

*These minutes were approved at the April 11, 2006, meeting.*

**ZONING BOARD OF ADJUSTMENT  
TUESDAY, MARCH 14, 2006  
TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL**

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

**MEMBERS ABSENT**

**OTHERS PRESENT:** Code Enforcement Officer Tom Johnson; Minutes taker Victoria  
Parmele

**I. Approval of Agenda**

*John deCampi 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 Vincent E. Todd Jr. & Cheryle St. Onge, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIII, Section 175-65(A) of the Zoning Ordinance to build a new, detached garage within the sideyard and wetland setbacks. The property involved is shown on Tax Map 14, Lot 18-0, is located at 225 Packers Falls Road, and is in the Rural Zoning District.

Chair Gooze noted the Board had conducted a site walk of the property on February 16, 2006, at which he, as well as Board members John deCampi, Linn Bogle, Henry Smith, Myleta Eng, Michael Sievert, Code Enforcement Officer Tom Johnson, and the applicants were present. Councilor Julian Smith was also present.

Ms. St. Onge said she had previously applied for a variance, to allow construction of an addition to her house as well as a detached garage, and noted that the house construction was approved by the Board. She said after discussion with the Board at that meeting, she had decided to apply separately for a variance for the garage.

She noted that at the February 14<sup>th</sup> ZBA meeting, she had offered to tear down 3 buildings, and to remove 2 driveways, in an effort to offset the new construction of the garage.

Ms. St. Onge said as part of the new application for the garage, the site for the garage had been pulled back a bit further, - an additional 8 ft. from what was originally proposed. She noted that these other buildings she was offering to tear down were substantially closer to the road than that, so she was actually bettering an existing nonconforming situation

She described the plans for the garage in some detail, explaining that what was proposed was in keeping with the historical architecture on the present property. She said it would be an improvement over the existing garage, and was in keeping with the Durham Master Plan, which advocated maintaining the rural and historical qualities present in the neighborhood and the area's scenic road.

Ms. St. Onge summarized that the new garage would improve the current nonconformity of the site in the following ways:

1. By being further from Packers Falls Road than the current woodshed location, which was 2.5 ft. along the road side of Packers Falls Road.
2. By creating a new garage that was not attached to the house, and thus reduced the risk of fire
3. To offset the new construction of the garage being proposed, the applicants agree to tear down 3 non-conforming buildings, and two additional driveways
4. The location of the new garage will be 10 ft. from Packers Falls Road on one corner and 14 ft. on its other corner.
5. By keeping the garage close to the road, the garage becomes the side of a created courtyard of green area between the garage, house, line of trees and wooded property line. This creates a wonderful yard on a small,  $\frac{3}{4}$  acre lot, - a place to play sports and enjoy the rural landscape.
6. By keeping the proposed garage close to Packers Falls Road, a line of established trees and an old apple tree will remain standing and the short existing driveway will be re-utilized.

Ms. St. Onge noted that the Town had listed the Durham Children's Center as an abutter, but it was not actually an abutter. In response to Board member Henry Smith, Ms. St. Onge said the garage would be 24 ft. by 26 ft., and would be about 19 ft. high.

There was further discussion on whether the Durham Children's Center was an abutter, and Mr. Johnson explained that there was a strip of land that separated this property from the applicants' property.

Chair Gooze said there were two letters from abutters, one from John and Laura Sheehan, which said they were in favor of the construction of the garage. He said the other letter was from Growing Places, a daycare facility, which said it had no problem with the garage.

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

**Julian Smith, 246 Packers Falls Road**, noted he was a neighbor to the property, and provided some history on it and the immediate area. He also spoke about his previous experience of having to obtain a variance in order to extend his kitchen in a way that would not extend further into the setback than the corner of his house did. He said a good compromise had been reached concerning this with the ZBA.

He said the applicants' emphasis on the historic nature of the lot was important, explaining that in that immediate area, the lots historically were small because mill workers had needed properties on which to live. He said the problem the applicants were having putting a garage on the property was the result of this historic nature of the lot.

Mr. Smith said that wanting to put the garage as close to the road as possible was a very practical matter, because of the slope of the yard, and also said a garage 35 ft. back would be closer to the wetlands. He also said part of the charm of the immediate neighborhood was the houses that were close to the road, describing other houses in the neighborhood that were also close to the road.

Mr. Smith said that by allowing this variance for the garage, which was a good size, the Board would be making it difficult for future owners to come to the ZBA for a variance to change this very attractive proposed garage into an apartment, a change of use that would result in an immediate change to the neighborhood.

**Stanley Wojnowski, Packers Falls Road**, said he had walked the property with the applicants, and was assured it was a single-family house. He provided additional details on the project, and said he had seen the layout for the proposed garage. He said he had no problem with it.

Chair Gooze closed the public hearing.

Mr. Sievert said he hadn't seen a problem with the proposed garage the first time the applicants had come before the Board. He said he believed it met the variance criteria, and represented a classic variance because of the small lot, especially because of the area variance criterion. He said the proposed layout for the garage worked, noting the open space that needed to stay there, and also that changing the driveway would negatively impact the sight distances.

Mr. Bogle said he had looked at the property three times, and said looking at the area and the historic neighborhood, the property represented a unique setting. He said he thought the new proposal was an improvement over the previous proposal, and was acceptable.

