

*These minutes were approved at the September 12, 2006, meeting.*

**Zoning Board of Adjustment  
Meeting Agenda  
Tuesday, August 8, 2006  
TOWN COUNCIL CHAMBERS -- DURHAM TOWN HALL  
7:00 P.M.**

**MEMBERS PRESENT:** Chair Jay Gooze; Vice Chair, John deCampi; Ted McNitt; Linn Bogle, Ruth Davis

**MEMBERS ABSENT** Secretary, Myleta Eng; Michael Sievert

**OTHERS PRESENT:** Minutes Taker Victoria Parmele

**I. Approval of Agenda**

Chair Gooze said there was an email from Zoning Administrator Tom Johnson requesting a continuance of the Berton application until the September meeting. Chair Gooze said Mr. Berton had agreed to this continuance.

Alternate Ruth Davis was appointed as a voting member in place of regular ZBA member Myleta Eng.

*John deCampi MOVED to continue Agenda Item II C until the September ZBA meeting. The motion was SECONDED by Linn Bogle, and PASSED unanimously 5-0.*

*Linn Bogle MOVED to approve the Agenda as amended. The motion was SECONDED by John deCampi, and PASSED unanimously 5-0.*

**I. Public Hearings**

- A. PUBLIC HEARING** on a petition submitted by Steven F. Kimball, Pine Ledge Holdings Inc., Auburn, New Hampshire, for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to increase the impervious surface ratio of the property to 65 percent. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue, and is in the Professional Office Zoning District.

Chair Gooze asked Mr. Kimball whether he wished his applications to be heard that evening, given that there would only be 4 voting members (He noted that he would be recusing himself since he was an abutter to the Kimball property).

Mr. Kimball asked if perhaps the Agenda could be rearranged so his applications were heard later in the meeting, so that there might be 5 voting members on the Board by that time. Chair Gooze said this could be done, and it was agreed that the Kimball applications would perhaps be heard after Agenda Item D (Lockhardt application).

***John deCampi MOVED to rearrange the Agenda, putting Agenda Items A and B after Item D. Ted McNitt SECONDED the motion, and it PASSED 5-0.***

After the Lockhardt application was heard, Mr. Kimball said that given the size of his project and the importance of it to the Town, he thought the full Board should be present to hear the application.

Chair Gooze agreed, stating that he would like to make every effort to have all Board members other than himself present to hear the applications. He said the applications would be continued to the September 12<sup>th</sup> ZBA meeting.

- B. PUBLIC HEARING** on a petition submitted by Steven F. Kimball, Pine Ledge Holdings Inc., Auburn, New Hampshire, for an APPLICATION FOR VARIANCE from Article II, Section 175-53(B)(1) of the Zoning Ordinance to increase the occupancy of a dwelling unit to four unrelated people for up to 12 dwelling units. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue, and is in the Professional Office Zoning District.

Same as above – continued to the September 12, 2006 meeting.

- C. PUBLIC HEARING** on a petition submitted by Paul Berton, Fall Line Properties Inc., Portsmouth, New Hampshire, for an APPEAL OF AN ADMINISTRATIVE DECISION from a decision of Thomas Johnson, Zoning Administrator/CEO, to limit the number of occupants in each of the units at 16-21 Dover Road to two people. The property involved is shown on Tax Map 4, Lot 50-0, is located at 16-21 Dover Road, and is in the Courthouse Zoning District.

Continued to the September 12, 2006 meeting.

- D. PUBLIC HEARING** on a petition submitted by William Lockhardt, Durham, New Hampshire, for an APPLICATION FOR VARIANCES from Article XII, Section 175-54 and Article VIII, Section 175-59(A)(2) of the Zoning Ordinance to build an addition within the sideyard and wetland setbacks. The property involved is shown on Tax Map 15, Lot 5-0, is located at 32 Bennett Road, and is in the Rural Zoning District.

Chair Gooze opened the public hearing.

Mr. Lockhardt spoke before the Board, explaining that his property contained approximately 1.4 acres, and a house built in the 1800's. He explained that the house was located about 44 ft. from the side lot line, so exceeded the 50 ft. sideyard setback, and was located about 80 ft. from the season wetland, so exceeded the 100 ft. wetland setback.

