

These minutes were approved at the September 26, 2006, meeting.

**ZONING BOARD OF ADJUSTMENT
TUESDAY, JULY 25, 2006
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Vice Chair, John deCampi; Ted McNitt; Linn Bogle; Secretary, Myleta Eng; Michael Sievert; Ruth Davis

MEMBERS ABSENT Chair, Jay Gooze

OTHERS PRESENT: Zoning Administrator Tom Johnson; Minutes Taker Victoria Parmele

I. Approval of Agenda

Vice Chair John deCampi explained that he would be chairing the meeting in place of Chair Jay Gooze, who was not in attendance. He said he would appoint one of the alternates for each of the agenda items, because 5 regular ZBA members were not present.

Chair deCampi said the Agenda would be approved as it was, noting it did not include approval of the June 13, 2006 Minutes. He said if there were time to review these Minutes, the Board would, later in the meeting, consider doing this.

Linn Bogle MOVED to approve the Agenda as submitted. The motion was SECONDED by Ted McNitt, and PASSED unanimously 4-0.

- A. PUBLIC HEARING** on a petition submitted by Kecia Hartmann, Greenland, New Hampshire, for an **APPLICATION FOR VARIANCE** from the Zoning Ordinance to address and change the conditions on Zoning Board variance approvals of May 25, 2004 and February 8, 2005. The property involved is shown on Tax Map 12, Lot 1-21, is located at 18-20 Cedar Point Road, and is in the Residential Coastal Zoning District.

Chair deCampi opened the public hearing.

Kecia Hartmann spoke before the Board, and asked to be able to finish off the attic as living space. She explained that the wording in a condition of a previous variance she had been granted said the attic could be no more than 28 ft. high, which it was, and that it was to be used for storage and for a furnace without any living space. She noted that when this variance had been

granted, Code Administrator Tom Johnson had said that if she wanted to finish the area off as living space, she would need to come back to the ZBA.

Mrs. Hartmann said originally the plan was to make this a rental property, but said the situation had changed and she would like to make it a home for herself and her children. She said currently there were two eight by eight bedrooms and one bathroom downstairs, and said she was asking that the attic be finished off with three bedrooms and two bathrooms, allowing the downstairs to be used as a living room, dining area, kitchen, and a playroom, with one bathroom.

She said the previous variances were approved knowing that this would be requested, and said the Board shouldn't be surprised that she was coming back for this, given the discussion at previous meetings. She provided details on this.

She said granting the variance complied with the spirit and intent of the Ordinance, given the other homes in the neighborhood. She also said there would be no decrease in the value of surrounding properties as a result of the variance. She submitted pictures of work done to the house so far, and also submitted some pictures of homes in the neighborhood that had been expanded.

Mrs. Hartmann began to provide some history on the property, stating she would like to clear up some of the stigma attached to it.

Chair deCampi said he was not sure that this history was relevant to the present application, and also said that if necessary, he would allow Mrs. Hartmann to rebut.

Mrs. Hartman said another condition of the previous variance she had been granted was that the existing drainage situation had to be taken care of. She explained that it turned out that the area in question was a designated wetland, and said she couldn't get a certificate of occupancy unless the wetland was drained. She said this situation had created a hardship for her. She said this issue was still outstanding, over a period of months, and said she was surprised the Town would have put such a condition on her previous approval. She provided details on this.

Chair deCampi noted the specific wording the ZBA had put in the motion to approve this previous application, and then asked if the parties involved had in fact gotten together with the Town Engineer.

Mrs. Hartmann said the Town Engineer had said he did not know why he should be involved in the situation, and recommended that she call NHDES.

It was noted that the neighbor involved in this situation with Mrs. Hartmann was Dorothy Oliver.

Mrs. Hartmann stated that the drainage problem was pre-existing, and that she had not created it. She said she thought the previous owner had aggravated the situation when he put in a septic system. She provided details on her dealings with NHDES and said she was trying to please Ms. Oliver, who had requested that her shed be lifted up, and wouldn't sign off until the drainage

situation was the way she wanted it. Mrs. Hartmann again said she hadn't caused the problem, and said she was asking the Board for some relief concerning this.

