

*These minutes were approved at the January 10, 2006 meeting.*

**ZONING BOARD OF ADJUSTMENT  
TUESDAY, NOVEMBER 8, 2005  
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL  
7:00 PM**

**MEMBERS PRESENT:** Jay Gooze; Henry Smith; John deCampi; Linn Bogle;  
Michael Sievert (arrived at 7:10 PM)

**MEMBERS ABSENT** Ted McNitt; Myleta Eng

**OTHERS PRESENT:** Code Enforcement Officer Tom Johnson; Victoria Parmele,  
Minute Taker

**I. Approval of Agenda**

Chair Gooze noted that Board members Myleta Eng and Ted McNitt would not be present for the meeting and that alternate member Michael Sievert was expected to arrive shortly. He noted that if there were only four Board members present, an applicant could ask that the hearing on the application be continued until there were five Board members present.

Chair Gooze also said that if a member of the ZBA made a motion to deny an application and it failed, he would then ask a Board member to make a motion to accept the application.

Mr. deCampi said he could possibly recuse himself from three of the four Items that evening. He said the Slamas were his neighbors, although noting he was not an abutter. He also said the two Wallace applications were being brought before the Board by Attorney Jack McGee who he had hired to represent him from time to time, although not recently. He provided details on this, and said he would seek the guidance of the Board on whether he should recuse himself.

Chair Gooze said he didn't think recusal was necessary for the Slama application, noting that all of the Board members sometimes knew people who submitted applications. He said it would be a different situation if Mr. deCampi were an abutter. He said that unless Mr. deCampi paid Attorney McGee an ongoing contingency fee, he didn't see the need for Mr. deCampi to recuse himself concerning the Wallace applications.

There was additional discussion on this by Board members.

Chair Gooze asked if Attorney McGee could speak about this to the Board.

Attorney McGee said he had represented Mr. deCampi, and had the utmost regard for his integrity, however, his client might be uncomfortable with this, so he would be happier, on behalf of his client, to not have to put Mr. deCampi in this position.

Mr. Sievert arrived at the meeting at this time.

There was additional discussion by the Board on whether Mr. deCampi should recuse himself.

Mr. deCampi noted he was absent from the September 13<sup>th</sup> meeting, so didn't have the background information needed concerning the Wallace Rehearing Item. He said he would therefore prefer to recuse himself on this application.

Chair Gooze asked Mr. deCampi if he could give a fair and impartial decision on the variance application, and he said he could. Chair Gooze said he accepted Mr. deCampi's recusal from the Wallace rehearing, but said he would sit in on the Slama variance and Wallace variance applications.

Chair Gooze said the Board had received a letter from Mr. Shuman indicating he had withdrawn his application. Chair Gooze noted that the applicant had previously asked that his application be continued to the October meeting.

Chair Gooze said there had been no further word concerning the Gangwer continuance.

Code Administrator Johnson said the Planning Board's Technical Review Committee was reviewing the application, and that based on that review, it might come back to the ZBA.

Chair Gooze noted that the ZBA sent a letter to the Hartmanns notifying them that if their application was not ready for this meeting they would have to reapply.

***John de Campi MOVED to approve the Agenda as submitted. The motion was SECONDED by Henry Smith, and PASSED unanimously 5-0.***

## **II. Public Hearings**

- A. **PUBLIC HEARING** on a petition submitted by Emily & Fred Slama, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to build a two-car garage within the sideyard setback. The property involved is shown on Tax Map 20, Lot 9-2, is located at 367 Durham Point Road, and is in the Residence C Zoning District.

Mrs. Slama said she and her husband wished to build a 26 ft. x 26 ft. two car garage. She said there was no attic or basement in the house, so the building would be very important for storage purposes. She said the structure would be located 15 ft. from the property line due to the unique setting of the property, and provided details noting that there was an outcropping of ledge right where the 50 ft. setback location was. She said the existing shed was 8 ft. from the property line, and that placing the garage at 15 ft. would put it in between these two distances.

Mrs. Slama also said that placing the garage anywhere else on the property would impact the open space on the property.

She then went through the five variance criteria. She said the proposed garage should not negatively impact the value of surrounding properties. She said the property was completely surrounded by trees.

She said granting the variance would not be contrary to the public interest because the garage would be aesthetically pleasing, and would be used for much needed storage.

