

# D-R-A-F-T

## ZONING BOARD OF ADJUSTMENT TUESDAY, OCTOBER 11, 2005 TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL 7:00 P.M.

**MEMBERS PRESENT:** Jay Gooze, Henry Smith, Ted McNitt, John deCampi, Myleta Eng (alternate) and Michael Sievert (alternate)

**MEMBERS ABSENT** Linn Bogle

**OTHERS PRESENT:** Tom Johnson, Code Enforcement Officer; Scott Chesney, UNH VP for Student Affairs; Victoria Parmele, Minute Taker

### **I. Approval of Agenda**

Chair Gooze explained that Item II C had been tabled indefinitely, and Board members discussed the fact that the applicant for Items II A and B had requested that the hearings on them be continued.

Chair Gooze asked if any members of the public were present to speak on the Hartmann application. He also noted this was the third month the application had been postponed. There was discussion about this, and about how to proceed concerning the continuation of the application.

Ms. Eng was appointed a voting member for the following motion.

***Ted McNitt MOVED to continue Items A and B to the December meeting, subject to the fact that if it is not brought to the Board by that time, it will be withdrawn. Councilor Smith SECONDED the motion and it PASSED 4-1, with Chair Gooze voting against this.***

There was discussion on Item II C concerning the Gangwer application. Mr. Johnson provided details regarding the property, and said the application might be withdrawn by the following month. The Board agreed to continue the Gangwer hearing to the next meeting, in November.

Mr. Sievert was appointed as a voting member for the following motion.

***John deCampi MOVED to begin the October 11, 2005 meeting at Item D. The motion was SECONDED by Ted McNitt, and PASSED unanimously 5-0.***

## II. Public Hearings

- A. **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.

Continued upon request of the applicant.

- B. **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.

Continued upon request of the applicant.

- C. **PUBLIC HEARING** on a petition submitted by Jesse Gangwer, Town & Campus Inc., Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article IX, Sections 175-28(D) and 175-30(A) of the current Zoning Ordinance and Sections 175-53 and 175-41(D) of the proposed Zoning Ordinance to change the use of a multi-use building to a multi-use/multi-unit building. The property involved is shown on Tax Map 2, Lot 14-1, is located at 4 Ballard Street and is in the Central Business Zoning District.

This item was tabled indefinitely.

- D. **PUBLIC REHEARING** on an August 9, 2005, approval by the Zoning Board of Adjustment for 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, and provided details on the original variance application presented in August. As part of this, she reviewed her previous explanation as to why the application met the variance criteria. She also spoke in detail about the previous discussion and ZBA decision on the application.

She presented her reasons for thinking the variance made sense. She said it would provide the owners with some flexibility if fraternity members had to leave the fraternity house for various reasons. She also said it seemed unreasonable to have rooms vacant when there was a high demand for student housing in Town, noting that the house at 10 Madbury Road was

already located in a densely populated area. She also said fraternities were regulated so that Town personnel were able to come in and check on them on a regular basis.

Mr. Sievert was appointed a voting member for this application.

Chair Gooze questioned as to the degree of control the University has over non-fraternity members in the fraternity house.

Ms. Mulligan said the University didn't have control over non-fraternity members, but said the Town, as well as the head of Greek affairs, could check the building. She said she would monitor the behavior of borders, and noted their leases had conditions, which held tenants to the same standards as fraternity members. She noted there had been a concern that if bad behavior occurred at a fraternity house this would be blamed on the borders, but she said this simply put more of an onerous on the owners to keep track of things.

Ms. Mulligan said there were fraternities in Town that were not affiliated with the University so it had no control over them either. There was discussion as to whether non-fraternity members were living in these fraternities.

Mr. Smith received clarification that the 10 Madbury Road fraternity was approved by the University and had no borders there at present.

Chair Gooze asked if anyone wished to speak in favor of the variance, and there was no response. He then asked if anyone wished to speak against the application.

**Arthur Grant, 261 Mast Road**, explained that he was a member of the Planning Board, and had been asked to convey the Board's concerns about the ZBA's previous decision regarding this property. He listed numerous concerns expressed by the Planning Board.

He said the definitions for fraternity and fraternity house were the same in the 2004 and 1999 Zoning Ordinances, and he read through these. He noted that the deliberations of the ZBA introduced questions as to the word "primarily", and said the Board was unanimous that it was meant to modify the words "lodging facilities", and not "members". He said it was significant that no mention was made of other categories of students in either definition.

Mr. Grant said the Board's second concern was that the ZBA decision expanded the definition of fraternity to permit a type of occupancy specifically excluded in all zoning districts in the 2004 Ordinance. He said doing this was contrary to the spirit and intent of the Ordinance, and compromised the specificity of the Ordinance as it related to fraternities. He also said that in developing percentages, this entered into the realm of policy making, and established a precedent so that other fraternities would seek special treatment.

Mr. Grant said the Planning Board questioned the validity of the hardship criteria used in this application. He said as an alumnus of UNH, he knew that numerous fraternity houses had financial pressures, but said they had options for coping with them. He provided details on some of these options.

He said the Board maintained that it was not appropriate to undermine the standing and integrity of the community's Zoning Ordinance by temporizing the clarity and specificity of this Ordinance as it related to the housing and operation of fraternities and sororities.

He said if the ZBA was convinced the Ordinance at present was unclear, or that there was a legitimate hardship problem, he would urge that such matters be referred to the Planning Board for its careful study, and a determination as to what was a responsible and fair policy for the community.

