

These minutes were approved at the December 8, 2015 meeting.

**Durham Zoning Board of Adjustment
Tuesday, October 13, 2015 7:00 pm
Town Council Chambers, Town Hall
8 Newmarket Road, Durham, NH
MINUTES**

MEMBERS PRESENT Chair Sean Starkey
Chris Sterndale
Mike Hoffman
Tom Toye
Ruth Davis
Al Howland, alternate
Henry Smith, alternate

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. He introduced members of the ZBA and staff.

II. Roll Call

III. Seating of Alternates

No alternates were seated.

IV. Approval of Agenda

Mike Hoffman MOVED to approve the Agenda as submitted. Tom Toye SECONDED the motion, and it PASSED 5-0.

V. Other Business

- A. **CLARIFICATION OF THE MOTION TO APPROVE** the petition submitted by James Siedenburgh, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 and Article XX, Section 175-109 of the Durham Zoning Ordinance to allow an accessory apartment on a property at 23 Durham Point Road and to allow for short term rental of the primary residence at 23 Durham Point Road. The property involved is shown on Tax Map 15, Lot 17-3, is located at 23

Durham Point Road, and is in the Residence C Zoning District. (This is a clarification of the motion only under the advisement of Town Counsel and not a reconsideration of the application.)

Chair Starkey explained that the conditions in the draft decision last month that came back to him specifically included the word “apartment”. He said the Board wasn’t talking about an apartment, even though this was how the original motion that failed was worded. He said for clarification when the draft decision was given to him, he had suggested changed “apartment” to “short term” rental in two of the three conditions: “The owner will occupy the property when the short term rental is being rented”; and “The short term rental can be rented for no more than 30 nights per calendar year, with a maximum stay length of two weeks per rental.”

ZBA members accepted the clarified wording.

***Chair Starkey MOVED to replace the words “apartment” with “short term rental”.
Chris Sterndale SECONDED the motion and it PASSED unanimously 5-0.***

VI. Public Hearings

- B. **PUBLIC HEARING** on a petition submitted by David Hills, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from an Article II, Section 175-7 and Article XX, Section 175-109 to allow for short term rental of the accessory apartment. The property involved is shown on Tax Map 11, Lot 22-6, is located at 135 Piscataqua Road, and is in the Residence C Zoning District.

Chair Starkey opened the public hearing.

Mr. Hills said he was looking to have an accessory apartment in his home, noting that a number of people, including students, parents and others had used it on a short term rental basis. He said it had also been used on a somewhat longer term basis by visiting nurses, etc.

He went through the variance criteria and how they were met. He said granting the variance would not decrease the value of surrounding properties because there were no abutters to this lot other than fields he owned in a separate lot. He said no physical changes would be made to the property, and said there would be a very minimal change in the traffic coming to and from the site. Concerning the public interest criterion, Mr. Hills said there would not be any change to the basic character of the area.

Mr. Hills said owing to 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 no fair and substantial relationship existed between the general public purpose of the ordinance provision and the specific application of it to the property. He said an

accessory apartment was allowed in his single family dwelling, and said there had been a significant number of requests for short stays. He said parents wanted to visit UNH students for 1-2 days, and also said there had also been requested for stays as long as 3 months.

He said the proposed use was reasonable because as a property owner he should be able to open his home to guests for short term stays as well as long term stays. He said he was in his home when visitors stayed there, and was very careful regarding who was able to stay in the home he loved so much.

Mr. Hills said substantial justice would be done in granting the variance because it would allow the owner to utilize and enjoy the property as he desired without impacting neighbors or the environment. He said it would allow him to open the home in timeframes that fit with his schedule, and meet the requests received from potential visitors. He said the use would not be contrary to the spirit and intent of the ordinance because he would occupy the home when people stayed there, and would not expand the currently allowed use.

Chair Starkey noted the buildings on the property, which included the larger residence closer to the road, a property off to the rear of the property that was currently rented, and a building behind the barn. Mr. Hills said he was looking to rent an apartment in the residence located close to the road. He said the other two houses on the property had been long term rentals for more than 60 years.

