

These minutes were approved at the November 18, 2014 meeting.

**ZONING BOARD OF ADJUSTMENT
Tuesday, September 9 2014, 7:00 p.m.
Town Council Chambers - Durham Town Hall
15 Newmarket Road, Durham, New Hampshire
MINUTES**

MEMBERS PRESENT:

Chair Sean Starkey
Vice Chair Robbi Woodburn
Tom Toye
Jim Lawson
Alternate Mike Hoffman
Alternate Ruth Davis

MEMBERS ABSENT:

Chris Sterndale, Secretary

OTHERS PRESENT:

Tom Johnson, Code Enforcement Officer/Health Officer;
Victoria Parmele Minutes taker

I. Call to Order

Chair Starkey called the meeting to order at 7:00 pm.

II. Roll Call

The roll call was taken. Chair Starkey noted that Mr. Sterndale would not be at the meeting.

III. Seating of Alternates

IV. Approval of Agenda

Chair Starkey said the Young Drive application was on hold. It was noted that the Board had received an email on this, and that the applicant was looking to delay being heard until there was a ruling from the Superior Court. Chair Starkey suggested that the application be put on hold to a further date to be determined by the ZBA. There was discussion.

There was discussion about the fact that a member of the public had said he'd like to make some public comments. Mr. Lawson said this wasn't part of the ZBA's rules of procedure, and also said he was concerned about setting a precedent by allowing public

comments now, and on a matter that wasn't on the agenda. He noted that there were a lot of issues before the Town. There was further discussion.

Chair Starkey MOVED to approve the Agenda as amended by removing Item V A. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

Ms. Davis was a voting member for the vote.

Chair Starkey asked Warren Daniel, the member of the public who said he would like to speak, if what he wished to discuss was specific to an agenda item. Mr. Daniel said no. There was further discussion. Ms. Woodburn said the ZBA didn't have a public comments forum because if there were Zoning issues that were likely to end up before the ZBA, they shouldn't be discussed in advance at a ZBA meeting.

Mr. Daniel said the ZBA dealt with hardship issues, and was the board of last resort, so should consider comments of importance to the Town. Mr. Johnson said an issue like this should be taken up with the Town Council and/or the Planning Board.

V. Public Hearings:

- A. ****The PUBLIC HEARINGS** on the petitions submitted by Young Drive LLC, Francis Chase, Seabrook, New Hampshire, for **APPLICATIONS FOR SPECIAL EXCEPTION AND VARIANCES** for the properties shown on Tax Map 4, Lots 42-9 thru 42-14, located on Young Drive

The application is on hold until a future Zoning Board meeting date to be determined by the Board.

- B. **PUBLIC HEARING** on a petition submitted by Jayson Seaman, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-58 of the Zoning Ordinance to allow for the construction of a landing off a door that will encroach 18 square feet into the wetland setback. The property involved is shown on Tax Map 3, Lot 3-7, is located at 46 Bagdad Road; and is in the Residence A Zoning District.

Jayson Seaman said this application was an extension of the issue the ZBA had heard two years ago concerning his property. He noted that he'd built an addition that encroached into the wetland setback after receiving a variance to allow this. He said he had talked to the ZBA about doing a deck when he'd gone for that first variance. He said he had built this deck, and said he failed the inspection when Code Office Mark Morong came to the property to do a final inspection of the addition because the deck wasn't on the plans for the addition.

Mr. Seaman said he was requesting a variance to allow the use of the deck/landing, which encroached into the wetland setback by 18 sf, and to allow future expansion of the landing to a deck up to 192 sf, which would involve 165 sf within the wetland setback area. He went through the variance criteria and how they were met with the application.

Mr. Seaman said granting the variance would not decrease the value of surrounding properties. He said the current landing was largely hidden from view by the main house, and said any increase in the deck would also be hidden, while also staying in keeping with the aesthetics of the house. He said a larger deck would increase the value of the house.

He said granting the variance would not be contrary to the public interest. He said the encroachment on the wetland setback was currently minimal and would increase only slightly with the new deck. He said the deck surface would be permeable and also said the location of Littlehale Creek meant it wouldn't be impacted by any runoff from the deck. He also said the work would be in keeping with the environmentally conscious approach he had applied to his property.

He said that concerning the hardship criterion, he needed to be able to get out of the sliding glass door that had been approved. He said the current landing was the smallest practical size that was feasible given the design of the house and the site constraints. He also said there were environmental impacts to the site before he purchased the property, so the deck was within the scope of this.

