

# D-R-A-F-T

**ZONING BOARD OF ADJUSTMENT MINUTES  
TUESDAY, DECEMBER 13, 2005  
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL  
7:00 PM**

**MEMBERS PRESENT:** Jay Gooze; Henry Smith; Ted McNitt; John deCampi; Linn Bogle;  
Myleta Eng Michael Sievert

**MEMBERS ABSENT** None

**OTHERS PRESENT:** Code Enforcement Officer Tom Johnson

## I. **Approval of Agenda**

Chair Gooze noted there was a long agenda, and the meeting might therefore have to be continued, so this would be decided later. He said although requests for rehearing were generally addressed after applications were heard, the Agenda should be changed so that if the Board agreed to rehear the Mulligan variance application concerning 10 Madbury Road, this application would be heard directly after that. He said the other requests for rehearing would then be tabled, and would be heard after the other variance applications had been heard.

There was discussion by the Board that for scheduling reasons, the requests for rehearing all had to be heard that evening.

Chair Gooze also noted that Agenda Item III A and B concerning the Hartmann applications had been withdrawn.

***Henry Smith MOVED to approve the proposed amendments to the agenda. John deCampi SECONDED the motion, and it PASSED unanimously 5-0.***

Chair Gooze said if Attorney Barbara Loughman wished to discuss the letter about the recusal matter, he would like the Mulligans to have the opportunity to respond anything that was said concerning them.

Attorney Loughman explained that a letter had been sent to a ZBA member asking him to recuse himself. She said she was not suggesting that this Board member had acted in bad faith, or had intentionally done anything improper. She said the basis for the disqualification was that he had a meeting with Mrs. Mulligan at the fraternity house at 10 Madbury Road prior to the ZBA meeting. She said this suggested that the Board member had engaged in a personal investigation of the facts regarding the request for variance, and said she believed this was inappropriate.

Attorney Loughman said this was not fair to members of the public or other parties who might have an interest in the application. She said this was unfair because if a Board member was going to rely on information obtained outside the hearing process, the other people participating, in this case the Town Council and Planning Board, didn't have the opportunity to respond to that

information, and didn't even know what it was. She said if he did discuss the application or information about it, she would ask that he recuse himself.

Chair Gooze asked if this implied that Board members couldn't individually go out to a site, and look at it, and if the owner was there, couldn't ask him to show what the variance request was about. He said Board members had done this as long as he had been on the ZBA.

Attorney Loughman said many boards went out on site walks as a board with the property owner, but she said it was a problem when there was discussion off the record.

Chair Gooze said he was talking about getting information such as where the applicant wanted to put a driveway. He said he had done something like this recently, and didn't ask the owner anything about the case, but wanted to see for his own benefit what the issue was so he would be more informed when he heard the application.

Attorney Loughman said there wasn't a problem with looking at the property, but said the problem with talking to the owner was that there was no control over what the property owner might say. She said there was no way to know what the discussion was about.

Board member Henry Smith said he appreciated that Attorney Loughman had brought this issue up, because sometimes these things needed to be clarified. He quoted from the Attorney Loughman's statement about the rehearing statement, and from the RSA 673:14 concerning disqualification of members. He noted the statement about official duties, which Attorney Loughman had referred to, and quoted her words "given that Board members may consider their own knowledge of the property, it may not be unlawful for a single Board member to go and take a look at a property that is a subject of an application before the Board, on his or her own. However it is improper for a Board member to have an ex parte discussion of the merits of an application with the owner.

Mr. Smith said he clearly agreed with this, and had issued a response to Administrator Selig, in which he said from his early days of being on the ZBA, he was very aware of this concept. He said the idea (of a site visit) was to obtain any additional information that might be helpful in evaluating the particular request to the ZBA for a variance, and that there be no discussion of the request whatsoever. He said this cardinal rule had been clear to him since he had begun serving on the ZBA, and said he was especially careful about this when he was the Chair of the ZBA

Mr. Smith said he felt he had acted in good faith and above board, and did not for a moment discuss the merits of the application with Mrs. Mulligan. He said he had not done anything improper, inappropriate or wrong, and therefore could not see any reason why he should have to recuse himself on this issue.

Mrs. Mulligan said she and Mr. Smith met at the property, and had a very quick visit, with very few questions. She said he just wanted to see the property to see if there was anything unique about it, and said she didn't think he obtained any significant facts that weren't shared at the public hearing. She said she didn't see that any conversation went on that shouldn't have gone on.

Chair Gooze suggested that the Board could take a vote on whether Mr. Smith should recuse himself. He said he personally didn't think he needed to.

Ms. Eng was made a voting member on this issue.

After some discussion the Board informally voted that Mr. Smith did not need to recuse himself.

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

- A. **REQUEST FOR REHEARING** by the Durham Town Council, Durham Planning Board and Assistant VP for Student and Academic Services at UNH, Scott Chesney, on an October 11, 2005, approval by the Zoning Board of Adjustment on a petition submitted by Ted & Shelley Mulligan, SEJ Properties, LLC, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 to permit the occupancy of a fraternity house with non-fraternity members. The property involved is shown on Tax Map 4, Lot 16-0, is located at 10 Madbury Road, and is in the Residence A Zoning District.

Mr. McNitt asked why Mr. Chesney was a co-applicant on this request for rehearing. There was discussion about this.

Mr. deCampi said he didn't have a problem with Mr. Chesney being a co-applicant, but he said he would check through the State RSA's to see if this was appropriate.

Chair Gooze said he had read through all the points made by Attorney Loughman as to why the application should be reheard. He said there were some points that he could find were reasons for rehearing, because of new evidence or on procedural grounds.

He noted that Item 2 b. referred to his own opinion that the conditions of the variance could be used as part of the argument of the uniqueness of the property that created hardship. He said there was enough question about this in his own mind about using this to cause him to think this was something he may have made an error on.

He also noted Item #3, that the Town Council had new evidence that it was not the case that the owners' property was unique because it didn't have a dining room and kitchen. He agreed this was new evidence that perhaps would affect the decision.

He said a third reason he thought the variance request should be reheard that the Board might have made a mistake in granting the variance, using just the term fraternity. He said there were other kinds of fraternities in Town, and if the Board did it for every one, this would almost be a change to the Ordinance. He said there was nothing unique about this fraternity.

