions on this property.

Board members agreed this was a use variance. Chair Gooze read through the criteria for a use variance, and said he thought the application could meet those criteria.

Mr. Smith asked what made this a unique setting.

Chair Gooze said it was where the building was located.

Mr. deCampi said it was also the size of the logo relative to the sign.

Mr. McNitt also noted the signs across the street. He said on balance, he was in favor of granting the variance, assuming that the logo would take up a very small percentage of the sign.

There was discussion with the applicant about the actual size of the proposed logo.

John deCampi MOVED to grant an APPLICATION FOR VARIANCE from Article XXIII, Section 175-131(C) to permit Wings Your Way the right to put a PEPSI logo on their 2 1/2 ft. by 6 ft. sign, as long as the logo does not exceed 8 inches x 11 inches. The motion was SECONDED by Ted McNitt.

Mr. Sievert noted the provisions of the Sign Ordinance which spoke about uniformity of aesthetic values, and the convenience of the customers.

Mr. McNitt said he did not think granting this variance would be against the public interest.

Chair Gooze said he believed the variance request met the hardship criteria as well as the other variance criteria. Mr. McNitt said he agreed with this.

The motion PASSED 4-1, with Henry Smith voting against it.

- E. PUBLIC HEARING** on a petition submitted by Ted & Shelley Mulligan, SEJ Properties, LLC, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 to permit the occupancy of a fraternity house with non-fraternity members. The property involved is shown on Tax Map 4, Lot 16-0, is located at 10 Madbury Road, and is in the Residence A Zoning District.

Shelley Mulligan spoke before the Board. She noted that in the previous application before the Board, for an Appeal of Administrative Decision, there was discussion around the word "primarily", and that it should be interpreted to refer to the type of use, not who actually resided at the fraternity house. She said the ZBA had interpreted the Ordinance to mean that 100% of the residents had to be

fraternity members.

She explained that the present application asked that she and her husband be granted a variance to allow the property to be rented to a limited number of non-fraternity members (20%). She said the current capacity of the residence was 24 occupants, and asked that five non-fraternity members therefore be allowed as tenants. She then read through the facts supporting the variance request.

She said the variance would not result in a decrease in the value of surrounding properties because the property was already zoned for, and occupied by UNH students. She noted the abutters did not include residential homes. She said no structural changes were proposed, and said the use would remain essentially unchanged.

She said granting the variance would not be contrary to the public interest because 10 Madbury Road was already student housing, and the use would not change. She said the variance would support the public interest because it would help to minimize students moving into town neighborhoods by filling vacant rooms with students. She said it would provide housing for students in an environment that had mechanisms to allow for Town control, and regulation and oversight by the Greek Affairs Office at UNH. She said the demand for in-town housing was reaching critical proportions, and said it would be unfortunate for students to not be able to find affordable housing in Durham, while units were vacant in fraternity houses, in a location that was already dense with student housing.

Mrs. Mulligan said denial of the variance would result in unnecessary hardship because during times when the building couldn't be filled by fraternity members, expenses would exceed rental income; at the same time demand for housing in downtown Durham was high. She then went through the three hardship criteria. She said the current zoning restriction as it applied to the property interfered with the reasonable use of that property for student housing, and primarily for lodging of members of a fraternity, considering its setting and location, as well as its layout, all of which were conducive to student housing. She said no fair relationship existed between the general purposes of the Zoning Ordinance and the specific restriction on the property. She said the variance would not injure the public or private rights of others.

Mrs. Mulligan said substantial justice would be done by granting the variance because it would assist in ensuring that units specifically designated for student housing were used. She said the variance also provided the opportunity for desirable and affordable student housing for UNH students who were not fraternity members, when the fraternity currently renting the property was unable to full units with its own members. She provided details on this, and the flexibility it provided, noting other housing options in towns were able to fill units as the need arose. She also noted that demand for student housing exceeded supply, so it seemed unreasonable to be so restrictive of students.

Mrs. Mulligan said the use would not be contrary to the spirit and intent of the Ordinance, as the building would remain one that was used primarily to provide

lodging facilities for the members and employees of the fraternity. She then provided detailed information on the owners' intent and ability to enforce its use as primarily as a fraternity, including its use over the past 50 years, and the floor plan of the building. She also noted that she and her husband, as local landlords, were able to monitor the property on a daily basis, and to enforce its use as was intended, and in a way that was consistent with the spirit and intent of the Ordinance.