Chair Gooze said concerning the word "primarily", he thought the applicants had admitted this was a fraternity and that normally non-members weren't admitted, but they were requesting a variance for particular reasons.

Mr. Grant said the point the Board was trying to make was that the word "members" was fundamental in the current Zoning Ordinance to what a fraternity/sorority was. He said if additional categories of people were to be legitimately recognized as living in a fraternity house, this definition had to change. He said the Planning Board didn't think it should be changed.

Mr. Smith noted that one of the criteria agreed upon by the owners was that any borders at the house must be students of the University.

Mr. Grant said if they were not fraternity members, he would say they were not legitimately in the house.

Mr. deCampi said it was useful that Mr. Grant was present, but he encouraged the Planning Board to tighten the definitions, because he didn't think the ZBA read them the same way as the Planning Board. He noted the ZBA's discussion on what "primarily" meant when the application was originally heard.

Mr. Grant said the ZBA could be assured that the word "primarily" would be removed from the Ordinance. There was discussion on what other wording would be more appropriate and how this would impact the need to get a variance.

Mr. Grant said the Planning Board was trying to protect the Zoning Ordinance. He noted that Ms. Mulligan had said the fraternity was currently fully occupied by fraternity members, so the hardship issue was satisfied. But he said it was not good policy to grant a variance in advance of a situation.

Mr. Sievert said that wasn't the way the hardship issue had been presented to the Board. He said he remembered the applicants had said having full occupancy was a problem, so it couldn't be said that the ZBA had made a decision that related to the future.

Scott Chesney, UNH Vice President for Student Affairs, explained that the University's position on this application was not aimed specifically at the Mulligans. He spoke about the joint effort during the last few years, between Town police, the University, and Mr. Johnson which had made a lot of progress in eradicating some fraternity behavior that had bothered members of the Town over many years. He spoke specifically about the elimination of large parties involving alcohol inside and outside of fraternity properties.

He said his concern about the variance recently granted to 10 Madbury Road was that it might harm those efforts. He said it was logical that other houses would come forward to ask for similar variances. He also said the University would have a difficult time potentially holding fraternity members accountable, in that if there was a problem, they would say they had nothing to do with it.

He said the national fraternity for the house at 10 Madbury Road had ruled that the property had to be completely alcohol free, but he said if there were borders there, this didn't apply to them if they were of a legal age.

Mr. Chesney said the University agreed with some of the concerns expressed by Mr. Grant, and said he was surprised when the variance was granted because his understanding of the Ordinance was what Mr. Grant had laid out.

Mr. Smith asked if the fraternity could require a non-alcohol policy for non-fraternity members, so this would apply to the entire house.

Mr. Chesney said the fraternity wouldn't have a say over the non-fraternity members, and noted that the fraternity did not own the house it lived in.

Mr. McNitt asked if Mr. Chesney knew what the practices were of other fraternities in Town concerning this.

Mr. Chesney said they were not supposed to be able to have borders that were not fraternity members, and noted that Mr. Johnson had been vigilant about trying to enforce this policy. He said that ultimately, it was the Town's Ordinance that had a say in this, not the University.

**Diana Carroll, 54 Canney Road**, said she was a member of the Town Council and the Planning Board, but that she was speaking as a resident. She noted that members of the University and the Planning Board had just spoken on the same side of this issue, and said she thought this was something that should be paid close attention to.

She said the issues involved needed careful study, noting there could be unintended consequences. She said the police had worked very hard to develop good relationships with the fraternities and now here was a situation where two different groups were living in a fraternity. She also cautioned against getting too carried away with the idea that this was a way to provide student housing.

Chair Gooze asked Ms. Mulligan if she wanted to give a rebuttal to comments that had been made.

Ms. Mulligan provided a handout of her responses to the arguments raised by Mr. Chesney of UNH.

Her letter explained that the house could never have more than 5 boarders, and said the 40% was added as a provision in case occupancy was very low, which most likely would never occur.

She said she and her husband felt that boarders had the opposite effect from what Mr. Chesney feared, and had actually calmed down the atmosphere of the house and helped it remain orderly. She also noted that non-fraternity members were not allowed to use the gathering area in the house. She also said it would be easy to put in place a non-alcohol policy at the house.

She noted the Whittaker tragedy had been cited by Mr. Chesney, and said this incident was not related to fraternity activity at 10 Madbury Road, and in fact hadn't happened at that location. She said whether or not Mr. Whittaker was a fraternity member was not relevant.

She also pointed out that she and her husband had agreed to put several conditions on the variance, to minimize the potential for problems.

Ms. Mulligan provided a response to comments made by the Planning Board.

She said surrounding property values would not be affected by this variance, and said it would allow students to be housed in a property already dense with student housing.

She said the variance would not be contrary to the public interest because it would help prevent students from migrating into neighborhoods. She also said she questioned Town Planner Jim Campbell's statement that fraternity houses were not a type of student housing, noting that in order to reside there, one must be a UNH student.

Concerning the hardship question, she said the unnecessary financial hardship lay equally with the owners as it did with the renting fraternity. She said not allowing the house to have a few non-fraternity members when the house could not be filled to capacity or when rooms became vacant was an unnecessary hardship because student housing was in great demand.

She said she came before the ZBA because she did have low occupancy of the house at that time, and said having a few non-fraternity members there on a limited basis seemed reasonable. She said the house was not designed for other activities, unlike some other fraternities, and said it was more like student housing.

Concerning the substantial justice criterion, Ms. Mulligan said her house was unique in that it mimicked more traditional student housing. She also noted again that fraternity members were indeed students, and said that therefore, substantial justice would be done in granting this variance.