Mr. Hills said the rental space had a bed and bath, and also said some people used the kitchen in the house while others went out to eat. Ms. Davis said her understanding was that an accessory apartment was a true apartment, with a kitchen and a bathroom. Mr. Johnson said there were all kinds of apartments in Durham, and spoke in some detail on this. Chair Starkey said the use being discussed now wasn't defined in the Zoning Ordinance, and Mr. Sterndale noted that this was the same issue the Board had dealt with in the variance application heard in September

Mr. Sterndale asked Mr. Hills if he was comfortable with having some restrictions on how often the space could be rented, and how many people it could be rented to. Mr. Hills said he was looking to be able to use the accessory apartment for rentals that were short term. He said the application the Board heard last month was different in a significant way from his, because he didn't have another attached apartment. He said he didn't think setting the length of time for a visit made a lot of sense, and said if someone in Town could have someone living in their house for a year, he didn't see how having someone there for six months, three months, etc. was material.

Mr. Sterndale said it was material in terms of whether the people living there for a year had a dwelling unit, which had its own kitchen and bathroom. Mr. Hills said the space

could be called an accessory apartment, and said he didn't understand why there would be a limit on the amount of time it could be used.

Chair Starkey said this use was like running a business, and said it hadn't been defined by the Town or the State how this business was being run. He said the State said if there was a short term rental, there was a rooms and meals tax. He said the Town's issue was that the use Mr. Hills was asking for wasn't defined in Durham's Zoning Ordinance. He said the use was more like a boarding house or a bed and breakfast. He asked Mr. Hills if he had gone to the State to say he was doing short term rental on his property so needed to pay the rooms and meals tax. There was discussion.

Mr. Hoffman said at some point, this use needed to be defined. There was further detailed discussion on whether the use was covered by any provisions in the Ordinance, including the definition of "boarding house". Mr. Hills said he thought he'd been told that what he had was called an accessory apartment. Chair Starkey said accessory apartment was the closest thing to the use as the Zoning Ordinance got, but it wasn't defined in this particular way. Mr. Toye said he wouldn't want to call it an accessory apartment, but might call it a bed and breakfast. Chair Starkey said he didn't think it was an apartment, which was why the Board hadn't called the space in last month's application an apartment.

Mr. Smith asked Mr. Hills if the rented unit in the house had an independent entrance, and Mr. Hills said guests used the same door as his family did. Mr. Howland asked Mr. Hills how many times he had rented the space, Mr. Hills said he'd rented it 6 to 8 times this summer, and said the typical rental was for 3 days. Ms. Davis asked what percentage of the last year the home had been shared, and Mr. Hills said it could have been about 50% of the time.

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

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

Chair Starkey said he didn't feel the application met the 5 variance criteria, and said specifically that he didn't see special conditions of the property that lent themselves to this use. He said he didn't think the use met the definition of accessory apartment, and believed it would either meet the definition of boarding house or bed and breakfast, which wasn't what the applicant had in mind. He said the Ordinance failed to define this use, and said such a definition was needed.

Mr. Hoffman said he was having a difficult time considering it to be a boarding house, because a single family home could have overnight accommodations, and shared cooking

and sanitary facilities. Chair Starkey said having someone you know stay at your house was a very different thing than advertising a bedroom for rent. There was discussion about the use possibly fitting the definition of a bed and breakfast. Mr. Johnson said bed and breakfast was a principal use for a property, and would probably require site plan approval. He said calling it an accessory apartment use wouldn't require that. He said boarding house was defined in the Zoning Ordinance, but wasn't an allowed use in Durham anymore. In answer to a question from Ms. Davis, he said if it was an existing boarding house, it would be grandfathered.

He said Mr. Hills was asking to be allowed to rent the space in his single family home for a night, a weekend, six months or a year. He said Mr. Hills was entitled to have an accessory apartment, but the question was for how long it could be rented. He noted that he'd sent an email to other boards/committees after the last ZBA meeting, asking them to weigh in on this issue. He said there were shared kitchens and bathrooms in plenty of the accessory apartments in Durham, with unrelated people living there. He spoke in some detail on this.

Ms. Davis asked if what Mr. Hills wanted was an accessory apartment. Mr. Johnson said yes, but said he (Mr. Johnson) was hung up on the length of stay aspect because this wasn't defined in the Zoning Ordinance. Chair Starkey said he was hung up because he didn't believe that a bedroom was a dwelling unit. Mr. Johnson said it was part of a single family home, which was a dwelling unit. Chair Starkey said unless the bedroom was 600 sf, he didn't think it was an accessory apartment. There was additional discussion.

