

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

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

MEMBERS PRESENT: Chris Sterndale
Tom Toye
Micah Warnock
Sean Starkey
Peter Wolfe, alternate

OTHERS PRESENT: Audrey Cline, Code Administrator
Victoria Parmele, Minutes taker

I. Call to Order

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

II. Roll Call

The roll call was taken.

III. Seating of Alternates

Chair Starkey said Mr. Wolfe would be a voting member for the meeting,

IV. Approval of Agenda

Chair Starkey MOVED to approve the Agenda as submitted. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0.

V. Election of Officers

Sean Starkey MOVED to nominate Chris Sterndale as Chair of the Durham Zoning Board of Adjustment. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0.

Sean Starkey MOVED to nominate Tom Toye as Vice Chair of the Durham Zoning Board of Adjustment. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0.

Sean Starkey MOVED to nominate Micah Warnock as Secretary of the Durham Zoning Board of Adjustment. Tom Toye SECONDED the motion and it PASSED unanimously 5-0.

VI. Public Hearings:

- A. **CONTINUED 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 for this application and left the table.

Chair Sterndale reopened the Public Hearing. He noted that at the April meeting, there had been an open legal question about whether it was possible for the applicant to surrender/abandon all of the past variances that had been granted. He said since then, the Board's attorney had indicated that there was no reason the ZBA couldn't grant a new variance contingent upon abandonment of the past variances.

Mr. Wolfe asked how specifically the old variances could be abandoned. Mr. Starkey said they could do this by stating in the approval that the variances would be abandoned. There was discussion that as a contingency of approving the variance, it would be good if Mr. Toye could draft a document stating that the past variances would be abandoned.

Mr. Toye agreed to work this out with Ms. Cline, and it was noted that Chair Sterndale could sign the document.

Chair Sterndale MOVED to close the Public Hearing. Sean Starkey SECONDED the motion and it PASSED unanimously 5-0.

Micah Warnock MOVED to approve the 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, with the contingencies that Mr. Toy abandons the past variance approvals in regard to use. 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 Sean Starkey SECONDED the motion and it PASSED unanimously 5-0.

- 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 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.

Attorney Tim Phoenix represented the applicant, and asked the Board to continue the Appeal of Administrative Decision. He said if the variances the applicant was requesting in the next Agenda item were granted, the Appeal of Administrative Decision would be dropped.

The Board agreed to continue the Application for Appeal of the Administrative Decision.

- C. **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.

Attorney Phoenix provided details on the existing building square footage and lot coverage, as compared to what was proposed that necessitated two of the variances. He said the applicants proposed to remove the building and build a new one, and said there would be a 133% increase over what existed now. He said the new building would be moved over a bit to create some views, and said a second floor was being added.

He said the existing home was old and needed to be removed. He noted that there were small cottages in the area that over time had been removed and replaced with good size houses, and said a number of variances had been granted for these properties in the past, including recently. He said in addition to the new home there would be a new state of the art onsite Clean Solutions septic system that would be an improvement environmentally. He said the big issue with this application was the second floor.

Steve Riker from Ambit Engineering provided details on other changes proposed on the site, including how the patio area and driveway areas would be blended. He said the Clean Solutions septic system that was proposed would use the best technology available. He said there were no plans to remove any trees, and said some minor grading would be needed between the proposed home and Little Bay in order to accommodate the leachfield. He said a wetland permit, shoreland permit and septic design were currently being reviewed by NHDES.

He explained that a Conditional Use permit was needed because of the structures proposed within the shoreland protection overlay district, and said the Conservation Commission had reviewed the application and recommended that the Planning Board approve it. He said the Conditional Use application was heard by the Planning Board on

April 25th, and said there was a public hearing on the Planning Board's agenda for May 9th.

Attorney Phoenix said a variance was needed to allow an increase in the footprint, which was already nonconforming at 16%, and which would be going up to 21%. He stated again that the big variance being requested was the proposed increase in usable building space. But he said this should be considered within the context of the area, and he noted an aerial photo that demonstrated this.

