

*These minutes were approved at the July 10, 2018 meeting.*

**ZONING BOARD OF ADJUSTMENT  
Tuesday, April 10, 2018 at 7:00 p.m.  
Town Council Chambers, Town Hall  
8 Newmarket Road, Durham, NH  
MINUTES**

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

**OTHERS PRESENT:** 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**

**IV. Approval of Agenda**

*Chair Starkey MOVED to approve the Agenda. Chris Sterndale SECONDED the motion and it PASSED unanimously 5-0.*

(Mr. Warnock was a voting member for the vote.)

Chair Starkey said the applicants for agenda items A and B had asked to postpone their applications to the next meeting because of scheduling conflicts.

*Chair Starkey MOVED to continue A and B to next reg scheduled meeting. Chris Sterndale SECONDED the motion and it PASSED unanimously 5-0.*

(Mr. Wolfe was a voting member for the vote.)

**V. Public Hearings**

- A. **PUBLIC HEARING** on a petition submitted by Monica F. Kieser, Hoefle, Phoenix, Gormley & Roberts P.A., Portsmouth, New Hampshire, on behalf of Manisha P. Heiderscheidt Rev Trust, Durham, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a February 20, 2018 email from Zoning Administrator Audrey Cline on the denial of a building permit for a new single family home. The property involved is shown on Tax Map 12, Lot 1-8, is located at 32 Cedar Point Road, and is in the Residence C Zoning District.

The application was postponed until the May 8, 2018 Zoning Board of Adjustment meeting.

- B. **PUBLIC HEARING** on a petition submitted by Monica F. Kieser, Hoefle, Phoenix, Gormley & Roberts P.A., Portsmouth, New Hampshire, on behalf of Manisha P. Heiderscheidt Rev Trust, Durham, New Hampshire, for an **APPLICATION FOR VARIANCES** from Article IX, Section 175-30(D)(3)(c&d) and Article XII, Section 175-54 of the Durham Zoning Ordinance to demolish the current structure on a property and replace it with a new single family home of greater square footage and building footprint than allowed, and also within the front and side setbacks. The property involved is shown on Tax Map 12, Lot 1-8, is located at 32 Cedar Point Road, and is in the Residence C Zoning District.

Postponed until the May 8, 2018 Zoning Board of Adjustment meeting.

- C. **PUBLIC HEARING** on a petition submitted by Thomas A. Toye IV, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-53 and Article XX, Section 175-109 of the Durham Zoning Ordinance to change the use of an existing barn, approved as a mixed-use building, to a multi-family structure with four dwelling units. 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

Mr. Toye said the property involved was a personal residence, at 50 Newmarket Road, and noted that the Tavern Way address was the name that was recognized by the Town. He said the property was formerly known and used as the Mill Pond Center for the Arts. He said the property contained a single-family residence, and a large barn that had hosted various residential and commercial uses over the last 40 years.

He said he was asking for a variance to allow residential apartments in the barn. He noted that there were currently 3 apartments in that structure, but said they hadn't been used since 2014 so had lost their grandfathered status. He reviewed the variance criteria and how they were met with the application.

Mr. Toye went through the variance criteria and how they were met with the application.

No decrease in the value of surrounding properties

He said he'd reviewed the recent sales history in the neighborhood. He also noted that his property was the original property in the neighborhood, and said since the residential uses in the barn had existed in the past, there was no reason to think that this use now would have an effect on property values. He made reference to emails from abutters that were in support of the variance application.

Public Interest

Mr. Toye said the conservation easement granted for a portion of his property in 2004 made reference to the view scape looking at the property from Route 108, including the historic structure that sat at the back of the site. He said there was an established interest in maintaining the field and the view of the barn at the back of field. He noted that it was an expensive property to operate and maintain, and said if the variance was granted, there would be additional resources to preserve the property as it sat today.

Hardship

Mr. Toye said the property was unique in the Residence B zone. Noting the Zoning map, he said the property contained over 14 acres, had 600 ft frontage on the river, had a view easement, contained 3 large structures, and was flanked by an historic corridor. He also noted that the property had a history of containing multiunit residential uses and mixed uses. He noted that a conditional use permit was approved in 1995 but wasn't fully carried out, for 2 more one- bedroom apartments in the barn. He spoke further on this.