Ms. Eng asked if there was any documentation from NHDES stating that the area in question was a wetland. She said this was not her understanding.

Mrs. Hartmann noted the approval from NHDES she had provided to the Town. She said it would cost another \$3,500 to do all that Ms. Oliver wanted to be done, and said she should at least share some of the responsibility for this, since the situation was pre-existing.

Chair deCampi asked if it was correct that no exterior construction would take place in finishing the attic.

Mrs. Hartmann said there would be a dormer in the front and back for the windows in the master bedroom.

Chair deCampi said Mrs. Hartmann was really asking for three things, then, in the application, if one included the windows on the second floor.

Mrs. Hartmann said there was no balcony involved with the windows, so the exterior construction did not come out past the existing footprint. She also said that with the increase in the square footage of the living area as a result of including the second floor, the total amount of square footage involved would still be smaller than the square footage of living area in other houses in the neighborhood.

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

Dorothy Oliver, 22 Cedar Point Road, provided a letter to the Board that she had written concerning the application. She also provided pictures of the area in question from 1999, noting that there had been 5 tall white pines, and no water there. She said that when the previous owner of the Hartmann property brought in fill, all the trees had died. She said the wet area was not pre-existing, but had now become a wetland.

She said the living space of the Hartmann property was essentially doubling, and said this was a classic example of how one expanded a shoreland footprint to 4 times the original size over a six-year period. She provided details on the history of the property, and how it had changed over time, stating that it was originally a 13 ft. x 16 ft. cottage.

She said the owner was now returning to ask to be able to use the attic for living space, an attic in which 135 square ft. of windows had been built. She said one window overlooked her front door and yard, and said she had not anticipated that her privacy would be compromised in this way. She said that in addition, two sliding glass doors had been built in front, and said this would necessitate expansion of the footprint for a deck. She asked when the approvals would stop.

Ms. Oliver said there were concerns about water quality on Cedar Point Road, providing details on this, and said the more people living in the home, the more water that would be used. She said the ratcheting up of requests must end, and said this only encouraged other owners to impact the shoreland with larger and larger building expansions. She urged the Board to turn down the variance requests.

Mr. Sievert asked for more details on the drainage problem.

Ms. Oliver explained that the previous owner had filled the area in question, which had caused water to drain onto her property and kill her trees.

There was detailed discussion about what exactly NHDES had said the situation was, and what needed to be done about it. There was also discussion on what the role of the Public Works Department had been and should be in such a situation. Chair deCampi noted that the Board hadn't actually asked the Public Works Department to solve the drainage problem, but had asked it to mediate between Mrs. Hartmann and Ms. Oliver concerning the problem.

Mr. Bogle said the intent of the Board at the time of granting the variance was that the drainage situation be corrected, which had nothing to do with a wetland restoration issue, in terms of species composition, etc. He said it was simply a drainage problem that had to be corrected so Ms. Oliver would not suffer from the changes in topography caused by the previous owner of the Hartmann property. He said Mrs. Hartmann had bought this problem when she bought the property.

Chair deCampi said he was inclined to agree with Mr. Bogle. He said Ms. Oliver was telling the same story now that she had before, and he said he was glad she was present to remind the Board of it. He said it was unfortunate that the Board had charged the Public Works Department with solving the drainage problem, and said the Board had seen nothing on what the Town Engineer had concluded. He said it was hard to see how the condition regarding drainage in the previous variance approval could be taken away without some evidence from the DPW.

Chair deCampi asked Mrs. Hartmann if the septic system on the property had sufficient capacity for the additional bedroom area being requested.

Mrs. Hartmann said the system had been upgraded a few years back, and said it was designed for 3 ½ bedrooms. She then started to provide some additional history on the property, and Chair deCampi said he did not think what the previous owner had done with the property, other than change the drainage, was relevant to the present application.

