

These minutes were approved at the February 12, 2019 meeting.

**ZONING BOARD OF ADJUSTMENT
Tuesday, November 13, 2018 at 7:00 p.m.
Town Council Chambers, Town Hall
8 Newmarket Road, Durham, NH
MINUTES**

MEMBERS PRESENT: Chris Sterndale, Chair
Tom Toye, Vice Chair
Micah Warnock, Secretary
Joan Lawson
Dinny Waters, alternate

OTHERS PRESENT: Audrey Cline, Code Administrator

I. Call to Order

Chair Sterndale called the meeting to order at 7:01 pm.

II. Roll Call

III. Seating of Alternates

Chair Sterndale seated Mr. Waters as a regular member for the meeting.

IV. Approval of Agenda

Chair Sterndale noted that the applicants for Agenda items V.A and V.C had asked for continuances.

*Tom Toye **MOVED** to approve the Agenda as amended. Joan Lawson **SECONDED** the motion and it **PASSED** unanimously 5-0.*

V. Public Hearings:

- A. **CONTINUED PUBLIC HEARING** on a petition submitted by Kimberley Laris, Portsmouth, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Durham Zoning Ordinance to subdivide a piece of property into two lots where each lot is less than the required minimum lot size of 150,000 square feet and has less than the minimum frontage of 300 feet. The property involved is shown on Tax Map 12, Lot 2-5, is located at 228 Piscataqua Road, and is in the Residence C Zoning District.

Continued.

- B. CONTINUED PUBLIC HEARING** on a petition submitted by J.U. Family Trust, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII.1, Section 175-54 of the Durham Zoning Ordinance to construct a deck on the house within the sideyard and rear yard setbacks. The property involved is shown on Tax Map 12, Lot 1-18, is located at 23 Cedar Point Road, and is in the Residence C Zoning District.

Ms. Ullman explained that at the last meeting, she and her husband had inadvertently not provided enough detailed information on the setbacks they were asking for a variance on, so had now submitted this information. She also noted that ZBA members had suggested that they go with 3.a. of the hardship criterion, and said they'd now done that.

Chair Sterndale noted that the Ullmans had highlighted the dimensions in the application, and confirmed that the numbers themselves hadn't changed, with the distance from the rear property line being 38 ft and the distance from the side property line being 32 ft.

He said the Ullmans had gone through the variance criteria last month. He asked if Board members need further clarification on anything. Ms. Lawson asked for clarification on the dimensions for the back deck.

Ms. Ullman said the back deck went out 10 ft from the house toward the back property line, deck, and said the furthest point of the deck from the back property line was 38 ft. The Ullmans also noted that the patios already encroached on the setback, and that the deck would be an additional 2-4 ft out from the patio.

Concerning the side setback variance, Ms. Lawson asked if there were steps going down from the deck, and was told there were not, and that the deck would be at ground level.

Chair Sterndale opened the Public Hearing, and asked if there were any members of the public who wished to speak for or against the application. There was no response.

Micah Warnock MOVED to Close the Public Hearing. Tom Toye SECONDED the motion and it PASSED unanimously 5-0.

Chair Sterndale said he was comfortable with not going through the variance criteria again, having pinned down the exact dimensions of what was proposed. Other Board members agreed.

Ms. Cline said the Board should note the additional information that had been provided since the last meeting.

Micah Warnock MOVED that the Zoning Board of Adjustment approves a petition submitted by J.U. Family Trust, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article XII.1, Section 175-54 of the Durham Zoning Ordinance to construct a deck on the house within the sideyard and rear yard setbacks as per the

documents presented at the Zoning Board meetings of October 9, 2018 and November 13, 2018. Joan Lawson SECONDED the motion.

Mr. Toye and other Board members said they were comfortable that the variance criteria had been addressed at the last meeting.

The motion PASSED unanimously 5-0.

- C. **CONTINUED PUBLIC HEARING** on a petition submitted by Clark Properties LLC, Middleton, New Hampshire on behalf of Town & Campus, Inc., Madbury, New Hampshire for an **APPLICATION FOR VARIANCES** from Article II, Section 175-7 and Article XII.1, Sections 175-54 and 175-56 of the Durham Zoning Ordinance to allow for a mixed use on the 2nd floor and residential use on the 4th floor of a commercial building, to allow for a 66:33 split between residential and commercial space, to allow for reduction in the density requirement from 1,200 square feet to 600 square feet, and to allow for the minimal habitable floor area per occupant in an unrelated household from 600 square feet to 300 square feet. The property involved is shown on Tax Map 2, Lot 14-1, is located at 74 Main Street, and is in the Central Business Zoning District.

Continued

- D. **PUBLIC HEARING** on a petition submitted by MJS Engineering, P.C., Newmarket, New Hampshire, on behalf of the Alpha Sigma House Corp. of Kappa Delta Sorority, Durham, New Hampshire for an **APPLICATION FOR A VARIANCE** from Article II, Section 175-7 of the Durham Zoning Ordinance to permit the existing lower level of a sorority to be defined as a basement rather than a story to allow for the existing building to be expanded to include a third floor. The property involved is shown on Tax Map 2, Lot 12-2, is located at 25 Madbury Road, and is in the Central Business Zoning District.

Engineer Mike Sievert represented Kappa Delta Sorority, and explained that they were planning to renovate and expand their existing building at 25 Madbury Road in order to improve the living conditions there, including providing accessibility. He said the variance had to do with definition of a story. He said the sorority currently had bedrooms located in the basement, and additional bedrooms/bunk rooms on the upper floors. He said the existing third floor bedrooms were located under a sloped roof line. He said the first floor was used as common space.

He said the proposed improvements included renovating the second floor, reconstructing the third floor and the entire roof of the building, and adding a three story addition with basement to the rear of the existing building. He said the new addition would include an accessible entrance and accessible bedrooms on the first floor, which didn't exist now.

Mr. Sievert said there were no changes proposed to the existing grades across the front of the building, and said that was part of the definition issue. He explained that in order to comply with the Zoning Ordinance, the building was limited to three stories, including a basement that was not counted as a story. He said that lower level had been considered a basement since it was constructed in 1965, but was now considered a story because of the

recent changes to the definitions of basement and story in the Zoning Ordinance. He said the applicant felt this was unreasonable.

