

These minutes were approved at the March 16, 2021 meeting.

**ZONING BOARD OF ADJUSTMENT
Tuesday, November 10, 2020 at 7:00 p.m.
Town Council Chambers, Town Hall
8 Newmarket Road, Durham, NH
MINUTES**

MEMBERS PRESENT: Chris Sterndale, Chair (attending in person)
Tom Toye, Vice Chair (attending in person)
Joan Lawson, Secretary (attending remotely)
Micah Warnock (attending remotely)
Mark Morong (attending remotely)

OTHERS PRESENT: Audrey Cline, Code Administrator (attending remotely)

I. Call to Order

Chair Sterndale called the meeting to order at 7:03 pm. He noted that he was the only ZBA member in the room, and said under the Governor’s Executive Order related to Covid-19, a quorum of members could meet remotely, which was the case tonight.

II. Roll Call

The roll call was taken.

Chair Sterndale	Yes
Tom Toye	Yes
Joan Lawson	Yes
Micah Warnock	Yes
Mark Morong	Yes

III. Seating of Alternates

No alternates were seated.

IV. Approval of Agenda

There were no changes made to the agenda.

V. Public Hearings:

A. **PUBLIC HEARING** on a petition submitted by Norman J. Silber, Attorney, Gilford, New Hampshire, on behalf of Seacoast Chabad Jewish Center, Durham, New Hampshire for an

APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a September 21, 2020 letter from Building Inspector, Audrey Cline, denying the use of the property for the holding of religious services. The property involved is shown on Tax Map 6, Lot 7-61, is located at 2 Chesley Drive, and is in the Residence A Zoning District.

Chair Sterndale noted the written submission from Attorney Silber, requesting that the Board rescind and revoke the notice of violation. He asked if that and nothing else was being requested, and Attorney Silber said that was correct. Chair Sterndale said what was provided appeared to be of a constitutional nature, and asked if there was anything concerning the application and interpretation of the Zoning ordinance being presented.

Attorney Silber said there were no factual dispute he knew of. He said Chabad was a non-profit organization, and said the residence at 2 Chesley Drive was a parsonage that was occupied by the owner, where services were held from time to time. He said the arguments were based on the constitution and federal statute. 42 US code 2000, concerning protection of land use as a religious exercise.

Chair Sterndale summarized that there wasn't any dispute of the facts concerning the holding of services at the property.

Attorney Silber quoted from the federal statute he'd noted, which he said was passed in 2000 concerning using land use to impinge upon religious freedom. He also quoted from Article 6 of the Constitution, the supremacy clause, which he said made federal laws supreme over state and local laws. He said the Town's attempt to prohibit having religious services in the residence violated both of the Constitution and the federal statute.

Chair Sterndale asked if there was anything going on with the Town about possibly accommodating that activity elsewhere. Attorney Silber said he wasn't aware of anything. He said there had been an issue around Christmas last year regarding placement by the same organization of a menorah. He said that was objected to and prohibited by the Town, and said the menorah was moved to Strawberry Bank in Portsmouth, as a private accommodation, not a Town accommodation. He said this had nothing to do with this violation.

Mr. Morong said the brief, he referred to a Florida case, but he said information on the case wasn't provided. He said it was a case that didn't seem to apply here, and he provided details on this.

Attorney Silber said he provided the case numbers to Attorney Spector Morgan, and said some of the cases were based on discrimination and some were based on the federal code. He said he hadn't seen any basis so far for a claim of discrimination in Durham. He also said he filed a RSA 91-A Right-to-Know request asking about other religious organizations that were possibly holding services in residences in Durham, and was told there was no information available on this.

Mr. Morong asked if there was a place to hold services other than at this location. Attorney Silber said there was a small facility in Durham and another one in Portsmouth. He said the Chabab was an international movement that was started in the US, and said there was no large synagogue involved. Mr. Morong noted a group that had wanted a small gathering place in the Business District, and said the only issue in that instance was that cooking fish there could have an impact on neighboring properties.

Ms. Lawson noted the quote in the brief about how the federal statute spoke about illegally discriminating activities. She asked if there was a situation where the applicant had seen other types of large assemblies in the neighborhood, to use as a basis for this statement.

