

These minutes were approved at the January 11, 2005 meeting.

**DURHAM ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, DECEMBER 14, 2004
TOWN COUNCIL CHAMBERS, DURHAM TOWN HALL
7:00 PM**

MEMBERS PRESENT: Chair Henry Smith, Jay Gooze, Ted McNitt, John deCampi, Linn Bogle, Myleta Eng, Sally Craft

MEMBERS ABSENT: None

OTHERS PRESENT: Interested Members of the Public

MINUTES PREPARED BY: Victoria Parmele

Chair Smith called the meeting to order and went over the procedures for the meeting. .

I. Approval of Agenda

Chair Smith noted that the ZBA had received two very late requests for rehearing, and asked Board members whether they thought these Items should be considered that evening. There was discussion about this, and Board members agreed they would consider these requests later in the meeting, as Agenda Items III B and C.

Ted McNitt MOVED to approve the agenda, with the addition of Items III B and C. The motion was SECONDED by John deCampi, and PASSED 4-1, with Linn Bogle voting against it.

II. Public Hearings

- A. CONTINUED PUBLIC HEARING** on a petition submitted by Troy Hartson, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XX, Section 175-109(D) of the Zoning Ordinance to allow for three accessory structures on a property. The property involved is shown on Tax Map 18, Lot 11-12, is located at 3 Simon's Lane, and is in the Rural Zoning District.

[Board members had agreed at the previous ZBA meeting to do a site visit in order to better evaluate the application.]

Chair Smith opened the public hearing.

Mr. Hartson thanked Board members for doing the site visit, and said he had nothing additional to add to this.

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

Mr. McNitt said this application had been covered thoroughly at the last Board meeting, and noted he had not attended the site visit. He also said he had considered the possibility that the playhouse was being used as a dwelling, and said this might have to be cleared up with the applicant.

Ms. Craft said she had not attended the site visit, but had viewed the property on her own. She said the only thing she was a bit uncomfortable about was that the Zoning Ordinance had not officially defined shed. She said that given there were no abutters in opposition to the application, she didn't have any issues with it, but said she was interested in the issue Mr. McNitt had raised.

Mr. Bogle said that based on the site visit, he had determined that with more efficient use, what was in the shed could easily be housed in the barn. He said he didn't feel the shed was essential, and he therefore felt that the Board should uphold the Ordinance, and deny the application for variance.

Ms. Eng said she had attended the site visit, and had seen that the playhouse was quite large. She said her understanding was that it was used for storage, and said she would like clarification on this.

Mr. Gooze said that at the site walk, Board members were told the playhouse was a smoking area. He also noted that if the applicant had come to speak with the Town before the shed was ordered, he would have gotten a smaller shed, so would not have needed a variance. He said if the Board said it wanted to uphold the Ordinance, Mr. Hartson would have to cut down the size of the shed, take it down, take the playhouse down, etc.

He said a key question was what the shed did to the surrounding area. He noted that the neighbors didn't seem to be bothered by it, and it didn't seem to be in anyone's line of sight. He said he was therefore leaning toward allowing it, given the special circumstances. He said he didn't see how allowing it would hurt the spirit and intent of the Ordinance, and didn't think the shed would diminish surrounding property values. But he said he would withhold his decision until he heard more from other Board members.

Mr. deCampi said he agreed with much of what had already been said, and said it came down to whether the use was against the spirit and intent of the Ordinance, and whether there was a hardship. He said the spirit of the Ordinance was to keep down structure clutter, and said he did feel that three structures approached clutter. He also said the

hardship was self created, so from a purely “by the book” approach, the variance shouldn’t be granted.

But he said that from the site walk, he had seen that the harm of allowing the structure at that location was very minor, so he could go either way in his decision. But he said he didn’t have a big problem with granting the variance.