He said the proposed use was reasonable, noting that the barn had been inspected, a sprinkler system had been installed, and only a few additional things were needed. He explained that previous plans to put the property back into service with a mix of commercial and residential uses had brought up several life safety and code issues. He said by keeping the barn as just residential, it was more feasible for this older structure to be rehabilitated. He said there were already 3 fully working kitchens in the building, and said one more would need to be added.

Substantial Justice

Mr. Toye said the property was part of an historic corridor, and said the barn punctuated the view from the road. He said he and his wife were trying to create a sustainable way to maintain the barn and the entire property, noting that it had fallen into disrepair at some point because there had been no plan to maintain it.

Spirit and intent of the Ordinance

Mr. Toye noted that the purpose statement for the Residence B zone spoke about the importance of maintaining the integrity and character of neighborhoods. He said the character of this neighborhood was generated around his property, which contained the original Smith Tavern, which was built in 1686 close to the river. He said that building was moved across the field one winter, and said the barn was built in 1917. He said the Historic District flanked both sides of the road.

Ms. Lawson asked for more details on the residential spaces proposed. She also noted that the last time Mr. Toye was an applicant before the ZBA, he got a variance for the community center, and asked what had changed since then.

Mr. Toye said he submitted a building permit to move forward with that plan, but said as he worked through various code compliance issues, it became clear that a limiting factor would be having to put in fire separation between the units, even with a full sprinkler system. He said it wasn't easy to accomplish that with a post and beam structure and balloon framing, and said there had been concern that the construction would take away from the interior character of the barn. He spoke in further detail about what would have been involved in terms of compliance issues.

Ms. Lawson asked where abutters were located. Mr. Toye provided details on the locations of the abutters. He noted that one abutter, Mr. Hillard had been very vocal during the Seacoast Repertory Theatre applications, but said he'd been supportive of the current plans, and the work being done on the property.

Mr. Sterndale noted that many variances and conditional use permits had been granted for the property over the years. He said before 1995, there were 2 apartments in the barn in addition to the Mill Pond Center, and said 2 more were approved in 1995 but were never constructed.

Mr. Toye said one was constructed and occupied through 2014 as part of 3 one-bedroom units, but said because these units were then not used over the course of 12 months, the apartments weren't allowed any more.

There was discussion about whether the past variance granted for particular uses didn't matter to the ZBA now.

Mr. Toye noted a previous variance that allowed up to 9 residents in the single-family residence, and which didn't signify anything about the residents having to be related.

Mr. Sterndale said the physical use of the apartments in the barn was discontinued in 2014, so the grandfathering was lost. He said last year the ZBA granted a variance that permitted 2 residential units on the second floor as part of mixed use, and said those units were vacant now. He said assuming that Mr. Toye implemented the currently proposed variance within the next 11 months, the barn would go from 2 to 4 one-bedroom units, But he said the legacy of last year's variance on mixed use, and the variance granted that allowed 9 residents in the single family house concerned him.

Mr. Sterndale asked if there were any concerns about frontage. It was noted that Tavern Way was a private road, and that this wasn't an issue in the past. Mr. Wolfe said this issue had come up when there was an application before the Planning Board, and said it was determined that the parcel had frontage on Route 108.

Ms. Lawson said what Mr. Toye was asking for was that the variance approved last year would basically be done away with, and that he would get a new variance to allow 2 more units. There was discussion. Chair Starkey said he believed that the change of use being requested now superseded the previous change of use that was granted.

Mr. Sterndale said the 2017 variance was straightforward. He also said the variance from 2009 lived indefinitely. Mr. Toye said he assumed that all of the conditions from 2009 would have to be met for that to be the case, and said there were several things now that would negate that variance.

Mr. Sterndale said he worried about what could happen with the next owner of the property. He said if Mr. Toye had no intention to have 9 people living in the house, a question was whether there was a way to abandon that allowed usage. He asked Mr. Toye if he would be willing to surrender the right to have 9 people living in the main house if the ZBA could find a mechanism to accomplish this. Mr. Toye said yes. He said he could see that future owners of the property might want to operate it differently, but said they could come back and make the case for this.

Mr. Sterndale asked if other ZBA members thought this was a reasonable way to go.

Mr. Wolfe asked if a condition of approval of the variance could be that Mr. Toye would put wording in the deed that would accomplish what Mr. Sterndale had suggested. Chair Starkey said any time the ZBA had done something like this, it seemed to backfire. He noted that such a condition affected the ability to transfer a property. Ms. Lawson asked what limits would remain on the number of residents in the house if the Board removed the ability to have 9 residents in the house. Mr. Sterndale said it would revert back to allowing 3 unrelated residents.

