

Town of Exeter  
Zoning Board of Adjustment  
March 15, 2022, 7 PM  
Town Offices Nowak Room  
Final Minutes

I. **Preliminaries**

**Members Present:** Robert Prior, Esther Olson-Murphy, Rick Thielbar, Laura Davies, Martha Pennell - Alternate, Christopher Merrill - Alternate

**Members Absent:** Kevin Baum, Anne Surman - Alternate

**Call to Order:** Acting Chair Bob Prior called the meeting to order at 7 PM.

I. **New Business**

A. The application of Gateway at Exeter, LLC for a variance per Article 4, Section 4.2 Schedule I: Permitted Uses and Section 4.3 Schedule II: Density and Dimensional Regulations (Residential) to permit a multi-family residential development on property located on Epping Road. The subject property is located in the C-3, Epping Road Highway Commercial zoning district. Tax Map Parcel #47-7. ZBA Case #22-4.

Jay Leonard, a lawyer, and Tom Monahan, the principal of Gateway to Exeter LLC, were present to discuss the application. Attorney Leonard said the project has ZBA variance approval from May 22, 2019 and Planning Board approval from Aug/Sept 2020, but there is now a concern regarding a condition of the variance. The previous application was for a mixed-use development, but we haven't been able to get financing for the mixed-use. In Dec 2021, we initiated a process through Mr. Sharples in the Planning Office where we planned just the residential part of the project, and that's the new plan.

Mr. Eastman and Town Counsel are concerned that the mixed-use status could be considered a condition of the variance approval. If that was a condition, it wasn't one that everyone understood, and it wasn't directly related to the variance granted. The mixed-use piece doesn't accomplish any zoning purpose.

There is a change in circumstance in that we want to build just the residential component. Another change in circumstance is that the pandemic changed the commercial and residential rental market, and we can't find a tenant for the commercial property. The other change is the passage of time. All of the other facts that supported the earlier variance are the same, so the conclusion regarding the variance should be the same.

Mr. Monahan can get financing to build the 224 rental units, and the project is exactly the same with regards to the residential property. 25% of those units, or 56 units, are dedicated to workforce housing as defined by the State of NH. 28 of those will be one-bedroom, and 28 will be two-bedroom. These will remain rental properties

45 for 30 years. The workforce housing will have a cost of rent plus utilities that is  
46 affordable to families who have 60% of the area median income (AMI).

47 Mr. Prior says the letter signed by the ZBA is ambiguous as far as the connection  
48 is concerned. He read from the decision letter: "We grant permission for a multi-  
49 family residential project as part of a mixed-use development plan within the area  
50 shown as the site on the display plan submitted and with the application as  
51 presented." There are five stated conditions, but this "as part of" is not a condition.

52 Mr. Prior read the conditions and asked Attorney Leonard to confirm that they  
53 are still the case. 1) The remaining 45 ± acres to the rear of the site remain  
54 undeveloped; Attorney Leonard said yes, we've already drafted a deed with the State  
55 and local people, and that should happen this month. 2) 25% of the residential rental  
56 units qualify as workforce housing rental units as defined under the NH State  
57 workforce housing statute; Attorney Leonard said yes. 3) The restriction for  
58 workforce housing rental shall be for not less than 30 years; Attorney Leonard said  
59 yes. 4) The residential portion shall remain as rental units for not less than 30 years;  
60 Attorney Leonard said yes. 5) The multi-family portion of the complex shall include  
61 not more than 224 residential rental units; Attorney Leonard said yes. Mr. Prior  
62 summarized that they're fully prepared to meet the five conditions.

63 Mr. Prior said there's ambiguity with "part of a mixed-use." There will be a  
64 mixed-use development, but it will be separated in time. They still intend to use the  
65 two acres at the front for non-residential use. Attorney Leonard said that's correct;  
66 the first lot, #47-6, is a little over two acres, and will be dedicated to the commercial  
67 use. We are fully intending to build a commercial use. It was originally proposed as a  
68 40,000-45,000 sq ft property with two stories, but we now can't commit to the size.  
69 We are not asking for a variance to that piece; it would remain zoned as the town  
70 has it zoned. Lot #47-7 is the lot that will have the residential component. It will be  
71 three buildings, two having 75 units and one having 74, just as we first proposed,  
72 and of the size proposed, with a 17,500 sq ft footprint. There will be a total of 224  
73 units. The last lot, #47-7-1, we are going to deed to the town and it will be restricted  
74 by conservation easements. The overseer of that land is the Exeter Conservation  
75 Commission. There are enforcement rights that will be granted to NHDES. The land  
76 [of #47-7-1] can't be developed.

77 Mr. Prior asked if separating the lots is intended to facilitate Mr. Monahan selling  
78 parcel #47-6. Attorney Leonard said he would either sell it or finance it separately,  
79 which requires a separate lot.

