

*These minutes were approved at the November 14, 2017 meeting.*

**ZONING BOARD OF ADJUSTMENT  
Tuesday, March 21, 2017 at 7:00 p.m.  
Town Council Chambers, Town Hall  
8 Newmarket Road, Durham, NH  
MINUTES**

**MEMBERS PRESENT:** Chair Sean Starkey  
Vice Chair Chris Sterndale  
Tom Toye, Secretary  
Mike Hoffman  
Joan Lawson  
Jay Gooze, alternate  
Micah Warnock, alternate  
Peter Wolfe, alternate

**OTHERS PRESENT:** Audrey Cline, Code Enforcement Officer/Health Officer  
Victoria Parmele, Minutes taker

**I. Call to Order**

Chair Starkey called the meeting to order at 7:02 pm.

**II. Roll Call**

The roll call was taken.

**III. Seating of Alternates**

No alternates were seated.

**IV. Approval of Agenda**

*Chair Starkey **MOVED** to approve the Agenda as submitted. Tom Toye **SECONDED** the motion and it **PASSED** unanimously 5-0.*

**V. Public Hearings**

- A. **PUBLIC HEARING** on a petition submitted by Katie & Kevin Jacques, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIII, Section 175-59(A)(2)(d) of the Durham Zoning Ordinance to construct a garage addition within the wetland setback. The property involved is shown on Tax Map 11, Lot 31-18, is located at 2 Riverview Road, and is in the Residence C Zoning District.

Mr. Jacques said they were proposing to construct an attached garage addition, and said the second floor of the garage would be a living room and small office. He said they weren't looking to add apartments. He noted that the existing house and driveway were located within the wetland setback. He said the addition would also fall within the setback, and would be approximately 57 ft from the edge of the wetland.

Mr. Jacques reviewed the variance criteria and how he believed they were met with his application. He said granting the variance would not be contrary to the public interest because the addition and use was not out of scale or different from other properties in the neighborhood. He said they were one of the few homes in the neighborhood without a garage. He said there would be no greater detriment to the wetland because of this addition and use than what currently existed on the subject property or similar properties developed for single family uses within wetland buffers. He said the paved driveway existed there now, and said no additional area would be disturbed for this proposal.

He said there would be no decrease in the value of surrounding properties because the Table of Uses allowed for single family dwellings and accessory apartments within the Rural district. He said the impact to the wetland would be no greater than there was now. He said the proposed construction of the attached garage addition to the existing single-family home was reasonable and not out of scale with other structures in the surrounding neighborhood.

Mr. Jacques said owing to special conditions of the property that distinguished it from others 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 that provision to the property. He said the property was currently developed within the WCO buffer in this location, and said there was no other location on the property outside of the buffer where the attached addition and use could be constructed. He said it would create an unnecessary hardship to the owners to accomplish their goal of constructing a reasonably sized single-family home on a 0.92 acre lot.

He also said the buffer area where the addition and use were being proposed was currently disturbed and being used for a paved driveway. He said the existing wetland on the property did not show evidence of being negatively impacted by the current use on the property. He said the proposed use was reasonable because the single-family residential dwelling existed within the wetland buffer currently. He also said the addition was not out of scale for the proposed use. He said the amount of soil disturbance would be minimized to only that required for the construction of the addition, and said proper erosion control would be used.

Mr. Jacques said by granting the variance substantial justice would be done because there was no gain to the general public by denial of the variance, but the loss to the owner was significant. He said the use was allowed in the district and said this was the only location on the parcel that was reasonable given the existing conditions of the parcel. He said the

area to be used was currently disturbed, and also said what was proposed would not harm abutters or the nearby wetland to any greater extent than what currently existed.

He said the use would not be contrary to the spirit and intent of the ordinance because the buffer area was currently disturbed in a portion of the area proposed for this addition. He said the addition and use would not cause any additional degradation to the wetland or the buffer greater than what currently existed today on the property.

Mr. Gooze asked whether if this variance application was approved, the applicants would need to come back if they wanted to use the additional space as an accessory apartment. He noted that this might require more septic system capacity. Ms. Cline said variance approval wouldn't condition an apartment in any way. Mr. Wolfe suggested that the Board could add a condition of approval that there could be no apartments in the garage. Mr. Toye said he wasn't sure that this was a concern of the Board. There was further discussion. Ms. Cline said the applicants would need to come to the Building Department like any other property owner who wanted to turn space into an apartment, and said the septic expansion issue would be looked at, at that time.

Mr. Sterndale asked the applicants what their plans were to manage runoff.

M. Jacques said gutters would keep water away from the Route 4 side of the road. There was discussion about the topography of the site, and Chair Starkey asked for more details on plans for diversion of runoff. Mr. Jacques spoke about using rain buckets to catch runoff and help water the garden. He also noted that the roof line for the garage would be set back and a bit lower than the current roof line, although the pitch would be the same. He said management of runoff from the roof would probably be better than current management of runoff from the driveway

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

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

Mr. Toye said he felt that the application met all of the variance criteria, and other Board members agreed.

