

These minutes were approved at the November 14, 2006, meeting.

**ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
TUESDAY, OCTOBER 10, 2006
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Jay Gooze; Secretary Myleta Eng; Ted McNitt; Linn Bogle; Michael Sievert; Ruth Davis

MEMBERS ABSENT Vice Chair John deCampi

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

I. Approval of Agenda

Chair Gooze noted that regular member John deCampi was not present, and said Board Secretary Myleta Eng would act as Vice Chair in his absence.

Chair Gooze said the applicants for Agenda Item II F, (Singelais) had asked that this application be continued, because another variance that was required was not included in this application. He said the application would be heard on November 14th.

Mr. Johnson said the attorney for the Manage Plus, LLC application (II G) had asked that it be continued to the November 14th meeting.

Ted McNitt MOVED to approve the Agenda as amended. Linn Bogle SECONDED the motion, and it PASSED 4-0.

II. Public Hearings

- A. PUBLIC 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, Article XIV, Section 175-74(A) and Article IX, Section 175-30(D)(3) of the Zoning Ordinance** to rebuild a single family home with accessory apartment, addition, and porch within the sideyard and shoreland setbacks 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.

Chair Gooze appointed Mr. Sievert as a voting member on this application. He then opened the public hearing.

Attorney Bill Tanguay spoke before the Board. He thanked the Board for agreeing to hear the application again. He said he was assuming that because this was a rehearing, he didn't need to go over the evidence submitted at the prior hearing.

He stated that the previous application had been denied because the Board had determined that it did not meet the public interest and spirit and intent of the Ordinance criteria, and said he would focus his attention on these two criteria. He said he was assuming that the Board felt it did meet the other three variance criteria, but he reviewed these criteria briefly, and how the application met them.

Attorney Tanguay provided a booklet of information containing information that had been provided to the Board previously as well as new documents and photos. He noted that NHDES approvals had been received and were included in the booklet. He also said the booklet contained a map of vegetative buffers/plantings that would be made, which were relevant to the NHDES permit and also related to how the property would look from the land and the water.

He said that footprint calculations and volume calculations had been provided, based on all the findings of the applicant's engineer, and said there was a statement from the engineer, Mr. Eckman, that there would be no adverse impacts on water quality from the development. He said Mr. Eckman had also determined that the house when completed would be only slightly higher than surrounding properties. Attorney Tanguay provided a series of photos to give a sense of what the house would look like, and said it was not bigger in size than houses already in the area, and was a similar style as well.

He explained that the Sidmore's existing structure was in substantial need of repair, and he again provided details on the construction that was proposed.

He read through the purpose of the shoreland protection overlay, and said the proposed design intentionally extended the house to the rear, exceeding the sideyard setback, so that the house wouldn't get closer to the water. He said this was their first concern, but said protection of rural character and scenic views, also included in the purpose statement for the shoreland zone, was important. He noted that the existing house was an eyesore, so putting in a quality house would add to the beauty of the area.

He said the primary purpose of the shoreland district, to protect surface waters, was the key issue, and said the bottom line was whether expansion of the existing building footprint would have an adverse affect on surface waters. He said NHDES, the Conservation Commission, and the applicant's engineer had said there would not be an adverse impact.

He said the essential character of neighborhoods was a key consideration in zoning ordinances, and noted that this concept had been highlighted in a series of cases, including the Simplex case. He provided details on some of these cases. He said in this case, what was proposed was entirely consistent with the character of the neighborhood, in that the house would be a similar size, shape, volume, and square footage as houses on either side, and would be more in keeping with the neighborhood than what was there now.

Attorney Tanguay noted that there were not a lot of court cases dealing with the spirit and intent of the ordinance criterion. He provided details on the Chester Rod and Gun Club case, and explained that it had tied the public interest and spirit and intent criteria closely together. He said it was important to ask whether what was being asked for was in marked contrast to the purpose of the Ordinance, and said the court had said one way to determine this was to examine whether what was proposed would alter the essential character of the neighborhood. He said if it was determined that it was in keeping with this essential character, this went a long way toward meeting the public interest and spirit and intent criteria, because zoning ordinances were supposed to be consistent with neighborhoods as they existed.

Attorney Tanguay said regarding the question of whether granting this variance would threaten health and welfare, in this case, all the evidence suggested that there was nothing that would threaten surface waters.

Chair Gooze asked if the Board had any questions for Attorney Tanguay, including questions regarding the other three variance criteria.

There was detailed discussion on what the increase in the footprint would be, and that there were different ways of presenting this.

Mr. Bogle said to him, the current house was 20 ft. x 62 ft., and what was proposed was 30 ft. x 62 ft., which represented an increase of 620 .f., which was a 50% increase in the footprint. He said the porches add to this square footage.

Attorney Tanguay said the new building was not entirely flat across the front, because there were some bump-outs, and he also noted that the covered porch was not part of the footprint calculation.