Mr. deCampi said he agreed with Mr. Bogle. He noted there were other properties in the area located close to the road, and said the current proposal substantially improved the situation as compared to the last proposal.

Mr. McNitt said he agreed with other Board members. He said it was a rather strong case for granting a variance, and said the application met all five variance criteria.

Board member Henry Smith said the applicants were proposing to tear down 3 nonconforming buildings, and to eliminate 2 of 3 driveways, and had made a good faith effort to move the proposed garage back 10 ft. from Packers Falls Road at one corner, and 14 ft. at the other corner. He said this was a very small lot, which was an important criterion, and also noted that with the new proposal, the applicants would not have to take down a line of established trees and an old apple tree. He said that given this, as well as other points made by Board members, he felt the application met all five variance criteria.

Ms. Eng said she agreed with what other Board members had said, especially concerning the idea of not having to cut the trees and being able to maintain a yard, which was key to keeping the rural feel of the area. She said she was in favor of granting the variance.

Chair Gooze said he agreed that the application met the five variance criteria. He said the most important thing to him was the uniqueness of the setting, with the small lot. He also noted that when the Board had held the site visit, it had taken measurements and asked questions, but did not discuss the merits of the case with the applicants.

Mr. Smith agreed, noting that Ms. St. Onge's description in point #4 of the application was incorrectly stated.

Mr. Bogle noted that the setback involved in this application was from the right of way, not from the edge of the paved road.

***John deCampi MOVED to grant the APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article XIII, Section 175-65(A) of the Zoning Ordinance to build a new, detached garage within the sideyard and wetland setbacks at 225 Packers Falls Road, in the Rural Zoning District, in accordance with the drawing submitted with the application entitled "ZBA March Revised Garage Site." Linn Bogle SECONDED the motion, and it PASSED unanimously 5-0.***

- B. PUBLIC HEARING** on a petition submitted by Jeffrey P. Christensen, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Section 175-72 of the Zoning Ordinance to build decks and an enclosed porch to an existing, non-conforming structure within the Shoreland Protection Zone. The property involved is shown on Tax Map 20, Lot 1-0, is located at 595 Bay Road, and is in the Residence C Zoning District.

Chair Gooze said the Board had conducted a site walk of the property on February 21, 2006, at which he as well as Board members John deCampi, Linn Bogle, Henry Smith and Myleta Eng, as well as Code Enforcement Officer Tom Johnson were present. Messrs. Christensen and Rist were also present for the site walk. He opened the public hearing.

**Donald Rist**, project manager for Mr. Christensen, explained that in September of 2005, the applicant was granted a variance allowing him to improve the existing camp structure, which involved installing a new foundation, a well, a septic system, mechanical system updates, along with the reconstruction of the deck and a three-season porch with a pier type foundation.

He said now that the structure was significantly improved, and doors and windows had been installed, it was realized that the solar gain resulting from the southern exposure of the building was going to cause a dramatic increase in the cooling system load. He said the applicant was therefore requesting an increase in the size of the existing three-season porch located between the primary building line and the reference line, to allow for the continuation of the roof and the shading of the deck on that portion of the camp. He also said they were requesting that

construction be permitted of a new section of decking along the southwest side of the building, to allow the addition of a second exit from the camp. He said the increase to the three- season porch would result in an additional 150 sq. ft. of space, and the addition of the new deck would involve approximately 200 sq. ft. of additional space.

Mr. Rist said the house was classified as a nonconforming structure with respect to the State's Shoreland Protection Act, noting that it said the addition of a deck or an open porch was permitted, to a maximum of 12 ft. toward the reference line. He said what was being requested was to continue the same line of the existing screened porch/three-season room, which projected 8 ft. 4 in. toward the reference line, and said that at this point, this would leave a remaining buffer of 16 ft. between the edge of the deck and the reference line.

He noted that in September, the applicant had proposed an aggressive schedule to complete work on the property by the spring growing season, in order to vegetate the site as soon as possible. He said this was why they would like to complete the work and the porch and deck quickly. He said siltation barriers and mulch hay had been installed and maintained, and said there had been no increase in runoff. He also noted that the boathouse had been removed, as agreed on in September, with no damage to the shoreland.

Chair Gooze noted there had been talk about angling the (eastern) corner, because at present it would only be 3-4 ft. from the bank.

Mr. Rist said potentially the building could be 12 ft., according to the RSA, but at 8 ft. 4 in., they would still have a good 4 ft. of clearance before going down the bank. He said with the deck, one could go from east to west without going down the bank. He noted there would never be a path on the bank.

Chair Gooze asked if there could be runoff problems at this location, and there was discussion about this.

Mr. Rist said they had installed a foundation drain, with an outlet heading away from the water, and said they could tie gutters and downspouts into this, although noting this would have some drawbacks.

Mr. Bogle asked what was meant by a solar roof in this instance.

Mr. Rist said it would be a sunshade type roof to defeat the direct rays from the sun on this side of the house, and said it would match the roof over the three-season room.

Mr. Bogle said to him, a solar roof implied that there were solar panels, so it might be better to simply call what was intended a roof.

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

Mr. deCampi said there were three issues to consider regarding the application.