***Chair Starkey MOVED that the Zoning Board of Adjustment approves a petition submitted by Katie & Kevin Jacques, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article XIII, Section 175-59(A)(2)(d) of the Durham Zoning Ordinance to construct a garage addition within the wetland setback as shown on survey plot plan dated January 2017. Joan Lawson SECONDED the motion and it PASSED unanimously 5-0.***

- B. **PUBLIC HEARING** on a petition submitted by Young Drive LLC, Seabrook, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-

54, Article XIII, Sections 175-59(A)(2)(d), 175-61 and 175-62, and Article IX, Section 175-46(F)(1&2) of the Durham Zoning Ordinance to allow for the construction of Elderly Housing Multi-Unit buildings greater than 30 feet in height, within the Wetland Conservation Overlay District, to allow structures within the wetland setback, and to allow parking between the front of the buildings and the property line and street. The properties involved are shown on Tax Map 4, Lots 42-2 through 42-17 inclusive, and Lot 47-0, are located on Young Drive, and are in the Coe's Corner Zoning District.

Mr. Gooze, Mr. Wolfe and Mr. Warnock recused themselves, and indicated that they wanted to speak as members of the public concerning the application.

Mr. Sterndale noted that what was posted for this application included Section 175-61 - uses permitted by Conditional Use in the Wetlands Conservation Overlay district, and Section 175-62 - uses that weren't permitted unless by special exception. He asked how to reconcile these provisions with the variances being requested.

Attorney Brown said the applicants weren't asking for a variance concerning the use, and explained that there was discussion with the Planning Board as part of the design review process that the elderly housing use would be addressed through the Conditional Use process.

Mr. Sterndale said he didn't see anything in Section 175-60 that said elderly housing was a permitted use in the WCO district, and also said he read Section 175-61 as not listing elderly housing as a use that could be allowed by conditional use. He said he therefore read this to say that the use was prohibited as per Section 175-62, and a special exception would be needed to allow the use in the WCO district.

Attorney Brown stated again that the applicants were advised that the use would be addressed through the Conditional Use process before the Planning Board.

Mr. Sterndale said he was happy to keep going if that was what the applicant was advised, but said he didn't know if that would survive an appeal, and said he thought it was an open question. There was discussion between Mr. Sterndale and Attorney Brown on whether the applicant might need to file for a special exception.

Ms. Cline said a variance would be the first step in any case, and said a special exception would be the second step if needed. Mr. Sterndale said he didn't think variances should be granted this evening for 175-61 or 175-62, and there was further detailed discussion. Chair Starkey said this wasn't something the Board would be voting on this evening. Ms. Cline said it could be a second application, and said the variance would come first in any case. Chair Starkey said the applicant could get clarification on this later if needed.

Attorney Brown introduced engineer Eric Metz, architect Gary Lowe and agent Francis Chase. He said there were three variance requests, and said they were needed to allow the redevelopment of the Young Drive property from its current use as multiunit housing focusing on students into multi-unit elderly housing, as defined in the Zoning Ordinance.

He said if the variances were granted, they would move on to the next phase and submit an application to the Planning Board. He said this application was the result of many hours of discussions between Young Drive LLC representatives, the Town of Durham and members of the community.

He reviewed the 3 variances being requested, concerning building height, allowing structures within the wetland setback, and allowing parking in front of the buildings. He then reviewed how the variance criteria were met.

#### Parking variance

Attorney Brown said the applicant was asking to allow parking between the structures and the road. He said granting this variance would not be contrary to the public interest because it would allow the structures to act as a buffer between the parking and Beards Creek. He also said application of the parking provision would no longer be necessary because the public travel way would be Dover Road, not Young Drive. He said the parking would not be visible, and would not be located adjacent to Beards Creek.

He said there would be substantial justice in granting the variance because the developers could then present their project, which would provide cultural and economic benefits to the Town. He said the values of surrounding properties would not be diminished if the variance was granted because the parking areas would be hidden from view from Dover Road and from the Beards Landing area.

He said literal enforcement of the ordinance would be a hardship and would be contrary to the original intent of the ordinance, which was to shield parking. He said the vegetative buffer requirement accomplished the goal of shielding parking.

#### Wetland overlay variance

Attorney Brown said granting this variance would not be contrary to the public interest because the impact would be less than 10% of the total defined wetlands on the property, as defined in the ordinance. He said the wetland areas would be preserved, and enhanced with this project, and said the spirit and intent of the Ordinance would therefore be observed.

He said substantial justice would be done in granting the variance because it would enable the project to be built, and would allow the developers to continue with their plans for the town homes and the community center, which were not part of the original project and were added as a result of discussions with the neighbors and the Town.

Attorney Brown said granting the variance would not decrease the value of surrounding properties because the wetland impact would be minimal, and the wetlands would be enhanced.

He said there was hardship because of the unique features of the property. He said the design change to include a community center provided benefits, including an appealing view of the development from Dover Road. He said this could only be done by impacting some of the wetlands, and said the same was true concerning the town homes. He said these buildings could not be constructed if there was literal enforcement of the ordinance, or they would have to be redesigned. He said this would call into question the ability to do the project. He said the public benefit was far greater than the encroachment.

Height variance to allow no greater than 45 ft

Attorney Brown said granting this variance would not be contrary to the public interest, and said there would be very little impact visually over what was currently allowed. He noted that the Zoning Ordinance set a 30 ft height limit, but the Planning Board was authorized to allow a 35 ft height limit.

He said the spirit and intent of the Ordinance would be observed in granting the height variance. He said emergency apparatus could reach a 45 ft tall building, and noted that no issues were raised about building height by Fire Department staff. He also said that the way the structures were designed, there was no delineation aesthetically between a 30 ft or 35 ft tall building and what a 45 ft tall building would look like. He said the height of the structures would vary by topography, and said this was necessary to allow tenant parking inside the building rather than using surface parking that could result in greater wetland impacts.