He said that concerning the substantial justice criterion, not granting the variance would mean the current landing would need to be torn down. He said this would make the back yard/patio are unusable, with no appreciable environmental benefit.

Concerning the spirit and intent of the Ordinance criterion, Mr. Seamen said the purpose of the variance request was to maintain satisfactory residential use of the property.

Chair Starkey said Mr. Johnson's letter had said that what was built wasn't just a landing, and was a deck that measured 5 ft by 6 ft. He noted that the drawing from 2012 did not include this deck. Ms. Woodburn said what had been built wasn't much more than a landing. Mr. Johnson said there was no definition of "deck", but said what was there, a deck and stairs, was bigger than a 3 ft by 3 ft landing. There was further discussion.

Chair Starkey said he thought that the possible expansion of the deck in the future needed to be re-noticed because it wasn't on the agenda. He said the expansion part of the application could be continued to the next meeting, or both items could be addressed at the next meeting. Mr. Seaman said he could come back in the future regarding expanding the deck.

Ms. Woodburn said the deck right now was a minor change, on the edge of the wetland setback and on the back side of the house. She said she thought it met the variance criteria.

Chair Starkey opened the Public Hearing. He asked if there were any members of the public who wished to speak for or against the application, and there was no response.

Jim Lawson MOVED to close the Public Hearing. Tom Toye SECONDED the motion, and it PASSED unanimously 5-0.

Chair Starkey said he agreed with Ms. Woodburn that this was a minor change and that there wasn't a major incursion into the wetland setback. He noted that there was already some wetland incursion that the ZBA had previously approved. He said he believed that the variance criteria were met, and also said he hoped that in the future, people would go by the plans that were provided to the ZBA with an application.

Mr. Lawson said where the stairs were placed had minimized the impact on the wetland.

Ms. Davis said there was hardship in that the applicant had a narrow lot, and there was a fairly small buildable area. She said she thought this small encroachment was ok.

Chair Starkey MOVED to approve a petition submitted by Jayson Seaman, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article XIII, Section 175-58 of the Zoning Ordinance to allow for the construction of a landing off a door that will encroach 18 square feet into the wetland setback, as shown on the plan submitted to the Code Officer entitled "Current Landing". The property involved is shown on Tax Map 3, Lot 3-7, is located at 46 Bagdad Road; and is in the Residence A Zoning District. Tom Toye SECONDED the motion, and it PASSED unanimously 5-0.

- C. **PUBLIC HEARING** on a petition submitted by Stephen & Lori Lamb, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Zoning Ordinance to allow for the expansion of an approved function hall and its approved use to more than 100 people. The property involved is shown on Tax Map 14, Lot 34-1, is located at 90 Bennett Road; and is in the Rural Zoning District.

Steve Lamb explained that the capacity of the current barn/function hall at the Thompson Inn was primarily based on the leachfield, which had a capacity for 100 people. He noted that he was planning to build an addition to the barn, which would then be used for events instead of having to put up a temporary tent.

He explained that an analysis was done of the leachfield in order to see how the use of low flow fixtures would impact its capacity. He said this information was provided to his septic designer, who then determined that the existing leachfield could handle 150 people if low flow fixtures were used. He said since the leachfield could be expanded or other things could be done to increase the capacity, they were asking for a variance to allow more than 100 people to use the facility at one time.

Mr. Lamb next went through the variance criteria and how they were met. He said there would be no decrease in the value of surrounding properties if the variance was granted. He said onsite parking would not increase and would remain concealed in a wooded area of the property. He said the barn addition and existing barn renovation would be designed to be in keeping with the historic nature of the property.

He said granting the variance would not be contrary to the public interest because use of offsite parking had already been approved with the use of shuttles to minimize traffic on Bennett Road.

Mr. Lamb said denial of the variance would result in unnecessary hardship. He said there was no fair and substantial relationship between the general public purpose of the Ordinance provision and its specific application to the property. He said rather than set up a temporary permitted tent for functions in conjunction with the inn, the existing barn and addition would provide a permanent structure in keeping with the historic nature of the property. Parking and traffic would be minimally impacted because the additional guests would be shuttled to offsite parking and hotels.

He said the proposed use was reasonable because the use of the barn as a function hall and use of offsite parking had already been approved. He said the temporary tent had also been approved. He said the grounds at the inn were well suited to outdoor daytime events for a group of this size and the impact of having these additional guests would be minimal since there cars would be parked offsite.

He said substantial justice would be done in granting the variance because it would not change the use of the property and would expand opportunities for year round income without impacting the surrounding neighborhood.