1. Enlargement of the amount of impervious cover resulting from an expanded roof over the front. He said he was opposed to this, noting there had been discussion with the previous owner of the property regarding what could be done on this property, and the Board's feeling at that time was strongly that it would not allow that house to be expanded, but would allow the house to be relocated and enlarged. He said his feeling was still that increasing the amount of impervious cover that close to the water was environmentally wrong, and said he would be opposed to any increase in the size of the porch or impervious cover.
2. Closing the existing screened room into a three-season room. He said he didn't have a problem with this, and said it seemed like a reasonable thing to do.
3. The deck – Mr. deCampi said the current deck was roughly 260 square feet, and the request was to increase this to approximately 500 square feet, essentially doubling its size. He said he didn't see the justification for that much of an increase. He said he was ok with some sort of increase, as long as there was 10% open space where the deck was pervious to rain passing through it. He said he thought a limit of an additional 100 square feet would be more reasonable, and would allow virtually everything Mr. Christensen wanted to do. He said he understood the logic of having a deck and a second egress, and also said the staircase seemed reasonable.

Chair Gooze asked which of the variance criteria Mr. deCampi had a problem with.

Mr. deCampi said he had a problem with at least the spirit and intent of the Ordinance and the public interest criteria. He said the issue involved was protection of the environment, both in his own mind, and as covered by the Zoning Ordinance. He said he felt strongly about not allowing the roof that was being asked for. He noted that the applicant wasn't pursuing more environmentally attractive ways to address the issue of solar gain, and suggested that instead of the roof, he could instead use reflective material on the glass.

Mr. Smith said the fact that the deck would be so close to the bank bothered him, and he noted it was an expansion. He said he wondered if it would be possible to cut the corner of the deck so it didn't come nearly as close to the bank as proposed, and also said he was in favor of cutting down on the square footage of the deck. He said he was concerned about runoff.

Chair Gooze asked Mr. Smith if he was more concerned about runoff issues because of the roof, noting that the deck would be made of pervious material if constructed properly.

Mr. Smith said he was still concerned that the deck would be located so close to the bank.

Ms. Eng said she too was concerned that the corner of the deck would be very close to the bank, but didn't know how this could be addressed. She said she did like the idea of a second egress, which was important for safety.

Mr. Bogle said he agreed with Mr. Smith and Ms. Eng about the corner of the deck, and said there were two possibilities for addressing this. He said one approach would be to cut off the

corner at least on a diagonal, so that it would be 8 ft. 4 in. on two sides, with the diagonal toward the water. He also said that with an 8 ft. 4 in. wide sunroom, he wondered if the deck beyond the sunroom, and outside of the bedroom, couldn't be less than 8 ft. 4 in. wide, - closer to 5 ft. wide. He said this would provide access, but wouldn't have as massive an effect. He said he didn't see that the applicant needed an 8 ft. 4 in. deck around three quarters of the house.

He said he agreed that the roof area as proposed was quite large, and said perhaps the roof area on the right side, as one looked at the plan, could be restricted to the length of the major room in the house, - 27 ft. 5 in. He said the roofing in that case wouldn't have such a massive appearance.

Mr. Sievert said he didn't see that the deck would cause much of a problem because it wouldn't be impervious. He also said that when he was at the site, the bank looked like it was well vegetated, and also noted that drainage arrangements could be made so the bank wouldn't erode.

Concerning the roof, Mr. Sievert said the Shoreland Protection Act clearly said the building shouldn't be expanded toward the reference line. But he said he didn't know that runoff from the proposed roof would put any contaminants into the water, as compared to a parking lot, and also said the drainage and erosion issues could be dealt with. He said with a deck, there wouldn't be those potential problems, so the deck expansion was approvable.

There was discussion that the Shoreland Protection Act said there could be an open porch up to a maximum of 12 ft. toward the water, which would include a roof. There was discussion about what this meant.

Mr. Sievert said he stood corrected, but said again that the runoff from the roof could be dealt with.

Chair Gooze said the area closest to the bank was actually a pervious deck. He said the Shoreland Protection Act did state that one could move out to that area, and it was up to the Board to decide if this was against the public interest because there could be damage to the area from water coming off the roof. He said he agreed with Mr. Sievert on this, and said he did feel the application met the criteria, but with some conditions that something would have to be done to protect the public interest concerning the area that water would be running on to.

He said he would be in favor of granting the variance if the Board or the applicant could figure out how to deal with the drainage issue. He also said that if other Board members agreed, he would like to open the public hearing again in a few minutes, in order to ask the applicant about this.

Mr. McNitt said he had some real concerns about this project. He said the interpretation which the Planning Board and ZBA had regarding extending a deck into a buffer area had in the past been that a building structure that met the buffer requirements was allowed to put a deck over the buffer area. He noted that sometimes the boards had even been reluctant to allow this.

He said in this case, there was a building that for a variety of reasons was in the buffer areas, and in one place was actually within 20 ft. of the actual shoreland. He said the applicant was asking

the Board to allow him to extend it by more than 8 ft on the shoreland side. He noted the space wouldn't be enclosed, but was about as close as one could get to an enclosed space.

He said he thought there was a real question as to whether this met the spirit and intent of the Ordinance, because of the issues of erosion control and aesthetics. He said unless some drastic changes were made, or he was convinced otherwise by Board members, he would feel strongly that the application didn't meet the variance requirements.