Chair Smith said that although the harm could be minor, the precedent set here could be major. He said it was a self-induced hardship, and said it was not a good idea to set a precedent with this. He said the intent of the Ordinance was to prevent structure clutter, so allowing this would fly in the face of the spirit and intent of the Ordinance. He said the barn could be used to store the equipment, noting he agreed it was not a good idea to leave the equipment outdoors. Chair Smith also said he would like to go back to Mr. McNitt’s comment about whether the playhouse was a dwelling.

Mr. McNitt said the comment that the playhouse was used for smoking could help explain the confusion over whether it was being used as living space.

Mr. Hartson explained that he had a business downstairs in his house, and said the playhouse was used like a basement, half as an area for storage, and the rest as an area for playing cards and smoking. He said it was definitely not used as living space, although he said he had heard that people had perhaps used it that way in the past. He said that in order to avoid smoking in the house, they smoked out there.

Mr. Gooze noted, concerning the issue of the precedent that might be set by granting the variance, that the Board was not setting a precedent every time it granted a variance. He said the whole point of a variance was to allow for special circumstances, and the Board had to look at each situation differently. He said that was why variances were granted, and said if it were otherwise, Boards would never grant one.

Chair Smith said his point was whether the applicant had other choices.

Mr. Bogle asked whether the shed behind the barn was considered a structure.

Mr. Johnson said it was a temporary, seasonal type storage unit, and said the Zoning Ordinance didn’t address it. There was additional discussion about this.

John deCampi MOVED to grant the APPLICATION FOR VARIANCE from Article XX, Section 175-109(D) of the Zoning Ordinance to allow for three accessory structures on a property. The motion was SECONDED by Jay Gooze, and PASSED 3-2, with Chair Smith and Linn Bogle voting against it.

- B. **PUBLIC REHEARING** on a September 14, 2004, denial by the Zoning Board of Adjustment on a petition submitted by Elizabeth Barnhorst, Durham, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from May 18, 2004 and June

29, 2004, letters from Zoning Administrator, Thomas Johnson regarding the occupancy of the Single Family Home with Accessory Apartment. The property involved is shown on Tax Map 1. Lot 12-13, is located at 1 Emerson Road, and is in the RA, Residence A Zoning District.

Chair Smith opened the public hearing, and asked Ms. Barnhorst if she would like to speak before the Board.

Ms. Barnhorst said she would like to review the appeal process she had undertaken some months back, and would also like to summarize the history of her dealings with the Town, in order to put things into perspective. She then provided a detailed summary of these things.

Ms. Barnhorst reviewed in detail the reasons why she had filed her Appeal of Administrative Decision. She said she believed she should be grandfathered for permission she was granted by an earlier Code Enforcement Officer. She said her original application had clearly checked residential, one family, addition, had described one apartment over the garage, and had indicated that there were 3 bedrooms. She said she had spoken with then Code Enforcement Officer Bill Edney about her plans, and specifically asked him how many bedrooms and how many tenants were allowed.

She said that based on the square footage and the Ordinance which said there could be no more than three unrelated, she was given a building permit and occupancy permit for the three bedroom apartment. She said that in no way had she intended to violate the Town's Zoning Ordinance, but said there may have been a different interpretation by the prior administration concerning the provisions of the Zoning Ordinance concerning renting to three unrelated persons. She provided additional details. She said there had been no decrease in the value of surrounding properties as a result of the addition, and said in fact the property values had gone up significantly since the addition had been built.

Ms. Barnhorst said denying her appeal would cause her unnecessary hardship. She provided financial details concerning her property, and said that when all factors were considered, she would be losing about \$8,000 a year if she lost her Administrative Appeal, noting that this figure was conservative.

She said she had never tried to hide the fact that she was renting to three persons, and met all the requirements she was asked to meet. She also said that at the first hearing of her appeal before the Board, it was said several times that it was highly unlikely that Mr. Edney would have allowed her to rent to three unrelated persons if he had known this was her intention. She said when she had a chance to reflect on this, she was offended that her integrity had been questioned.