He said the variance was therefore requested to permit the existing lower level of Kappa Delta to be defined as a basement rather than a story where the " ... front exterior wall of the lower floor level rises more than two feet above finished grade." He said this would allow the existing building to be renovated/expanded to include a full third floor in order to move resident bedrooms out of the basement. He noted that the current definitions for basement and story both indicated that there had to be a maximum of 2 ft. of wall above the existing grade to qualify as a basement. He said the front of the applicant's building had walls that varied from 1 ft. 8 in. to almost 6 ft.

Mr. Sievert next reviewed the variance criteria and how they were met with the application.

He said there would be no decrease in the value of surrounding properties in granting the variance. He said the surrounding properties were similar in scale to fraternities and said there was a 3-4 story apartment/mixed-use building next door. He noted photos that showed that some of their basements were raised above the grade. He said allowing the proposed renovation and expansion to include additional space for improved bedrooms in a reconstructed third floor, with the existing lower level accepted as a basement, would complement the uses, scale and size of adjacent properties. He said this would increase the property values for both the sorority and the surrounding properties. He said the value of the sorority building would increase because it would be expanded to fit resident bedrooms on upper floors rather than in the basement, and said the increase in building size and creation of properly sized double bedrooms would upgrade the quality of the building.

Concerning the public interest criterion, Mr. Sievert said Kappa Delta sorority had been in the building since it was purchased in 1996. He said the original center portion of the building was constructed in the early 1900's, and said the wings to either side were believed to have been built in 1965. He said the existing lower level had always been considered a basement, it was classified as a basement in the Town's property tax cards, and it was considered to be a basement in accordance with current building code definitions. He said the definition of a basement and a story in the Zoning Ordinance was different than how the building code defined them, thereby creating the issue.

He said granting the variance to classify the lower level as a basement and to allow a three story building above was in the public interest because it would recognize that the lower level had been a basement for years before this recent 2017 zoning ordinance definition. He said the lower level was mainly below grade and was unobtrusive in appearance, especially on the front elevation. He said the proposed renovation/expansion moved resident bedrooms out of the lower level to upper floors, which would bring the building more into compliance with the spirit and intent of the Zoning Ordinance, under Article 175-55, Paragraph 8. He said the proposed renovation/expansion was comparable in size, massing, scale and character to the adjacent properties, which were permitted and

allowed by zoning. He said most of the adjacent properties had grades that were more than two feet below the first floor.

Mr. Sievert said owing to special conditions of the property that distinguished it from other properties in the area, denial of the variance would result in unnecessary hardship because no fair and substantial relationship existed between the general public purpose of the ordinance provision and the specific application of this provision to the property because. He said the general purpose of the definition of basement and story was to limit the height of buildings and to prevent a basement from being too prominent and unsettling in appearance at the front of a building. He said the Zoning Ordinance also prohibited dwelling units in the basement of multi-unit residences.

He said the existing building presented an attractive appearance where most of the adjacent front grade was reasonably close to the first floor, as shown in the attached Proposed East Front Elevation drawing. He said the proposed design also reflected the intent of the Ordinance by creating an image of a two story building with a third floor under a dormered roof line. He said the existing grades across the front of the building had been in place long before the new 2017 Zoning Ordinance definition of a story and basement, and said it was unreasonable to apply these definitions that created a strict dimensional limit that prevented construction of a third floor when the purpose of the Ordinance was being met.

Mr. Sievert said the proposed use was reasonable because sororities were permitted within the Central Business District with Conditional Use approval and Site Plan review. He said the Central Business District allowed three story buildings up to 35 feet height on this lot along Madbury Road. He said the existing building was currently a sorority, and included bedrooms under a sloped roof, which was considered to be a half-story by zoning. He said the proposed renovation/expansion enhanced the living conditions for the sorority members, and said the proposed height, including a full third floor and basement, would be less than 34 feet 7 inches, with the new roof peak within two feet six inches of the existing roof peak.

He said the exposed lower level wall did not have a significant impact on the height of the building. He said the bedrooms were being moved out of the basement into the upper floors, and said a sufficient number of double bedrooms that met current standards were being provided for the current number of residents. He also said the sorority use was well situated, with several adjacent fraternities and apartments occupied by students.

Mr. Sievert said substantial justice would be done in granting the variance. He said the use of the building as a sorority was permitted by Zoning and complemented surrounding properties. He said the scale of the proposed renovation/expansion with three stories plus a "basement" was comparable to surrounding properties, especially the adjacent Madbury Commons property which was 3 to 4 stories in height and had a basement with walls much higher than the two feet now allowed. He said the existing building front, which was not being modified at grade, had been at the current elevation grades since it was constructed in 1965, and said it had been considered to be a basement since that time as indicated in the Town's own property tax cards. He said denial of the variance would

create a loss to the owner that would far outweigh any gain to the public because the grade condition had existed at the property since 1965.

Concerning the spirit and intent of the Ordinance, Mr. Sievert said the Zoning Ordinance Conditional Use requirements limited building height to 35 feet maximum and the number of stories to three, and said the Zoning story definition's intent was to minimize the exposed basement wall. He said height of the applicant's building was less than 35 feet high and said the basement was unobtrusive and felt like a basement. He said the discrepancy in the height of the exposed basement wall along the front elevation for a building dating to the early 1900's and 1965 expansion did not alter the fact that the proposed building appeared to be two stories in height with a third story under the roof line as intended in the Zoning Ordinance. He said the building met the building code definition of a basement plus three stories, and said the proposed existing "basement" plus three stories met the spirit and intent of the Ordinance.

Mr. Warnock asked what the planned use of the basement was. Architect Art Guidano said it would be used as common space, with a dining area and a commercial kitchen, and said there wouldn't be bedrooms there. He described the new top floor, which now was a half story and would be a full story. He said the roof elevation would be just under an average of 35 ft. He said one would be able to see the upper level of Madbury Commons beyond the building.

Chair Sterndale opened the Public Hearing and asked if there were any members of the public who wished to speak for or against the application. No one came forward to speak.

