

*These minutes were approved at the December 9, 2014 meeting.*

**TOWN OF DURHAM  
ZONING BOARD OF ADJUSTMENT  
October 14, 2014  
Durham Public Library  
MINUTES**

**MEMBERS PRESENT:** Chair Sean Starkey; Vice Chair Robbi Woodburn; Secretary Chris Sterndale; Tom Toye; alternate Ruth Davis

**MEMBERS ABSENT:** Jim Lawson; alternate Mike Hoffman

**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.

**III. Seating Alternates**

Chair Starkey appointed Ms. Davis as a voting member for the meeting.

**IV. Approval of Agenda**

**CHECK**

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

- A. \*\* The PUBLIC HEARINGS** on the petitions submitted by Young Drive, LLC, Frances 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 are currently on hold until a future Zoning Board of Adjustment meeting date to be determined by the Board.
- B. PUBLIC HEARING on a** petition submitted by Stephen and Lori Lamb, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Zoning Ordinance to allow for the use of the existing barn, addition and tent as accessory function spaces for the inn at a capacity as determined by the fire, plumbing and health and safety codes. 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.

Mr. Lamb noted that this application had been continued from the September meeting. He said since that time, he had asked the Fire Department about their requirements in terms of the building capacity. He said the department looked at what he had planned, and had no issues with what he was trying to do.

He also said he'd asked the septic designer to look at the site in regard to the capacity for putting in a larger septic system. He said the designer felt comfortable with designing a new leach field for the same location as the existing leach field that would be able to handle a capacity of 150 guests using standard plumbing fixtures. He said the letter from the septic designer was in the ZBA's packet. He noted that they planned to use low flow fixtures.

He said the Planning Board met after the ZBA meeting last month, and asked him to go back to the ZBA and get a variance to increase the number of guests to reflect the capacity of a new leach field or more, depending on the site, etc. He spoke further on this.

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

***Chair MOVED to close the Public Hearing. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.***

Chair Starkey said at the last meeting, the initial request was to increase the amount of allowable capacity for use of the existing barn, addition and tent as accessory function spaces. He said the ZBA sent the applicants back to get more information on the septic capacity and Fire Department requirements. He said he believed the five variance criteria were met. He suggested that the capacity number should be limited by the design of the septic system or what was allowed according to the Fire/Safety code, whichever was less.

Ms. Woodburn said in reading the application, it seemed that the applicants weren't asking the ZBA to set a limit, and were asking the Board to allow the use, while the limit would be set by others. Chair Starkey said there had been concern about how many people would be allowed, so the ZBA could still put a number limiting it to the maximum capacity of the septic system or basing it on the Fire/Safety code, whichever was less. Ms. Woodburn noted that the Board had discussed the fact that the septic system might not be a limiting factor, because Porto potties could be brought in for an event. Ms. Davis said she didn't think setting an upper limit at 150 was appropriate, because the Porto potties could be used.

Chair Starkey suggested that the capacity number could therefore be determined by the Fire/Safety code, and Ms. Woodburn agreed. She noted that there weren't a lot of abutters, and also said the property was surrounded by open space. There was discussion that the Lambs would have to get a permit from the Fire Department for an event that was very big.

Chair Starkey reopened the public hearing to hear from Mr. Lamb on this. Mr. Lamb provided some details on some of the specific fire and safety limits involved, concerning the number of exits, etc. Chair Starkey closed the public hearing again.

Mr. Toye asked if the Planning Board would be the board that would decide when the applicant would have to bring Porto potties in. There was discussion.

Mr. Johnson suggested that the motion should say “as determined by fire, building, plumbing and health and safety codes.

*Chair Starkey MOVED to approve a petition submitted by Stephen and Lori Lamb, Durham, New Hampshire, for an Application for Variance from Article XII, Section 175-53 of the Zoning Ordinance to allow for the use of the existing barn, addition and tent as accessory function spaces for the inn at a capacity as determined by the fire, building, plumbing and health and safety codes. 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. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.*

- C. **PUBLIC HEARING** on a petition submitted by James Bruner, Durham New Hampshire, on behalf of Steven Nollkamper and Maria Basterra, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-59(A)(2) of the Zoning Ordinance to allow for the construction of a 16 ft by 16 ft addition into the wetland setback. The property involved is shown on Tax Map 6, Lot 2-1, is located at 9 Orchard Drive and is the Residence B Zoning District.

