

—Solar Ordinance (draft) and Special Exceptions —

September 15, 2022

Planning Board  
8 Newmarket Road  
Durham, NH 03824

Dear Members of the Board,

During the July 13, 2022 extensive discussion of the draft solar ordinance held prior to setting a date for a public hearing, Chair Rasmussen stated objections to permitting some uses only by Special Exception, arguing that, in effect, this creates an undue burden. (See, below, verbatim transcription.)

The Chair did not support his argument that “Special Exceptions get declined a lot more often than Conditional Uses do.” The recent record of Planning Board denials for Conditional Use applications, notwithstanding the past few months, does support part of that argument, but... I would suggest that one look further.

Attorneys have noted that the criteria for Conditional Use permit approvals are akin to the criteria required for granting a variance. That led me to look at the history of Zoning Board decisions.

Please see the accompanying table documenting a five-year history of decisions made by the Zoning Board on variance and Special Exception applications. Only two of the 19 applications for Special Exception submitted since March 2017 were denied, that is, only 11%. To flip the numbers: 89% of those applications were approved.

The underlying rationale for zoning is that it provides for the well-being of the community as a whole, not just for individual residents. And that is the intention of this draft solar ordinance.

Zoning also represents the belief that a well-regulated use of land allows for neighbors to co-exist with less friction by the community’s managing conflicting interests. To get to that point sometimes requires that neighbors be given a venue to air their concerns or that an independent third party evaluate the likely impact on neighbors—hence, the creation of the Zoning Board of Adjustment and the incorporation of steam valves, i.e., variances and Special Exceptions.

Regards,

Robin

**July 13, 2022 Planning Board: Partial verbatim transcript**

MEMBERS PRESENT: Paul Rasmussen (Chair / *recused on Toomerfs project*), Heather Grant (Vice Chair), Lorne Parnell, Sally Tobias (Council Rep), Richard Kelley, James Bubar,

ALTERNATES PRESENT Barbara Dill, Emily Friedrichs, Chuck Hotchkiss (Alternate Council Rep), Nicholas Germain

ABSENT: William McGowan

ALSO PRESENT: Town Planner Michael Behrendt (remote).

**VIII. Solar Energy Systems Ordinance.** Proposed amendment to Zoning Ordinance initiated by Durham Town Council. The draft addresses numerous aspects of solar energy systems including rules and allowed locations for systems that are accessory to single family houses, systems accessory to multifamily and nonresidential uses, small and large utility-scale systems, and group net metering host systems. *Recommended action:* Set hearing for August 10, 2022.

/.../

[DCAT marker about 35:00]

Rasmussen: Special Exceptions get declined a lot more often than Conditional Uses do, just so you know.

Tobias: They can be. But it's going to the Zoning Board, and they have to prove a need for it. It's not as expensive.

Rasmussen: It's not as expensive, but it tends to be in some ways a higher threshold to pass.

Tobias: I would be in favor of making it easier.

/.../

[definition of carport discussion about 51:15]

[DCAT marker about 52:29]

Rasmussen: ...then you go to the next section, and if for whatever reason you've got one of these situations where we're saying you can't do it, now you can go ask for a Special Exception, OK. Now, keep in mind that...

Grant: [speaking over Rasmussen: unintelligible]

Rasmussen ...so, part of the heartburn I have with the Special Exception, especially in light of a lot of the public comment we've received on various things recently, is that the ZBA has to refuse you, if you are violating the character of the neighborhood.

And we've been hearing a lot of public comment about, if you can't abide, you know... It seems to me like Sections 4(a), (b), and (c) is defining what the character of the neighborhood should be, so if you can't do that, you don't deserve to have

Special Exception. So it's sort of saying, between this and the first criteria that the ZBA has to go by, you're dead in the water.

I think we could handle this administratively, by saying, we saying, you know, keeping (a), (b), and (c) as is, and then modifying (d) you know, if there is a— what's the term?—hardship trying to follow these rules, and then providing a mechanism to define that hardship\*\*, then staff could handle it. And it doesn't have to go to us, it doesn't have to go to the ZBA. And the hardship, and I'd be looking at the, and I'm thinking, so the question is: what's the best way to define hardship? I'm going to throw out a wild idea, alright, and people can throw it away or build on it as they want, but hardship could be defined as "if it costs X percent more than if I do it the other way," you know. If you compare the two different ways. Or if I get a solar study, and the solar study says, "the only place I can put it is in my front yard, the I should be allowed to put it in the front yard.