Mrs. Slama said denial of the variance would be a hardship because the zoning restriction as applied to their property was impractical because the lot was limited due to the outcropping of ledge. She also said putting the garage any place else would interfere with the open space on the property, and would also intrude on the driveway.

She said granting the variance would mean substantial justice was done because the garage should not impact her neighbors, and the garage would be located in an area that was pleasing to the eye and would not intrude on the driveway. She said it was the most logical location for the garage.

She said granting the variance would not be contrary to the spirit and intent of the Ordinance because while the 50 ft. setback was reasonable in some cases, in this case it was not because of the unique setting of the property.

She noted a letter from the Grafs, abutters across the street, which said they had no objection to the building. Chair Gooze read the letter from the Grafs.

Mr. Smith said the Slamas already had a two-car garage, and asked why they needed another.

Mrs. Slama said they had two cars, and no storage space.

Chair Gooze asked for details on the ledge outcrop on the property.

Bob Gray, of Gray Construction provided details on this. He said there was a large amount of ledge on the property, including the area of the 50 ft. setback, so the proposed location for the garage was ideal.

Chair Gooze asked about the possibility of locating the garage on the other side of the house, and Mrs. Slama said there was a garden there.

Mr. Bogle said he understood that tucking the garage in the corner would be nice, but he said this was a very big lot. He noted it was actually a 35 ft. setback that the Slamas had to observe, and said he thought a garage could be positioned within the 35 ft. setback. He asked the Slamas if they could observe this.

Mrs. Slama said if they did, this would have to place the building in a location that would break up the open field. She also said the building would be a lot more visible as one drove up the driveway, and also said constructing the garage might be more expensive because of the ledge outcrop.

Mr. Sievert asked for details on where the driveway was, and also asked if test pits had been done to determine if there was ledge at the proposed location for the garage.

There was discussion about this, including the fact that the turnaround for the driveway was part of what was considered in determining where the garage should be located.

Mr. Sievert asked why they couldn't put the building more toward the left, so that it would stay toward the corner, but would make the 35 ft. setback.

Mr. Gray said it looked like there were outcroppings of ledge in that area.

Mr. Slama said the garage could not be put closer to the garden because there was a septic system in that area.

Mr. Sievert suggested other possible alternative locations for the garage, and there was discussion about this.

Mr. Smith suggested another possible location for the garage, and Mrs. Slama said this would require an additional driveway.

*Chair Gooze opened the public hearing.*

There was no one to speak for or against the application

*Chair Gooze closed the public hearing.*

Chair Gooze appointed Mr. Sievert as a voting member of the Board for the evening.

Mr. Bogle said that ledge outcrops were common, and said if the garage was built where it was proposed, fill would be needed, or else the area would have to be blasted. He noted that no test pits had been done to determine if there was ledge, but said he suspected there was ledge under the proposed location.

He said he thought the property was big enough so that an alternative location could be found. He said he didn't see hardship, and said it would be contrary to the spirit of the Ordinance to locate the garage so close to the side setback.

He said the area just off of the driveway turnaround would be a much easier location for the garage, with no outcrop and a gentler incline. He said he thought there was plenty of room to do this, and said that based on the lack of hardship, and the fact that granting the variance would not be in the spirit and intent of the Ordinance, he didn't think he could vote for the variance.

Mr. Smith said he understood the Slama's desire to place the garage in an area that was more aesthetically pleasing, but said he didn't think this amounted to a hardship issue. He said when he was out at the property that day, he thought the garage could be located elsewhere, and didn't see that placing it somewhere else would interfere with the reasonable use of the property. He noted the property was located in the RC District, and said he believed it would be contrary to the spirit and intent of the Ordinance to grant the variance. He said for this reason, and because he did not feel there was a hardship, he could not support the variance request.

Mr. deCampi said he was very familiar with the property and adjoining areas, noting he had even considered buying the property at one point. He said nobody would possibly be able to see the garage, even from the properties in the area that were not yet built on.

He said he didn't think the application technically met the variance criteria, but said this was a victimless crime, in that if it were put in at this location, it wouldn't inconvenience anybody. He said there was a beautiful view on and of the property, and said if the garage was moved to the other side, it wouldn't remain. He therefore said that while he didn't think the application met the technical criteria for granting a variance, he also didn't feel this was an unreasonable thing for the Slamas to ask for.

