These minutes were approved at the August 12, 2008 meeting.

ZONING BOARD OF ADJUSTMENT
TUESDAY, June 10, 2008
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT: Jay Gooze; Jerry Gottsacker;; Ruth Davis; Robbi Woodburn; Carden Welsh; Ed Harvey

MEMBERS ABSENT:

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

I. Approval of Agenda

Chair Gooze suggested that Item II C be moved up to II A, unless there was an objection.

Jerry Gottsacker MOVED to approve the Agenda as amended. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings:

C. 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.

The applicant, William Lockhardt, said this was am adjustment from a variance requested the previous year. He said the plan was to remove the back porch, and to extend the family room on the back of the house. He said the house was built in 1835, and all of it was within the side setback. He said he had forgotten to put in a bulkhead, so this variance was requesting an 8 ft by 8 ft bulkhead. He said that currently, the only way to get to the basement was with a ladder. He noted that the encroachment was on the side setback, not the wetland setback.

There was discussion about the exact amount of square footage that was being requested with this variance.

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

Robbi Woodburn MOVED to close the public hearing. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

Ms. Davis said she believed that the variance request met all five variance criteria. She said the ZBA had previously granted the variance for an addition on this property, and said there was no real concern about this from abutters. She said the bulkhead was necessary to meet the code, and said she didn't believe that granting the variance would be contrary to the spirit and intent of the Ordinance. She said the intent of the sideyard setback was to maintain the open feeling in the district, and she said that given that there was no abutter close by, there wouldn't be an impact.

Ms. Woodburn said she agreed with Ms. Davis.

Mr. Gottsacker and Mr. Welsh agreed as well, with Mr. Welsh noting that the bulkhead would extend away from the wetland. Chair Gooze agreed that the variance request met all five variance criteria.

Jerry Gottsacker MOVED to approve an application for variances to build an 8 by 8 ft bulkhead that will encroach a bit more on the wetland and sideyard setbacks, per the plans submitted with the application. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

A. CONTINUED PUBLIC HEARING on a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an **APPLICATION FOR EQUITABLE WAIVER** from dimensional requirements of the side yard setback and the shoreland setback for the new construction of a home. 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 said he wanted to be sure that everyone was clear on the issues that would be addressed as part of this particular application. There was discussion.

Attorney Tanguay spoke as the applicants' representative, and said the Sidmores were seeking an equitable waiver to permit the building that was built in accordance with the plans that were submitted, and the building permit that was issued. He said he realized this case had been around for a long time, and he noted that the membership of the ZBA had changed somewhat during that time. He said he would therefore like to go over the history concerning the property, noting among other things that this present application needed to be framed properly.

Attorney Tanguay first highlighted in detail portions of the ZBA Handbook that related to the variance process. He stressed the importance of having a letter from the Town as to what a property owner had violated in a particular situation, stating that that property owner would not come to the Town asking for relief for something he/she had not been told was a problem. He said he realized the ZBA knew this, but said it was something worth reminding everyone about.

He next reviewed in detail RSA 674:33-a concerning equitable waivers, and the kinds of situations it was intended to address. He discussed in some detail the legislative history of this RSA.

Attorney Tanguay then provided a detailed history of the case, and as part of this, handed out a timeline of all the events/documentation relating to it He explained that this detailed timeline was needed in order to demonstrate that the applicants had acted in good faith, that the building was substantially completed before discussion of a problem came about, and that the cost of curing was not worth what needed to be done. He said this timeline and documentation included, among other things:

- the letter from code officer, dated Dec 20, 2005, and said this was the kind of thing that should be done when there was a violation. He provided details on this.
- He noted a set of plans, dated 5-1-06, which were before the Board on the first round of variances. He said the house in question was manufactured house, and showed what the factory built. He said the plans didn't show anything that put the house on the ground, or the basement to be built by the builder.
- A DES permit, dated July 31, 2006 which made it clear that when the side porch was built, disturbance of soil was allowed in order to build there
- Variances granted on 10/12/06 to construct the house, involving a sideyard setback to the Bates property, the shoreland setback to the Bay, and a request to enlarge the volume and footprint of the structure..

He said the process then moved forward to get the plans finalized, and to work on some of the details to make it work. He said this plan didn't deal with the basement apartment. He said it was clear there was going to be an apartment, but the details weren't there because this wasn't what the factory was involved with. He said it wasn't an issue at the time because there was a porch up above. He said the applicant then went through putting together a more detailed set of plans.

Continuing the timeline, Attorney Tanguay noted:

- The detailed set of plans dated April 18-20, 2007. He said at this point, sheet 3 began to show some further detail that was not on the original plan, such as the front steps; the elevation at the south end, where the basement apt showed up; sliding glass doors; and the deck. He said that was what the variance in November was granted for. He said the plans also showed back steps for which the variance had previously been granted.

Mr. Gottsacker asked what daylight basement walls referred to in these plans.

Don Smith, D & D Homes, the builder for the project**,** said this referred to the walls built on the ground level to create the walkout, which were part of the structure. He said this did not involve the wing walls.

Attorney Tanguay noted where the wing walls appeared in the April 18-20, 2007 plans.