Mrs. Mulligan then read through some suggested conditions for granting the variance. She said she and her husband were willing to expand these if the Board wished.

1. We would agree that boarders be restricted to UNH students only, and would be allowed to reside at 10 Madbury Road only when the renting fraternity is not able to fill the units.

2. Boarders would be subjected to the same house rules as applies to the members of the fraternity, and this would be written into the lease agreement. (Mrs. Mulligan then provided detailed examples of these house rules.)

Chair Gooze asked how long the house had been used as a fraternity, and if it had always been the same, structurally, as it presently was, essentially a rooming house.

Mrs. Mulligan said it had existed since the early 1950s and said it was structurally the same as it had been at that time.

Mr. deCampi asked what the minimum and maximum number of occupants were at the house within the last year.

Mrs. Mulligan said it was between 6-18 people.

Mr. McNitt said the proposed condition was that at any given instant, there would not be any more than 5 non-fraternity members, and asked if that would also apply for the summer.

Mrs. Mulligan said yes, it would apply regardless of the season.

In answer to a question from Mr. Smith, Mrs. Mulligan said they would like to have the option to have a maximum of 5 non-fraternity members there, which was 20% of the maximum number of occupants possible in the house.

Wes Merritt, an abutter, of SWC Properties, said he had no problem with the variance request, and said he didn't think granting the variance would cause any harm to his property. He said it was probably a good thing, as part of keeping the density of student residences downtown so students wouldn't need to drive, and would use the businesses in the downtown area.

Mr. Smith asked if there had been any problems at the fraternity house.

Mr. Merritt said he had only owned his property for a year, but said he had not seen any problems. He said his tenants said the situation had improved at the

Mulligan property.

Ted Mulligan said he and his wife were Durham residents, and paid close attention to issues relating to student housing. He said they believed in problem resolution together, and noted he was an active member of the Durham Landlord Association, and had also attended some Rental Housing Commission meetings. He said both Mr. Johnson and Chief Fire Marshall Tetreault were on speed dial on his phone. He said management was above board, and noted he had a policy that when the inspection of the building was done, he was present along with a member of the fraternity.

Mr. McNitt asked Mr. Mulligan how parking would be handled at the property for non-fraternity members.

Mr. Mulligan said they would have parking spaces, and said this was included as part of the rent, also noting the fraternity collected the rent and parking fees and then they paid him. He explained that the national chapter of the fraternity was only involved in the property for insurance purposes. He also said that if non-fraternity boarders were allowed to live at the property, the first option would be for friends of fraternity members, who hadn't pledged but were potential recruits, to live there.

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. Smith said he had a nice visit with the Mulligans, and said he thought the property was being managed well. He said his concern was that the variance, if granted, would go with the property. He also said he wondered if a precedent was being set if the application were approved.

Chair Gooze said he agreed that the variance ran with the property, but he said this was a good precedent to set, to begin to get a handle on the wording "primarily". He said the number 20% bothered him in that he would like to see other fraternities come to the ZBA for variances concerning this issue, but said allowing 20% non-fraternity members at some of the larger fraternity houses could result in large numbers of non-fraternity members living at these properties. He said if the Board decided to grant this variance, it would need to find a way to insure this didn't happen, and said perhaps the Board would decide this was a unique situation. He said he would not be opposed to allowing 5 non-fraternity members.

He said this was a use variance that was being asked for, and said the application met the three hardship criteria. He said it met the spirit and intent of the Ordinance, and also said it was in the public interest, also noting he was not using economic criteria in considering the application. He said given all of these things, he was in favor of granting the variance.

Mr. deCampi said he wanted to make sure that the non-fraternity members would not be allowed to exceed 40% of the occupancy of the house at any point in time. He said he was not necessarily opposed to granting the variance, noting it seemed

to be the sensible thing to do. But he said without this stipulation, the property could become a dormitory.

There was detailed discussion about this.