She said the variance request met the spirit and intent of the Ordinance, explaining that there was no intent to change to mixed use. She noted borders in other fraternity houses in Town, which hadn't changed the nature of the use. She said she and her husband simply wanted to

have some flexibility by having the option of putting a few non-fraternity students in the house. She said this helped the fraternity meet its financial obligations, noting the reason she didn't renew the release of one fraternity was that it wasn't felt it could fulfill these obligations.

Ms. Mulligan noted Mr. Campbell's concerns about UNH's lack of control over what went on in the fraternity house if there were non-fraternity members living there. She said her experience as a landlord was that the tenants who had given her the most difficulty had not been non-fraternity members. She said having a few non-fraternity members in fraternity houses gave Town governance more control over the monitoring of student behavior than if these students were placed in other neighborhoods. She also noted that she and her husband had agreed to a number of conditions related to the variance to alleviate Mr. Campbell's concern.

She said if she and her husband had felt this would be a step backward for the Town, they wouldn't have asked for a variance. She said what they were asking to be allowed to do had gone on in the past, and said it was good to provide flexibility for buildings like theirs that functioned primarily as lodging for students.

Ms. Mulligan said she agreed the wording of the variance decision was somewhat confusing, and suggested the following wording: "The number of non-fraternity members can never exceed 5 (20% of full occupancy) and can never exceed 40% of the occupancy at any given time."

She said the argument that the ZBA was doing re-zoning in voting to approve the variance was an unfair statement. She said the Board had deliberated carefully each standard for approving variances, and was very thoughtful in making its decision.

Mr. Smith asked if there were a small number of fraternity members who were of drinking age. Mr. Mulligan said that most probably there were, and noted it would be possible for underage members to drink as well. He said if there was a non-alcohol policy there, the fraternity could not demand that non-members not drink.

Ms. Mulligan said she didn't think the fraternity could, but said she and her husband could require this if it was in the lease.

In answer to a question from Mr. deCampi, Mr. Mulligan provided some general information on the rent paid by non-fraternity members.

Mr. Sievert asked Ms. Mulligan if the fraternity signed a one-year lease, and she said it had. Mr. Sievert asked her why it was a hardship for her if the fraternity couldn't fill the building with fraternity students. He said this was not unlike the situation for other rental properties in Town that had leases.

Ms. Mulligan said it was easier for other places to get people to move in, noting that the fraternities had an induction process, and when it was done, there was not another one for six months.

Mr. Mulligan said if a border were placed in the house under the variance, that border would have an individual one-year lease. He said the one-year lease for the fraternity would likely be amended to change the rent structure, to allow the landlord more control.

Mr. Sievert asked, concerning the issue of the spirit and intent of the Ordinance, if it was definite this use had gone on for 50 years.

Ms. Mulligan said word of mouth had indicated that it had.

Mr. Sievert questioned why this was all of a sudden a problem when it had been going on for so long.

Ms. Mulligan said the incident with Mr. Whittaker had brought this to the forefront. She noted she had assumed he was a fraternity member when she and her husband bought the building.

Chair Gooze said the ZBA had rounded up to allow five non-fraternity members in the motion, and said he was curious about why this had been done, noting the Board had sometimes rounded down. There was discussion about this, and about the numbers included in the original decision. It was agreed the wording was somewhat unclear, and that Ms. Mulligan's proposed amendment was clearer.

Chair Gooze asked if there was any rebuttal to Ms. Mulligan's comments.

**Richard Kelley, Stagecoach Road**, said he was the Chair of the Planning Board and that he was present to speak against the applicant's request. He said it sounded like it wasn't easy running a business renting property to fraternities/sororities and making a profit. He noted these organizations were having a harder time getting recruits that met their expectations. He said in order to alleviate that, they wanted to allow borders on the same premises.

He said he didn't think there was a financial hardship in this kind of situation, noting that other commercial endeavors had to make some changes if they were not profitable. He said if they decided to change the use of a structure, they had to go before the Planning Board.

*Chair Gooze closed the public hearing.*

Mr. deCampi said ZBA members had read the Ordinance differently than Mr. Grant had represented it, or at least were uncertain about it. He said the letter from Mr. Campbell had lent an air of clarity to this issue, and said it came down to the fact that the ZBA was being told by those who wrote the Ordinance that the proposed use of the fraternity house was contrary to its spirit and intent.



He said he didn't see where it changed the issues regarding the variance criteria. He said he didn't see that having borders would decrease the value of surrounding properties, and that he didn't necessarily see where this would be contrary to the public interest, although noting some points made by Mr. Chesney that might relate to this.

He said he didn't know if denial of the variance would be an unnecessary hardship, but noted Mr. Kelley's point that the world changed. He said he had difficulty determining if substantial justice was served by granting the variance.

But he said he was convinced the use was contrary to the spirit and intent of the Ordinance, and said he was inclined to vote against the application because this was now clear. He said he had seen a shift in the preponderance of the evidence.

Mr. McNitt said it was difficult to go against the fact that the Planning Board was saying granting this variance was contrary to the spirit and intent of the Ordinance. He said he had read for a long time that the word "primarily" modified "lodging", and noted he had never considered this word absolute.

He said that part of what had encouraged the ZBA was the quality of supervision by the current owners, and said this had influenced him in his previous vote. But he said he had done a lot of thinking about the contention that there was no way to insure that there would be the same owners supervising in the future. He said he would like to hear what others had to say before deciding on this application.

