

These minutes were approved at the May 9, 2006, meeting.

ZONING BOARD OF ADJUSTMENT
TUESDAY, APRIL 11, 2006
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT: Jay Gooze; Ted McNitt; John deCampi; Linn Bogle; Myleta Eng

MEMBERS ABSENT Michael Sievert

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

I. Approval of Agenda

Chair Gooze appointed Ms. Eng as a voting member for the meeting.

Ted McNitt MOVED to approve the agenda as submitted. The motion was SECONDED by John deCampi and PASSED unanimously 5-0.

II. Public Hearings

- A. PUBLIC HEARING** on a petition submitted by Ralph Kleinmann, Durham, New Hampshire, on behalf of Robert Herriott, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54, Article XIV, Section 175-74(A) and Article IX, Section 175-30(A) of the Zoning Ordinance to demolish an existing cottage and build a new house with attached garage within the Shoreland Protection Zone. The property involved is shown on Tax Map 20, Lot 16-3, is located at 267 Durham Point Road, and is in the Residence C Zoning District.

Chair Gooze opened the public hearing.

Mr. Herriott explained that in the early 1950's, Malcolm Chase had subdivided his land into five $\frac{3}{4}$ acre lots, each with 100 ft. of frontage, and with one 16-acre lot that was considered common land and served multiple purposes, including access to the beach, and a boat launching area. He said none of these things was affected by what was proposed. He said there were mainly tent sites in the area in the early 1950's, then tent platforms, and then summer cottages that were built on concrete block.

He noted there wasn't enough room under the house to allow the previous owner of his property to retro-insulate the flooring. He said at a later time, the second owner tried to insulate the cottage walls but couldn't do this adequately. Mr. Herriott said he had tried to replace 8 of 20 single pane windows a year ago, and provided additional details on windows issues. He said he became discouraged about whether he would be able to retro-insulate the house in order to use it

year round, and felt it would be a shame if he and his wife would have to therefore move away from the Bay.

Mr. Herriott said he talked with Mr. Kleinmann, who lived in the property next door, and said Mr. Kleinmann said he would come up with something sensitive to state and local codes, which also took into account the Herriotts' preference to live in a small cottage on the Bay, in a somewhat primitive way. He said the plan being presented was what he and Mr. Kleinmann had come up with. Mr. Herriott said a new garage was part of the plan, noting he and his wife currently had to walk 150 ft. from their car to the house.

Mr. Kleinmann said Mr. Herriott had asked him to be the general contractor on the project, and said he had worked on the application with him. He said what was proposed was to rebuild the existing cottage in the same likeness, with the addition of an attached garage and a small entryway. He said the setbacks from the water and the side lot lines would be maintained. He noted he owned the lot below the Herriotts' property, and had received a variance from the ZBA last year to build a house on the property.

He said the Herriotts' house was not built to be livable through the winter months, and said they wanted to live there year round. He said both he and Mr. Herriott were familiar with the need to meet the spirit and intent of the Ordinance, based on his own experience before the ZBA last year. He said Mr. Herriott had taken all of this into account, when deciding to rebuild the cottage.

He said Mr. Herriott was not asking for much, and simply wanted the most reasonable solution. He said the living area would be about 855 s.f., which was half of what was approved for two of the five lots in the same subdivision. He said the attached garage was considered to be a necessary comfort for the Herriotts.

He said the proposal was to rebuild the house on slab with no basement, so there would be little disruption to the environment. He said the setbacks would be maintained, noting the garage addition would not encroach further toward the side boundaries or the water. He also said moving ahead with the project would result in a new septic system, which was approved by the State last year.

Mr. Kleinmann said that as an abutter, he fully approved of the project, stating that he would be much less enthusiastic about it if Mr. Herriott were required to move the cottage back further from the water. He said the lots were not wide, and explained that the property boundary was angled, so that the lot got narrower as one moved back away from the water. He said staggering the houses would preserve the open space between the homes and would really make a difference in terms of privacy. He said if the house had to be moved back into the open space area, this would take away from the privacy.

Mr. Kleinmann noted that his house had to be moved back to 80 ft. from the shoreline, and said the construction of the garage on the Herriott property would generally fall behind that 80 ft line.

Ms. Eng asked if there would be a driveway for the garage, and was told there would be, with the gravel driveway extending to the garage.

Mr. Bogle asked what was in the existing barn on the property.

Mr. Herriott said this was used for guest quarters, because there was no room in the cottage for guests. He said the barn contained a sitting room, a bedroom and a sink, but said there was no kitchen, with meals taken at the cottage.

Chair Gooze said Section 175-72 A. 4 of the Zoning Ordinance required that the Planning Board review a project when there was an expansion, as a conditional use.

Mr. Johnson said the Board could make ZBA approval dependent on the project getting approved by the Planning Board.

Chair Gooze asked if there was anyone to speak in favor of the application.

Mr. Herriott said a neighbor, Maynard Jackson, had sent a letter on behalf of all of the Bay Corporation lot owners.

Mr. deCampi read the letter from Mr. Jackson, and also noted a letter from Mr. Chase, also a neighbor, which spoke in favor of the application.

Mr. Herriott said the neighbors had offered to come to the meeting to speak in favor of the application.

Chair Gooze asked if any members of the public wished to speak against the application. Hearing no response, he closed the public hearing. He noted that this was an area variance that was being requested.

Ms. Eng said she thought the application met all of the variance criteria, and said the hardship in this case was that there were special conditions of the property. She said it was long and narrow, and said moving the cottage location back any further from the water would violate the side yard setbacks. She said she did not see other feasible alternatives for moving it back.

She said the applicants had been sensitive to the environment with what was planned. She said the house would be built on slab, would not be increasing the footprint, and would not be increasing the setback violations.

Mr. McNitt said he agreed with Ms. Eng. He said the plans for the property certainly were consistent with the spirit and intent of the Ordinance, and perhaps even improved the situation slightly.