Mr. Bogle said he wanted to grant the rehearing, noting that personally he felt the Board had erred in its previous decision. He said it was a unique situation that a decision of the ZBA was being challenged by the Town Council, the Planning Board, and the University. He said he agreed with Chair Gooze that the previously approved variance set a precedent that logically would have to be extended to all other fraternities/sororities in Durham, and said rather than do this, it would be better to turn this matter back to the Planning Board and ask them to redefine, or redraft the Ordinance to allow boarders.

Mr. deCampi first said that from reading through the RSA's, it appeared that it was appropriate for Mr. Chesney to be a co-applicant on the application.

Mr. deCampi said he thought the wording of the Ordinance was unfortunate, but said after Mr. Grant had testified at the previous meeting, he was persuaded the Board had erred in its previous decision, and voted to overturn the granting of the variance. He said he thought this emphasized

that the spirit of the Ordinance expressed that there should not be non-fraternity members living there. He also noted that he generally favored re-hearings, so was in favor of doing this.

Mr. McNitt said he was in favor of rehearing the application.

Mr. Smith said he agreed with most of what he had heard, and thought the rehearing should be granted.

***John deCampi MOVED to rehear the APPLICATION FOR VARIANCE from Article II, Section 175-7 to permit the occupancy of a fraternity house with non-fraternity members. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.***

- C. **PUBLIC REHEARING** on an October 11, 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.

Mrs. Mulligan requested that this third rehearing be continued, noting she and her husband were shocked that this had occurred, and that they had not sought legal counsel prior to this decision.

Mr. deCampi noted that there had been one rehearing prior to this one.

Mr. deCampi and Mr. McNitt said the applicant was entitled to counsel. Chair Gooze said he wasn't quite sure what to do with this.

**Annmarie Harris, 56 Oyster River Road**, said that notice was provided of the possibility that this application might be reheard that evening, and said members of the public should have the right to speak that evening.

Attorney Loughman said the public notice sent out made it very clear that if the ZBA voted in favor of rehearing the variance application, it would be reheard this evening.

Chair Gooze said that was how he felt about this.

Mr. Smith asked if the Board could hear this, since members of the public were present, and could then continue the hearing.

Ms. Mulligan said they had tried to schedule legal counsel, but explained that they hadn't wanted to put the money forward if it was unnecessary, and frankly were surprised at the decision.

Attorney Loughman said she felt that the Board should either have the rehearing that evening or not, but did not think the Board should allow the public to speak that evening and then continue the hearing until another night. She provided details on this.

There was additional detailed discussion about this. Chair Gooze noted that when continuances were granted by the ZBA, it was with the approval of both sides. He said he would like to go ahead with this.

***John deCampi MOVED to deny the request for a continuance of the rehearing of the variance application. Henry Smith SECONDED the motion, and it PASSED unanimously 5-0.***

Mrs. Mulligan provided details on the variance application, which had previously been presented before the ZBA, and approved. She explained that a lot of the conditions placed on the approval were associated with conditions she and her husband had put on boarders. She said their intention was not to make the property into a boarding house, and said they were just looking for a little flexibility if there was a vacancy. She said this would be for short periods of time, and wouldn't change the structure.

She said if fraternity members thought allowing a few boarders would change the function of the building as a fraternity, they would never allow it. She also noted that historically, boarders had existed in fraternity houses in Durham on a very limited basis, and this had never been a problem. She said the Zoning Ordinance had been in place for a long time, but hadn't been enforced until the last few years.

Chair Gooze asked if the leases were full year leases or 9-month leases.

Mrs. Mulligan said the current fraternity in the house had a 12-month lease.

Chair Gooze asked if someone moved out early, if he was still obligated to pay the lease, and Mrs. Mulligan said yes.

Mrs. Mulligan said what was unique about 10 Madbury Road was not only that it didn't have kitchens and dining rooms, but also that it was designed almost exclusively for lodging. She said this made it easier to put boarders in. She said the property really was unique in the way it was laid out, stating that as far she knew, there were only one or two fraternity houses in Durham similar to this.

Mrs. Mulligan also said she and her husband were Durham residents, so they monitored the property a lot, and cared about the relationship between the University and the Town. She said the boarders there in the past had actually made it a calmer place, but said she and her husband had no intention of changing the property into a boarding house.

She provided details on their ownership and previous leases with fraternity members, and noted things they had learned based on financial hardships that occurred. She said they had learned to structure things better now, but said it was an error to say there was now no financial hardship because they had strategically figured out ways to do this.

Mrs. Mulligan said there was still the potential of not being able to fill the building with students because of the restrictions, so the financial hardship issue potential still existed. She said she disagreed with the argument that because there was one lease, it wasn't the owner's problem, noting that if the fraternity couldn't fill the building, they would leave. She said just because they were functioning well at the moment and the building was full, it was unfair to say there was no financial hardship.

She said the new evidence she and her husband were providing was that this was a nonconforming building, in that the affiliation with the University was therefore not a requirement for fraternities in the house. She said the current fraternity was affiliated, and said it was her preference to have this. She said the information around the University therefore had to be taken into consideration.

Mrs. Mulligan also said she disagreed with the new evidence presented by the Town Council that the property was not unique because it didn't have a dining room or a kitchen. She said she had

shared it was unique that there were very few options at the house other than lodging, noting she had never said this was the only house like this in Durham, but that there were very few others.

She said the second piece of new evidence had to do with pledges only being able to join fraternities at 6-month intervals. She provided details on this.

Mrs. Mulligan said she felt this was an issue that had been blown way out of proportion. She said allowing a few boarders really did help provide the student population with a place to live, and thus kept them out of the neighborhoods. She said if one was interested in the public interest, it made perfect sense to do this. She said she was shocked and frustrated, and said she felt the ZBA had already deliberated carefully over this.

Mr. Bogle noted that the fraternity leased the whole house from the Mulligans, but asked if it was the case that if there was an empty room, the Mulligans could rent it out and thus make additional money beyond what the fraternity was paying them for the lease.

Ms. Mulligan said it was not, and said she and her husband were requesting that if the fraternity had some empty rooms, they could have their buddies move in, if they were screened.

Mr. Bogle asked what the position of Sigma Nu nationally was in regard to non-members living at the fraternity's house. He noted the ZBA was dealing with another case in which a local fraternity had taken a mortgage from the national fraternity, and one of the conditions was that if there were non-members found to be living there, the mortgage would be forfeited. He asked if this applied in this situation.

Mrs. Mulligan said she didn't think this was the same kind of situation. She said in this case, she and her husband owned the building, not the national chapter. She said the fraternity was in favor of the variance, to allow renting out the extra rooms to boarders. She said this allowed them flexibility, and said they had not voiced that this was something the national chapter wouldn't be happy with. She said the fraternity members would prefer not to rent to non-members, but said she felt they thought it was to their advantage to have boarders if needed. She notes she and her husband didn't pressure them one way or the other.