He said there would be no decrease in the value of surrounding properties in granting the variance. He said the project would enhance the community and especially the neighborhood, and said this would likely raise property values.

Attorney Brown said that concerning the hardship criterion, the public benefit far outweighed literal enforcement of the ordinance. He said the variance was necessary to allow for the three main structures to be built. He also said the indoor parking proposed was much more suitable than surface parking in terms of land design. He said economically, the project would not be feasible without the variance.

ZBA members asked questions, and there was then detailed discussion about what the heights of the proposed buildings would be, based on the building elevations/drawings that had been provided. Mr. Hoffman asked what was being defined as the eve, and what was being defined as the ridge. He said in reality, one could argue that the eve line was where the average roof line was, and asked if what was shown was truly the eve. He said looking at the two eve lines, it appeared that the applicants were using the lower eve line to create a false façade treatment.

Mr. Lowe said the gambrel roof extended down to the lower eve line, which was the base of the gambrel. He said that eve line continued across, and was one of the main architectural features of a building.

Ms. Cline said with a complicated roof like this, the Board wasn't going to get a definitive answer on the roof height. She spoke in some detail on this, and said she would call the bottom of the gambrel the roof line. She noted that the gambrel pieces changed in plane from back to front. Mr. Lowe said he was treating the smaller pieces as dormers.

Mr. Sterndale said the case being made for hardship concerning the roof height appeared to boil down to whether doing the project, including the taller roof was better for the community. Attorney Brown said aesthetically, the difference between a 35 ft building and a 45 ft building was minimal. He said another hardship was that this project as designed used the first floor as inside parking, and said if the requested building height wasn't approved, the parking would need to be put outside.

Mr. Sterndale said that could be the justification of hardship for any other property in the zone, and asked how this property was different. Attorney Brown said there were limits on what could be designed, and said the only way to make the project economically feasible were the currently proposed structures. He said another argument was that the benefit of allowing the project outweighed literal enforcement of the Zoning Ordinance.

Chair Starkey said at the site walk, it was said that the majority of the parking would be placed under the building. He said some pretty deep excavation would be needed to allow parking underneath Buildings B and C, and said this would take place in the buffer. He also said the entrance to the garages for these buildings would be near or in the buffer. Mr. Metz said the way Young Drive was being reconfigured, it would hug the lowest point, and said this would minimize some of the disturbance.

Chair Starkey asked why the townhouse units were included in the project. Attorney Brown said originally there was a Building D, which was the same height as the other 3 buildings, and contained more units than what was proposed now. He said based on concerns from abutters and the Town, the developers had decided to eliminate it and instead put 4 townhomes in. He said without them, the project wouldn't be economically feasible.

Mr. Sterndale asked how, concerning the no decrease in property values criterion, a 45 ft plus building wouldn't be detrimental to abutting property values. Attorney Brown said the primary reason was the project itself, and said without the variance, the project wouldn't happen, and property values would stay the same and might decrease. He said if the project happened, it wouldn't negatively impact surrounding property values, and said he believed property values would increase. Mr. Sterndale questioned this, and there was further discussion with Attorney Brown.

Chair Starkey asked what type of vegetation disturbance was expected with the proposed location of the townhouse buildings. Attorney Brown said he didn't know which trees if any would have to be taken down. He said there would be a landscaping plan as part of the Conditional Use process, and said it would encompass the entire project, including the woodland area of Beards Creek. There was detailed discussion about the proposed community center, which Mr. Sterndale noted wasn't in prior iterations.

Chair Starkey asked members of the public who would like to speak concerning the variances being requested to come forward.

**Jay Gooze, 9 Meadow Road**, said he was not an abutter, but knew a lot of the history about the Young Drive area. Concerning the public interest criterion, he said there had been constant calls to the Police Department over the years because of problems caused by residents living in student housing on Young Drive. He noted that with the recent court ruling, the applicant had every right to keep doing student housing, and said there could be these same kinds of problems again.

He said the purpose of the height limitation was to prevent buildings that blocked air and light. He said that wasn't the case with what was proposed, and said there was a view scape argument. But he said they would be nice looking buildings, and noted that there was a water tower behind his own property.

He said right now, if he was looking for a place to live in Durham, he would not be looking at the Bayview Road area because of the problems with the Young Drive area in the past, which could come back again if these variances weren't approved. But he said the Bayview Road area would be back in the picture in terms of property values if the variances were approved. He said all three variance requests were legitimate, and said he felt they met the criteria. He said he realized that some people didn't want to look at larger buildings, but said the public interest was extremely important in this case.

Chair Starkey read into the public record a detailed letter submitted by **John Carroll, 54 Canney Road**, which spoke in favor of granting the variances for the project. Mr. Hoffman also noted another letter in favor of the variances from **Peter Stanhope, Dover Road**. Chair Starkey read this detailed letter into the public record.

**Firoze Katrak, 565 Bay Road**, said he'd been on the Town Council for a few years and therefore had heard complaints from residents living in the Bayview Road and Beards Creek areas. He said it wasn't an easy decision concerning the public interest criterion, having to consider what would be worse, the mess student residents would create especially if there were more of them living there, or a 45 ft building. He said from the Town's viewpoint, it would be worse if young people could create a nuisance in that area again.

He said he thought this was a reasonable proposal. He noted that he was one of the people who tried to write the legal settlement with Young Drive LLC, in order to protect the interests of people living in the neighborhood. He said the final settlement was the best they could get, and said they all had to live with it. He spoke further, and suggested that the broader interests and benefits of this project should be recognized.