Micah Warnock MOVED to Close the Public Hearing. Tom Toye SECONDED the motion and it PASSED unanimously 5-0.

Mr. Warnock noted that this was a situation where something was being called a story, when it would never be appraised as a story because it was in fact a basement. Chair Sterndale said the interpretation that it was a basement in this instance was simply going by the book and following the Zoning Ordinance.

Mr. Toye said there would be no decrease in the value of surrounding properties in granting the variance, noting that the property was located in the heart of a student housing area. He said the renderings indicated that what was proposed would be an upgrade from what was there now, including making the building safer and easier for the Town to monitor, so granting the variance would not be contrary to the public interest. Ms. Lawson also noted that there would be improved accessibility.

Mr. Toye said that concerning the hardship criterion, there was no fair and substantial relationship between the general public purpose of the ordinance provision and the specific application to this property. He said the application of the definitions to this property didn't make sense, so given that the proposed use was reasonable, hardship existed. He also said the substantial justice and spirit and intent of the ordinance criteria were met.

Joan Lawson MOVED that the Zoning Board of Adjustment approve a petition submitted by MJS Engineering, P.C., Newmarket, New Hampshire, on behalf of the Alpha Sigma House Corp. of Kappa Delta Sorority, Durham, New Hampshire for an APPLICATION FOR A VARIANCE from Article II, Section 175-7 of the Durham Zoning Ordinance to permit the existing lower level of a sorority to be defined as a basement rather than a story to allow for the existing building to be expanded to include a third floor. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0.

- E. **PUBLIC HEARING** on a petition submitted by Durbin Law, Portsmouth, New Hampshire, on behalf of the ARNE LLC, Hooksett, New Hampshire for an **APPLICATION FOR SPECIAL EXCEPTION** as specified in Article XII.1, Section 175-56(F) Durham Zoning Ordinance to construct a septic system & leach field within the 30-foot front yard setback. The property involved is shown on Tax Map 17, Lot 13-2, is located at 221 Packers Falls Road, and is in the Rural Zoning District.

Attorney Gamester noted that the applicant was before the ZBA last month for another special exception, and before the meeting it was discovered that another special exception was needed, for the septic system. He said all of the prior statements about that application, which were in the Minutes, would be incorporated into the record for this application. He said the first special exception that was approved was to allow the house to be located within the wetland buffer.

He reviewed how the 3 special exception criteria were met with the application.

1. That the use will not be detrimental to the character or enjoyment of the neighborhood by reason of undue variation from the kind and nature of other uses in the vicinity or by reason of obvious and adverse violation of the character or appearance of the neighborhood.

Attorney Gamester said the installation of the septic system and leach field within the front yard setback would not be detrimental to the character or enjoyment of the neighborhood. He noted that a septic system was defined as a structure, but said once constructed, the septic system and the leach field would not be visible to neighboring properties or to the public at large. He said the septic system would be consistent with the neighborhood, which was comprised of single family residences to the north and the east, a large wooded area to the south, and a farm to the west.

2. That the use will not be injurious or noxious and thus detrimental to the neighborhood by reason of any of the causes stated in Part B. of this chapter.

Attorney Gamester said the proposed use would be the exact opposite of being injurious or noxious, and said it would therefore not be detrimental to the neighborhood. He said since the Board had already granted a Special Exception for the single-family residence, placing the septic system and leach field in any other location on the property would force the system and field to be within the wetland buffer. He said this would potentially create a scenario where there could be greater danger and harm to the wetland buffer, the wetland, and the neighborhood. He said by allowing the use to be within the front yard

setback, all but a small portion of the septic system and leach field would be outside of the wetland buffer and the farthest it could be from the actual wetland, which made it the most logical and least impacting location.

3. That the use will not be contrary to the public health, safety or welfare by reason of undue traffic congestion or hazards, undue risk to life or property, unsanitary or unhealthful emission or waste disposal or similar adverse causes or condition.

Attorney Gamester first noted the response to criterion #2, and incorporated it into the response for criterion #3. He also noted that the applicant would be installing an "Enviro-Septic" system designed by Presby Environmental, Inc. that he said would meet all NHDES subsurface regulations. He said this type of system was considered to be better than the typical stone and pipe systems, and he spoke in further detail on this. He also said the system would be installed in the most suitable location on the property that was farthest from the edge of the wetlands. He said it would not represent any threat to individual or public health, safety and welfare, and would not create unsanitary or unhealthful emissions or waste disposal.

Chair Sterndale said while the ZBA frowned upon the stacking of variances for a property, this was a situation where the need for the second special exception was discovered after notice was posted for the first one. He opened the Public Hearing, and asked if there were any members of the public who would like to speak in favor or against the application.

Cheryl St Onge, Packers Falls Road, noted that she'd spoken at last month's ZBA meeting on the first special exception application. She said it looked bad there now with mud everywhere and running into the wetlands because work had started. She said she realized that the septic system would be better, but she said the Conservation Commission was never informed about the project and wasn't able to walk the site. She said since the ZBA was revisiting the property with this application, she'd like them to revisit the whole project. She said the size of the house was not modest, and said if the footprint was smaller and the building was taller, it would have less impact on the wetland. She also said if all of the applications had been addressed together, she wasn't sure that they would have been approved.

Chair Sterndale said the erosion control issue was something for the Town to deal with. Ms. St. Onge said the neighbors had been reporting it, but said the problems went back to the larger issue, which was the wetlands. She said she realized that this was a lot of record but she questioned a house of that size. She said last month, there was discussion by the ZBA about tabling the application entirely, but then the Board said it would go ahead and vote on the application. She asked again that they revisit the original special exception, which wasn't in keeping with the neighborhood. She noted that she was representing some of the other neighbors who couldn't be at the meeting.

Chair Sterndale noted that there was a 30 day period during which an abutter could ask for a decision on an application to be revisited.

John Sheehan, Packers Falls Road, said he agreed with Ms. St. Onge, and said it was interesting that the Board couldn't go back and revisit the first special exception application. He said if all of the application were presented at one time, the decision might have been different regarding the size of the house.

