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February 9, 2024

Durham, NH Zoning Board of Adjustment
8 Newmarket Road
Durham, NH 03824

RE: 12 Schoolhouse Lane (Tax Map 108, Lot 73-1)
Opposition to Variance Requests

Chairman Warnock and Members of the Durham Zoning Board of Adjustment:

This office represents Holly Neiweem. I write to express Ms. Neiweem's respectful opposition to two variance applications submitted by M.D. Shaad Mahmud and Erika Nauman Gailat (the "Applicants") with regard to 12 Schoolhouse Lane (Tax Map 108, Lot 73-1) (the "Subject Property"). More specifically, the Applicants have requested variances from (1) Article XII.1, Section 175-53 (Table of Uses) of the Durham Zoning Ordinance (the "DZO") in order to construct a four-unit multi-family structure in the Residence A Zoning District, where multi-family uses are not permitted (the "Use Variance"); and (2) Article XII.1, Section 175-54 (Table of Dimensions) of the DZO in order to permit 9,463 sf of lot area per dwelling unit where 20,000 sf is required (the "Density Variance" or, together with the Use Variance, the "Variances"). For the reasons set forth herein, Ms. Neiweem—as the owner of 13 Old Landing Road (Tax Map 108, Lot 57), which directly abuts the Subject Property—requests that the Board deny the Variances.

As set forth in the often-cited New Hampshire Practice series, "It is not easy to obtain a variance and it should not be. The zoning ordinance in every community was voted upon by the legislative body and should not be lightly varied." Peter J. Loughlin, *New Hampshire Practice: Land Use Planning and Zoning* (4th Ed.), § 24.21. With that in mind, it is clear that the variances should be denied, as the applications do not satisfy any of the statutory requirements for a variance set forth in RSA 674:33.

I. Variance Standard

Under New Hampshire law, the Board may authorize a variance from the terms of the DZO if:

1. The variance will not be contrary to the public interest;
2. The spirit of the Ordinance is observed;
3. Substantial justice is done;
4. The values of the surrounding properties are not diminished; and
5. Literal enforcement of the provisions of the Ordinance would result in unnecessary hardship.

RSA 674:33, I(a)(2).

II. Analysis

The Board should deny the Applicants' variance requests because they do not satisfy the five criteria of the variance standard.

a. Granting the variances will be contrary to the public interest.

The New Hampshire Supreme Court has held that "to be contrary to the public interest . . . the variance must 'unduly, and in a marked degree' conflict with the ordinance such that it violates the ordinance's 'basic zoning objectives.'" Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581 (2005) (quotation omitted). Applying these principles, the Court has established that a variance may be deemed to violate an ordinance's basic zoning objectives and thus be contrary to the public interest under two circumstances: (1) where "granting the variance would 'alter the essential character of the neighborhood'"; or (2) where "granting the variance would threaten the public health, safety, or welfare." Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011) (quotation omitted). Both of the Applicants' requested variances are contrary to the public interest because they would alter the essential character of the neighborhood.

Contrary to the Applicants' argument that their proposal is consistent with the character of the neighborhood is, respectfully, inaccurate. The neighborhood features, for the most part, single family residences (or structures that are consistent in appearance with single family residences) that do not exceed two stories in height. The materials that the Applicants have submitted to the Board are consistent with this fact. Specifically, the Applicants attached to their application as Exhibit E sixteen property cards reflecting details of various properties, which are notable in several regards. First, only three of the sixteen properties are in the Residential A zone (one of which being the Subject Property). Seven of the properties are located on Main Street, Dover Road, or Newmarket Road, solidly in the Church Hill or Courthouse zoning districts and outside of the neighborhood in which the Subject Property is located. And, of course, the Applicants chose not to include numerous parcels featuring single-family homes, in particular those along Old Landing Road. Putting all of that aside, the vast majority of the properties the Applicant included in Exhibit E—including the three referenced in the Applicant's