Ms. Barnhorst said after her first hearing before the Board, she had been able to get in touch with Mr. Edney, and had explained her present situation to him. She said she had asked him whether she had misinterpreted what he had said, and he said that she fully

understood what he had granted her permission for. She noted the letter that Mr. Edney had written on her behalf so that there would be something to this effect in writing. Ms. Barnhorst referred to some of the things Mr. Edney had said in his letter, including that he had granted her permission to rent to three, that was the ordinance at the time, she had met all the requirements, and she should be grandfathered.

Ms. Barnhorst said she was upset about the way this had come about, and said she should be grandfathered. She said her next recourse, if her appeal was denied, was to seek legal counsel, because she did not believe this was a way to run a town.

Chair Smith said he had read the minutes carefully, and there was only one person who said he doubted that Mr. Edney had ever said this. Chair Smith said he had stated that it was unfortunate the Board didn't have anything in writing, and he said he wanted to make it very clear that the Board had not accused Ms. Barnhorst of anything. He noted that one of the reasons the third tenant was allowed to stay through May was that the Board believed Ms. Barnhorst had acted in good faith.

Chair Smith asked if any members of the public wished to speak for or against the appeal. There was no response, and he closed the hearing.

Mr. Gooze said because of the way the Zoning was written at the time the addition was built, it was difficult to interpret. He noted that Mr. Edney had made a number of interpretations based on the Ordinance which may not have been allowed if these interpretations had come before the Board at the time.

He said this issue was dear to his heart, and said this particular house was different than others in applications the Board had reviewed, noting that it was owner occupied, and was legally using the accessory apartment as a subordinate use. He said that given that, and that the zoning was really difficult to interpret for a number of reasons, it was hard to say that one couldn't have a legal subordinate accessory apartment and not have a limit of three.

He noted that the original hearing was continued, and when the opinion was received from Mr. Mitchell, he had voted with the Board to deny the appeal.

Mr. Gooze said he had thought about this again, and still had problems with the way the Ordinance was written at the time. He said that given this, and the fact that there were very few instances where there was a legal apartment being used in a legal way where there was enough square footage for three tenants, he felt it was appropriate to grant the appeal. He said this was not the same situation as where someone was renting out the entire property.

Chair Smith asked how Mr. Gooze had voted after the Board heard from Mr. Mitchell, and it was determined that Mr. Gooze had voted to deny the appeal.

Mr. Gooze said he did not feel that Mr. Mitchell had quite gotten a handle on what the Board had asked him.

Mr. Bogle noted that the Edney letter used the word accessory apartment, but then discussed accessory structures, and said he thought this confused the issue. He also said he had a problem with whether a Code Enforcement officer could permit what the Code did not allow. He said the Code clearly stated that one could not have more than three unrelated.

Mr. Bogle said the whole business of what Mr. Edney might have said, with nothing in writing from that period, was confusing. Mr. Bogle said now there was a letter from Mr. Edney after he had been gone for several years, which did not actually say Mr. Edney gave permission. Mr. Bogle said that Mr. Edney could not permit what the Code forbade, and said that there should have been a decision from the ZBA on this.

Ms. Craft said the circumstances leading up to this situation were shadowed in gray. She said she believed there were good intentions, and said she didn't believe Ms. Barnhorst would have built this if she didn't think she had permission to do so. She said she agreed with Mr. Gooze that the interpretation of the previous Code was difficult. She said she would like to listen to other comments from Board members, and said again that there were a lot of gray areas with this, especially regarding the older code.

Chair Smith noted the Board had discussed that there were gray areas before, and had therefore continued the hearing in order to get an opinion from Attorney Mitchell on this.

Ms. Craft said there was now this letter from Mr. Edney, and said she saw no reason not to believe that he acted to the best of his ability. But she said she wanted to hear what other Board members had to say.