Mr. Bogle said the Zoning Ordinance allowed the applicant to replace the existing building on the same footprint, and also allowed the expansion of a nonconforming structure. But he said the

expansion allowed was restricted to no more than 15% of the existing footprint, but the proposed expansion represented a 43% increase, so in that sense did not meet the Ordinance.

Mr. McNitt said Mr. Bogle's point was well taken, but noted that this was not occupancy space that was proposed.

Mr. Bogle said he would prefer that the house was placed 80 ft. back, as the Kleinmanns were required to do. He noted this was a voluntary demolition, and theoretically should be 125 ft. back from the shoreland. He said he thought the new house could be constructed further back, and said that would be his preference.

Mr. deCampi said he agreed with Mr. Bogle, and said he thought the property could be rotated, providing details on this. He said this would put the house entirely beyond the 80 ft. setback without the problems Mr. Kleinmann talked about. He said he had no problem with the attached garage, but said the house should be at least 80 ft. back, as was required of Mr. Kleinmann, by being rotated in order to meet the spirit and intent of the Ordinance, and to meet the public interest.

Chair Gooze said he was leaning toward agreeing with Ms. Eng and Mr. McNitt. He noted that when the Board heard Mr. Kleinmann's variance request, the size of the proposed structure was one of the reasons the Board wanted it to be moved back. He said that if Mr. Herriott were not putting a garage on, he would have been allowed to build the new cottage on the existing footprint.

There was discussion about this.

Chair Gooze said the garage would not be encroaching any further into the shoreline area, and said the application therefore met the public interest. He said the hardship criterion was met because of the uniqueness of the lot, which was narrow, and said it would be hard to move the house back without encroaching further on the sideyard setbacks. He said he felt the application met all of the variance criteria.

Mr. McNitt noted that on Riverview Avenue, most of the houses had not done what was proposed for this application - to cut down the trees in front of the house. He said he believed those trees were outside of the 50 ft. shoreland buffer, but what was consistently done in other parts of Town was that the trees were trimmed to allow a view of the water. He said the tree canopy and root system were left intact. He said he would much prefer to see this, although it would not affect his decision concerning this application.

There was discussion about this. Mr. Johnson said the tree cutting was not in the original plan, so the Board couldn't rule on this issue that evening.

Chair Gooze said he agreed with this.

Ted McNitt MOVED to approve the Application for Variances from Article XII, Section 175-54, Article XIV, Section 175-74(A) and Article IX, Section 175-30(A) of the Zoning Ordinance

to demolish an existing cottage and build a new house with attached garage within the Shoreland Protection Zone at 267 Durham Point Road, within the Residence C Zoning District, - subject to the provision of review by the Planning Board, if that is appropriate. The motion was SECONDED by Myleta Eng, and PASSED 3-2, with Linn Bogle and John deCampi voting against it.

- B. **PUBLIC HEARING** on a petition submitted by Sharon Somers, Donahue, Tucker & Ciandella, Portsmouth, New Hampshire, on behalf of Jeffrey P. Christensen, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Section 175-74(A) of the Zoning Ordinance to build decks and a three season 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.

There was discussion as to whether Section 175-72 should also be addressed.

Attorney Somers said she had spoken with Mr. Johnson by email, and with Mr. Campbell in person, and said it was her understanding that the applicant would be going before the Planning Board to seek an interpretation.

Attorney Somers said she would prefer that the Board hear the variance application first, and if it were granted, would like the rehearing request to be tabled until the appeal period ended, and then would seek a withdrawal of the request for rehearing. She said if the variance request were denied that evening, she would like the Board to take up the rehearing request that evening.

Chair Gooze said he would accept this.

Attorney Somers noted that Mr. Christensen appeared before the Board in March with his application, and was back before the Board now with a revised application. She said that in order to move forward with it, the Board needed to make a finding that the application was materially different than the application presented by Mr. Christensen in March.

Attorney Somers said it was in fact a materially different application, She referred to the case of *Morgenstern v. the Town of Rye*, where a variance request was denied, but a revised application was approved, with the finding that the application was materially different. She said this was a similar situation.

Chair Gooze said the Board needed to decide if the revised proposal was substantially different.

There was discussion among Board members, and it was agreed that the application was substantially different than the previous application. The Board voted unanimously to hear the variance request.

Attorney Somers said what was proposed was similar in character to neighboring properties. She presented Exhibit A, which contained photographs of decks of neighboring properties. She also said that by adding the decks and porch, as well as the general improvements to the property, the property would be upgraded, which would likely increase its value.

She said granting the variance would not be contrary to the public interest. She read from the Town's shoreland overlay provisions, and said there would be no alteration of the essential character of the neighborhood, or threat to health, safety or welfare. She said the concerns of the Board were now met. She explained that a portion of the deck had been removed, and provided details on this. She also said another issue for the Board had been concerns about how drainage would be handled as part of the project. She said a drainage expert had been contracted to come up with a simple, viable solution, and said the contractor for the project, Mr. Rist, was present to answer any questions the Board might have on this.

Attorney Somers noted that Mr. Christensen would maintain the natural vegetation between the house and the water line. She also said the applicant was affirmatively meeting the objectives of the Zoning Ordinance, because he had removed the old shed on the property.

Mr. Bogle said this had been a condition of the original variance, and said he did not think it applied concerning this variance.

Attorney Somers said the proposal complied with RSA 438 B:2, which allowed the addition of a deck or porch up to 12 ft. from the reference line of the water body. She said this spoke to the public interest, and said the application satisfied this component.

Mr. Bogle questioned this reading of the Statute, and said the language actually said "...12 ft. toward the reference line..." He said this was an aspect of a point made by Mr. McNitt at the previous hearing. He said he felt there was a significant difference between the two different readings.

Attorney Somers said this was an area variance, so in terms of the hardship, the question was whether the proposed use was reasonable, given the special conditions of the property. She said the applicant believed it was, given the configuration of the lot.