Chair Gooze noted that the Shoreland Protection Act was referring to nonconforming structures, not structures outside the buffer zone that were being extended toward the buffer zone.

Mr. McNitt said he had attended a NHDES class locally where the teacher had spoken about a situation where someone whose building footprint was not expanded into the buffer area wanted to build an open deck out over it. He said this person had said although NHDES didn't like it, it would permit a non-foundation deck to be built out into the buffer area.

Mr. deCampi said NHDES had essentially pled with them not to approve anything, including decks, closer than 75 ft. from the water, and said this was part of the reason he was opposed to granting this variance.

Mr. Johnson said there were two different State regulations involved here. He said for a new building, a deck had to meet the 75 ft. requirement, but he said for an existing nonconforming structure, it was understood by the State Shoreland Protection Act that the structure wouldn't be expanded, but would allow the 12 ft. extension.

Chair Gooze said that was how he was reading this.

Mr. McNitt noted there was about 80 ft. of buffer area behind the house, but when this project was through, there would be about 2 ft. in front of the house on that corner.

Mr. Johnson said at a meeting that day, NHDES had made the distinction between a new building and a nonconforming structure where a 12 ft. extension was allowed.

Chair Gooze re-opened the public hearing, and said he would like to ask the applicant a question. He asked what could be done to meet the spirit of the Ordinance regarding drainage in the area.



Mr. Rist said he and Mr. Christensen would have to do some brainstorming on this. He read from State regulations Env/Ws 1406.03 that “no deck or porch located between the primary building line and the reference line shall be converted to become part of the primary living space.” He said this was understood, and said the applicant would not be back to ask that he be allowed to convert the deck or porch to living space.

He provided details on the drainage system that had already been installed at the house, noting there had been concern about drainage off the hill in September, when the previous variance request was before the Board. He then provided details on two possible ways of tying into this existing drainage system. He also discussed why the drainage probably wouldn’t increase anyway because of the roof.

He noted that in September, a wetlands delineation had been done, and at that time it was clearly marked on the plan that they were 24 ft. from the reference line. He said by moving 8 ft., they would then be approximately 16 ft. from the reference line. He said according to the Shoreland Protection Act, it sounded like they could move 12 ft. toward the reference line, yet they were only asking to move 8 ft.

He said the applicant was open concerning the deck situation. He also noted that some of the roof area already existed. Concerning the deck area on the right side of the plan, he explained that they were attempting to add a front door to the house because it didn’t have one, and wanted exposure to Bay Road. He also noted that there were sliding walls in the deck portion off the main house. He said these would stay, and said Mr. Christensen wasn’t planning to absorb the deck into the house.

Ms. Eng asked about the solar roof, and whether it was retractable.

Mr. Rist said it was a fixed roof, and the applicant was proposing to match the existing roof, and bring the roofline along the entire length of the back. He said the solar roof area would be open, while the area to the right of it, in front of the main house, would have sliders with seasonal screened panels. He explained that Mr. Christensen did not want to be exposed to the sun.

Chair Gooze closed the public hearing.

He then asked Mr. Johnson whether, in terms of expansion of a nonconforming structure, the deck qualified as a structure.

Mr. Johnson said it did.

Chair Gooze said the Board could still make a decision on whether the expansion was for or against the public interest, etc.

Mr. Bogle said in essence, anything in excess of the porch that was currently there was an expansion of the footprint, which supposedly was not allowed under the code.

Chair Gooze agreed, and said in order to be allowed, it needed to meet the variance criteria. He said he was having a problem with the application because of the roof, and said he would be more comfortable if they were just considering the deck. He said moving 8 ft. closer bothered him, concerning the runoff issue.

Mr. deCampi said if there were three Board members against the roof area expansion, perhaps the Board could develop a consensus on what it was in favor of granting.

Chair Gooze said he didn't have a problem with the deck, even in the corner, because a deck would be pervious.

Mr. deCampi said he too could live with the deck as long as it was fully pervious.

Mr. deCampi numbered the drawing of the project that had been provided to Board members, designating areas 1-6.

There was discussion about the idea of reducing the square footage of the deck in section 1 and section 5, as had been suggested by Mr. Bogle.

Chair Gooze said the Board seemed to be stuck on whether the roof would be in the public interest, and within the spirit and intent of the Ordinance, in terms of protecting the environment.

Mr. Sievert said he didn't think the roof would negatively impact the environment in this small area. He said it would increase the runoff, but said there should be some way to collect that so it didn't go over the bank, although noting it probably wouldn't erode the bank anyway. In answer to Chair Gooze, he said he would be comfortable with granting the variance if there was a way to address the runoff.

Mr. Bogle said the property was at the water's edge anyway, so the water would go over the bank one way or another. He said putting rain gutters on therefore wouldn't really make a difference. He then asked what the deck would be made of noting treated lumber could potentially put toxic chemicals into the water.

Chair Gooze reopened the hearing, and it was determined that synthetic lumber would be used. He then closed the hearing.

Mr. deCampi said he didn't want to see a roof anywhere other than where it now was, section 4. He also said he was inclined to think that reducing the deck in areas 1 and 2 to a limit of 5 ft. from the building made sense, to diminish encroachment into the shoreland setback. He said this would still allow a secondary means of egress.

