

These minutes were approved at the April 12, 2011 meeting.

**Durham Zoning Board
Tuesday February 8 2011
Durham Town Hall - Council Chambers
7:00P.M.
MINUTES**

MEMBERS PRESENT: Chair Robbi Woodburn; Vice Chair Ruth Davis; Secretary Sean Starkey; Jerry Gottsacker

MEMBERS ABSENT: Carden Welsh; alternate Edmund Harvey

OTHERS PRESENT Tom Johnson, Director of Zoning, Building Codes & Health;

I. Approval of Agenda

Chair Woodburn called the meeting to order at 7:00 pm. She pointed out that there were less than five ZBA member voting that evening, and said applicants therefore had the option to postpone having their applications heard. She noted that at least three votes were needed for a motion on an application.

Chair Woodburn said there had been a request to postpone hearing Items II D and E until the next meeting. She also said the applicant Nancy Barrett had asked that her Request for Rehearing be moved up on the Agenda, because of family considerations.

In addition, she said she would need to recuse herself regarding the Parsons application, which would mean that there would be only three voting members for that application as well.

Sean Starkey MOVED to postpone Agenda Items II D and E to the March 8 2011 meeting. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

Mr. Gottsacker noted that the Request for Rehearing should be a shorter agenda item than the other Agenda items, and recommended moving it forward.

Sean Starkey MOVED that the Request for Rehearing (III A) be moved to become first on the Agenda as Item II A, after Approval of the Agenda. Jerry Gottsacker SECONDED the motion and it PASSED unanimously 4-0.

Attorney Schulte, representing applicant Nancy Barrett, asked that the Request for Rehearing be rescheduled because there would be only three voting members to hear it that evening. He noted that he would not be available for the ZBA meeting on March 8th. He said it was realized that he and Ms. Barrett would not get to participate as part of the

Request for Rehearing, but he said he would like to be present for it in order to observe the discussion. He said he could do a meeting later in March, or one in April.

Attorney Malcolm McNeill, an abutter concerning the Barrett application, said the decision the Board was being asked to act upon had been rendered in October. He said the applicant had already requested two extensions because counsel was unable to be there, and he noted another occasion when the ZBA had been unable to act because of a lack of a quorum.

He said if the Request for Rehearing was continued to March/April, it would be six months since the decision had been rendered. He said in the mean time, the buildings the Board had found to be in violation continued to be there. He noted that he and his wife, as well as Attorney Schulte could view on videotape what the Board ultimately decided. He said given the extensive delays, although not intentional, there needed to be closure one way or the other on this case.

Attorney McNeill spoke further, and requested that this case, if not heard that evening, be rescheduled to an earlier date where there was reasonable assurance of a quorum. He asked that the Board not respond to Attorney Schulte's request, which would mean the case would be continued for what appeared to be another sixty days.

Attorney Schulte said when there were only three ZBA members present for the meeting in January and his client's agenda item was then postponed, there had been the possibility of having a special meeting where it would be heard in January. But he said Attorney McNeill had asked that this be put off until the present meeting because he would be on vacation later in January. He said Ms. Barrett was only asking for what Attorney McNeill had asked for.

Attorney McNeill said however this proceeded, he waived any request to be there, because he couldn't participate in any fashion. He said he and his wife had no desire that this matter be extended based on the non-availability of non-participating parties.

Chair Woodburn said it was the applicant's right that there be five members present, and Mr. Starkey said the Board therefore would not hear the Request for Rehearing that night. The Board discussed when to schedule the Request for Rehearing.

Sean Starkey MOVED that the Request for Rehearing on an October 5, 2010 denial of a petition submitted by Nancy Barrett, Durham, New Hampshire for an Application for Appeal of Administrative Decision from a July 8, 2010 letter of Zoning Administrator, Thomas Johnson, regarding the definition of a structure, be moved to the March 8, 2011 ZBA meeting, as long as there are 5 voting members. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

Attorney Schulte noted that Chair Woodburn had not recused herself for the motion, and asked if it was her intention or not to vote on the Request for Rehearing.

Chair Woodburn said she did not feel it would be appropriate for her to vote on it. She

also apologized to those in the audience that the Board didn't have five members there that evening to vote on applications. She said they would make sure there were five voting members for the Barrett application at the March 8th meeting.

Chair Woodburn confirmed that representatives from Metro PCS would like their application to be heard at the March 8th meeting.