She said the substantial justice variance criterion was a balancing test, and said in this situation, the applicant would benefit by having a porch and deck similar to others in the neighborhood, and because of the drainage plan, there would be no adverse impact to the public. She said the installation of rain barrels would reduce the impacts of runoff from the roof, stating that these were ideally suited for this project.

Attorney Somers said the spirit and intent of the Zoning Ordinance was to protect the quality of the shoreland. She said this application met that intent, stating that the water and shoreline were protected by the drainage plan and the maintenance of natural vegetation. She said what was proposed was a part of a package of improvements to the property, which cumulatively would actually enhance the shoreline.

Mr. McNitt asked Attorney Somers if there was any distinction between a porch and a deck.

Attorney Somers said a deck had no covering, while a porch typically had a roof. She said in terms of enclosures, there could be half walls on a deck, or a porch, but said the distinction to keep in mind was one of whether a deck or porch would constitute living space.

She said she did not think either of those things could be said of the proposal, stating that the enclosed 10-month room was intended to be a three-season porch, and was not intended to be living space, that was heated, had utilities, etc.

Chair Gooze said if living space was intended, it would have to meet different codes, and there was discussion about this with Mr. Johnson.

In answer to a question from Mr. McNitt, Mr. Johnson said the State allowed no more than a 12 ft. projection toward the reference line, as part of a deck, open porch, or three-season porch. He provided additional details on this, and said a roof was allowed, but said there could be no insulation, and no heat.

Chair Gooze asked if there were any members of the public who wished to speak in favor of the application.

Richard Gallant, 594 Bay Road, said the environment was the key issue regarding this application, noting that the main concern was the human footprint on the shoreline. He said the State accepted the idea of a deck, and said he thought the variance should be allowed because the deck would limit the ability to walk on the land near the shoreline. Mr. Gallant said the concern in March was the runoff issue, but said Mr. Christensen had addressed this, which was something in his favor. He noted the State had strict requirements concerning windows that could be used, which was a limiting factor in terms of what could be considered living space.

Chair Gooze said there was a letter from Mrs. Christensen, who lived on Emerson Road. He said the letter spoke in support of the variance request. He then asked if there were any members of the public who wished to speak against the application. Hearing no response, he closed the public hearing.

Mr. deCampi said he was still opposed to the project because of environmental concerns, based on the same variance criteria, - the public interest, and the spirit and intent of the Ordinance.

He said he was uncomfortable with the rain barrel approach, and said this was not a permanent solution to the drainage problem. He noted that if the barrel disappeared for some reason, the Board wouldn't know about it.

Mr. deCampi said he was more comfortable with the decks, and said he thought the Board could write some conditions concerning them. But he said the roof still bothered him as much as it did for the previous application.

There was discussion about the issue of the wording in State statute concerning "12 ft. toward the reference line." Mr. deCampi said this issue was not relevant to the application, because the Town had the right to be more restrictive than that.

Mr. Bogle said he had reservations about the amount of deck coverage, given the sensitive location within the shoreland setback. He said the Board had originally agreed to allow the house to be rebuilt on the original footprint. He said he had seen sliding doors in the walls in three places where there was no footprint, including the two sides of the bedroom, noting that sliding doors were usually put in with the expectation that one could walk out on to something. He said the rebuild was done with the expectation that these decks would be added, but they were not in the building permit, as far as he could see.

He said as a nonconforming structure in the shoreland zone, the increase of the footprint that was allowed was limited to 15%, but said the increase in this application was about 40%. He also said he was disappointed that the corner area of the deck that was eliminated was then added on to the deck on the other side.

Mr. Bogle said he felt there was too much deck. He said he was pleased that the deck space was removed where noted, but said he would like to see it pared back some more, providing details on this. He also said he would like to see the roofing over the entrance portion removed so that the roofing would correspond with the length of the main room of the main part of the house.

He said the application did not meet the spirit and intent of the Ordinance in terms of the location of the project in a sensitive area, and also did not meet the Ordinance in the sense that the purpose of the Shoreland overlay was to conserve the natural beauty and scenic quality of the shoreland. He said this would be a large structure sitting out in the open.

Mr. McNitt said he wanted the owners to enjoy the property, but said he had to agree with what Mr. deCampi and Mr. Bogle had said. He said there was too much roof, too close to the water, and said he would feel much better if the enclosed porches were decks. He said he did not feel the application meet the spirit of the Ordinance in terms of environmental pollution issues in the shoreland area. He also said he couldn't see any public benefit, and could see negative aesthetics.

Ms. Eng said she had been in favor of granting the previous variance application submitted by Mr. Christensen, if rainwater could be taken away from the house and tied into a drainage system. She said she liked the idea of rain barrels, but agreed with Mr. deCampi that there would be no guarantee that they would remain. She said because of this, she was not in favor of granting the variance request, because the application did not meet the public interest. She also said that because the project would be so close to the shore, it did not meet the spirit and intent of the Ordinance.

Chair Gooze asked Mr. Johnson if porches counted toward the increased percentage of building footprint that was allowed, since this was not living area.

Mr. Johnson said he would have to review this, given some changes to the Zoning Ordinance, but said his initial reaction was the deck was a structure, and was an extension of the house, although it was not habitable.

Mr. Bogle said the footprint issue should be reviewed by the Planning Board and clarified, regarding foundations, decks, etc. He said this was very important in terms of interpreting the Zoning Ordinance.

Mr. Johnson said he would pass this on to the Planning Department.

Chair Gooze said he had been set to accept this application, noting he was against Mr. Christensen's previous application because of the runoff issue, in an area where the proposed roof was so close to the shoreline. He said the applicant had now taken care of this, which was why he thought this was a new proposal.

He said he was having trouble with the spirit and intent criteria, and how much this proposal would hurt the shoreland. He noted that a person speaking in favor of the application felt that having the deck was better than walking on the ground near the shoreline.