Mr. Gottsacker asked what the significance was of the April 18-20, 2007 date.

Attorney Tanguay said this was after the original variance was granted and before the building permit was issued. He said these plans were submitted to get the building permit.

Mr. Welsh said this appeared to be the first time that the fact that the application wasn't consistent with the variance showed up.

Attorney Tanguay agreed that this was the first time that details such as the back steps appeared in the plans, the first time that the basement and walkout at the south end of the building appeared, and the first time the wing walls appeared. But he said he disagreed that this was in some way a violation or a change to the variance.

Ms. Davis referred to the DES permit for soil disturbance granted on July 31, 2006, and asked whether this permitted the removal of soil to expose the southern wall, which was necessary in order to install the retaining walls.

Attorney Tanguay said there was always some confusion about that, and said the applicant had read that as giving them the authority to take the soil out.

Ms. Davis asked if the volume of soil DES had authorized to be taken out equaled the amount that was actually excavated.

Attorney Tanguay said the soil taken out was the soil underneath where the side porch now was.

Ms. Davis asked if DES authorized excavation of soil beyond that, closer to the water, with this permit. Attorney Tanguay provided details on the amount of soil that was excavated. He said there were a lot of photos that showed this.

Mr. Gottsacker said he recalled that DES had said in its letter that too much soil has been taken out.

Attorney Tanguay said DES said this permit, dated July 31, 2007, authorized disturbance of soil, but didn't authorize the removal of soil. He said DES had said that with corrective action, it was expected that there would be some soil disturbance, but they had thought the soil would be put back. He said he had read through the permit, and didn't see that that was in there. He said there was a disagreement about this, and DES had said to put the soil back. He said the applicant was prepared to do this.

Ms. Woodburn said as part of the application to DES for this permit, an applicant had to illustrate the amount of soil being moved. She asked if there was a record of what the intention had been concerning this. She also asked who put the application together.

Chair Gooze said pertinent to this was whether what the applicants had submitted to DES the plans that had been submitted to the ZBA, or the plans from May of 2007.

Mr. Smith said it was clear that DES used the first plan. He noted that the structure itself was the same size in the first plan as it was in the final plan.

Ms. Woodburn said the impact on the site from the second plan was completely different.

Mr. Smith disagreed. He also explained that if there was a structure on a hill of soil, and soil was removed on two sides of the hill, - from the back of the house and the walkout end, it was virtually impossible to put the soil back in the same manner. He said this was why the wing walls were used, to provide support.

Chair Gooze asked whether the plan submitted to DES showed the excavation required to make the sliding doors area, etc.

Mr. Smith said he had never seen any detail on this.

Mr. Welsh asked if that plan showed the wing walls.

Mr. Smith said no, but said he didn't think this had anything to do with the excavation of the soil.

David Eckman of Eckman Engineering said Mr. Sidmore, who was not an engineer, had filled out the wetland permit application, and hadn't calculated and included cubic yards of soil. He said this came out when they had met with DES. He said DES' main issue was the retaining walls.

Attorney Tanguay said the ZBA didn't deal with the final construction plans, dated April18-20, 2007. He said an applicant came to the ZBA to get a variance before going forward with final plans. He said the May 18, 2007 building permit was based on the April 18-20, 2007 set of plans.

He noted wording on the building permit: " One must comply with prior approval by ZBA decision and files." He said he believed that if someone was putting something in the ground that caused another variance request, one needed to go back to the ZBA. He said having already gotten a variance didn't exempt someone from having to get another one.

He said he believed that this language meant that the building permit and the plans submitted complied with the variance that was granted, because otherwise, the permit wouldn't have been granted. He said an applicant needed to be told if this was not case. He said it had been assumed in this instance that what was on the plans satisfied the Zoning Ordinance. He provided further details on this. He said there had been an appeal before the ZBA regarding the back porch.

Ms. Woodburn noted the wording at the bottom of the certification page of the building permit: "Neither the review of any applications, or plans by official of the Town of Durham, nor any subsequent inspection of the premises, should be relied upon as an assurance of conformity to legal requirements. The applicant shall remain fully responsible for complying with all applicable United States, New Hampshire or Durham laws, ordinances, regulations or conditions."

Attorney Tanguay said if someone built something not on the plan, and it was then discovered as part of the process of inspections, a person had to go back to the ZBA. But he noted that the cases he had cited to the ZBA in a letter submitted in Sept 2007 were the same cases cited by the Legislature in regard to the equitable waiver statute, concerning the fact that a property owner relied in good faith on a building permit application being received. He said in this instance, the owner was entitled to rely on that, and if the project was built in accordance with the plans and the building permit, the

Town couldn't then say a mistake was made, or the Town had changed its mind in terms of what the Zoning Ordinance meant.
He said in this instance, there was nothing on the ground that wasn't in the plans. He said there had never been a cease and desist order, or a stop work order. He said the applicants had even come back before the Board without an actual letter from the Code officer. Attorney Tanguay then spoke in some detail about the letter he had written to the ZBA dated April 4, 2008, and the Town Attorney's response to it.

Mr. Welsh asked whether the wording on the first page of the building permit was in fact a conditional approval.