Sean Starkey MOVED to continue to the March 8, 2011 ZBA meeting the public hearing on Item II C submitted by Metro PCS. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

Mr. Gottsacker summarized that the Board was left with Agenda items II A and B to hear that evening.

Sean Starkey MOVED to approve the Agenda as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Moby & Yasmine Parsons, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to construct a shed within the rearyard setback. The property involved is shown on Tax Map 11, Lot 16-9 is located at 19 Shearwater Street, and is in the Residence C Zoning District.

Chair Woodburn recused herself for this application, and Ms. Davis served as Chair in her place.

Mr. Parsons provided an aerial photograph of the property, and the proposed location for the shed. He said there was a pool in the backyard and leach field, and large areas of granite ledge. He said in order to keep the shed out of the middle of the back yard, there was only one good location, which put it within 15 ft of the back property line, when the requirement was that it be 35 ft from the line. He said the back property line abutted the Websters' driveway, but said their house was pretty far up on the hill, so the shed wouldn't obstruct their view or the view of any other neighbors in any way.

Mr. Starkey determined that the applicant and the abutters each had driveways that came off of Shearwater Street.

Mr. Parsons said the shed would measure 14 ft by 16 ft, and Mr. Johnson noted that the application said the shed would be 10 ft by 14 ft. Mr. Parsons explained that they hadn't decided exactly on the size yet because there were a lot of options, and said it would be anywhere from 10 ft by 16 ft to 14 ft by 16 ft.

Mr. Johnson said the Board could amend the application concerning the shed size, but said whatever it granted that evening would be what the applicants were locked into.

There was discussion between Mr. Parsons and Ms. Davis about his comment that there weren't other locations on the property to put the shed. Ms. Davis asked if any neighbors had sheds close to their own property lines.

Mr. Parsons said some neighbors off of Shearwater also had sheds, and he provided details on this.

Ms. Davis noted that the setbacks in this neighborhood were tricky.

Mr. Johnson explained that the setback was 35 ft because the required 50 ft setback could be impacted by 30% for the accessory structure that was proposed.

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

Robbi Woodburn, Cormorant Circle, said she lived around the corner from the applicant's house, and noted that she had gone through this exact process of going for a variance for a shed. She explained that the houses in this development were originally a part of a Planned Unit Development (PUD), and the setbacks were originally 10 ft on each side.

She asked the Board to imagine the havoc created for these pie shaped lots when the setbacks for the Residence C Zoning district were imposed. She said this spoke to the specifics of the properties and how they couldn't necessarily accommodate normal things one would put on a lot. She said the shed she had proposed was 15 ft from the property line, and said her neighbors had had no problem with it. She said she would support this variance request if it was in her neighborhood.

Ms. Davis asked if there were any members of the public who wished to speak against the application, and there was no response.

Jerry Gottsacker MOVED to close the public hearing. Sean Starkey SECONDED the motion, and it PASSED unanimously 3-0.

Ms. Davis noted that the Board had heard at least one other case from this neighborhood, and noted that the large setback requirements weren't workable for many kinds of home improvements that one would propose there.

Mr. Starkey said there hadn't been evidence one way or the other that granting the variance would decrease the value of surrounding property values.

He said he did not think that granting the variance would be contrary to the public interest, noting that they hadn't heard anyone speak against the application. He said the shed seemed to be set well away from any roads.

Mr. Gottsacker said there also appeared to be a lot of foliage so that at ground level, the shed

would be hard to see.

Mr. Starkey said the hardship was that the property was originally part of a PUD that had 10 ft setbacks, and was a pie shaped lot.

He said substantial justice would be done in granting the variance because the applicants would be better able to use their lot, and store things that otherwise would be left out in the open.

He said granting the variance would not be contrary to the spirit and intent of the Ordinance because the idea was to make sure people weren't encroaching on peoples' property lines and putting up eyesores.

Sean Starkey MOVED to approve an APPLICATION FOR VARIANCE submitted by Moby & Yasmine Parsons, Durham, New Hampshire from Article XII, Section 175-54 of the Zoning Ordinance to construct a shed within the rearyard setback no closer than 15 ft to the property line, and no larger than 14 ft by 16 ft, with no working utilities put in the structure. The property involved is shown on Tax Map 11, Lot 16-9 is located at 19 Shearwater Street, and is in the Residence C Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 3-0.