Mr. Smith said he agreed that the provision of student housing should not be a consideration of the ZBA in this application. He said the ZBA had added conditions to the motion because of concern that the variance went with the property. He said they had discussed the word "primarily" on two occasions, and had noted there was some ambiguity that needed to be clarified, but at the moment it was not clear.

Mr. Smith said that in the agreement, only students could live in the house. The owners had to provide a list of the occupants to Town officials when they came to the property and a minority of non-members could live there as borders with a maximum of five borders allowed at any given time. He said that given all of this and the ambiguity of the word "primarily", he would reluctantly have to uphold the Board's decision until further classification, and with the understanding that this decision applied only to this particular house.

Ms. Eng said she was not present for the original hearing. She said the only criterion she felt the application met was that there would be no decrease in property values of surrounding properties. She said granting the variance was contrary to the public interest because it potentially undermined the work the Town and the University had done, in that there was very little control over non-fraternity members.

She noted that financial hardship could be considered, but said the applicants still would have reasonable use of their property even without the variance, noting there were alternatives such as raising the rent. She said this criterion therefore wasn't met.

She said there was a fair and substantial relationship to the general purpose of the Zoning Ordinance in that the house was for fraternity members only. She also said the private rights of others could be injured in not having control over non-fraternity members.

Ms. Eng said the issue of whether granting the variance would be contrary to the spirit and intent of the Ordinance was confusing to the Board when it didn't know what "primarily" referred to. But she said that looking at the history provided by Mr. Johnson, it was clear to her that it meant fraternity houses were for fraternity members only.

She said she agreed the variance and its conditions ran with the property, and that the Mulligans were doing a wonderful job, but she said if the property were sold, there was no guarantee that the new owners would maintain the same controls. She also said that since the use was not legal, even if had been done for fifty years, it couldn't be grandfathered. Ms. Eng said she would not be in favor of granting the variance.

Chair Gooze said this was a very difficult application, noting the variance criteria could each go in different ways, depending on how one looked at them.

He said there had been points on both sides about the public interest. He said he thought this variance could be granted as not being contrary to the public interest, stating that the public interest was a varied situation in this instance.

He said the spirit and intent of the Ordinance was observed, which was to use the facility primarily for a fraternity. But he said there was controversy about this wording until there was a definite definition. He noted the property had been used this way for a long time, and said it wasn't clear whether this had been illegal since there hadn't been a good definition of how it could be used. He said he wasn't sure how this definition should be interpreted.

Chair Gooze said he could also agree that substantial justice was met. He noted that the reason he was going through all of these was that there were conditions attached to the variance, which ran with it. He said if someone else owned the property in the future and didn't follow the conditions, the variance would be null and void, and the owner would have to start from scratch. He said it was because these conditions were attached that he had voted for this variance previously, and said if they weren't there, he would be very concerned that these things could go either way.

Chair Gooze said the variance criterion he had real problems with was the special conditions of the property. He noted this was a use variance, and said he was not sure what the conditions of this property were that made it special.

Mr. Smith noted that there were no cooking facilities at the property, and said he wasn't sure if this was a special condition or not.

Chair Gooze said he personally thought that with the conditions involved that ran with the variance, he would vote to approve the variance. He said the special conditions of this particular property were the conditions involved with the variance application, and the fact that the property had been used for a long time in a way that it could not be said for sure was illegal, until there was further clarification from the Planning Board.

Mr. deCampi said the Board had upheld Mr. Johnson's judgment that the Ordinance prohibited non-members, and a variance was therefore needed. He said that variance was granted in August, which was now being re-heard.

Chair Gooze said he was in favor of granting the variance, but said he had a problem with saying there could be five non-members in other instances besides this application. There was discussion about this.

Mr. Sievert said in terms of whether granting the variance would be in the public interest, he agreed it would. He noted this had been going on for fifty years and no one had said anything, but he said he realized there were values on both sides. He said he would like to see the Town Council work a lot better with the University on these issues.

Mr. Sievert also said perhaps there would be substantial justice in granting the variance because housing was being provided for students in the area where it already existed.

He said that after listening to the Planning Board state so decisively what the Ordinance said, he didn't think the variance request met the spirit and intent of the Ordinance. However, he said the Board's comment that the ZBA was rezoning the Town was a little strong.

Mr. deCampi said he took great umbrage to the way Mr. Campbell had said this.

Mr. Sievert said he had trouble with the idea that there was unnecessary hardship. He said the first time this application had been presented to the Board, it seemed as though there could potentially be a financial hardship. But he said he now didn't see how it was any more unique to rent a fraternity house than any other student housing.

Mr. Smith said the argument that this had been done for the last fifty years might or might not be true, but said it probably was, and had simply not been known. He said it had come to light only recently that it was against the spirit and intent of the Ordinance, and should not be done. He said he felt the Board had attached important conditions to the variance for this particular property. He also said one could say that the special conditions of the property were at least as special as those for the property where a PEPSI sign was proposed at a another recent ZBA meeting.

Ms. Eng said the Planning Board had come to the meeting this evening and stated that the application was definitely contrary to the spirit and intent of the Ordinance. She said this was a really important criterion, and also noted that a variance request had to meet all of the criteria. She said she didn't think the variance should be granted.

Mr. McNitt said he still thought the Zoning Ordinance at best was unclear. He said if the Planning Board intended that a fraternity house should be used strictly for lodging of fraternity members or employees, it would not have put the word "primarily" into it.