He said a variance was being requested to allow an 11.5 ft front yard setback when 30 ft was required. He explained that the building had been pushed forward so that the back of the home would be further from the water than the existing home. He noted that a lot of the houses on Cedar Point Road were fairly close to the lot line. He also said the sideyard setback on the west would be reduced from 8 ft to 6 ft with what was proposed.

Attorney Phoenix said there would be no increase in non-conformity with respect to parking in the front yard. He said the property would be more conforming with respect to the east side setback. He said an important thing to note was that with what was proposed, there would be an overall reduction in lot coverage from 34.1% to 26.4%, which would make the property more conforming. He also said the home will be sited further back from the water. He said the proposed average building height of 28.6 ft would be well under the height limit.

Attorney Phoenix reviewed the 5 variance criteria and how they were met with the application. He said the first step in the ZBA's analysis was to determine whether granting a variance was not contrary to the public interest and was consistent with the spirit and intent of the ordinance. He said these factors were considered together pursuant to *Malachy Glen Associates, Inc. v. Town of Chichester, (2007)* and said the ZBA must determine whether granting the variance would unduly and to a marked degree conflict with the ordinance such that it violated the ordinance's basic zoning objectives

He said the purpose of the ordinance was to promote, health, safety welfare, He said Cedar Point Road homes had been replaced by year-round homes over the years, and said considering this, and looking at the specific purpose of the ordinance and the Master Plan, a new year-round home with an advanced on-site septic system did reflect these purposes. He said the design would protect natural and scenic resources, would conserve overall open space on the site, and also said the amount of impervious surface would be substantially reduced. He said the existing home didn't fit the character of the area that had grown up around it, and said the building that was proposed would fit better, and wouldn't threaten health, safety or welfare, for the reasons stated.

Attorney Phoenix said granting the variances would not decrease the value of surrounding properties. He said right now there was a poor-quality home on the property, and said the new home would be tastefully designed, would meet the code and would be an improvement from an environmental perspective. He said the value of the applicant's property would increase and said the value of other properties would not be decreased.

Attorney Phoenix reviewed the 3-part test for determining whether the hardship criterion was met. He the special conditions of the property were that the lot was a prior nonconforming lot, which was much smaller than the required lot size. He reviewed the other nonconforming aspects of the lot. He said there was no fair and substantial relationship between the ordinance provisions and their application to the property.

He said the front yard and sideyard setbacks would not be changing that much, and said they were consistent with setbacks in the era. He also said the overall impervious surface impact would be decreasing with what was proposed, and noted that the increase in usable area was occurring because there would be 2 stories. He said the proposed use was reasonable, noted that it was a permitted use, and also said the house design was reasonable.

Attorney Phoenix said granting the variances would do substantial justice to the applicants and would not harm the public. He said the applicants had the right to reasonable use of their land, and said allowing a decent home with 2 floors and a new septic system was fair and reasonable. He said denying this wouldn't benefit the public in a way that would outweigh the hardship to the applicant.

Mr. Toye noted the Conditional Use application that was currently before the Planning Board. Mr. Riker explained that the permit was needed for the driveway, retaining walls, septic system, etc., but not for the house. It was noted that a shed currently on the property would be removed.

Chair Sterndale asked if reasonable relief could be granted for a house that was smaller than what was proposed. Attorney Phoenix said yes, but said the applicant didn't think the variances being requested were unreasonable, and he spoke further on this. Chair Sterndale noted that most of the starting points for other variance applications on Cedar Point Road, in terms of the amount of square footage, were considerably smaller than the 1,400 sf with this application. Attorney Phoenix said the 700-sf lot that had been noted was on a smaller lot. There was further discussion.

Mr. Heiderscheidt spoke about possibly putting in a smaller house, in the middle of the lot in order to meet the setbacks, but said this would have blocked neighbors' views. He said it was thought that the aesthetics were better for the neighborhood with the proposed footprint. Attorney Phoenix stated again that it was the second floor that was causing such an increase in square footage.

Chair Sterndale asked if there were any members of the public who wished to speak in favor of or against the application.