February 7, 2024 supplemental submission (4 Old Landing Road (108-49), 5 Old Landing Road (108-61), and 22 Dover Road (108-62))—feature structures that appear no different from a typical single-family home. The fact that a number of the properties are utilized for student housing (with many presumably featuring individual bedrooms and shared common areas) does not change this reality. In addition, as noted in the community letter dated January 8, 2024, all properties on Old Landing Road, from 6 Old Landing to 17 Old Landing, are owner occupied.[1]

For these reasons, the area cannot properly be described as "transitional," as the Applicants suggest. Moreover, the fact that nearby parcels are zoned differently from the Subject Parcel does not mean that there is no basis for enforcing the applicable zoning provisions—the Applicant's argument, if adopted by the Board, would create uncertainty for owners of parcels located along the boundaries of zoning districts in a manner that could have a negative impact on community trust and property values throughout the City as a whole.

The Applicants do not propose to construct a structure that—consistent with the structures in existence on other parcels in the neighborhood—is similar in appearance to a single-family home. Rather, they propose to construct a three-story, four-unit structure that is very different from the vast majority of the other structures in the area. The proposed structure will stand out from the other structures in the area in a manner that will greatly alter the essential character of the neighborhood. In particular, the structure will be significantly larger and taller than the majority of the other nearby structures. For all of these reasons, granting the variances will alter the essential character of the neighborhood and, therefore, be contrary to the public interest.

b. The variances do not observe the spirit of the DZO.

The New Hampshire Supreme Court has stated, "With respect to the first and second criteria, we have recognized that '[t]he requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance.'" Perreault v. Town of New Hampton, 171 N.H. 183, 186 (2018) (quoting Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007)). Here, as set forth above, a decision to grant either of the requested variances would be contrary to the public interest. Accordingly, the variances do not observe the spirit of the DZO.

In addition, the requested variances would run counter to the spirit and intent of the ordinance provisions in question.

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[1] The Applicant suggests in its February 7, 2024 submission that this statement from the community letter was inaccurate because 4 Old Landing Road is a multi-family use. However, it is clear that the community letter refers to the properties "from 6 Old Landing to the last property at 17 Old Landing[.]" In any event, as noted above, the structure on 4 Old Landing Road is similar in appearance to a large single-family home.

First, restrictions on the type of use permitted in particular zones are generally intended to ensure that the uses in question are consistent with or otherwise complement one another. As set forth above, the Applicants' proposal is not consistent with, or complementary to, the other uses in the neighborhood. Accordingly, a decision to grant the Use Variance would not observe the spirit of the DZO.

Similarly, the purpose of density restrictions is typically to avoid overcrowding and the problems that come alongside it, including traffic. Here, the Applicants openly acknowledge that "vehicular and pedestrian traffic has increased substantially on Schoolhouse Lane" and that vehicles parked on Schoolhouse Lane "at times block[] the driveways of local residence[.]" Applicants' Memorandum, at 2. The fact that traffic already presents a problem on Schoolhouse Lane does not support a decision by the Board to disregard the density restrictions in the DZO. Rather, existing traffic problems on Schoolhouse Lane make it even more important that the Board enforce density restrictions in order to avoid exacerbation of the problem. A variance to allow a use that will generate more traffic than what would be generated by permitted uses, in an area where traffic already presents a problem, would not observe the spirit of the applicable density regulations.

c. A decision to grant the variances will not do substantial justice.

The standard for determining whether substantial justice will be done requires weighing the benefit to an individual against a gain to the general public: any loss to the individual that is not outweighed by a gain to the general public is an injustice. Harborside, 162 N.H at 515. Here, while Ms. Neiweem acknowledges that there would be some degree of loss to the Applicants if they were not permitted to move forward with their proposal, that loss would be outweighed by the gains to the general public associated with a denial of the variance, including the avoidance of (1) exacerbation of existing traffic problems on Schoolhouse Lane; (2) the construction of a structure that is inconsistent with the character of the neighborhood; (3) potential impacts on nearby property owners' privacy and quiet enjoyment—for example, due to noise; and (4) negative impact on nearby property values. In addition, as mentioned above, a decision to deny the variance would preserve community trust in the enforceability of zoning restrictions with regard to properties along the edges of zoning districts. Accordingly, substantial justice is done by denying, not promoting, the requested variances.