Attorney Tanguay asked what it was about the plan that had violated the prior ZBA approval. He also said if there was something in the plan that had violated the prior approval, the time to blow the whistle on this was then. He said at that point, the applicant would have had the opportunity to decide what to do.

There was detailed discussion about the wording on the first page of the building permit.

Chair Gooze suggested that the Board should listen to the abutter's attorney before getting into these kinds of questions.

Attorney Tanguay said he believed the language meant that the building permit was granted by the Code Enforcement Office, who believed that it was consistent with the Zoning Ordinance. He said the permit said not to violate the Ordinance, and not to do something that was not on the plan. But he said there was nothing on the plan that was in violation of the Ordinance, and even if there was, the time for Mr. Johnson to speak about this had been then and not later. He spoke in further detail on this.

He said there was nothing that happened between May 18th 2007 and Nov 15th 2007 that was any different than what the state of the world was on May 18th, other than the neighbors complaining. He said the building was the same. He said there wasn't anything built that was not in the plan, and wasn't anything newly done. He said the state of the plan was the state of construction.

Ms. Davis asked if it was correct that the variances the ZBA had granted pertained to the ground up, and the ZBA hadn't been discussing what happened under the porch.

Attorney Tanguay said underneath the porch was not discussed. He reviewed the variances that had been granted in some detail. He said with the first variances applied for in 2006, there was no discussion about basement access other than the fact that there would be an apartment there. He said the fact that there would be an apartment was always known, but he said they didn't discuss variances that might be needed with regard to that. He said by May of 2007, when the plan came along, it showed that underneath the porch that was approved would be a walkout for the basement apartment.

Ms. Davis asked whether, when the building plans were submitted, the applicant was waiting to see if the design for the walkout would be ok.

Attorney Tanguay said he couldn't answer that, other than to say the plan was submitted. He said to this day, he didn't know why a walkout basement created the need for a further variance. He provided details on this, and said the fact that a walkout door was put in rather than a concrete wall didn't create a new structure. He agreed that a retaining wall was different than putting a window on a wall that was already approved

He said the Sidmores didn't think there would be a problem because there was no new violation. He said the wing walls were an item that had been discussed with the Code Officer, and he noted that the Sidmores didn't even want them. But he said the building designer and Mr. Johnson thought they were a good idea. He said they provided structural support underneath the porch, but not beyond that, and they stabilized the soil to get a cleaner look to the property.

Ms. Davis said the wing walls were on the building permit application, so this was a discussion that happened prior to the plans being submitted.

Mr. Smith provided further details on the thinking behind the structural support that needed to be provided for the house, and the soil work that was done on the site. He said it was a landscaping detail, and said it was decided on by the Sidmores. He said something had to be used to support the soil, and he provided details on the site.

Ms. Davis said she had heard from Attorney Tanguay that there had been discussion with the Code officer about installing wing walls, and Mr. Smith said he believe the original idea had come from himself, although he hadn't discussed this with the Code officer.

Chair Gooze asked whether the wing walls would have been needed, if the soil hadn't been dug out for the sliding doors and patio.

Mr. Smith said the wing walls, or something, would still have been needed in order to provide support. He said once the dirt was excavated, it was impossible to put it back the same way.

Mr. Sidmore spoke before the Board, and said he and Mr. Johnson had discussed various things that could be done, over a period of time.

Attorney Tanguay said on June 18th, the inspections began, and he provided details on this. He said the home was manufactured off site, said the building was delivered between June 28th and July 18th. He said by July 18th, the building was essentially there, and substantial construction was done. He said nothing happened between that time and some time in August to alert the applicants that there was a problem.

Ms. Woodburn asked if the wing walls were poured at the same time the foundation was poured, and was told yes.

Chair Gooze noted the Building Permit dated June 18, 2007, and the wording at the bottom of the second page: "Neither the review of any applications, or plans by official of the Town of Durham, nor any subsequent inspection of the premises, should be relied upon as an assurance of conformity

to legal requirements. The applicant shall remain fully responsible for complying with all applicable United States, New Hampshire or Durham laws, ordinances, regulations or conditions."

Attorney Tanguay agreed that if there was something not in the plan that the homeowner had included in the project, that would be one thing.

He said in August 10, 2007, Attorney Shulte complained to Mr. Johnson that there were things on the site that the abutters didn't expect to see. He provided details on this. He said the neighbors had the right to complain. But he said they started this process going, saying that the plans and building permit hadn't been looked at, and that it was doubted the construction and excavation were disclosed in the plans and building permit, when they had been.

He said there was further correspondence that said the abutters had now looked at the building permit, and everything seemed to be on it, so they would not bring a determination against the Code Officer**.** He said the correspondence said it was an enforcement issue, but the neighbors didn't bring an enforcement action themselves**.**

Attorney Tanguay said then, the Code Officer said the applicants needed to do something, but there was no letter stating what they were being asked to do. He said they were only told there was a problem with the wing walls and the walkout. He said he had asked for a continuance of the public hearing on the variance application because he didn't know what was being claimed to be a problem.

He said his letter to the Code officer dated September 11, 2007 stating among other things the owner had relied in good faith upon the building permit and had incurred substantial construction. He said he had cited court cases regarding this, which had reflected the same line of reasoning for an equitable waiver case.