Mr. Sterndale said he'd like to see something more permanent to address this and said he thought there should be one permitted use. Mr. Toye noted again that in order for the 2009 variance allowing 9 residents to live in the house to be valid, all of the other conditions would have to be met. There was further discussion.

There was detailed discussion about the fact that a condition of approval with the 2009 variance was that there would need to be a full-time property manager. Mr. Toye said it sounded like things were out of control back in 2009, with people living in the barn and in the house. He said this was where Mr. Hillard was coming from in asking that there be a property manager as part of granting the variance. Chair Starkey agreed and noted that all of the abutters had been concerned about noise and other issues at that time.

Mr. Wolfe asked whether the conditions that went with the 2009 variance approval were wiped out with the 2017 variance that was approved. Chair Starkey said the use of the property had flipped several times, and he provided some history on this. Mr. Wolfe agreed that the Board needed to clean things up in regard to the various variances that had been granted for the property over time. Chair Starkey said he thought the Board would

need to find out the correct way to do this. Mr. Sterndale said doing this would be a good legacy for future ZBA's.

Chair Starkey opened the public hearing. No members of the public came forward to speak.

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

The Board went through the variance criteria and whether they were met with the application.

Chair Starkey said he didn't think that granting the variance would decrease the value of surrounding properties in a way that could be documented. Mr. Wolfe said the Board had decided on this criterion a year ago when the other variances were granted.

Concerning the public interest criterion, Chair Starkey said the Residence B zone didn't allow multiunit dwellings. He said if the variance was approved, there would be two multiunit dwellings on a single piece of land, and said he'd need to look into that more.

Mr. Wolfe said the Board had made a decision on that issue a year ago, and had also allowed both residential and commercial uses on the property. There was discussion about the fact that granting this variance would expand the extent of residential uses. Mr. Wolfe said perhaps it was better to have the residential uses as compared to the commercial uses.

Chair Starkey said that concerning the hardship criterion, the uniqueness of the property in the zone was clear. Mr. Wolfe said the Board had decided on that last year, and said the proposed use was reasonable, in that it changed the use of a portion of the building to what the other part of the building was, instead of having a commercial use. Board members said they had no issues with this criterion.

Chair Starkey said he believed the variance application met the substantial justice criterion, and he also said he believed that the spirit and intent criterion had been met. He summarized that the Board agreed that the 5 criteria were met.

He said right now the variance application was written as a change of use of the barn, which had been approved as a mixed use building, to a multifamily structure with 4 apartments. He said that had to supersede previous approvals, but said he still thought the Board needed clarification on how to clean things up regarding the previous variances.

There was further discussion. Chair Starkey said this approval would supersede the 2017 and 2009 approvals. He said it would change the use to completely residential, and would remove the opportunity to do mixed use, and to go back to the 2009 approval for 9 residents in the single-family house.

Ms. Lawson said her reading of this was that all of the 2009 variance would go away because that approval of mixed land use had contained several conditions. Chair Starkey said all of these conditions would have to be met in order for the house to be able to be used as stated in the 2009 variance. There was further discussion. As part of this, there was discussion about what would happen with the previous variances if Mr. Toye didn't go forward with his plans based on the current variance being requested.

Chair Starkey said this was an opportunity to clean things up, and said he was comfortable waiting a month and getting some answers as to how to do this. Mr. Wolfe considered whether the Board could conditionally approve the application now.

Chair Starkey reopened the public hearing. He said there was no dissent on the Board as to whether the variance criteria being met. He asked Mr. Toye if he'd like the ZBA to vote on the application this evening, or to continue it to the next meeting so the Board could get further information concerning addressing the issue of the previous variances.

Mr. Toye said he could see where the Board was coming from. But he said as a property owner, and a real estate professional, he didn't see that the terms of the 2009 variance that was approved were viable. He said they didn't work for the Seacoast Repertory Theatre. He said he'd like the Board to vote on the application this evening.

***Chris Sterndale MOVED to continue the application for 30 days. Peter Wolfe SECONDED the motion.***

Chair Starkey recommended voting down the continuation since the Board had discussed the variance criteria, and he asked for a vote. There was discussion about whether the Board could grant conditional approval, and allow the weight of any previous use variances to be clarified. Mr. Wolfe said the Board could say that this was a change of use, and that the criteria for the 2009 variance were no longer applicable.