**Michael Behrendt, Durham Town Planner**, said he wasn't speaking in favor of the application or in opposition to it, and was before the ZBA to present information as context. He provided handouts, and noted that he was not asserting that this information



was pertinent to the variance criteria. He reviewed the design review process for this project that had occurred before the Planning Board over many months, and explained that a number of changes were made to the design and were generally considered to be positive. But he said the scale of the project had remained fairly large. He said the applicants had stated that a senior housing project was economically viable only if there would be a minimum number of dwelling units, and said they'd indicated that they would have to revert to student housing if they couldn't build the number of units they needed.

He said he didn't think it was appropriate to consider that to be a threat, and said it seemed like a realistic statement, given the fact that the property was used as student housing for many years, it was being used as student housing when they purchased the property, and given that they had a legal right to do this, including providing a higher density of residents than had been the case before. He provided details on this.

Mr. Behrendt asked ZBA members to familiarize themselves with this information, so they could understand the context. He said there could be up to 180 occupants, which was more than double what had been there historically. He said there were other uses allowed in the district beyond duplexes and student housing, but said many of these uses weren't viable for the site. He said a single-family subdivision, or a smaller scale development of townhouses would be greatly preferred, but said the applicant had said this wasn't economically feasible.

He said the Master Plan had a different vision for this site, but said the Town was bound by the terms of the settlement agreement, and couldn't bring a legal action against the developers if they reverted to student housing. He spoke further about the settlement agreement, and said it had several positive provisions.

**Mary Alice Shatzle, 5 Bayview Road**, read into the public record a collective statement from residents of the neighborhood of concern about the proposed variances.

**Micah Warnock, 45 Woodman Drive**, said the applicants had stated that there would be no adverse effects on property values from this development. He asked if the applicants were required to do an appraisal on this. He said he was an abutter, and said he believed this proposed development would result in more student rental properties in the neighborhood. He provided details on this.

**Kevan Carpenter, 20 Bayview Road**, first questioned the distance of Building C from his property line, as indicated on the plans provided. He also said going from a 30 ft tall building to a 45 ft tall building represented a 50% height increase, and said this difference could really be seen. He said with the land clearing that would be needed, he would be looking right at that building, so his property would be directly impacted and its value would be significantly decreased. He said the applicants could do the development without a variance, and said their economic goals and the impacts of this on the neighbors should be looked at.

He said the wetlands issue related to the public interest. He said wetlands weren't restricted just to that property, so saying there wouldn't be an impact on them was false. Regarding allowing parking in front, he said there would be a direct impact on most of his neighbors on Bayview Road as a result of this. He said he hoped the ZBA would look at each variance request in detail, because there were multiple areas where the variance criteria weren't met. He said this would be a critical decision for their community.

**Robert Sullivan, 32 Bagdad Road**, noted that he was the Chair of the Conservation Commission, and said the Commission had discussed the project. He said the area most troubling concerning wetlands impacts was along the pond side, and noted that this area was already very disturbed. He said the Commission felt that cleaning up the left-hand side of the road would improve the quality of wetlands in that area. He said looking at the long term, it would be an improvement if the wetland variance was allowed because of the enhancements that would be provided on the site. He spoke in some detail on this. But he said it was surprising to see that the community center would be 28 ft away from Beards Creek, and said it would be good if that was changed. Mr. Sullivan recommended several conditions that should be imposed if the wetland variance was approved.

**Barbara Flynn, 4 Beards Landing**, read into the public record a letter she'd submitted, asking the ZBA to deny the height variance being requested.

**Eleanor Harrison-Buck, 42 Woodman Road**, asked the ZBA to reject the variances being requested, and said she supported the statements submitted by other residents living in her neighborhood. She said there would be health and safety risks if the variances were granted, and she noted her concerns about building taking place right up against the wetland buffer zone and possible safety concerns because of trees snapping off during storms, etc. She urged the Conservation Commission and the ZBA to be proactive and anticipate these impending risks in evaluating the variance requests.

She recommended that the applicant should reduce the footprint of the project, which would reduce the need to remove trees. She also said rejecting the variance requests would address possible light pollution from a 4 story multi-building complex with no buffer, and would preserve the character of the neighborhood.

**Aaron Hubble, Jennifer Pribble, 8 Bayview Road** said they agreed with the variance request concerning allowing parking in front of the buildings. Mr. Hubble said they were on the fence concerning the variance to allow encroachment on the wetland setback for the town homes. He said the big issue was the height variance, and said they agreed with what others had said concerning this. He said having seen the balloons on the site, they were trying to imagine what 45 ft buildings all the way across would look like. He said they were also thinking about the loss of trees that would occur, and the impacts from lighting in buildings of that height, with the trees gone. He said they felt this would have a negative impact on property values.

Mr. Hubble said that concerning the economic argument the applicants were making for hardship, that was their problem, not the problem of residents of the neighborhood. He

said that concerning the issue of what would happen if the variances weren't approved, with a possible doubling of the density of student housing, the ZBA was supposed to evaluate the application on its own merits. He said there was a choice between two bad options, and said there had to be alternatives in between. He said perhaps a developer who wanted to work with the community would come in. He said they didn't want student housing in their area, but said the development currently proposed felt like too much. He said they were not sure whether they were for or against the application.

**Karen Sayers, 6 Bayview Road**, noted that she strongly supported 55 plus housing, but said she agreed with what Mr. Hubble had said, and said it wasn't an easy decision to make.