Mr. Bruner said the property involved was located at Foss Farm. He noted that the wetland overlay map showed that there was a wetland down by the Oyster River, which the property bordered on. But he said the wetland overlay didn't show any wetlands at the side property lines. He said the wetland in question with this application was at the side property boundary, adjacent to 11 Orchard Drive, and he explained that the developer of the subdivision had created drainage swales between the lots as part of grading of the lots.

He also said the septic designer who came in at some point outlined that there were hydric soils present in the drainage swale and also noted the two other wetland criteria were present. Mr. Bruno noted that the Section 175-59 of the Zoning Ordinance talked about swales not being wetlands.

He said there would be no decrease in the value of surrounding properties as a result of the variance because the proposed addition was within the appropriate setback from the side property line, and would have a positive impact on the value of the house and property.

Mr. Bruner said granting the variance would not be contrary to the public interest because there would be no negative impact on the wetland. He said site construction would

include the use of silt fencing to prevent unintended and un-permitted impacts to the wetland.

He said denial of the variance would result in unnecessary hardship because there was no fair and substantial relationship between the general public purpose of the ordinance provision and the specific application of that provision to the property. He said the addition would have no negative impact to the wetland area because the area was now currently grass with no wetland vegetation affected by the proposed work. He said there would be hardship if the variance was denied because there was no other viable option to increase the size and functionality of the kitchen. He said the proposed use was reasonable because the addition would add value to the house, meet the owners' need for a new kitchen and would be built with responsible and professional building techniques that would have no negative impact on the wetland.

Ms. Woodburn determined that the applicant's property contained almost 2 acres. She confirmed that the addition didn't sit in the side yard setback, and said she assumed that this area was lawn.

Mr. Bruno said that was correct. He said the existing house was a cape and said the current galley kitchen was very small and encroached on the living room. He said the proposed expansion would house the kitchen, and would allow the main space to look out at the wetlands and the river. He noted that the house was located at the apex of the property, and said runoff drained away from the house. He said there was low land at Orchard Drive, and said the drainage basin there collected runoff from the applicant's property and the adjacent property, and allowed percolation into the soil.

There was discussion on Section 175-59 of the Zoning Ordinance. Ms. Woodburn said in theory, if this was a man-made wetland, the applicant didn't need a variance. Mr. Bruner noted that when he went to apply for the variance, Mr. Johnson was out of town. He said he applied for the variance because he wanted to cover his bases and meet the dead line for the application to be heard.

There was discussion about the wetland/drainage swale Mr. Bruner had spoken about. Mr. Johnson said he was familiar with the neighborhood but didn't know whether the wetland was man-made or not. He said it was possible that when the subdivision was put in, there was some encroachment into existing wetlands as a result of fill being brought in. He said it would therefore be safer to go for the variance.

Ms. Woodburn said it could be determined whether there was an original wetland there by looking at whether the original subdivision existing conditions plan indicated there was designated wetland there before construction. Mr. Bruner said the wetland overlay gave the impression that there wasn't any wetland, and Ms. Woodburn noted that plenty of areas that were classified as wetlands didn't show up on a wetland overlay map.

Chair Starkey said it looked like there was room to do the expansion without needing to remove any tree or disturb other vegetation. Ms. Davis asked about the degree of slope on the property. Mr. Bruner said the front yard was flat. He noted that a new, approved septic system was located in the wetland buffer. He said the proposed addition wouldn't

impact the septic system in that there would be no additional bedrooms created.

Ms. Davis asked if there would be guttering for the addition. Mr. Bruner said a gravel drip edge was required. He said the rest of the house had gutters, and said if the applicant's budget allowed, guttering would be put on the addition. He also noted that the drip edge allowed percolation into the soil around the whole foundation.