Mr. McNitt said he was presently against the application as it now stood. He said he was willing to yield somewhat concerning the fact that the structure had been expanded toward the shoreland. He said he liked the idea of reducing the size of the deck, and not covering any more roof. He said the key point regarding the roof was that it meant there was that much less area of ground for the rain to soak into before going over the bank. He said this made a big difference concerning erosion.

Chair Gooze asked Mr. McNitt if he could accept a roof if there was some kind of drainage system, and Mr. McNitt said he would not. He said he would consider this to be expansion in the worst place, in the wrong direction

Mr. Smith said he agreed with Mr. McNitt. He said he would not find the gutter acceptable, and agreed with the idea of a reduction in the square footage of the deck. He noted a second egress was important, and said the applicant would still be able to do this if the deck were reduced in size.

Ms. Eng said she would be in favor of reducing the deck. Concerning the roof, she said she wasn't sure.

Chair Gooze said to him there was a distinction between a deck and an open porch. He said he was afraid to make a decision without getting another opinion as to whether the roof would make a difference concerning runoff and impacting the environment. He said he would be in favor of approving this application if someone could tell him there would be no difference between having a deck there and having an open porch with a roof on it. But he said he would vote against it at present.

***John deCampi MOVED to deny the APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article XIV, Section 175-72 of the Zoning Ordinance to build decks and an enclosed porch to an existing, non-conforming structure within the Shoreland Protection Zone. Ted McNitt SECONDED the motion.***

After some discussion, Chair Gooze re-opened the public hearing so Mr. Christensen could speak.

Mr. Christensen said he would like to work something out with the Board. He said the second egress was important, but said he understood the concerns about roof coverage. He said limiting the deck to 5 ft. would be too close, but suggested rounding out the corner. He also noted the water was not very close at that corner, even at high tide.

Mr. deCampi agreed it was a very shallow cove. But he said he didn't think the Board should be getting into deal making at present. He suggested that Mr. Christensen might want to withdraw his application and submit an amended application for the next meeting.

Mr. Christensen said time was of the essence, because of mud season.

Mr. Bogle noted the square footage for the house was 792 sq. ft., and the square footage of all the decks being requested was 658 sq. ft., which represented a major increase in the footprint, in a sensitive area.

Mr. Rist noted that much of the deck already existed, so 500 sq. ft. was not being added. He said sections 6, 5, and 4 were already there.

Mr. deCampi said that what was proposed for section 6 was much larger than what was already there.

Mr. Johnson suggested that the Board agree to table the motion, and to hear from Mr. Christensen again later at the meeting, after Agenda Item II c, so Mr. Christensen could perhaps avoid having to deal with mud season.

Board members agreed with this idea.

***Ted McNitt MOVED to table the Christensen application until after Item II c. The motion was SECONDED by John deCampi, and PASSED 4-1, with Linn Bogle voting against the motion.***

**Recess 8:30-8:36 pm**

- C. **PUBLIC HEARING** on a petition submitted by Peter Cathey, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to build a new, single family home on a proposed subdivided lot with no frontage. The property involved is shown on Tax Map 16, Lot 29-4, is located at 86 Longmarsh Road, and is in the Residence B Zoning District.

Chair Gooze opened the public hearing.

**Sarah Smolenack** explained that her husband was unable to make the meeting that night. She said they were requesting a porkchop subdivision of approximately 2.5 to 3 acres off of a current 5-acre parcel, with access through an easement in what would become the front 2 to 2.5 acres. She said the front acreage was already developed as a single family home, and said she and her husband were considering building a house on the back property. She said they would be selling one of the properties, and said if the house was sold it would be sold as such. She said in the event that they sold the proposed back 2.5-3 acres, the easement would allow them to control the development integrity of both properties, by stipulating that the back acreage would be for one, single family home.

She said they felt that there would be no decrease in the value of surrounding properties because creating a 2.5 to 3 acre lot for a single-family home would result in a minimum 2 acre lot, and a maximum 3 acre lot being created from the 5 acres, so the residences would not be crowded. She said both of these lots would be greater than the 40,000 sq. ft. minimum required in the RB zone.

She said granting the variance would not be contrary to the public interest because the acreage was large enough to maintain the medium density character of the RB zone and the deeded easement would clearly state that the access was to one lot for a single family residence. She noted that the end of Longmarsh Road where the proposed easement driveway would be located was very lightly traveled.

She said substantial justice would be done in granting the variance because the current 5 acre lot was sizable enough to be subdivided into 2 lots that were both significantly larger than the RB

minimum square footage required, and because due to the shape of the lot, this division could only be accomplished by granting a variance for lot frontage.

She said granting the variance would not be contrary to the spirit and intent of the Ordinance because the lot would be similar to and in keeping with the characteristics of the other lots in this medium density area, with the additional control of the access through a deeded easement to control the character, and use of, the lot and dwelling.

Mr. deCampi noted the reference to a 30 ft. wide easement for proposed deeded access, and said this wording conflicted. He asked if what was proposed was to take title to the strip, or to have an easement on it.

**Ms. Smolenack** said they proposed to have an easement on the strip. She also noted that the easement was actually 12 ft., explaining that her husband had made an error concerning this.