Attorney Silber said there wasn't a claim here of discrimination, and said the claim was that the federal statute prohibited the use of land use regulation to restrict religious observance. He spoke further on this. Ms. Lawson said she read things a bit differently, but thanked Attorney Silber for the information.

Chair Sterndale asked Ms. Cline to speak about the administrative decision she'd made.

Ms. Cline said there were some complaints about a tent at the applicant's property for a number of weeks, which wasn't a violation. She said she was later shown a website where people could sign up for religious services at the property, and said she wrote a letter to the applicant that this was a violation. She said the event was held, and she then delivered a formal violation letter, based on language in the Zoning Ordinance that reasonably limited services. She noted that there was a Conditional Use process available to the applicant concerning the use if he wished to go through that process.

Chair Sterndale asked if other efforts were made to accommodate the applicant's needs in a zone where it was permitted. Ms. Cline said yes, and spoke about a special use permit that was granted to the applicant after she learned about a gathering planned for a public park. She said the Town also offered the use of any public area, for the most part, for another planned service, but he didn't respond.

Mr. Warnock asked how to differentiate the Rabbi as a person vs. the Chabab as an institution. Ms. Cline said she looked at the website that was offering sign-ups for a service, which the Town didn't feel was a personal religious exercise. There was discussion that the property was owned by an organization, not an individual, and was the residence of the Rabbi who ran the organization. Mr. Warnock confirmed that the advertisement about an event was an appeal by the institution, not by the Rabbi.

Janice Aviza, Garden Lane said cities and towns established zoning within their communities for obvious reasons. She said Residential zoning meant residential areas were designated for the quiet enjoyment of their homes by residents. She said people in neighborhoods were protected by

Zoning from having a carwash, a drive-through bank, a restaurant, a medical office, a grocery, or a church/synagogue next door. She said the religious observances that were held over the summer at 2 Chesley Drive were far outside of that intention.

She said these services were advertised in Fosters as “Open to All”, and noted that several of the cars parked all over Chesley Drive were from other states. She said this was egregious, and said if the Rabbi didn’t have a house of worship, maybe he needed to establish one, in a properly zoned area and have his services there instead of imposing on the already beleaguered residents of Chesley Drive. She said the fact that his home was tax exempt as a rectory didn’t entitle him to conduct worship services there.

Ms. Aviza said everyone was dealing with COVID, and said several churches in Town were dealing with it in ways that accomplished their mission to the best of their abilities, on their own premises. She said perhaps the Rabbi could use the storefront he rented behind the Subway shop. She asked the ZBA to protect the neighborhoods of Durham by enforcing existing zoning regulations. She said residents were entitled to quiet enjoyment of their family homes.

Yaning Li, Chesley Drive said as neighbors, they couldn’t go out easily when these services were happening. He said he hoped they could find an open space to spread out and do the service more easily instead of doing them in his neighborhood, where the cars, noise, singing, etc. made his kids scared to go outside.

Marshall Banks, Chesley Drive said he supported the Jewish faith. But he said the way their road was right now, with cars on both sides of the road impeding emergency services, etc., the Rabbi should have taken into account that he lived in a residential neighborhood. He said the road should be kept for residents.

Attorney Silber noted suggestions made this evening about the applicant finding another location, and said while he understood this line of thought, the law said a person could have religious observances in his home, and that land use regulations couldn’t prohibit this. He said if there were issues concerning cars, etc., the police needed to give tickets for this.

Mark Morong MOVED to Close the Public Hearing. Tom Toye SECONDED the motion and it PASSED unanimously 5-0 by a roll call vote:

<i>Chair Sterndale</i>	<i>Yes</i>
<i>Tom Toye</i>	<i>Yes</i>
<i>Joan Lawson</i>	<i>Yes</i>
<i>Micah Warnock</i>	<i>Yes</i>
<i>Mark Morong</i>	<i>Yes</i>

Ms. Lawson said she did a web search on the information provided, and said she didn’t see a federal law that said zoning against religious gatherings was against federal law, and that therefore supported the applicant’s request.