Mr. Lamb said the use would not be contrary to the spirit and intent of the Ordinance. He said the site had been the home to the Highland House since the late 1890's. He said there were a multitude of outdoor gatherings, barn dances, weddings and family reunions over the years, and said he and his wife were attempting to carry on this tradition.

Ms. Woodburn asked for more details on how many people there would be at events. Mr. Lamb said at a typical event there would be 130-175 people, and said the leachfield would be expanded as needed to accommodate this.

Ms. Woodburn said if the ZBA was going to allow an expansion, it had to be based on something. There was discussion on the previous variance Mr. Lamb had received, which was to allow a maximum of 100 people to use the facility. There was discussion about what the Lambs were asking for now. Ms. Woodburn said the Lambs were asking to be allowed to have more than 100 people, based on the septic designer's reassessment of the leachfield capacity.

Ms. Woodburn said the ZBA couldn't grant a variance on a hypothetical that at some point the applicants would get a bigger leachfield. Mr. Lamb said the 100 person limit in the 2009 variance approval was based on the leachfield for some reason, and said he had requested that number. He said perhaps he shouldn't have asked specifically to be allowed to have 100 people, and he spoke further on this. Ms. Woodburn said the leachfield capacity was in fact a good thing to base the numbers on.

Mr. Lawson said the previous variance was under the definition of an inn, and said it was granted based on that. He said he didn't know how to grant a variance concerning the

capacity for a use now that wasn't in the Table of Uses. He said conference center seemed to be the best fit. There was discussion. Mr. Lawson said the previous variance was not in regard to a conference center. He said he was comfortable with how the use was characterized in 2009, as a function room that was separate from the Inn. But he said he wanted to be sure there wasn't an issue that came up if this current variance request was approved.

Mr. Lamb said what was needed was a definition of the barn as a stand-alone function hall. It was noted that there was a definition for conference center. There was further discussion. Mr. Johnson noted that the Lambs were asking for an expansion of the function hall and were doing away with the tent option.

Ms. Woodburn said there would be an expansion of an approved function hall. Mr. Toye asked if by granting the variance, they would be making the Inn accessory to the function hall/conference center. Mr. Lawson said the definition of inn included a function room, and didn't specify size, so he was comfortable with the previous variance that said the function room was accessory. Mr. Lawson said the Lambs were asking for an expansion of the approved use.

Ms. Woodburn said the ZBA didn't have to worry about the leachfield being the limiting factor on the number of people, because the Planning Board would address this. She also said there were ways to bump up the capacity that were acceptable.

Chair Starke noted that the definition of inn didn't include anything on a function room.

Mr. Lamb said he had approval for the function hall and the tent, and said if he used the tent he would have to expand the leachfield because there would be more than 100 people. He said he would take the necessary steps, and said the barn expansion was proposed so they didn't need to use a tent in the future.

He said the 150 number was what the designer was comfortable with, and said they might have to expand the leachfield anyway, for a number that was larger than this. He said there intent was to put people inside for noise control, as well as to have a better function facility. He said the variance was being requested in order to expand beyond the 100 person limit while meeting the requirements of the code. He also said a tent might still be used in the future, even with the expansion to the barn.

Ms. Woodburn said the variance request had made her think about possible variance creep, and said it was always important to think about this. There was discussion about possible use of a tent in the future. Mr. Lawson said there was variance creep here, and said while he thought this was workable, the facility had become a conference center. He spoke further.

Mr. Toye determined that event permits weren't needed currently. Mr. Johnson said once the certificate of occupancy was issued for the function hall, an assembly permit would be needed for each event. There was discussion that the permit would reflect life safety

concerns, and would include a capacity number. Mr. Johnson also noted that the capacity concerning the septic system would need to be approved by DES. He said variance approval by the ZBA would be based on the septic capacity. Ms. Woodburn noted that if the Lambs upgraded the septic system, they would have to come back for another variance.

After further discussion, the ZBA decided that the Lambs should go to the Planning Board to pin down the number on the capacity, and then come back for the variance, based on this number. Chair Starkey noted the ZBA's concern about variance creep, and Ms. Woodburn said the ZBA would prefer that the Lambs know what number of people they wanted and had the capacity for, and then ask the ZBA for this.

Mr. Lawson said there might be a few things beyond numbers that the ZBA would require in order to grant the variance, and said these things were likely to be outcomes of the Planning Board process.

Chair Starkey asked if there were any members of the public to speak for or against the application. There was no response.

Chair Starkey MOVED to continue the Public Hearing to the October meeting. Jim Lawson SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Hoffman was a voting member.