Contrary to the Applicants' arguments, a decision to deny the variances would not constitute an unlawful taking of the Applicants' property. It is well-established under New Hampshire law that "[l]imitations on use create a taking if they are so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the property and preventing the private owner from enjoying worthwhile rights or benefits in the property." Huard v. Town of Pelham, 159 N.H. 567, 574 (2009). The DZO's restrictions on the use of parcels in the Residence A district very simply does not rise to this level. As is evident from the

DZO Table of Uses, there are numerous other uses to which the Subject Property could be put, in compliance with the terms of the DZO, were the variances to be denied. Those uses include, among others, a single-family home, senior housing (single-family, duplex, or multiunit), or an adult day care facility.

d. Values of surrounding properties will be diminished if the variance is granted.

A decision to grant the requested variances would very likely have an adverse impact on surrounding property values to the extent that such a decision would (1) allow the construction of a building, and a use of the Subject Property, which is inconsistent with the character of the neighborhood, exacerbates existing traffic problems, produces more noise than permitted uses, and impacts neighboring property owners' privacy; and (2) demonstrate an unwillingness on the part of the ZBA to enforce zoning restrictions along the border of zoning districts. In addition, the Applicants' proposal raises significant concerns regarding drainage and water runoff, particularly in light of the nearby steep slopes. Based on the Applicants' proposed drainage, Ms. Neiweem anticipates that excess runoff from the Subject Parcel will run to her property in a manner that will negatively impact her property value.

e. Literal enforcement of the provisions of the DZO would not result in an unnecessary hardship to the Applicants.

The hardship standard for variance applications is codified in RSA 674:33. To satisfy this requirement, the Applicant must show that, "owing to special conditions on the property that distinguish it from other properties in the area: [n]o fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one." RSA 674:33, I(b)(1) (internal numbering omitted).

i. Even assuming there are special conditions of the Subject Property, those conditions are not relevant to the ordinance provisions in question or the Applicants' requested relief.

The Applicants argue that the relevant special conditions of the Subject Property include (1) the fact that it is in excess of the 20,000 sf minimum lot size in the Residence A district; and (2) it is located in a high-density neighborhood. Even assuming, for the sake of argument, that these are in fact special conditions of the Subject Property which can be considered in connection with the hardship standard, that standard is nonetheless not satisfied because there is

a direct and significant relationship between the public purposes of the use and density restrictions and their application to the Subject Property.

More specifically, the fact that the Subject Parcel is larger than the 20,000 sf minimum lot size applicable in the Residence A district does not mean that there is no reason to enforce the 20,000 sf *per dwelling unit* requirement. The 20,000 sf lot size requirement and the 20,000 sf per dwelling unit requirement are separate and distinct for a reason. Put differently, it is not logical to conclude that there is no reason to enforce the 20,000 sf per dwelling unit requirement to lots that exceed 20,000 sf. Accordingly, argument does not support a finding of hardship respecting either of the Applicants' requested variances.

Similarly, assuming for the sake of argument that the Applicants are correct that the Subject Property is located in a high-density neighborhood, that does not make it such that there is no reason to enforce the use and density regulations set forth in the DZO. In fact, as noted above and given existing problems associated with the current density of the area (e.g. problems associated with traffic), this special condition would actually support strict enforcement of the DZO's density and use regulations in order to avoid exacerbation of those problems.

In light of the foregoing, granting the requested variances would frustrate the purposes of the use and density restrictions set forth in the DZO. Whatever hardship may exist under this requirement, it is not unnecessary to the purposes of the DZO. Accordingly, the Applicants' cannot satisfy the hardship standard, and the variances should be denied.

ii. The proposed use is not a reasonable one.

For all of the reasons set forth above, the Applicants' proposed use is not a reasonable one.

III. Conclusion

For the foregoing reasons, Ms. Neiweem respectfully requests that the Board deny the Applicants' variance requests.

Sincerely,

/s/ Megan C. Carrier

Megan C. Carrier, Esq.