Mrs. Hartmann stated again that Ms. Oliver had two sheds located beside the wetland area, and said Ms. Oliver wouldn't sign off until the sheds were raised up.

Ms. Eng asked where the furnace was now located in the Hartmann house, and Mrs. Hartmann said it was located in a closet on the second floor. She noted that the basement was 5 ft. high, and flooded constantly.

Chair deCampi closed the public hearing.

There was discussion by the Board that the conditions of the previous approval that the Board was looking at that evening were done under the 1999 Zoning Ordinance.

Chair deCampi briefly reviewed the history of the Hartmann property, including the work done by the previous owner and the Hartmanns, as well as the previous variances that had been granted. He noted that the Board had approved the attic because the Hartmanns had wanted a furnace upstairs, since flooding sometimes occurred on the bottom floor. He said the attic was permitted to have a height to the peak of not more than 28 ft., to be used for storage and the furnace. He said Mrs. Hartmann was now coming back asking to be able to use the attic as living space.

Mr. Sievert first noted that he wasn't sure how to address the variance criteria, since no variance was being requested. He then said that this was the type of property that the variance process was written for. He noted there was a proper septic system on the property, and said the property was not much different than other properties in the area. He said he did not see how the 5 variance criteria were not met, in allowing the upstairs to be used as living area. He questioned the role of the ZBA concerning the drainage issue, and also said it seemed odd to put the Public Works Department in a position of having to mediate concerning this issue.

There was some discussion on this.

Mr. Sievert said the area sounded like a wetland, so he did not see why the Department of Public Works should be involved. He said that unfortunately if there was a problem, it had to be fixed, and it did not matter whose fault it was. He said he did not think the Board should advocate one way or another concerning the drainage issue. He said if the area was a wetland, this should be addressed in a certain way, and said if done correctly, should solve the drainage problem. He provided details on this.

Ms. Eng stated that in the May 24, 2004 variance approval, there was a stipulation that the Public Works Department would mediate concerning the drainage issue. She said she was really surprised that the drainage problem hadn't been fixed, and that this was now called a wetland restoration issue. She noted previous minutes on the drainage issue, and said she believed the problem was caused by the previous owner filling in a portion of his property. She said the stipulation in the previous approval that this situation would be fixed was something that Mrs. Hartmann's attorney had readily agreed to, so it was clear that the Hartmanns knew about, and were willing to fix the problem.

Ms. Eng said she was concerned about the fact that the Hartmann property was located so close to the water, and said she was not in favor of the variance being requested. She said Mrs. Hartmann had expressly said that the attic space would be used purely for putting in a furnace, and would not be used for living space. She said the Board had made it pretty clear that this was what it wanted, and said she was surprised it was now being presented by Mrs. Hartman that the Board should have known that Mrs. Hartmann would come back to the Board to ask that the attic be made into living space.

She said granting the variance was against the public interest, and also said that because the property was so close to the shoreline, granting the variance would be contrary to the spirit and intent of the Ordinance. She said the Board had not created this hardship. She said she understood that this was a small lot, but said the applicant should look at what was appropriate for the lot. She said what was being asked for was not, and said she was not in favor of granting the variance.

Mr. Bogle said the original variance application for this property was one of the early cases he had sat on as a Board member. He said he felt this was a case where the Board was being subjected to the salami effect, in terms of variances being asked for one slice at a time. He said he thought the Board had bent over backwards concerning this property, in allowing the previous cottages to be moved, added on to, and later in allowing a second floor.

He said he thought the owners had pushed it pretty hard in terms of what had been built as an attic, stating that he saw much more than what had been requested, with the peaked roof in front and back, and the windows. He said he therefore found it difficult to allow this to be converted to living space, and said given the things the Board was previously told, and the variances that were previously granted, he did not feel he could vote for a further variance on this particular property.