Mr. Sievert said he didn't have that big a problem with this application, and said it sounded like the applicants had given a lot of thought to their property, and said he agreed with the idea of having a property work out the way an owner wanted it to. He said granting the variance would not be contrary to the public interest, and also said it wouldn't be contrary to the spirit and intent of the Ordinance because the purpose of setbacks was to provide separation, and in this instance there was nobody nearby.

He said substantial justice would be maintained in granting the variance, and also said doing so wouldn't impact property values. But he said he didn't think the variance request met the unnecessary hardship criterion, because he didn't see that the proposed location was the only place the garage could go. He also said that despite what he had heard, he didn't see that there were special conditions of the property.

Chair Gooze said this was an area variance. He said he didn't think granting the variance would be against the public interest. He also said the spirit and intent of the Ordinance was to provide some space between the properties, and said granting the variance in this instance wouldn't be against this. He said he couldn't say there would not be substantial justice, or a decrease in property values, by granting the variance.

But he said he did have a problem with the hardship criterion, and whether the special conditions of the property made the variance necessary. He referenced a court case where the applicants wanted to enlarge their house, and the court determined that because of wetlands on the property, the application met the hardship criterion.

He said except for the aesthetic consideration, the garage could be located someplace else on the property. He said everyone had their idea of aesthetics, and where they wanted to put things on their property. But he said a request for variance had to meet all the criteria, and he said he didn't think it met the hardship criterion.

Mr. Sievert said he thought that aesthetics was enough of a consideration, but said the applicants hadn't proven that they couldn't achieve the same result in another location. He also said it was hard to tell if what they were proposing was really unreasonable.

Mr. deCampi said the applicants hadn't sold their concept effectively, and said he wouldn't be leaning toward granting the variance if he didn't know the property as well as he did.

***Henry Smith MOVED to deny the APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to build a two-car garage within the sideyard setback at 367 Durham Point Road, in the Residence C Zoning District, based on the fact that it effectively does not meet the hardship criterion, and does not meet the spirit and intent of the Ordinance.***

There was discussion as to whether there was consensus among Board members that the variance request did not meet the spirit and intent of the Ordinance, and whether this should be in the motion. It was agreed to leave this in the motion.

***Linn Bogle SECONDED the motion, and it PASSED 4-1, with John deCampi voting against it.***

Chair Gooze called for a five-minute recess at 8:00 P.M.

The meeting resumed at 8:05 P.M.

- B. PUBLIC HEARING** on a petition submitted by Sharon Somers, Donahue, Tucker & Ciandella, Portsmouth, New Hampshire, on behalf of New Hampshire Beta Association of SAE for an **APPEAL OF ADMINISTRATIVE DECISION** from a September 1, 2005, letter from Zoning Administrator, Thomas Johnson, regarding the use and the occupancy of a vacant fraternity house. The property involved is shown on Tax Map 2, Lot 11-2, is located at 28 Madbury Road, and is in the Residence A Zoning District.

Chair Gooze OPENED the Public Hearing on this application.

Attorney Sharon Somers represented the applicant. She noted she had submitted two packets to the Board, the original appeal, as well as supplemental information.

She said the characterization of the use of the property was erroneous, and said she was present to discuss this. She said New Hampshire Beta Association, operating chiefly as Sigma Alpha Epsilon, had owned and operated the house in question since 1928. She said the SAE chapter continued in existence from the 1920s to 2002, when it chose to voluntarily close on a temporary basis. She said it did this in order to reassess, regroup, and start afresh.

Attorney Somers explained that Tau Kappa Epsilon fraternity (TKE) moved in subsequent to this, and acted as a placeholder for the nonconforming use. She noted that during this time, SAE did continue to use the property occasionally for meetings.

Attorney Somers said the September 1<sup>st</sup> letter from Mr. Johnson indicated concern about the status of the house since TKE had moved out in June. She said that based on Articles of Agreement, it was clear that there currently was a functioning fraternity in the building, Zeta Epsilon Zeta (ZEZ).

She also said she had provided evidence/information that NH Beta Association was in good standing with the State, and had also said she had indicated the long range plans of the organization, which were to reactivate the local SAE chapter. She said they intended, with the full support of the national organization, to get things off the ground, and to work closely with

UNH to make sure things were done properly. Attorney Somers provided details on the process that was planned to reactivate the fraternity, and noted this would take some time to accomplish.