Chair Gooze asked if it was still the case that runoff would be addressed with a roof system and a drywell, and Attorney Tanguay said that was correct.

Ms. Davis asked if the current house on the property had gutters, and was told no.

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

Steven Kalvelage, 2 Cedar Point Road, said he was still a very strong supporter of the variance request, stating that granting it would provide substantial justice to the Town. He said he felt it would be a severe injustice for neighborhood if this application were not approved.

Robert Calnan, 3 Cedar Point Road, said he had a spectacular view of the point this house would sit on. He said although it might seem the house would be a lot bigger than it currently was, it would fit in the neighborhood. He said he had developed a good understanding of what met the variance criteria, and said he didn't see how this application would not. He said he was very much in favor of granting the variance.

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

Ms. Davis said she did not believe granting this variance would be contrary to the public interest. She said she thought that previously, the Board had thought it possibly was against the public interest because of the greater volume of the house, which would be too large a presence as seen from the water. But she said she thought the photos showed that the new home would probably be all right in the neighborhood, and would not alter the essential character of the area.

She said she didn't think granting the variance would threaten health, safety or welfare, in terms of surface water impacts, because the drainage system proposed would catch stormwater and allow infiltration. She said she did not think granting the variance would be contrary to the public interest.

She said that regarding the spirit and intent of the Ordinance, what was proposed would protect the surface waters and scenic views.

Mr. Sievert said he agreed that granting the variance would not be contrary to the public interest, in that the house would fit in, in this area. He said that regarding protection of surface waters in the shoreland zone, in this case the applicant was going overboard in providing for underground infiltration of stormwater. He said what was proposed was more than acceptable in terms of meeting the spirit and intent of the Ordinance. Mr. Sievert noted that he had been in favor of granting the variance, the previous time the application was heard by the Board.

Chair Gooze noted that the letter from Conservation Commission Chair Dwight Baldwin expressed his opinion, not the opinion of the Conservation Commission. He also noted that although the State shoreland setback was 50 ft., Durham's shoreland setback was 125 ft., and he said that between these two distances, it was important to minimize stormwater runoff and erosion and sedimentation.

Mr. Sievert noted that runoff from a roof was a lot different than runoff from a paved parking lot. He said the drainage system was a little overboard because this was a float lot, with no big drop-offs.

Chair Gooze said there was a 40-50% increase in the footprint, and more than a 100% increase in volume, but he said it was a small house to start with, so it was hard to say there could only be a 15% increase. He said it was important to look at what was around this house, and to be reasonable. He said he was not uncomfortable with what the applicants were asking for, and said he thought seeing the pictures was very important. He said he felt the variance request met all five variance criteria.

Mr. McNitt said he had voted in favor of the Sidmore application the last time, but had started from scratch this time. He said his previous vote had come down to the spirit and intent criterion, and said in this district, aesthetic considerations - what could be seen from the land and the water, as part of the character of the Town - was very important. He said he had weighed this with the fact that the neighbors had said was presently an insufficient house, at the new one

would be a substantial improvement. He said this was the reason he had voted the way he had last time.

Mr. McNitt said he had asked himself what would strengthen his position on this, and said one thing that did was the fact that the property had excellent vegetative cover in the 25 ft. of the property closest to the water. He said the photos showed there was this buffer, except for a stretch in front of the house. He said he would feel better if the buffer was extended, except for the approach to the dock area. He said he was still in favor of granting the variance, but suggested that extending the buffer might make the variance application more satisfactory to some of the other Board members. He said this was the area where erosion and sedimentation would be of greatest concern.

Mr. Bogle said there would be no decrease suffered to the value of surrounding properties, but he said there was a question about what the neighborhood was. He noted that there were a number of other small camps on that road, and said as the Board approved one enlargement after another each of these properties would be asking for a variance to build beyond the terms of the Ordinance. He said he felt the purpose of the Ordinance was in part to prevent a buildup of shore land lots with much larger houses than had existed there. He said these were very small lots, and some of them depended on easements over adjacent lots.

Mr. Bogle said it was hard to say what the public interest was in this situation. He said he assumed the Zoning Ordinance was written in terms of the public interest, and said if it was not, what was the purpose of having a Zoning Ordinance. He said to the extent that this proposal contradicted the Ordinance, it was not in the public interest.

Regarding the area variance criteria, Mr. Bogle said he thought the house could be enlarged, and made into more suitable habitat than what was there now. But he said he didn't think the house had to be as large as what was proposed. He said the spirit and intent of the Ordinance was to prevent over-building close to the water. He said what was proposed did represent over-building, and was contrary to the spirit and intent of the Ordinance.

Ms. Eng said she agreed with Mr. Bogle. She said although granting the variance would not be contrary to the public interest in terms of the neighborhood, if one was considering the public interest in terms of the Town as a whole, it would be contrary to the public interest. She referred to Chapter IV of the 2000 Master Plan, which noted that variances resulted in stormwater runoff problems, habitat reduction, and incremental changes to the shoreland, all of which represented a substantial threat.