Mr. McNitt said this was a classic case, noting the size of the initial approval the Board had granted. He said the house had now grown so that it was a substantial building, and Mrs. Hartmann was asking that living space be moved into an attic clearly intended at the most for storage. He said if one looked at the expansion of the building since this had started, in the shoreland area, the applicant was way out of bounds. He said he felt the expansion was contrary to the spirit and intent of the Ordinance, and said he thought the Board should go back to what was granted before and stay with it.

Mr. McNitt also said he felt strongly that if a neighbor did something that shifted drainage, this was always something that should be corrected. He said he found it difficult to grant the variance on top of what the Board had granted before.

Chair deCampi appointed Ruth Davis as a voting member on the application.

Ms. Davis asked if the neighbors across the street, the Weglarz ere within 125 ft. of the shoreland, and was told they were not. She noted that this property had also grown, but was not right near the water. She said the sliding glass doors on the Hartmann house implied there would be a deck in the future. She also said that at previous ZBA meetings, she had seen that property owners had asked engineers to look at their particular drainage issues. She said this might be appropriate in the present situation.

Ms. Davis said she had heard what had been said about the addition of the second floor of the house, and said this was a tough call. She said granting the variance to allow the second floor to be used as living space wouldn't decrease the value of surrounding properties, and would not be contrary to the public interest, since a family would be living here, and it wouldn't be a rental property. She said it would be an unnecessary hardship to not grant the variance. She noted she

had heard that the hardship was self-imposed, but said she would like the family to be able to use the space. She said there would be substantial justice in allowing the owner to use the space. She said she did not think granting the variance was completely against the spirit and intent of the Ordinance.

Ms. Davis said she thought the drainage condition needed to stay, and said the problem needed to be addressed. She said she was not sure what the correct way to address this was. She said if the variance to allow the attic to be used as living space was granted, she thought allowing the dormers was correct as well. She said for her, granting the variance came down to the spirit and intent of the Ordinance criterion, and said she would have to think about this some more.

Chair deCampi said if the Board was going to restrict the use of the attic, it should have restricted the size of the house when it was built. He said it seemed wrong to not give permission to use the attic as living space now. He noted there would be no additional runoff as a result of what was being asked for now. He said this seemed like an entirely reasonable thing to ask for, and also said he did not have a problem with the dormers, if there were windows there.

Chair deCampi said he thought the drainage issue had to be fixed by the Hartmanns, and that they should not be given the occupancy permit until they fixed it. He asked Code Administrator Tom Johnson if he was willing to mediate concerning this issue, stating that it was crazy that the problem hadn't been resolved in two years.

Mr. Johnson explained that when the discussion on the drainage problem had first come up at a previous ZBA meeting, it was decided that rather than force the parties involved to hire an engineer, former Town Engineer Bob Levesque would come out and look at the problem. Mr. Johnson said Mr. Levesque had done this, and had then said that the Hartmanns needed to call NHDES. He said the Hartmanns had contacted Jones and Beach, which submitted a wetlands plan to NHDES. He said the Board had that approved plan.

There was discussion about this by the Board.

Mr. Sievert said this approach kept the Town out of the matter, and would fix the drainage problem as per the wetlands permit. He said this should make everyone happy.

Chair deCampi said he respected Mr. Sievert's opinion, given that he was an engineer. He then asked Ms. Oliver if she would be satisfied if the plan was implemented.

Ms. Oliver said she would be fine with this.

Chair deCampi asked if the Board wished to discuss the application further.

Mr. Sievert said he was present for the variance approval for the attic in 2005. He said it would be wrong to deny the present variance request, noting that the Minutes indicated Mr. Johnson had said at the hearing in 2005 that if the Hartmanns wanted to convert the attic to living space, they would have to come back to the ZBA. He also said the attic was already there, so no further expansion was being asked for now.