Mr. Sievert said there would be no decrease in value of surrounding properties as a result of granting the variance, and also said he didn't think it would be against the public interest, noting the applicant's statement about keeping students in that location was great. He said he did think the application met the hardship criteria, noting that the property had been used this way for years. He said there was also the issue of what the wording "primarily" meant, and said that if the property was kept mainly as a fraternity, he thought the application met the spirit and intent of the Ordinance.

There was discussion about the recent number of occupants at the fraternity, both fraternity and non-fraternity members, including the occupancy in the summer.

Mr. Mulligan said the reason there were currently only 6 fraternity members living at the property was because the fraternity was in transition. He said that normally, about half of the fraternity members stayed over the summer

Mr. Sievert said it sounded like the proportion of non-fraternity to fraternity members might never become an issue, or if it did, this would only be short-lived.

There was discussion among Board members about the purpose of a condition concerning the number of non-fraternity members that could live at the property. There was also detailed discussion about what the wording of such a condition should be.

Jay Gooze MOVED to approve an APPLICATION FOR VARIANCE from Article II, Section 175-7 to permit the occupancy of a fraternity house with non-fraternity members, with the following conditions: that the maximum number of non-fraternity members shall not exceed 20% of the total capacity, in this instance five people; that at no time shall non-fraternity members be more than 40% of the current occupancy; and that the conditions as set forth by the Mulligans in their application, as suggested conditions for variance, shall be part of this motion.

It was noted that if the motion passed, the wording on conditions that was provided by the applicants would be included in the actual decision concerning the variance.

Mr. Johnson asked how he would be able to know the status of the occupants of the building, for enforcement purposes. There was discussion about this. Mr. Johnson suggested the lease could indicate which occupants were fraternity members and which were non-fraternity members, and would be available on request.

Mr. Mulligan said he had a problem with turning over the lease as part of the public record.

Mr. deCampi said it would be unreasonable of the applicants if they were not willing to provide names to the Code Enforcement Officer if he came to inspect the property.

Mr. Mulligan said he was simply concerned about turning over leases, but said he could live with the idea of providing a list of occupants.

An additional condition was added to the motion to reflect this: *that a list be maintained showing the occupants at any given time, and whether each was a fraternity or non-fraternity member, to be made available to appropriate town officials upon inspection. The motion was **SECONDED** by Henry Smith, and **PASSED** unanimously 5-0.*

F. PUBLIC HEARING on a petition submitted by John & Carol Burns, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XXI, Section 175-116(C) to construct parking areas within the 30-foot front yard setback. The property involved is shown on Tax Map 6, Lot 7-36, is located at 39 Mill Pond Road, and is in the Residence A Zoning District.

Mrs. Burns said unfortunately her husband could not be present to explain the application, and said she would speak about it. She explained that a driveway put in to support a two car garage completed in 2004 was expanded to be wider than the garage in order to permit pull-out and turnaround, so cars could exit the driveway onto the street in a forward direction. She said the contractor hadn't told them a variance was needed for this. She said the top coat still needed to be put on the driveway, and explained this had not happened because it was discovered that they were not in compliance.

There was detailed discussion among Board members and Mrs. Burns regarding the layout and dimensions of the paved area on the property. There was also discussion about the curb cut on the property, and the issues involved with the variance.

Mr. Johnson explained that the Burns had originally obtained a variance for a two-car garage that would encroach a bit into the setback. He noted that they were told during the construction phase that when they went to do the driveway, including a flared driveway, they would have to get a driveway permit from the Public Works Department since the area would be expanding beyond the garage for the turnaround, was in the front yard setback, and created a "parking lot". He said the contractor never went to the Public Works Department, and paved the driveway beyond the two-car garage, creating a parking lot separate from the garage area.

Mr. Johnson also noted that there was an old curb cut on the property that was gravelly and deteriorated. He said when the driveway was paved, a base coat was put on the curb cut as well, which represented a continuation of the curb cut, when the applicant had previously been told to take it out. He said when he went

to do the final inspection of the garage, the driveway permit was denied because there was now a parking lot in the front and side yard setbacks, and a continuation of the illegal curb cut.

Mr. Johnson provided additional details on how the situation could be changed.

Mrs. Burns provided details on the layout, and why the turnaround space was needed.

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.

There was additional discussion by Board members about the layout and dimensions of the parking area, and what was needed for a good turnaround.

