

These minutes were approved at the July 12, 2022 meeting.

**ZONING BOARD OF ADJUSTMENT
Tuesday, June 14, 2022 at 7:00 p.m.
Town Council Chambers, Town Hall
8 Newmarket Road, Durham, NH
MINUTES**

MEMBERS PRESENT: Micah Warnock, Chair
Neil Niman, Vice Chair
Chris Sterndale
Leslie Schwartz, Alternate

MEMBERS ABSENT: Alex Talcott
Mark Morong

OTHERS PRESENT: Audrey Cline, Zoning Administrator

I. Call to Order

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

II. Roll Call

The roll call was taken. Alex Talcott and Mark Morong were absent.

III. Seating of Alternates

Leslie Schwartz was seated for the first case.

IV. Approval of Agenda

V. Public Hearings:

- A. **PUBLIC HEARING** on a petition submitted by Eckman Construction Company, Bedford, New Hampshire, on behalf of Torrington Malden One LLC, Boston, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XII.1, Section 175-55(8) of the Durham Zoning Ordinance to permit the construction of two apartment units within the basement of an apartment building. The property involved is shown on Tax Map 107, Lot 2, is located at 22 Madbury Road, and is in the Professional Office Zoning District.

Tom Hutter, representative for the case, spoke to the five criteria for variance. He stated the additional units are not in contrary to public interest nor do they affect the general public. Regarding the spirit of the ordinance, a fire sprinkler system was installed last summer to preserve the health and safety in the building. The new construction will also involve water mediation to ensure a dry living space. Mr. Hutter stated the values of surrounding properties will not be diminished, the units will not be noticeable from the street and substantial parking already exists. Mr. Hutter felt the two units would provide safer and

needed housing for students on campus, and in doing so it would not result in damage to the public or neighbors in any way.

Mr. Hutter acknowledged that two basement units had existed prior to the current ownership and prior to the ordinance, however, four-five years ago they had flooded and were ripped down to the studs. Mr. Warnock asked Mr. Hutter to speak to the hardship faced by the owner, and he responded that the space, which contains a workshop on the other side, is not usable for any other means and the units cannot generate money as intended. Mr. Hutter stated the owners currently do not use the space and since purchasing the property the primary focus has been to address the ground water issue and turn the units back into quality living spaces for students.

Pete Doucet, of Torrington Properties, was in attendance via Zoom. He stated they did not own the property when it flooded and clarified that the issue was not of flooding but more with ground water due to the grading. He said there are plans to address both the grading and an inadequate sump pump.

Audrey Cline stated her interpretation of the code is to deter new construction including adding another floor that would aesthetically affect the height and appearance of a property. When asked about the intended layout of the space, Mr. Doucet confirmed the two basement units would contain five total bedrooms, two in one unit and three in the other. Mr. Sterndale and Ms. Cline discussed the intent of the ordinance and whether it leaves room for existing structures. They referenced a past approval that granted renovations to a preexisting sorority house in their discussion.

Chair Warnock acknowledged that three “yes” votes would be required for approval and that only four members were seated. He gave Mr. Doucet the option to pause the case and wait until next month, but stated he was not certain there would be five members present at the July meeting. Mr. Warnock explained that if the vote did not pass, the decision could be appealed based on an error but not due to a lack of five board members. Regarding the option to resume next month, Mr. Doucet stated timing was an issue since they planned to construct the units prior to college reopening. Ms. Cline suggested proceeding with the next case and allowing Mr. Doucet time to consider his options, however, Chair Warnock pointed out that Leslie Schwartz would be leaving due to a prior engagement and the board would be down to three members. The board decided to grant a short recess so Mr. Doucet could consider his options before proceeding.

The board took a five-minute recess and upon return Mr. Doucet agreed to proceed.

Ms. Schwartz asked for the structure’s total number of apartments. The property manager confirmed seventeen units with two beds each and the addition of two basement units would bring it the total to nineteen. Vice Chair Niman asked about the time frame of the abandoned apartments wondering if there was a more accurate date than four-five years ago. Mr. Doucet stated the units were livable five years ago under the previous ownership. He stated they purchased the property in 2019 and his understanding was the apartments were deemed unlivable two years prior to the purchase.

Chair Warnock and Ms. Cline discussed the availability of parking in relation to the number of units. There are forty parking spots which accounts for the two units in the basement.

No public comments were provided.

Mr. Sterndale confirmed with Ms. Cline that parking is driven by the number of units and that the planning board takes into account units rather than bedrooms in their considerations. Mr. Sterndale was concerned that granting a variance might mitigate a prior site board review, however, Ms. Cline felt an approval would not inhibit actions taken by the planning board. She also showed little concern since there would be no changes to the exterior features of the building.

Chris Sterndale MOVED to close the Public Hearing. Vice Chair Niman SECONDED the motion and it PASSED 4-0

Vice Chair Niman did not agree with some of the points submitted by the applicant, specifically in the spirit and the intent of the ordinance, which clearly states no new basement dwelling unit or unit partially below grade shall be permitted at any residence, multi-unit, or mixed use with residential usage [...]. Chair Warnock felt the building was purchased “as is” and since there were no existing basement apartments it is not a hardship. Vice Chair Niman felt the hardship claim of no alternative use for the space is inaccurate since the space is usable, just not usable to rent out and monetize. Board members agreed the space could still be used in other ways. Mr. Sterndale felt that the intent of the ordinance as Audrey presented it was accurate with the word “new” verses “none shall be permitted,” however, he felt the hardship criteria was not met. Vice Chair Niman felt the spirit and intent of the new ordinance was to minimize or reduce density and to ensure no additional students were living in the zones by prohibiting or regulating the number of units. For this reason, he felt five additional bedrooms may not be consistent with the spirit of the ordinance. Ms. Schwartz did not feel some of the criteria, particularly the hardship, was fully articulated. She agreed the zoning was changed for a specific reason. Vice Chair Niman felt that the installation of fire sprinklers and evacuation devices was a good thing to do, but the improvements do not entitle one to additional occupancy and does not meet the substantial justice criteria.