Mike Cleary, 26 Cedar Point Road, said he'd lived on Cedar Point Road since 2002, and said there had been various changes to the neighborhood over that time. He said he was in favor of the proposed house design and said it was appropriate for the

neighborhood. He spoke further, and said all of the people in the neighborhood he'd spoken to thought it was great.

Craig Harris, 34 Cedar Point Road, said he'd lived on Cedar Point Road for 30 years. He said what was proposed was an improvement, in that it cleaned up a troubled property and made it usable. He said he was in favor of the project.

Chair Sterndale MOVED to close the Public Hearing. Sean Starkey SECONDED the motion and it PASSED unanimously 5-0.

Mr. Warnock reviewed the math involved with what was proposed, and said the proposed 3,400 sf was large.

Mr. Wolfe said the neighborhood had changed, and said this application solidified those changes. He said he thought the proposed increase in volume was appropriate in relation to the rest of the houses on Cedar Point Road.

Mr. Starkey said this was a different neighborhood than it was 5 years ago, and said what was proposed wouldn't dwarf what was done previously and would fit with the new character of the area. He said the applicant had laid out well how the variance criteria were met. Mr. Toye agreed, and noted that no abutters had spoken about an impact on their property values.

Chair Sterndale said he echoed Mr. Warnock's concerns about the overall mass and volume that was proposed, but he said that horse had left the barn. He said the setback issues were straightforward, and noted some net improvements concerning nonconformity, including the decrease in overall lot coverage that was proposed.

Mr. Starkey said he believed the public interest and spirit and intent criteria were met based on the information laid out in the design. He said he thought what was proposed was an improvement in terms of impacts on property values. He said substantial justice would be done in granting the variances.

Tom Toye MOVED to approve 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, as presented in Exhibits A, B and C. 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. Sean Starkey SECONDED the motion and it PASSED unanimously 5-0.

Attorney Phoenix asked the Board continue the Appeal of Administrative Decision, and said if the Variances were ok after the 30-day period, the Appeal would be withdrawn. The Board had no objection to this.

- D. **PUBLIC HEARING** on a petition submitted by Mary Lohnes Ehrenworth & Richard Hallett, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Durham Zoning Ordinance to reduce the non-conforming shoreline frontage for Lot 25-0, increase the non-conforming shoreline frontage for Lot 26-0 and create a new non-conforming side setback for Lot 25-0. The properties involved are shown on Tax Map 12, Lots 25-0 & 26-0, are located at 22 Colony Cove Road and 18 Colony Cove Road respectively, and are in the Residence C Zoning District.

Chair Sterndale opened the Public Hearing,

Mr. Hallet provided a slide presentation concerning the application. He said he'd built their home at 18 Colony Cove Road about 3 years ago in order to be near his wife's mother, who had lived at 22 Colony Cove on the water. He said she had passed away about 2 years ago, and said they currently lived at 18 Colony Cove Road. He noted that in the past, this area had been a series of small camps with docks that had access to the water.

He said they were proposing to grant themselves water access from 18 Colony Cove Road across the lot at 22 Colony Cove Road, so they could put in the dock. He noted that his wife had grown up at 22 Colony Cove Road, with access to the water. He said to offset the loss of square footage from that lot, they proposed to add property from the field lot to it, which would result in a net increase in square footage.

Mr. Hallet explained that they owned the lot that was currently a field, adjacent to Colony Cove Road, and said they proposed to remove it from being a buildable lot and attach it to the 18 Colony Cove Road property. He said this would increase its current lot size so that it was almost conforming to the 150,000 sf lot size requirement. He said removing that lot from being buildable would preserve the scenic nature of the neighborhood.

He said the variances requested were to decrease the frontage at 22 Colony Cove Road to 170 ft, but said this would be offset by increasing the lot size slightly. He said a variance was also needed to allow the 18 Colony Cove Road property to have 75 ft of frontage, which was less than the required 200 sq ft of frontage. He said they were also asking for a variance on the sideyard setback, since the deck of the 22 Colony Cove Road house was about 27 ft from the new lot line, and the house was 40 ft, when 50 ft was required.

He provided an aerial view of the property, and noted the shed that would be removed, and also showed where the proposed dock would be located.