Tobias: Yeah.

Rasmussen: Alright? That, it shouldn't matter at that point if I'm violating the nature of the neighborhood. We're supposed to be promoting the idea that my house can be net zero.

Tobias: Yeah [xxx] point. Well, even along the idea that the character, the same focus has to be on Conditional Use. So the same argument would be here if it came under Conditional Use.

Rasmussen: Right.

Tobias: So, we're turning, we're still encouraging that political process, which can be very costly for people that just want to...

Rasmussen: That's why I'd rather see a nice hard criteria that a...

Tobias: Yeah.

Rasmussen: ...Code Enforcement Officer can manage.

Tobias: Yeah, I would agree with that.

**\*\*MOWER NOTE: Hardship in land use law is not a matter of financial constraint for the applicant. It is about a unique feature of the property.**

### ***History of decisions by Zoning Board of Adjustment (ZBA), Durham, NH***

[see following pages] compiled by Robin Mower, September 7, 2022

- Applications decided from March 2017 through August 2022
- Source: official minutes posted at Town of Durham website.

- variances
  - applied: 80
  - approved: 66 (82%)
  - denied: 14 (18%)
- Special Exceptions
  - applied: 19
  - approved: 17 (89%)
  - denied: 2 (11%)

Notes: (a) Missing meeting dates reflect canceled meetings; (b) chart includes only variances (“V”) and Special Exceptions (“SE”), not appeals from administrative decisions, for example, and (c) while all care was taken to capture data accurately, errors may have been made inadvertently, e.g., since some appeals were continued to later dates.

Date	Type	Application details	Decision	Vote
20170321	V	garage within wetland setback	approved	unanimous
20170321	V	building height	denied	unanimous
20170321	V	parking location	approved	4–1
20170321	V	wetland setbacks	denied	unanimous
20170321	V	change of use	approved	unanimous
20170418	V	sign placement within ROW	approved	unanimous
20170613	V	new house front and side setbacks	approved	unanimous
20170613	V	new house: front and side setbacks	approved	unanimous
20170613	V	new house within WCO & SPO	approved	unanimous
20170613	V	new house footprint expansion	approved	unanimous
20170613	V	new house volume expansion   decision later (9/12/17) suspended awaiting more information	approved	3–2
20170711	SE	septic within WCO	approved	unanimous
20170711	V	ADA ramp/walkway in front setback	approved	unanimous
20170808	V	(rehearing) new house volume expansion	denied	3–2
20170808	V	drive-thru for pharmacy (decision later (9/12/17) suspended for Town counsel review; upheld	denied	unanimous
20170808	V	uses for 4-story mixed-use building later (9/12/17) suspended for Town counsel review	denied	4–1
20170912	V	construction within WCO	approved	unanimous
20170912	V	leach field within side setback	approved	unanimous
20170912	V	driveway and drive widths	approved	unanimous
201712/05	V	(rehearing) new house volume expansion	approved	3–1–1

Date	Type	Application details	Decision	Vote
20180508	V	change of use	approved	unanimous
20180508	V	new house larger than demolished	approved	unanimous
20180508	V	change frontage and setback	denied	unanimous
20180508	V	location of generator	approved	unanimous
20180814	V	(rehearing) change frontage and setback	approved	unanimous
20180814	V	build larger home in WCO than demolished [note: vote not recorded in minutes but viewed on DCAT]	approved	unanimous
20181009	SE	build home within WCO buffer	approved	unanimous
20181009	V	allow 2 condos on 1 lot	approved	unanimous
20181113	V	build deck within side and rear setbacks	approved	unanimous
20181113	V	define lower story as basement so as to expand to 3rd floor	approved	unanimous
20181113	SE	build septic and leach field within front setback	approved	4-1
20181113	V	create smaller lots	approved	unanimous
20181113	V	permit driveway to access parking lot	denied	4-1
20190219	V	subdivision into small lots, structures within setbacks	denied	unanimous
20190219	SE	location of septic closer to lines	approved	unanimous
20190219	V	building height	approved	unanimous
20190219	V	build porch within front setback	approved	unanimous
20190409	V	build house additions within WCO setback	approved	unanimous
20190409	V	home occupation: dog training within MUDOR	approved	unanimous
20190409	V	build wraparound deck into wetland, shoreland, rear setbacks	approved	unanimous
20190514	V	location of barn with setbacks	approved	unanimous
20190709	V	build additions into setbacks	approved	4-1
20190709	V	location of leach field	approved	unanimous
20190910	V	frontage relief on porkchop subdivision	approved	unanimous
20191015	V	location of generator in side and wetland setbacks	approved	unanimous
20191210	V	build addition to accessory structure	approved	unanimous
20191210	SE	permit accessory building to contain heat	approved	unanimous
20191210	V	build shed forward of front facade	approved	unanimous
20200211	V	build detached garage with accessory apartment, location	approved	unanimous
20200211	V	build larger accessory apartment	approved	unanimous