Concerning the issue of whether the Conservation Commission was notified about the original special exception application, Attorney Gamester said they were in fact notified Chair Sterndale asked Ms. Cline if that had happened, and noted that the Minutes of the ZBA meeting indicated that this had happened. There was discussion.

Attorney Gamester said he realized that the abutter questioned the size of the building last month, and said the Minutes reflected that, and that Board members thought it was an appropriate size. He said the presentation on the septic system tonight was the same as the way it was presented last month, He also noted that the wetland and the wetland buffer were two different things.

Ms. St. Onge spoke about the excavation currently occurring on the applicant's property, and said there was a trench of water heading toward the wetlands on what was extremely sloped land. She said there was no silt fencing and no hay bales in place. She spoke again about the ZBA possibly revisiting the original special exception application, and determining whether the Conservation Commission had in fact looked at it and if they had concerns.

Chair Sterndale said the ZBA had no say about the trench, erosion control measures, etc. He also said approval of the prior special exception was in place and had not been appealed. He noted that if the Board said no to the special exception application before it now, that would impact the project.

Ms. St. Onge asked whether if the Board's decision was delayed, this could include a chance for a public walk of the applicant's property with the Conservation Commission.

Chair Sterndale said the Board could do that for the current application, concerning the location of the septic system, but said he wasn't sure that doing that would be valuable.

Attorney Gamester said while he appreciated the concerns of abutters, it was pretty well settled that the original special exception couldn't be revisited. He said the applicant was here now for just the septic system portion of the project, and said it would be located outside of the wetland buffer. He said that regarding the size of house, it was the number of bedrooms that was the issue for NHDES concerning the sizing of the septic system. He said all of it could be fit outside of the buffer, in the best possible site as indicated by test pits, which would be good for the wetland, wetland buffer and the neighbors. He said putting the septic system anywhere else would be a poor decision.

Ms. St. Onge said the ranch house to be built measured 36 ft by 52 ft, which was an enormous footprint, on a property with a good deal of slope. She said if the building footprint was smaller but taller there wouldn't be as much soil disturbance and there would be less impact on the wetland.

Tom Toye MOVED to Close the Public Hearing. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0.

Mr. Toye said according to the ordinance, the applicant needed to contact the Conservation Commission. There was discussion about whether this had happened, and Ms. Cline said she would get that information. It was noted that the question was whether the window for appeal would be opened if this hadn't happened.

Chair Sterndale asked the Board if they wanted to wait for answers on this before moving forward with this application. Ms. Cline noted that the special exception application tonight didn't require notification of the Conservation Commission, but the previous application did. Mr. Toye said he thought this was an unrelated issue. Mr. Warnock said he understood that there was an erosion issue, but said that was a code enforcement issue, not a zoning issue. He also said the size of the structure wasn't egregiously larger than others in the area.

Ms. Lawson said if this were to be a multilevel home, that would free up some of the land so the special exception for the septic system might not be needed. Mr. Toye noted that it had been said that the proposed location for the septic system was the best location on the property. Ms. Lawson asked whether testing had been done of places on the property that would have been available if the house dimensions were different. There was discussion that the available building envelope was relatively small.

Mr. Toye said the Board had agreed previously that the proposed location for the septic system made sense. He said this happened to be within the front setback, and said it was unfortunate that this wasn't caught in the beginning. But he said he thought the application met the Special Exception criteria. He said he felt bad that the abutters were upset about the ZBA's previous decision, where the Board acknowledged that the Conservation Commission knew about the application.

Chair Sterndale said the Board had acted based on that assumption. He said he agreed with Mr. Toye, and noted that there was an appeal window for this case. Mr. Toye said he'd gone by the applicant's property and saw the conditions that had been described. He said he didn't think it was within the ZBA's purview to do anything about that. Ms. Cline said it was realized that this was an enforcement issue.

Micah Warnock MOVED that the Zoning Board of Adjustment approves a petition submitted by Durbin Law, Portsmouth, New Hampshire, on behalf of the ARNE LLC, Hooksett, New Hampshire for an APPLICATION FOR SPECIAL EXCEPTION as specified in Article XII.1, Section 175-56(F) Durham Zoning Ordinance to construct a septic system & leach field within the 30-foot front yard setback as per the provided site plan dated September 18, 2018 by ARNE LLC. Tom Toye SECONDED the motion and it PASSED 4-1, with Joan Lawson voting against it.

- F. **PUBLIC HEARING** on a petition submitted by Durbin Law, Portsmouth, New Hampshire, on behalf of the ARNE LLC, Hooksett, New Hampshire for an **APPLICATION FOR A VARIANCE** from Article XII.1, Section 175-54 of the Durham Zoning Ordinance to permit the creation of a lot which is less than the 150,000

square-foot minimum. The property involved is shown on Tax Map 17, Lot 13-2, is located at 221 Packers Falls Road, and is in the Rural Zoning District.

Attorney Gamester said the applicant's property was unique, and he noted the existing conditions plan. He said it was oddly shaped, with 5 sides, but said it had been a lot of record since 1910. He said conveyances between owners and lot line adjustments, had resulted in this shape, and said the best way to correct the shape of the lot was to do a lot line adjustment. He noted that the lot current contained 55,444 sf. He said the variance would then be needed for the lot size, which would be 35,579 sf after the lot line adjustment, where a 150,000 sf lot was required.

Attorney Gamester went through the variance criteria and how they were met with the application.

Concerning the public interest and spirit and intent of the Ordinance criteria, he said the proposed reduction in lot area would not threaten public health, safety and welfare, would not create any traffic burden to the neighborhood and would have no negative impact on municipal services. He said the Board had already granted relief for a single-family residence to be constructed on the property, which was evidence that the further development of the property was in the public interest and spirit of the ordinance. He said granting this variance would not have any additional effect on public health, safety, welfare, and would not create any further traffic burden to the neighborhood, or create a negative impact on municipal services.