He said he would reluctantly say the Board should not grant the variance because the Planning Board had represented the fact that the intent of "primarily" was that the building should be used to provide lodging for fraternity members and employees. He said he didn't like it, but said he had to reconsider this in view of the evidence that had come in, and say no.

Chair Gooze said the conditions attached to the variance were very special, and made this a unique situation. He said he didn't feel this decision would set a precedent for other fraternities, and said until the ZBA or the Town Council got another definition for fraternity/fraternity house, he thought he could vote in favor of this.

Mr. McNitt asked what happened if the Planning Board changed the wording next year so it was clearer.

Chair Gooze said the Board would have to look at the particular application for a variance. He noted that all variance requests were against the Ordinance, in a sense, but said it might be that because of the special conditions of a property, the spirit of the Ordinance was being upheld. He said the whole point of the ZBA was to consider these things.

***Henry Smith MOVED to uphold the original decision of August 9<sup>th</sup>, 2005, and approve this APPLICATION FOR VARIANCE from Article II, Section 175-7 to permit the occupancy of a fraternity house with non-fraternity members, with all the conditions enumerated in the decision applying very strictly, with replacement of conditions 1 and 2 with the following "The number of non-fraternity members can never exceed five once there was full occupancy, and could never exceed 40% of the occupancy at any given time. Jay Gooze SECONDED the motion, and it PASSED 3-2, with Michael Sievert and John deCampi voting against it.***

Chair Gooze noted the conditions under which a rehearing of the matter could be requested.

- E. **PUBLIC HEARING** on a petition submitted by Kenneth & Jolene Shuman, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to allow the building of a shed within the sideyard setback. The property involved is shown on Tax Map 11, Lot 23-46, is located at 12 Morgan Way, and is in the Residence C Zoning District.

Kenneth Schuman described the shed that what was proposed for his property, and said he planned to use it to store small boat trailers in the winter, as well as other items. He said it was a large building to call a shed, but was not large enough for a car. He said a major purpose of having the shed was to allow the garage to be used for cars. He said it was important that the shed be on a level area, near the driveway.

He said as proposed, the shed would be 32 ft. from the side yard setback, and said the style and color would be similar to his house. He provided details on variances previously granted to neighbors for garages or sheds. He also said he had discussed his plans with the neighbors, who had agreed the proposed shed would not be a problem. He said it would be located in a wooded area, and would not be easily seen from the road.

Mr. deCampi asked if the 50 ft. setback could perhaps be met by doing some grading, and Mr. Schuman said there were some large rocks in that area that would make this difficult.

Mr. deCampi asked if the shed could be put adjacent to the garage, and Mr. Schumann said this would impact the existing landscaping.

Chair Gooze read letters from two abutters, the Haneys and the Wilhelms. The Haneys indicated there had been some drainage and erosion problems related to the Schumann's property, and said they were concerned about possible additional problems. They provided additional details about this in their letter. Chair Gooze also read the letter from the Wilhelms, which indicated that they believed the shed was out of character with the area.

Ms. Eng was appointed a voting member for this Item.

Mr. Johnson pointed out that this was an accessory structure that was proposed, so the sideyard setback was actually 35 feet. He said there was currently no specific size criterion for accessory sheds, so if this setback requirement could be met, a variance wouldn't be needed.

Based on this, Chair Gooze asked Mr. Schuman if the shed could perhaps be moved back 3 feet so it would then meet the side setback requirement of 35 feet.

There was discussion about this with Mr. Schuman.

Mr. Smith noted the size of the shed was a concern of abutters, and asked how large it would be compared to other sheds in the area.

Mr. Schuman said it was larger, but was not that visible.

Mr. Smith suggested reducing the size of the shed, and Mr. Schuman said this would be difficult.

Mr. Sievert said the applicant didn't have to do this because there was nothing in the Ordinance concern this. He said if the shed was moved back 3 feet, and was less than 20 feet tall, it could be done.

There was discussion as to how to proceed concerning the application, given this.

Mr. Schuman said he didn't think moving the shed 3 feet would be a problem, and also said he could discuss issues of concern with the Haneys. As suggested, he asked for a continuance of the hearing.

- F. PUBLIC HEARING** on a petition submitted by Sharon Wallace, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-53 and Article XX, Section 175-109 of the Zoning Ordinance to allow an existing, accessory barn to be used as a one-unit dwelling. The property involved is shown on Tax Map 11, Lot 2-0, is located at 116 Dover Road, and is in the Office & Research Zoning District

Attorney John McGee informed the Board that Ms. Wallace was ill so could not attend the hearing. He said that this was a follow-up application, noting the applicant had asked for two units the previous month, and had now submitted an application for only one unit.

He provided details on research he had done which hopefully would make this whole issue moot, and said he was presently seeking a continuance to be able to straighten this out.

The Board agreed to continue the hearing to the November 8<sup>th</sup> ZBA meeting.

- G. PUBLIC HEARING** on a petition submitted by John & Stephanie Herring, Dover, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from a September 9, 2005, letter from Zoning Administrator, Thomas Johnson, regarding the occupancy of a single family dwelling with an accessory apartment. The property involved is shown on Tax Map 1, Lot 9-13, is located at 133 Madbury Road, and is in the Residence A Zoning District.

Attorney Tom Dwyer spoke for the applicant. Mr. Johnson noted that he had met with Mr. Herring and his attorney regarding this application in his office.

Attorney Dwyer explained that the reason why the Herrings had purchased the property was to be able to provide housing for the Exeter Seawolfs Junior Hockey organization. He provided details on the purpose of this organization, which had existed for approximately 30 years. He said the Herrings had been benefactors of this organization for 7-8 years.