Mr. Morong said he wasn't a lawyer, but said he would go by the Zoning Ordinance, which was what ZBA members were supposed to go by. He said if there was a problem with that, the lawyers would have to sort it out. Others Board members agreed.

Mr. Toye said RSA 175-53 didn't specifically prohibit religious facilities, and said instead it was a conditional use so there was a process that could be gone through. He said if the applicant went through that process and hit a roadblock, there might be more for him to talk about.

Ms. Lawson said Attorney Silber didn't articulate that he was here tonight in part in regard to a possible conditional use permit, but his writing indicated that.

Ms. Cline noted that Attorney Silber's letter was written to the Planning Board, which oversaw the conditional use process.

Michah Warnock MOVED that the Zoning Board of Adjustment deny a petition submitted by Norman J. Silber, Attorney, Gilford, New Hampshire, on behalf of Seacoast Chabad Jewish Center, Durham, New Hampshire for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a September 21, 2020 letter from Building Inspector, Audrey Cline, denying the use of the property for the holding of religious service. Joan SECONDED the motion.

Mr. Toye said he had looked up the federal code. He said it was clear what the Zoning Ordinance said, and said Ms. Cline had acted consistent with that.

The motion PASSED unanimously 5-0 by a roll call vote:

<i>Chair Sterndale</i>	<i>Yes</i>
<i>Tom Toye</i>	<i>Yes</i>
<i>Joan Lawson</i>	<i>Yes</i>
<i>Micah Warnock</i>	<i>Yes</i>
<i>Mark Morong</i>	<i>Yes</i>

B. **PUBLIC HEARING** on a petition submitted by Suzanne Brunelle, Devine Millimet Attorneys at Law, Manchester, New Hampshire, on behalf of John Leland, Dover, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII.1, Section 175-54 of the Durham Zoning Ordinance to allow for the creation of a lot with less than 300 feet of lot frontage. The property involved is shown on Tax Map 12, Lot 6-2, is located at 194 Piscataqua Road, and is in the Residence C Zoning District.

Attorney Brunelle said Mr. Leland had entered into a Purchase and Sale Agreement with the Dalys, for the sale of approximately 3 acres of Mr. Leland's approximately 6.37-acre property. She noted that the Leland property was located between Piscataqua Road and Little Bay, and had approximately 300 feet of road frontage along Piscataqua Road, and 231.2 feet of shore frontage

along Little Bay. She said even though there was the 300 ft of frontage, the applicant had always accessed the parcel by a 20-ft wide deeded right-of-way over an abutting lot, Map 12, Lot 6-3 which was owned by Michael Olsen. She said the Dalys' property contained about 3.8 acres, and had no existing road frontage. She said they currently accessed their property by the same deeded right of way that the Lelands used.

She said the Olsens and Dalys agree to adjust the lot lines so the Daly parcel would consist of approximately 6.8 acres and the Olsens' property would contain approximately 3.4 acres. She said with the sale, the lot line adjustment would result in the Olsen parcel having 30.28 feet of road frontage. She said if all approvals were received, the Dalys planned to construct a driveway off Piscataqua Road.

Attorney Brunelle reviewed the variance criteria and how they were met with this application.

Public interest – She said the Ordinance stated in 175-3 that the purpose was to protect the public health, safety and convenience, and general welfare while ensuring that development was commensurate with the character and physical limitations of the land. She said granting this variance would not be contrary to these objectives because the Lelands had requested a variance in order to be able to sell the portion of their parcel that they didn't use. She said the proposal would not alter the essential character of the neighborhood.

She said specifying a minimum frontage in an ordinance was generally done to prevent the overcrowding of land, but said the applicants weren't requesting the variance so they could create a new lot or add an additional structure. She said there would be no overcrowding of the land if the variance was granted. She also said the Lelands' property would continue to be accessible by means of the deeded right-of-way across the Olsen parcel, so there would be no change in the essential characteristics of the neighborhood.

She said granting the variance would not threaten the public's health, safety, or welfare.