He reviewed in detail the timeline from this point on, including the violation notice dated November 9, 2007, which laid out 5 issues. He reviewed these issues in detail, stating that the first two, regarding the wrap around porch and the new chimney cited a setback issue. He said the third issue, regarding the possible increase in the elevation, gave no indication that there was some violation of the Ordinance.

Concerning the fourth issue, regarding the retaining wall and walkout on the lower level, he said the Code Officer's letter didn't give any sense of what the violation was, and simply said it was never authorized. But Attorney Tanguay said it was on the building permit, and was inspected over and over.

He said that unless a letter from the Code Officer said something needed to be approved by the ZBA because it violated the Zoning Ordnance, the applicant didn't know what to look for. He noted that the state of the plans and what was built were the same, and said the information available to write this letter was known on the date the building permit was granted. He said nothing happened after this other than the complaint from the neighbors. He said this was what the need for equitable waivers was all about.

Regarding the fifth issue, that the excavation work and soil removal was never authorized, this didn't say there was a violation of the Zoning ordinance. He said the letter said it wasn't part of the original approvals, but he said this work didn't have to be approved by the ZBA, unless there was a violation of the Zoning Ordinance.

He also noted that the applicant was blindsided in being told a variance was needed for the patio, noting that it was not in this letter.

Continuing with the timeline, Attorney Tanguay said that on Nov 13, 2007, variances were granted for the back porch and the chimney. He then noted the January 2008 appeal by the Bates, and the February variance requests, which the ZBA denied. Concerning the Code officer's February 15, 2008 letter regarding this denial, he asked what the Code Officer knew then that he didn't know on May 15, 2007. He said if this letter had been written back then, the Sidmores could have responded in one way or another, and the costs wouldn't have been what they had been.

Attorney Tanguay then went through each of the equitable waiver requirements and how they were satisfied.

(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;

He said this requirement was satisfied because the applicant had submitted a building permit, and didn't know there were any violations. He reviewed the timeline again, and said there was nothing that alerted the Sidmore to potential issues until after the building was delivered, and until after substantial completion was done.

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;

He said the applicants said they knew what the law was; they were before the ZBA in 2006 to seek variances; in the process there were additional variances required that were obtained; and after getting them they engaged in conversation with the builder, the engineer, and the Code Officer and submitted plans, which were approved. He said the building permit was issued, and what was built was what was on the plans and the building permit. He said the only thing that could be said was that the Code officer must have changed his mind at some point, and decided there was a problem.

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

Attorney Tanguay said this was not a nuisance situation. He said the ZBA had ruled on a number of occasions that there was no diminution in the value of other properties in the area from anything the Sidmores had done.

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected

He said the building was delivered, in reliance on a plan, and was built according to this plan. He said the cost estimated by the original builder to correct the issue, based on the Feb 15, 2008 letter from the Code Officer, was $36,000. He also said the engineer had said there would be structural issues with the house, if the Feb 15th letter had to be followed, and that there would be costs involved with this. Attorney Tanguay said it would be inequitable to require that the existing work be undone.

Mr. Eckman provided details on this, reviewing the June 10, 2008 letter he had written to the ZBA concerning this application. He said if one had to jack up this new building, there could be potential problems. He said this home was something the Sidmores had saved for their whole lives, and said it would be foolish to create structural issues with the house.

He said there would also be environmental impacts if this work were done in the proximity of the shoreline. He said this was supported by DES, which just wanted the retaining walls cut back out within the 50 ft setback. He said the most environmentally friendly solution would be to cut the walls back and more or less leave things alone. He also provided details that having flattened out the area somewhat reduced stormwater velocities, allowing better stormwater treatment by the vegetation installed there.

Mr. Eckman said that concerning the safety issue, the safest solution was to leave the southerly egress as a full doorway and not consider replacing it with a crawl space. He then summarized that some minimal changes would result in the best solution.

Attorney Tanguay asked that the equitable waiver be granted, and said the effect of this would be that as built, the building was essentially blessed, and no further variances would then be needed.

The Board stood in recess from 8:55-9:00 PM.

Attorney Shulte, representing the abutters, the Bates, spoke before the Board. He said he had inserted into Attorney Tanguay's timeline a few things that had been left out. He said the basic premise here was that when someone wanted to do something with his/her land, and this required approval from the Town, at every stage of the process, the burden was on the individual to provide information, and to explain how an application complied with the regulations, or why the individual was entitled to relief from those regulations. He said this burden of proof was not on the ZBA to fill in the gaps, was not on the Code Officer to correct the applicant's mistakes, and was not on the neighbors to fill in the evidence the applicant did not have, or chose not to submit to the Board.

He said the best that could be said about the application submitted was that it lacked the information the ZBA needed in order to make a knowledgeable decision. He noted that Attorney Tanguay had

said the applicants had been blind-sided about the patio issue. But he asked the ZBA to think about how the abutters had felt, because they were given limited information, like the Board.

He said the Bates had supported the project to enlarge the house at first. He said the project was described to them the same way it was described to the ZBA. He said the pictures the ZBA was given showed the structure set on grade, the same way the mobile home was, although there was to be a garage under it. He said there had been every indication that nothing would be substantially different about the rest of the property other than the fact that the building would be larger.