Mr. Smith said to do what was proposed, the applicants would have to take out a good part of the rock wall next to the road, and some of the trees in the area. There was discussion about the current state of the rock wall.

Chair Gooze asked if any members of the public wished to speak in favor of the proposal. Hearing no response, he asked if there was anyone who wished to speak against it.

Attorney Sharon Somers said she was present to represent Donald and Patrice Gray, abutters to the property in question. She handed out a written copy of her comments, and then read through them.

She said the applicants objected to the proposed application to obtain a variance to construct a new, single family dwelling with no frontage. She said the application did not comply with the public interest component, noting the Chester Rod and Gun Club case, 2005, where the Court held that in order to be contrary to the public interest “the variance must unduly and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” She said in this case there were several instances where granting a variance would violate these objectives.

She said the RB zone called for 150 ft. of frontage, while 0 ft. of frontage was being requested. She also noted that although this was characterized as a porkchop subdivision, the Durham Zoning Ordinance provisions 175-57 concerning porkchop subdivisions allowed for reduced frontage requirements in two to three lot porkchop subdivisions, but only if the proposed subdivision was located in the Rural or Rural Coastal zone. She said if the legislative body had intended to broaden this policy to include the RB zone, it would have done so. She noted that the recently amended Zoning Ordinance included no changes concerning this.

Attorney Somers said another reason why granting the variance would be contrary to the public interest was that the 1988 approval of the five lot subdivision which included the lots of the Grays and the applicants was predicated upon the creation of a five lot subdivision, not a six lot

subdivision. She said if the variance were approved, this would essentially countermand the 1988 Planning Board subdivision approval.

Concerning the hardship criteria, Attorney Somers noted the *Vigeant v. Hudson* case, 2005, decided subsequently to the *Boccia* case, which provided guidance on the *Boccia* decision. She said in this case, the court indicated that because of the unique configuration and size of the lot, it would be difficult to find any permitted use that could comply with the dimensional requirements. She said the court also said that the proposed use of multi-family housing was reasonable because it was a permitted use in the zone.

She said this was not the case in the present situation, where what was being discussed was not a pre-existing lot, and the applicant was seeking to create a second, rear lot to accommodate a second dwelling. She said it was not presumed here that the proposed use was inherently reasonable because it was a permitted use.

She also said it was clear that the existing lot, based on its current use as a single family house lot, was more than adequate to meet the dimensional requirements, so the hardship criterion was not satisfied.

Attorney Somers noted that the applicant had referenced 175-39F, concerning the Planning Board's ability to waive frontage requirements, which was not really applicable. She also said this provision had to do with conservation subdivisions, which was not relevant to this application.

Attorney Somers said the key variance criterion that was not met in this application was the spirit and intent criterion. She said the intent of the Ordinance was to provide adequate frontage in the RB zone, as part of maintaining the integrity of medium density residential uses, and to ensure that new development was consistent with and maintain the character of the neighborhood.

She noted that the 1988 subdivision plan lots met or exceeded the frontage requirements, and also said the tax maps for Long Marsh Road indicated that other lots on this road met or exceeded those requirements. She said if the variance were granted, it would enable the creation of a second rear lot, with inadequate frontage, which would be contrary to the spirit and intent of the Ordinance. She said the lack of any provision that sanctioned the creation of rear lots with inadequate frontage was further evidence that the application didn't comply with the spirit and intent of the Ordinance.

Attorney Somers said the question to be asked concerning the substantial justice criterion was whether the loss that would be sustained by the applicants if the variance were denied was outweighed by the gain to the general public. She said in this instance, the applicants would still have full use of the lot for purposes of a single family dwelling, including the rear portion of the lot, while granting the variance would establish a dangerous precedent for the development of rear lots with inadequate frontage. She said this would undercut the clearly expressed wishes of the legislative body in passing the Zoning Ordinance.

She also noted there were other large lots in the area that might decide to use this case as a precedent in order to be able to subdivide.

Attorney Somers said the Grays believed that approval of the proposed subdivision and construction of a single-family home on the newly created lot would have a negative impact on their property values. She said their home currently looked out on an upland, forested slope, and the construction of a second home in this area would dramatically and detrimentally change the landscape abutting their back yard. She also said Ms. Farag of the Don L. Thompson Real Estate Agency had said the additional home there would negatively impact the value of the Gray's property.

Attorney Somers said the evidence indicated that the five variance criteria had not been met, and said the Grays were in the audience to answer any questions the Board might have.

Chair Gooze received clarification that Attorney Somers felt this was an area variance.

Chair Gooze asked if the Board had any questions for Attorney Somers, and there were none. He then asked if there was any one else who wished to speak against the application. Hearing no response, he asked if the applicant had a rebuttal to Attorney Somers' statements.

**Ms. Smolenack** said it was realized there was not enough frontage, so they were asking for an easement to allow the driveway. Concerning the spirit and intent of the Ordinance criterion, she said the minimum lot size in that area was 40,000 sq. ft., and what was proposed was a 2 acre and a 3 acre lot. She said even though according to the porkchop subdivision provisions, they could propose 2 extra lots, they loved that area, and were not trying to sell off their land.

She said they had proposed the 2 lot subdivision because they didn't feel it would impact their neighbors. She said 3 acres was a good size piece of land, and said the proposed house would be located far enough away from the neighbors. She said there was a huge gully separating the property from the Grays, and said the house would be put on the side farthest away from the Gray's property.