D. PUBLIC HEARING on a petition submitted by BAA Realty Acquisitions, LLC, Portsmouth, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a July 23, 2014 approval of a modification by the Planning Board. The properties involved are shown on Tax Map 2, Lots 12-3 and 12-4, are located on 17 Madbury Road and 21 Madbury Road, and are in the Central Business Zoning District.

Ms. Woodburn recused herself. Mr. Hoffman and Ms. Davis were appointed as voting members.

Attorney Chris Mulligan noted that at the last ZBA meeting, the Board had granted the applicant's appeal of the Code Officer's Administrative Decision to issue building permits for the Madbury Commons project.

He said that Appeal also prompted additional action at the Planning Board level. He said based on the ZBA's granting of the Appeal, Mr. Johnson had revoked the building permits. He said Madbury Commons then submitted an amended site plan application that was clearly done in response to his client's Appeal to the ZBA.

Attorney Mulligan said the current Appeal of Administrative Decision was in regard to the Planning Board's treatment of the request for approval of Madbury Commons' site plan modification. He said the Planning Board treated it the issues involved as a site plan

modification so it could approve the application without holding a full hearing on the matter.

He said the motivation of the Planning Board in doing this was clear. He said the memo from the Town Planner on this made it clear that the motivation was to foreclose his client's appeal rights. He said from an equity and fairness perspective, this was inappropriate. He also said a site plan modification was only permitted when there would be no meaningful impact on abutters. He said for the reasons stated in the original appeal last month, there was an impact on his client and on the public.

Attorney Mulligan said at the time the Planning Board acted on the site application, it didn't have the benefit of information known to the owners of Madbury Commons regarding the effect that the change in their plan would have on the existing tree-scape on the neighboring properties. He noted that he had submitted information on this to the ZBA last month. He said in June and July, Madbury Commons' design professionals confirmed that excavation necessary to construct the wing of the property would compromise the root structure of the existing trees along the border of the properties.

Attorney Mulligan noted that his client's site plan application couldn't be approved because of the issue of elimination of the tree-scape, and said the Planning Board should therefore have had a public hearing on the tree-scape issue with the Madbury Commons project. He said to his knowledge, the Planning Board didn't have information on this. He said the Planning Board took the position that the changes proposed by Madbury Commons were very minor, and could be approved without a public hearing. But he said they were not minor changes.

He also noted that the site plan changes meant there were changes within the wetland overlay zone. He said this required that the new plan go back to the Conservation Commission for comments and recommendations. He said that alone demonstrated that the proposed changes would have a significant impact on the public. He spoke further on this.

He said his client was asking that the ZBA to reverse the Planning Board's decision and send the approved site plan modification back to the Planning Board, so it would have the benefit of the information that had not been before it, including the information on the trees.

Chair Starkey confirmed that the applicant had filed a case in Superior Court.

Attorney Mulligan said he and the Town Attorney had agreed that that proceeding would be stayed until the ZBA process caught up. He said it would be a dual appeal.

Chair Starkey said his concern was that this Board didn't have jurisdiction in this matter.

Attorney Mulligan said the ZBA had jurisdiction over things the Planning Board did that involved an interpretation of the Zoning Ordinance. He said the Superior Court had

jurisdiction over basically everything else. He said the Planning Board incorrectly treated the proposed changes to the site plan as a modification. He said the Planning Board's Rules of Procedure were adopted pursuant to the Zoning Ordinance, so were part of it. He also said broadly that Article V, 175-16 of the Zoning Ordinance identified broadly the powers of the Planning Board, including review and approval of site plans. He said they did that on July 23rd, in accepting the site plan modification. He said this was what his client was asking the ZBA to address.

Chair Starkey said he didn't know that the ZBA held jurisdiction regarding this matter.

Attorney Ari Pollock, representing Golden Goose LLC, the owners of the Madbury Commons property, said his client would be affected by this Appeal if anything other than denial occurred. He said this issue did not relate to the Zoning Ordinance or an interpretation of the construction of the Zoning Ordinance. He said State law provided for the Planning Board to adopt Rules of Procedure, and said that was what was at issue today. He said his client's view was that this did not relate to an interpretation of the Zoning Ordinance, so the ZBA did not have the authority to grant the Appeal

Attorney Mulligan agreed that this was a threshold issue, but said there was a mix of Zoning and other issues within Site Plan review. He said if his client didn't make this appeal to the ZBA, the Town Attorney would pounce. He said the ZBA has broad authority, and could exercise it broadly. He said this was also a matter of fundamental fairness, but said he understood the concerns, which were well founded, and said it wasn't an easy call.