Mr. Smith asked why the Mulligans had ushered the previous fraternity out of the house

Mrs. Mulligan said the previous fraternity had a deadline to obtain 18 individually signed leases, to make sure the house was filled, and unfortunately they couldn't meet it. She said there wasn't a problem with the relationship with the fraternity or a behavior problem that had caused this, and was simply a business decision. She noted that the fraternity had said it could get some non-members to fill the house, but she and her husband said no, and were trying to get the variance in order to get the flexibility to allow this.

Mr. Mulligan said the current fraternity in the house had one lease for the entire house, and were paid X amount of dollars annually for this. He said the variance would allow the fraternity to have non-fraternity members occupy the house in order to satisfy this existing lease obligation.

Attorney Loughman said it was clear that the property didn't meet the hardship criteria, and said what Mrs. Mulligan had just said, that they rented the house for the year and received their money for this whether the rooms were full or not, made this even clearer. Attorney Loughman also noted that this year, 23 of the 24 slots were filled, so not being able to have boarders was not

a hardship. She said speculation of something that could happen that would be hardship wasn't a basis on which the ZBA could grant a zoning variance.

She said the other issue regarding hardship was whether there were special conditions of the property. She said in this case, there was a fraternity house on Madbury Road, a road that was full of fraternity houses. She said it was not the case that there was something special about this fraternity because there was no dining room and kitchen, noting there were other fraternities where this was the layout. She said if the variance was going to be granted for this fraternity house, how could the Board say no to other fraternities that could come in and say they didn't have a dining room or kitchen, or a big enough meeting room. She noted a lot of fraternities held their meetings at the MUB, so this was not something special about the property.

Attorney Loughman said the Simplex case said the Board had to consider the unique setting of property in its environment. She said this meant that as this house sat in the neighborhood, there needed to be something unusual and unique about it. But she said this was simply not the case here.

She also said the hardship claimed by the applicant was self-created. She noted that the courts had shied away from this concept for a number of years, but said the Simplex case breathed new life into the concept. She said the Supreme Court had said that a self-created hardship existed when an owner bought a property with knowledge of the zoning restrictions on it. She said that was clearly the case here. She noted that the Court had said a whole case couldn't be decided based on this, but said that when it existed, the applicant bore a heavier burden in demonstrating that a variance was justified.

Attorney Loughman said the only hardship the applicants were claiming was financial, and were not even claiming it was their hardship, but was the hardship that might exist for the fraternity. She also said they were not talking about the present situation, but were talking about a financial hardship that might happen in the future.

Attorney Loughman said the substantial justice requirement was not always a significant issue in a variance application, but was in this case. She said if the Board was going to grant a variance to a property that was not unique, it was leaving itself in a situation where it was being unjust to owners of other properties in the neighborhood who might want to make the same request. She provided details on this, and said the ultimate outcome of this was that the ZBA was legislating, which was not its function.

Concerning the variance criterion on the spirit and intent of the Ordinance, Attorney Loughman said the Zoning Ordinance didn't allow rooming houses. She said it wasn't enough to say the property was not a rooming house because there could be only four non-members living there, and she said it either was a fraternity house or it wasn't.

Attorney Loughman said the owner hadn't proved that granting the variance was not contrary to the public interest. She said the Town and the University had the common goal of holding fraternities accountable, and saw that allowing the rental of rooms in fraternity houses eroded the control that the University had over what went on in them. She said it was her understanding that the University and the Town Council were very concerned about this issue, noting they had hired her to convince the Board not to grant this variance. She said there had previously been a non-fraternity member living in this same house who had killed someone with his car. She said the

issue the University was concerned about was how one could go after the fraternity when it wasn't a member of the fraternity that did this.

Attorney Loughman reviewed some procedural errors that had been made when the Board deliberated the previous time on this application. She said there had been discussion about what the word "primarily" meant, and it appeared that one or two people who voted for the variance were swayed that it was not clear whether this word defined the people in the house or the activity in the house. She said this was clearly an error by the Board, and asked it not to do this again, because at its July hearing, the Board had decided that the word "primarily" defined the activities, not the people who could live in the house. She said that decision was not appealed, so became final 30 days after it was made, and was binding on the Board and the Mulligans.

Attorney Loughman said it appeared from watching the videotape of the October meeting that a Board member said he didn't feel the variance request met the spirit and intent of the Ordinance, but then voted in favor of the variance. She said it was important when voting on a variance that each Board member voting in favor of a variance found in favor of the applicant on all five criteria.

Chair Gooze noted that this last issue was addressed at a recent conference he attended. He said Board members knew well that when they voted yes on a variance request, they had come to the conclusion that all of the criteria had been met.

Mr. Smith said he had reviewed the tape of the July 12<sup>th</sup> meeting as well as the Minutes for that meeting, and said it wasn't clear to him that the Board had defined clearly that the word primarily referred to activities. He said he was puzzled at Attorney Loughman's interpretation.

Attorney Loughman said her interpretation was based on the fact that the Code Administrator/Enforcement Officer had already made his decision that "primarily" defined the activity, and the ZBA had upheld this, and in doing so was saying it was correct that primarily defined activity.

Mr. deCampi said he viewed things a little differently on an administrative decision than he did on a variance. He said that with a written administrative decision, if the issue was ambiguous, the Board had taken the view that the Code Administrator/Enforcement Officer was right. He said he specifically remembered the discussion where the Board had talked about not understanding what the word primarily referred to, and because this was ambiguous, had found in favor of Mr. Johnson in the appeal of administrative decision. He said the Board thought Mr. Johnson had made a perfectly reasonable reading of the Ordinance.

He said when the Board read it at the first meeting where it dealt with this application, it voted in favor of the variance request because Board members couldn't convince themselves that the Town really intended that this exclude boarders. He said the Town really needed to clarify this. He said when Mr. Grant testified about this at the October 12, 2005 Board meeting, it was clear what the intent was. But he said that at that time, several colleagues still read the definition as being too unclear to deny the variance request.

**Chair Gooze declared a five-minute break at 8:15 PM.**

**The meeting resumed at 8:21 PM.**

Mr. Chesney said he had been asked to represent the University concerning this application. He said that on the issue of kitchen and other facilities in fraternities and sororities, in reality for the recognized fraternities, no common format existed. He provided details on this. He said Mrs. Mulligan had described her fraternity house as having no kitchen or dining hall, but he said it was his understanding that Sigma Nu did have a small cooking area. He said this was actually the most common format for fraternities.