Mr. Johnson provided a copy of Attorney Somers' comments to the applicant.

Chair Gooze closed the public hearing.

Mr. Smith noted the Board had just received the letter from Attorney Somers. He said that looking through it, the frontage issue was a stumbling block, and said granting the variance would be against the public interest and probably against the spirit and intent of the Ordinance. He also said it was hard for him to see how this would meet the hardship criteria.

Ms. Eng said she felt granting the variance would be against the spirit and intent of the Ordinance, stating that when the Town made that lot, they intended it to be one lot. She said the area around it was conservation land, and said she had a hard time with the idea of another house going in that back property.

Mr. deCampi said Attorney Somers had summed up the situation quite well. He said the porkchop provisions of the Zoning Ordinance did not apply to the RB zone, and said it would therefore be difficult to meet the spirit and intent of the Ordinance. He said he felt the Board

would be legislating if it granted the variance. He said he understood why the applicants wanted this, but said he didn't see any way the Board, as a non-legislative body, could grant it.

Mr. Bogle said he agreed with Mr. deCampi. He said this wasn't a case of a porkchop lot, and said by approving this the Board would be creating a back lot that was landlocked with no frontage. He said the back lot only had right of passage on the easement, and said he didn't think this met the spirit and intent of the Ordinance because the lot would have no frontage. He noted the Board had refused to do this in a prior case on Packers Falls Road not long ago.

Mr. Bogle also said Attorney Somers was correct that approving this application would set a disastrous precedent, noting there were many other properties where the owners could then ask to subdivide their properties.

He also said the 12 ft. easement would run along the property line, and would therefore have to run within the 20 ft. side yard setback. He said the application did not meet the spirit and intent of the Ordinance, and was contrary to the public interest.

Mr. Sievert said he agreed.

Chair Gooze said a porkchop subdivision was not a permitted use in the RB zone, which made this a use variance as well as an area variance. He said the application didn't meet the variance criteria either way. He said he agreed entirely with Attorney Somers' statement, so would be against granting the variance.

Mr. McNitt said he agreed with what others had said. He said he had looked extensively at a way to approve this, recognizing the need of the applicants, but had come to the same conclusion as other Board members and Attorney Somers. He said this was not a permitted use, which meant it was contrary to the spirit and intent of the Ordinance. He said he had thought about whether it could be proportioned down from what would be permitted in the Rural or RC zone, but couldn't manage to do that. He noted that the frontage for the property was 114 ft., which was less than what was required even for a single lot in the RB zone.

He said the Board would be doing an injustice to the neighborhood to approve the application, and said the value of surrounding properties might or might not be diminished as a result of granting the variance. He summarized that granting the variance was contrary to the public interest, and was completely contrary to the spirit and intent of the Ordinance.

Chair Gooze noted that there had recently been a situation where a lot had no frontage, but a variance was approved because Board members felt it was a unique situation, since there was already a non-frontage lot with a house that used the same road the house in question would be put on. He said the Board generally had been consistent about not allowing non-frontage properties.

Mr. McNitt said a key point made by Attorney Somers was that the original Planning Board approval in 1988 was for a five-lot subdivision, when six lots had been requested.



Mr. Smith said he agreed with Mr. McNitt concerning the substantial justice criterion. He also said he agreed with what Attorney Somers had said, - that granting the variance would harm the general public because it would establish a dangerous precedent for the development of rear lots with woefully inadequate frontage.

***John deCampi MOVED to deny the APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to build a new, single family home on a proposed subdivided lot with no frontage, located at 86 Longmarsh Road, in the Residence B Zoning District, - based on the application failing to meet the public interest, spirit and intent of the Ordinance, substantial justice, and hardship criteria. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.***

## **II b. Christensen Application, continued....**

Chair Gooze opened the public hearing again, and said the applicant would be allowed to discuss his revised proposal.

Mr. Rist thanked the Board for the opportunity to discuss this further. He said Mr. Christensen was willing to cut the corner off of area 1, and said it would be somewhere close to 8 ft. on the diagonal from the corner of the house to the corner of the deck. He also said they would subtract the roof section over section 2, but still keep it on area 3, and potentially on area 5. He said area 6 would be an open, pervious deck. He said area 5 was approximately 74 sq. ft., and area 3 was about 97 sq. ft., for an increase in the roofed area of about 175-180 ft.

He said they also proposed to install a drip trench in the ground that would tie into the existing foundation drain, and he provided additional details on this. He said the idea was to bring the water as far away from the shoreland as possible, and to then allow it to run across the vegetated area.

He said area 5 was a unique situation because the existing slope of the roof in area 4 didn't allow headroom to install a full door on the gable wall. He said what was planned would allow installation of a full height door.

There was discussion about exactly how the corner of area 1 would be handled. There was also discussion about exactly where the drainage would come out.

Mr. McNitt said what was proposed concerning the roof would cover what used to be absorbing ground, and said runoff would be taken away with the foundation drain, which he approved of. He asked how the drainage would get to the water after it left the foundation drain.

Mr. Rist said it would disperse gradually over a grassed area.

Mr. deCampi said cutting off the corner of the deck would cut down about 4 ft. of the deck.