Attorney Gamester said the property was currently vacant and surrounded by single-family residences to the north and east, a large wooded area to the south, and a farm to the west. He said given that the Board had already granted relief to construct a single-family residence on the property, it was reasonable to submit that there were no privacy, landscaping, light, air or space concerns with respect to the reduction in lot area. He said the variance relief proposed would not alter the essential characteristics of the neighborhood or impact the public or abutters in any negative way. He said it would in fact help abutting properties and resolve current issues. He noted that it had been discussed that the existing encumbrance could be remedied by easements, but said it was realized that the lot line adjustment would take care of the encroachment and eliminate future potential issues that could arise.

He said substantial justice would be done by granting the variance relief. He said there was no public benefit served by denying the variance relief, but said if the variance was denied, there would be a detriment to the applicant and nearby abutting properties, as there would be a continued encroachment of the house located on lot 13-1 over the shared boundary line. He said while this encumbrance could be somewhat remedied by the grant of certain property interests and rights through an easement, it would still create a situation in perpetuity where the owners and future owners of the property and lot 13-1 would have to deal with the encroachment and this would increase the possibility for future dispute. He said granting this variance and allowing the applicant to proceed to the Planning Board with a lot line adjustment would permanently resolve the current issue and would prevent future issues and disputes from occurring relative to encroachments.

Attorney Gamester said granting the variance would not decrease the value of surrounding properties. He said it would allow the proposed lot line adjustment to move forward, and said it was highly likely that surrounding property values (specifically lot 13-1) would increase due to the fact that this relief would allow the applicant to eliminate the current encroachment and encumbrance. He also said the applicant had already obtained the required relief to construct a single-family residence on the property, so the reduction in lot area would not affect any abutting properties in any tangible way, so would not diminish surrounding property values

He said literal enforcement of the Zoning Ordinance provisions would result in an unnecessary hardship. He said there were special conditions that distinguished the property from surrounding properties, and noted that it was part of an "ancient" lot of record, which first appeared in the Registry as far back as 1910. He also said the property and lot 13-1 underwent a lot line adjustment in 1984 with additional land being appended to the property. He said this was the result of confusion between the applicant and the Town regarding how many tracts of land existed due to a poorly designed plan from 1984.

Attorney Gamester said the property and surrounding lots generally pre-dated the adoption of the Ordinance and had generally been further defined and developed over the years by the then current owners' use of the lots, as farms, wooded tracts, and residences. He said the property was unique in that it had remained in an undeveloped state since its creation and the lot line adjustment in 1984. He also said the property was particularly unique in that it was believed to be the only parcel in the surrounding area that was being encumbered by an abutting lot's house encroaching on it.

He said there was no fair and substantial relationship between the general purpose of the Ordinance provision and its specific application to the property. He said the Ordinance provisions applicable to the Rural Zoning District were intended to create standards for lot size, depth, setbacks and density to further the historically rural areas that were low density and were not served or intended to be served by municipal services, and to further preserve the natural and scenic environment of the rural area.

Attorney Gamester said strictly applying current zoning standards to the property that pre-dated the adoption of current Zoning was impractical and was the reason that the court, and subsequently the Legislature had provided an outlet for zoning relief. He said the property in its current state was already nonconforming to the Ordinance by being roughly 1/3 the required minimum lot size, so even in its current state, strict application of the Ordinance to the property was impossible. He also said the Board had already granted relief that allowed for the development of a single-family residence on the property, so the further reduction in lot size, and consequential increase in lot nonconformity, would similarly have no fair and substantial relationship to the general purpose of the Rural Zoning District and its related dimensional requirements.

He said the proposed use of the property as a single-family home was reasonable, even with the requested reduction in lot area, and was reasonable in light of the spirit and intent of the Rural Zoning District, where single family residences were permitted by

right. He said what was proposed was similar to the character of surrounding properties and homes. He said a more conforming lot would be created, including geometrically, and said the encumbrance/encroachment would be eliminated. He also said a shed would be demolished, and said the new structure would be located within the building envelope, and would have a new septic system in the location that was proposed and granted.

Ms. Cline said previous lot line adjustments were looked as part of the reviewing this application.

Chair Sterndale opened the Public Hearing, and asked if there were any members of the public who wished to speak in favor of or against the application. No members of the public came forward to speak.

Joan Lawson MOVED to close the Public Hearing. Tom Toye SECONDED the motion and it PASSED unanimously 5-0

Mr. Warnock said this was about fixing a lot line issue, and said other issues were addressed with previous variances, which weren't on the table now. Ms. Lawson said given the two prior approvals, it made sense to make everything good. She also said that if the three applications had been brought together to the Board, she thought the discussion would have been different. Chair Sterndale said it would have changed the size of the lot, but said the end product would still be within the building envelope, and the encroachments still would have existed. There was discussion that any future development of the parcels would probably come back to the ZBA.

Mr. Warnock said he believed that the public interest and spirit and intent criteria were met by fixing the encroachment, and also said there was substantial justice in that the property was no longer encroached upon. He also said that one of the properties would probably increase in value without the encumbrance on it. He said a hardship existed concerning the property, and said granting the variance would take it away. He also said he agreed that there was no fair and substantial relationship between the general purpose of the Ordinance provision and its specific application to the property.

Mr. Toye said the square footage of the combined lots didn't meet the Zoning Ordinance requirement for lot size, and said by granting this variance, there was a greater likelihood of conformity of the other lot in the future. Mr. Warnock said both lots would be closer to conformance than they currently were, in granting the variance.

Tom Toye MOVED that the Zoning Board of Adjustment approves a petition submitted by Durbin Law, Portsmouth, New Hampshire, on behalf of the ARNE LLC, Hooksett, New Hampshire for an APPLICATION FOR A VARIANCE from Article XII.1, Section 175-54 of the Durham Zoning Ordinance to permit a reconfiguration of two existing lots of record in which the square footage of each lot is less than 150,000 square-foot minimum per the ordinance, as shown on plat lot line adjustment dated July 30, 2018. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0.

- G. **PUBLIC HEARING** on a petition submitted by MJS Engineering, P.C., Newmarket, New Hampshire, on behalf of the Toomerfs, LLC, Durham, New Hampshire for an

APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from an October 25, 2018 letter from Zoning Administrator, Ms. Cline. The properties involved are shown on Tax Map 4, Lots 38-5 & 55-0, are located at 12 Cowell Drive and 18 Main Street respectively, and are in the Residence A and Church Hill Zoning Districts.