Mr. Chesney also said that official chapter meetings of several fraternities/sororities were held at the MUB because there wasn't enough space at the fraternity/sorority house for this. He said Sigma Nu therefore was not unique concerning this. He provided additional details on the rooms at this fraternity house.

**Councilor Diana Carroll** noted she was a member of the Town Council and the Planning Board, and said both groups were concerned about the fact that the definition of fraternity house was unclear and had caused problems. She said the Planning Board had recently developed a clearer definition, and had approved it unanimously. She said the Town Council had also approved this definition unanimously. She said the spirit of the definition was now clear, and she then read through it.

**Councilor Peter Smith** noted that it was made very clear when the Town Council voted to approve this revised definition that the reason it was taking this action was not because it was making a change to the substance of the Ordinance, but rather that in recognition of the concern surrounding this definition, the Council wanted to remove any conceivable doubt as to what the word "primarily" referred to.

**Mike Davis, Sumner properties**, said he had recently cleared a fraternity out of one of his properties. He provided details on this, and noted there had been a yearly contract with the fraternity. He said the property was grandfathered, so didn't have to have a recognized fraternity there. He said there were certain times when he would need to put extra people in the building, in order to meet the numbers, because the Town didn't give him a break on his taxes. He also said he currently didn't have another fraternity to put in there. He said he wasn't sure if he was for or against the variance application.

**Arthur Grant, 261 Mast Road**, said what Mr. Davis had just said was symbolic of what the Planning Board was concerned about. He said there were 14 recognized fraternities, and each, based on the previous variance approved for 10 Madbury Road, would now be eligible to claim the opportunity to have boarders. He said the Zoning Ordinance made no provision or mention of boarders, and he said what was not permitted in the Ordinance was not allowed. He said this was not an argument with the Mulligans, and said the Planning Board was simply concerned with the misinterpretation and amplification of the Ordinance.

**Beth Olshansky, Packers Falls Road**, said she had watched the ZBA on many occasions make solid, deliberate decisions. She said she thought there had been a lot of confusion at the previous ZBA meetings on the intention of the definition of fraternity house, and said she hoped that this had now been clarified. She said she hoped that if the Board granted this variance, that each member would indicate that the application met each and every one of the variance criteria.

Mr. Mulligan said she took issue with the idea that this case could be setting a precedent. She said she did feel this was a unique situation, due to the fact that she and her husband were Durham residents and she was a member of the faculty of UNH, and that there were very specific

conditions on the lease and the property was well monitored. She said the Board needed to look at the merits of this case, noting that they had done this previously, and said she didn't feel the information presented that evening was new.

Mr. Mulligan said he thought Mr. Davis had brought up a good point, in looking at the big picture. He said a lot of interest had been generated on this issue in the last six months, and said this was good because there was a lack of understanding between various parties. He said now that it had come to the surface, there was the possibility of greater understanding.

Mr. Mulligan said there might come a day when the fraternities and sororities would go away. He said he realized this had been talked about, and asked what the Town would do with 14 empty buildings. He said the economics of the situation were such that something needed to happen with them. He said that clearly, the Town Council and Planning Board had a very organized strategy that evening, and said he and his wife unfortunately couldn't compete with the resources being provided against them. He noted that ironically, his tax dollars were being used to pay for this.

Mr. Mulligan asked whether instead this was a matter between the ZBA, the Planning Board and the Town Council, and said the ZBA was in an untenable position. He provided details on this. He noted the substance of the issue hadn't really changed that much, but said that during that process, they had all become more educated.

He said he wasn't good at arguing the variance criteria, but was good at looking at the big picture. He said they all needed to look at the big picture, and toward working collaboratively with each other. He said this was the first time in several years that the University and the Town were on the same page. He said this was great, and said now, they had to get the property owners on the same page, so the economic viability was there, student control was there, and the upkeep of the properties was there.

Mr. McNitt asked Mr. Chesney whether, with this new definition for fraternity house, if he could assure him that other fraternities were not doing the same thing that the Mulligans were doing.

Mr. Chesney said he could not, but said what he could assure Mr. McNitt of was that the University had told all of the recognized fraternities that they were expected to follow the law, and were not permitted to have boarders. He said when he received information that this was being violated, he got in touch with Mr. Johnson.

Chair Gooze closed the public hearing. He said it was important to keep in mind that this was a use variance, noting that the idea of financial hardship was more relevant concerning an area variance.

Ms. Eng noted first that when the variance request was approved in October, this was by a 3-2 vote, so was not a unanimous vote. She then said the only criterion she felt this variance request met was that it would not decrease property values of surrounding properties. She said she felt the variance could not be granted.

Mr. Smith said since rehearing the variance request, he had read through various materials. He said in doing this, he noticed a statement by Mrs. Mulligan at the August ZBA meeting, that the 10 Madbury Road property had been purchased as an investment, and in the future might want to convert it to mixed use commercial and apartments. Mr. Smith said this hadn't leaped out at him

in the past, but now had. He said he now didn't think the variance request met the hardship criterion, and also quoted from Attorney Loughman's statements about self-created hardship.

Mr. Smith said his thinking was that because there was the alternative in the future for the Mulligans to convert to mixed use, there was no interference with the reasonable use of the property, so there was no hardship.

Mr. McNitt said the Planning Board had provided the Board with a very clear understanding of the way it wanted the Ordinance to stand in the future, noting it was regrettable this was not the case in the past. He said the reason for his question to Mr. Chesney was that he (Mr. McNitt) had gathered the impression in the last 6 months that fraternities in general brought in non-members, especially during the summer. He said this was one of the things that had influenced his vote. He said his thought had been that if this was a general practice in fraternities, having the Mulligans put some bounds on this use was clearly a desirable thing.

Mr. McNitt said it was now clear that his impressions might have been incorrect, but he noted he would still like to know how common a practice it was to bring in non-members. He said there was no question that the rules as they now stood told him that at least one member of the Board misunderstood the intent and specific meaning of the word primarily. He said to him, primarily had meant mostly, not absolutely, and said in most cases this word was used because it didn't mean absolutely. He said the ZBA had plenty of good reasons for making the decision it made the first time.

Mr. deCampi said he was in the same place as he was the last time this variance request was heard. He said the Ordinance was intended to exclude boarders, and said he would vote against the application.