Mr. Bogle noted that the previous Minutes indicated that Mrs. Hartmann had testified that the original plan was for the house to have 3 bedrooms. He said she had stated at the time the original variance was granted that what was planned for one floor would allow her to use the property as a single family home. He said Mrs. Hartmann was now saying the house couldn't be used as a single family home unless the upstairs could be used as living space.

Chair deCampi said Mrs. Hartmann was saying she would be more comfortable if the upstairs could be used.

There was discussion that this was a use variance being requested.

Ms. Eng said in terms of the hardship criteria for a use variance, the applicant would still have reasonable use of the property if the variance were denied.

Ms. Davis said she wasn't sure it would be reasonable to have 3 bedrooms on the first floor.

Ms. Eng said that was the applicant's first intention, to have the bedrooms downstairs.

Ms. Davis asked whether the Board was considering whether this was a reasonable use then or now. She said granting the variance would not injure the rights of others, and said she did not think it would result in a greater impact on the land now than it had before.

Mr. Bogle asked whether the Board would be combining all three requests into one motion.

After some discussion on this, it was agreed to do a separate motion on the drainage issue.

Ms. Eng said she did think that granting the variance would injure the public and private rights of others, in this case, Ms. Oliver. She noted Ms. Oliver's letter had stated the upstairs windows of the Hartmann house overlooked her yard.

There was discussion by the Board of the windows issue.

Chair deCampi said the Board should deal with the drainage issue first because it was the simpler one.

John deCampi MOVED to withdraw condition #2 of the May28, 2004 variance, but that the ZBA require that Kecia Hartmann implement the NHDES restoration plan approval dated July 11, 2006, and mitigate the wetlands as dealt with in that plan, between 18-20 Cedar Point Road and the adjoining property at 22 Cedar Point Road, and that this be a condition for occupancy at 18-20 Cedar Point Road.

Mr. Johnson said this was a condition of the previously approved occupancy permit, and said if using the attic as living space was approved, it would be a condition of that building permit.

Chair deCampi asked Mrs. Hartmann and Ms. Oliver if they each would like to make a brief final statement.

Mrs. Hartmann spoke about the shed on Ms. Oliver's property, and said she thought it was illegal to permit the shed because it was too close to the property line. She asked if someone could mediate this as well.

Chair deCampi said if this wasn't in the restoration plan, Ms. Oliver did not get it, and if it was, she did get it.

Mrs. Hartmann stated that she never expanded off of the footprint, and said this had already been done when she bought the property.

Ms. Oliver said she was reasonably comfortable with what the Board was proposing.

Ted McNitt SECONDED the motion.

Mr. Bogle said the motion was all right, as long as it was understood that the intent of the Board was that the drainage problem be fixed before occupancy could be granted.

The motion PASSED 5-0.

Mr. McNitt said the request met the 5 variance criteria.

Concerning the issue of living space and windows on the second floor, Mr. McNitt said the construction was already there. He said to tear down the structure would be completely unreasonable in this case. He said concerning this use, the question was whether now or later there would be more people in the house than there currently would be. He said he saw the possibility of the property going from 3 to 5 bedrooms, and noted that the septic system was adequate for 3.5 bedrooms.

He said if the property were sold, and it went to 5 bedrooms, this would definitely be contrary to the spirit and intent of the Ordinance. He said this is what had to be juggled, but said his feeling was that having let the house be constructed, and given that the septic system had the capacity for 3.5 bedrooms, he was in favor of approving the variance request. He said this would not decrease the value of surrounding properties as long as there was not a health and safety issue. He said granting the variance did not conflict with the public interest, and said he believed it was a reasonable request to meet the needs of the family. He said virtually every other house on the street had been expanded, either legally or illegally, so substantial justice would be done in granting the variance. He said as long as the health and safety requirements were met, approving the variance would not be contrary to the spirit and intent of the Ordinance.