Mike Sievert of MJS Engineering said with due respect to Ms. Cline and Mr. Behrendt, the applicant was appealing the Administrative Decision that was received.

He said the properties were located in the RA District as well as the Church Hill District, and contained about an acre of land. He said there were student rentals on both properties, and noted that one of the buildings was a multiunit building. He said the applicant was proposing to construct a surface parking lot on the 18 Main St. property that would contain 48 spaces, and said right now there were about 17 spaces there. He said there were 3 parking spaces on the Cowell Drive property.

He said Ms. Cline and Mr. Behrendt had determined that the design would need a variance for the proposed access at 12 Cowell Dr. in the RA district. He said Mr. Behrendt said a variance was needed because surface parking was not allowed in the RA district, and a driveway would be an integral part of that use. He said Ms. Cline's interpretation of the Ordinance was that the driveway was accessory to the commercial use of surface parking, which was different than the allowed driveway, and was accessory to the allowed uses in the district.

He said he didn't agree with these opinions, and he spoke in detail on this. He said he believed that there was no provision in the Ordinance that directly addressed this situation, and said it was a gray area. He said the proposed surface parking wasn't in the RA district, and said driveways were allowed in the RA district. He spoke in further detail on this.

Chair Sterndale noted that if the ZBA agreed with the applicant concerning one of the interpretations, a variance might still be needed from the same section of the Ordinance.

Ms. Cline first spoke about Mr. Behrendt's interpretation of why a variance was needed. She then spoke about her own interpretation, and said something that was accessory was accessory to a principal use, and said the proposed driveway was accessory to the commercial parking lot. She also said this wasn't the only access. She said it was not a use in itself and was an accessory structure to the commercial use on the same lot. She said the allowed accessory use or structure must be accessory to the allowed use on the parcel, and not to allowed uses on adjacent parcels.

Ms. Cline answered questions from Ms. Lawson, and there was further detailed discussion.

Chair Sterndale said he agreed with Ms. Cline's interpretation of the Ordinance, so he therefore disagreed with the appeal of Administrative Decision. He also said he agreed with Mr. Behrendt's interpretation.

Tom Toye MOVED that the Zoning Board of Adjustment denies a petition submitted by MJS Engineering, P.C., Newmarket, New Hampshire, on behalf of the Toomerfs, LLC, Durham, New Hampshire for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from an October 25, 2018 letter from Zoning Administrator, Audrey Cline. Joan Lawson SECONDED the motion and it PASSED unanimously 5-0.

- H. **PUBLIC HEARING** on a petition submitted by MJS Engineering, P.C., Newmarket, New Hampshire, on behalf of the Toomerfs, LLC, Durham, New Hampshire for an **APPLICATION FOR A VARIANCE** from Article XII.1, Section 175-53III(3) of the Durham Zoning Ordinance to permit a driveway on Lot 38-5 as an accessory use to access a surface parking lot on Lot 55-0. The properties involved are shown on Tax Map 4, Lots 38-5 & 55-0, are located at 12 Cowell Drive and 18 Main Street respectively, and are in the Residence A and Church Hill Zoning Districts.

Mr. Sievert said the 18 Main St. property was located in the Church Hill District, and the 12 Cowell Dr. property was located in the Residence A District. He said the parcels were bordered on the south by Main St. with approximately 140 ft. of frontage, and were bordered on the north by Cowell Dr. with approximately 146 ft of frontage. He said they were bordered on the west by the US Post Office and a residential student rental property, and were bordered on the east by St. George's Episcopal Church and another residential property.

He said the building at 18 Main St. was currently a 4-unit apartment for student rentals, and said there were 5 paved parking spaces and 12 gravel parking spaces on the lot. He said the building at 12 Cowell Drive was currently a single-family residential house that was used for student rentals, and said there were 3 parking spaces there on a paved driveway and parking area.

He said the applicant proposed to construct a new parking lot on the rear portion of the 18 Main St. property, and said the entire parking lot would be contained there, with only the access to the parking lot across the 12 Cowell Drive property. He explained that the existing paved parking lot on the Main St property would remain, as part of the proposed parking lot, but said the 12 existing parking spaces on the gravel area would be incorporated into the new paved parking lot. He said there were currently 17 parking spaces on the Main St. property and 3 spaces on the Cowell Drive property. He said there would be 48 spaces on the two lots with what was proposed, with all of the new spaces going on the Main St. property, and resulting in a net increase of 28-30 parking spaces.

He said the applicant was requesting the variance for the driveway access off of Cowell Drive. He went through the variance criteria and how they were met with the application.

He said granting the variance would be in the public interest. He said driveways were an allowed use in the RA district, and said the lot currently had a driveway. He said off street parking and surface parking were allowed as an accessory use in the RA district,

which would require a driveway for access, and said this driveway was therefore an accessory use to access the surface parking lot on the adjacent lot.

Mr. Sievert said they were designing the driveway at the existing location, to go up into the parking lot. He said there was another access to the 18 Main St property from Main St., and said it would not be discontinued. He noted that it was narrow, and said both the Cowell Drive driveway and the Main St. driveway would provide ingress and egress. He spoke in some detail about the advantages of having the Cowell Drive access.

He said the parking lot would be used for tenants of 18 Main St, and noted that the applicant had other student rental properties downtown, including the Grange, which was why the parking lot was needed, as a conditional use, so others could use it as well.

He said the spirit and intent criterion related back to the public interest test. He said because the driveway existed, minor changes would be required to provide access to the surface parking on the adjacent lot. He said the spirit and intent of the ordinance would be observed because granting the variance would not alter the essential character of the neighborhood or threaten the public health, safety or welfare. He noted letters from the Fire Department and Police Department in regard to this.

Mr. Sievert said substantial justice would be done in granting the variance. He said there would not be a public benefit achieved by denying the variance sought for the approval of the use of the proposed driveway as an accessory use, because it existed now and would require minimal changes for the intended use. He said the harm to the owner by denial of the variance would outweigh any benefit to the public because the location proposed for the additional access provided a much safer and less congested access than the current access location on Main St. He said providing this additional access would improve upon the traffic congestion that would exist by only having access from Main St. He said there would be no physical change in the appearance or use of the property as a result of granting the variance.