She said that in terms of the hardship criterion, the house was substandard, and could be enlarged, but not to this extent. She noted that all five criteria had to be satisfied, in order to grant the variance, and said she didn't think the public interest and spirit and intent criteria were satisfied.

She said the Town could be more restrictive than NHDES, and she noted that in most cases, the Board had gone with the more restrictive approach. She said that in terms of the character of the neighborhood, things were getting ratcheted up, and she said as other properties were improved,

they would want to be able to do more and more. She said a bad precedent was being set, in allowing this house to be so large. In answer to a question from Chair Gooze, she said it was the overall size of the house that concerned her, and the fact that it would be in the shoreland district.

There was discussion about this.

Mr. Sievert said it was important to be careful about the definition of building footprint, and he provided details on this. He said he had read the Master Plan, and was not against protecting the shoreland, but said he knew this could be done in other ways. He also noted that the drainage system on the property right now was much less than what was proposed, and he said if other properties were upgraded in this way, this would improve the situation in the neighborhood.

Chair Gooze agreed that the houses in this area were getting bigger, but he said this was the property that was in front of the Board right now. He said if it were the first house on Cedar Point to ask for this, he didn't think the variance would be approved. But he said these houses were there, which was why he didn't think granting the variance was against the public interest.

Michael Sievert 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(D)(3) of the Zoning Ordinance to construct the house as proposed at 8 Cedar Point Road, in the Residence C Zoning District, including the drainage system, and plantings as proposed in Section B of the Motion for Rehearing attachments presented this evening. Ted McNitt SECONDED the motion.

Mr. Johnson noted that this application did not include the variance for a swimming pool, and this was confirmed with Attorney Tanguay.

Ms. Eng asked how far the plantings would be from the water, noting that a buffer of natural vegetation was required for the first 25 ft. from the shoreline. There was discussion about this, with Mr. Bogle noting that native plants could be planted there, but not exotic plants.

Attorney Tanguay said that beach roses made up a big part of the buffer, and if mowing of the area were stopped, they would fill in most of the buffer area. He said the applicants would be glad to do this, except in front of the existing ramp and dock.

The motion PASSED 3-2, with Linn Bogle and Myleta Eng voting against it.

- B. **PUBLIC HEARING** on a petition submitted by Paul Berton, Fall Line Properties Inc., Portsmouth, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7, to allow three occupants in each of the units at 16-21 Dover Road. 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.

Mr. Sievert recused himself, and Chair Gooze appointed Ms. Davis as a voting member.

Applicant Paul Berton spoke before the Board. He noted that the variance was in regard to 3 buildings on his property, which contained a total of 6 units. He described improvements that had recently been made to his entire property, as part of the hotel development. He said the current 4 person occupancy in each of the 6 units was in question because it fell under an occupancy cloud, where there were past interpretations of occupancy that were in conflict with current documentation.

He noted that Chair Gooze had said that previous statements of Town staff concerning occupancy were wrong, which was unfortunate for him as a property owner. He noted that there was no chronology to the different codes and how they were applied to the different properties in the past, until recently, in part as a result of the Rental Housing Association's work.

Mr. Berton said Durham was unique in its code regarding occupancy, and said he was sure that every code officer in Town had struggled in applying the code to individual properties. He said it was important that the Board recognize how time had worked against everyone in this process, and he asked if the Board had recommendations as to how to weigh these things, including the documentation over time.

He provided some history on his property, noting that he had lived there for a time in 1975, as a student, when there were 4 occupants per unit. He also said he had coached for 14 years and during that time, numerous members of his team had stayed there. He said there were always 4 occupants per unit during that period as well. He said he had purchased the property in 1994, and there were also 4 occupants per unit then, also noting that a hot topic at that time was the 3 unrelated provision. He provided details on his dealings with Town staff at that time, and the numbers he was told could be used.

Chair Gooze asked if a letter Mr. Berton had referenced, which had come from Town staff when Mr. Berton had been interested in purchasing the property, said how many people could occupy each of the units.

Mr. Berton said no, and said the number provided by the Town was the overall number for the entire property. He provided details on this. He went through the complicating factors in the history of the property - the issue of grandfathering and what was being grandfathered, the chronology of the codes and the Zoning Ordinance, letters of occupancy, etc. He said he had done due diligence as to what he could do with the property. He noted that Town staff at that time didn't look at what was in the Ordinance and then go into properties and apply tape measures. He demonstrated how Mr. Stephan had come up with the 75 occupants number, stating that Mr. Stephan never measured the units in this property, and that he probably operated off the tax card.

