

These minutes were approved at the September 12, 2023 meeting.

ZONING BOARD OF ADJUSTMENT
Tuesday, August 22, 2023, at 7:00 p.m.
Second Floor Conference Room, Town Hall
8 Newmarket Road, Durham, NH
MINUTES

MEMBERS PRESENT: Micah Warnock, Chair
Neil Niman, Vice Chair
James Bubar
Kevin Lemieux
Joseph Warzin, Alternate

MEMBERS ABSENT: Mark Morong, Secretary
Leslie Schwartz, Alternate

OTHERS PRESENT: Audrey Cline, Zoning Administrator
Graham Camire
Frank Silva
John E. Lyons Jr. Esq.

I. Call to Order

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

II. Roll Call

III. Approval of Agenda

No amendments were made to the agenda.

IV. Seating of Alternates

Joseph Warzin was seated as a voting member.

V. Public Hearings:

- A. **CONTINUED DELIBERATION** on a petition submitted by Frank Silva & Graham Camire, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article II Definitions Section 175-7 of the Durham Zoning Ordinance to allow seating on an adjacent lot as an accessory use to their principal restaurant. The property involved is shown on Tax Map 108, Lot 16, is located at 39-41 Main Street, and is in the Central Business Zoning District.

Chair Warnock stated that this is not a Public Hearing so no applicant input would be taken. He mentioned that all of the members, with the exception of Member Lemieux, were at the meeting with the Town Attorney, so he asked the Board what they would like to do now.

Member Bubar stated that he would like to discuss the recent memo from the Town Attorney. He passed out a handout of excerpts from the Zoning Ordinance. He stated that he doesn't have a problem with the idea that the seating is a principal use of the restaurant. However, if the Board says it is a principal use, then they can pass on a variance, and he doesn't think that is right. He believes that the variance should be for principle use to allow for external seating on an adjacent property that has been leased. He prefers narrow definitions. He is also wondering which property the variance is going to.

Chair Warnock stated that the concern is what happens when one of the properties sell. If they give a variance for seating to the second lot, that goes with the lot even if it sells. If the business changes, it becomes an accessory use, not a principal use.

Member Lemieux stated that if they give a variance, then future cases will need to come before the Zoning Board for variances.

Vice Chair Niman stated that in the meeting with the Town Attorney, the advice given was that restaurant seating is permitted on both of these lots, hence they do not need a variance for seating on lot 2. It doesn't matter where the kitchen is. The Attorney's advice was to dismiss the case because they do not need a variance. They just need site plan approval from the Planning Board.

Vice Chair Niman believes that Member Bubar is saying that restaurant seating is not a principal use on lot 2 because there is an apartment building there. The seating is an accessory use to the apartment building. So according to Member Bubar, the applicants need a variance.

Member Bubar stated that he still likes the concept that it is principal use to the restaurant – an extension of the principal use. As long as it is on leased property, it can be a variance to both the restaurant and the adjacent property. The Planning Board may send it back to the Zoning Board if they dismiss the case. This use has been there for 3 years, the Boards just need to figure out the right way to approve it.

Vice Chair Niman mentioned that the Town Attorney stated that if the Board was not going to dismiss the case, they would be wise to re-open the Public Hearing.

Member Warzin stated that he thinks it make sense to vote first on what the Town Attorney recommended.

Chair Warnock MOVED to dismiss the case, SECONDED by Member Warzin.

Discussion:

Member Lemieux feels it would be better if the applicants did a lot-line adjustment.

Member Bubar's concern with the dismissal is that it doesn't give the applicant any support for their application with the Planning Board.

Chair Warnock stated that he does not like the idea of approving a variance for the sake of creating a variance when they have had counsel that this is a primary use and a variance is not needed.

Member Bubar stated that he just doesn't feel that it complies with the definition of principal use.

Vice Chair Niman stated that it is not that the Board is turning down their application for a variance, but that they do not need a variance. He feels the Planning Board would not send it back to the Zoning Board. He is wondering if they could re-open the Public Hearing to hear from the applicant what their preference is.

Zoning Administrator Cline mentioned that there would have to be a re-noticing if the Public Hearing were re-opened. It was decided that the Board would not re-open the Public Hearing.

Chair Warnock stated that they need to follow through with this motion, and if it fails, they can then go to the next step of creating a variance.

Member Lemieux stated that the variance doesn't really apply to the residential lot. He feels that it is more of a Planning Board issue.

Vice Chair Niman suggested that they amend the motion to say that "restaurant seating is allowed on lot 2 and permitted in the Zone, as per the Town Ordinance; and hence, the Board does not believe the applicants need a variance and as a result, the Board dismisses the case."

Chair Warnock MOVED to withdraw his original motion, SECONDED by Member Warzin.

Vice Chair Niman MOVED that restaurant seating is allowed on lot 2 and is permitted within the Zone. Hence, the Zoning Board does not believe the applicants need a variance, and as a result, the Board dismisses the case due to the fact that seating is a primary use within the Zone. SECONDED by Member Lemieux, and PASSED 5-0-0.

VI. Other Business

VII. Approval of Minutes: None

VIII. Adjournment

Vice Chair Niman MOVED to adjourn the meeting, SECONDED by Member Bubar, and PASSED 5-0-0.

Adjournment at 7:33 p.m.

Minutes submitted by Administrative Assistant, Karen Edwards.