Chair Gooze said Section 175-54 of the Zoning Ordinance said that no more than 25% of the front yard could be used for a parking space. He asked if the parking space was just the area off the side of the driveway, or included the driveway too.

Mr. Johnson said the issue was what was beyond the two garages.

Chair Gooze asked Mr. Johnson to explain why the variance was needed for the extra 9 ft.

Mr. Johnson said the applicants needed the variance for an extra 9 feet because they had created a parking lot right up to the Town right of way. He said there was a question as to whether the Board wanted them be able to top coat what they had already base coated.

Chair Gooze asked if the applicants were asking for more pavement than the blacktop he saw when he had recently visited the site.

Mrs. Burns provided details on this.

Chair Gooze said there needed to be a better presentation by the applicants on the issues and dimensions involved in the application in order for the Board to be able to make a decision on the variance request. He said the Board should continue the hearing and the applicant could then come back with better information, or the Board could simply deny the application.

Board members agreed the public hearing should be continued, because the application at present was too imprecise to act on.

Ted McNitt MOVED to continue the public hearing on an APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article XXI, Section 175-116(C) to construct parking areas within the 30-foot front yard setback because of a lack of information, and Code Administrator Johnson will possibly work with the applicant in order to allow the Board to make a decision. John deCampi SECONDED the motion, and it PASSED unanimously 5-0.

G. PUBLIC HEARING on a petition submitted by Gary Flaherty, Hollis, New

Hampshire on behalf of Jeffrey Christensen, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IX, Section 175- 27(B) and Section 175-73(D&E) of the Zoning Ordinance to replace an existing foundation of a camp within the Shoreland Protection Zone. The property involved is shown on Tax Map 20, Lot 1-0, is located at 595 Bay Road, and is in the Residence C Zoning District.

Attorney John Levenstein, the attorney for the applicant, said he realized the application was continued to the next meeting, and asked how much the Board wanted the applicant to get into concerning the legal and technical aspects of the application.

Mr. deCampi suggested that the applicant explain what he wanted to do, which would be helpful when the site walk was done.

Gary Flaherty, Hollis, NH said he was serving as applicant on behalf of the owner of the property, Jeff Christiansen. He explained that the existing structure on the property was a 2-bedroom camp, and was to replace the sono-tubes .He said he was asking to keep the same structure, on the same footprint, and just wanted to put up a cross wall under the building in order to lift it up and provide better support for it in its current location.

Chair Gooze noted that the ZBA had previously granted a variance to allow relocation of the septic system on the property, and removal of a shed.

Mr. Flaherty said the current focus was to replace the foundation with a proper foundation for plumbing, heating, etc. and said the septic system and other issues couldn't be dealt with until they knew where the building was going to be.

Chair Gooze said he thought the building was going to be right where it presently was.

Mr. Flaherty said that with the previous application on the property involving a new septic system, the building was proposed to be up near Bay Road. He said the present owner just wanted to give the existing building a better foundation, and improve the building.

Mr. deCampi asked Mr. Johnson what the Ordinance said about this.

Mr. Johnson said it was an old camp, and the applicant was now looking to make it into a permanent year round dwelling. He said the sono-tubes could simply be replaced, but the applicant wanted to do a continuous foundation wall, which involved excavation issues, including the fact that equipment would need to be brought in.

Chair Gooze noted Section 175-27 (B) of the Ordinance, and read from it. He said according to these provisions, the foundation was not grandfathered.

Attorney Levenstein said the Ordinance didn't specifically state everything that would be considered repair and maintenance, and simply included some examples. He said the proposed work wouldn't be a structural change.

There was discussion about whether what was proposed was in fact a structural change.

Attorney Levenstein spoke about the State Shoreland Protection Act provisions concerning what was allowed to be done on non-conforming structures. He said the provisions said an applicant could replace, in kind, a structure that was already there. He said the provisions said the existing foundation could be replaced, which was what the applicant wanted to do. He said the Shoreland Protection Act also spoke about situations where if there was a change in technology, an applicant was allowed to use this technology, and shouldn't be limited to how things were done when the building was constructed. He said this was what the applicant proposed to do. He said the footprint would not change, and the work would make the foundation safer, and provide a better structure. He said he could provide a memo from NHDES regarding this.

