

Town of Exeter
Zoning Board of Adjustment
December 21, 2021, 7 PM
Town Offices Nowak Room
Final Minutes

I. **Preliminaries**

Members Present: Chair Kevin Baum, Vice-Chair Robert Prior, Clerk Esther Olson-Murphy, Rick Thielbar, Christopher Merrill - Alternate, Anne Surman - Alternate

Members Absent: Laura Davies, Martha Pennell - Alternate

Call to Order: Chair Kevin Baum called the meeting to order at 7 PM.

I. **New Business**

- A. Continued public hearing on the application of Roger Elkus for a variance from Article 5, Section 5.5.3 to permit the proposed construction of a second principal building (residential) on the property located at 181 High Street. The subject property is located in the R-2, Single Family Residential zoning district. Tax Map Parcel #70-119. ZBA Case #21-13.

Mr. Baum said this application has been withdrawn by the applicant.

- B. The application of Lisa Butler for a special exception per Article 5, Section 5.2 and Article 6, Section 6.18 – Cemetery Regulation to permit the proposed construction of a garage and enclosure of an existing deck within the required statutory 25-foot setback from the abutting cemetery. The subject property is located at 37 Linden Street, in the R-2, Single Family Residential zoning district. Tax Map Parcel #82-19. ZBA Case #21-14.

Mr. Merrill said he will exempt himself from this case because he is on the Cemetery Board. Ms. Surman will be the voting alternate.

Lisa Butler said this is the third step in the special exception process. The Cemetery Trustee Board and Select Board have approved the request. She's looking to renovate the home to make it accessible for her partner, who is wheelchair-bound. If the cemetery were not there, it would be a 10 foot setback, but because of the cemetery it's a 25 foot setback. The ordinance provides for a special exception for "use and enjoyment" of the property, which for us would mean enclosing an existing porch and adding a garage. The changes would stay within the 10 foot setback. There's a shed by the cemetery fence that we will likely tear down. Mr. Prior said that there will actually be less intrusion for the cemetery with that structure removed.

Mr. Baum opened the public hearing, but there was no public comment. He closed the public hearing and brought the discussion back to the Board.

45 Mr. Prior said in this case, we can rely on the written submission and not
46 go through the criteria.

47 Mr. Prior made a motion to approve the application of Lisa Butler for the special
48 exception for the property of 33 Linden Street as submitted. Ms. Surman seconded. Mr.
49 Baum said this clearly meets the criteria and it's an improvement over what's currently
50 on the property. It's reasonable and will not detract from any property values or the
51 public health, safety, or welfare. Mr. Prior, Mr. Thielbar, Ms. Surman, Ms. Olson-Murphy,
52 and Mr. Baum voted aye, and the motion passed 5-0.

53
54 C. The application of Phillips Exeter Academy for a variance from Article 4, Section
55 4.3 Schedule II: Density and Dimensional Regulations-Residential to permit the
56 proposed construction of a residential structure (two-family dwelling)
57 approximately ten feet (10') from the front lot line where a twenty-five foot (25')
58 front yard setback is required; and a special exception per Article 4, Section 4.2
59 Schedule I: Permitted Uses and Article 5.2 to permit the proposed construction of
60 three (3) two-family dwellings within the R-2, Single Family Residential zoning
61 district. The subject properties are located at 35 High Street, 10 Gilman Lane and
62 8 Gilman Lane, in the C-1 Central Area Commercial and R-2, Single Family
63 Residential zoning districts. Tax Map Parcels #71-117, #71-118 and #71-119.
64 ZBA Case #21-15.

65
66 Mr. Merrill said he will let Ms. Surman vote on this issue, but he will
67 participate in the discussion.

68 Roy Tilsley of the Bernstein Shur Law Firm was present to represent
69 Phillips Exeter Academy, as well as Cory Belden of Altus Engineering, Mark
70 Leighton of PEA, and Robert Harbeson and Christina O'Brien from Market
71 Square Architects.