She said a nonconforming use could continue unless there was a clearly articulated intention to abandon this use. She said it was clear by the actions of SAE that it did not intend to abandon the use of the property as a fraternity, and said it had continually maintained this use in some fashion since the 1920's. She also noted that since there had recently been an operating fraternity on the site, there was no intent to abandon the use.

Attorney Somers said SAE acknowledged the context in which the Town's September letter was issued, and that things had gotten off to a rocky start. But she said the Board of Directors had taken steps to work with members, to make sure further incidents didn't happen. She said the occupants of the house had been told that if the questionable conduct continued, they would be evicted immediately. She provided additional details on what SAE was doing to improve the situation.

Chair Gooze asked for clarification on what the nonconformance involved, and there was discussion about this. He also received clarification that the previous fraternity at the house after SAE ceased to have fraternity members there in 2003 was a recognized fraternity, but the current fraternity at the house, ZEZ, was not.

Mr. deCampi said he didn't see where Mr. Johnson had erred in any of this, but said he was not opposed to having the property remain a fraternity house. He also said he thought the application for an appeal of administrative decision was faulty, and that the applicant should have gone for a variance.

Attorney Somers said she felt the administrative decision approach was appropriate. She also noted there was a limited amount of information available to Mr. Johnson when he made his administrative decision, and said since that time, she had provided additional information on the status of ZEZ and SAE.

Chair Gooze noted that the letter said if SAE didn't have a recognized fraternity in the house by June 2006, the fraternity use would be considered abandoned. He asked Attorney Somers if she was saying it could meet the deadline.

Attorney Somers said their only concern was to maintain the right to keep this use, and to have a place to service the needs of SAE. She said if the organization could meet the deadline, and the Town agreed that this took care of the issue, SAE would be happy. She said she didn't know if that recognition would take place by then, but said if there was consensus that it was doable, this whole issue might become academic.

Mr. Bogle asked if the SAE chapter got started by June 1, 2006, would ZEZ be kicked out.

Attorney Somers said if they acted appropriately, the intention was to have the organization there as an operating fraternity. She said she didn't know if SAE members would be there by then, and if not, SAE would like to continue to be able to have ZEZ there until SAE could move in as a fully operable chapter.

Mr. Bogle noted that ZEZ had become an organized fraternity on Sept 29<sup>th</sup>, while Mr. Johnson's letter was dated September 1, 2005. He said there seemed to be a major problem with the timing of all of this.

Attorney Somers said there had been some rocky times, but she said the bottom line was that ZEZ was a fraternity that was organized and recognized as a corporation.

Mr. Bogle asked for details on SAE in recent years.

Attorney Somers said SAE was still the property owner, and met from time to time as a corporation, so did continue to exist in that capacity, but not as a functioning chapter of fraternity brothers.

Mr. Sievert asked if the grandfathered status could be lost because an organization at the house was not a fraternity, or because the property would be vacant.

Mr. Johnson said the fact that there wasn't a UNH recognized fraternity in the house was the key issue. He said ZEZ was organized as a fraternity after he sent his letter so had operated illegally, and was not a recognized fraternity.

Chair Gooze asked if ZEZ was illegal now because it was not a recognized fraternity, or because it was using the property as a rooming house.

Mr. Johnson said there was no recognition of the fraternity by UNH, and no national recognition. He provided additional detailed information on this. There was discussion of the variance previously granted to SAE.

Mr. Smith asked if ZEZ was recognized by the national fraternity.

Attorney Somers said ZEZ was not yet recognized by the University.

Mr. Smith asked how many people lived in the house and was told there were about 7-8 people there. He then asked how they became members.

Attorney Somers said they did this on a voluntary basis, as members of a corporation. She said they had signed Articles of Agreement, and were in the process of creating bylaws.

Mr. Smith said it was not clear whether there was a legitimate fraternity in the house right now.

Attorney Somers spoke about the variance granted to SAE in 1998, and said for it to go away, it would have to be litigated.

Mr. Johnson said he agreed with Attorney Somers that the variance still stood, but said SAE still needed to meet the conditions of the variance, and hadn't done this.

**Ed Spuler, New Hampshire Beta of SAE**, said the organization had always been recognized by the national fraternity, and he provided details on this. He also said that SAE had been asking ZEZ if it had bylaws, but had not heard back on this yet, so didn't know if it had them.