Mr. deCampi said he would recuse himself from voting, because he was not at the September 14th meeting.

There was discussion about this, and Chair Smith designated Ms. Craft as a voting member because she had been at the September 14th meeting. It was noted that she had voted against the administrative appeal at that time.

Ms. Craft said she was open to changing her mind.

Ms. Eng said she had a problem relative to whether Mr. Edney could approve something that wasn't permitted. She said if Mr. Edney made an error in approving it, she didn't think the present Board could say the appeal should be granted because he made an error. She said she believed the error needed to be corrected. She also noted the variance would run with the property, and asked if the three unrelated would go with the property. She said she was leaning toward staying with three total unrelated.

Mr. McNitt said regarding the recent Edney letter, that Mr. Edney had made some mistakes on it, and provided details on this. He said the property was treated as a non-integral apartment, so he gave it the benefit of three unrelated people, rather than considering it integral, where there would be a total of three unrelated people for the house and apartment.

Mr. McNitt said how and why this situation had happened could not be known, but said it had caused confusion and hardship for the applicant. He said the issue was further complicated because the Board had seen other situations related to this in the RA district. He said he believed the Board had turned all of these down, and noted that in some cases, the properties were not owner occupied, and in some cases, they were.

Chair Smith said the Board had granted Ms. Barnhorst a reprieve to May, to rent to three people, because they believed she acted in good faith. He said the opinion from Attorney Mitchell had helped the Board make its decision in September, and said he said he disagreed strongly with Mr. Gooze. He said the Board should uphold Mr. Johnson's decision because he (Chair Smith) was worried about setting a precedent, and about overturning their decision which was made upon good information from the Town Attorney. He said he was against this appeal, and would vote against it.

Ms. Craft said she had heard what Chair Smith had said, and agreed that keeping to the letter of the law was important to the Town. But she said the letter from Mr. Edney corroborated what Ms. Barnhorst had said. She said she felt that members of the Board had to take responsibility for what Town officials may have said or done in the past. She said she did have a concern that if the property was sold, three unrelated people could rent the apartment, and an unrelated non-owner family could rent in the main house.

There was discussion that this could happen, and would make the property essentially a duplex.

Mr. Gooze noted he had said before that if they granted this appeal, the property could only be used in a way where the apartment was a subordinate use to the house. He said if someone bought the property and rented out both sides when it was not owner occupied, it was no longer an accessory apartment. He asked Mr. Johnson for clarification on this.

Mr. Johnson said if the appeal was granted, there could be three unrelated and the family in the house. He said if there were no family on the property, it would revert back to the three unrelated for the entire structure.

There was detailed discussion between Board members and Mr. Johnson about the idea of "subordinate use".

Mr. Gooze noted that Mr. Edney's letter was problematic, but said he could see why he had interpreted the Ordinance the way he did. There was discussion about the way the letter was written.

Ms. Craft asked if there was any way to stipulate that the main part of the house would have to be owner occupied.

Mr. Gooze said there could be a condition that the property would have to go under the new Zoning Ordinance if there was a change of ownership.

Mr. McNitt said the tradition of the variance going with the land was very strong.

Mr. Johnson noted that Mr. Edney's letter referred to "independent" in the context of the building and fire codes, not the Zoning code.

Mr. McNitt said with most of these kinds of cases, the Board had not had any kind of written evidence. He said in this case, they had an after the fact letter from Mr. Edney, which was about half way to the standard they would normally use. He said in this situation, the information tended to support Mr. Gooze's position, concerning owner occupied. He also said it supported Ms. Barnhorst's contention that it met the criteria as she understood it.

Mr. McNitt noted that the Board was simply being asked to determine if Mr. Johnson had made the right decision. There was discussion about this.

Ms. Craft said it still came back to the old code and the interpretation of it.