72 Attorney Tilsley said the project is seeking one variance and one special
73 exception to create a four acre lot out of 71-117, 118, and a portion of 119. That
74 lot contains 8 housing units for faculty; we're seeking to add 5 units for a total of
75 13. This lot is partially in the C-1 district and partially in the R-2 district. This
76 project is subject to HDC and Planning Board review. The variance is from 4.3 to
77 allow a structure, in this case a two-family dwelling, to be located within 10 feet
78 from the front lot line in the R-2 zone, where 25 feet is required. It would be right
79 next to an existing duplex on the C-1 side with a 10 foot setback. We had
80 originally proposed 13.5 feet for the setback, but the HDC preferred having
81 symmetry between the two properties with an enclosed front entryway. The
82 special exception is from 4.2 and 5.2 to permit the three two-family duplexes on
83 the R-2 portion of the lot.

84 Corey Belden of Altus Engineering spoke about the site design. Currently
85 there are 8 units on the site. The structure at 35 High Street has 6 units and there
86 are two single-families at 8 and 10 Gilman Lane. The proposal is to do a lot
87 merger and lot line adjustment which will create a four acre lot that will contain
88 the new development. Our goals were to provide better access to the site, the

89 ballfields, and the town DPW pump station, and to improve the intersection at
90 Gilman Lane. We're looking to close off the curb cut and provide all access
91 through the signalized intersection.

92 Mr. Prior asked Mr. Belden to discuss who is impacted by the closure of
93 Gilman Lane. Mr. Belden said public access will be through the new access, but
94 the easement will remain. The existing road will end at the new duplex driveway.
95 We will close the curb cut completely, although it may serve as emergency
96 access. Until and the town will still have access.

97 Ms. Surman asked if pedestrians can still use the road. Mr. Belden said
98 it's a private road and owned by the Academy, but it will still be walkable. Mr.
99 Prior asked for confirmation that Gilman Lane is at present a private road, and
100 Mr. Belden said that it is. Mark Leighton said it is a private drive, but we allow
101 people to walk down through there. The use of it will be the same as it is now,
102 and we are improving it by adding a sidewalk.

103 Mr. Baum asked if the intersection would be signalized. Mr. Belden said
104 there's currently a signal for the driveway at 35 High Street that's run on a
105 detector.

106 Mr. Prior asked if the structure at 25 High Street, which is not an
107 Academy property, has any rights over Gilman Drive. Mr. Leighton said no, but
108 we've met with the owner of that property and we're willing to give him a piece of
109 our property for his driveway.

110 Robert Harbeson of Market Square Architects presented the design
111 proposals for the two duplexes and the triplex.

112 Attorney Tilsley said regarding the setback variance, if this were the C-1
113 zone, it would be a 10 foot required setback. We're very close to the C-1 zone.
114 35 High Street has a 10 foot setback, and the HDC liked the idea that the two
115 buildings would be lining up. Many nearby properties are closer than 10 feet from
116 their lot lines, so it's consistent with the area. In front of the lot line, there's a five
117 foot concrete sidewalk, so there's some additional separation from traffic.

118 Attorney Tilsley went through the variance criteria. 1) The variance will
119 not be contrary to the public interest and 2) The spirit of the ordinance will be
120 observed; yes, the proposal does not alter the essential character of the
121 neighborhood, as most properties have a 10 foot or less setback. It's not contrary
122 to the public health, safety, or welfare. Closing off Gilman Lane and directing
123 traffic through the signalized intersection will be a benefit for safety and traffic
124 flow. 3) Substantial justice is done; yes, there's no gain to the public by strict
125 enforcement of this ordinance in the requirement of a 25 foot setback. The loss to
126 the applicant would be significant. It would make it hard to comply with the HDC
127 and limit the potential for faculty housing on this site. 4) The value of surrounding
128 properties will not be diminished; yes, the 10 foot setback would make it
129 consistent with surrounding properties. 5) Literal enforcement of zoning
130 ordinance will result in an undue hardship; yes, the location at Portsmouth Ave
131 and High Street is on the edge of the C-1 and R-2 zoning districts and we're
132 trying to find a way to marry the uses. There's no fair and substantial relationship

133 between the 25 foot setback requirement and its application to the property. It's a
134 transitional area and the 10 foot setback is consistent with the rest of the
135 neighborhood. The proposed use is reasonable; duplexes are allowed by special
136 exception, and we're complying with the requirements of the HDC, which
137 approved our attempt to line this up.