**Christine Carpenter, 20 Bayview Road**, questioned taking the word of the applicant claiming that the variance was needed for building height because otherwise the project wasn't economically viable. She said she didn't think student housing was as profitable now as it had previously been.

**Jody Ransom, 6 Bayview Road**, noted that she'd provided a letter of her comments, and said it discussed how the Master Plan spoke about infill development and the particulars of how this should be done in the Coes Corner District. She said the proposed buildings would appreciably decrease her property values, and noted that she and her husband had considered moving. She said they were opposed to the variance requests.

**Peter Wolfe, 11 Riverview Road**, said he was speaking to represent the process. He said he was disappointed that the Town Planner had said that if the ZBA didn't approve the variances being requested, there would be student housing on this property. He said the ZBA ruled on an application as a court did, looking at facts and applying the law. He reviewed in detail the variance criteria, how they related to this application and whether he thought they were met.

He said the key with this application was the hardship criterion, and whether there were special conditions of the property that distinguished it from others in the area. He said the applicants had provided nothing as to why it was unique and so a variance was needed. He said the burden on this must arise from the property. He said the uniqueness here arose from the plight of the owner, and said the fact that the owner couldn't make as much money if he followed the Ordinance wasn't a hardship. He also said the economic hardship hadn't been proved. He said he didn't think this application worked from a process perspective, and said he wanted to make sure that the Zoning Ordinance was followed, and that the ZBA did what the law required.

**Glendowlyn Howard 5 Bayview Road**, said it was obvious that many of the residents of the neighborhood were between a rock and a hard place. She said she was deeply concerned that there were only two choices, and said there were more choices than that, but greed appeared to be standing in the way. She suggested that there should be a smaller, age restricted development that fit the Ordinance or required minor variances.

**Pete Pekins, 10 Beards Landing**, said not being able to maximize profit wasn't a factor to be considered concerning hardship. He also said that regarding the claim that the proposed structures would be in keeping with the area, people should view the new housing next to Hannaford's.

**Jesse McKone, 35 Dover Road**, said she hoped the ZBA would hold the developer to the existing Zoning requirements concerning building height and impacts on wetlands. She said she appreciated Mr. Sullivan's comments regarding impacts on wetlands from the proposed community center, which would be located 28 ft from the shoreland. She also spoke in some detail about the proposed parking for the development. She said she supported all that others had said against granting the variances.

**Scott Snyder, 6 Beards Landing**, noted view #5 in the packets, which demonstrated the difference between a 30 ft and 45 ft building. He said the collective voice of the residents in the neighborhood spoke volumes concerning the variances. He noted the letter he'd submitted that explained why the variances should be denied. He said if the building height variance was denied, this would solve the wetland issues.

He said the applicant had failed to show justification for variance approval. He said he thought the proposed building height would create a density issue that benefited the applicant and would be detrimental to the neighbors. He said he didn't think Young Drive LLC had acted in good faith and been fully transparent, and he spoke in some detail on the roof line issue. He said the roof line wouldn't make a difference if the proposed building wasn't so tall.

Attorney Brown said the applicant had not come forward with a take it or leave it approach. He noted the previous time the applicant was before the ZBA 2.5 years ago, and said tonight was a continuation of that process. He said since that time they'd entered into a settlement agreement with the Town, which they didn't have to do. He said the applicant had wanted this development for the Town, and said what the ZBA was looking at now wasn't the first design that was proposed.

He spoke about the design review process, including site walks, and discussions with the neighbors. He said a lot of the issues being worked out were Planning Board issues, and spoke in some detail on this. He said with the height issue, a hardship was the shape of the land. He also noted that they couldn't expand out because of acreage limitations, and said if that had been possible, they could have dropped the height. He said this was a limit of the property. He said the applicant had significantly altered the plan as a result of working with the Planning Board and the subcommittee that was formed. He said the applicant believed the criteria for the three variances being requested were met.

**Mary Alice Shatzle** said there had clearly been an open process with the applicant, and said the design did change over time. But she said she felt that 4 story buildings were too dense on that site.

**Scott Snyder, 6 Beards Landing** said his concerns at the beginning of the process were the same as his concerns today. He agreed that the developer included the community in the process but said it came down to the size, scope and scale of the project. He said it was too tall, too wide, and would house too many people. He said there were other options, and he encouraged the developer to keep the community engaged. He said he'd be happy to be part of that process.

**Eleanor Harrison-Buck** said it seemed that the neighbors were responsible for the developers making the wrong choice for this piece of land, which therefore required them to not follow the Zoning Ordinance. She said the neighbors should not be held responsible for bearing the burden of a poor decision.

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

Chair Starkey proposed that the ZBA look at the 3 variance requests individually.

Mr. Toye first spoke about the highest and best use concept appraisers used, as it related to this application. He said the variance addressed the legal position on this, and said if the ZBA didn't provide a path for the applicant to advance, the highest and best use was to continue the use as student housing. He said it came down to whether denial resulted in a benefit to the community that outweighed the rights of the property owners.

There was discussion that the ZBA had to evaluate the variances based on the Ordinance and the 5 variance criteria for these variance requests. Mr. Hoffman said he felt that the alternative use that was possible had no bearing on deciding on the application. He noted that each variance being considered required a 3/5 majority in order to pass, and each ZBA member had to find that all 5 criteria were met in order to vote in favor of it.