Mr. Smith noted the letter that said SAE was not a chapter.

Mr. Spuler said it was correct that SAE was not a chapter, having voluntarily shut down in 2002 because of activities of its membership, but he said it was a corporation.

Chair Gooze said the previous variance referenced a time limit, and he asked Attorney Somers what this referred to.

Attorney Somers said she was not sure, and discussed a possible reason for this.

Chair Gooze said the previous variance granted to SAE in February of 1998 referred to fraternity. He said that the 1997 definition of fraternity included the fact that it had to be recognized by the University.

**Scott Chesney, Director of Residential Life, UNH**, said Mr. Spuler had spoken to him last spring about the possibility of beginning the process of re-colonizing SAE. He said the University had looked forward to that new beginning, and he provided details on this.

He said he was then surprised on opening weekend to see people living at the house, noting he had thought TKE would leave, and the house would then be under renovation. He said he asked some guys at the house why they were there, and said they indicated they weren't fraternity members of any kind, and just happened to be renting the place. He said it was basically a boarding house, and said that the police had significant problems with the occupants the next weekend, when there was a massive party of over 200 people, where there was underage drinking. He also said there had been other parties at the house.

Mr. Chesney said the house was currently unsupervised, and he implored the Board to support Mr. Johnson's Administrative Decision, which he said he fully supported. He said ZEZ was not recognized by UNH, and was formed in late September, noting it seemed clear that it was formed in reaction to Mr. Johnson's letter.

He said it was a prominent fraternity house, and said students thought it was a fraternity. He said because of the massive party there, articles were written about UNH not controlling its fraternities. He said this situation had cast significant doubt as to whether the University would want to work positively with SAE, and said it seemed like a breach of the collaboration that Mr. Spuler had talked about.

Mr. Chesney said SAE had not contacted him about re-colonizing the house in January, and he said this was not going to happen.

Chair Gooze asked if SAE had a response to this.

Mr. Spuler said what Mr. Chesney had said was a mischaracterization of what had happened, and he provided details on this.

Attorney Somers said she wanted to reiterate that SAE wanted to make sure there were not individuals living at the fraternity house who were acting inappropriately, and that she just wanted to make sure that when SAE had pledges, it could start the chapter from the ground up. She said SAE was simply trying to ensure its right to do this.

Mr. Johnson said this application was an appeal of his September 1<sup>st</sup> letter, and said he felt the appeal should be denied. He noted his September 9<sup>th</sup> letter ordering ZEZ to vacate the house because of various fire and police calls, and said that since that time, there had been a large gathering at the house, and additional calls. He said there was still an illegal fraternity living there, so the house was either a rooming house or an apartment building.

He said if this matter were turned over to the Town Attorney, there would potentially be \$38,000 in fines. He said SAE was talking about possibly being in compliance in June of 2006, but he said that nobody currently had a handle on what was happening with the property.

*Chair Gooze closed the public hearing.*

Mr. deCampi said although the discussion had wandered all over the place, this was a narrow issue - whether Mr. Johnson's Administrative Decision was right or wrong. He said the appeal had to fail because no logical reason had been offered to find it in error.

Mr. Smith said there was no reason to think Mr. Johnson made a mistake in his September 1<sup>st</sup> letter.

Mr. Bogle said he agreed with this. He said he would be perfectly happy to see SAE continue as a fraternity, and said they had until June of 2006 to make things right. He said he hoped it could do that.

Chair Gooze said the statement in Mr. Johnson's September 1<sup>st</sup> letter about abandonment by June 1, 2006 was correct. He said the fraternity that was in the house when the variance was given was a recognized fraternity, and therefore if there wasn't a recognized fraternity in the house by this date, it lost its status. He said a fraternity that wasn't recognized would be more difficult for the neighborhood, and wouldn't be controlled as well.

He also spoke about the fact that Mr. Johnson's September 1<sup>st</sup> letter said this might be an illegal dwelling. Chair Gooze said because the fraternity in there was not recognized, and because of statements made by Attorney Somers, this didn't seem to be a bona fide fraternity. He said he therefore felt that all of the parts of Mr. Johnson's letter held true at the present time. He said SAE had the opportunity to get recognized by June of 2006, so it would not lose its status.