138 Attorney Tilsley said regarding the special exception, this is to allow three
139 duplexes in the R-2 zone. Mr. Baum asked about the triplex. Attorney Tilsley said
140 we're dealing with HDC on the triplex, and may get it or not. Mr. Baum said
141 duplexes are permitted by special exception but triplexes are not. Attorney Tilsley
142 said Mr. Eastman said because the triplex will be located in both zones, including
143 C-1, it would be allowed. He discussed the setbacks for each building, which
144 meets what's required.

145 Attorney Tilsley went through the special exception criteria. 1) The use
146 has to be permitted by the zoning ordinance; yes, 4.2 section 1 says that
147 duplexes are allowed by special exception in the R-2 zone. 2) The use is
148 designed, located, and proposed to be operated so that the public health, safety,
149 and convenience will be preserved; yes, we're providing on-site parking, ingress
150 and egress from the signalized intersection, and with a wider curb cut, which will
151 be a safer way to get to the property. 3) The proposed use is compatible with the
152 zoning district and adjoining post-1972 development; yes, the neighborhood is
153 predominantly multi-family. This is a transition area between C-1 and R-2, so we
154 believe it's appropriate to have this use there. 4) Adequate landscaping and
155 screening is provided; yes, there will be fencing and buffers along the back and
156 sides. We will create an area that is appropriately screened from abutters. 5)
157 Adequate off-street parking; yes, all parking will be provided on-site, with no on-
158 street parking. We're adding just 5 units to what's there now, so it's not as big of
159 a difference as it might appear. 6) The use conforms with all applicable
160 regulations governing the district; yes, the only one not complied with is the 25
161 foot setback, which we are looking for variance relief from. 7) Planning Board
162 Review; yes, that will be required anyway for the lot line adjustment and site plan.
163 8) The use will not adversely affect surrounding property values; yes, duplex and
164 multifamily uses are consistent with this neighborhood. We have adequate
165 screening, and are meeting rear and side setbacks. We are creating a walkable
166 family-friendly area, which should actually enhance property values. Criteria 9)
167 storage of hazardous materials and 10) dealing with the special treatment of
168 specific lots in town do not apply.

169 Mr. Prior said regarding 2), he is concerned that by approving this we're
170 increasing the number of people accessing High Street on that stretch. Is a traffic
171 study planned or required? Mr. Belden said that will be hashed out during site
172 review. Gilman Lane is a poor access and has a limited ability to make left hand
173 turns, so we're looking to relocate that access.

174 Mr. Merrill asked what will happen if the HDC says they have to keep that
175 building in the middle. Attorney Tilsley said it wouldn't change what we're
176 requesting today. Mr. Belden said if required to be maintained, we'd look to turn it

177 into a duplex. Mr. Baum said we're dealing with these plans as presented. If
178 something changes, they'd have to come back.

179 Mr. Merrill asked if the changes would affect the owners of 39 High
180 Street. Mr. Leighton said not that they're aware of. That property's driveway does
181 not trigger the light. Mr. Baum said he assumes the Planning Board will address
182 that.

183 Anthony Zwaan of 7 Marlboro Street, an abutter, said the setback is a
184 straightforward proposal, but the three duplexes are not consistent with the
185 neighborhood. The Planning Board will look at this, but ZBA approvals severely
186 limit subsequent review. It's a shame that there are so many units in this
187 development. The relocation of Gilman Lane is predicated on the tearing down of
188 8 Gilman Lane and on being built right up to the property line of what used to be
189 the High Street Market, with no buffer. The plan as presented doesn't fairly
190 represent the lack of buffering for this project. Regarding public access, when the
191 Court Street development was proposed, the Academy promised to maintain
192 public access to the sports field, but that did not happen. This proposal is totally
193 out of character with the neighborhood, small detached family homes would be
194 better.

195 Attorney Tilsley said regarding the setbacks, we did 25 feet when 15 is
196 required. The fence is along the property line with trees. Mr. Baum asked if they
197 can do a more vegetated buffer, since a six foot tree along the property line is not
198 going to shield the view. Mr. Belden said we will look to see which trees can be
199 preserved, but the landscape architect felt like most of them were not worth
200 preserving and that it was better to plant new trees. Mr. Leighton said we're open
201 to more planting.