Mr. Bogle said he felt that approving the variance request was contrary to the public interest in that this logically would have to be extended to other fraternities. He said he didn't see there was financial hardship, noting the Mulligans had a contract with the fraternity, and it was the fraternity's problem if it couldn't rent all the rooms. He also said he felt granting the variance would be contrary to the spirit and intent of the Ordinance.

Mr. Sievert said he hadn't changed his opinion on this variance request. He said it didn't meet the hardship criterion, didn't meet the spirit and intent of the Ordinance, and would not promote substantial justice. He also said it had been made clear that evening, more than when the application was first heard, that granting this variance would be contrary to the public interest. He noted the people present that evening concerning the application.

Chair Gooze said he believed he had previously made an error in using the special conditions of the land to say there was hardship for the applicant. He said he had now been persuaded that there was nothing special about this property, and said he didn't think the variance met the hardship criteria. He also noted this was a new hearing, and with all the input from members of the public, he now felt the public interest was not upheld in granting the variance. He said the only variance criterion he saw the request meeting was that it wouldn't result in a decrease in the values of surrounding properties.

Mr. Smith said that when he had voted in August and October on this variance request, he had acted in good faith. He said in reading through the documents since that time, he had now reached a different conclusion. He said this had been a difficult situation. He said he thought the

Mulligans were excellent landlords, and said he hoped they didn't have any empty rooms, and that things went well for them.

After detailed discussion among Board members as to which variance criteria should be cited in the motion, the following motion was agreed upon.

*John deCampi MOVED to deny the APPLICATION FOR VARIANCE submitted by Ted & Shelley Mulligan, SEJ Properties, LLC, Durham, New Hampshire from Article II, Section 175-7 to permit the occupancy of a fraternity house with non-fraternity members because it does not meet the hardship criterion, and does not meet the spirit and intent of the Ordinance. The motion was SECONDED by Linn Bogle, and PASSED unanimously 5-0.*

**5 minute recess**

### **III. 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.

The application was withdrawn by 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.

The application was withdrawn by the applicant.

- D. PUBLIC HEARING** on a petition submitted by Sherri M. Brown Living Trust, Portsmouth, New Hampshire, for an. The property involved is shown on Tax Map 16, Lot 25-1, is located at 210 Longmarsh Road, and is in the Rural Zoning District.

Sherri Brown said she would like to postpone hearing the application so her husband could be there to present the application. She explained that he had left the meeting because of a medical emergency.

*John deCampi MOVED to continue to January 10, 2005 the hearing of the APPLICATION FOR VARIANCE from Article XII, Section 175-54 to build a single-family home on a lot without adequate frontage. Linn Bogle SECONDED the motion.*

Mr. Johnson said there might be members of the public present who might not be able to make the public hearing in January. He noted this was taken into consideration for the Mulligan application.

There was detailed discussion about how to handle this.

Mr. deCampi called the question.

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

- E. **PUBLIC HEARING** on a petition submitted by Michael A. Groover, Barrington, New Hampshire, on behalf of Pamela S. Bradley, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-65(A) of the Zoning Ordinance to allow the placement of a septic system within the 75-foot wetland buffer zone. The property involved is shown on Tax Map 10, Lot 6-2, is located at 4 Ambler Way, and is in the Residence B Zoning District.

Mr. Groover said he had been hired by the applicant in regard to the septic system. He also said a septic system inspector had been hired, and had determined that although the present system on the property had not yet failed, it was in a failing condition, and was barely keeping up with conditions. He said Ms. Bradley was the only person in the residence most of the time, and said if that changed, the septic system would quickly fail.

He said a new septic system had been designed for the property, and said although the attempt was made to keep it within the rear and sideline setbacks, it was impossible to get 75 ft. away from some poorly drained soils that had been delineated. He said it was a type of wetland that was hard to identify, and noted he had hired NH Soil Consultants to delineate this line.

Mr. Groover said the present septic system had been put in too low, given the water table, and was also put too close to the wetland soils. He said when he dug the test pit, he had determined the proper elevation, size, and configuration for the system, and he said the proposed location for the new system, which was upgrade from the old one, would probably have proper receiving soil underneath. He said this system would make the present situation a lot better.

He noted he would be applying to NHDES for a waiver, since the required state setback from a wetland was 50 ft. and the applicant only had 40 ft. But he said that considering that the applicant was doing the best she could with the site, the State would probably allow this. He said he was asking the ZBA to approve this variance subject to the State approving the septic system.

Mr. deCampi asked why the applicant couldn't put the system in the northwest corner of the property.

Mr. Groover explained that when the subdivision had been developed, this area had been used as a stump dump. He said the area was now covered with grass, but did not have good receiving soils. He also noted there were more wetlands over in that area, so considering everything, it was not a good place for the new septic system.

Mr. McNitt asked if the conditions would be better if the system was moved to the right, and therefore would be within the 20 ft. side setback.

Mr. Groover said he thought this would make only a marginal difference.

**Eric Boswell, 3 Ambler Way**, first received clarification on the local and State setback requirements for septic systems, and why the variance was being requested. He then asked what the impact of the new system would be, and if it was essentially a replacement system.

Mr. Groover said the new system would be located at a higher elevation, so would work better, and would result in higher water quality.

Mr. Boswell said he would have to say he would be against the granting of this variance, because he didn't know what the impact would be on his property. He noted that he lived across the street and to the right of MS. Bradley's property.

Mr. Johnson determined from Mr. Boswell that his property was served by Town water, so there was no issue concerning potential impacts to a well on his property.

**Christine Guarino, 3 Ambler Way**, said it was difficult to make a judgment in the absence of adequate information, and said she therefore would be forced to say she would be against this application. She said her property was downhill from this property, and said water flowed from it to her property, noting her water table was high, and that water was sometime visible on the surface. She said that perhaps this water was already polluted, and said her concern was the impact of the new system on the flow of water to her property.

Mr. Groover said the new septic system was designed for 4 bedrooms, and based on its design, would not cause pollution. She said the applicant wanted to correct the current situation.

Mr. deCampi asked when the previous septic system had been put in, and Mr. Groover said it was installed in the 1960s, as part of the development of the subdivision.

Mr. Bogle asked what the situation was with the present septic system, and Mr. Groover provided details on how the current system was presently overloaded.

Mr. Bogle said there was no other alternative than to make this correction, so the only question was whether there was another spot on the lot that that was preferable.

Mr. Groover said he had looked for alternative locations, and the proposed site was the only place they could put the system.