Mr. Gooze said there was no question in his mind that the code as written was open to some interpretation. He said he could see the Board's point of taking the most restrictive position, - that a single family home with an accessory apartment was essentially one unit, but said the old code didn't specifically say this. He said it was therefore up to the Board to interpret in the way if felt appropriate, and said he could see the interpretation going both ways. But he said he didn't think the interpretation went with the property if the property were not owned and lived in, with the apartment as subordinate.

Chair Smith said if the administrative decision was not upheld, this would be an ongoing question. He said he thought the Board had made a good decision, which was unanimous, and said they were very fair to Ms. Barnhorst.

Mr. Bogle said there was a possible problem with the owner occupancy aspect, because the Board was being confronted with it. He provided details on this.

Mr. McNitt said Ms. Barnhorst should be able to speak.

Ms. Barnhorst said Mr. Edney had called her that day. She said she had asked him to come to the hearing, but he had a previous meeting. She said he had called it a separate dwelling unit, and she had relied on him for guidance. She said the Board should stand behind his decision, or be prepared to compensate her for legal expenses on lost income.

She also noted the letter from Attorney Mitchell was not signed, and said she did not believe that he wrote it. She also noted that this was not a case of self-inflicted hardship, as had been the case with a previously heard hearing that evening.

Jay Gooze MOVED to grant the APPEAL OF ADMINISTRATIVE DECISION from May 18, 2004 and June 29, 2004, letters from Zoning Administrator, Thomas Johnson regarding the occupancy of the Single Family Home with Accessory Apartment. Sally Craft SECONDED the motion, and it FAILED 2-3, with Chair Smith, Ted McNitt, and Linn Bogle voting against the motion.

- C. **PUBLIC HEARING** on a petition submitted by Mill Pond Center Inc., Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XXIII, Section 175-133(A&G) regarding the placement of a sandwich board sign. The property involved is shown on Tax Map 6, Lot 9-8, is located at 50 Newmarket Road, and is in the RB, Residence B Zoning District.

Mr. Gooze recused himself from this Agenda item, and Chair Smith designated Ms. Eng as a voting member in his place. He then opened the public hearing.

Chris Strong said she was a consultant who had worked with the Mill Pond Center since it was purchased in March, 2002 and transferred to nonprofit status. She provided some history on the development of the property, and noted that after it was purchased, the staff at the Center took time to get ideas from the community as to what kinds of services it would like the Center to provide.

She said the Center was present to request a variance in order to allow a sandwich sign at the entrance of the driveway for safety reasons, so traffic could be directed better to the site. She noted feedback from those using the Center had said the previous signs were hard to read, and were in fact a safety issue, and said the proposed sign would deal with this. She also provided details on the fact that the sign was important in marketing new programs and performances.

Ms. Strong noted that the signage at the property had historically been grandfathered. She said Center staff had gone before the Historic District Commission, and had received a temporary, six-month Certificate of Approval for the sign. She also said an architect would work with the Center to create more appropriate signage within six months.

Board members asked if the sign would be out only at the time of performances. Mr. Bogle asked if the sign would be at the roadside 24 hours a day for days on end, or would it be taken off the roadside at sunset.

Ms. Strong said it would need to be up at 8:00 at night if there was a performance, but said if there was a matinee, potentially it could be removed at night. She also said the Center would like to be able to use the sign for anything that was up and coming, including performances, enrichment programs, etc. She said they knew from research that people often bought tickets the day of a performance or program, so the sign was important in capturing last minute traffic to the Center.

There was discussion about allowing six months for the sign, and Ms. Strong said they were asking for no more than 6 months, and noted that was what the Historic District Commission had approved. She said if the variance were approved, she would let the architect know this was the window.

Ms. Eng asked if the sign was lit, and Ms. Strong said it was not.

Chair Smith asked why the sign couldn't be taken in at night, and put back out in the morning.

Ms. Strong said they Center could do that.

Mr. Bogle noted that leaving the sign out might be asking for trouble because of possible vandalism.