He said he wasn't sure the rain barrels could handle runoff from the roof, and said that he did not feel he knew enough to make a good decision. He noted that the State said the expansion could go 12 ft. toward the reference line, but said that based on the local Zoning Ordinance provisions concerning the shoreline, the application did not meet the spirit and intent of the Ordinance.

In terms of the criterion of public interest, and specifically whether what was proposed would change the nature of the area, he said there were certainly decks that were much closer to the water than this would be, noting that one deck actually hung over the water.

Chair Gooze said he would like to re-open the public hearing. He asked Attorney Somers and the applicant if they knew when the decks in the pictures were put in, and how they were approved.

There was discussion as to whether the properties in the photos could be identified.

Attorney Somers said regardless of when they went in, that was the character of the surrounding neighborhood, and said this was what needed to be considered.

There was discussion about the pictures, and whether these decks may have been put in without permits, with Mr. Bogle stating that if this were the case, they would have to be taken out.

Mr. Rist said all the pictures in A2 and A3 were essentially taken within 500-700 yards from 595 Bay Road. He provided details on this.

Mr. Johnson noted that the screened room in picture A4 had been approved by the ZBA.

Attorney Somers said looking at these photos, what was proposed was not different in character aesthetically with what was in the pictures. She said this spoke to the public interest issue.

Chair Gooze closed the public hearing.

He said the spirit and intent of the Ordinance, specifically the shoreland provisions, was the only criterion of concern to him. He said he liked the rain barrels, and there was additional discussion on them.

John deCampi MOVED to deny the application for variances from Article II, Section 175-54 and Article XIV, Section 175-74(A) of the Zoning Ordinance to build decks and a three-season porch to an existing, non-conforming structure within the Shoreland Protection Zone at 595 Bay Road, located within the Residence C Zoning District, - based on the application failing to meet the public interest, and being contrary to the spirit and intent of the Ordinance. Linn Bogle SECONDED the motion.

Chair Gooze said he would vote in favor of the application. He said there was enough protection of the shoreland provided, and said that based on everything else in the area, it was difficult to deny this. He said the applicant had answered his questions.

The motion PASSED 4-1, with Chair Gooze voting against it.

There was discussion as to whether to decide then to rehear Mr. Christensen's previous application. The Board decided to wait to discuss this later in the meeting under Agenda Item III A.

- C. **PUBLIC HEARING** on a petition submitted by Linda L. Underwood, Berwick, Maine, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to build a garage addition within the sideyard setback. The property involved is shown on Tax Map 1, Lot 13-9, is located at 61 Edgewood Road, and is in the Residence A Zoning District.

Chair Gooze opened the public hearing.

Mr. Underwood said he and his wife were in the design phase of the project with their architect. He said they purchased the house with the hope of retiring there, and said as part of this, they wanted to build additional living quarters to the rear of the property (a master bedroom and bathroom) as well as to enlarge the existing garage. He said the question was whether they could get a sideline variance prior to going forward with the project. He said it was realized that this was a long, narrow lot.

Mr. deCampi received clarification that there was an existing one-car garage, and the plan was to add an additional bay next to it, which would add an additional 14 ft. to the garage. It was noted that there would be two doors for the garage.

Chair Gooze asked if the applicant had looked at the idea of having a single door for the garage, and also asked how much encroachment in the setback there would be if this were done.

Mr. Underwood said the proposal would then be close to not needing a variance, and said this was an option.

Mr. Bogle asked if what was proposed would affect the trees in the area.

Mr. Underwood said he had talked with Public Works Director Mike Lynch about this, and said as part of the electrical work that would be needed, one big tree would be taken down. He said they would try to save the oak tree close to the house by cutting some limbs and building underneath it.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application. There was no response.

Mr. deCampi asked Mr. Underwood if he had talked to the O'Quinns, whose property abutted the Underwoods' property on the side where the setback encroachment was.

Mr. Underwood said he had not spoken to them.

Chair Gooze closed the public hearing.

Mr. Bogle suggested that the Board could perhaps table this application, in order to let Mr. Underwood explore how much addition would be needed if he went with a single door for the garage instead of two doors.

Mr. deCampi agreed that the application should be tabled so that the exact amount that was needed for the garage in order to meet the Underwoods' goals could be determined. He said he did not think the engineering had been done on this yet. He said it was up to the applicant to ask for the least amount of variance that could be obtained, and yet still achieve the goal.

Chair Gooze said he had a problem with this application, questioning what about this particular property made it unique. He said concerning the hardship criterion, the question in this instance was whether what the applicants wanted could be accomplished with a single door for the garage, which would involve the least possible variance. He said looking at what was currently proposed, he did not think it met the hardship criterion.

He also said he did not think what was proposed met the spirit and intent of the Ordinance, noting in this case that he was concerned about the properties in the neighborhood, not the abutter.

Mr. McNitt said he agreed with Chair Gooze concerning the uniqueness issue. He said a purpose of zoning in this area was to keep the lots close together, and said a 10 ft. setback was fairly important to the neighborhood. He said if there were another feasible method to accomplish what the applicants wanted, he would like to see it. He said a single door for the garage might very well be the answer. He agreed the application should be tabled.

Ms. Eng said she agreed with what other Board members had said.

Chair Gooze asked Mr. Underwood if he was agreeable to tabling the application, so that he could come back with a plan regarding the garage door.

Mr. Underwood said he was fine with this, and also said he would get a letter from the O'Quinns. He asked for clarification on what defined the footprint, - the eave of the roof or the foundation of the garage, stating that he wanted to make sure he was looking at the right vertical plane as it related to the footprint.

Mr. Johnson said this was determined by the sidewalls of the house, with the understanding that the roof overhang would be 6-12 inches.

Mr. Underwood said he might want to have that overhang, so he would be able to stack wood.

It was agreed that the application would be tabled and continued to the next meeting.

John deCampi MOVED to table this matter, and to continue it to the next ZBA meeting. Linn Bogle SECONDED the motion.