Mr. Toye read the definition of bed and breakfast, and asked where it said it had to be the primary use. Mr. Johnson said it became a primary use because bed and breakfast was an officially designated use. There was further discussion. Mr. Sterndale said the reason the Board handled the previous Airbnb application the way it did was because they didn't want to go down the road of considering it a bed and breakfast, and wanted to meet the applicant's needs within the existing code. He said the hole in the code here was that bed and breakfast wasn't the primary designation, even though the use was functioning like a bed and breakfast.

Chair Starkey said last time, there were two accessory dwelling units, which wasn't permitted. There was discussion that the other rented buildings on the current property under discussion were single family homes.

Mr. Hoffman said a dwelling unit had to have independent cooking and sanitary facilities, and said the space in question didn't have that, so couldn't be an accessory dwelling unit. But he said the definition for single family dwelling unit didn't exclude renting a room. Mr. Johnson said on page 97 of the Zoning Ordinance, bed and breakfast was listed as a

commercial use. He said Mr. Hills lived in his single family home and had multiple buildings on his property, and said Mr. Hills wasn't looking to change to a different principal use of his property. There was further discussion on this. Mr. Johnson said the Ordinance only allowed up to a two week stay at a bed and breakfast.

Chair Starkey said the reason this situation had come up was that Mr. Johnson learned that people were advertising bedrooms for rent online. Mr. Hoffman said rental of space in single family homes was a common practice in Durham, whether for 3 days or 4 years. There was discussion that this wasn't clearly defined in the Ordinance. Mr. Johnson said when he came to work in Durham, a lot of accessory apartments were simply rooms. Mr. Hoffman said if the 3 unrelated rule was followed, he viewed this use as potentially in compliance with the Ordinance.

Mr. Johnson noted that it was a complaint that had started this process. He said an entire house on Cedar Point Road, which was a single family home with an accessory apartment, was rented out and there were a number of parties there. He said he'd gone to the Airbnb website and saw the property and other listings in Durham. He said these uses weren't registered with the Town as accessory apartments, bed and breakfasts, etc. He explained that residents wanting to rent a room in their house had to register with the Fire Department and the Code Office, and said both departments did inspections of the space.

There was detailed discussion about how to craft the motion, and what conditions to include in it. Chair Starkey read the three conditions that were put on the approval for the similar application last month: 1) The owner will occupy the property when the short term rental is being rented; 2) The variance approval expires at the end of calendar year 2017; 3) The short term rental can be rented for no more than 30 nights per calendar year, with a maximum stay length of two weeks per rental

Mr. Sterndale said he thought there should be a time limit for each particular stay to prevent people from getting around the three unrelated rule. There was further detailed discussion on what period of time made sense. Mr. Toye said tenancy was defined as a period of 90 days or more. Mr. Sterndale noted that allowing someone to stay there for 6 months was a semester, which created a potential student housing situation. Mr. Hoffman said he was ok with allowing a stay up to 3 months for this location and property. He also said he didn't think it was critical to limit the number of times the space could be rented. There was additional discussion.

Mike Hoffman MOVED that the Zoning Board of Adjustment does hereby approve a petition submitted by David Hills, Durham, New Hampshire for an APPLICATION FOR VARIANCES from Article II, Section 175-7 and Article XX, Section 175-109 to allow for short term rental of the accessory apartment with the conditions that:

1. The owner occupy the property during the short term rental;

- 2. The short term rental will be rented for no more than 89 consecutive days to the same party; and*
 - 3. The variance approval expires at the end of calendar year 2017.*
- Chris Sterndale SECONDED the motion, and it PASSED 4-1, with Chair Starkey voting against it.*

- C. **PUBLIC HEARING** on a petition submitted by Christopher Levesque, Madbury, New Hampshire, on behalf of Emily R. Hart Rev Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from the Article XII, Section 175-54 and Article XX, Section 175-109(D)(3) of the Zoning Ordinance to construct an accessory dwelling unit that is more than 25 percent of the total floor space of the main home and is within the property setbacks. The property involved is shown on Tax Map 12, Lots 1-23, is located on Cedar Point Road, and is in the Residential Coastal Zoning District.

Mr. Sterndale noted that the last time Mr. Levesque came before the ZBA concerning this property, there was a proposal for a new house, and on the plan was a proposal for an accessory apartment. Mr. Levesque noted that at that time, he got some input on how to do the apartment and have less impact on the property. He said the accessory apartment part was withdrawn then, and it was coming back now. He said the footprint had been reduced, and also said the structure had been moved to a more central location on the lot, where there were more uniform setbacks, and more vegetation to buffer the structure from the 11 Cedar Point Road property. He said some of the material being provided now with the application was redundant.