Mr. Berton said what he was proposing was to find a middle ground between 35 years of history and the current interpretation of the code. He said he was proposing that there would be 3 occupants per unit, instead of 4 or 2. He said doing this would align this property with the other properties he owned in that area. He said these properties had always been tied together by infrastructure, sewer and water, so it was easy to see how the 3 units weren't seen as freestanding

duplexes, but instead were seen as part of a complex. He noted that the redevelopment of the site had resulted in some improvements to the apartments in the 3 buildings.

He said granting the variance would not have a negative impact on surround properties, also noting that having the hotel nearby would always be an asset, in terms of making sure that the townhouses were good neighbors for it.

Mr. Bogle received clarification that Mr. Berton had sold the hotel, so had no further interest in it.

Mr. Berton said granting the variance would not be contrary to the public interest, in that this would be a well managed student rental property, in a well-segregated complex that was not in the neighborhoods.

He said denial of the variance would be an unnecessary hardship, in that it would result in a 20% decrease in his overall rental numbers, and would have a devastating impact on the operation of the property. He noted again that he had done due diligence on the property before purchasing it, and had invested in the property based on a previous interpretation of what could be done with it.

He said striking a middle ground in terms of occupancy would do substantial justice, and would not be contrary to the spirit and intent of the Ordinance.

Mr. McNitt asked what the calculation was that had come up with the 3 occupants number.

Mr. Johnson said in the previous variance case, the single-family ratio of 1 per 300 s.f. was used because the properties were duplexes. He said Mr. Berton was requesting to bring the occupancy number in line with the rest of the properties on the lot, 1.5 per 300 s.f. of habitable floor area.

Ms. Davis asked why the occupancy allowed for a duplex was 1 occupant per 300 s.f., but was 1.5 occupants per 300 s.f. for an apartment.

Chair Gooze said allowing greater density was better for commercial developments.

It was clarified that the buildings in question had not been rebuilt, but had been moved to another location on the site.

There was discussion about possible impacts on neighborhoods from the buildings in question.

Mr. Berton provided details on a committee recently set up by Administrator Selig at the request of the Town Council to look at providing increased density in the core downtown area, the Courthouse District, and the Church Hill district, as a stimulus to get people to invest more in these areas and as a way to get student rentals out of the neighborhoods. He described the various entities involved on this committee.

He also passed around a document, developed in the mid 1980's, which provided occupancy data, and said this was an example of data whose origin was unknown.

Mr. Bogle asked what the size was of the units in question, and Mr. Johnson said each was 742 s.f.

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

Mike Davis, Sumner Properties, said he supported the variance request, stating that he hoped the Board would look at the 3 duplexes as an apartment complex, and would think the 1.5 occupants per 300 s.f. was appropriate.

Michael Sievert said he supported the variance request. He said he had been involved with the design of the hotel project, and said the original site plan, before the project was built, showed existing conditions. He said the plan was brought forward to numerous boards, over a period of 2½ years, so all the numbers were known. He noted that all the buildings were on one piece of property, and explained that this was used to determine density, providing details on this.

Chair Gooze asked what was reviewed by the ZBA during that time.

Mr. Sievert said just the sign issue had come before the ZBA. He said there were no density issues, so they weren't spoken of. He said everyone knew the numbers all along the process, including the neighbors, especially during the first site plan review, which involved a proposed large increase in student housing. He provided details on this, and noted that things that were asked for by neighbors were put into the site plan.

There was discussion about this.

Mr. Bogle said it didn't matter how much scrutiny the projects had received, and said the ZBA was now dealing with the occupancy issue for the three duplexes.

Chair Gooze asked if there were any members of the public who wished to speak against the variance request. There was no response. He then read a letter from resident **Gwendolyn Howard**, which noted previous letters of complaint about the duplexes she had sent to the ZBA and the Planning Board. Her letter described actions she had had to take since the relocation of the duplexes, including calls to the police, and said there continued to be a lack of respect for the neighbors. Her letter asked what actions could be taken to limit these problems in the future.

Mr. Berton said there was no record of the police calls Ms. Howard had referred to, and said he would be upset if there were. He noted an incident in 2004 involving fireworks, but said the duplexes were not occupied at that time. He also questioned Ms. Howard's complaint of night time activity in that area, providing details on the actual level of activity in that area at night.

He noted that during the construction phase, some guests of tenants of the duplexes had thrown some rocks. He said he had apologized to Ms. Howard for this, and had tried to create some communication with her, but he said this didn't work. He said he didn't think others viewed his

property as a threat to their well being. He noted that Ms. Howard had the opportunity to address her concerns at the Rental Housing Association meetings.

Chair Gooze closed the public hearing. He appointed Ms. Davis as a voting member on this application.

Mr. Bogle asked if the buildings in question were being redefined.

Chair Gooze said the first thing to consider was how strongly the Board felt about the grandfathering issue. He said if it was agreed the use/occupancy was grandfathered, there could be 4 occupants, not 3. He said if the Board felt this was not grandfathered, the question was whether it felt the applicant deserved a variance to allow 3 occupants. He noted that the Board had gone through a lot of applications where it had said the previous documentation didn't count, so the grandfathering issue was not clear. But he said the variance request was a valid question.