Mr. Bogle recommended that Mr. Underwood get a letter from the O'Quinns.

The motion PASSED unanimously 5-0.

8:45- 8:50 p.m. break

- D. **PUBLIC REHEARING** on a November 8, 2005 denial of the Zoning Board of Adjustment of a petition submitted by Emily and 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 Board had done a site walk of the property, and said the Minutes for this were in Board members' packets.

Attorney Tanguay of McNeill, Taylor and Gallo thanked Board members for looking at the Slama property again, and looking at possible alternative sites for the garage. He noted he had provided the Board with a packet of information at the site walk, including a design plan. He went through this material, which showed where the garage was proposed, and also showed other sites that were considered but which did not work.

He said there was a sharp curve as one entered the property, and the driveway was below grade of the open area up above. He said there was a visibility problem because of this. He also said there were ledge outcroppings on the property which would mean that blasting would be required in order to locate the garage elsewhere.

Attorney Tanguay said he had some additional things to present that evening. He said one piece of information was an additional plan of the property that showed in greater detail where the ledge was located.

There was discussion on the ledge on the property. Mr. Slama provided details on this, and said the map accurately identified where the ledge was located.

Attorney Tanguay next showed photos of the turnaround, explaining that if the garage were moved forward, this would infringe on the turnaround, making it difficult to get in and out of the property. He said a third piece of information was the estimate cost of ledge removal, - \$15,000.

Attorney Tanguay said this was an area variance. He noted the Boccia case, and said this was not a use variance because it involved a permitted use. He provided details on this. He said because a permitted use was involved here, an area variance was more likely to be approved than a use variance, because the application did not violate the zoning scheme. He said the spirit and intent of the Ordinance was therefore largely met because this was a permitted use in the RC District.

Attorney Tanguay quoted from the Boccia case, and also quoted from *Vigant v. Hudson*, which indicated that assuming a use was permitted, but special conditions made it difficult to comply with the Ordinance, an area variance might be necessary from a practical perspective.

He said the question to be asked was whether there was a reasonably feasible method to accomplish the goal. He said the applicants had looked at alternative locations for the garage, and had indicated why they wouldn't work. He noted that the court had said that the financial component had to be considered when thinking about reasonable alternatives, which amounted to more than mere inconvenience. He said a \$15,000 blasting job was more than mere inconvenience, noting this was about 25% of the total cost of the whole project.

He noted that the *Vigant* case had indicated that there was no need to ask the question of whether the intended use was reasonable, stating that if it was permitted, it was assumed to be reasonable. He said there was no need to talk about alternative uses, and said an area variance could not be denied because a ZBA disagreed with a proposed use.

He said there were several special conditions of the property, first noting the curved driveway, which was below the grade of the field, resulting in poor visibility, and an unsafe situation. He said another special condition was the need for a turnaround because of the driveway.

Attorney Tanguay said the fact that the septic system was located close to the turnaround was another issue, and said there was concern that blasting near it would impact it. He said another special condition was that the field was on a plateau, which dropped off sharply on all sides, and said this led to some special concerns and considerations. He said in this case, this meant that the abutter was not likely to construct a building in that area, which got at the actual purpose of the setback in this instance.

He said another special condition was the great amount of conservation land abutting the Slamas' property, which encouraged wildlife and in fact contained active wildlife populations. He said the open field on their property was consistent with this land use.

He also noted that an additional condition was that if the garage were moved near where the garden presently was, this would cause a drainage problem, and would involve the removal of trees and the stonewall.

Attorney Tanguay said the garage in the currently proposed location would not be seen by the neighbors, and would not be seen from the road, so would be the most acceptable location in order to meet a series of goals and criteria set forth by the Town.

He noted that the Board had agreed the application met everything but the hardship and spirit and intent of the Ordinance criteria the previous time the application was heard. He said regarding the latter criterion that there was nothing in the Minutes of the meeting concerning this, other than statements that Board members did not feel the application met this criterion.

He spoke about the spirit and intent of the Zoning Ordinance, noting that the updated Zoning Ordinance to a large extent contained the conservation subdivision concept. He said this was all about conserving land, keeping it open and promoting wildlife corridors. He said this was one of the things the applicants thought they could accomplish by tucking the garage into the corner, and leaving as much of the field as possible open.

He said a further purpose of the Ordinance was to promote orderly growth, and to advance good planning, including conservation of open space and protection of natural and scenic resources. He said the applicants felt their proposal accomplished this. He said the proposed location of the building would be less likely to be seen from the road, which was consistent with a scenic approach.

He said the proposed garage violated the Ordinance because of the setback issue. But he said the purpose of setbacks was to prevent overcrowding, and said this wouldn't happen in this instance because a building would never be built right beyond the stonewall. He said the letter and the spirit of the Ordinance were different things, so one needed to ask what was accomplished in this instance by insisting that the setback be met.

He said to insist on meeting the Ordinance, and to force the building into the field and not put it in the corner was wrong from a planning perspective, because the building in that case would be more visible, and would increase the sense of overcrowding. He said this would defeat the purpose of setbacks. He also said it would defeat the purpose behind the conservation subdivision concept.

Attorney Tanguay said no public interest would be advanced in denying the application, and said alternative approaches would in fact spoil the view, open space, and the wildlife corridor. He said literal enforcement of the hardship criterion made no sense, given this particular property, and advanced no particular purpose. He also said to deny the application would not protect the spirit and intent of the Ordinance, in terms of the issues of safety, the general welfare, and open space protection.

He said to deny the variance application would be an injustice to the owner and the abutters, who thought this was the best location. He said it therefore would not advance the concept of substantial justice.

He noted the letter from the neighbors, the Graffs, who said they were in favor of the application. He also said to deny the application, and force the garage into the field, would diminish property values.

Attorney Tanguay said he believed all the variance criteria were met.

Mr. Bogle said the setbacks provided buffers between properties, and questioned what might happen with future owners.