Mr. Sterndale noted that the primary dwelling was designed to be small, and was also designed for a use that was consistent with the neighborhood. There was discussion that the lot and the lot across the street were considered to be one lot.

Mr. Levesque went through the criteria for both variance requests.

Article XII-Section 175-09A of the Zoning Ordinance to permit the construction of a detached accessory apartment within the general setbacks of the RC zone.

He said there would be no decrease in the value of surrounding properties as a result of granting the variance because the proposed accessory unit was located and sized in such a way that the maximum possible setbacks were achieved. He said the setbacks for the proposed structure were greater than those of many neighboring properties.

He said granting the variance would not be contrary to the public interest because the proposed setbacks wouldn't have a material impact on abutters due to the highly vegetated surroundings. He also said there was no encroachment on the public ways or sensitive environmental areas.

Concerning the hardship criterion, Mr. Levesque said owing to the small nature of the lot, the property could not be reasonably used in strict conformance with the Ordinance because all of the required setbacks were overlapping, leaving no compliant location to rebuild a new structure. He said only with this variance could one expect to continue to utilize this lot in a way that was consistent with the neighborhood and its own historical use. He said this was true of the proposed structure as well as any other possible replacement structure for this lot.

He said substantial justice would be done in granting the variance because it would permit the owner to utilize and enjoy the property in a way that others in the neighborhood utilized and enjoyed their property, and without having an adverse impact on abutters or the environment. He said many structures in this small community were built in much closer proximity to the shoreland, wetlands and property boundaries.

Mr. Levesque said the use was not contrary to the spirit and intent of the ordinance because it was consistent with the use of surrounding properties. He said one could only assume that the spirit and intent of the setbacks was to maintain reasonable buffers for both neighbors and the environment while maintaining the character of a given area. He said every attempt had been made to be mindful of the impact this structure might have on its surroundings. He said the structure itself was modest, and scaled to fit the existing space, and said single story designs were abandoned for a smaller two story approach. He said abutters who would be affected were consulted with respect to the location, and plantings were offered as an additional buffer.

Variance requested from .Article -Section 175-109(D)(3} of the Zoning Ordinance to permit the construction of an accessory dwelling unit that is greater than 25% of the total floor space of the single family dwelling to which it is accessory.

Mr. Levesque said no decrease in the value of surrounding properties would be suffered as a result of granting the variance because the proposed structure was designed to be in keeping with the character and scale of its surroundings. He said the dwelling unit would be located in a way that maximized setbacks and would have only minimal visibility from neighboring lots.

He said granting the variance would not be contrary to the public interest because the basic character of the area would be unchanged. He said when considering the total lot coverage, even with a small accessory apartment, the total construction was well under the 20% maximum. He said the additional size of the building would be neither injurious nor obstructive to neighbors. He said the additional size would not result in an uncharacteristic encroachment on property lines or sensitive environments.

Mr. Levesque 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 because no fair and substantial relationship existed between the general public purpose of the ordinance and the specific application of that provision to the property. He said the general public purpose of this ordinance was to maintain the development density and general character of an area.

He said in an effort to make the project both passable to the Board and palatable to neighbors, the primary dwelling unit was designed as a relatively modest two bedroom house with a single car garage. He said the total useable floor space was approximately 1600 square feet, and said due to the small area of the primary dwelling, the accessory apartment was limited to just 400 square feet. He said this was an extremely small area in which to include all the items needed in a stand-alone dwelling. He said the specific application of this ordinance would result in a dwelling that was both prohibitively small and economically unviable.

Mr. Levesque said by granting the variance, substantial justice would be done because a single standard would be applied across the board for Cedar Point Road, which like many older established coastal areas was characterized by relatively dense development when compared to current standards for land division and property setbacks. He said despite numerous expansions and rebuilds, Cedar Point had maintained its character even with many concessions made with respect to allowable building size and setback. He said granting this variance would merely be an extension of the flexibility given to others in recent times when they sought to improve their property in this same area.