Ms. Davis said it sounded like the occupancy issue was not addressed during the planning process.

Chair Gooze asked if Mr. Johnson would have been aware of how many people were in the units.

Mr. Johnson said no, but said all of the Boards had discussed density issues during the site plan review processes.

Chair Gooze said he realized that there was no piece of paper on this, but said a lot of people had been involved in the review process. He said he could see how Mr. Berton was bringing this up, and said it was a different situation than simply having the information on an assessing card.

Mr. Johnson said the first site plan showed duplexes, and said in his mind, the Planning Board and Town Council considered these duplexes to be apartment buildings, providing details on this.

Mr. McNitt said the original plan for the property had met a lot of opposition from the neighbors and the Planning Board, mainly because of the total number of people who would be provided for on the site - between the three duplexes, Nicks Bricks, and the proposed building.

Chair Gooze said it seemed like there had been a lot of oversight on this in the past.

Mr. Bogle said those involved in the process might never have actually considered the number of people in the units.

There was discussion that the Planning Board wouldn't necessarily have been looking at the number of occupants per unit.

Chair Gooze suggested that the Board put aside the grandfathering issue, and look at the variance issue.

Ms. Eng asked what these buildings were, technically speaking.

Mr. Johnson said based on the case now being appealed, they were duplexes. But he said they were not on individual lots of record, and instead were three buildings on one lot.

Chair Gooze said this was a use variance being requested, and said there was no question that this was a unique situation. He said a question was whether the use was reasonable, and whether the other criteria for hardship were met.

He said the issue of the spirit and intent of the Ordinance related to density, and whether the use was grandfathered. He said he was looking at this as a question of whether the use would harm the abutters, or would be against the spirit and intent of the Ordinance, in terms of density. He noted that there were not many properties like this in Town. He said it was premature for the Board to use the density discussion at the recent committee meeting Mr. Berton had referred to.

Chair Gooze said he was in favor of granting the variance, stating there would be less people in these buildings than there currently were. He also said he thought the property was unique.

Mr. Bogle said there would still be reasonable use of the property by allowing 2 occupants per unit. He said these were three separate buildings, and said he was concerned about redefining these buildings.

Mr. Johnson noted that Davis Court and the Durham House of Pizza had 3-4 buildings on each lot. There was discussion as to whether there were other properties with multiple duplexes on them.

Mr. Johnson said Mr. Berton's buildings would still be duplexes, but if the variance were granted, the Board would be granting relief to allow one more occupant per unit.

Chair Gooze said he was having trouble with the reasonable use part. But he said he didn't think the Board would be setting a precedent if it approved this variance, because there were no properties like this, so each application would be different.

Ms. Eng said she could see both sides regarding this application. She said her concern about approving the variance was that it would run with the property, and that Mr. Berton might not be the landlord forever.

Chair Gooze said the point made about the fact that the hotel would be nearby was a good one.

Ms. Eng asked how this kind of monitoring would actually occur.

Chair Gooze said the hotel would be very aware if there were problems, and would get on the case of the owner of the duplexes. He said part of the uniqueness of the property was that there was a hotel on it.

Ms. Eng said she agreed that the units could still be rented if two occupants were allowed. She said she thought there was a relationship between the Ordinance and the occupancy restriction, for health and safety reasons. But she said she would like to hear what others on the Board had to say about this.

Chair Gooze said regarding what was reasonable, he thought it was reasonable to have 2 occupants, when there had been 4, but he also said he thought it was reasonable to allow 3 occupants, when there had been 4.

Mr. McNitt asked whether there were any other duplexes in Town that had only 2 occupants per unit.

Mr. Johnson said no, noting that the duplexes on Young Drive had 6 occupants, and that a duplex on Coe Drive had 3 occupants per unit. He said these other buildings were true duplexes, whereas Mr. Berton's buildings were duplexes on paper only, with no dual driveways, yards, etc.

Chair Gooze said here again was the uniqueness of this property.

Ms. Davis said when she looked at these buildings, she had thought they were apartments. She said she was leaning toward looking at 3 occupants as a reduction over the current 4 occupants. She noted that the building was in a commercial district, and was currently well managed. She said she didn't think granting the variance would decrease the value of surrounding properties, or would be contrary to the public interest, given the overall uniqueness of the property in the district it was in. She said this was a use variance, but said there was a paper trail of grandfathering, where it was thought there would be more residents there.

She said she didn't think imposing a 2-occupant limitation was necessary, and said if the property were well managed, it could be prevented from becoming a public nuisance. She said there would be substantial justice if the variance were granted. She said the spirit and intent of the Ordinance was to limit overcrowding, and said that if the property were well managed, 3 residents per unit would not overcrowd this district.