Attorney Dwyer said that typically, the players came from out of state and traditionally had been hosted by families. He explained that some of these families had now backed out of this arrangement, and said it was difficult to place the players individually in homes, so the house had been purchased so the players could be housed together.

Attorney Dwyer noted there were two issues with the Town, the administrative decision made by Mr. Johnson on several grounds, and the variance. He described the key issues involved in the administrative decision; whether the kids needed to be in school, whether they were US citizens, and whether the house was being run as a business.

He asked that the determination be made to overturn the administrative decision, based on the findings that the players were not truants and were not illegal aliens, and that the building was used strictly to provide housing for the players. He said no business activity whatsoever was conducted there.

Mr. deCampi asked if rental payments were received, and Attorney Dwyer said no. He said the kids each paid \$350 per month for everything in the program. He said the Herrings received no money from anybody for this activity.

Chair Gooze said he thought that Mr. Johnson's administrative decision letter had made reference to the more than 3 unrelated persons provisions.

Mr. Johnson said his original letter, addressed to the former owners of the property, concerned occupancy issues. He said the other possible issues were added later.

Mr. deCampi provided details on the fact that he didn't think the administrative decision should be done first. He noted that if the variance was done and it failed, the administrative decision didn't matter.

Attorney Dwyer said after he received the administrative decision letter, and especially because of the more than three unrelated persons issue, he and the Herrings met with Mr. Johnson and concluded it was in the hockey program's best interest if the property were sold.

He said this issue might therefore become moot. He said as a practical matter, there was now a situation where the applicants had stumbled into a zoning issue they did not anticipate, but had people living in the house for the season.

Chair Gooze said there were two parts to the issues with this property, and said he would like to address the administrative decision part and the variance part separately so the issues would not be confused. He asked Attorney Dwyer if he was including the more than three unrelated persons issue in the appeal of the administrative decision.

Attorney Dwyer said he was not. He also said he would like to get a decision on the appeal of administrative decision, and would like the variance application to be tabled, because the applicants were selling the property.

Mr. Smith said the administrative decision spoke about the occupancy issue, and said the Board should consider the whole decision. He also noted that the Board didn't know if the property would actually be sold.

Attorney Dwyer said it was hoped the property would be sold within 30 days.

Mr. deCampi said the application was sloppy, noting there was no supporting evidence to support the claims that there was no truancy or immigration problems, and that the house was not being run as a business.

Mr. Sievert said the administrative decision and variance addressed separate issues, and said he thought the Board should move on with each of them.

There was detailed discussion among the Board, and with Attorney Dwyer, as to whether this organization was a business. Chair Gooze asked Mr. Johnson if he considered it to be a business.

Mr. Johnson provided details on this, and said although it might be a non-profit organization, it was a business.

Attorney Dwyer said this begged the question as to what was a business. He provided details on why the organization was not a business.

Mr. Sievert said he didn't think the organization was a business.

Mr. deCampi said he was willing to accept this, and Mr. McNitt said he agreed, assuming that what Attorney Dwyer had said was factual.

Mr. Smith said the Board had received information orally that this was not a business, but said the question remained whether it was. He said he had no proof that it was not, and said he would uphold the administrative decision.

Chair Gooze asked what Mr. Smith would like to see that would prove this was not a business.

Mr. Smith said he would like to see a letter stating this, and Ms. Eng said she agreed.

Mr. Sievert said there was no business being run out of the house, and said Attorney Dwyer had stated there was no business.

Chair Gooze said it would be good to see a letter on this, and said the Board could ask for this. He said the Board could also simply take Attorney Dwyer's word on this.

Chair Gooze appointed Mr. Sievert as a voting member for this Agenda Item.

***John deCampi MOVED to find in favor of the applicant on three of the points raised in Mr. Johnson's September 9<sup>th</sup>, 2005 letter.***

***1. That based on Attorney Dwyer's representation that Mr. Herring receives no payment of any sort for the use of this house by the Seawolves or any of its members, we find no business has been undertaken at 133 Madbury Road.***

***2. That based on Mr. Johnson's investigations, we find that there are no issues with truancy or citizenship in violation of Durham's ordinances existing at 133 Madbury Road.***

***3. The applicant has separated out the issue of occupancy by more than 3 unrelated individuals, so that matter was not considered by the Board under this action. Ted McNitt SECONDED the motion, and it PASSED 4-1, with Henry Smith voting against it.***

**H. PUBLIC HEARING** on a petition submitted by John & Stephanie Herring, Dover, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow more than three unrelated occupants in a single family home with an accessory apartment. The property involved is shown on Tax Map 1, Lot 9-13, is located at 133 Madbury Road, and is in the Residence A Zoning District.

Attorney Dwyer said that as a practical matter, in light of the applicants' plans to sell the property, he would like the application to be continued to the December meeting. He noted the property might not be sold precisely within 30 days. But he said he would like to see what the Board had to say about this.

There was discussion about the residents now living in the house.

Chair Gooze appointed Ms. Eng as a voting member for this Agenda Item.

***Ted McNitt MOVED to continue the hearing on an APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance to allow more than three unrelated occupants in a single-family home with an accessory apartment. The motion FAILED for lack of a SECOND.***

Attorney Dwyer went through the variance criteria. He said he believed there would be no decrease in the value of surrounding properties as a result of the house as it was presently being used. He said this was a reasonable use, and was similar in character to the use of other houses in the area.