He said the use would not be contrary to the spirit and intent of the ordinance because the character and the integrity of the neighborhood would be unchanged. He said the property would still be home to a small single family dwelling and an accessory dwelling that were in keeping with the scale and character of the surroundings. He said the overall proposed lot usage and relative building size would be smaller than one would find in a quick visual survey of the neighborhood. He said the spirit and intent of the ordinance was to curb development that was too dense, and to rightfully protect the character of a given area. He said the proposed accessory dwelling was designed to be an efficient use of available space that was located in a way that was both mindful of how the abutters utilized their space and cognizant of how a new building could affect the landscape.

Mr. Levesque noted the chart he'd provided that illustrated land use on Cedar Point Road, and said what was proposed here was what the average and the median number was in terms of square footage. He said the design for the space was minimalistic, and included multipurpose rooms. He also said the lot where the accessory apartment was proposed was bigger than nine other lots on Cedar Point Road, and said those lots contained houses with multiple bedrooms. He noted that the septic system for both of the owner's lots was on lot 1-24, which was why the lots were merged.

Mr. Howland said it struck him how much care had been taken to put the house in an appropriate location, and said the design was reworked frequently to reduce it in size so it fit best on the property. He said the applicant was penalized concerning the accessory apartment for doing such a good job with the primary residence.

Mr. Smith said he'd reread the variance granted for the house in August. He said it seemed that with the current application, it was reasonable for the ZBA to say that the accessory apartment needed to be no more than 25% of the total living space. He said he didn't see where it would be a hardship to do this.

Architect Walter Raus said he'd attempted to design a 400 sf house to begin with so the variance wouldn't be needed. He said it was 14 ft by 16 ft on two levels, and said he had to put the stairway outside of the heated space. He said it had a bedroom and a small kitchen, and that was it. He said it was doable but not worth building, and would not attract someone to live there permanently. He said the building was not envisioned to be a camp.

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

Chair Starkey said Mr. Levesque had done a good job with the variance criteria. He noted that there had been a lot of creep concerning boundaries in this neighborhood, but said what was proposed with this application was not unreasonable. He said while the applicant could have done the accessory apartment as part of the primary dwelling, he instead had proposed to put it across the street, on land that was part of the lot. He said the septic system could handle it. He said the Board might consider saying the accessory apartment could be a maximum of 50% of the total floor space of the primary dwelling, which would be about 800 sf.

Chair Starkey re-opened the public hearing to hear from Mr. Leveque what the total floor space was of the primary dwelling. Mr. Levesque said the house would have 1650 sf. Chair Starkey closed the public hearing. He said the 50% limit made sense. Mr. Teye said he didn't necessarily disagree with this, but considered whether this would open the door for other applications. There was further discussion.

Mr. Hoffman said what was proposed was a nice design, and said he didn't think the applicant should be penalized for building a smaller primary structure that would fit into the area and look great. He said the abutters had been taken into account to a great degree, and noted that the lot in question had been vacant and used for storage in the past. He said having a small cottage there would be a nice change.

Chair Starkey noted letters from two abutters, who were in favor of granting the variances.

Chair Starkey MOVED that the Zoning Board of Adjustment does hereby approve a petition submitted by Christopher Levesque, Madbury, New Hampshire, on behalf of the Emily R. Hart Rev Trust, Durham, New Hampshire, for an APPLICATION FOR VARIANCES from the Article XII, Section 175-54 and Article XX, Section 175-109(D)(3) of the Zoning Ordinance to construct an accessory dwelling unit not to exceed 50 percent of the total floor space of the main home and within the property setbacks, as shown on the plan dated 7/24/15 named Building Permit Plan B-2. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.

VII. Approval of Minutes

September 8, 2015

Page 2, 3rd paragraph, should read "...on a long term basis, and couldn't ..."

Page 3, put space between 1st and 2nd lines at the top of page. Also, 3rd paragraph from bottom should say "...was an allowed use but..."

Page 6, include the motion to close the public hearing. ***Chris Sterndale MOVED to close the Public Hearing. Chair Starkey SECONDED the motion and it PASSED unanimously 5-0.***

Page 8, 1st paragraph after motion should read "...he didn't think there was..."

Chair Starkey MOVED to approve the September 8, 2015 Minute as amended. Mike Hoffman SECONDED the motion, and it PASSED unanimously 5-0.

VIII. Adjournment

Chair Starkey noted that ZBA members were invited to attend the next Economic Development Committee meeting, where economic researcher Brian Gottlob would speak. There was also discussion that there would be a session of the Law Lecture Series tomorrow night.

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

Adjournment at 8:45 pm

Victoria Parmele, Minutes taker

Ruth Davis, Secretary