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**VIA FEDERAL EXPRESS
AND EMAIL**

March 31, 2015

Mr. Sean Starkey
Chair, Zoning Board of Adjustment
Town of Durham
15 Newmarket Road
Durham, NH 03824-2898

Re: Motion for Rehearing

Dear Chairman Starkey:

On behalf of Colonial Durham Associates, LP, enclosed please find the following Motion for Rehearing of March 10, 2015 Decision of the Zoning Board of Adjustment Pursuant to RSA 677:3, for filing with the Durham Zoning Board of Adjustment.

Please contact me with any questions.

Very truly yours,

Ari B. Pollack

Enclosures

cc: Colonial Durham Associates, LP
Thomas F. Johnson, Durham Code Enforcement
Michael Behrendt, Durham Town Planner
Laura Spector-Morgan, Esq.

STATE OF NEW HAMPSHIRE
TOWN OF DURHAM

STRAFFORD, SS.

ZONING BOARD
OF ADJUSTMENT

**MOTION FOR REHEARING OF MARCH 10, 2015 DECISION
OF ZONING BOARD OF ADJUSTMENT PURSUANT TO RSA 677:3**

NOW COMES Colonial Durham Associates, LP (“Appellant”), by and through its attorneys, Gallagher, Callahan and Gartrell, P.C., and respectfully submits this Motion for Rehearing, and says:

The March 10, 2015 decision of the Zoning Board of Adjustment (the “ZBA”), denying Appellant’s application for appeal of the January 8, 2015, administrative decision of Town Planner Michael Behrendt, is unlawful and unreasonable for the reasons set forth below.¹

I. The ZBA ignored the plain language of the zoning ordinance in affirming Michael Behrendt’s decision that dormitories are not an available dwelling type in a mixed-use development

In his January 8, 2015 decision, Town Planner Michael Behrendt opined that the term “dormitory” is included in the zoning ordinance for reference only and inclusion of the term has no other purpose. *See also* March 9, 2015 Memorandum of Michael Behrendt. Based on that determination, Mr. Behrendt concluded that a dormitory is not an allowed use in the Central Business Zoning District, nor, under his reasoning, in any zoning district in the Town. However, at the March 10, 2015 ZBA meeting, it was recognized by ZBA members that the zoning ordinance includes and defines the term “dormitory,” and assigns dormitories a unique household dwelling density distinct from all other dwelling types. *See* Article II, Table II-1. Dwelling Density by Type (providing that a dormitory is a “dwelling type” and assigning it a

¹ Appellant also incorporates in full the factual and legal arguments contained in Appellant’s Application for Appeal of January 8, 2015 Administrative Decision of Michael Behrendt and the minutes and video recording of the March 10, 2015 meeting of the ZBA.

maximum density of 3 occupants per 300 square feet of habitable floor space).² It was further undisputed that UNH is not subject to the Town’s zoning ordinance, and that there is no language in the zoning ordinance to suggest that the term dormitory is included for reference purposes only.

Given these factors, the ZBA’s decision is unlawful and unreasonable because it ignores the plain language of the zoning ordinance. Under New Hampshire law, words included in an ordinance are to be given effect. *See State v. Njogu*, 156 N.H. 551, 554 (2007) (explaining that a legislative body is presumed to know the meaning of the words it chooses and to use those words advisedly). Thus, where, as here, dormitories are a defined dwelling type and have an assigned dwelling density, they should be recognized as an available housing type. Accordingly, the ZBA should have reversed Mr. Behrendt’s conclusion that dormitories are unavailable in any zoning district in the Town of Durham.

Similarly, Mr. Behrendt’s conclusion that the term dormitory is only included in reference to UNH-owned housing is also incorrect. There is no language in the ordinance to suggest that dormitories must be publically affiliated or operated. In contrast, fraternities and sororities, which are defined, must be associated with UNH. Specifically, the definition of “Fraternity/Sorority House” requires that members be “students currently enrolled at the University of New Hampshire” and that the fraternal organization be “officially recognized by the University of New Hampshire.” Yet, the definition of dormitory is silent as to “recognition” and includes no companion provision that dormitory residents be UNH students. Consequently, there is nothing in the zoning ordinance to support Mr. Behrendt’s contention that dormitory dwelling types are limited to use by UNH, or otherwise require some affiliation with UNH. In

² The dormitory dwelling type is the only dwelling type that is assigned a maximum density of 3 occupants per 300 square feet.

fact, the opposite is true – there is an express requirement for student affiliation in the context of fraternities and sororities, but not with respect to dormitories. This contrast highlights that dormitory uses are available separate and apart from any connection to UNH.

II. The ZBA’s determination that apartment dwelling types are allowed as part of a mixed-use development in the central business district but dormitories are not, is arbitrary and has no grounding in the language of the zoning ordinance.

In affirming Michael Behrendt’s administrative decision, the ZBA adopted his position that dormitories are not allowed for inclusion in a mixed-use development because dormitories are not specifically listed as an allowed dwelling type for such developments. In reaching this decision, the ZBA and Michael Behrendt both relied on language in Section 175-53A, which states “[a]ny use that is not listed as a Permitted Use or a Conditional Use is prohibited in the district.”

The ZBA, however, recognized that (1) mixed-use with residential developments are allowed in the Central Business District by conditional use permit, and (2) that apartments are an allowed residential dwelling type for such developments notwithstanding that apartments are treated similarly and not listed as a use in the Central Business District. Nevertheless, the ZBA arbitrarily concluded that dormitories are not allowed, even though they are an equally viable residential dwelling type. This conclusion is unreasonable and an abuse of the ZBA’s discretion.

The zoning ordinance specifically provides that “mixed-use with residential” is allowed by conditional use permit in the Central Business District. The zoning ordinance, however, does not distinguish between types of “residential” uses that are allowed. Therefore, the ZBA and Mr. Behrendt should have concluded that all forms of residential use are available so long as the development otherwise complies with the requirements of a mixed-use with residential development. The ZBA’s arbitrary conclusion that some forms of residential use are allowed

(i.e., apartments) but that dormitories are not, has no basis in the language of the zoning ordinance, and should be reversed on rehearing. If apartments are an available dwelling type it follows that dormitories are also equally allowed absent language to the contrary.

WHEREFORE, for the reasons stated, Appellant requests that the Durham Zoning Board of Adjustment:

- A. Grant Appellant's Motion for Rehearing;
- B. Vacate its Decision of March 10, 2015;
- C. Reverse the January 8, 2015 Administrative Decision of Town Planner Michael Behrendt; and
- D. Grant such further relief as justice and equity requires.

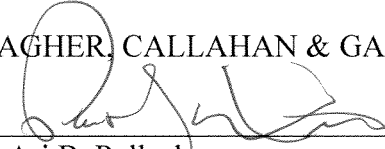
Respectfully submitted,

COLONIAL DURHAM ASSOCIATES, LP

By Its Attorneys

GALLAGHER, CALLAHAN & GARTRELL, PC

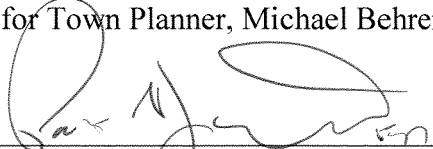
Dated: 3/31/2015

By: 
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Robert J. Diétel
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Rehearing has this day been forwarded to Laura Spector-Morgan, Esq., attorney for Town Planner, Michael Behrendt.

Dated: 3/31/2015

By: 
Ari B. Pollack