Chair Starkey asked about the drive-under garage. Mr. Bruner provided details on this, and said there was an existing accessory apartment above it.

Ms. Woodburn said in looking at the drawing, she thought that where the applicant proposed to put the addition totally made sense.

There was discussion about the deck that was noted on the plot plan that had been provided this evening. Ms. Woodburn determined that the deck didn't yet exist, and said if the applicant intended to do a deck as part of the construction, he needed to request a variance for this as well. Mr. Bruner said he thought the building permit included allowing the deck. He provided details on the location of the deck relative to the wetland. Ms. Woodburn said the notice for the meeting didn't make note of the proposed deck.

Chair Starkey said if the applicant did proposed to do the deck as well, there were two choices. He said the ZBA could vote on the variance request for the addition and the applicant could then apply for the variance for the deck separately. He said the alternative was for the public hearing to be continued and the application could then be re-noticed to include the variance for the deck along with variance for the proposed addition, and both could be heard and deliberated on at the November ZBA meeting.

There was discussion. Mr. Sterndale agreed that the deck issue was separate, but suggested that the ZBA should provide a sense of where it was headed with the variance application for the addition. Chair Starkey said he didn't have a problem with the proposed placement of the addition.

Mr. Bruner said the addition would affect runoff being absorbed into the ground, but the deck would not. Ms. Woodburn said the deck was still a structure. There was further discussion about whether the wetland in question was actually a wetland, and about what the applicant's options were concerning the two variances that were needed.

Mr. Johnson suggested that the ZBA could vote on the variance for the addition, and then continue the case and hear from the applicant concerning the proposed deck at the next meeting. He said if the application was continued, the applicant would only have to pay for the notice for the public hearing. Ms. Woodburn said she agreed with the approach Mr. Johnson had suggested. There was further discussion on how to proceed.

Chair Starkey opened the public hearing, and asked if any members of the public wished to speak for or against the application. There was no response.

***Robbi Woodburn MOVED to close the Public Hearing. Chris Sterndale SECONDED***

*the motion, and it PASSED unanimously 5-0.*

There was discussion about the fact that the most recent set of drawings were not in the ZBA's packet. Ms. Woodburn said if the deck had been shown on the plot plan provided with the application, it would have been noticed.

Chair Starkey said that concerning the hardship criterion, the proposed location of the addition made sense given the way the property was set up, and would mean the least amount of encroachment into the wetland setback. He provided details on this. He also said the ZBA had sometimes required guttering in the past as a condition of approval. Ms. Woodburn noted that gutters could concentrate flow and that a drip strip was a better way to handle runoff.

Chair Starkey said he was ok with the three variance criteria Mr. Bruner had addressed being met. Mr. Sterndale said the ZBA had seen applications for several houses on Orchard Drive. He said it was tough terrain to work with, and said it was appropriate for the ZBA to provide some leeway on this.

Ms. Davis confirmed that the plans the ZBA was looking at tonight were not provided to staff with the original application.

*Chair Starkey MOVED to approve a petition submitted by James Bruner, Durham New Hampshire, on behalf of Steven Nollkamper and Maria Basterra, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article XIII, Section 175-59(A)(2) of the Zoning Ordinance to allow for the construction of a 16 ft by 16 ft addition into the wetland setback; and to continue the Public Hearing for the information received by the Zoning Board of Adjustment this evening for additional plans. The property is shown on Tax Map 6, Lot 2-1 and located at 9 Orchard Drive in the Residence B Zoning District;. Robbi Woodburn SECONDED the motion and it PASSED unanimously 5-0.*

- D. PUBLIC HEARING** on a petition submitted by Garvey and Company, Ltd, Durham, New Hampshire on behalf of Chet Tecce Jr. Rev Living Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to allow for the addition of a front porch to an existing structure within the 50 foot front yard setback. The property involved is shown on Tax Map 13, Lot 6-3, is located at 240 Mast Road and is in the Office Research/Light Industry District.