Attorney Tanguay said the applicant did want a buffer so there wouldn't be overcrowding, but said in this location, it would be impossible that there would be a structure located on the other side of the property line, within close proximity to it, because of the steep drop off in that area.

Mr. McNitt asked if the garage would be built on slab.

Mr. Slama said yes, and said there would be no crawl space underneath the house.

Attorney Tanguay noted that the house was built on slab, which was one reason the garage was needed, because there was a lack of storage space.

Mr. Bogle asked if blasting would be needed for the driveway, and Attorney Tanguay said no, and provided details on site work that would be needed.

Mr. Bogle said it looked like the building could be built on ledge at another location in the vicinity of the turnaround, in a way so that no blasting would be required.

Attorney Tanguay said this would mean the garage would be placed into the turnaround, which would shorten it, and make the ability to back out difficult. He also said it would be much closer to the septic system.

Mr. Bogle said it looked like the garage would just about fit in the location he was proposing, and might require a variance of a few feet concerning the back corner.

Mr. Slama said there was an elevation gain in that area, and said if the garage were pulled forward, in order for it to be level, blasting would be required. He said the whole point of the original application was to move the garage to the plateau, which was the perfect location for the garage, although there was the setback issue. He said if the front of the garage were located too close to the turnaround, a larger vehicle wouldn't be able to safely turn around. He provided details on this.

There was discussion about this by Board members.

Chris Ann Borner, 20 Adams Point Road, said she was an abutter who was present to speak in favor of the variance application. She said her property was conservation land, and said only 2 additional lots could ever be developed on it. She said if she ever did this, she wouldn't place a house near the Slamas' house because of the drop-off issue. She said a more desirable place for a house would be closer to the pond. She said what was proposed would cause the least impact on her property, noting she had walked the land with Mr. Slama.

She said what was proposed would not devalue her property. She said her intent was to never sell or develop her conservation property. She also said she believed the Slamas would take good care of their property. Ms. Borner also said she had some concerns about the turnaround, noting that if it were not big enough, there was the chance of creating a more dangerous situation.

She said she did not see what would be gained by not granting the variance. She noted that the spirit of the Ordinance was to protect abutters, and she was the one who potentially would be harmed, but said she actually saw what was proposed as a positive thing.

She said on every level, what was proposed would be a better plan than alternative plans, and in fact would benefit her more than any other plan. She noted that the Slamas had said that if there were any problem with the corner area, they would put up a vegetative buffer. She said there was already a natural buffer in this location.

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

Mr. McNitt first noted that if this were truly a conservation development, the garage would be tucked in with the other building, leaving the rest of the property as open space. But he said the key point was that it was difficult to see how the proposed construction would affect the intent of the RC District. He noted however that if someone conceivably wanted to put a structure on the next property, it could be questioned why the setback needed to be adhered to, when it did not need to be adhered to in this instance.

He noted the setback issue, but said he couldn't say this application was against the other variance criteria. He said he couldn't say it was against the public interest, and said a small case could be made concerning unnecessary hardship, noting he did not know the cost of what Mr. Bogle was suggesting. He said he did not think it would make any difference in terms of the openness of the field, whether the garage was located at the proposed location or the location suggested by Mr. Bogle. He also said he doubted there would be any impact of the garage on surrounding properties.

Mr. McNitt said his original feeling was that the garage would be the one blockage in a big piece of open space, but said the only thing really affected by this was the deer traveling the corridor. He said he couldn't make a strong case for or against the application.

Ms. Eng said she was in favor of granting the variance, because it was not against the public interest and because there was a hardship because of the special conditions of the property. She also said there could potentially be a dangerous situation where the view of vehicles was

blocked, so the turnaround was needed. She also noted the issue of potential impacts on the septic area of an alternative location for the garage.

She said she felt that where the garage was proposed was the best location, but said she would like to see if it could be moved back somewhat from the stone wall.

Chair Gooze said the Board could attach a condition that the garage should be as far forward as possible, given the lay of the land. He said he did think the application met the variance criteria. He said he felt the application met the spirit and intent of the Ordinance, and the public interest. He said he had seen from the site walk that there was no other location for the garage than what was proposed. He said placing it in a different location would require some blasting and other site work, and said there would be no harm in putting it in the proposed location.

Mr. Bogle said from the outset, he had felt there were alternative locations for the garage, in order to keep it out of the setback.

Mr. deCampi said he had been in favor of granting this variance for some time, because he knew the land in this area. He said there would be no harm in putting the corner of the garage near the setback because it wouldn't be seen. He agreed with Ms. Eng about the proximity to the stonewall, and said there should be a requirement that the garage be 10-15 ft. from it.

Chair Gooze asked Mr. Slama if that was workable.

Mr. Slama said he had discussed the idea of increasing this distance with the developer. He said the garage would be located at least 15 ft. from the stonewall.

Mr. deCampi said this should be a condition of approval.

John deCampi MOVED to grant the Application for Variance from Article XII, Section 175-54 of the Zoning Ordinance to build a two-car garage within the sideyard setback at 367 Durham Point Road, in the Residence C District, - with the condition that no part of the garage shall be closer than 15 feet from the stone wall. Myleta Eng SECONDED the motion, and it PASSED 4-1, with Linn Bogle voting against it.

III. Board of Correspondence and/or Discussion

- A. **REQUEST FOR REHEARING** on a March 14, 2006 denial by the Zoning Board of Adjustment 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 asked Board members if they believed any procedural errors had been made concerning the application, or if there was any new evidence. He noted Attorney Somers letter concerning potential procedural issues.

Ms. Eng noted Item 15 in Attorney Somers's letter. She said Mr. deCampi had addressed this in saying what was proposed would be environmentally dangerous.

Chair Gooze said he did not see that the Board had done anything wrong procedurally. He noted that Attorney Somers' letter said the Board had provided no evidence to justify its position, but he said it was up to the applicant to provide evidence that what was proposed would have no impact.

Mr. deCampi said he did not think either of the criteria for granting a rehearing was met.