Attorney Shulte said one of the things left out of the timeline was the July 11, 2006 denial of the variances on a vote of 3-2, which occurred because members of the Board thought the project was bigger than it needed to be, and would impact the shoreland and the neighbors. He said the application was reheard, and was approved because one member of the Board changed his vote.

He said if the ZBA had been told that instead of a 2 story structure on the south end, there would be a 3 story structure, with hundreds of cubic yards of soil permanently excavated, that middle vote might not have shifted. He also said that if the abutters had known, and could have spoken, the outcome might have been different. He said the applicant had not met his obligation to the ZBA, the neighborhood or the abutters, to provide this information.

He said the applicant said he had spoken with a number of people about the site work, and had come up with different ideas. But Attorney Shulte said when it came time that the applicant would be doing something that would implicate the approvals, it was his responsibility to come back to the ZBA and say the plans were different. He provided details on this.

Attorney Shulte said a second exhibit he had provided for the Board was a letter from the Sidmores to Dori Wiggin of DES, regarding the proposed plantings and restoration of the shoreland flora. He provided details on this, and said the clear implication of the letter was that there would be no disturbance of the soil, that what was there would be kept, and that there would be significant new things added to protect the environment. He said that was not what happened, and said instead, the applicants had excavated truckloads of material they now said shouldn't have to be brought back.

Regarding the specific requirements of the equitable waiver statute, Attorney Shulte said his general comment was that the burden of proof was on the applicant. He also said that if there was an equal balance of evidence, or no evidence submitted by the applicant, a ZBA could not make an affirmative finding on an equitable waiver, and it had to fail. He provided details on this, stating that an applicant had to come up with some evidence that granting the equitable waiver would not have a negative effect. He said the ZBA had zero evidence on that in this instance.

Attorney Shulte also said the ZBA had made findings in February that: this proposed use of the patio area, which the Board had never approved before, would be too close to the neighbors and would be a more intense degree of use than had been approved in the past; that there would be more activity in the setback area; that there were specific adverse effects on the abutter; and also, if not allowed, there would be less impact on the shoreland.

He next went through the requirements for granting an equitable waiver.

(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;

He said the equitable waiver didn't address the main part of the house, but said it did address the structural things identified at the February 12, 2008 meeting, - the sliding doors, windows, concrete pavement on the patio and the retaining walls. He said the Board needed to decide whether these things were substantially complete, and he provided details on this. He noted a letter from the Bates to the Sidmores, which was the first notice to the Sidmores that the work they had done did not comply. He noted that the Sidmores should have known before they submitted the building permit that there was a significant difference between the final plans and the plans the ZBA had seen.

He said as of July 9, 2007, the concrete floor was not paved, the door was not put in, and the windows were not put in. He said the retaining walls had been put in. He described the structural support for the building, and said all of the "decoration" could be taken out and nothing would happen to the house. He noted photographs regarding this.

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;

Attorney Shulte said the ZBA would have to decide whether the violation was a result of ignorance of the law. But he said there was obfuscation or lack of information that had been provided. He said Attorney Tanguay had told the ZBA at the present meeting that the plans given to the Code Officer were not created until long after the ZBA approvals. He said what the ZBA had seen was therefore not enough to allow it to make an informed decision.

He said that regarding whether there had been a good faith error in measurement, or an error in Ordinance interpretation, this didn't seem to be the case, but he said he hoped the Board would ask questions about this, regarding what Mr. Johnson had written on the building permit. He provided details on this, and said there didn't seem to be an error in Ordinance interpretation in this case.

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

Attorney Shulte said Board had previously found that allowing the underground patio to be in place for active use with a walkout to the front lawn would have an adverse impact on the abutter, and said he hoped the ZBA would continue to uphold this finding.

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained,

that it would be inequitable to require the violation to be corrected.

Attorney Shulte said it was known what the extent of construction was at the time the applicant got the notice of violation, and said there had been scant progress at that point. He said the cost would not seem to be a significant factor. He noted that since that time, the Sidmores had done an extensive amount of work, including a patio, windows, and glass doors, and said the Code Officer had warned that they were proceeding at their own risk. He said he felt that from the time they decided to expand the project beyond what they had told the ZBA, they were acting at their own risk

Attorney Shulte said drawing #4, the foundation plan in the April 2007 plans, did not indicate any need to do extensive excavation underneath where the porch would be for the first floor. He noted the question asked as to whether DES was told this would be excavated and used underneath, and he said it was known this question wasn't asked. He said these plans didn't indicate that would happen, and said they did indicate that the porch would be supported on posts, and that the excavation and structural work wouldn't be needed.

He said whether there was excavation under the deck had nothing to do with the structural integrity of the house, or the porch above it, because they were independently supported. He said when the applicant became aware of the discrepancy between the newly developed plans and the original plans and what he had told the Board, he should have come back to the Board. But he said he didn't come back, and said it was his fault that he didn't do this. He said if an expense had been incurred as a result of this he had only himself to blame. Attorney Shulte asked the Board to deny the application for equitable waiver.