Mr. Bogle received clarification that once the new system was installed, the pollution problems should be eliminated. He said he thought this would be helpful to the abutters.

In answer to a question from Mr. McNitt, Mr. Groover said the present system was an old stone and pipe system. He said what was proposed was an "enviro-septic system", and provided details on how this system worked.

Mr. Smith asked whether the water flow problem would still exist if the new septic system was installed and took care of the pollution problem.

Mr. Groover said this problem would always be there, noting it was a surface water issue that had occurred historically, and had nothing to do with the septic system issue.

Mr. Sievert pointed out that the setback from the foundation and foundation drain would be improved with the new system, noting that at present, the effluent might be short-circuiting from the failed system into the foundation drain.

Mr. Boswell asked if this would be a mounded septic system.

Mr. Groover said it would not, and provided details on this.

***John deCampi MOVED to grant the VARIANCE requested from Article XIII, Section 175-65(A) of the Zoning Ordinance to allow the placement of a septic system within the 75-foot***

***wetland buffer zone, based on the fact that it meets all five variance criteria. The motion was SECONDED by Ted McNitt, and PASSED unanimously 5-0.***

Chair Gooze said everyone agreed this would be an upgrade to the septic system, and had nothing to do with the surface water issue.

- F. **PUBLIC HEARING** on a petition submitted by Bill Hersman, Durham, New Hampshire, on behalf of the Center for Constructive Change, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XXI, Section 175-112 of the Zoning Ordinance to build a second commercial building on a lot and to provide fewer parking spaces than is required for a commercial building. The property involved is shown on Tax Map 2, Lot 8-3, is located at 16 Strafford Avenue, and is in the Residence A Zoning District.

Chair Gooze said he would recuse himself on this application. He said he lived across the woods from this property, and had some questions to ask about the variance request, so was uncomfortable sitting on the Board for this. He said Ted McNitt would take his place as Chair, and appointed Mike Sievert as a voting member in his place.

Mr. Hersman said he was looking for a location for Xmed, a new company he had developed, and said he would like his new building to be either 5,000 square feet or 7,200 square feet. He said variances were being requested from the dimensional requirements for the building and from the parking requirements. He noted he had a ½ acre lot, and in order to site a second building on the rear of lot, this would mean the majority of the property would be covered with either structures or paved parking surface.

Mr. Johnson said it was already a professional office use, and the applicant was looking to expand on this with another building. He said he would need to go before the Planning Board for full site plan approval.

Mr. McNitt said the proposed building would meet the setback requirements, but would have excessive lot coverage, and would have less parking than what was required for a building that size.

Mr. Sievert asked if this was a conforming use.

Mr. Hersman provided details on his business, involving an innovative MRI technology. He said there would be some assembly of test equipment at the building, but said there would not be wide scale commercial sales taking place at the facility.

Mr. Johnson said that currently, under the present Ordinance, this was a nonconforming use, but said under the new Zoning Map, this property would be in the Professional Office District, so would be a conforming use.

Mr. McNitt noted that Section 175-38 of the Zoning Ordinance said there could be no parking between the front wall of the principal building and the front property line, but he said that was what was proposed for this property.

There was detailed discussion about this.

Mr. McNitt asked what the nearby buildings were, and Mr. Hersman provided details on this.

Mr. Bogle asked how the new Ordinance affected the issues of lot coverage and parking.

Mr. Johnson said that under the Professional Office District in the new Ordinance, the impervious coverage allowed would increase from 30% to 50%.

There was discussion on the degree of impervious coverage of the proposed building.

Mr. Bogle said it looked like with a 5,000 square foot building, the front yard would be maintained, but with a 7,200 square foot building, the front yard and side yard to the right of the house would be completely asphalt.

Mr. deCampi asked Mr. Hersman what size building he was applying for.

Mr. Hersman said he was applying for the 7,200 square foot building, and said there would be about 80% coverage of the lot as a result of this.

Mr. Smith asked if the trees in the back would have to be removed for either the 5,000 square foot or the 7500 square foot structure.

Mr. Hersman said they would all have to be removed, for both building sizes.

Mr. Smith received clarification that the applicant was asking for one parking space per 600 square feet, which exceeded what the Ordinance allowed.

Mr. Johnson noted again that there would be full site plan review for the project. He also said the property fronted on water and sewer, and was on a Town road that had storm sewers. He said the Town right of way ended at about the center of the property, and the rest of the right of way was owned by UNH. He said the Planning Board would address all of these issues.

Mr. Bogle said the applicant had provided a picture of the building, and asked if this was the type of building he planned to provide.

Mr. Hersman said he would probably get a local architect to design the building, and would like to see something that was aesthetically pleasing.

Chair Gooze asked what the chance of fire hazard was, pointing out that there were a lot of woods to the back and side of the property. He noted he lived on the other side of those woods.

Mr. Hersman said rubidium would be used, noting that it was a flammable material, but would be used in small quantities (typically 25 grams) and would be treated very cautiously. He said it would be handled in stainless steel sinks, and under normal operations would be entirely enclosed by glass. He said that part of the reason he would not be doing this research in the existing structure on the property was that it was built of wood, and had carpets. Mr. Hersman said that in many ways, rubidium was less hazardous than gasoline, and he provided details on this.

Mr. Bogle asked what the relationship was between the University and Xmed, and Mr. Hersman provided details on this.

Mr. Bogle said Mr. Hersman had indicated in his application that he might be leasing space in the building to UNH.

Mr. Hersman explained that the University would be demolishing its Physics Building in 2007, and his academic research would need a home during that time. He said it would be

advantageous to him to be able to move this into the new building, and then to move it back to the University building once it was completed.

Mr. Bogle asked if the 5000 square foot building would satisfy Mr. Hersman's needs.

Mr. Hersman said this would be quite tight, but said it was included in his application because he didn't know what his funding capabilities were yet. He said his preference would be to have the 7,500 square foot building, if it met the ZBA's requirements.

Mr. Gooze said he was in favor of granting this variance, noting he walked this area a lot, and that an apartment was located to the right of it. He said it would be good for Durham to allow this, especially since the Zoning Ordinance was changing to allow something like this in that area of Town. He provided details on this, and said he personally would like to see the larger building approved, in order to allow the business to expand.

**Michael Davis, Sumner Properties**, said he owned 10 and 14 Strafford Ave. He provided details on this area of Town, and said he had no problem with the proposed building.

Mr. McNitt closed the public hearing. He said the use variance issue would be wiped out by a change in the Ordinance, and said this was an area variance being requested. There was discussion as to whether the use variance issue was relevant for this application.