Chair Sterndale noted the voluntary lot merger and 2 lot line adjustments that would occur if the variances were approved. He asked if there was anything about the lot size

for the 22 Colony Cove Road property that impacted the future developability of the older home that existed there, such as concerns about the septic system there. He noted that there was an intent to sell that property.

Mr. Hallet said the current septic system wasn't in compliance, and said before the property was sold it would need to be repaired, or located in another place on the property. He said he didn't believe a variance would be needed for that. Ms. Cline said it as far as she could tell a variance wouldn't be needed.

The names of several neighbors who were in support of the application were read into the public record.

Mr. Hallet went through the variance criteria and how he believed they were met with the application. He said granting the variance would not decrease the value of surrounding properties because what they were proposing with the dock would fit in with the character of the neighborhood.

He said he didn't believe granting the variance would be contrary to the public interest, noting that they were planning to merge the lots and preserve the scenic view along Colony Cove Road. He also said granting access to the water with the dock would allow the use of natural resources without impacting others in the area.

Mr. Hallet also said granting the variance would not be contrary to the spirit and intent of the ordinance. He said the natural woodlands along the access point would be preserved. He also said the scenic beauty of the area would be preserved by merging the lots, noting that the existing field would be preserved.

Mr. Starkey said he was struggling with the hardship criterion, and specifically what the special conditions of the property were. He said he realized that Mr. Hallet and his wife didn't have access to the water now, but said he didn't believe that this was a special condition. He said the 200 ft frontage requirement was intended so that there wouldn't be dock after dock lined up along this area, so that the shoreline wouldn't be disrupted.

Mr. Hallet said there was no fair and substantial relationship between the general public purpose of the ordinance provision and its application to the properties. He said he didn't see that he and his wife were impacting the general public purpose of the ordinance provision with what was proposed. He said the proposed use was reasonable because it fit with the character of the neighborhood. He said the new dock would be further from the existing dock than most other docks, as seen in the picture provided.

Mr. Wolfe said he was troubled with whether the hardship criterion was met, and said the applicant needed to show that there were special conditions of the property that distinguished it from other properties that required a variance. He asked how this property was different from others in the area, besides the fact that it didn't have a dock.

Mr. Hallet said lot 18-0 was an example that showed this was done in the past, and said there were other properties along Great Bay that were shaped like that.

Chair Sterndale asked if lack of waterfront was a special condition in that neighborhood. There was discussion. Some Board members said they didn't see that this was the case.

Mr. Hallet said he and his wife were willing to preserve the field in front of the house, and he noted some photos that showed the field. He explained that if they hadn't built the new house, they might have been able to remodel the house at 22 Colony Cove Road, but said that wasn't possible now. He said they were willing to keep the field in a pristine condition rather than selling it as a buildable lot, noting that selling it would allow them to remodel the waterfront house. He said while this wasn't exactly related to the variances being requested, it was relevant to the scenic value of the neighborhood. He said they would like to preserve the field, and noted how the neighbors benefited from the fact that it was there. But he said given taxes, etc., selling it as a buildable lot was the other option if they couldn't achieve what they were looking for with the variances.

Chair Sterndale closed the Public Hearing. He said there was a public purpose in the ordinance, in setting a minimum frontage along the shoreline. He said there was also a public purpose that would be benefited by pulling the house lot out of contention so close to the water in that neighborhood. He spoke further on this, and said there was a pretty significant public value to that. He said he thought the Board should consider this.

Mr. Warnock said he thought that this was a fair swap. Mr. Toye said he thought that was a great argument, but said he wasn't sure it was within the Board's purview to do that. Mr. Wolfe agreed, and said he was stuck with the variance criteria. He said they were lacking on #3, even though there was a benefit to the overall project.

Mr. Starkey said the application had been very thoughtfully laid out. But he said he didn't see that the application met the spirit and intent, hardship (special conditions) and substantial justice criteria. He said it was unfortunate that these property lines were changed in the past. He said he would love to see land preserved but said he couldn't get there based on the way the Ordinance was written.