Art Guidano, AG Architects**,** spoke before the Board**,** and said he had looked at information on this project at the request of the Bates.

Chair Gooze asked Mr. Guidano to address the four points of the equitable waiver specifically.

Attorney Shulte said the issue Mr. Guidano would address primarily was the cost of dealing with the remedy.

Mr. Guidano spoke in detail about the issue of replacing the existing end wall. He said this end wall was not a bearing wall, and said the bearing walls were the two side walls and the center steel beam. He said the end wall could be removed, and said a foundation wall could be put in its place. He provided details on two ways it could be done, and said it could be relatively easily achieved, given the excavation that had already been done. He said he hadn't calculated the cost of doing the work that would be involved.

Chair Gooze asked if there were any other members of the public who wished to speak against the application. There was no response. Chair Gooze said he would take a rebuttal from the applicant's attorney.

Attorney Tanguay said regarding the issue of possible diminution of the value of surrounding properties that the abutters in this area, over the past two years, had said this wasn't an issue. He also noted that the Board had determined with the most recent variance request that there would be no

diminution in property values, even though the variance was denied. He also said that regarding the issue of nuisance, the ZBA had denied the applicant's variance based on the spirit and intent of the Ordinance. He said nuisance wasn't an issue.

Regarding the substantial completion criterion, he said the July 7, 2007 photo didn't have anything to do with notice provided to the Sidmores by Mr. Johnson, which was some time around August 20, 2007, He said the picture didn't say anything about August 20th.

Regarding the email from Mrs. Bates to the Sidmores and to the Town Administrator, he said these didn't amount to a notice that there was a violation of the Zoning Ordinance. He said that could only come from the Code Enforcement officer.

Regarding photos of the proposed home, he said nobody had thought about details of finishing the apartment on the lower level. He noted that garage doors were not shown on the photos either. He said the Sidmores did not receive a notice of violation, and did not proceed at their own risk, but proceeded based on the good faith following of a building permit that had been granted.

Mr. Smith said that regarding the structure issue, there was a steel beam in the basement, but it only carried the span of the garage on the north end, and there was no steel beam for 2/3 of the building. He said the walkout wall was a bearing wall, and he also provided details on the support it provided along with lally columns. He said there were therefore some structural issues with that wall.

Mr. Eckman said to put in a full height concrete wall, they would have to return the grade to what it was, and said jacking the house would be required. He also noted that modular houses were trucked in pieces, and that once they were put together, they were more fragile.

Attorney Shulte said Attorney Tanguay assumed that there had to be official notice from the Town of a violation, but he said this was not what the Statute said. He provided details on this. He said the key word was "violation", and said the Sidmores had no reason to know there was a violation. He said the fact that the neighbors had complained the house was too big didn't create a violation. He said the applicants didn't have a violation until they were told there was one.

Chair Gooze asked Attorney Shulte if he wished to rebut.

Attorney Shulte said nothing new had been said, so there was nothing to rebut.

Jerry Gottsacker MOVED to close the public hearing. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

The Board agreed to go through the equitable waiver requirements one at a time.

(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value

Mr. Gottsacker said there were three issues, what a violation was, what substantial construction was, and who discovered it. He said the neighbors' comments were not a violation, and said clearly the Statute referred to a municipal official saying the property owner was in violation of the Ordinance. He said Mr. Johnson gave the notification, but not until six months later.

Regarding the issue of substantial construction, he said the pictures showed that substantial construction was there, and said six months was a lot of time. Concerning this issue of who discovered the violation, he said the Statute did not say this could be a neighbor.

Chair Gooze asked Mr. Johnson when he felt he had given the notification that there was a violation. He said by the time the ZBA got the letter with the five points in it, it was November, but he noted that the Board was certainly talking about this before then.

Mr. Johnson said the first violation would have occurred when the building permit was issued on May 18, 2007, with the first note that the Sidmores must comply with the plans that were part of the ZBA decision and were in the files. He said based on the equitable waiver criterion, there was failure to inquire. He said they never called to ask why this stipulation was on there.

He said the second time there was notice of a violation was a conversation with either Mr. Sidmore or Mr. Smith, after the plumbing inspection, regarding issues Attorney Shulte's emails had brought to light.

Mr. Welsh asked Mr. Johnson if he always put that stipulation on the permit, and Mr. Johnson said yes, if there was an issue with the plan that was submitted. He provided details on this, and said he put it there in this instance because the plans for the modular home did not match the plans that were part of the ZBA approval.

Ms. Woodburn noted that Mr. Johnson had issued the permit anyway.

Mr. Johnson said yes, noting that the May 1, 2006 elevations showed what the ZBA had approved, including the garage under. He said there was not any discussion about the south side walkout. He said in the plans that came in April 18, 2007, sheets 3 and 4 both had notes that said the elevations were for conceptual purposes only, and were not to be used for construction purposes. He explained that this was historically a problem with modular homes, in that they came in with plans from the factory with a lot of options shown that didn't apply to a particular site, whether there was a zoning problem or not.

Ms. Woodburn asked Mr. Johnson whether, when he issued the building permit with these conditions, he followed up when the applicant picked up the permit.