#### Building Height variance

Mr. Hoffman said that concerning the decrease in property values criterion, he felt the building was out of scale in close proximity to abutting properties, and said this was exactly what zoning was supposed to prevent. He noted that with the building height proposed, some abutters might not see the sun until later in the morning,

He said he felt that granting the variances could potentially shift Young Drive student housing problems to Bayview Road because it would become a new area for student rentals as a result of the proposed elderly housing development. He said he thought the problems with student housing were a management issue. He also said if this building height variance was granted, everyone should be able to build to this height in that zone, and he spoke in some detail on this. He said the proposed use, putting a very large housing complex between a number of single family neighborhoods was excessive at this scale, and wasn't reasonable. He said it was also driving the need for the parking variance.

Mr. Hoffman said he didn't believe that granting the variance would result in substantial justice, and said while he understood the worries about Young Drive becoming a student housing neighborhood again, he didn't think that factored into the 5 variance criteria. He also said what was proposed was extremely contrary to the spirit and intent of the Ordinance, and noted that the Coes Corner district was an entryway into the Town. He said a gradual shift in the scale of buildings was envisioned for this district. He summarized that he didn't think any of the variance criteria were met, except for reasonable use under the hardship criterion.

Mr. Sterndale said he agree with Mr. Hoffman on variance criteria 1, 3 and 5. He said going from 30 to 45 ft was a dramatic change, and said nothing in this site told the ZBA to do that. He said he agreed with what Mr. Hoffman had said concerning the variance criteria.

Chair Starkey said he agreed that the building height variance request didn't meet criteria 1, 3 and 5. He said whether it met the public interest criterion depended on who one spoke to, and said there had been a lot of comments on both sides.

Mr. Toye said he had nothing to add, and said he agreed with what other ZBA members had said. Ms. Lawson also said she agreed with what had been said.

***Chris Sterndale MOVED that the Zoning Board of Adjustment denies a petition submitted by Young Drive LLC, Seabrook, New Hampshire, for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Durham Zoning Ordinance to allow for the construction of Elderly Housing Multi-Unit buildings greater than 30 feet in height due to the fact that the application did not meet the requirements for all five of the variance criteria. Joan Lawson SECONDED the motion and it PASSED unanimously 5-0.***

#### Parking Variance

Mr. Toye said he felt the parking variance being requested was reasonable, noting that it was a long and skinny site. He said the vehicles would be kept away from wetlands and the water, and said putting some parking under the buildings was a nice solution, which would result in less surface parking. He said that concerning the public interest criterion, he didn't think the view scape from Route 108 would be tarnished, and also said he didn't think granting this variance would affect the abutters. He said he thought the hardship criterion was met because it could be argued that the property was unique in the district in that it was pretty small.

Chair Starkey said he thought the application met the spirit and intent of the Ordinance, and he provided details on this. He also said there were special conditions of the property that resulted in hardship. He said it met the public interest because the parking wouldn't be highly visible from Route 108. He summarized that all five variance criteria were met.

Mr. Sterndale agreed, and noted that Young Drive would become a private way and the parking wouldn't be visible. He said granting this variance should be contingent on a footprint like this, rather than granting a blanket approval.

Mr. Hoffman said he thought granting the variance would be contrary to the spirit and intent of the Ordinance, because it spoke about parking not being visible from a public way. He said a viewshed analysis was lacking, but said the parking would be very visible from Route 108. He said no proposed buffering was shown on the plan, said if this had been provided, he might have a different opinion.

***Chair Starkey MOVED that the Zoning Board of Adjustment approves a petition submitted by Young Drive LLC, Seabrook, New Hampshire, for an APPLICATION FOR VARIANCE from Article IX, Section 175-46(F)(1&2) of the Durham Zoning Ordinance to allow for parking between the front of the buildings and the property line and street as shown on the plan dated February 20, 2017 submitted by Young Drive LLC. Chris Sterndale SECONDED the motion and it PASSED 4-1, with Mike Hoffman voting against it.***

#### Wetland Setbacks

Chair Starkey said it was hard to say based on the evidence whether granting this variance would decrease property values. He said he didn't necessarily believe that granting the variance would be against the public interest. He said he didn't see where there were special conditions of the site that meant the wetland encroachment was needed. He said he was struggling with the substantial justice criterion, and whether there was a way to use the property and accomplish a similar project without needing the variance. He said the spirit and intent of the Ordinance was to protect wetlands, and said he thought there was a way to do the project while protecting them.

Ms. Lawson said she agreed that criteria 3,4 and 5 were not supported.

Mr. Toye said it seemed that the townhouses were unnecessary and were completely inside of the wetland setback. He also questioned the placement of the club house and the lack of parking for it.

Mr. Sterndale said he didn't see how the townhouses wouldn't negatively impact the value of surrounding properties. He said he agreed that variance criteria 3, 4 and 5 weren't met. He said some smaller wetland encroachments would be appropriate, but said wholesale encroachment in the buffer wasn't sufficiently warranted.

Mr. Hoffman said a lot of building was being asked for with this project, on this size lot. He said he felt the site could be developed in a more reasonable manner.

***Chair Starkey MOVED that the Zoning Board of Adjustment denies a petition submitted by Young Drive LLC, Seabrook, New Hampshire, for an APPLICATION FOR VARIANCE from Article XIII, Section 175-59(A)(2)(d) of the Durham Zoning Ordinance to allow structures within the wetland setback due to the fact that the***

*application did not meet the requirements for unnecessary hardship, substantial injustice, or meeting the spirit and intent of the Ordinance. Mike Hoffman SECONDED the motion and it PASSED unanimously 5-0.*

The meeting stood in recess from 10:05 to 10:13 pm.