Mike Hoffman MOVED to close the Public Hearing. Tom Toye SECONDED the motion, and it PASSED unanimously 5-0.

Chair Starkey said he believed that this wasn't something for the ZBA, and spoke further on this. He said the case was filed, and said this was something for the court to decide.

Mr. Lawson said that as broad as the ZBA's authority might be, he believed that this appeal was over the boundary. He said he didn't believe that the ZBA had the authority to act on this type of appeal. Mr. Toye said he didn't have anything to add to this.

Chair Starkey MOVED to deny the petition submitted by BAA Realty Acquisitions, LLC, Portsmouth, New Hampshire, for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a July 23, 2014 approval of a modification by the Planning Board. The properties involved are shown on Tax Map 2, Lots 12-3 and 12-4, are located on 17 Madbury Road and 21 Madbury Road, and are in the Central Business Zoning District. Mike Hoffman SECONDED the motion.

There was discussion about whether the ZBA's vote would have an impact on the court case.

The motion PASSED 4-0-1, with Tom Toye abstaining.

VI. Board Correspondence and/or Discussion

- A. **REQUEST FOR REHEARING** on an August 12, 2014 Denial of a petition submitted by BAA Realty Acquisitions, LLC and EZT Holdings, Portsmouth, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a June 25, 2014 Planning Board denial of an application for Site Plan and Conditional Use Permit. The properties involved are shown on Tax Map 2, Lots 12-5 and 12-6, are located on 15 Madbury Road and 8 Mathes Terrace, and are in the Central Business Zoning District.

Mr. Starkey said the question for the ZBA was whether the Planning Board erred in its interpretation of the Zoning Ordinance, based upon the information before the ZBA.

Attorney Mulligan noted that this was a request for the ZBA to rehear the appeal.

Mr. Starkey said information was brought forward by the applicant that there was an error by the Planning Board in its denial of the site plan application based on its interpretation of the Zoning Ordinance

Mr. Lawson said he thought an appeal was an opportunity to look at the ZBA's decision again and how it was made. He said this could be done with or without new information. He noted that the ZBA had had a vigorous discussion on the interpretation of "neighborhood". But he said he didn't think the ZBA illegally or improperly delegated its authority to the Planning Board.

He said he thought the ZBA's discussion was rigorous and engaged, and said the Board's judgment was sound that there was nothing incorrect in the Planning Board's interpretation or application of the Ordinance. He said it was important to look at the appeal in order to look at everything again, but said he still came to the same conclusion after doing this. He said he was therefore inclined to deny the appeal.

Mr. Hoffman said he had nothing further to add. Ms. Davis said she had read through the information on this application, but said she hadn't been present for previous discussions, so probably shouldn't vote on this. She recused herself and left the table.

Chair Starkey said the ZBA had a vigorous discussion on what a "neighborhood" was. He said he didn't think the ZBA had erred in saying that it was the Planning Board's decision on how to view this. He said he didn't think it was up to the ZBA to make this determination and said he didn't think the Zoning Ordinance gave the ZBA the authority to do this. He said he was inclined to deny the request for rehearing.

Mr. Toye said he agreed that the ZBA had a very thoughtful debate on all of this at the last meeting, and didn't have to have this debate again

Chair Starkey MOVED to deny the REQUEST FOR REHEARING on an August 12, 2014 Denial of a petition submitted by BAA Realty Acquisitions, LLC and EZT

Holdings, Portsmouth, New Hampshire, for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a June 25, 2014 Planning Board denial of an application for Site Plan and Conditional Use Permit. The properties involved are shown on Tax Map 2, Lots 12-5 and 12-6, are located on 15 Madbury Road and 8 Mathes Terrace, and are in the Central Business Zoning District. Jim Lawson SECONDED the motion and it PASSED unanimously 4-0.

VII. Approval of Minutes

July 8, 2014 Minutes

Chair Starkey MOVED to approve the July 8, 2014 Minutes as submitted. Jim Lawson SECONDED the motion and it PASSED 3-0-2, with Chair Starkey, Jim Lawson and Tom Toye voting in favor of the motion, and Ruth Davis and Mike Hoffman abstaining because of their absence from the meeting. CHECK

VIII. Other Business

Ms. Davis spoke with the Board about the Law Lecture Series she'd recently attended, where there was a presentation about safety measures that perhaps were needed for public meetings. There was discussion.

IX. Adjournment

Chair Starkey MOVED to adjourn the meeting. Mike Hoffman SECONDED the motion, and it PASSED unanimously 5-0.

Adjournment at 8:32 pm
Victoria Parmele, Minutes taker

Chris Sterndale, Secretary