Mr. Johnson said when someone picked up a permit, those conditions were typically highlighted. He said if he wasn't there and the person had questions about the conditions, he/she would typically call him later.

Mr. Gottsacker said the difference between the ZBA plan and the one tied to the building permit was the wing walls. He said the sliders for egress, and not windows, was shown on both.

There was discussion that the sliders were not shown on the original plan.

Ms. Woodburn also said that the south end elevation was completely different in the second plan. She said what made her uncomfortable about this situation was that in her professional work, she looked to get a sign off from the Code Officer that she could go ahead with the work, based on the plans. She said the question was whether the builder or applicant, after seeing the conditions on the permit, would realize there was a problem.

Chair Gooze suggested they move on to part b, which addressed this issue.

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;

Chair Gooze read from RSA 674:33 -a, IV, (the equitable waiver statute). " This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them".

He said that was pretty definite, that Mr. Johnson was under no obligation to inform someone when the person was not following the plan.

Ms. Woodburn said this got to the issue of error, and that it was an error to assume that getting a building permit meant that the property owner had the go ahead, and complied with all regulations. She said she was thinking of this the way the applicant might have been thinking of this.

Mr. Gottsacker said having done several projects that Mr. Johnson had looked at, he said his assumption had been that when he got a building permit, he was set.

Chair Gooze said the property owner was still obligated to follow the Ordinance, and it wasn't the Code Officer's job to baby sit the person.

Mr. Gottsacker said if he got a building permit and submitted the plans, and then got the permit, he would assume there was a direct relationship between the two.

Chair Gooze said the permit/plan said "conditional upon following the ordinance."

Ms. Davis said the question could be more specifically raised that there was the stipulation that the home be built according to what the ZBA approved. She questioned whether the Board approved the garage underneath.

There was further detailed discussion about the issue of the property owner being obligated to follow the Ordinance, regardless.

Mr. Gottsacker said at best, this came down to a mistake. He said the mistake was that the plans had the wing walls and walkout shown. He read the following: "an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority".

Mr. Welsh asked who made the error.

Mr. Gottsacker said the fact that the drawing was wrong, and that Mr. Johnson issued the permit based on it was simply an "error in ordinance interpretation."

Ms. Woodburn said Mr. Johnson had just said that he felt the drawing was a problem, and this was why he had put the stipulation on the permit. She said this was difficult for her in that if this had been her plan, and she hadn't actually been told there was an error…….

Chair Gooze said if there hadn't been any stipulation on the permit, he might be leaning toward saying there was a good faith error. But he said in this case, the stipulation was there. He asked what would have happened if the Bates hadn't said anything.

Mr. Johnson said it would have been picked up at during the inspections, and there was discussion that at this point, there really would have been substantial construction.

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

Chair Gooze said the Board had gone through this for the variance applications, and didn't feel comfortable using this as a reason to deny the variance. He said he didn't feel comfortable using this as a reason to deny the equitable waiver request.

Mr. Gottsacker said the neighbors said the house was a lot better than it was before.

Chair Gooze said a project could bother neighbors in a lot of ways. But he said he didn't know about the property values being an issue.

Mr. Welsh said the ZBA had ruled last time that the opening out area where people would gather was a nuisance to the neighbors. He said the neighbors had pointed this out, and this issue was one of the reasons the variance wasn't granted.

There was discussion on what the legal meaning of nuisance was.

Ms. Woodburn said she was surprised that the ZBA had allowed the deck above, but not the people congregating on the space below. She said she didn't understand what the difference was.

Mr. Welsh said this space below meant there were essentially two families that could be using the outdoor space.

Chair Gooze said he didn't think there was enough reason to say this criterion wasn't met.

Ms. Woodburn said she agreed.

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

Chair Gooze said there were different opinions expressed concerning this, with one opinion that there was a non-load bearing wall and would not represent a substantial investment to correct.

Mr. Welsh asked if there were perhaps other ways to correct the situation, such as taking away the doors.

Ms. Woodburn said the violation didn't have to do with whether or not there was a door, but had to do with the excavation and filling done within the shoreland protection overlay district. She said 175-73 said excavation within the shoreland zone was not allowed without a variance, and she said it was the grading that allowed the doors to be there in the first place that was the violation.

Mr. Gottsacker said it was pretty clear that a substantial amount of money would be required to fix this problem, and said this would be a burden.

Ms. Woodburn said any person who did excavation within the shoreland zone had to pay the penalty and replace the soil at their own expense.

Mr. Gottsacker said the essence of this was that the cost outweighed the public benefit.

Ms. Davis noted that the stipulation said the project had to comply with what the ZBA approved. She said the Board had approved the variances based on the drawings and the planting plan. She said she didn't know how legal the planting plan was, but said it clearly gave the impression that all of that vegetation would remain.

Ms. Woodburn said that was why DES had granted the permit.

Ms. Davis said the wording of the approval made reference to the planting plan. She said the planting plan had given her the impression that that end of the building wouldn't be dug up.

Ms. Woodburn said there was no question that it was totally the ZBA's expectation that there wouldn't be any grading.