Spirit and Intent of the Ordinance – Attorney Brunelle said the spirit of the ordinance would be observed if the variance was granted. She said the purpose of the RC district was to protect the water quality of the community's principal surface waters and to preserve the rural character and scenic beauty of these coastal areas including the view of the shore as seen from the water. She said If the variance was granted, the rural character and scenic beauty of the coastal areas, including the view of the shore as seen from the water, would be preserved and the water quality should not be affected.

Substantial justice - Attorney Brunelle said substantial justice would be done in granting the variance, and said it would allow a property owner the reasonable use of his property. She said if the variance was not granted, the applicant would be prohibited from selling the Property to the Dalys, resulting in a loss, which would be an injustice to the applicant.

Values of surrounding properties – Attorney Brunelle said these property values would not be diminished by granting the variance. She said the variance would permit the Lelands to sell acreage to the Dalys, who intended to request a lot-line adjustment from the Planning Board and construct a driveway with that acreage. She said this would assist in the reduced use of the right of way over the Olsen parcel. She also noted that after the lot line adjustment, the Leland’s parcel would contain approximately 3.4 acres, which met the lot size requirements for the RC zone.

Unnecessary Hardship Attorney Brunelle said there were special conditions of the Lelands’ property that distinguished it from other properties in the area. She said it was accessed by a deeded right-of-way over the Olsen Parcel, and therefore didn’t require minimum road frontage for the creation of a driveway off Piscataqua Road. She said the Lelands didn’t intend to construct a driveway on the property. She said they wanted to make reasonable use of their property in selling a portion of it to the Dalys.

She said there was no fair and substantial relationship between the general purposes of the ordinance provision and the specific application of that provision on the property. She said the Lelands’ parcel uniquely contained a right-of-way over the Olsen Parcel in addition to its approximately 300 feet of road frontage. She also said the proposed post lot-line adjustment acreage of the Leland parcel would be approximately 3.4 acres, which met the minimum lot size requirement in the RC district. She said the proposed use was reasonable one, and said the Lelands property would continue to be used as a residential use, which was a permitted principal use in the RC district and Shoreland Protection Overlay district, and was compatible with the surrounding residential properties.

Chair Sterndale noted that the Board had received two plans, which had different dates on them. Attorney Brunelle said the updated plan was less cluttered, and explained that some of the setbacks had been removed. Chair Sterndale spoke about showing a potential building setback on the western-most property for a possible building site. He said why not split the frontage 50/50, so both parcels would be more compliant with the frontage requirements. There was discussion with Attorney Brunelle about this. Chair Sterndale asked if there was an issue concerning rights to access the right of way. Attorney Brunelle said no, but said going across two properties to get to a property was unusual. She said the right of way was functioning well and legally.

Ms. Lawson asked what the intention was for building a house on the Daly property. It was noted that a new residential structure would be built for the Dalys to live in, and it wouldn’t be located up by the road. There was discussion that the minimum lot size was 150,000 sf. Mr. Morong said it looked like there could be a building site up by the road, but said unless the lot size requirements changed, he didn’t think it would make the cut.

Ms. Cline noted that there were other restrictions concerning having additional dwelling units, and spoke further.

Attorney Brunelle said the Dalys were moving there to have a single-family residence. Mr. Morong said it was what someone might come up with in the future that he was thinking about. Attorney Brunelle said the Planning Board would have to approve this.

Mr. Warnock asked why would there be a land transfer that didn't make equal road frontage for the two properties, and said this didn't make sense to him either. Ms. Lawson said it was explained that the frontage would be transferred to Mr. Daly, and that Mr. Leland didn't need the frontage because he had the use of the right-of-way for access. Mr. Warnock said the Lelands would be left with 30 feet of frontage, when splitting the frontage 50/50 would have made things closer to compliance.

Ms. Cline said that would have resulted in two nonconforming properties instead of one, and said generally that was thought to be a harder reach with a variance, regardless of the size of the nonconformance. She said that was the way this kind of situation was typically looked at.

Chair Sterndale said evenly dividing the properties would preclude future development on either of them on the roadside, with the existing setbacks. Mr. Morong said it didn't look like even if someone wanted to subdivide, that the lots would meet the current requirements. There was further discussion. He spoke about the proposed location for the driveway, and said it wasn't a bad place for it.