Mr. deCampi said this was the type of business Durham should attract, in that it sprang from the University. But he said he was against the request for variance, explaining that as long as this was the Residence A District, the degree of lot coverage and location of a semi-industrial building there bothered him. He said the parking there was too limited, and said when Xmed grew, there would be inadequate parking. He said the Ordinance said there couldn't be parking between the building and the street, but if the applicant went for the larger building, he would need to do this.

Mr. Smith asked Mr. deCampi if he would be in favor of a 5,000 square foot building.

Mr. deCampi said he wouldn't be in favor of either, because the case hadn't been made for this at the present time. He said in addition to the lot coverage and parking space issues, the use variance existed under the current Ordinance. He also said parking between the building and the street was prohibited. He said to him, the application didn't seem to meet the current Ordinance, as it was currently written.

Mr. Johnson said he was not sure this Board dealt with the use issue, noting that a nonconforming use could only be expanded with a conditional use permit.

There was discussion about the current use of the building.

Mr. Sievert noted that the Ordinance said the lot coverage for a nonconforming use could not be increased by more than 50%, and said the increase in lot coverage as a result of the proposed building might be greater than this, given the size of the existing building.

Mr. Johnson said the applicant might have trouble with this when he went before the Planning Board. There was discussion that this issue might also come back before the ZBA later.

Mr. Smith noted that the applicant had indicated that the amount of parking provided would be sufficient, but he said this could change.

Mr. deCampi said that having this business somewhere in Durham was in the public interest.

Mr. Sievert asked what the maximum number of employees at the facility would be, and Mr. Hersman said there might be as many as 10-12 employees. There was discussion on how many parking spaces would actually be needed, what the Ordinance allowed, and how many spaces were available.

There was discussion on whether the existing house on the site would stay or go.

Mr. Hersman said if he removed the house, he could put in a few more parking spaces. He said he would do this if approval from the Board were contingent on this.

Mr. Smith asked how much of the existing house on the property would be compromised if the 7,500 square foot building was built, and Mr. Hersman provided details on this.

Mr. Sievert said the house was currently used for offices, and asked if this office space could be used as part of the business.

Mr. Hersman said the house could ease the transition as the other building was being built, and provide details on this.

It was re-stated that the variances were being requested concerning the amount of parking and the degree of lot coverage.

Mr. Bogle said for a 7500 square foot building, the applicant would need something like 40 parking spaces for a light manufacturing business. He noted he was asking for far fewer spaces than the performance standards would require.

Mr. Johnson said if the ZBA was inclined to grant this variance, it could provide the Planning Board with specific guidance on the amount of impervious coverage that would be allowed. He noted that the actual configuration of the building could change. He said the Board could also provide specifics in terms of the number of parking spaces that should be allowed.

Mr. deCampi said Mr. Hersman had said he would need 80% coverage of the lot. He also said he didn't think there should be blanket waivers from the lot coverage or parking requirements.

There was discussion on what the Zoning Ordinance said the parking space requirements were for this kind of use.

Mr. deCampi noted that the Ordinance said manufacturing, research, testing, etc. allowed not less than 1 parking space per 400 square feet and said this seemed reasonable to him.

Mr. Johnson said that would be 18.75 parking spaces for a 7,500 square foot building.

It was noted that another 4.5 spaces would be required for the existing building on the property, and that given that the applicant had 15 spaces currently, a waiver for some additional parking spaces would be needed.

Mr. McNitt said that concerning lot coverage, with the house, the new building and parking lot, at least 75% of the property would be covered with impervious surface.

Mr. deCampi said the request was for 80% coverage, and said this seemed accurate based on the drawing.

Mr. Sievert said he didn't have a problem with this variance request, especially because it would be a commercial use. He said it could probably meet all the variance criteria. He said it was hard to see the whole picture, especially concerning parking. He said with the low amount of use, this wouldn't be a problem, but in the future, if this became a bigger office building, there wouldn't be enough parking. He said perhaps a restriction could be put on the use of the property, but said this might not work in terms of someone wanting to buy the property.

Mr. Johnson said this was the kind of thing that would be spelled out in a conditional use permit, which ran with the property.

Mr. Sievert said in that way, the Planning Board could deal with this. He said that concerning the amount of impervious coverage that was desired, he didn't see a problem with this. He said he didn't know if the hardship went away because it was going to become commercial. He said the proposed use wouldn't decrease the value of surrounding properties. He said substantial justice would be done in granting the variance because this was the kind of use they had all said they wanted in Durham. He said the variance request would meet the spirit and intent of the Ordinance, if the zone were being changed to commercial.

Concerning the parking issue, Mr. Sievert said he thought the proposed use fell under 1 space per 400 square foot, which wasn't far from what he could get. He said he didn't see any diminution in property values of surrounding properties as a result of the variance. He said substantial justice and the spirit and intent of the Ordinance would be maintained in approving the variance.

Mr. Bogle said this seemed to be the type of business that was desired by Durham. He said he didn't think it would be contrary to the public interest at that location. He said he wasn't sure about the hardship criterion, and whether there were special conditions existing with regard to the property.

He said granting the variance would be consistent with the spirit and intent of the Ordinance in that it was already a commercial use, and under the new Ordinance, would be a permitted use there. He said it wouldn't diminish the value of surrounding properties, noting that there were no abutters present who were against the variance request, and that the property owner to the right had said he was in favor of granting the variance. He also said granting the variance would result in substantial justice being done. He said he felt the 5-variance criteria were met concerning the building coverage variance being requested.

Concerning the variance request for parking, Mr. Bogle said it would be advantageous to have fewer cars there than more, noting more would be required if the Ordinance were strictly observed. He said that for future owners, if new parking were needed, they might have to tear down the existing building on the property. Mr. Bogle said he was inclined to grant the variance request.

Mr. deCampi said he didn't think the application met the hardship criterion or the spirit and intent of the Ordinance. He said if he were the applicant, he wouldn't put the building at that location, and said the property had limited utility.

Mr. Smith said it was hard to know about the hardship issue, but said he would give the application the benefit of the doubt, and would say it met the 5-variance criteria. He said if the application were to be approved, he would like to follow the suggestion that the ZBA should provide the Planning Board with some guidelines.

Ms. Eng said her perspective on this application was more in line with Mr. deCampi's, because the property was zoned Residence A at present. She said she was having a tough time coming up with special conditions of the property that constituted hardship. She said she was against granting the variance.