Ms. Davis said Mr. Johnson wrote on the building permit not to do anything not approved by the ZBA, and it was clear that this was what the Board had approved. She said there was nothing on the plans of the building itself to show what happened under the porch.

Ms. Woodburn said she thought the equitable waiver issue came down to requirement b, whether the violation was not an outcome of ignorance of the law.

Chair Gooze said the question was whether, regarding part b, there was a good faith error in calculation or measurement by the owner or the owner's agent, and said he didn't think so. Regarding "an error of ordinance interpretation or applicability made by a municipal official..", he said he Mr. Johnson had done everything he was supposed to do. He said he wrote a condition on the permit, and was under no obligation to do more than that. He said if someone said part b was met, this essentially said that Mr. Johnson had made an error.

Ms. Woodburn said she didn't feel that Mr. Johnson had made an error in interpretation, and said there was an error of assumption by the applicant that having a building permit in hand was sufficient.

There was discussion on this.

Mr. Welsh asked how Mr. Gottsacker would be able to say yes on part b.

Mr. Gottsacker said b was troublesome. He said the worst case scenario was that there was an error. He said if he personally had come to Mr. Johnson for a permit, and had plans, and Mr. Johnson saw problems on the plans and didn't say anything to him, and then later came to him when the building was ¾ done that he had to tear it down, he would be abhorred. But he said if he brought him plans and was told there were some deficiencies in it, he would be able to fix them. He said if he went ahead and used the original plans after he was told they weren't right, that would be wrong.

Mr. Welsh said what bothered him was that in the original variance that was granted, Attorney Tanguay said what was proposed was not going toward the water in any way, and that there would be no disturbance. He said the fact that there had been a vote of 3-2 to deny the original variance; that the later variance request was approved 3-2, and then a plan was done and there was disturbance toward the water, when there had been a big discussion on this issue, was a failure to inquire.

Chair Gooze said the ZBA had to follow the Ordinance, and this was the way it was written.

Mr. Gottsacker noted that the State statute said an equitable waiver could only be granted if the ZBA found the request met all of the criteria.

Ms. Woodburn said when she saw the final plans and saw the wing walls and the elevations, she said they should be able to do this. She said she then read the building permit with Mr. Johnson's notes. She said it was clear that the onus was on the applicant to be aware of all the things they were proposing and that they met all the codes. But she said she had a nagging feeling that this didn't make sense, and that it wasn't fair. She agreed the ZBA couldn't say yes to b, but said it didn't feel right.

Mr. Welsh asked if the stipulation on the permit was highlighted, and there was discussion.

Mr. Gottsacker asked Mr. Johnson if he had talked with anyone about the plan that showed the wing walls, and Mr. Johnson said no.

Chair Gooze asked for a motion.

Carden Welsh MOVED to deny an APPLICATION FOR EQUITABLE WAIVER from dimensional requirements of the side yard setback and the shoreland setback for the new construction of a home, located at 8 Cedar Point Road in the Residence C Zoning District, due to a failure of the application to meet RSA 674:33-a I, section b. Chair Gooze SECONDED the motion, and it PASSED 3-2, with Jerry Gottsacker and Robbi Woodburn voting against it.

Chair Gooze said he thought it would take too long to go through the Sidmore's variance application that evening. He said he didn't want to put this off another month, but after lengthy discussion, it was agreed to hear the variance application on July 8, 2008.

Recess from 10:25 –10:33 pm

B. PUBLIC REHEARING on a February 12, 2008 denial of a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to install cement retaining walls for soil removal and erosion control on south end of the basement and north end, 8 feet east from original house stairs 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.

Continued to July 8, 2008

II. **Approval of Minutes** – May 13, 2008 (Note Page 7)

Page 7, 4th paragraph from bottom should say "An associate of Mr. Matson said….". 2nd paragraph from bottom should say "She said…..

Page 10, 9th paragraph, should read "..these kinds of areas change from residential to non-owner occupied."

Page 11, 2nd paragraph, include a line between "Chair Gooze said he didn't look at it this way" and the following sentence.

Page 12, before Agenda Items II D and E, a paragraph should say "Items II D and II E are continued to June 10, 2008.

Carden Welsh MOVED to approve the May 13, 2008 Minutes as amended. Jerry Gottsacker SECONDED the motion, and it PASSED 4-0-1, with Robbi Woodburn abstaining because of her absence from that meeting.

V. Other Business

A.

Mr. Gottsacker said he had been unable to find a link to the NHDES presentation regarding the shoreland protection act update. There was discussion.

Chair Gooze noted that the Bates were suing the Town regarding the Sidmore variance approval for the chimney and the wrap around porch.

He said he was still waiting to hear the results of the Palmer and Stonemark cases.

There was discussion on the current shortage of judges in the State, that court cases could therefore be stuck in limbo for a long time, and that this might be a possible incentive for people to settle cases out of court.

Chair Gooze noted that resident Shawn Starkey had applied to become an alternate member of the ZBA, and said hopefully the Council would approve him.

B. Next Regular Meeting of the Board: **July 8, 2008

VI. Adjournment

Robbi Woodburn MOVED to adjourn the meeting. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0

Adjournment at 10:50 pm

Victoria Parmele, Minutes taker

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Jerry Gottsacker, Secretary