John deCampi MOVED that the ZBA grant Kecia Hartmann the right to build 3 bedrooms on the second floor in accordance with the plan stamped ZBA Hearing July 25 2006, that there be no further bedrooms added to this house beyond those bedrooms without the approval of this Board, and that further, we grant Mrs. Hartman the right to build the two dormers with windows, which do not increase the footprint of the house, in accordance with the previously

referenced plan. Ted McNitt SECONDED the motion, and it PASSED 3-2, with Linn Bogle and Myleta Eng voting against it.

- B. PUBLIC HEARING** on a petition submitted by Krist Farm, LLC, Durham, New Hampshire, 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 16, Lot 30-1, is located at 25 Winecellar Road, and is in the Rural Zoning District.

Chair deCampi opened the public hearing.

Mr. Rief explained that in addition to owning the property the building addition would be put on, he also owned the property he would be encroaching on if the variance were approved. He said he had a conservation easement that stated that the two parcels would never be separated. He said he was asking for the variance in order to have a certified plot plan for his mortgage, explaining that he could have done a lot line adjustment instead, but preferred not to incur the fees for this. He provided details on this.

Mr. Sievert was appointed as a voting member.

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

Mr. Bogle said this was a unique situation, given the fact that both properties were owned by the same entity, and that there was a conservation easement involving both of them. He said he was inclined to approve the variance request.

Mr. McNitt said granting the variance would not decrease the value of surrounding properties, and would not be contrary to the public interest. He said the applicant needed the variance in order to be able to make full use of the property, noting there were possible alternatives, but that it was not clear that they were reasonable alternatives. He said there would be substantial justice in granting the variance, and said doing so would not be contrary to the spirit and intent of the Ordinance.

Other Board members agreed with this. Chair deCampi noted that because the property could never be subdivided, the setbacks did not make a lot of difference.

John deCampi MOVED to grant the Variance from Article XII, Section 175-54 of the Zoning Ordinance to build a garage addition within 25 ft. of the property line, at 25 Winecellar Road, in the Rural Zoning District. Linn Bogle SECONDED the motion, and it PASSED 5-0.

II. Approval of Minutes –

June 13, 2006

Ted McNitt moved to amend the Agenda to include review of the June 13, 2006 Minutes. The motion was SECONDED by Linn Bogle, and PASSED 4-1, with Mr. Sievert voting against the motion.

Page 1: Under approval of Agenda, spelling should be Christensen;

3rd paragraph, should read “..as a result of..”

Page 2, 3rd paragraph, last sentence should read “ to speak against it, and there was no response.”

9th paragraph, should read “...should make his case..”

Page 8, should be a break between the 4th and 5th paragraphs

Page 10, should be a break between the 2nd and 3rd full paragraphs

4th paragraph, should read The sign contractor for Irving said the signs....”

Page 11, 2nd paragraph should say “..the number of signs meant,...”

4th paragraph, should read “hardship criterion”; 7th paragraph, should read “..liked the hanging sign, and said he also thought ..” Same paragraph, should say “But he said he did not see why...”

Page 13, 4th paragraph from bottom, should read “Mr. Sievert said he did not see a....”

Page 15, 5th paragraph, should read “..what was proposed would not...”

Page 19, 4th and 11th paragraph, should say “Attorney Tanguay”

Ted McNitt MOVED to approve the June 13, 2006 Minutes as amended. The motion was SECONDED by Myleta Eng, and PASSED unanimously 4-0.

III. Other Business

Mr. Johnson noted the upcoming Law Lecture Series, and said Board members should get the forms turned in to Karen Edwards if they planned on attending.

He noted that the 20 Strafford Ave. applications as well as the Berton application had both been continued to the August meeting, and said he would not be present for that meeting. He suggested that Mr. Berton could attend the August meeting and be heard by the Board, and the case could then be continued so he (Mr. Johnson) could be present to support his opinion on the case.

IV. Adjournment

Linn Bogle MOVED to adjourn the meeting. The motion was SECONDED by Ted McNitt, and PASSED unanimously 4-0.

The meeting ADJOURNED at 8:45 P.M

Myleta Eng, Secretary