- C. **PUBLIC HEARING** on a petition submitted by Thomas A. Toye IV, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-53 of the Durham Zoning Ordinance to change the use of an existing barn to house a community center, performing arts, training & skill development, workshop & gallery, artisan space, business office and two 1-bedroom apartments. The property involved is shown on Tax Map 6, Lot 9-8, is located at 9 Tavern Way, and is in the Residence B Zoning District.

Mr. Toye recused himself for this application.

Mr. Toye provided details on the property, and the fact that he'd purchased it about a year ago. He said they renovated the main home, which was formerly owned by the Seacoast Reparatory Theatre. He said prior to 2014, the property was operated with all of the uses he was now proposing. He said these uses were discontinued in 2014, and the property lost the grandfathering to continue to allow those uses at that time. He said he believed that the vision for the property now was what it was used for in the past, and said he thought it would be able to coexist with abutting properties and the community while being his family home.

Mr. Toye next went through the variance criteria and how they were met with the application. He said granting the variance would not diminish the value of surrounding properties. He noted that the property operated with the proposed uses from 1980 until 2014, and he provided a list of abutting properties that had been sold in recent years, which he said established a basis for stability of the market.

Concerning the public interest criterion, he said the adaptive re-use of an historic agricultural building would preserve its heritage. He said the proposed uses would help to promote a sense of community and would contribute to economic and social vitality. He spoke in detail about the proposed uses as a community center, and said the proposed space for gatherings would be separate. He said there would be plenty of parking for the uses proposed.

Concerning the hardship criterion, Mr. Toye said owing to the special conditions of the property that distinguished it from other properties in the area, denial of the variance would result in an unnecessary hardship. He said there was no fair and substantial relationship between the general purpose of the ordinance provision and the specific application of that provision to the property. He said the property consisted of 14.1 acres of land of which 9.87 acres were subject to a conservation easement administered by the South East Land Trust of NH. He said structural improvements on the property consisted of a +/- 5000 SF residence, a detached carriage house, and a 3-story post and beam, gambrel roofed barn.



He said the barn structure was known to the community as the Mill Pond Center, and had been a center for community activities including performing arts, weddings, family events, anniversary parties, birthday parties, summer camps, etc. for almost 40 years. He also said the barn currently has three 1 bedroom apartments, which had been unoccupied since 2014. He said previous uses of the barn were "pre-existing, non-conforming" uses within the Residence B zoning district. He said these uses were discontinued in 2014 due to necessary life safety improvements, which were unaffordable at the time by the previous owner, a non-profit organization.

Mr. Toye said the proposed uses for which the variance was requested would all take place within the barn. He said the barn had a full sprinkler system and fire alarm monitoring system, which had been recently inspected and deemed to be serviceable by Burns Security.

He said the property was unique in the zone, with its 14 acres, conservation easement, and view. He said the proposed use was reasonable because they would maintain the character and appearance of the 100 year old barn and would not alter or otherwise require an expansion of the existing barn structure. He also said the uses would all take place inside and would not be seen or heard by any of the neighboring properties. He said the residential structure onsite, historically known as Smith Tavern, was a family home and said the proposed uses in the barn were intended to be low intensity, non-disruptive uses that would not impact the peaceful enjoyment of that residence or the neighboring residential properties.

Mr. Toye said by granting the variance substantial justice would be done because the Mill Pond Center was an icon for the community. He spoke in detail on this, and said there was a generation of people that had grown up taking classes and attending functions at the property. He said granting the variance would promote a sense of community and contribute to the social vitality of the Town. He described in detail some of the uses being considered: community center, performing arts, training and skill development; karate; yoga, etc. dance; artisan space. He said the plan was to put the barn into productive service to justify the cost of renovating and maintaining the structure. He said it wasn't really a money-making proposition.

Mr. Toye said the use would not be contrary to the spirit and intent of the ordinance because the purpose of the Residence B District was to maintain the integrity of existing medium density residential areas while ensuring that new development, redevelopment and expansions of existing buildings and structures was consistent with and maintained the established character of these neighborhoods. He said adaptive reuse of the 100 year old barn promoted the character of the Route 108 historic district and the character of the existing neighborhood, since the proposed uses were in place from 1980, when it was first renovated by Lew and Judy Roberts until 2014, when they were discontinued by the Seacoast Reparatory Theater.

Mr. Toye said he was also requesting to be allowed to have 2 one bedroom apartments on the second floor only. He noted the supporting documents provided from previous ZBA and Planning Board decisions, and spoke in some detail on this.

Mr. Sterndale asked if there was any concern about creep in terms of the allowed uses. Ms. Cline said care was taken to line up the language with the Zoning Ordinance and Building code definitions for uses.

Mr. Hoffman asked Mr. Toye if he would be willing to have a condition of approval that the house would need to be owner occupied.

Mr. Toye said he would prefer to not have that as a condition. He said he'd be happy to trade that for a condition that the main house would need to remain as a use that was consistent with the Zoning Ordinance. He said limiting it to being owner occupied would limit the property's future value, and he spoke further on this. He said the proposed uses wouldn't be a money maker, and would help sustain operation of the barn. He said conditions that might limit future value would potentially affect his ability to proceed. He noted his background in property management, and said the property would be appealing to someone interested in renting, or running a bed and breakfast in the future.

Chair Starkey said he was inclined to give the owner latitude in making the property work, and not putting too many restrictions on it. There was discussion about the reasons for possibly requiring an owner-occupied property. Mr. Toye said this would severely limit the pool of potential buyers.