Ms. Craft asked if the Center had a plan for what to do with the sign in regard to snow plowing, and there was discussion about this.

Ms. Craft also asked what the plans were for the permanent signage, and it was determined that a new sign would replace the temporary sandwich board sign.

It was clarified that the applicant would have to go to the Historic District Commission, and then back to the ZBA for a variance because of the size of the sign. There was discussion about this. Mr. Johnson said they probably wanted to maintain the same size for the main sign for the name of the facility, but might want to put a message board on as well, so the total aggregate could go to 6 sq. ft.

David Murphy, Treasurer of the Mill Pond Center, said having signage there was critical. He said he realized the Town didn't want this sign to be the permanent solution. But he said the sign was really important in order to provide awareness of the Center, and to help increase fundraising capability in order to make the operation more stable, and to provide a resource to the community

Kate Kirkwood, interim director of programs, noted she had heard many times that visitors couldn't find the Center, and also said there was confusion with the

professional building. She also said as the Center attracted more people, there would be increasing safety issues.

Chair Smith closed the hearing.

Mr. McNitt asked what use category the Mill Pond Center fell under.

Mr. Johnson said he did not know, noting he had not looked at the file, had never had any issues with the facility, and had never been to the building.

Mr. McNitt said he heartily endorsed the Mill Pond Center, and said it was a real addition to Durham, but said the signs were commercial in a residential district. He said he had no objection to a temporary sign, but said he didn't know what the basis would be for considering the permanent sign.

Chair Smith said this was a not for profit community center, so he didn't think it was commercial. He said it seemed to be a legitimate educational facility, and fully certified. There was discussion about what the Ordinance had to say about this facility.

Mr. deCampi said the sign out there at present was one of the ugliest he had ever seen. He said he would like to see the Center develop the final signage more rapidly. He said he was sympathetic to their situation, but said he would like to see the temporary sign used there for no more than two months.

Ms. Craft agreed the sign was not very attractive, but said she would not vote against the temporary sign. She suggested that giving the applicant 4 months would be more appropriate, given that it would be hard to install the permanent sign when the ground was still frozen, and that the architectural work was pro-bono.

Ms. Eng agreed with Ms. Craft, that 4 months would be better. She said the Center did need a sign, and said she agreed the current sign was not attractive, but said she had no problem with granting the variance.

Mr. Bogle said the Center was a great facility, and said he no problem with granting the variance, for up to six months, noting that the issue of the ground freezing was valid.

Chair Smith said he agreed the Center was a very important, not for profit enterprise, and served a valuable purpose in the community. He said he was in favor of the variance, for six months, as approved by the Historic District Commission. He also said he felt the sign should be brought out for appropriate events and removed from the public way at night.

There was discussion about where the sign might be stored when it was not out.

Mr. Johnson asked that the Board include the stipulations that any Federal, State, County, or local agencies be held harmless, that the sign be within 10 feet of the

driveway entrance, and that the sign be put under their existing sign and lashed to the support posts, so it would be out of harm's way during a snowfall.

John deCampi MOVED to grant the APPLICATION FOR VARIANCE from Article XXIII, Section 175-133(A&G) regarding the placement of a sandwich board sign, subject to four conditions: The sign will be out there for no more than 6 months; The Mill Pond Center will hold harmless all government entities with regard to the sign, and all liability that may result from the sign; The sign will be located within 10 feet of the driveway entrance, when it is out adjacent to the road overnight (from the end of a performance to the following morning) the sign will be moved inside the low stone wall, and placed under the existing sign. The motion was SECONDED by Linn Bogle.

Chair Smith MOVED to amend the motion, to say six months instead of four months. Myleta Eng SECONDED the motion, and it PASSED 3-2, with Linn Bogle and John deCampi voting against it.

The original motion, as amended, PASSED unanimously 5-0.