- B. **PUBLIC HEARING** on a petition submitted by Robert DiBerto on behalf of Elaine Helstrom, Eliot, Maine for an **APPLICATION FOR VARIANCE** from Article XX, Section 175-109(C) of the Zoning Ordinance to allow for either related or unrelated tenants in an accessory apartment located within an accessory structure. The property involved is shown on Tax Map 11, Lot 2-0, is located at 116 Dover Road, and is in the Office Research Zoning District.

Chair Woodburn returned to the table.

Mr. DiBerto spoke before the Board on behalf of his wife, Elaine Helstrom. He said this was a continuation of issues being addressed for the 116 Dover Road property. He noted that they had previously received a variance for an accessory unit. He provided details on changes that had been made to the property and said everything was now up to code. He said a substantial amount of money had been put into the upgrade of the property.

Mr. DiBerto explained that he was asking now that they have the flexibility to be able to rent the upgraded unit to a couple, as well as to two unrelated people. He noted that it was only a two bedroom unit, so wasn't of great size. He said under the NH Housing laws, he believed that it would be discriminatory to not be allowed to rent to a couple. He said he just wanted to do things right the first time.

Mr. Johnson explained that this was an existing single family home where a family could live. He said this was an accessory dwelling unit, in an accessory structure. He said it was still a single family property, so there couldn't be family in the accessory unit as well because this would in effect make the property a duplex. He said this property was not a

duplex.

Mr. DiBerto said he had been involved with another property that was located in the Office Research district on Main Street, and said in that situation, he was always told by previous building inspectors that the three unrelated rule didn't apply in that district.

There was discussion that some Zoning districts in Durham allowed more than three unrelated people in an apartment.

Mr. Starkey noted that accessory apartments weren't allowed in accessory structures, but that the applicants had been granted a variance for this.

Mr. Gottsacker said it was a quirk in the Zoning Ordinance that the applicants couldn't rent the accessory apartment to a married couple.

Ms. Woodburn said the apartment, which had two bedrooms, would be large enough to house a married couple with a child. She said if the Board allowed this, they would have to put a limitation on it. She said they would want the applicant to have reasonable use of the property, and wouldn't want to be discriminatory, but said this would have to fit in with what the spirit of the Ordinance was.

Mr. DiBert said he realized that a concern was potential students in the school system that the apartment would generate if there was a family living there. He noted that the unit was about 900 sf, and said he would be willing to stipulate that no more than one child would be permitted, if a couple lived there. He said this would mean there would be about 300 sf per person.

Chair Woodburn asked if there was anyone who wished to speak in favor of the variance request.

Attorney Stephanie Burnum said she represented Joy and Albert Gambosi, who lived directly across from the applicants' property. She said she was speaking in favor of the variance request. She said the Gambosis had lived across the street for quite some time, and had been very disturbed about the previous owners, having seen numerous parties there and a poorly maintained property. She noted that noise from that property was able to reach their property. She said the Gambosis would much rather see this property taken care of by a family or couple, instead of having students live there.

Julian Smith, Packers Falls Road, said he wished to speak in favor of the variance request. He said he recognized that there was a quirk in the Zoning Ordinance, and said he hoped the Planning Board would take a look at this. He said he might bring this up to the Planning Board himself.

He noted that he had a personal interest in this matter. He said he was planning to divide his house into two units, with one unit for his wife and himself, and the other unit, with three bedrooms, which would be suitable for a family. He said when he had discussed

this option with the Code Officer, he was told there would be a problem if there were two families living in the house in two separate units.

Mr. Smith said he was also looking to the future, noting that there were many others in the community like himself who owned houses that were meant for families, and had large tax bills. He said he could see that the ZBA would be getting more applications like this, from elderly couples or widows/widowers who might like to share their house with a family rather than with students.

He said it would make sense to grant this variance, and to encourage the Planning Board to take a look at the existing Ordinance. He said if the Zoning interpretation didn't change, there might be more variance applications of this kind.

Mr. Gottsacker noted that the ZBA couldn't initiate zoning changes.

Mr. Smith said he could suggested this change, both as a Town Councilor as well as a Council representative to the Planning Board. He noted that the Planning Board was in the process of looking at several other possible changes to the Zoning Ordinance, particularly because of the downtown rethinking that was going on.

Sean Starkey MOVED to close the public hearing. Ruth Davis SECONDED the motion, and it PASSED unanimously 4-0.

Chair Woodburn said Councilor Smith's presentation had to do with the evolving nature of Zoning regulations. She noted that Mr. DiBerto had said he would be comfortable with restricting the number of children living in the apartment to one, and said she believed this would allow the Board to go forward with granting the variance. She said the larger issue concerning the Zoning provision itself could be dealt with later by the Planning Board.