He said the general purpose of the Ordinance appeared to be relatively clear, to strike a balance in this University town. He said the residents of the house were not University students, but happened to be of a similar age, in a university town. He said the house was supervised by coaches who also served as adults in the house. He said there was a curfew of 9:00 pm, and said there were strict regulations in place for athletic purposes. He said this was a reasonable use of the property,

He said substantial justice would be served by granting the variance because it was the owners' constitutional right to use the property as they saw fit. He said the spirit and intent of the Ordinance was served with this variance, because the balance to be put under the microscope was the applicants' constitutional right to use the property within reason versus the purpose of accommodating the needs of the community and the students, in conjunction with the characteristics of Madbury Road. He said the purpose of the Ordinance was served with these people living here, especially because of the strict curfew.

Concerning the hardship issue, Attorney Dwyer said the present use was a reasonable use of the property, and considered the applicant's constitutional rights and the general purpose of the Ordinance, which was to balance student housing with the characteristics of the neighborhood. He questioned at what point on Madbury Road fraternity row began and ended, and said that certainly was the issue.

He said the use would in no way offend the purpose of the Ordinance. He said it was a non-University use, used in a manner that was consistent with the characteristics of the neighborhood. Attorney Dwyer also said the variance would not cause injury to the public and private rights of others.

He said it came down to the Herrings' constitutional right in Federal and state statutes versus the general purpose of the Zoning Ordinance, to balance the needs of a University town and the specific non-university use of this property. He said they in no way offended the general purpose of the Ordinance.

He said the applicants preserved the right to challenge the constitutionality of the Ordinance as written, and provided details on this.

Mr. deCampi asked what the property was used for previously. There was discussion about the likelihood this had been a single-family property. Mr. deCampi said the present use appeared to be a substantial change of use from what it had been before.

Mr. Smith said given the fact that this was not a fraternity, he was puzzled that Attorney Dwyer had said in the application that the use was similar to other uses on Madbury Road. There was discussion about this.

Mr. McNitt said this property appeared to be well outside the fraternity area.

Chair Gooze noted he lived ten streets down toward the center of Durham, and said the area in question was definitely not fraternity row.

Chair Gooze asked if any members of the public wished to speak in favor of the application for variance, and there was no response. He then asked if anyone wished to speak against the application.

**Richard Bernart, 127 Madbury Road**, said he lived for over 45 years, within 350 feet of the applicant's house, and said he objected to the variance being requested. He said the zoning districts were designed for the best use of the land, in conjunction with the Master Plan. He said granting the variance would create spot zoning districts, and would change the character of the neighborhood permanently. He said it was clear that the applicant was using the property as a boarding house/rooming house, and said if this use continued, property values could be significantly reduced.

**Diana Weidenbacker, 130 Madbury Road**, said she lived across the street, and was there to speak against the application. She said she had chosen this neighborhood because she did not want to live with students, and said she was concerned that her property values might now decrease. She said it was the responsibility of the applicant to have checked into this, and said to allow this to occur would set a bad precedent.

Mr. deCampi asked where the nearest fraternity was, and Ms. Weidenbacker said it was almost a mile away. She said there were no other multi-family houses in our neighborhood.

**Patti Bedker, 5 Hampshire Avenue**, read the remarks of **Paul Tsang**, who spoke against granting the variance.

**Roland Palmatier, 128 Madbury Road**, said he had nothing personally against the hockey team, and said they seemed to be quiet, but he said the variance would go with the property. He said he didn't recommend that it be allowed, and said this would be contrary to the will of the Town.

**Elizabeth Hagner, 123 Madbury Road**, said she didn't want this variance to go with the property. She said the applicant did know about the more than three unrelated rule.

**Jane Grota, 4 Lundy Lane**, said she was against putting students in the house, and said the applicant should abide by the Zoning Ordinance.

**Kathy Brunet, 7 Hampshire Avenue**, read a letter from Richard Ager, who lived on Scotland Road. Mr. Ager's letter provided details on why he was against the variance. He said it was important that this kind of behavior had consequences in Durham.

Ms. Brunet asked the Board not to grant the variance, and also asked it not grant a continuance. She went through the variance criteria as they related to this application, and said this was not a constitutional issue. She said one more day of allowing this use was not appropriate.

**Coreen Schmidt McCrown** said she lived behind a house that had athletes living in it. She said any time a large group like that congregated, there were problems, and urged the Board to think about what potential problems that would be created if the variance was approved.

Chair Gooze asked if Attorney Dwyer had any rebuttal to these comments, and he said he did not. Chair Gooze then closed the public hearing.

Mr. Johnson said there was multi-unit apartment building across Route 4, about a quarter mile from the neighborhood in question. He also explained that the house was a dormitory, and provided details on this. He said it was an illegal change of use, and said that therefore, a variance could not be granted for it, and must be denied. He noticed it had been advertised incorrectly.

There was detailed discussion by the Board and Mr. Johnson as to how to proceed.

Board members went through the variance criteria as they applied to this application.

Mr. Sievert said granting the variance would decrease the value of surrounding properties; would be contrary to the public interest; did not involve hardship and was not a reasonable use of the property in any way; would not result in substantial justice being done, and would be contrary to the spirit and intent of the Ordinance.

Mr. deCampi said he agreed with these points. He asked whether the decision would be legally stronger if it was denied based on change of use or based on the more than three unrelated issue.

Mr. McNitt said the board could deny the application for two reasons: 1) because of the change of use, which was out of the ZBA's purview; and, 2) because of the more than three unrelated provision. He said granting the variance would be against the public interest, noting the comments from members of the public, and he also described how the application didn't meet any of the other variance criteria.