Mr. Bogle said he disagreed. He said it had been known all along that these were duplexes, and said there had been the same limitations on space in relation to the number of occupants over the last 30 years. He said he did not see any rationale for the variance. He said the code existed when Mr. Berton bought the property, and he put in 4 occupants per unit, knowing the implications.

Mr. Bogle said he did not think granting this variance was in the public interest, given the neighborhood, and he also said it was against the spirit and intent of the Ordinance to allow overpopulation. He noted that some the Park Court residents had spoken to him with general concerns about this. He said he did not think granting the variance was warranted in this instance.

Chair Gooze questioned whether it would be a different situation if the buildings were pushed together to make one building, and would therefore be considered an apartment building.

Mr. Bogle said there was a reasonable use of the property already, and said he didn't think there was hardship.

Mr. McNitt said he had a lot of respect for what Mr. Bogle and Ms. Eng said, but said this was a justifiable case for variance. He said going from 4 occupants to 3 was an improvement, and would not decrease the value of surrounding properties.

He also said granting the variance would not be contrary to the public interest, stating that he didn't see an enormous number of people here protesting this application, something the Board had seen in the past for this kind of thing, including Mr. Berton's previous site plan applications.

Mr. McNitt said this was a use variance being requested, and said he felt this was a unique property. He said the Courthouse District currently allowed a variety of professional and retail services, and could not be called a residential district. He said the restriction on duplexes as residences really should not apply here.

He said he felt there would be substantial justice in going from 4 occupants to 3, and said although this was not in the spirit and intent of the Ordinance, the improvement was in line with the Ordinance. He said he was in favor of granting the variance.

Ruth Davis MOVED to approve the application for variance from Article II, Section 175-7 of the Zoning Ordinance, to allow three occupants in each of the units at 16-21 Dover Road, in the Courthouse Zoning District. Ted McNitt SECONDED the motion.

Mr. McNitt said it was important that the Board recognize that the area where the buildings were located was essentially becoming a commercial neighborhood.

Chair Gooze said he agreed with the fact that it was becoming commercial, but he said the question was how this use affected the abutting area. He said he wanted to be sure that Board members were comfortable with this. He said he personally felt comfortable with the fact that the number of occupants was going down. He also said all the site planning that had gone on, and the fact that this issue was coming up at this point in time, were mitigating circumstances.

Mr. McNitt said there were much bigger issues concerning the project that had been considered during the site plan review process, which was why no one had paid attention to the occupancy issue.

The motion PASSED 4-1, with Linn Bogle voting against it.

- C. PUBLIC HEARING** on a petition submitted by, Cheney Rev. Trust, Newmarket, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIV, Section 175-74(A) of the Zoning Ordinance to build an addition within the shoreland setback. The property involved is shown on Tax Map 20, Lot 3-2(2A), is located at 575 Bay Road, and is in the Residence C Zoning District.

Attorney Steven Dibble provided a letter of appointment stating that he was to represent the applicant. He explained that about 90% of the house was now located within the shoreland overlay, making most of the house a nonconforming use except for a small corner of it. He said the applicant was proposing to put on a 14 ft. by 26 ft. addition on the back of the house, which would be used as a kitchen. He said this area would be where the current kitchen was located, and said the current kitchen area would become a dining room.

He said there would be the same roofline, and said there would be a 12% increase in the building footprint and approximately a 12% increase in the volume of the building. He said the work to be done would be located entirely within the 125 ft. shoreland setback area, but would be well beyond the previous 75 ft. shoreland setback. He said the work would not encroach closer to the water.

He said the view of the addition would be architecturally consistent with the present building. He also said that because of the location of the expansion, as seen from the water, this would be a modest proposal in terms of adding to the nonconformity of the property. He said this expansion of a nonconforming building was well within the provisions of Section 175-30 B:3 of the Zoning Ordinance. He also said there would not be an increase in the number of dwelling units, and said there wouldn't be an increase in the burden from any other aspect of the property.

Attorney Dibble said because the expansion was allowed under the Ordinance, it was hard to argue that granting the variance was against the spirit and intent of the Ordinance, or that the public interest would be harmed. He also said there would be no decrease in the value of surrounding properties. In addition, he said what was proposed was a reasonable use of the property, and said it would be a hardship if the variance were denied. Attorney Dibble said all five variance criteria were met with the application.

Mr. McNitt asked when the house was built.

Attorney Dibble said it was built when the shoreland setback was 75 ft., and was fully in compliance with this setback at that time.

Chair Gooze asked if any members of the public wished to speak for or against the variance. Hearing no response, he closed the public hearing. He appointed Mr. Sievert as a voting member for this application.

Chair Gooze said he didn't think every property that was expanded within the shoreland overlay would receive a variance, for example, a house that was located 5 ft. from the shoreland. But he said in this case, the building was already far enough away, so he didn't think there would be damage to it as a result of the expansion. He said he felt the application met all the variance criteria.