Steve Garvey said the farm stand at the Tecce farm sat approximately 42 ft from the edge of the right of way. He said the applicant proposed to extend the roof line by 6 ft, and said there would be 4 posts to support the extension. He said there would be 31 ft rather than the required 50 ft from the edge of the right of way.

He explained that the edge of the right of way had been determined by utilizing the yellow lines on Mast Road, noting that no survey of this had been done by the State or abutters except for the Lodges, which wasn't close enough to use in regard to the applicant's property. He said the edge of the right of way was therefore determined to the

best of the applicant's ability. He noted that there was a drainage basin that was 7-8 ft into the right of way. He said people parked all over the place.

Mr. Garvey explained that Mr. Tecce was now farming the land that had comprised Amber Acres, and also said another 5 acres of orchard had been planted behind the farm stand earlier this year. He said in order for Mr. Tecce to be able to function in a more efficient manner for himself and future generations, the farm stand was being improved, and said as part of this the roof line would be extended out. He also said the structure would be made to look more like a log cabin. He said the posts would be on concrete piers.

Chair Starkey asked if there would be any impact on the existing parking on the property from what was proposed. Mr. Garvey said no, and said people currently didn't park close to the building. He said there was about 10-15 ft between the cars and the corn table at the farm stand.

Mr. Johnson asked if the applicant was going to the Planning Board for site plan approval, and Mr. Garvey said no. Mr. Johnson said he thought the applicant needed to go to the Planning Board because what was proposed was adding onto a commercial entity. He said there was no surveyed site plan for the property, and said he thought the Planning Board would want a surveyed plan or a letter from NHDOT agreeing with the calculations on where the property line might be. He also said the posts would conceivably push the parking closer to the road. He said at least an agreement with NHDOT was needed, in case it wanted to widen Mast Road in the future.

Mr. Garvey said NHDOT had been to the site, and said he could get a letter from them on this if needed. Mr. Johnson said he thought the Planning Board would want to see something like that, if not a surveyed site plan. There was further discussion on whether the applicant needed to submit a site plan application for the addition. Mr. Johnson said the applicant was reconfiguring the parking, and noted again that there was no plan on file.

Mr. Garvey said there was no configuration of the parking proposed, and Mr. Johnson said when as a result of the Planning Board reviewing the application, there might be some reconfiguration of the parking. Mr. Garvey said what Mr. Johnson had described was a worst case scenario, and said he thought the applicant would be able to go to the Technical Review Committee. Mr. Johnson said if this happened, the application might still come to the Planning Board, and the parking area might need to be delineated. He said the letter from NDOT could help with this.

Mr. Garvey went through the variance criteria. He provided details on the location of the farm stand relative to surrounding properties and the State road, and said there would be no decrease in the value of surrounding properties as a result of granting the variance because these properties would not be negatively affected by what the applicant proposed.

He said that owing to the special conditions of the property that distinguished it from other properties in the area, denial of the variance would result in unnecessary hardship.

He said there was no fair and substantial relationship between the general purpose of the ordinance provision and its specific application to the applicant's property. He said there would be no impingement of health and safety, and also said a case could be made that the improvement to the farm stand would protect health and welfare by allowing people to shop for vegetables under cover from the sun and rain. He also said granting the variance would not impact the parking, and did not affect the flow of the traffic on and off of the state road.

Mr. Garvey said it would not be financially feasible to move the stand or any of the other houses nearby in order to meet the ordinance, and said they all were or might be located within the front yard setback. He said it was therefore reasonable that a variance would be granted so the farm stand could better serve its customers. He said the proposed use was reasonable, and said granting a variance was specifically designed for cases like this, which was a conforming use with a nonconforming building location that pre-dated the ordinance. He said this required a little help to make the building a bit more usable for the purpose for which it was intended, and the purpose it had served for a very long time.

He said substantial justice would be done in granting the variance because it would provide needed relief from the strict enforcement of the ordinance. He said strict enforcement would stop the renovation and construction of the porch, which was meant to increase the convenience of patrons and increase the ability of the farm stand to stay in business and be profitable, and thus allow the farm to continue to operate and thrive, as it had for three generations.