***The motion FAILED 1-3-1, Chris Sterndale voting in favor of the motion, Chair Starkey, Joan Lawson and Micah Warnock voting against it, and Peter Wolfe abstaining.***

***Chair Starkey MOVED to approve a petition submitted by Thomas A. Toye IV, Durham, New Hampshire for an APPLICATION FOR VARIANCES from Article XII, Section 175-53 and Article XX, Section 175-109 of the Durham Zoning Ordinance to change the use of an existing barn, approved as a mixed-use building, to become a multi-family structure with four dwelling units. This approval supersedes all previous variances in their entirety of change of use for this property. 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. Peter Wolfe SECONDED the motion.***

There was discussion about whether this was the right way to proceed. Chair Starkey noted that the Board's decision could be appealed. The conditions in the motion were revised (as reflected above). Mr. Wolfe said he would vote against the motion, and said

he wanted to get this done right. Mr. Warnock agreed, and suggested that some terminology should be developed with Mr. Toye. Mr. Sterndale said the concerns that had been raised about previous variance affected all 5 criteria. Chair Starkey said he disagreed completely. He recommended that anyone planning to vote against the motion should explain which criteria they were basing this on.

Mr. Sterndale suggested that the motion should be withdrawn. Mr. Wolfe withdrew his second of the motion. ***Joan Lawson SECONDED the motion.***

***The motion FAILED 2-3, with Chris Sterndale, Peter Wolfe and Micah Warnock voting against it.***

***Chair Starkey MOVED to continue the application for 30 days to get an answer to their question. Micah Warnock SECONDED the motion and it PASSED 4-1, with Chair Starkey voting against it.***

## **VI. Approval of Minutes –**

### November 14, 2017

Page 6, 2<sup>nd</sup> to last paragraph, should say “Mr. Levesque said that concerning the issue of structural density...”

Page 9, VI Approval of Minutes, should include the following:

*The March 21, 2017 minutes were approved at the November 2017 meeting  
April 18, 2017 Minutes were approved at the November 2017 meeting  
September 12, 2017 Minutes were approved at the November 2017 meeting  
(The August 8, 2017 Minutes were approved at the December 2017 meeting)*

### March 21, 2017 Minutes

*Peter Wolfe MOVED to approve the Minutes as submitted. Chris Sterndale SECONDED the motion and it PASSED unanimously 5-0.*

### April 18, 2017 Minutes

*Micah MOVED to approve the April 18, 2017 Minutes as submitted. Chair Starkey SECONDED the motion and it PASSED unanimously 5-0.*

### September 12, 2017 Minutes

Page 1, Strike Mike Hoffman, Chair Starkey, and Peter Wolfe from MEMBERS PRESENT list. Also strike Audrey Cline from OTHERS PRESENT list



*Chair Starkey MOVED to approve the September 12, 2017 Minutes as submitted. Chair Starkey SECONDED the motion and it PASSED unanimously 3-0-2, with Peter Wolfe and Mike Hoffman abstaining because of their absence from the meeting.*

*Chair Starkey MOVED to approve the November 14, 2017 Minutes as amended., Micah Warnock SECONDED the motion and it PASSED unanimously 3-0-2 with Chris Sterndale and Joan Lawson abstaining because of their absence from the meeting.*

December 5, 2017

Page 3, second to last paragraph, spelling of “Starkey”

Page 5 The further discussion should go under Other Business

*Chris Sterndale MOVED to approve the December 5, 2017 Minutes as amended. Micah Warnock SECONDED the motion and it PASSED 4-0-1 with Joan Lawson abstaining because of her absence from the meeting.*

## **VII. Other Business**

Chair Starkey said it was time for a new Chair of the ZBA and said he would turn down the nomination if it was made.

Mr. Wolfe asked if there would be follow through with Ms. Cline and if needed with the Town Attorney on the questions raised tonight concerning the previous variances for the Toye property. Chair Starkey said yes. There was discussion that the public hearing could be opened again if the application was reheard

Chair Starkey noted the Office of Strategic Initiatives conference that was coming up.

Mr. Sterndale noted the Cedar Point Road document that the ZBA had said would be written up. Chair Starkey said he would write something up for the next meeting.

## **VII. Adjournment**

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

Adjournment at 8:26 pm

Victoria Parmele, Minutes taker

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Micah Warnock, Secretary