***John de Campi MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION from a September 1, 2005, letter from Zoning Administrator, Thomas Johnson, regarding the use and the occupancy of a vacant fraternity house. The motion was SECONDED by Henry Smith, and PASSED unanimously 5-0.***

Chair Gooze called for a five-minute recess at 9:10 P.M.

The meeting resumed at 9:15 P.M.

- C. 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.

Chair Gooze opened the public hearing.

Jack McGee, Attorney for Mrs. Wallace, said she was seriously ill and could not be at the hearing. He provided details on the history of the property, as he had at the previous variance request hearing. He noted that the previous variance request was for two units in the garage, but it was denied, so Mrs. Wallace was now asking that one unit be allowed.

Attorney McGee said that since the September hearing, he had gone through records on the property. He said these records were a little sketchy before 2001, which might explain the fact that there was no certificate of occupancy. He said that at the September hearing, the Board seemed to have a great deal of problem with the illegal use of the property as a single unit dwelling with a duplex. But he said it seemed clear that the usage of the property in 1990 was quite legal, and he provided details on this.

He noted that, as he had pointed out in September, even if it were an illegal use, Mrs. Wallace was an innocent party to this. He asked the Board to look at this variance request in its totality.

Attorney McGee next went through the variance criteria. He noted the Board hadn't had a problem with two units, in terms of the potential impact on surrounding properties. He said this variance also would not result in a negative impact on surrounding properties, noting there was no one that evening to speak against the variance request.

He said he couldn't think of how it would be against the public interest to allow something to continue that had been going on for 15-20 years. He also said it would be substantial justice to grant the variance, noting that here was a structure that had been converted to a residential use, and it seemed to be an economic waste, and unfair to require Mrs. Wallace to make it into some other type of structure.

Attorney McGee said granting the variance would not be contrary to the spirit and intent of the Ordinance because the goals and objectives as stated in the Master Plan would be accomplished. He said the buildings were well set back, and promoted the very openness and lack of intense development envisioned by the Ordinance and the Master Plan for this part of Town. He provided details on this. He spoke about what was intended by putting Mrs. Wallace's property in the new Route 108-OR District.

He noted the changed rules concerning the hardship criterion, and said that when dealing with use variances, the rules were much relaxed. He provided details on this. He said the question has

to be asked whether the restriction as applied to the Wallace property interfered with its reasonable use, considering the unique setting of the property in its environment. He said the Wallace property met this test.

Attorney McGee also noted the goals of the Ordinance for the district Mrs. Wallace's property was in, and said it met all of these, and probably better than anything else that could be put in there. He also noted the hardship criterion, that the variance would not injure the public or private rights of others. He said there was no one present to complain about the variance request, so it clearly met this third test.

Attorney McGee pointed out that under the current Ordinance, if Mrs. Wallace included the restriction that no one under 55 could live in her units, they would be permitted. He said he was not sure what the difference was between having someone 54 and 55 living there, and said Mrs. Wallace was asking for basic fairness.

Mr. Smith asked Attorney McGee to explain exactly what was being requested.

Attorney McGee said the variance request was that the garage should be allowed to be used for one independent residential dwelling unit.

Mr. deCampi asked for clarification on the reason why the variance was being requested that evening.

Mr. Johnson said approval wasn't granted for a duplex previously. He said what was being asked for was a second principal dwelling unit on the property, which was not permitted in the OR District. He said the applicant could potentially expand a nonconforming use with a conditional use permit issued by the Planning Board, and could have an accessory dwelling unit in an accessory structure, with some limitation. But he said what had been advertised that evening was that Mrs. Wallace was asking for a second principle dwelling unit.

There was detailed discussion about this by Board members, and whether a use variance could cover this as well.

Attorney McGee was asked to provide further clarification on what Mrs. Wallace was asking for in her application. He said the applicant was asking for a separate dwelling unit, so there would be two principle uses.

Mr. deCampi said in other words, Mrs. Wallace was asking for an approximately 800 sq. ft. separate structure.

There was discussion with Attorney McGee as to whether Mrs. Wallace would be agreeable to using an accessory apartment approach.

Attorney McGee said Mrs. Wallace was looking to get an independent unit that would be used by a family, or no more than three unrelated individuals. He said Mrs. Wallace was not willing to concede that she didn't have a dwelling unit. He provided additional details on this.

There was discussion about what a family meant.