202 Attorney Tilsley said we identified multifamily properties along High
203 Street, Marlboro Street, and Gilman Lane, and this is not unusual for this
204 neighborhood. Mr. Baum said on Marlboro Street, #7 is not a two family and #10
205 is a commercial structure, but there is another two family behind that. Mr. Belden
206 said this information came directly from the town's website.

207 Mr. Baum asked the applicants to address the question of public access
208 to the trails and field. Attorney Tilsley said the access will be on whatever we call
209 this new road. It will be the same level of access. Mr. Leighton said he
210 understands their interest, but this is private property. There's no plan to make
211 any changes to what Gilman Lane allows now, but we reserve the right to close
212 the trails. Mr. Prior said being in compliance is not the same as honoring
213 tradition. People are used to being able to walk with impunity on those grounds.
214 He observed Gilman Lane today and observed 6 - 8 people go for a walk down to
215 the river or to the fields.

216 Anthony Zwaan said this development looks and feels more like a
217 development from a for-profit developer than from an institution that is part of the
218 community. It's not respectful of the town or the neighborhood. They should give
219 up a couple of units and be more respectful. Regarding open space and green
220 space, this is intended to create a buffer around the buildings, but in this case

221 they're pushing the buildings out to the margins to create the illusion of space
222 between the buildings, at the expense of abutters. A six foot fence is not an
223 adequate screen. He doesn't understand the hardship here, or the suburban-
224 style design.

225 Attorney Tilsley said we're open to whatever buffering makes sense. The
226 intent is to buffer appropriately and that's why we created a setback that's bigger
227 than required. Clustering the buildings together is something we'd do if we were
228 trying to exceed the required density, but that's not what we have here. This is an
229 allowed density. We're trying to create an attractive and livable area.

230 Mr. Prior went through the variance criteria. 1) The variance will not be
231 contrary to the public interest and 2) The spirit of the ordinance will be observed;
232 yes, he believes the variance will not be contrary to the public interest and will be
233 consistent with the neighborhood. Mr. Baum said he agrees. He walked down
234 there and the other houses are 10 feet to 0 feet setback. Mr. Prior continued with
235 the variance criteria: 3) Substantial justice is done; yes, there's no harm to the
236 public by having that building located this distance from the street, given that
237 other buildings around it have the same setback. 4) The value of surrounding
238 properties will not be diminished; yes, there's been no testimony to that effect,
239 and he doesn't see any issues. The only question would potentially be with 25
240 High Street, but that varies from 9 - 11 feet from the street. 5) Literal enforcement
241 of zoning ordinance will result in an unnecessary hardship; the balance is with
242 the needs of the HDC, which has a say over the property. It's their desire, as well
243 as the applicant's, to see the 10 foot setback. Mr. Baum said there's law that
244 when surrounding properties have a similar condition, there's a hardship. The
245 purpose of the setbacks is to provide safety and distance from the other
246 properties, as well as consistency. This is an area where it doesn't make sense
247 to have large yards.
248

249 Mr. Prior made a motion to approve Phillips Exeter Academy for a variance from Article 4,
250 Section 4.3 Schedule II as presented. Mr. Baum seconded. Mr. Baum, Mr. Prior, Ms. Olson-
251 Murphy, Ms. Surman, and Mr. Thielbar voted aye, and the motion passed 5-0.

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255 Mr. Baum asked for discussion on the special exception. Mr. Prior said
256 just because there are two-family houses in the area doesn't mean we have to
257 extend the number of two-families. Ms. Olson-Murphy said the existing two-
258 families were all one family houses that have been converted, while these look
259 like duplexes. Mr. Baum said 47-49 is clearly a duplex, so they don't all look like
260 single-family houses.

261 Mr. Prior went through the special exception criteria. 1) The use has to be
262 permitted by the zoning ordinance; yes, 4.2 section 1 says that duplexes are
263 allowed by special exception in the R-2 zone. 2) The use is designed, located,
264 and proposed to be operated so that the public health, safety, welfare, and