III. Board Correspondence and/or discussion:

- A. **REQUEST FOR REHEARING** on a November 9, 2004, denial by the Zoning Board of Adjustment on a petition submitted by Christine Rockefeller, Dover, New Hampshire, on behalf of Glassford Lane Realty Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow five unrelated occupants to reside in a single family home.

Chair Smith said Mr. Gooze had returned to the table. He noted that a letter from the applicant said the spirit and intent of the Ordinance was that it was initially enacted to address density issues by setting forth a minimum square footage per occupant, depending on whether the property was considered an apartment, a single family house, etc. The letter said the blanket prohibition on more than three unrelated persons occupying a single-family structure, regardless of the size of the structure, bore no fair and substantial relationship to the anti-density purpose of the ordinance.

Mr. Bogle asked if there was any new evidence, concerning this application, and Board members agreed there was not any new evidence.

Chair Smith said the Board previously discussed these issues, and the applicant's statement said nothing new.

Ms. Craft said the point had been made that the situation wasn't a matter of density, but rather that it flew in the face of any interpretation of the Ordinance.

Chair Smith said there were very good reasons for the three unrelated provisions in the Zoning Ordinance, noting they were intended to protect the public health safety, and general welfare of the community. He noted there was significant precedent for towns being able to do this.

Ted McNitt MOVED that request for rehearing be denied, SECONDED by John deCampi, and PASSED unanimously 5-0.

Chair Smith declared a 10-minute recess at this time.

The meeting reconvened at 9:05 pm.

Sally Craft and John deCampi left the meeting at this time.

B. REQUEST FOR REHEARING - Stephen Zagieboylo, 28 Mill Road

Chair Smith designated Myleta Eng as a voting member.

Mr. Gooze asked if this was a single-family home with an accessory apartment. There was discussion that the assessor's card said two-family but that wasn't necessarily valid for zoning purposes. He said there was nothing in the request that showed that the Board made the wrong decision.

Mr. Bogle provided some history on the property, and said he didn't remember the owner's ever renting.

Mr. McNitt said there was clearly nothing new.

Mr. Bogle said he didn't see new evidence.

Chair Smith said he didn't think the property was zoned as a two family house, and said they were quite clear on this in November. He said he didn't think the Board had made a mistake on this.

Mr. McNitt said he had known the Hatches well (the former owners of the property), and said at no time since he had moved to Durham was it used as a two-family house.

Mr. Gooze said that even if it was used as a two family house, it was not legal under the Zoning Ordinance.

Jay Gooze MOVED that the REQUEST FOR REHEARING by Mr. Zagieboylo submitted by letter dated Dec 7, 204 concerning the decision of the ZBA on November 9th denying an Appeal of Administrative Decision, be denied. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

C. REQUEST FOR REHEARING - David Kemmerer, Quakertown, Pennsylvania, for property at 10 Cowell Drive.

Mr. Bogle noted the applicant was saying the testimony of neighbors caused the Board to make the incorrect decision. He said the applicant also cited various codes, but said he didn't think these codes had affected the Board's decision at all. He said his decision was based on the Ordinance, and said this property didn't pass review for 3 occupants, based on square footage. He said he didn't even think it passed for two occupants, noting the square footage was less than 600 sq. ft.

Mr. Johnson said the square footage was 588 sq. ft., and said he gave the applicant the benefit of the doubt and rounded it up to 600 ft, by including all of the living room area.

Ms. Eng said she agreed with Mr. Bogle that the decision was based on square footage, not what was stated in the applicant's letter. She said she was not in favor of rehearing this application, and said she did not think the Board made a mistake of any kind.

Mr. Gooze noted that the minutes from the meeting indicated the decision making process Board members went through, and the variance criteria that were cited. He said although he had listened to the testimony of the neighbors, he had gone by the Ordinance. He said he did not think the applicant had presented anything new, and did not think the Board had made errors.