Mr. Lockhardt passed around a survey of the property, which had been done when his septic system had been upgraded. He explained that he would like to remove the existing porch, and build an expansion of the house in this same location. He said that with the expansion, the house would go back a total of 12 ft, which was 5 ft. more than the house currently went back. He said this was where the further encroachment into the wetland setback would occur. He also noted that the current encroachment into the sideyard setback would not be increased as a result of the expansion.

Chair Gooze asked what the barn was used for, and also asked whether it was located within any of the setbacks.

Mr. Lockhardt said it was a two-car garage, but was currently used as a storage building for garden equipment, but no chemicals. He said it was located within the wetland setback.

Mr. deCampi said the barn seemed to be located much closer to the wetland than the house, and was told that was correct.

Mr. Bogle noted that the edge of the Hydric B soils on the property were shown as a straight line that ended somewhere behind the barn, and asked where they went from that point.

Mr. Lockhardt said this area was a drainage area, which dried up in June. He said there was no wetland vegetation growing there.

Ms. Davis asked if this area drained into the creek, and was told this happened sometimes, when there was a high water level.

Mr. McNitt said he presumed the house was quite a bit above the wetland area.

Mr. Lockhardt said it was about 10 ft above the wetland, and also said that with the addition, he planned to put in drainage tiles in order to pull water coming in around the house away from it.

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

Chair Gooze said one thing he wished to note was that when the Board considered an application where there was something encroaching into a setback, if the Board agreed to allow this, it tried to get some kind of concession from the applicant in exchange for this. He also said he thought it might be useful to do a site walk, given that there was a wet area on the property.

Mr. McNitt said he didn't think these things were necessary in this case. He said this was an area variance, and said the house and barn had been there for a long time before the Zoning Ordinance existed. He said he thought the planned improvements to the property were definitely a benefit to the immediate area and to the Town, so there would be no decrease in the value of surrounding properties. He said the house and addition would be located well above the wetland, and he noted that the wetland was only a wetland in terms of the strictest interpretation of what a

wetland was. He said it was inconceivable that anything that was proposed by the applicant would harm this wetland. He said this was a unique situation, and said he didn't see any easy way for the applicant to get the same result by putting the addition on the other side of the house. He said the variance was clearly justified in this case.

Ms. Davis said granting the variances would not result in a decrease in the value of surrounding properties, and said the addition would result in a nice improvement to the area. She said the house was already a little too close to the property line, and said this would not change with the proposed expansion. She said granting the variances would not be contrary to the public interest because there was no one close by, and because of the improvement to the property. She said denying the variances would be an unnecessary hardship to the owner.

She said the issue was mostly whether the addition could impact the wetland. She said this wetland was a seasonal drainage ditch for the most part, and said she didn't see how the proposed addition could impact the wetland in a way that would increase flooding or cause pollution. She said it was therefore not against the spirit and intent of the Ordinance. She said she thought the variances should be granted.

Mr. Bogle said he agreed with what other Board members had said. He said there would be no impact from the expansion on the value of surrounding properties, and said there were no concerns regarding offending the public interest. He said that given the special conditions of the property, this was a minor expansion that was proposed, and said that in order to make the house a little more livable, the variances were needed. He said he didn't see any other way to be able to add on to the house, so substantial justice would be done in granting the variances. He said granting the variances would be consistent with the spirit and intent of the Ordinance, and noted the house's higher elevation relative to the wetland. He said he was in favor of granting the variances.

Mr. deCampi said he agreed that the variances should be granted, for all the reasons stated by other Board members.

Chair Gooze said a site walk was therefore not needed, and said he agreed with what other Board members had said regarding granting the variances.