Mr. Bogle said he thought the fact that the Board had heard a second variance request from Mr. Christensen made the issue of this rehearing moot. There was discussion about this, and about the fact that the applicant could ask for a rehearing on the application that had been heard that evening.

Mr. McNitt said there was no evidence of procedural errors, and no basis for rehearing the application.

Ms. Eng agreed with what others had said.

John deCampi MOVED to deny the rehearing of the March 14, 2006 variance application, because the Board did not find there was any procedural error or new evidence. Ted McNitt SECONDED the motion, and it PASSED 5-0.

B. REQUEST FOR RHEARING on a February 14, 2006 denial by the Zoning Board of Adjustment on a petition submitted by Vincent J. & Gay N. Macri, Durham, New Hampshire, for an APPLICATION FOR VARIANCES from Article II, Section 175-7 and Article IX, Section 175-29(A) of the Zoning Ordinance to place a storage trailer on a vacant lot. The property involved is shown on Tax Map 15, Lot 22-2, is located at 9 Timberbrook Lane, and is in the Residence B Zoning District.

Mr. McNitt said he would abstain from the discussion, because he was not present for the original hearing on the application.

Mr. Bogle said Mr. Macri had provided a statement to the ZBA that outlined 5 points he was basing his request for rehearing on, and said the Board should review these. He then read through the 5 points. There was brief discussion as each of the points was made.

Concerning point #5, Mr. Bogle said he recollected that Mr. Macri had not seen a letter that was submitted at the hearing.

Chair Gooze said the February 14, 2006 Minutes indicated on page 14 that he "...would be against the application with or without Mr. Lonsinger's letter, and wanted to be sure it was clear whether the letter was influencing Board members." He also noted that before the vote was

taken, he said he would be against this application with or without Mr. Lonsinger's letter, and said he wanted to be sure it was clear whether the letter was influencing Board members."

He said Board members had had the chance at that point to say the letter was influencing them, and no one did. He noted at the end of the vote, he said he "...wanted to be sure that the vote was not reflective of the letter. He said he felt what the Board had heard verbally from Mr. Lonsinger and other members of the public was enough. He said he had considered all of the facts in the case, and felt the variance application was contrary to the public interest, was contrary to the spirit and intent of the Ordinance, and did not meet the hardship criteria."

Mr. Bogle said there was wording in the Minutes to the effect that he was voicing his objection to the application based on Mr. Lonsinger's letter. He said this introduced a question. He said he gathered Mr. Macri was saying that because he did not see the letter before the meeting, the Board could not consider it. Mr. Bogle said he did not think that was true at all. He said there were many meetings where ZBA members were handed letters, and said that could influence them.

Chair Gooze said Mr. Macri had ample opportunity to rebut the letter, at the meeting.

Mr. Johnson said most letters received by the Board at a meeting were in favor of an application, but this one basically came out of left field, and Mr. Macri's point was that he did not have an adequate opportunity to prepare to rebut it.

He said since the meeting, his office, the Public Works Department office and the Town Engineer's office had spent a lot of time with both Mr. Macri and Mr. Lonsinger, jointly, and there were some additional facts. He said based on Mr. Macri's points #2 and #5, the Board might want to grant the rehearing and ask him to address just those two points.

Chair Gooze said he had been pretty specific that this letter wasn't influencing the Board's decision.

Mr. Bogle noted that he had stated the letter did influence his decision, which was in the Minutes.

Chair Gooze said he had given Mr. Bogle the chance in the end to make a statement. He also noted that Mr. Lonsinger was present, and was essentially saying everything in the letter. He said Mr. Macri had ample opportunity to rebut the letter.

Mr. Bogle said he did not see the difference between written testimony handed to the Board at the meeting, in the presence of the applicant, and verbal testimony.

Chair Gooze said he could see there might be some question about the opportunity to rebut, if the letter had been received that day, and Mr. Lonsinger wasn't there to speak on it. He said the fact that Mr. Lonsinger had spoken to the points of the letter refuted what Mr. Macri was saying.

Ms. Eng asked if Mr. Macri could have asked for a continuation of the hearing.

Mr. Johnson said Mr. Macri was instructed he could ask for a rehearing.

Chair Gooze said he wouldn't grant a request for rehearing based on the letter, since Mr. Lonsinger was present at the meeting.

Ms. Eng asked again if Mr. Macri could have asked for a continuation of the meeting if he wanted to review the information.

Chair Gooze said he could have. But he said it happened all the time that people provided letters at meetings.

There was discussion about whether Mr. Lonsinger's letter was read out loud at the meeting, and also whether the letter was on the table for the Board at the meeting, or Mr. Lonsinger handed it out that evening.

Chair Gooze said he did not see a problem with receiving a letter at a meeting as long as the person who wrote it was there to speak to it at the meeting.

Mr. Johnson said Mr. Macri did not have time to review the letter, research it and prepare a response to it, and said that was what he was asking to do.

Mr. Bogle said the Board did not do this routinely with other cases. He said the Board did get opposing letters handed to them at meetings.

Mr. deCampi said the letter issue did not justify a rehearing.

Chair Gooze said he would feel more comfortable about this if Mr. Macri had now provided specific points he had not had a chance to rebut, and that were not brought up at the meeting.

He noted that the conferences ZBA members attended often talked about the fact that requests for rehearing had to provide specific reasons for a rehearing, and needed to specify which variance criteria the applicant was asking for the rehearing on. He said he did not see any of this in Mr. Macri's request. He said he did not agree with Mr. Johnson on this.

Chair Gooze also said he did not see where Mr. Macri said he had more information to give the Board.

Mr. Johnson said point #2 addressed this.

There was discussion of point #2 concerning "investigations, subsequent to 2/14/06, and written reports by the Town of Durham public officials that contradict the reliability of certain public statements and alleged facts (approx. 14 in number) made in opposition to our application and used by the ZBA in making its 5-0 decision on 2/14/06."