Mr. Garvey said granting the variance would not be contrary to the spirit and intent of the ordinance. He said the ordinance was there to promote the health and safety of the public, and said this would be accomplished by putting the porch on the front of the farm stand and within the front yard setback. He said no one would be affected, as the parking would not change. He said there was an asphalt apron that most patrons parked on, and said it was a sort of natural place to stop. He said the addition of a 6 ft porch would make the farm stand more functional and attractive for the public.

Chair Starkey noted that there were no members of the public in the audience.

***Chris Sterndale MOVED to close the Public Hearing. Chair Starkey SECONDED the motion and it PASSED unanimously 5-0.***

Chair Starkey said he was fine with the variance criteria being met, and Ms. Woodburn agreed. Chair Starkey said what Mr. Johnson had noted concerning the possible need for a site plan application would be worked out separately from the variance application.

***Chair Starkey MOVED to approve the petition submitted by Garvey and Company, Ltd, Durham, New Hampshire on behalf of Chet Tecce Jr. Rev Living Trust, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to allow for the addition of a front porch to an existing structure within the 50 foot front yard setback, as shown on the drawings submitted in***



*the application. The property involved is shown on Tax Map 13, Lot 6-3, is located at 240 Mast Road and is in the Office Research/Light Industry District. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.*

## **VI. Board Correspondence and/or Discussion**

- A. REQUEST FOR REHEARING** on a September 9, 2014 denial by the Zoning Board of Adjustment 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 at 17 Madbury Road and 21 Madbury Road, and are in the Central Business Zoning District.

Ms. Woodburn recused herself for this agenda item, and left the meeting at 8:06 pm.

Chair Starkey said there would be discussion by the ZBA on the request for Rehearing, but no public hearing or discussion by the applicant. He said the Board would be voting on whether the rehearing should be granted based on the information that had been submitted. He said he didn't see anything new that indicated that the request for rehearing should be granted.

Mr. Sterndale asked if at the last meeting, the ZBA had gotten into the details concerning an amendment to an approved site plan application vs. a modification to an approved site plan application. Chair Starkey said yes. He said this issue was well beyond the ZBA.

Mr. Sterndale said he was receptive to the Request for Rehearing, but wasn't at the previous meeting. Chair Starkey noted again that the question was whether the applicant had provided anything in the information provided that would prompt granting the request for rehearing. He said he didn't see anything.

*Chair Starkey MOVED to deny the Request for Rehearing on a September 9, 2014 denial by the Zoning Board of Adjustment 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 at 17 Madbury Road and 21 Madbury Road, and are in the Central Business Zoning District. Ruth Davis SECONDED the motion.*

Mr. Toye said he was on the fence about this. He said he didn't see that there was anything new that the Board hadn't discussed, but said the point the applicant was trying to make was valid. He said the Planning Board's treatment of the proposed changes to the approved site plan as a modification was a big deal.

*The motion FAILED 2-0-2, with Tom Toye and Chris Sterndale abstaining.*

## **VII MINUTES**

### August 12, 2014 Minutes

***Chair Starkey MOVED to approve the August 12, 2014 ZBA Minutes as submitted. Ruth Davis SECONDED the motion, and it PASSED unanimously 4-0.***

## **VIII Other Business**

Mr. Johnson It was noted that the ZBA would meet on the 3<sup>rd</sup> Thursday in November, at the Library.

Mr. Toye asked for an update on the Young Drive applications. Mr. Johnson said the applicant had to get through Superior Court, and then would decide how to proceed with the variance and special exception applications. He said there wasn't a court date yet that he was aware of. There was discussion about how much longer the ZBA would allow the applications to be continued.

## **IX Adjournment**

***Chair Starkey MOVED to adjourn the meeting. Chris Sterndale SECONDED the motion, and it PASSED unanimously 4-0.***

Adjournment at 8:13 pm

Victoria Parmele, Minutes taker

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Chris Sterndale, Secretary