The architect for the project said they had spoken with NHDOT and showed them the preliminary driveway plans, including sight distance drawings, to make sure that they met the standards for that location.

Chair Sterndale opened the Public Hearing.

There were no members of the public who spoke for or against the application.

Micah Warnock MOVED to Close the Public Hearing. Joan Lawson SECONDED the motion, and it PASSED unanimously 5-0 by a roll call vote:

<i>Chair Sterndale</i>	<i>Yes</i>
<i>Tom Toye</i>	<i>Yes</i>
<i>Joan Lawson</i>	<i>Yes</i>
<i>Micah Warnock</i>	<i>Yes</i>
<i>Mark Morong</i>	<i>Yes</i>

Mr. Toye said he believed that the applicant had met all five variance criteria. He said the variance wasn't contrary to the public interest and wasn't contrary to the spirit and intent of the ordinance because the applicant wasn't creating a scenario that would allow for further density, and was correcting a situation where there was a right of way crossing two

properties. He said there would be a dedicated driveway for the Daly lot, and said the lot would conform to the 300 ft frontage requirement. He said there would be no concerns for abutters.

He said substantial justice would be done in granting the variance because both property owners would get what they wanted, with the Dalys getting direct access to Piscataqua Road, and the Lelands able to section off a piece of their land that was unused and sell it to the abutter. He said there was no detriment to anyone with this, and said no members of the public had suggested otherwise.

Mr. Toye said he couldn't see any reason why property values would be diminished if the variance was approved.

Concerning the hardship criterion, he said there was a unique situation, and said the Daly property was landlocked and one had to cross two properties to get access to Piscataqua Road. He said this set it apart from other properties in the zone. Chair Sterndale said granting the variance would relieve the hardship. Mr. Morong agreed, and said it would tidy up things if the Dalys had their own driveway. He said it would be a better situation for everyone.

Joan Lawson MOVED that the Zoning Board of Adjustment approve a petition submitted by Suzanne Brunelle, Devine Millimet Attorneys at Law, Manchester, New Hampshire, on behalf of John Leland, Dover, New Hampshire for an APPLICATION FOR VARIANCE from Article XII.1, Section 175-54 of the Durham Zoning Ordinance to allow for the creation of a lot with less than 300 feet of lot frontage. Micah Warnock SECONDED the motion.

Mr. Toye said he didn't see that there was a need to specify the plans in the motion.

The motion PASSED unanimously 5-0 by a roll call vote:

Chair Sterndale Yes

Tom Toye Yes

Joan Lawson Yes

Micah Warnock Yes

Mark Morong Yes

Other Business:

Review & Approve 2021 Zoning Board Meeting Dates

There was brief discussion on this.

Tom Toye MOVED to approve the 2021 Zoning Board Meeting Dates as amended. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0 by a roll call vote:

Chair Sterndale Yes

Tom Toye Yes

Joan Lawson *Yes*

Micah Warnock *Yes*

Mark Morong *Yes*

Approval of Minutes:

September 15, 2020

Tom Toye MOVED to approve the September 15, 2020 Minutes as distributed. Micah Warnock SECONDED the motion and it PASSED unanimously 5-0 by a roll call vote:

Chair Sterndale *Yes*

Tom Toye *Yes*

Joan Lawson *Yes*

Micah Warnock *Yes*

Mark Morong *Yes*

VII. Adjournment

Chair noted that the ZBA had denied an application for rehearing last month, and asked what had happened with this. Ms. Cline said it had been appealed to Superior Court, but the Town hadn't been served yet.

Tom Toye MOVED to adjourn the meeting. Joan Lawson SECONDED the motion and it PASSED unanimously 5-0 by a roll call vote:

Chair Sterndale *Yes*

Tom Toye *Yes*

Joan Lawson *Yes*

Micah Warnock *Yes*

Mark Morong *Yes*

Adjournment at 8:07 pm

Victoria Parmele, Minutes taker

Joan Lawson, Secretary