Mr. Toye said he thought it was just the hardship criterion that wasn't met. Chair Sterndale agreed. He noted the test questions for granting variances, and said limiting docks was a valid public purpose. There was discussion. Mr. Starkey said to offset the decrease of the frontage, he thought something would have to happen concerning the shoreline. He said that was where he was coming from in terms of the spirit and intent of the ordinance.

Sean Starkey MOVED to deny the petition submitted by Mary Lohnes Ehrenworth & Richard Hallett, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Durham Zoning Ordinance to reduce the non-conforming shoreline frontage for Lot 25-0, increase the non-conforming shoreline

*frontage for Lot 26-0 and create a new non-conforming side setback for Lot 25-0. The properties involved are shown on Tax Map 12, Lots 25-0 & 26-0, are located at 22 Colony Cove Road and 18 Colony Cove Road respectively, and are in the Residence C Zoning District. Tom Toye **SECONDED** the motion and it **PASSED 5-0**.*

Chair Sterndale suggested the possibility of getting deeded dock rights. Mr. Hallet said the state wouldn't allow two docks on a single property.

- E. **PUBLIC HEARING** on a petition submitted by JoAnne Tremaine, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Durham Zoning Ordinance to install a generator within the sideyard setback. The property involved is shown on Tax Map 12, Lot 1-5, is located at 37 Cedar Point Road, and is in the Residence C Zoning District.

There was brief discussion that the generator had already been installed. John Philbrick, whose company had installed the generator, explained that the setback issue wasn't seen until after the inspection was done.

Mr. Starkey asked why they had picked that side to install the generator instead of putting it in the back. Mr. Philbrick said the key was where the fuel source was and said the generator had to be 10 ft from it. He spoke further and said where it was put had made the most sense, including the expense of placement. He noted that the neighbors had been contacted about the placement and were in favor of it.

Mr. Wolfe noted that the company had installed a generator for his house.

There was discussion about the location of the generator as compared to other possible locations. Ms. Tremaine said that in regard to possibly putting in the back, she didn't want the generator to be located where it would be ugly, and also said there was concern about the extend of gas piping that would have been needed in order to put it there. She also said she wouldn't be able to get to it in the snow if it was in the back yard.

Chair Sterndale asked if there were any members of the public who wished to speak in favor of the variance application.

Craig Harris, Cedar Point Road, said the generator had been placed in a tasteful location. He said he couldn't see it, and said it was very quiet. He spoke further on this and said it was the absolute best place to put it.

Chair Sterndale closed the Public Hearing.

Mr. Wolfe noted the small nature of the lots on Cedar Point Road, and he referenced the variance granted for another property there this evening. He said the same logic applied for this application in terms of the spirit and intent of the ordinance being met.

Mr. Toye went through the variance criteria. He said the generator had been put in a logical location, that was out of view from abutters, who had spoken in favor of it. He

said there was no reason to think there would be a negative impact on surrounding properties.

He said that concerning the public interest criterion, possible noise and aesthetics were the considerations. He said the abutter had clearly said he couldn't see it, and that the noise was nothing compared to a previous generator and other noise from the air.

Mr. Toye said that concerning the hardship criterion, he couldn't see how applying the ordinance provision specifically to this property had a general benefit to the public. He said the proposed use was reasonable, and also said there would be a safety issue if the gas piping was further away from the energy source.

He said substantial justice would be done in granting the variance. He said the homeowner wanted it, and said the contractor had explained that the location minimized the expense and complexity of the installation, and facilitated maintenance.

He said granting the variance would not be contrary to the spirit and intent of the ordinance.

Sean Starkey MOVED to approve a petition submitted by JoAnne Tremaine, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Durham Zoning Ordinance to install a generator within the sideyard setback, as shown on the diagram provided in our packet. The property involved is shown on Tax Map 12, Lot 1-5, is located at 37 Cedar Point Road, and is in the Residence C Zoning District. Peter Wolfe SECONDED the motion and it PASSED unanimously 5-0.

VII. Other Business

None

VIII. Adjournment

Tom Toye MOVED to adjourn the meeting. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0.

Adjournment at 8:41 pm

Victoria Parmele, Minutes taker

Micah Warnock