265 convenience will be protected; while he dislikes the moving of Gilman Lane, he
266 does see the benefit from a safety perspective for traffic to go through the light.
267 However, he's concerned about the density of people in this development. He
268 has some questions about how this proposal meets #2. Ms. Surman said this is a
269 big change for that intersection. It would be nice to see a traffic study. Mr. Baum
270 said it doubles the number of units, but only to 13, which is not a big increase.
271 This will go through Planning review to deal with traffic. Mr. Prior said once we
272 grant the usage, all a traffic study can do is a fine-grained analysis of the use. Mr.
273 Baum said the Planning Board could say it's too much or unsafe, but he doesn't
274 think that's going to happen with 13 units. Multifamily is permitted in the C-1. With
275 faculty housing, typically at least one spouse will be walking to work. Ms. Olson-
276 Murphy said these are family-sized units with more activity, which will impact the
277 area. Mr. Prior continued with the criteria: 3) Proposed use is compatible with the
278 zoning district and adjoining post-1972 development where it is to be located; yes
279 and no. This neighborhood is not as uniformly or predominantly multi-family as
280 the applicant has suggested. Mr. Baum said there is a lot of multi-family use
281 along High Street. He has trouble with the idea of denial based on use when it's
282 a zone that permits duplexes by special exception. Mr. Thielbar said a lot of the
283 things we've discussed haven't been part of our purview. Mr. Prior continued
284 with the criteria: 4) Adequate landscaping and screening; he believes that the
285 applicant will honor the verbal commitment that was made to consider screening
286 options, but we should consider putting in a condition. Mr. Baum said we should
287 make it clear to the Planning Board that it's a concern and should be addressed.
288 5) Adequate off-street parking - yes, we have no evidence to the contrary - and
289 ingress and egress are so designed to cause minimum interference on abutting
290 streets; taken narrowly, yes, they're putting the entrance through the signaled
291 intersection. His concern with traffic has to do with the volume coming out onto
292 High Street, rather than disruption or interference, so they meet the language of
293 #5. 6) The use conforms with all applicable regulations governing the district
294 where located; yes, we have no evidence to the contrary. Mr. Baum said yes, it
295 meets all setbacks and other requirements. 7) Planning Board Review; yes, that
296 will be required, but we can still say that in our conditions. 8) Use will not
297 adversely affect abutting property values; yes, we've had no testimony
298 mentioning property values. Any impact would be best addressed by the
299 landscaping. Mr. Baum said with a condition on landscaping, he's comfortable
300 with this criteria. The other two criteria do not apply.

301 There was general discussion about possible conditions to the motion.
302

303 Mr. Thielbar moved to approve the application of Phillips Exeter Academy for a special
304 exception per Article 4, Section 4.2 Schedule I: Permitted Uses and Article 5.2 to permit the
305 proposed construction of the subject properties located at 35 High Street, 10 Gilman Lane and 8
306 Gilman Lane, in the C-1 Central Area Commercial and R-2, Single Family Residential zoning
307 districts. Ms. Surman seconded.
308

309 Mr. Baum made a motion to amend the motion to add the condition to add a landscape buffer
310 on the eastern property boundary to the satisfaction of the Planning Board. Mr. Thielbar
311 seconded. Mr. Baum, Mr. Prior, Ms. Olson-Murphy, Ms. Surman, and Mr. Thielbar voted aye,
312 and the amendment passed 5-0.

313
314 On the amended motion, Ms. Surman, Mr. Baum, and Mr. Thielbar voted aye, and Mr. Prior and
315 Ms. Olson-Murphy voted nay. The amended motion passed 3-2.

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317 **II. Other Business**

318 A. Approval of Minutes: November 17, 2021

319 Corrections: Mr. Prior line 303, should be "frontage feet" instead of "square feet." Mr. Thielbar
320 said line 201, "here" should be "there." Ms. Olson-Murphy said her name was spelled wrong in
321 lines 216, 219, 322, 323, and 331.

322

323 Mr. Thielbar made a motion to approve the minutes of November 17, 2021 as amended. Mr.
324 Prior seconded. Mr. Baum abstained as he was not present at the Nov 17 meeting. Mr. Thielbar,
325 Ms. Olson-Murphy, Mr. Prior, Ms. Surman, and Mr. Merrill voted aye, and the motion passed 5-
326 0-1.

327

328 **III. Adjournment**

329

330 **MOTION:** Ms. Surman moved to adjourn. Mr. Thielbar seconded. All were in favor and the
331 meeting was adjourned at 9:22 PM.

332

333 Respectfully Submitted,

334 Joanna Bartell

335 Recording Secretary