Chair Gooze asked if the applicant was asking for a permanent foundation.

Mr. Levenstein said the applicant wanted a frost wall, but not a full foundation.

Mr. Flaherty said they weren't looking to put a slab down, and were just trying to bring the building up to code.

Mr. Johnson said sono-tubes were considered a structural foundation.

Attorney Levenstein read Section 175-75 of the Zoning Ordinance, and noted it talked about conditions when an owner could do extensive repairs. He said repair of the basis of the building could be considered extensive repair, and was therefore allowed, noting as the Ordinance required, it would be done within a year, and would not extend further into the shoreland zone than the original foundation, and would not result in a new or increased threat to the shoreland.

He said one reason the applicant was before the Board was that there was an issue as to whether this was a repair, and if it was, if it was already permitted by the Ordinance. He said the other issue was that the work would be done within the shoreland buffer zone, and involved concerns about excavation/soil disturbance that would result from the work on the foundation. He said the first issue required an Appeal of Administrative Decision, and the second issue required a variance. He noted that the application included both issues.

Mr. deCampi said the application couldn't be for both an Appeal of Administrative Decision and a Variance.

Attorney Levenstein said if the applicant didn't get the variance, it didn't matter if the Appeal of Administrative Decision was granted. He said he was just noting that Mr. Johnson had raised the issue as to whether the proposed work was a repair.

Chair Gooze said the Board saw this as a variance request. He said the Board would continue to discuss the application at the next meeting, and meanwhile would do a site walk of the property, hopefully on August 23rd.

Mr. Johnson asked if the Board wanted to open up the public hearing in order to hear from members of the public.

Chair Gooze asked if any members of the public wished to speak for or against the variance request.

Richard Gallant, 595 Bay Road, said he was an abutter, and said he was amazed at the paucity of documents on file concerning the application for a building permit for this property. He said he had noticed that a driveway was put on the lot which extended into the 50 ft. primary building setback required by the State in the Shoreland Protection Act. He said this driveway was apparently put in without a wetlands permit, and if so, was in violation. He provided additional details on this, also noting that the 50 ft. setback requirement meant that construction on the site that resulted in increased usage of the septic system would need to undergo septic review, and most likely would result in a required upgrade of the septic system.

Mr. Gallant said the proposed frost wall would have to go down several feet due to the high clay content of the soil, noting that the winter weather created a sea of mud on the lot under a grassy mantle. He also said that leaching of groundwater to the Bay would be prevented by the frost wall, causing the water to be diverted around the structure.

He noted that the accessory structure which had generated concern on the part of ZBA member Linn Bogle during the last variance request regarding this property would not only remain on the property, but would be enhanced. He said this structure sat only 6 inches above the high water table, and was, or had been, used to store tractors, lawnmowers, etc.

Mr. Gallant said the present septic system was installed in the early 1960's to replace a dry well, and said the owner of the property used it solely as a summer retreat. He noted that the most recent owner, Mr. Vallery, attempted to live in the structure with his wife and child, and had pumped his septic tank frequently in the winter.

Mr. Gallant said the problems or concerns he had raised might well be able to be corrected. But he said there was no acknowledgment of them in the application, or how they would be solved. He urged the Board to give the present application a full review, and also asked the Board to wait until the State permitting had taken place. He said he believed the application would be very different from its initial form after this process, and the Board could then render an informed judgment.

Mr. Gallant said he would like to state that he believed the financial impact on his own property as a result of the proposed work at 595 Bay Road would either be neutral or positive. He said his concern was about the environmental damage that could result from a poorly structured variance. He noted that a variance presently existed on the 595 Bay Road property that allowed the owner to realize the property's value.

Mr. Gallant said he had spoken to Mr. Eben Lewis at the NHDES Wetlands

Bureau concerning State permitting requirements, and noted he had sent Mr. Lewis a copy of his present statement to the ZBA.

Jeff Christiansen, the owner of the property, said he had bought the property about 10 months ago, and wanted to bring it up to code, not expand it. He noted that he owned Lee Custom Cycles, and didn't want to build a "McMansion" on his property in Durham. He said he wanted a nice camp, where he could put his boat. He said he could try to simply fix up the building as it presently was, but said the sono-tubes had disintegrated and the crawl space was uneven. He said it was a very salvageable building, and said he wanted to jack it up and put in a 4 ft. foundation in order to have a level playing field. He said he realized the water issues with the site, and just wanted to make the building structurally stable. He noted he was paying \$12,000 a year in taxes, and said he just wanted to be able to use the property. He noted he wanted to clean it up and make it look good.