He said the proposed driveway to the property and proposed surface parking lot would not diminish surrounding property values. He said there was currently an existing driveway to this parcel for access and parking, and said the existing use of student housing was not changing. He said this use had existed for many years and said adjacent properties were used for the same purpose. He said granting the relief would create no additional impact to abutters above and beyond the impacts that currently existed, because there would be no physical changes to the property. He said the traffic on the street was high due to the existing uses.

Mr. Sievert said that concerning the hardship criterion, there were special conditions of the property that resulted in a hardship. He said the parcel was situated close to the intersection of Cowell Dr. and Madbury Road and at the beginning of the neighborhood. He noted that there was high traffic volume now for the Post Office and the Church, going in and out of Cowell Drive. He said the student rental use existed and was the same as the use on adjacent parcels. He said the Cowell Drive parcel was directly adjacent to the parcel where the parking lot was proposed and was owned by the

applicant. He said this parcel had an existing driveway that accessed the lot and ended approximately 3 ft from the 18 Main St property, to which it would provide access. He said the Cowell Drive lot was an extension of the 18 Main St. lot and was uniquely situated to provide access given its location and current use. He said the Police Chief was very much in favor of separating the traffic and getting some of it onto Cowell Drive. He also said the Fire Department said there would be better access for their vehicles with the Cowell Drive access.

He said no fair and substantial relationship existed between the general public purpose of the Ordinance and the specific application to the property. He said the general public purpose was to allow associated accessory uses, but to not overburden the neighbors. He said off-street parking and surface parking were allowed accessory uses on this lot and said either would require a driveway for access. He said the more intense surface parking use would be on the adjacent lot where it was allowed but a safer and much less congested access was available via the Cowell Drive lot, which was already being used as a student rental.

He said providing an extension of the driveway to access the proposed parking lot was reasonable and did not burden adjacent properties. He said the proposed use was reasonable, and noted that driveways, access, off-street parking and surface parking were all allowed or accessory uses within the RA district. He said use of the property was permitted by right within the applicable zoning district and was similar in nature to adjacent properties. He said the driveway as an accessory use was therefore reasonable.

Mr. Sievert said the applicant felt the driveway made the traffic work better, and felt strongly that there was a huge need for a parking lot in the downtown. He said it would mainly be for student rental properties and wouldn't have peak traffic flow, and said most of the vehicles wouldn't move on a daily basis. He also said because the lot was so close to the downtown area, there was an opportunity to provide parking for business owners. He said an option the applicant was weighing was utilizing some of the spaces in the lot for this, and said this would be presented as part of the site plan application that would go to the Planning Board.

Chair Sterndale asked why the applicant couldn't access the area through the church parking lot that was already functioning as a commercial parking lot. Mr. Sievert said they'd thought about this, but said there would be a conflict with the church's use and explained that it would lose a few parking spaces if the access was brought in there.

Chair Sterndale said the applicant was trying to minimize traffic at the choke point at the Post Office, but was also saying there would be students who would park on the lot all week, and there might be some parking spaces for businesses.

Mr. Warnock said opening up use of the parking lot to other students in the area would increase the number of cars there. There was discussion. Chair Sterndale asked if funneling traffic through one reasonably good entrance with good visibility might be a lot better.

Mr. Sievert said the applicant didn't own the church property so this wasn't an option at this point. He said he and the applicant felt the variance criteria were met because the safety and access would be improved and there wouldn't be an increase in the traffic, even though there would be 30 additional vehicles. He said these vehicles would come and go at different times. He spoke further and there was discussion.

Mr. Warnock said a concern with what was proposed was that it would be adding cars on a residential road, and he noted that he lived nearby on Woodman Road. He spoke further on this.

Mr. Waters asked to hear more about the possibility of parking spaces for businesses. Mr. Sievert said there would be about 8 spaces, and said they could be metered, or designated for specific business owners and their employees. He said this could free up spaces in the Pettee Brook parking lot. He said this approach would come down to financial considerations. He said this was an ideal location for parking that was needed for the downtown that was needed.

Ms. Lawson noted that it was just the access that the ZBA was concerned with and it was a given that there would be a surface parking lot.

Mr. Murphy said that concerning the idea of providing parking for businesses, while the easiest thing to manage was student parking, he was open to doing parking for businesses. He spoke further on this and said the idea was being explored as a secondary option.

Chair Sterndale said the lot could be used without cutting through to Cowell Drive, and asked if the intention was to do that. Mr. Murphy said yes.

Mr. Sievert read letters from the Fire Department and the Police Department into the public record.

Mr. Waters said it would seem that access to the parking lot from the back would be better than from the front, in terms of dealing with snow.

Ms. Cline asked Mr. Sievert to speak about the one way access option. Mr. Sievert said there had been discussion about having a one way in, one way out loop that would bring cars in off of Main St and out at Cowell Drive, or vice versa. He spoke further on this.

Chair Sterndale opened the Public Hearing and asked if there were any members of the public who would like to speak for or against the application.

Susan Richmond, 16 Cowell Drive, said if the access could be through the church parking lot that would be amazing, and she spoke further on this. She said the proposed driveway would need to be wider, and said the additional parking spaces would turn it into commercial parking if this was opened up to the larger community. She said 28 more spaces was a concern in regard to public health, safety and welfare, and she spoke in some detail on this. She said the existing driveway on Cowell Dr. had poor visibility

and said it was difficult to make a safe exit from it. She said what was proposed would make it harder to get in and out of Cowell Drive. She asked if perhaps a traffic study of the area should be done.

Ms. Richmond said that concerning a possible decrease in the value of surrounding properties, Cowell Dr. didn't have a high traffic volume now, and said what was proposed would therefore decrease property values. She noted that people might view it as a cut through to Main St. She said it was a family neighborhood and said property owners tried to keep it from deteriorating. She said she didn't think it was a student neighborhood, as described in the application. Concerning the issue of pedestrian traffic in the area, she said most of the permanent residents worked in Town and walked downtown, noting that she did this.