Date	Type	Application details	Decision	Vote
20200317	V	build shed forward of front facade	denied	3-2
20200317	V	convert office to residence	approved	unanimous
20200317	V	parking within WCO and front court	approved	unanimous
20200317	V	build mixed-use with office, nonpublic daycare, residential in DBP district	approved	unanimous
20200512	V	more than one accessory dwelling unit on lot	approved	unanimous
20200512	SE	location of septic	approved	unanimous
20200512	V	larger addition to garage and forward of front facade	approved	4-1
20200512	SE	heat in existing garage	approved	unanimous
20200609	SE	to allow 4 cars in residential driveway	approved	unanimous
20200609	V	build exterior stairs in shoreland setback	denied	4-1
20200710	V	multiunit unrelated occupancy (up to 9 total, 3 per unit)	approved	unanimous
20200710	V	covered front porch with stairs	approved	unanimous
20200710	V	build garage, additions within side setback	approved	unanimous
20200710	V	accessory apartment within RB	approved	unanimous
20200710	V	garage within wetland setback	approved	unanimous
20200710	V	rebuild barn with larger impervious surface ratio	approved	unanimous
20200811	V	widening of the driveway, encroaching on the side setback	denied	3-1-1
20200811	SE	widen driveway, number of parked vehicles and where	denied	unanimous
20200811	SE	[2nd attempt, same application] allow 4 parked vehicles	approved	unanimous
20200811	V	change of use to accessory apartment (detached), replace structure	approved	unanimous
20200811	V	sign size, i.e., larger	approved	unanimous
20201110	V	create lot small frontage	approved	unanimous
20210209	SE	short-term rental accessory apartment	approved	unanimous
20210316	V	build house, garage, detached pool house within WCO [later requested rehearing to detail reasons; again denied 6/8/21]	denied	unanimous
20210316	V	number of units in nonconforming multi-unit building	approved	unanimous
20210413	V	build garage and decks in shoreland	approved	unanimous
20210511	SE	build house and driveway in SPO	approved	unanimous

<b>Date</b>	<b>Type</b>	<b>Application details</b>	<b>Decision</b>	<b>Vote</b>
20210511	V	build addition in shoreland setback	approved	unanimous
20210608	V	above-ground pool in rear setback	approved	unanimous
20210713	SE	heat within shed	approved	unanimous
20210810	V	shed replacement in side setback	approved	unanimous
20210909	SE	leach field in side setback and septic in wetland setback	approved	unanimous
20210909	SE	short-term rental in RA zone	approved	unanimous
20211012	V	addition in side setback	approved	unanimous
20211109	V	build large greenhouse in setbacks	denied	unanimous
20211109	V	heat for greenhouse	approved	unanimous
20220208	SE	renovate shed to studio with heat	approved	unanimous
20220208	SE	short-term rental in RA zone	approved	unanimous
20220208	V	subdivide creates small setback	approved	unanimous
20220412	V	generator in side setback	approved	unanimous
20220412	V	accessory apartment (detached)	approved	unanimous
20220510	V	deck for pool in rear setback	approved	unanimous
20220501	V	shed in side and rear setbacks	approved	unanimous
20220614	V	two basement apartments in PO	denied	unanimous
20220614	V	reconfigure apartments re number of bedrooms in CBD	approved	unanimous
20220712	V	size of sign in Historic District	approved	unanimous
20220712	V	convert office space into two hotel suites	approved	unanimous
20220712	SE	add parking space RA home	denied	unanimous
20220809	SE	short-term rental in RB zone	approved	unanimous