*Chair Gooze opened the public hearing.*

**Madeline Lockhardt, 73 Durham Point Road**, said she was the owner of Oyster River Real Estate, and said she did not feel granting the variance would decrease the value of surrounding properties. She also said she had been told by the Wallaces that the garage had been used as single residential unit since at least the mid 1980's.

*Chair Gooze closed the public hearing.*

Mr. Johnson read from Section 175-28:D concerning enlargement of a nonconforming use, which said a conditional use permit was required for this. He said 175:21:D said the Planning Board was required to do the review for this. He said this application had been advertised as a separate dwelling unit that was being requested.

Chair Gooze said if the Board allowed this variance, there was the potential to allow it essentially as a duplex, which allowed much higher density than would be the case for an accessory apartment. He said this would be contrary to the spirit and intent of the Ordinance. He also said he didn't think the variance request met the hardship criterion of the Zoning Ordinance affecting the property in a negative way.

Mr. Sievert asked how this was an enlargement of a nonconforming use, and Mr. Johnson provided details on this. He said there was a single-family home on a septic system, as well as an illegal duplex.

Mr. Sievert said the property had been a duplex over the years, and there was no enlargement of the building being proposed.

Mr. Bogle noted the complete lack of records on the property by the Town and the owners, and said he had a problem with this. He noted that state septic system records, including a site plan for the second building, might be useful. He said he would be willing to allow an accessory apartment in an accessory structure, but not two separate homes on the lot, because this was against the spirit and intent of the Ordinance.

Mr. Smith said he had thought Mrs. Wallace was asking for a single accessory dwelling unit, but was informed this was not the case. He said what was proposed would mean there could be two separate dwelling units, with three unrelated people in one, and three unrelated in the other. He said this flew in the face of the Ordinance, and said he would be against granting the variance.

Mr. deCampi said he was concerned about what Mr. Johnson had said about whether it was in the Board's right to do this. He said he would be all right with granting a variance for an accessory dwelling unit of a certain number of square feet, perhaps between 820-950 sq. ft., which would give Mrs. Wallace what she wanted. But he said he was uncomfortable with allowing a second, separate dwelling unit on the property. He said he was not sure if the Board could grant this, and if it was in the Town's best interest to grant it. He said it seemed to be

contrary to the spirit and intent of the Ordinance. He said it seemed to give the Planning Board the right to do what was being asked here, and not the ZBA.

Mr. Sievert said if the current use of the property was illegal, he questioned if it was really a nonconforming use. He also said that if it was a nonconforming use, he questioned whether the ZBA was allowed to give or deny a variance, if the Ordinance said the applicant could go for a conditional use with the Planning Board.

Chair Gooze asked what Mr. Sievert's position was if one went with the assumption that this was an illegal use, so a use variance was needed.

Mr. Sievert also said if this was considered as a use variance, he believed it met all the variance criteria. He said he didn't think the variance request should be denied after years of this use, which was more than they were now asking for. He said they had clearly pointed out that based on the existing regulations at the time, it was allowed. He said it couldn't be determined whether the illegal use was maliciously done.

Mr. deCampi said the Board had classically taken the view that if something was supposed to be applied for, and it wasn't applied for, it didn't exist. He said that was what this was.

Chair Gooze said he agreed with this, and provided details on this.

Mr. deCampi said he would like to find a way to grant some relief to the applicant, because he felt some relief was in order.

There was discussion that it would be appropriate for the applicant to come back with something else for the property.

***Linn Bogle MOVED to deny the 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 completely independent one unit dwelling because it does not meet the spirit and intent of the Ordinance, the hardship criterion, and is against the public interest.***

Mr. Johnson suggested that instead of going through the variance criteria, it would be better to talk about the conditional use process. Board members disagreed with this.

***The motion was SECONDED by John deCampi, and PASSED 4-1, with Michael Sievert voting against it.***

## **II. Board Correspondence and/or Discussion**

- A. REQUEST FOR REHEARING** on a September 13, 2005, denial by the Zoning Board of Adjustment 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 two-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.

Mr. deCampi recused himself on this matter.

Chair Gooze noted there were items on the list in the application that referred to the structure as being permitted, but he said he didn't feel the Board had made a mistake on this. He said he didn't see anything in the 54 points made by the applicant that indicated any new evidence, or anything the Board hadn't considered at the previous hearing.

Mr. Smith said he didn't see that the Board had made a mistake, or that there was any new evidence.