Chair Sterndale asked if there was a pedestrian way from Bay View to Cowell Dr. There was discussion. It was noted that while there was no legal pedestrian access from Cowell to Main St, people did it.

Susan Herald, 6 Glassford Lane, said several people wanted to come to the meeting tonight but couldn't because they all found out about the application today. She spoke in detail about her concerns about how existing drainage problems at 3 Cowell Drive and elsewhere in the neighborhood would increase as a result of the driveway off of Cowell Drive. She spoke about how snow from the parking lot would be part of the problem.

She spoke about illegal parking on Cowell Drive over the years and said the Police Department had not been very responsive concerning this. She noted her concerns about emergency access to her property because of the illegal parking, and said she was concerned that there would be increased congestion in the area because of the new driveway, which would make emergency access more difficult. She spoke in detail about traffic flow in the area, noting that it was difficult to turn onto Madbury Road from Glasford Lane and that this had gotten more difficult in recent years because of the increase in student housing downtown.

She said the parking lot and driveway could make things worse. She said she was worried that there would be overflow traffic onto her street. She noted that the neighborhood was changing, with more children living in starters homes there, and said people wanted to be able to let their kids ride their bikes there. She spoke about possible cut throughs, and said she couldn't believe there wasn't a better way to do this. She said there was already a driveway.

Mr. Sievert said he wasn't saying this was student neighborhood but said adjacent uses were student rentals and said the use was already there on the applicant's lots. He said it was already commercial in the area. He said there wouldn't be a cut through, and noted that there was a steep hill going up to Main St. and that the road wouldn't be widened there to create an easier turn.

He said this was an opportunity to negate some of the illegal parking that went on, by having assigned spaces, and said students could walk to their classes. He said people couldn't just come and park there, and said all of the spaces would be assigned, as was

the case now. He also said there was good enforcement. He said there would be minimal parking spaces from which cars would come and go frequently. He said they were trying to solve a parking issue in the Town, and said they felt Cowell Dr. was as good place to put the driveway because there was an easy in and out at that location.

Micah Warnock MOVED to Close the Public Hearing. Joan Lawson SECONDED the motion and it PASSED unanimously 5-0.

Mr. Warnock said he was hard pressed to get there on approving the application, looking at the decrease in value of surrounding properties, spirit and intent of the Ordinance, and substantial justice criteria. He said the applicant already had an access and could increase it to make room for egress and ingress.

Ms. Lawson said she didn't disagree. She said she tried to listen for the real reason for doing this, and said the most outstanding one was probably that it took traffic off of Main St. But she said the applicant was creating more traffic by putting in a larger surface parking lot. She said if it was accepted that the parking lot would go in either way, the applicant would be putting traffic into the neighborhood.

Mr. Warnock said there were single family dwellings on Cowell Drive, and said those houses would never go back to single family homes again if this entrance to a multiunit building was put in. He said this would devalue the value of those homes.

Mr. Toye said there were also two large churches and the Post Office nearby. He said that activity took place away from the family neighborhood, but said he realized that people might drive down there sometime, not intending to be there. But he said it wasn't logical that increasing the parking lot area would make illegal parking in the area worse. He also said with a narrow entrance on Main St. and at a bad angle, he couldn't imagine that the Fire Department thought it was accessible, so it would benefit most from the Cowell Drive entrance.

Mr. Warnock said that entrance could be fixed. It was noted there was an elevation change there.

Chair Sterndale said the applicant had said he could build the parking lot with the entrance he had. He said a hardship would therefore not be relived by providing a second access. Mr. Toye said a question was whether there was a better overall schematic with what was proposed.

Chair Sterndale said granting the various would not be contrary to the broader public interest, noting that the increased parking was needed downtown. Ms. Lawson noted that the application wasn't about the parking lot, and was about the access to it. Chair Sterndale said safer access was in the public interest, as was access for emergency services. But he said the public interest in terms of the Cowell Drive neighborhood would be hurt. He said the Cowell Dr. area was a pocket neighborhood that was one way in and one way out, and was trying to be a single family neighborhood. He said the addition of cars would incorporate the area into the downtown scheme in a way that

hadn't been the case in the past. He said it would definitely be hurt by this addition. Ms. Lawson agreed that that was a good description of the situation.

Chair Sterndale said that concerning the spirit and intent of the Ordinance, the purpose of the RA District was nondescript so one could say that this criterion was met. He said he didn't see that substantial justice would be done in granting the variance, and said he couldn't imagine that the driveway off of Cowell Drive wouldn't diminish the value of at least a few properties. Concerning the hardship criterion, he said it had been established that there was usable access with or without the variance. Ms. Lawson agreed.

Mr. Toye said he didn't think he could make a strong enough argument to counter what Chair Sterndale had said. He said he could get there on everything but the spirit and intent of the Ordinance criterion, in regard to the accessory use, and he spoke briefly on this. There was further discussion.

Chair Sterndale MOVED that the Zoning Board of Adjustment deny a petition submitted by MJS Engineering, P.C., Newmarket, New Hampshire, on behalf of the Toomerfs, LLC, Durham, New Hampshire for an APPLICATION FOR A VARIANCE from Article XII.1, Section 175-53III(3) of the Durham Zoning Ordinance to permit a driveway on Lot 38-5 as an accessory use to access a surface parking lot on Lot 55-0 for failure to meet the criteria of public interest, substantial justice, diminishment of property values and hardship. Micah SECONDED the motion and it PASSED 4-1 with Tom Toye voting in opposition of it.

VI. Other Business:

VII. Approval of Minutes

October 9, 2018

Page 2, 6th paragraph, should read "...that distinguished it from other properties....."

Chair Sterndale MOVED to approve the October 9, 2018 Minutes as amended. Micah Warnock SECONDED the motion and it PASSED 3-0-2, with Joan Lawson and Dinny Waters abstaining because they weren't at the meeting.

VIII. Adjournment

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

Adjournment at 10:20 pm.

Victoria Parmele, Minutes taker

Micah Warnock, Secretary