Chair Gooze asked Mr. Johnson if he was saying that there was such information out there.

Mr. Johnson said he was.

Chair Gooze said he could accept that as a reason for a rehearing.

Mr. deCampi said he could as well, but not based on the letter received from Mr. Macri. He said he had difficulty with the letter, because Mr. Macri implied there was information, and then did not come forward with it.

Chair Gooze said he would be willing to rehear the application, based on point #2 only, based on Mr. Johnson telling the Board there was other information. He said the rehearing would be restricted to this. But he noted again that there were supposed to be specific points on which a request for rehearing was based.

Mr. Bogle said he did not see evidence/ proof of error with the request for rehearing.

Chair Gooze said Mr. Johnson was telling the Board there was such evidence. He said if it was the case that as Mr. Johnson said, there was other evidence out there, the Board should have a rehearing.

Mr. Bogle read through point #2 again.

Mr. deCampi said Mr. Macri needed to give the Board enough specific information to allow it to grant the rehearing, and said it just wasn't there. He said he would like to hear what other Board members thought about the request for rehearing.

Ms. Eng said she was not in favor of granting the rehearing. She said she agreed with Mr. deCampi that Mr. Macri should have provided the Board with the information he referred to in point #2.

Chair Gooze noted Mr. Macri referred to "public statements" in point #2, and could have indicated what public statements this referred to.

Ms. Eng said the other points were also not specific.

Chair Gooze said he was only addressing point #2. He said he still did not know what the public statements were.

John deCampi MOVED to deny a REQUEST FOR RHEARING on a February 14, 2006 denial by the Zoning Board of Adjustment on a petition submitted by Vincent J. & Gay N. Macri, Durham, New Hampshire, for an APPLICATION FOR VARIANCES from Article II, Section 175-7 and Article IX, Section 175-29(A) of the Zoning Ordinance to place a storage trailer on a vacant lot, - because the applicant referenced new information, but failed to give the Board any new information. Myleta Eng SECONDED the motion, and it PASSED 4-0.

IV. Approval of Minutes

Ted McNitt MOVED to approve the Minutes for the site walk on the Slama application. Linn Bogle SECONDED the motion and it PASSED unanimously 5-0.

February 14 2006 Minutes

Page 1 – Name of Victoria Parmele should be listed under OTHERS PRESENT

Page 3, 3rd line, should read “..buildings on the property that were unsightly...” Also 6th paragraph, should read “.. it would eliminate the courtyard effect.”

Page 4, paragraph top of the page starting with “Ms. St. Onge” should read “..also noting that the existing yard...”

Page 6, 1st paragraph, should read “Ms. Eng said she did not think...”

Page 8 first paragraph, should read, “He said he had not seen the property...”

Page 11, bottom paragraph, should read “..and said they had improved its property values..”

Page 12, 10th paragraph, should read “He received clarification from Mr. Johnson that even though this”

Page 14, 2nd paragraph, should read “Mr. Macri protested from the audience.”

Also, 4th paragraph, should read “Chair Gooze said he would be against this application with or without ...”

Page 15, 6th full paragraph, should read “..that there was already the private road that...”.

Linn Bogle MOVED to approve the February 14, 2006 Minutes as corrected. The motion was SECONDED by Myleta Eng, and PASSED 4-0-1, with Mr. McNitt abstaining because of his absence from that meeting.

March 14, 2006 Minutes

Page 1 Should be indicated that Julian Smith was at the site walk

Page 2, 1st paragraph should read “.. advocated maintaining the rural and...”

Page 4, under II B. take out the duplicate “Public Hearing”

Also, in the next paragraph, indicate that Mr. Christensen and Mr. Rist were present at the site walk.

Page 5 3rd and 4th full paragraph, 5th paragraph, use the word “bank” instead of “banking” in several locations.

Page 7, bottom paragraph, should read "...there was a building that for a variety of reasons was in the buffer areas.."

Page 8, 5th full paragraph, should read "...would allow the 12 ft extension of a deck or a porch." Also, 8th full paragraph should read "...a 12 ft extension was allowed for a deck or a porch,"

Page 9, 1st full paragraph, should say "...State Shoreland Protection Act

Page 13, bottom paragraph should say "...was reasonable because it was a permitted use in the zone."

Page 14, 2nd paragraph should read "...current use as a single family house lot,..."

Page 15 4th paragraph should read "Concerning the spirit and intent of the Ordinance criterion, she said the..."

Page 16, 1st full paragraph should read "... was correct that approving this application would..."

Page 17, 3rd paragraph from bottom. Should read "Mr. deCampi said cutting off the corner of the deck..."

John deCampi MOVED to approve the March 14, 2006 Minutes. The motion was SECONDED by Ted McNitt, and PASSED unanimously 5-0.

Feb 16th Todd and St. Onge application, Site Walk Minutes

Julian Smith should be added as an interested party.

Myleta Eng MOVED to accept the Minutes as amended. Linn Bogle SECONDED the motion and it PASSED 4-1, with Ted McNitt abstaining because of his absence from the site walk.

Feb 21st Christensen application, Site Walk Minutes

The Minutes should note that the contractor, Mr. Rist, was present at the site walk.

John deCampi MOVED to approve the Minutes as amended. The motion was SECONDED by Linn Bogle, and PASSED 4-0-1, with Ted McNitt abstaining because of his absence from the site walk.

IV. Other Business

Mr. Johnson said the 28 Madbury Road matter would be going to court. He also spoke briefly about the Wallace matter, noting that Mrs. Wallace had passed away, and Mr. Wallace was now involved concerning the property.

Chair Gooze noted he had attended the recent NH Office of Energy and Planning conference with Mr. McNitt and Mr. Bogle. He commented on differing opinions expressed by attorneys at the conference on some issues.

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

10:51 p.m. Adjournment
Victoria Parmele, Minutes taker

John deCampi, Secretary

GET CONFERENCE MATERIALS IF POSSIBLE