



**TOWN OF DURHAM
ZONING BOARD OF ADJUSTMENT**
8 NEWMARKET RD
DURHAM, NH 03824
PHONE: 603/868-8064
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Town of Durham

MAY 16 2025

Planning, Zoning
and Assessing

paid
\$506
#2052

VARIANCE

Prior to seeking a variance, the property owner must have been denied a building permit by the Building Inspector or denied an approval by the Planning Board.

Name of Applicant 9 Madbury Road, LLC

Address: 9 Madbury Road, Suite 108, Durham, NH 03824

Phone # (203) 293-6315

Email: management@universitydowntown.com

Owner of Property Concerned same

(If same as above, write "Same")

Address: same

(If same as above, write "Same")

Location of Property: 9 Madbury Road

(Street & Number)

Tax Map & Lot number Map 106, Lot 39

A Variance is requested from Article(s) _____ Section(s) 175-42.B.10 of the Zoning Ordinance to permit:

residential dwelling units with four bedrooms where two is maximum permitted.

All applications must include a statement explaining how the applicant meets each of the five (5) statutory requirements for granting a variance, (A) through (E), which are found on page 2. The Zoning Board of Adjustment may consider the variance application incomplete if these five statements have not been addressed. In addition all applications must be accompanied by adequate plans and exhibits.

Owner Authorization and Signature:

1. I/we do hereby authorize Hoefle, Phoenix, Gormley & Roberts, PLLC to file this application with the Zoning Board of Adjustment, to appear before the Board and to act on my/our behalf.
2. I/we do hereby authorize members of the Zoning Board of Adjustment and/or staff to enter upon the property on the afternoon prior to the Zoning Board meeting for purposes of reviewing this application.
3. To the best of my/our knowledge the information contained in this application is complete and accurate.

Owner's Signature(s):

Date:

5/14/25

Date:

RSA 674:33 Powers of the Zoning Board of Adjustment:

I(a) The zoning board of adjustment shall have the power to:

(1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and

(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

- (A) The variance will not be contrary to the public interest;**
- (B) The spirit of the ordinance is observed;**
- (C) Substantial justice is done;**
- (D) The values of surrounding properties are not diminished; and**
- (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

(b)(1) For purposes of this subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (A) No 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**
- (B) The proposed use is a reasonable one.**

(2) If the criteria in subparagraph (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

EXPIRATION PERIOD FOR VARIANCES

Any Variances granted shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

APPLICATION OF 9 MADBURY ROAD, LLC

9 Madbury Road
Durham Tax Map 106, Lot 39

APPLICANT'S NARRATIVE

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I. THE PROPERTY:

The applicant, 9 Madbury Road, LLC owns the mixed commercial/residential building at the intersection of Madbury Road and Petty Brook Lane. The four-story building was built in 2012 and consists of commercial uses on the ground floor and residential units on the second and third floors. The fourth floor, which previously consisted of office space, is presently vacant. On April 23, 2025, the Planning Board granted the applicant a Conditional Use Permit to convert the fourth floor to residential use. A copy of the CUP application and the Planning Board's Notice of Decision are attached hereto.

The applicant desires to convert the entire fourth floor to residential use, as the historically weak demand for office space has been significantly exacerbated post-pandemic and the fourth floor is not conducive to any other commercial use. In general, the maximum permitted number of bedrooms in any dwelling unit in a mixed-use building is four. Section 175-55.F. This property, however, is in the Central Business District, where section 175-42.B.10 limits the number of bedrooms any dwelling unit within a mixed use with residential building or development to a maximum of two (2) bedrooms. The existing floor plate and layout of the fourth floor does not lend itself to two bedroom apartments for many reasons, most notably the non-traditional depth of the building, which would create significant windowless interior space in a two bedroom configuration. The applicant is proposing a total of five apartments, with four having four bedrooms and one having two bedrooms.