Ms. Eng said she agreed that the application met all five variance criteria. She said the hardship was that the applicant had an existing building that was located within the 125 ft. shoreland setback. She said the addition that was proposed was reasonable, and would not encroach further toward the water, and said she was in favor of granting the variance.

Mr. Bogle agreed this addition was acceptable, and would not be visible from other properties. He said he was in favor of granting the variance.

Mr. McNitt, Chair Gooze and Mr. Sievert were in agreement with this.

Ted McNitt MOVED to approve the application for variance from Article XIV, Section 175-74(A) of the Zoning Ordinance to build an addition within the shoreland setback, as shown in the drawing presented, for the property located at 575 Bay Road, in the Residence C Zoning District. The motion was SECONDED by Linn Bogle, and PASSED unanimously 5-0.

- D. **PUBLIC HEARING** on a petition submitted by Cheryl Lamoureux, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIV, Section 175-74(A) of the Zoning Ordinance to build a roof overhang within the shoreland setback. The property involved is shown on Tax Map 6, Lot 7-5, is located at 54 Oyster River Road, and is in the Residence A Zoning District.

Chair Gooze opened the public hearing.

The applicant, Cheryl Lamoureux, spoke before the Board. She said her home had been built in 1974, and said she now wanted to build an overhang over a portion of the front door entryway, in order to prevent rainwater from cascading down onto her family and guests when they came to her house. She said the existing gutter was not able to handle the rainwater, and noted that the rainwater flowed down into the garage after hitting the entryway.

Mr. McNitt received clarification that flooring and shingles currently on the entryway would not change as part of this project.

Ms. Eng asked if there was any drainage system proposed as part of this project.

Ms. Lamoureux said a gutter system would be put on the overhang.

Chair Gooze asked if any members of the public wished to speak in favor of the variance request.

Robert Silverman, 50 Oyster River Road, said his property abutted the Lamoureux house, and said he approved of the rain protection that was proposed for the property.

Bill Annis, Oyster River Road, said he lived across the street, and said it was very evident that an overhang and gutter system was needed to carry the water away from the entryway.

Chair Gooze asked if there were any members of the public who wished to speak against the variance request. Hearing no response, he closed the public hearing. He appointed Ms. Davis as a voting member for this application.

Ms. Davis stated that she was in favor of granting the variance request, and said what made the property unique was that it was located within 50 ft. of the Oyster River. She said she didn't see

any other way to stop the rain from cascading onto the entryway, and briefly went through how she felt the five variance criteria were met. She said granting the variance would not be contrary to the spirit and intent of the Ordinance, which in this instance was to protect water quality. She said there was no issue concerning water coming off the roof possibly impacting the river. The other Board members agreed with Ms. Davis, and said they were in favor of granting the variance request.

Ruth Davis MOVED to approve the application for variance from Article XIV, Section 175-74(A) of the Zoning Ordinance to build a roof overhang no more than 13 feet by 50 inches within the shoreland setback, at the property located at 54 Oyster River Road, in the Residence A Zoning District. The motion was SECONDED by Myleta Eng, and PASSED unanimously 5-0.

- E. **PUBLIC HEARING** on a petition submitted by Keith & Eva Haney, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XXI, Section 175-116(C)(1) of the Zoning Ordinance to create a second curb cut. The property involved is shown on Tax Map 11, Lot 23-45, is located at 4 Tirrell Place, and is in the Residence C Zoning District.

Chair Gooze opened the public hearing.

Eva Haney spoke before the Board, and said she was not asking to be able to create a second curb cut, but was asking to be able to use an older existing driveway as well as her new driveway. She said a condition of the permit for the new driveway was that the old driveway would be taken out, and she also said she had previously received a variance from the ZBA concerning the remodeling of her house.

She provided details on the remodeling undertaken for the house in 2004, explaining that as part of this, one of the existing driveways was torn out, and a lawn and shrubs were put in at that location. She said there was going to be a downstairs accessory apartment on the south side of the house, and said the existing older driveway allowed direct access to this optional living area, which was otherwise not accessible.

Chair Gooze asked if these kinds of things were discussed when the previous variance application, to relocate the garage and convert the existing garage to living space on a nonconforming lot came before the ZBA. There was discussion about this with the applicant.

Chair Gooze asked if the applicant would still want this curb cut if the apartment were not there.

Ms. Haney said yes, the driveway was used to get to the woodshed, and to allow her to more easily store her small boat. She noted that there were other neighbors in the area who had double curb cuts. She said the area where the driveway was located was not near a curve in the road, and also said what was being asked for fit with the neighborhood. She also explained that she couldn't reach the back portion of the property without this driveway, and said it would be a hardship if she had to carry her boat over her head in order to store it on her property.

She said she had talked with the neighbors, providing details on this, and said there was no one who was against granting the variance to allow the curb cut.

Chair Gooze asked if any members of the public wished to speak in favor or against the application. Hearing no response, he closed the public hearing. He appointed Mr. Sievert as a voting member for this application.