There was discussion that the application was specifically restricted to proposed indoor uses. Mr. Toye said he thought he would have any right to host an event that any other property owner would have. There was discussion that this would depend on the event.

Mr. Toye suggested that at times when the property wasn't owner occupied, the Town could require professional management for anything that was rented. He said if the property had to be owner occupied, he would need to reconsider whether he wanted to proceed.

Chair Starkey asked members of the public if they would like to speak for or against the application.

**Jeff Hiller 6 Laurel Lane**, said he supported the application, and said he didn't think the property had to be owner occupied. He said he understood Mr. Toye's vision, and said the uses proposed weren't excessive. He said he thought it was the best possible fit of uses for this property.

**Diana Carroll, 54 Canney Road**, said she was speaking as a long term resident, and said she'd been very involved with the Mill Pond Center. She noted that she had recently attended a meeting at the Toye's house, and had been very interested in what they might be doing with buildings on the property. She said it was good to see that the barn was

being repaired, and also said the two apartments proposed seemed like a good use of space. Mr. Toye said each unit would contain 600 sf. There was discussion about how many people would be allowed to live there.

Ms. Carroll said it seemed like a good use of space to open the barn to artisans, and she spoke further on this. She said she found the term community center to be a stretch, and spoke in some detail on this. There was detailed discussion by ZBA members about what this current concept of a community center was about. Ms. Cline said this would be a mixed-use building, and said the assembly and life safety issues were code issues and would be addressed. She noted the upgrades that had been done. Ms. Carroll said people would have a different vision for a community center than what was planned. She said these would really be businesses, and said she thought they would be good for Durham. She noted that there was a lot of parking available.

Mr. Toye said parking would be directly behind the barn and he provided details on his plans concerning this.

There was discussion about site plan approval being needed to address parking, occupancy and other issues because the grandfathering had been lost. Mr. Gooze noted that the Planning Board could require property management as part of the site plan review process. There was further discussion about the number of renters that would be permitted.

**Dennis Meadows, 34 Laurel Lane**, said Mr. Toye was asking for three different variances, for a community center, apartments and commercial rental space. He said he thought it was important to understand what was actually going to happen there if the plan went ahead. He said it wouldn't be anything like it used to be, and said if the variances were granted, the bulk of the space devoted to public use would go away. He said the space was drastically changed, and spoke about how the parking available would change.

He said he was not being critical of the proposal, and said if he owned the parcel, he would do more or less the same thing. He said he admired the time Mr. Toye had put into the property and the work that had been done. He said the use of the space on the property would be Mr. Toye's decision. He spoke further, and said the variances needed to be decided on the merits, and not on the history of the property.

Mr. Toye said he didn't disagree much with what had been said. He said he felt the proposed uses were lower in intensity than what proposed in the past.

Chair Starkey noted letters in support of the variance from residents Amanda Merrill, Rick and Susie Renner, Charles Noon, and Jeff and Tina Hiller.

***Chris Sterndale MOVED to close the Public Hearing. Chair Starkey SECONDED the motion and it PASSED unanimously 4-0.***

Chair Starkey said he believed the variance request met the 5 criteria. He said he didn't think the value of surrounding properties would be decreased, although stating there was no evidence concerning this. He said granting the variance would not be against the public interest, and said Mr. Toye was trying to have uses that were similar but not exactly the same as those in the past. He said the special conditions of the property were preexisting, including a barn used as a theater in the past.

He said substantial justice would be done in granting the variance because he didn't know that the building in its current state would otherwise be used. He said granting the variance was not against the spirit and intent of the Ordinance, and said he thought a use could be done here that was close to the use in the past that could also be helpful to the public. He said the 2 one bedroom apartments proposed were a reduction from the current 3 built-in apartments, and said he was ok with what was proposed. He said some space might need to be used as storage in the future.

Mr. Sterndale said he was comfortable deferring the nitty gritty issues concerning what was proposed to the Planning Board. There was further discussion.

***Chair Starkey MOVED that the Zoning Board of Adjustment approves a petition submitted by Thomas A. Toye IV, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article XII, Section 175-53 of the Durham Zoning Ordinance to change the use of an existing barn to house a community center, performing arts, training & skill development, workshop & gallery, artisan space, business office and two 1-bedroom apartments as a mixed-use building.***

Chair Starkey noted that he'd included "mixed-use building" in the motion because it wasn't a permitted use in the district.

***Mike Hoffman SECONDED the motion and it PASSED unanimously 5-0. Alternate Micah Warnock voted in place of Tom Toye.***

## **VI. Other Business:**

### **A. Discussion of Potential Septic System Workshop**

After discussion, Board members agreed that they were familiar with and continued to learn about the changing technology concerning septic systems, and therefore didn't need a workshop on this.

## **VI. Approval of Minutes**

December 13, 2016

Page 1, Third paragraph, "shone" should be "shown"

2<sup>nd</sup> page, motion to approve August 9, 2016 minutes should say "...Ms. Lawson abstaining"

***Chris Sterndale MOVED to approve the December 13, 2016 Minutes as amended. Chair Starkey SECONDED the motion and it PASSED unanimously 5-0.***

**VII. Adjournment**

***Mike Hoffman MOVED to adjourn the meeting. Chris Sterndale SECONDED the motion and it PASSED unanimously 5-0.***

Adjournment at 4:18 pm

Victoria Parmele, Minutes taker

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Thomas Toye, Secretary