***John deCampi MOVED to grant the VARIANCES from Article XII, Section 175-54 and Article VIII, Section 175-59(A)(2) of the Zoning Ordinance applied for by Mr. William Lockhardt to build a family room on the back of his house to extend not more than 12 ft. from the current back wall of the house, and in accordance with the plans submitted, for the property located at 32 Bennett Road, within the Rural Zoning District. Linn Bogle SECONDED the motion, and it PASSED unanimously 5-0.***

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

- E. REQUEST FOR REHEARING** on a July 11, 2006, denial by the Zoning Board of Adjustment on a petition submitted by Evelyn Sidmore, 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 rebuild a single family home with accessory apartment, addition, porch and a pool within the sideyard and shoreland setbacks. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar Point Road, and is in the Residence C Zoning District.

- F. REQUEST FOR REHEARING** on a July 11, 2006, denial by the Zoning Board of Adjustment on a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article IX, Section 175-30(D)(3) of the Zoning Ordinance to rebuild a single family home with accessory apartment within the shoreland setback with an increase to the building size. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar Point Road, and is in the Residence C Zoning District.

It was noted that the two Sidmore applications that had previously been heard by the Board had been combined at that time, and it was agreed that the Board would combine the two applications in this instance as well.

Chair Gooze said there were a number of pieces of information that had arrived that evening, and were not in Board members' packets. He said if the Board were to hear the requests for rehearing that evening, it would have to go through this information first. He said it might be more appropriate to put off considering the request for rehearing until the September meeting, by which time Board members would have had the chance to go through this information. But he noted there were no other applications for the Board to hear that evening, so there was in fact time to consider the requests for rehearing.

There was discussion about this by Board members, and they agreed informally, by a 4 to 1 majority, to discuss, that evening, whether to rehear the Sidmores' variance applications.

Mr. McNitt said that because it had been a tight vote, the rehearsals were appropriate.

Mr. deCampi said the key issue was whether the Board had erred in considering the applications. He said to some extent he agreed with Mr. McNitt that because of the close vote, the rehearing should take place as a matter of course, in fairness to the applicants. He said he didn't think the Board had made a mistake in denying the variances, but because of the fairness issue, he was willing to rehear the application.

Chair Gooze said the Board had denied the previous variance requests because it said granting them was against the public interest, and against the spirit and intent of the Ordinance. He said the Board had to decide whether it had made a mistake concerning this. He noted there had been a split in terms of how the Board saw the spirit and intent criterion.

He said he had voted in favor of granting the variances, but said he now still had to decide with the other Board members whether the Board had actually made a mistake in its vote on the variance applications. He reviewed Board members' previous votes, and the variety of reasons behind these votes, noting they all focused on the public interest and spirit and intent of the Ordinance criteria.

Chair Gooze noted the shed on the property, and said perhaps something could be worked out with the applicant, where the shed would be removed in exchange for something. He said this could be talked about at a rehearing. He also said it was possible the Board had made a mistake, and that there were other ways to look at the situation. He said he was in favor of granting a rehearing.

Ms. Davis said she agreed that rehearing the applications would be the fair thing to do, noting that there had been differing opinions among Board members concerning the issue of protection of the shoreland.

Chair Gooze said Board members could have been more precise in terms of why they had felt granting the variances was against the spirit and intent of the Ordinance, noting that the Courts tended to look at this.

Mr. Bogle said the two things that needed to be considered regarding whether to rehear an application were whether the Board had erred, and whether there was new evidence to consider.

Chair Gooze said that perhaps the landscaping information could be considered new evidence.

Mr. McNitt said one of the elements in considering the spirit and intent of the Ordinance was protection of the shoreline as viewed from the Bay, and said the visual impact, looking at the house from the water, could be ameliorated with landscaping. He noted he had previously decided that the landowner was entitled to the variances. He said that although he often fought hard regarding shoreland and wetland cases, in this case there would be minimal impact to the shoreland.

Chair Gooze said that based on the lack of precision in comments made by the Board in denying the variances previously, he felt the Board would have trouble if this decision were appealed to another level. He said for that reason, he felt the Board had erred in its previous decision to deny the variance requests.

Mr. Bogle said he didn't see that the Board had made an error, and didn't see any new evidence. He spoke in some detail on information the Board had received that evening, and about information it had been told it would receive concerning the application, which he was not sure had in fact been received.

Chair Gooze said like Mr. Bogle, he was annoyed that the Board got information during the meeting that it should have received prior to the meeting.