Mr. Sievert said he had gone by the property. He said he didn't believe granting the variance would decrease property values, noting that he had seen other double driveways on the properties in the area. He said granting the variance would not be contrary to the spirit and intent of the Ordinance because there were no access or safety issues. He said this was an area variance, because there was only 200 ft. of frontage, and he said the property was unique because access to the back of the property was limited.

He said substantial justice would be done in allowing access and use of this part of the property. He said granting the variance would not be contrary to the spirit and intent of the Ordinance, because there were no safety issues, and also because the driveway already existed on the property, and didn't appear to have been a problem in the past.

Chair Gooze said he also had gone by the property, and said he agreed with Mr. Sievert.

There was discussion that the purpose of curb cut provisions was to ensure safety on the roads that were accessed by the driveways, and to mitigate other impacts on these roads, in terms of plowing snow, mailboxes, etc.

Mr. McNitt said he agreed with other Board members, and said a key determinant was the fact that there were a substantial number of driveway cuts in the immediate neighborhood. He said if this were not the case, more justification for this variance would have been needed.

Mr. Bogle said the application met the five variance criteria, and in addition, the property was very well maintained. He said with the apartment there, off street parking was needed, especially in the winter.

Ms. Eng said she didn't have any problems with the variance request, because the access was needed for the apartment, and because this driveway already existed.

Myleta Eng MOVED to approve the application for variance from Article XXI, Section 175-116(C)(1) of the Zoning Ordinance to create/retain the second curb cut, as per the plans submitted. Michael Sievert SECONDED the motion, and it PASSED unanimously 5-0.

- F. PUBLIC HEARING** on a petition submitted by Larry & Mary Singelais, Bow, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XXIII, Section 175-133(D)(3) of the Zoning Ordinance to permit a residential accessory sign larger than six square feet. The property involved is shown on Tax Map 12, Lot 2-3, is located at 239 Piscataqua Road, and is in the Residence C Zoning District.

Continued to the November 14th 2006 meeting.

- G. PUBLIC HEARING** on a petition submitted by Manage Plus, LLC, Amesbury, Massachusetts, on behalf of VHS Realty Inc., Canton, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-45(F)(2) of the Zoning Ordinance to permit four regular and two handicapped parking spaces in front of a commercial building. The property involved is shown on Tax Map 4, Lot 49-0, is located at 3 Dover Road, and is in the Courthouse Zoning District.

Continued to the November 14th 2006 meeting.

III. Board Correspondence and/or Discussion

- A. REQUEST FOR REHEARING** on a September 12, 2006, denial by the Zoning Board of Adjustment 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.

Mr. Johnson said this had been postponed until November 14th, and said by then it would be known whether the application would be withdrawn or not.

III. Approval of Minutes

No Minutes

V. Other Business

Chair Gooze said he had attended the committee meeting Mr. Berton had spoken about, where among other things, the density issue and professional management of apartments were discussed. He provided details on this, as did Mr. Johnson. Chair Gooze said a concept that had been proposed was that rental properties that definitely had professional management could be granted an increase in density. He said his concern about this would be how abutting areas would be impacted.

Mr. Johnson said such projects would come before the Planning Board, which would address potential impacts on neighboring properties.

Chair Gooze said the committee had also talked about requiring licensing for all rental units. He said the committee was acting in a way that was almost similar to the Zoning Rewrite committee.

He said their next meeting was November 10th, and said it would be good if there were ZBA representation there. He noted that the Fire Department had an interest in the work of this committee.

Mr. Johnson said the Fire Department had also seen some horrendous violations in single-family homes with rental apartments.

Mr. Sievert said he agreed with the 3-unrelated provision in some cases, but said what the committee was looking at was a way to address student housing issues in the whole town.

Chair Gooze said he would like ZBA members to discuss what the policy should be concerning placing applications on the Agenda, and whether a denial letter should always be required first.

There was detailed discussion about this.

Chair Gooze said another issue was the fact that the Board often did not get applications with enough information in them.

Mr. Sievert said in order to make a decision, the Board sometimes needed a lot of information from applicants. But he said this meant that applicants found themselves having to spend time figuring out the Ordinance/regulations, then having to spend substantial time getting a denial letter, and then applying for a variance, only to have the ZBA potentially deny that variance.

There was detailed discussion on this by the Board.

Chair Gooze said he believed that when the Board determined during the review of an application that the applicant needed to get more variances than were listed on the application, that the application might be denied. But he said he wanted to check with the Board's attorney on this.

There was detailed discussion about this, and about the current process of accepting applications.

Mr. McNitt and Mr. Bogle said they would not be at the November 14th 2006 meeting.

There was discussion that if there were only 4 people at a ZBA meeting, 3 votes would be needed in order to approve a variance request, and that a 2-2 tie would be a denial. Chair Gooze said he would add this to the statement he made at the beginning of each meeting.

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

Adjournment at 10:30 p.m.

Myleta Eng, Secretary