The Board agreed that there was no evidence either way that there would be a decrease in the value of surrounding properties as a result of granting the variance. It was noted that if anything granting the variance would make things better for surrounding properties.

Mr. Gottsacker noted that the abutter had said that granting the variance would be in the public interest.

Concerning the hardship criterion, Mr. Gottsacker said the unintended consequence of the Section 175-109(C) was that there couldn't be a married couple living there.

Mr. Starkey said the applicants were trying to do the right thing, so were looking for the ability to have a family there, and were willing to restrict this to no more than what they were already permitted to have in terms of unrelated people. He agreed that there was a hardship because of the current Zoning provision.

He said substantial justice would be done in granting the variance, because the applicants

were trying to create a good use and make it a family neighborhood in doing so.

He said granting the variance was not contrary to the spirit and intent of the Ordinance, which was to make sure they didn't get more than three unrelated in these types of properties.

Mr. Gottsacker said the Town shouldn't have an Ordinance that discouraged small families, and said this was happening because of the way the Ordinance was presently worded. He noted that he was in the same situation as Mr. Smith, and could see wanting to sublet a property. He agreed that more people in Town would be in this situation, so the Ordinance needed to be clarified.

Chair Woodburn said the Ordinance needed to adjust and evolve, and said seeing variance applications on a particular issue made this apparent. She said the variance criteria had been addressed, and others agreed.

There was discussion on how to word the motion. Mr. Johnson said the three unrelated rule did not apply in this zone, and suggested going with the wording in the application. He said the limitation could be added in.

Mr. Gottsacker and Mr. Starkey said what was needed was wording allowing a maximum family of three people, because the unrelated tenants were already covered.

There was discussions on the other variances that had been granted for the property.

Chair Woodburn reopened the public hearing.

Mr. DiBerto provided details on the variances he had already received, including the fact that he was approved for two bedrooms.

Mr. Johnson said there also the history of the property when the Wallaces owned it, including some court cases that had denied them possibly what the ZBA was about to grant to Mr. DiBerto. He said the Board was safer if it stayed with the wording in the application, He said this meant that Mr. DiBerto could rent to related or unrelated people, and could even rent to a family with two children, because they would still be limited to the square footage and the number of bedrooms.

Mr. Gottsacker said this was a self limiting thing, in terms of the number of people that would live there.

There was further discussion. Mr. Johnson noted that the applicant was allowed 300 sf per tenant.

Chair Woodburn said there would therefore not be more than three people living in the apartment under any circumstances.

Sean Starkey MOVED to approve an Application for Variance submitted by Robert

DiBerto on behalf of Elaine Helstrom, Eliot, Maine, from Article XX, Section 175-109(C) of the Zoning Ordinance to allow for either related or unrelated tenants in an accessory apartment located within an accessory structure. The property involved is shown on Tax Map 11, Lot 2-0, is located at 116 Dover Road, and is in the Office Research Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

III. Approval of Minutes

October 12, 2010

Page 4, last paragraph, should read "...perhaps turned over in 5-6 years, but..."

Page 6, 4th paragraph from bottom, should read "...of at least 120,000 sf; a pasture..."

Page 8, 5th paragraph, should read "...close, so she didn't think that granting..."

Jerry Gottsacker MOVED to approve the October 12, 2010 Minutes as amended. Sean Starkey SECONDED the motion, and it PASSED unanimously 4-0/

November 9, 2011 Minutes

Put ZBA member titles with names

Page 4, top paragraph, motion should say "Matt Savage SECONDED the motion..."

Sean Starkey MOVED to approve the November 9, 2011 Minutes as amended. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

IV. Other Business

Mr. Gottsacker asked where it said that applicants had the right to postpone, if there was less than a full board. He said in researching this, he hadn't been able to find it.

Board members agreed that it would be good to look this up. He said if the law said the applicant had the right to postpone, that was one thing. But he said it was something different if the Board was just doing this as a matter of custom.

Mr. Starkey noted that he was the ZBA representative to the Master Plan steering committee. He said the Master Plan Visioning session had taken place on January 28th, and said there was an excellent turnout, and excellent feedback.

V. Adjournment

Sean Starkey MOVED to adjourn the meeting. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 4-0.

Victoria Parmele, Minutes taker

Jerry Gottsacker, Secretary