Mr. Sidmore described various views of the property that had been provided to the Board that evening, including a photo with the proposed expanded house superimposed on the existing lot. He also made note of a letter from NHDES, and information on proposed planting and restoration of shoreland flora.

There was further discussion by the Board on whether they could decide whether to rehear the applications, when all of this information had been thrown at them at the last minute. Chair Gooze said the timing still worked, if the Board decided to continue this discussion.

***Mr. deCampi MOVED to continue the discussion on the Request for rehearing, in view of the amount of new information provided this evening. Mr. Bogle SECONDED the motion, and it PASSED unanimously 5-0.***

#### **IV. Approval of Minutes – July 11, 2006**

**Page 1**, under Others Present, should also say “Members of the Public” Also, include Titles of Board members.

**Page 2**, bottom paragraph, should say “Attorney Somers first went through..” Also, put period at end of that sentence.

**Page 3**, 3<sup>rd</sup> paragraph, should read “..would benefit from the deck.”. Same paragraph, should read “..no adverse impacts to the public,..”

**Page 5**, 4<sup>th</sup> paragraph, should read “He stated that what was now proposed was as far...”.

6<sup>th</sup> paragraph, should read “..he had been in favor of granting the variance...”

**Page 6**, bottom paragraph needs period at the end of the sentence.

**Page 7**, bottom paragraph, should read “..they hadn’t seen there was an option to move..”

**Page 9**, 2<sup>nd</sup> paragraph from bottom, should read “..said he felt the applications met these.”

**Page 10**, 6<sup>th</sup> full paragraph, should read “Mr. Sievert stated that since the house was being moved back farther from the shoreland...”

**Page 11**, 3<sup>rd</sup> paragraph should read “ F.X. Bruton”

**Page 13**, 1<sup>st</sup> paragraph, should read “..noting it would be very close to..” Also, 1<sup>st</sup> paragraph, 3<sup>rd</sup> sentence, should say “She said everything that would go on at the pool..”

2<sup>nd</sup> paragraph 1<sup>st</sup> sentence should read “Chair Gooze asked if any other members of the public wished...” 2<sup>nd</sup> sentence should say “He asked Attorney Bruton if he wished to present a rebuttal.”

**Page 14**, 4<sup>th</sup> paragraph, should read “..had proposed an addition, including a basement...”

5<sup>th</sup> paragraph, removed the words “but she said” on the second line of the paragraph. Last sentence of this paragraph should read “She noted that she didn’t have a problem...”

3<sup>rd</sup> paragraph from bottom, should read “..because it violated the setbacks, and involved a footprint increase and a volume increase.”

**Page 17**, 4<sup>th</sup> full paragraph, should read “..Attorney Bruton requested that this not be done.”

**Page 18**, under Agenda Item II K, should say “This hearing was continued to the August 8<sup>th</sup> ZBA meeting.” Also, the motion on page 19, under Adjournment should say : *John deCampi MOVED to continue the meeting until July 25, 2006.....*”

#### **V. Other Business**

Next Regular Meeting of the Board: \*\*September 12, 2006

Chair Gooze said he would be attending the Planning Board meeting on August 23<sup>rd</sup>, to present the Board with some information on the difficulties the ZBA had been having with the interpretation of the spirit and intent of the Ordinance, regarding protection of the shoreland. He

said the Planning Board might be able to help the ZBA find a way to be more precise concerning interpretation of the Ordinance. He welcomed other ZBA members to join in this discussion. He provided some details on the kinds of things he would like to look at with the Planning Board, including whether that Board thought that properties in the shoreland where houses already existed should be handled differently than properties where a house had not been built yet.

There was discussion on the idea of having someone who was a joint member of the Planning Board and the ZBA.

Mr. Bogle said the provisions for the shoreland zone needed to be sharpened, and said that at present, the situation was in shambles.

Chair Gooze suggested that Mr. Bogle attend the upcoming Planning Board meeting.

## **VI. Adjournment**

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

8:45 p.m.

Victoria Parmele, Minutes Taker

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Myleta Eng, Secretary