He said the Master Plan was very specific as to how Madbury Road was to be treated, and said the ZBA had consistently spoken regarding the more than three unrelated provision as it applied on outer Madbury Road.

Mr. Smith said the only variance criterion he wasn't sure about, as applied to this application, was the question of whether the variance would result in a decrease in the values of surrounding properties. But he said he thought it probably would decrease. He said he agreed with Mr. Sievert, and said the variance request flew in the face of the spirit and intent of the Ordinance, and should be denied. He noted this kind of activity had been denied several times by the Board.

Ms. Eng said she agreed with what others had said, and said she agreed this was a change of use. She also said this was not an issue of renting to students; it was an issue of renting to more than three unrelated people.

Chair Gooze said he agreed with what others had said. Concerning a possible decrease in property values, he said an appraiser had told him that student housing would not negatively impact his property values because it was far enough away from the house.

He said he didn't think the application could meet the other variance criteria either. He said that even looking at the Simplex case, there was no hardship, with no special conditions that would render the proposed use reasonable. He said granting the variance was not in the public interest, and said it would be contrary to the spirit and intent of the Ordinance.

Chair Gooze said for these reasons, the variance should be denied. He also said he agreed this was a change of use, and was a basis for denial.

There was discussion as to whether to add wording concerning the change of use issue to the motion.

***Henry Smith MOVED to deny the APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance to allow more than three unrelated occupants in a single family home with an accessory apartment, because it does not meet any of the five criteria needed for a variance to be approved, and it is also the feeling of the ZBA that there may well be a change of use, and there would be a denial on that basis alone, based on this not being the Board's responsibility Myleta Eng SECONDED the motion and it PASSED unanimously 5-0.***

### III. Approval of Minutes

September 13, 2005 (Note pgs. 6 & 7)

Throughout the Minutes, it should say "Chair Gooze...."

Page 1, 2<sup>nd</sup> paragraph from bottom, should read "...on Tuesday evening."

Page 2, 1<sup>st</sup> paragraph under II A, should read "...Ms. Eng..." 5<sup>th</sup> paragraph from bottom should read "...regarding non-member boarders."

Page 3, 4<sup>th</sup> paragraph from bottom, should read "...19 ft...."

Page 4, 1<sup>st</sup> paragraph should read "...still be before the Board because.." Same page, 3<sup>rd</sup> paragraph from bottom should read "...the parking area was moved back a foot...." Same paragraph, should read "...but noted that most of the residents in the faculty area..."

Page 6, blank spaces in paragraphs 3,4 and 8 should say "Rist"

Page 7, 1<sup>st</sup> full paragraph should read "Mr. Rist..."

Page 8, 7<sup>th</sup> full paragraph, should read "...said it didn't really have anything to do with this...." Bottom paragraph should read "...would like to see the house moved back..."

Page 9, 2<sup>nd</sup> paragraph under II K, should read "...with the applicants on this." 2<sup>nd</sup> paragraph under II M should read "Dr. Bragdon..."

Page 10, 2<sup>nd</sup> and 5<sup>th</sup> full paragraphs should read "Dr. Bragdon..."

Page 12, Motion on that page should read :..Durham Point Road.."

Page 13, 2<sup>nd</sup> paragraph of II F, should read "...made note of the recent site visit..." Same paragraph, should read "...moving the house back 100 ft. would place it..."

Page 14, 5<sup>th</sup> full paragraph, should read "...back to 80 ft., and because of..."

Page 15, 1<sup>st</sup> paragraph, should read "...met the spirit and intent..."

Page 16, 4<sup>th</sup> and 7<sup>th</sup> paragraphs, should read ""Mrs. Reed"

Page 18, top paragraph, should read "But he said because the other properties nearby were so similar..." 2<sup>nd</sup> full paragraph should read "...was dug 7 ft. deep..." 2<sup>nd</sup> paragraph from bottom of page should read "...Mrs. Reed's property".

Page 20, bottom paragraph, should read “..Attorney McGee said Durham had “grown up” concerning zoning...”

Page 21, top paragraph should read “..especially Mrs. Wallace, that this was...” Next paragraph should read “..was not the zoning official..”

Page 24, the motion should read “Linn Bogle MOVED to deny...”

Page 26, 4<sup>th</sup> full paragraph, separate the two sentences into two different paragraphs.

***Ted McNitt MOVED to approve the September 13, 2005 Minutes as amended. The motion was SECONDED by Michael Sievert, and PASSED unanimously 5-0.***

#### **IV. Other Business**

Board members discussed the upcoming State planning conference at Loon Mountain, and which members planned to attend it.

Chair Goose said there had been a question as to whether there could be a rehearing on a rehearing. He said he had done some research on this, and said the courts had essentially said was that if there was a specific legal issue, it could go right to Superior Court, and didn't have to come to the ZBA for a rehearing first. He provided additional details on this.

Mr. McNitt brought up the issue of whether the ZBA had the right to say no to granting a continuance, and whether there was a way to be consistent about this. There was discussion about this by the Board.

Mr. deCampi noted that for the Dwyer application, the appeal of administrative decision application and the variance application were both written on the same form. He said two applications should be filled out for this, and also said two fees should be paid by the applicant.

#### **V. Adjournment**

***Mr. deCampi MOVED to adjourn the meeting, Myleta Eng SECONDED the motion, and it PASSED unanimously 4-0.***

Adjournment at 11:00 pm

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John deCampi, Secretary