Mr. Bogle said he didn't see any mistakes the Board had made, or any new evidence.

Mr. Sievert said he didn't remember that the 1990 ordinance allowed duplexes, so this seemed like new information.

Chair Gooze said he didn't feel this new information provided had any bearing, given that this wasn't a permitted use.

Mr. Sievert said if the use was permitted before and met the requirements, and now was illegal, perhaps a variance should be granted, since the use met the recommendations of the Master Plan, which said an existing residential use could be expanded, although new residential uses couldn't be developed. He said that as long as he had lived in Durham, it had been very clear that this was an apartment.

There was discussion about this.

***Henry Smith MOVED to deny the request for rehearing. Linn Bogle SECONDED the motion, and it PASSED 4-1, with Michael Sievert voting against it.***

#### **IV. Approval of Minutes**

##### **A. September 27, 2005**

Page 4, 9<sup>th</sup> paragraph, should read "Mr. McNitt said he preferred the words.."

Page 5, bottom paragraph, should read "Newington", not Newmarket.

***Linn Bogle MOVED to approve the September 27, 2005 Minutes as amended. The motion was SECONDED by Henry Smith, and PASSED 5-0.***

##### **B. October 11, 2005**

Page 3, 3<sup>rd</sup> full paragraph, should read "..put more of a burden on..."

Page 4, top paragraph, should read "..by compromising the clarity..."

5<sup>th</sup> paragraph, should read "..one of the conditions agreed upon by the owners..."

Page 9, 3<sup>rd</sup> paragraph from bottom, should read "..decision until further clarification, and with the..."

Page 10, 6<sup>th</sup> paragraph, should read “..until there was a definite clarification.”

Page 13, 9<sup>th</sup> paragraph, should read “..there was nothing in the Ordinance concerning this.”

Page 17, 5<sup>th</sup> paragraph from the bottom, should read “He said the applicants reserved the right...”

Page 18, 5<sup>th</sup> paragraph from the bottom, should read “..did know about the more than three unrelated rule, and said he would take his chances.”

Page 21, 2<sup>nd</sup> paragraph under Other Business, should read “Chair Gooze..”

***John deCampi MOVED to approve the October 11<sup>th</sup>, 2005 Minutes as amended. The motion was SECONDED by Henry Smith, and PASSED unanimously 4-0-1, with Linn Bogle abstaining.***

Mr. Bogle said that there was something important that should have been included in the October 11<sup>th</sup> Minutes, and was not. He said that at the October 11<sup>th</sup> meeting, Elizabeth Hagner had stated that she had talked to the real estate person, and that person had told Mr. Herring about the three unrelated rule, and he had said he would take his chances. Mr. Bogle said this was not reflected in the minutes. He also said leaving important testimony out of the minutes happened quite often.

Chair Gooze noted the issue of whether alternates on local boards should participate in deliberations on applications. He said there were a number of points of view on this, but said he liked having alternates participate. He asked Board members what they thought about this.

Mr. deCampi said if alternates felt they couldn't contribute to a meeting unless they were chosen to vote on certain Items, it would lower their interest in being on the Board.

Chair Gooze said he was ok with allowing this, but pointed out some of the perspectives presented at the recent planning conference on the potential problems of allowing this.

Mr. Smith noted he had previously been taken aback at a comment made by Tim Bates that alternates should have to sit in the audience during deliberations, and had discussed this with Ben Frost. He said he didn't agree, and felt the alternates should be at the table, and should be involved in the discussions.

There was discussion as to whether there had been any court cases on this.

Mr. Bogle said this was strictly at the discretion of the Board.

Mr. Johnson noted there was a request for rehearing being prepared by either the Town Council's or the Planning Board's Attorney, concerning the ZBA's 10 Madbury Road decision. He provided details on possible scheduling of the rehearing so the issue could be resolved. There was discussion about this.

Chair Gooze said he would like to present to the Board some of the information he had obtained at the recent planning conference at Loon Mountain. There was discussion about this.

There was discussion on the Agenda for December, and whether the rehearing on 10 Madbury Road could be on it.

**V. Adjournment**

***Michael Sievert MOVED to adjourn the meeting. The motion was SECONDED by John deCampi, and PASSED unanimously 5-0.***

Adjournment at 10:45 p.m.

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John de Campi, Secretary