Mr. Johnson noted another letter from another member of the public, **Robert Blake, 580 Bay Road**.

Mr. deCampi read the letter, which said the application should be denied. He said the living unit and shed should be removed, and a new home should be built according to the Zoning Ordinance. He said the current application would do nothing to enhance the property, and would be a detriment to the neighborhood.

Chair Gooze asked if any other members of the public wished to speak for or against the application. There was no response. He then noted that the hearing would not be closed, and instead would be continued until the September 13th ZBA meeting.

- H. **PUBLIC HEARING** on a petition submitted by Andrew & Kecia Hartmann, Greenland, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIII, Section 175-65, Article XIV, Section 175-72(A), Section 175-73(D&E), and Section 175-74 to permit the construction of a single family dwelling with attached garage, a well and a septic system within the front yard, side yard, wetland and shoreland setbacks. The property involved is shown on Tax Map 11, Lot 31-14, is located at 1 Riverview Court, and is in the Residence C Zoning District.

(Not heard - site walk on the property to be held on August 23rd; application to be heard at the September 13th, 2005 ZBA meeting.)

- I. **PUBLIC HEARING** on a petition submitted by Andrew & Kecia Hartmann, Greenland, New Hampshire, for an **APPLICATION FOR SPECIAL EXCEPTION** in accordance with Article XIII, Section 175-62(A) and Article XIV, Section 175-75(E) to permit the construction of a single family dwelling with attached garage and a well. The property involved is shown on Tax Map 11, Lot 31-14, is located at 1 Riverview Court, and is in the Residence C Zoning District.

(Not heard - site walk on the property to be held on August 23rd; application to be heard at the September 13th, 2005 ZBA meeting.)

III. Approval of Minutes - No Minutes

IV. Other Business

A. Chair Gooze noted that the Barnhorst case had been officially discontinued.

Mr. McNitt said the property at 595 Bay Road already had an on-going variance that allowed a larger structure that would be about 100 ft. from the water, a new septic system, and got rid of the accessory shed. He said another owner was now coming in for a different variance and asked generally speaking, what happened when there were two variances.

There was discussion about this issue, and Mr. Johnson said he would check with the Town Attorney on this.

Chair Gooze noted he had not yet had the chance to work on a wording change in ZBA decisions so that applicants whose applications were denied should appeal this decision to the ZBA before appealing the denial to the Superior Court. He said he would try to have something on this ready for the Board to look at by the September ZBA meeting.

Mr. Sievert said he wanted to clarify that earlier in the meeting, he had not said the Board shouldn't take the most restrictive interpretation of the Zoning Ordinance, but had just said he didn't agree with the interpretation.

He also said, in his opinion, tilling was not excavation. He said if one looked at the definition of excavation in the Zoning Ordinance, excavation referred to the "commercial taking of earth.....", and did not include excavation incidental to construction. He said he therefore didn't see why the applicant in Item G needed a variance. He asked why someone would need a variance when that person was not mining material.

Mr. deCampi said what was proposed would have an environmental impact.

Mr. Johnson said the definition of excavation in the Zoning Ordinance was a noun, referring to a specific use, the commercial taking of earth. He said the Shoreland Protection Act used excavation as a verb, and was not referring to this commercial land use.

There was discussion about this. There was also discussion about how excavation was defined in the revised Zoning Ordinance.

Mr. Sievert said if one got approval for construction to do a building at 50 ft. from the shoreland, one had to be able to do excavation of some kind, and could put temporary erosion control measures in place.

Mr. Johnson provided details of the proposed Ordinance as it related to this, and there was additional discussion. He said Board members were more than welcome

to attend the current Zoning rewrite public hearings on the proposed amendments to the Ordinance.

Chair Gooze noted he had presented a recent update to the Town Council on the Zoning Board of Adjustment.

B. Next Regular Meeting of the Board: **September 13, 2005

V. Adjournment

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

Adjournment at _____

Victoria Parmele, Minutes taker