Mr. Rist said the idea was to match the 8 ft. 4 in. dimension, and not increase it.

Mr. Christensen said he would like to have a barbecue and lawn chairs so anything less than this would be a bit tight.

Mr. Rist said regarding the idea of tinted windows, the problem was once there was a film on the window, it was hard to see anything outside after dark.

Mr. deCampi said he realized this, but still had a problem with the roof that was being requested.

Chair Gooze closed the public hearing.

Ms. Eng said with the perforated foundation drain, she didn't have a problem with the roof. She also said she would be ok with cutting the corner.

Mr. Smith asked what happened if the drainage could not be done. There was discussion about this.

Mr. McNitt said if the contours were correct, he believed it could be done. He said he would go along with what was proposed, although he was not happy with it.

Mr. deCampi said he would vote against it, because he still thought there was too much roof and too much deck. He said the application was contrary to the public interest because it was environmentally dangerous, and said it was also against the spirit and intent of the Ordinance.

Mr. Bogle said he was still concerned that it was a lot of deck, and represented a major expansion of the footprint. He said he felt the amount of deck could be cut back. He noted other cases where the Board had been a lot tougher, and said he would vote against the application.

Mr. Sievert asked what the soil type was there. Told that it was clay, he said it looked like the drainage could work. He said he didn't have a problem with what was proposed, noting it looked like the roof had been taken away from the corner that was the closest to the bank. He said a trench would take any water from the roof down the bank. He provided additional details on the drainage system that could be used.

Chair Gooze said he felt this was a worthwhile proposal. He said the Board had been tough in terms of expansion of houses, but said he didn't remember being tough on porches and decks. He said taking the roof off of the section closest to the bank, and putting the drainage ditch in solved the problems he had with the application. He said based on this, he did feel the application met the variance criteria.

Mr. Sievert asked if the Board needed to establish the exact angle for the corner of area 1.

Chair Gooze said according to the plan, it would be no more than 8 ft. 4 in. on the diagonal.

Mr. deCampi said he had calculated that 3.5 ft. would therefore be cut off the corner.

***John deCampi MOVED to deny the APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article XIV, Section 175-72 of the Zoning Ordinance to build decks and an enclosed porch to an existing, non-conforming structure within the Shoreland Protection Zone at 595 Bay Road, in the Residence C Zoning District, - based on the application not being in the public interest, and being against the spirit and intent of the Ordinance. The motion was SECONDED by Linn Bogle.***

Mr. Smith said he agreed with Mr. deCampi about concerns about the possible environmental impact of this project on the shoreland zone, so he felt granting the variance would be contrary to the public interest. He also said he agreed that this proposal represented a significant expansion, so could well be contrary to the spirit and intent of the Ordinance. He said he had enough doubts to say he couldn't approve this.

***The motion PASSED 4-1.***

Chair Gooze said if the applicant reapplied, he would have to propose something that was substantially different.

***John deCampi MOVED to approve the Minutes of the February 21, 2006 site walk. Linn Bogle SECONDED the motion, and it PASSED 4-0.***

Mr. Rist asked for clarification on what "substantially different" meant, and Chair Gooze said Mr. Rist should talk with Mr. Johnson about this.

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

- A. **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 explained that the Town Attorney felt it would be better from a procedural standpoint if the Board reheard the Slama application, explaining that Mr. Mitchell felt there were enough procedural questions, because of the way the Board had now changed its application form, to justify this.

Chair Gooze said there would be no obligation on the part of the Board regarding the merits of the application. He also said that only appeals that were going on within the 30 day period when this application change was made needed to be considered. He said the Slamas were the only applicants who had appealed a decision made by the Board during this time period.

He recommended that the Board make a motion to rehear the Slama application. He said the Slamas would then be informed of this, and he suggested that another site walk should then be done.

There was discussion as to whether the Board should vote that evening on whether to rehear the application, and it was agreed that it would be better to vote on this at the present meeting. It was also clarified that Chair Gooze was making the request for the rehearing, at the request of the Town Attorney.

***Ted McNitt MOVED to do a site walk of the Slama property on an acceptable date, and to schedule a rehearing for April 11<sup>th</sup>, 2006, subject to the approval of the Slamas. John deCampi SECONDED the motion, and it PASSED 5-0.***

### **III. Approval of Minutes**

No Minutes

### **IV. Other Business**

Chair Gooze noted the letters back and forth concerning the issue brought up by the Richmonds, of whether an ordinance could be developed that would require that realtors would have to include the 3 unrelated persons provisions when selling a house.

Mr. Smith said he liked the idea, and Mr. deCampi's letter, but said legislation would be required in order to accomplish this, and the Board couldn't do that.

Chair Gooze said that Board members whose terms were expiring and wished to reapply needed to send a request to Administrator Selig and the Town Council. He announced that Mr. Smith had just been elected to the Town Council, so would soon be leaving the ZBA.

Mr. Johnson provided copies of the amended Zoning Ordinance, adopted February 20, 2006, to Board members.

### **V. Adjournment**

***Henry Smith MOVED to adjourn the meeting. The motion was SECONDED by Linn Bogle, and PASSED unanimously 5-0.***

9:40 pm adjournment

Victoria Parmele, Minutes taker

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John deCampi, Secretary