The existing apartments on the second and third floor are all four or more bedroom units. This configuration has had no negative effects on the neighborhood or the Central Business district, and the introduction of four additional non-compliant apartments will not either. Due to the configuration of the floorplate of the building, two bedroom apartments would be extremely inefficient. The corridor has limited access points for doorways due to mechanical rooms, -laundry room, elevator and stairwells, limiting the applicant to five apartments. Compliance with the two-bedroom limitation (which would not apply in any other zone in Durham) would create a floorplan with long narrow apartments with significant windowless interior space or unusually large (approximately 10'x20') bedrooms. Furthermore, the proposed floor plan seamlessly integrates the existing HVAC and electrical panels and any deviation would require an extensive redesign.

Accordingly, the applicant respectfully requests a variance from section 175-2.B.10 to permit four (4) four bedroom apartment units. Notably, the Planning Board, understanding the constraints imposed by the existing conditions, specifically

contemplated in its CUP approval that, should this variance be granted, no further Planning Board approvals would be required.

II. VARIANCE CRITERIA:

The applicant believes the within Application meets the criteria necessary for the Board to grant the requested variance.

Granting the requested variances will not be contrary to the spirit and intent of the ordinance nor will it be contrary to the public interest. The "public interest" and "spirit and intent" requirements are considered together pursuant to Malachy Glen Associates v. Chichester, 152 NH 102 (2007). The test for whether or not granting a variance would be contrary to the public interest or contrary to the spirit and intent of the ordinance is whether or not the variance being granted would substantially alter the characteristics of the neighborhood or threaten the health, safety and welfare of the public.

The essentially mixed commercial/residential characteristics of the neighborhood would not be altered in any manner whatsoever by this proposal. The proposed residential use is consistent with the building's existing use and has been approved by the Planning Board. But for the unique characteristics of the building design, being essentially square and with the fourth floor originally designed to accommodate office space, multiple two bedroom apartments accommodating the same number of bedrooms and tenants would be permitted under the ordinance. The applicant is simply proposing to spread the number of bedrooms out over fewer apartments.

Were the variance to be granted, there would be no change in the essential characteristics of the neighborhood, nor would any public health, safety or welfare be threatened.

Substantial justice would be done by granting the variance. Whether or not substantial justice will be done by granting a variance requires the Board to conduct a balancing test. If the hardship upon the owner/applicant outweighs any benefit to the general public in denying the variance, then substantial justice would be done by granting the variance. It is substantially just to allow a property owner the reasonable use of his or her property. In this case, there is no benefit to the public in denying the variance that is not outweighed by the hardship upon the owner. Strict compliance with the two-bedroom limit would result in a grossly inefficient and wasteful floor plan with massive bedrooms and/or excessive windowless interior space. Denying the variances would serve no public purpose that is not significantly outweighed by the resulting detriment to the applicant.

The values of surrounding properties will not be diminished by granting the variance. The existing residential use at the building consists entirely of four or more-bedroom apartments. This configuration of the permitted residential use has not had any negative effects on the neighborhood and the introduction of four additional non-

compliant units would not be expected to either. The values of the surrounding properties will not be negatively affected in any way.

There are special conditions associated with the property which prevent the proper enjoyment of the property under the strict terms of the zoning ordinance and thus constitute unnecessary hardship. The existing built environment of the property is a special condition that distinguishes it from neighboring properties. As noted above, the property was developed for office space to occupy the fourth floor. The existing floor plan and configuration of the building will not lend itself to the two bedroom per unit limit.

The use is a reasonable use. Residential use on the fourth floor of this building is permitted as the applicant has obtained a CUP from the Planning Board for such use. Where a use is permitted, it is reasonable. *Vigeant v. Hudson*, 151 NH 747 (2005).

There is no fair and substantial relationship between the purpose of the ordinance and its application to this particular property. The purpose of the two bedroom restriction in the CBD is presumably to encourage commercial development or to encourage more affordable residential development. There is no fair and substantial relationship between the purpose of this restriction and its application to this property. Demand for office space has been historically weak in this location and this has been exacerbated post-pandemic. No other commercial uses are appropriate for a fourth floor site. Apartment units with bedrooms at the size that would result if the applicant were to comply with the restriction would most likely have to be marketed as luxury dwellings to accommodate their unusually large size.

III. Conclusion.

For the foregoing reasons, the applicant respectfully requests the Board grant the variance as requested.

Respectfully submitted,

Dated: 5-14-2025

By: *Christopher P. Mulligan*
Christopher P. Mulligan Esquire