Mr. McNitt said the Board had given the applicant every possible consideration, and said the situation was not considered a justifiable hardship, based on any of this. He noted that although there was a lot of opposition from the neighborhood, the Board gave the application full consideration under the Zoning Ordinance.

Ted McNitt MOVED to deny the Request for Rehearing of the decision against the Application for Variance on Nov 9th, 2004. Jay Gooze SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Johnson noted his office had received a request for rehearing that day from Jonathan Chorlian, 9 Stevens Way. He said if he had seen it in time for that evening's meeting, he would have brought it and asked the Board to consider whether to rehear it. There was discussion about this, and it was agreed the request for rehearing and the potential rehearing should be put on the agenda for January.

IV. Approval of Minutes

November 9, 2004

Page 2, 4th full paragraph, should read 1988, not 1980.

Page 6, 1st paragraph, should read, "...and/or the playhouse to store the ..."

Page 8, 1st paragraph, should read "She said she was trying to ..."

Same page, 10th paragraph, should read "...with the cellar, but said..."

Page 9, 4th paragraph, should read "...with the condition that it not exceed..."

Page 11, 1st full paragraph, should read "Caroline Whitlock.."

Same page, 10th full paragraph should read "...under Boccia for area variances, and Simplex for use variances, and said this application did not meet these criteria."

Page 12, 4th paragraph, should read "...588.7 square feet of habitable floor area."

Same page, 6th paragraph, should read "...the variance criterion applied only to..."

Page 16, 1st paragraph, should read "...being the main criterion..."

Same page, 2nd paragraph from bottom, should read "...had said there was no real difference..., and said the more people occupying the building..."

Page 19, 5th full paragraph, should read "...and the applicant was providing the information..."

Same page, under Approval of October 12, 2004 minutes, should say approval was postponed until November 16th.

Same page, 3rd paragraph from bottom should read "He said the Board had prevailed on all of its cases this year."

November 16, 2004

Page 2, bottom paragraph, should read "He said Exhibit G noted that..."

Page 3, 3rd paragraph should read "...for this, but was asking to stay within..."

Page 4, 3rd paragraph from bottom, should read "...was clarified that Mr. Chorlian..."

Page 5, 1st paragraph, should read "...the house was built, a duplex described..."

Page 8, 3rd paragraph, should read "...since he was on the Planning Board."

V. Other Business

Mr. Gooze said he had given the revised definition to Town Planner Jim Campbell concerning the three unrelated in a single family house, whether there was an accessory apartment or not, and whether it was owner occupied or not.

Mr. McNitt said part of the confusion on this, as seen in Mr. Edney's letter, was that it had sometimes been interpreted that there could be three for each.

Mr. Gooze said there was no question that this needed to be cleaned up, but noted that the Board had been pretty consistent about the way it had voted on this.

Mr. Johnson noted that Mr. Gooze had attended a Rental Housing Commission meeting that day, and said Chair Smith had been at a previous meeting. He said it was good that the Board was represented there, and noted there was some discussion that day about the Board being hardnosed and not granting relief for applicants. He said he and Mr. Gooze had showed where they had in fact granted relief, to show the Board didn't have blind eye.

Mr. Gooze said the issue of granting relief until the end of a semester had been brought up at the meeting, and said he and Mr. Johnson had described circumstances where the Board had done this.

Chair Smith noted the whole issue was one for the Landlords Association to address as well.

Mr. Gooze said they were addressing these issues. He said the various entities were getting more involved, including the University. He noted that mediation services were available from the University, and said these services were available to the neighborhoods.

Mr. Johnson said January 5th, 12th and 19th were the dates targeted for the public hearings presenting the revisions of the Zoning Ordinance, and noted that different items would be covered at each hearing.

Chair Smith said the next ZBA meeting would be held on Jan 11th.

VI. Adjournment

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

Meeting Adjourned at 10:30 pm

John deCampi, Secretary