Chair Warnock made a MOTION that the Zoning Board of Adjustment DENY a petition submitted by Eckman Construction Company, Bedford, New Hampshire, on behalf of Torrington Malden One LLC, Boston, Massachusetts, for an APPLICATION FOR VARIANCE from Article XII.1, Section 175-55(8) of the Durham Zoning Ordinance to permit the construction of two apartment units within the basement of an apartment building in the Professional Office Zoning for failure to meet the spirit of the ordinance, substantial justice, and unnecessary hardship criteria. Vice Chair Niman SECONDED the motion and it PASSED 4-0 by roll call vote: Chris Sterndale - Yes, Neil Niman – Yes, Leslie Schwartz – Yes, and Micah Warnock – Yes.

Chair Warnock let the applicants know they have 30 days to appeal.

- B. **PUBLIC HEARING** on a petition submitted by 60 Main Street RE, LLC, (Peter Murphy), Newburyport, Massachusetts, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-42(B10) of the Durham Zoning Ordinance to permit the number of bedrooms within an apartment unit to be greater than two. The property involved is shown on Tax Map 109, Lot 104-0-1-4, is located at 58 Main Street, and is in the Central Business Zoning District.

Ms. Schwartz recused herself from the case due to a conflict of interest and left for the evening. The board was reduced to three members, and the applicants chose to proceed with their case.

Mike Sievert of Horizons Engineering and property owner Pete Murphy explained the background of 58 Main Street, also known as 60 Main St. The original property includes a restaurant and campus store that were subdivided into condominiums. Mr. Murphy owns the condominiums while another party owns the restaurant and store. Mr. Sievert stated the plan is to convert two of the two-bedroom units currently occupied by seven students into six units. He stated the building, which has served as a student rental for 50+ years, contains a “L” shaped hallway for common access to the restaurant, store, and condominiums.

Mr. Sievert spoke to the five criteria of the variance. He stated the proposal is not contrary to the public interest since the units are allowed in the central business district and have historically contained more than one occupant. Regarding the spirit of the ordinance, they are preserving the historic multiple occupancy of the building while also reducing the number of occupants. He stated the change will provide better space flow, give each unit better light, and improve the overall conditions of the building. Mr. Sievert stated there is no public benefit by not granting the variance and reaffirmed that they are reducing the density of students by creating 6 units. Regarding substantial justice, there will be no physical changes to the exterior or the building’s appearance, and property values will not be diminished. In speaking to the hardship criteria, Mr. Sievert stated the access pathway to the spaces is limited by the size, shape, and layout of the narrow “L” hallway and stairway. The current layout provides limited access to a landlocked back storage area located behind the units.

Pete Murphy apologized to the Board for presenting a plan with 7 units instead of 6 and a plan that appears to be blocking windows while it was meant to show the addition of windows. He explained the purpose of the renovation is to decrease the number of attendants while overall enhancing the interior to provide better functionality and attract a higher caliber of tenants. Mr. Murphy also stated that single bedrooms are more desirable post COVID, and the reconfiguration will better serve the demand.

There were no public comments and no further questions from the board.

Mr. Sterndale MOVED to close the Public Hearing. Vice Chair Niman SECONDED the motion and it PASSED 3-0.

Vice Chair Niman felt the application met all the criteria and he was in support of it. He believed that the proposal was in line with the spirit and intent of the ordinance to reduce the number of tenants. Also, he pointed out the construction is in an existing building and involves reconfiguring the building, which will improve the quality of life for Durham residents. Chair Warnock applauded the renovations and felt it may reduce the probability of problems that can occur with multiple people living in a unit. Audrey Cline explained the purpose behind the town's decision for reducing four-five bedrooms down to two bedrooms was to make downtown apartments less attractive to students from a marketing standpoint. Mr. Sterndale stated he was comfortable with the extra people per unit and felt there was no gain to the public by enforcing the ordinance, but he did suggest capping it at six bedrooms.

Mr. Sterndale made a MOTION that the Zoning Board of Adjustment APPROVE a petition submitted by 60 Main Street RE, LLC, (Peter Murphy), Newburyport, Massachusetts, for an APPLICATION FOR VARIANCE from Article XII, Section 175-42(B)(10) of the Durham Zoning Ordinance to permit up to six bedrooms within an apartment unit at 58 Main Street. Vice Chair Niman SECONDED the motion and it PASSED 3-0 by roll call vote: Chris Sterndale – Yes, Neil Niman – Yes, and Micah Warnock – Yes.

VI. Other Business: None provided

VII. Approval of Minutes: May 10, 2022

Audrey Cline made the following revision: On page 2, line 4 replace the word “gavel” with “gravel”.

Vice Chair Niman MOVED to approve the May 10, 2022, minutes with the revision, 2nd by Mr. Sterndale and it PASSED 3-0.

VIII. Adjournment

Mr. Sterndale MOVED to adjourn the meeting, 2nd by Vice Chair Niman and it PASSED 3-0.

Adjournment at 8:19pm
Karyn Laird, Minutes taker

Mark Morong, Secretary