Mr. McNitt said granting the variance would not be contrary to the public interest, and in fact was very much in the public interest. He said a variance was needed for the proposed use, given the size of the property, and said the benefit could not be achieved on that particular piece of property in some other way, so this was a case of hardship. He said the use was definitely not consistent with the spirit and intent of the Ordinance until the new Ordinance was passed, and said he would like the Board's motion to make reference to the new Zoning Ordinance. He said the value of surrounding properties would not be diminished as a result of granting the variance, given the nature of surrounding properties.

Mr. Johnson said he thought any variance for impervious cover or parking should be tied to conditional use permit approval, so if the applicant walked away from this, the variance wouldn't apply to another use of the property. Mr. Johnson suggested that the Board provide numbers for parking and impervious coverage percentage. There was discussion on this.

***Henry Smith Moved to grant the request from Xmed for VARIANCES from Article XII, Section 175-54 and Article XXI, Section 175-112 of the Zoning Ordinance to build a second commercial building on a lot and to provide fewer parking spaces than is required for a commercial building, and to recommend as a guideline to the Planning Board that there be no more than 75% coverage with impervious materials, that there be a minimum of 16 parking spaces, and that this is entirely conditional upon granting of a conditional use permit specifically to Xmed for the project as described, and passage of the new Zoning Ordinance. Linn Bogle SECONDED the motion, and it PASSED 4-1, with John deCampi voting against it.***

- G. PUBLIC HEARING** on a petition submitted by Stanley & Janice Aviza, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XXI, Section 175-116(C) of the Zoning Ordinance to allow for a second curb cut on a residential property. The property involved is shown on Tax Map 6, Lot 3-23, is located at 2 Garden Lane, and is in the Residence A Zoning District.

After some discussion, this application was continued to the January 2005 meeting.

- B. REQUEST FOR REHEARING** on an October 11, 2005, denial by the Zoning Board of Adjustment 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.

Mr. McNitt and Mr. Bogle recused themselves because they were absent from the October meeting, and Ms. Eng and Mr. Sievert were appointed in their places.

Chair Gooze said he didn't see anything here that was not presented at the original hearing.

Mr. Smith said he didn't think the Board had made a mistake in its previous decision on this application, and also said he didn't see anything new had now been presented by the applicant.

Ms. Eng, Mr. deCampi, and Mr. Sievert agreed with this.

***John deCampi MOVED to deny the REQUEST FOR REHEARING on an October 11, 2005, denial by the Zoning Board of Adjustment 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. Mike Sievert SECONDED the motion, and it PASSED unanimously 5-0.***

- C. **REQUEST FOR REHEARING** on a November 8, 2005, denial by the Zoning Board of Adjustment 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 read through each point in the applicant's letter, and there was detailed discussion about some of these points. It was agreed that no new information had been presented, and that the Board had not made any procedural errors.

***Henry Smith MOVED to deny the REQUEST FOR REHEARING on a November 8, 2005, denial by the Zoning Board of Adjustment 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, and to uphold Mr. Johnson's decision. Linn Bogle SECONDED the motion, and it PASSED unanimously 5-0.***

- D. **REQUEST FOR REHEARING** on a November 8, 2005, denial by the Zoning Board of Adjustment 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.

Chair Gooze said the applicants were still saying they wanted a variance because they had chosen the site for the garage for aesthetic reasons. He also noted the restrictions on the property had to do with things they had done with their property.

Chair Gooze noted the Board had received a letter from Joan and Frank Graf, neighbors of the Slamas, who said they were sorry the variance had been denied, and said the proposed location was the superior one in terms of the neighborhood.

Chair Gooze and Mr. Bogle said the Board had taken this into account previously, and said it was therefore not new evidence.

Mr. McNitt recused himself, and Mr. Sievert was appointed a voting member on this Agenda Item.

Mr. Smith said the applicants had presented information that they had presented before, and said didn't see there was new evidence.

Mr. Sievert said some additional information had been presented, and he provided details on this.

Chair Gooze said there were some limitations on the use of the property because of some of the things the applicants had previously done with it. He said these limitations were therefore self-imposed. He also said some new information had been provided on wildlife habitat.

Mr. deCampi said he had previously thought was a lot of sense to this application, and said the applicants had now provided additional information, and had tried to do a better job of selling their position. He said he thought the proposed location for the garage was a good one, and wouldn't bother anyone.

Chair Gooze said he was uncomfortable with it because it didn't meet the variance criteria.

Mr. Sievert said he agreed with Mr. deCampi, and said the 50-ft. setback was restrictive.

Chair said this was not new information.

***Linn Bogle MOVED to deny the REQUEST FOR REHEARING on a November 8, 2005, denial by the Zoning Board of Adjustment 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. Henry Smith SECONDED the motion.***

There was additional discussion on the request for rehearing.

***The motion PASSED 3-2 with John deCampi and Mike Sievert voting against it.***

- E. **REQUEST FOR REHEARING** on an October 11, 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 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 explained that this request for rehearing had come in after the meeting packets had gone out. Board members agreed it had made the 30-day deadline, so the Board should discuss whether the application could be re-heard.

Chair Gooze went through the points in the request for rehearing, and said he didn't see any new evidence, or that the Board had made a procedural error.

Mr. Sievert said he was having a hard time with the fact that duplexes were allowed when the dwellings were built. He said he was giving the applicant the benefit of the doubt concerning the records on the property.

Chair Gooze said this had been discussed previously.

Mr. Sievert said he felt the Board had made a mistake on this application. He said he would like to bring the application back and take one more look at it before it went to Court.

Mr. deCampi said he agreed, and said he didn't think having one unit in that building was bad.

There was discussion that the applicant wanted one independent unit, not an accessory unit.

Mr. Sievert said he didn't feel this would be a big problem because the amount of land on the property was so large, noting the septic and well requirements could be met.

There was additional discussion on the request for rehearing.

Mr. McNitt said he was not a voting member on this Agenda Item, and Mr. Sievert was made a voting member in his place.

***Henry Smith MOVED to deny the REQUEST FOR REHEARING on an October 11, 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 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. Linn Bogle SECONDED the motion, and it PASSED 4-1 with Mike Sievert voting against it.***

III. **Approval of Minutes**

November 8, 2005

Postponed until the January 10, 2005 ZBA meeting.

IV. **Other Business**

V. **Adjournment**

***Henry Smith MOVED to adjourn the meeting. John deCampi SECONDED the motion, and it PASSED unanimously 5-0.***

The meeting ADJOURNED at \_\_\_\_\_ PM.

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John deCampi, Secretary