80 Ms. Pennell read information from the Planning Board minutes from August 20,  
81 2020 that did not seem to match the conditions set by the ZBA. Attorney Leonard  
82 said using the words "mixed-use" in the decision created an expectation that that  
83 was associated with the variance in Mr. Sharples' interpretation. That interpretation is  
84 what's holding things up. Mr. Prior said it wasn't a condition, but it was part of the  
85 ZBA decision. We don't need to worry about what the Planning Board did or didn't  
86 do; we need to look at the underlying decision that allows residential use in this zone.  
87 Ms. Davies said the inclusion of "mixed-use" was intentional, and we insisted on it.  
88 Mr. Prior said it was part of the application. Ms. Pennell said she doesn't see where

89 the Zoning Board discussed the timing and the commercial building that had to be up  
90 before the other two finished. Mr. Prior said he doesn't believe it was discussed.  
91 Attorney Leonard said we fully expected to build the commercial building, but things  
92 changed. We were trying to minimize the footprint of development, maximize the  
93 undeveloped area, and have buffers in place, and that all continues to be true.

94 Mr. Thielbar said frequently a variance application is simple enough to  
95 approve as submitted, but this request was too much. The applicant should come up  
96 with some bullet points on what we are actually approving. Attorney Leonard said the  
97 variance is for 224 residential multi-family units, of which 25% or 56 units will be  
98 workforce housing. He asked that the Board use the exact same language of the  
99 earlier approval but with no requirement regarding the time of the construction of the  
100 commercial property. The residential and commercial should be independent. Mr.  
101 Eastman said the motion should specify that the variance is for lot #47-7, because  
102 there has been a subdivision.

103 Mr. Prior asked for public comment.

104 Nick Taylor, the Executive Director of the Workforce Housing Coalition of the  
105 Greater Seacoast, spoke in favor of this proposal and its 56 workforce housing units.  
106 NH is short 20,000 housing units and we need those units to continue to grow our  
107 economy. Ms. Davies asked if Mr. Taylor had seen any difficulties with conditions of  
108 approval holding the project to workforce housing. Mr. Taylor said no, not when the  
109 conditions of the approval are clear.

110 Aaron Brown of 11 Deer Haven Drive in Exeter, the Vice Chair of the Exeter  
111 Planning Board, said Ms. Pennell was misinterpreting Planning Board condition 16. If  
112 the Exeter Planning Board had abandoned the commercial aspect of this project, we  
113 would not be here and the applicant would not have tried to sue the town. What  
114 they're not telling you is that they don't want to do the commercial, so they're  
115 separating the lots. Is the ZBA re-hearing this variance? Are they going to unwind a  
116 Planning Board condition? Mr. Prior said the Board is only looking at the ZBA  
117 condition and the ambiguity surrounding "as part of a mixed-use development".  
118 We're not going to rehear the five variance criteria. The applicant needs a  
119 clarification and an extension, because this approval runs out on May 22, 2022. We  
120 allowed residential use in a commercial zone, and none of those factors have  
121 changed, except that indication that it's part of a mixed-use development, which was  
122 part of the statement but not a condition of approval. As a Board, we need to decide  
123 whether we are comfortable not tying it to a commercial use.

124 Mr. Brown said that a proposed zoning amendment to rezone this corridor for  
125 multi-family residential use was defeated by a town vote five or six years ago. The  
126 Planning Board is starting to see residential uses coming in through variances; at  
127 what point do these variances become a rezoning of the property? If it's time for a  
128 zoning change, we should be bringing this back to the voters.

129 Mr. Prior said that's not something that's within the ZBA's purview. It wasn't  
130 necessarily that the voters rejected this, it could be said that they didn't wish to give  
131 blanket approval and are content to allow the ZBA to make a case-by-case decision.

132 In 2019, putting in 224 residential units made a lot of sense to this Board, and  
133 nothing's changed with that.

134 Mr. Brown said to clarify condition 16 of the Planning Board, the project is  
135 allowed to build 112 units and get their occupancy permit before having to build the  
136 commercial project. Mr. Prior said the Planning Board will have to deal with that once  
137 the ZBA process is over.

138 Darren Winham of 3 Juniper Ridge, the Town Economic Development  
139 Director, said it's not true that Mr. Monahan doesn't want to do the commercial. As  
140 soon as the market will allow it, he will do that. He [Mr. Winham] likes that this project  
141 is rental. Workforce housing is a huge issue, and since these are rentals, the cost is  
142 60% of area median income [AMI] vs 80% of AMI for condos. In the case of McKay  
143 Drive, the market was good for market-rate housing and they built two large  
144 buildings; when the market allowed, they found the commercial for the front, and the  
145 Primrose School is going in now.

146 Attorney Leonard said the TIF for the corridor specifically includes reference  
147 to multi-family. It's not contrary to what the town passed. Regarding enforcing  
148 covenants, we have used the same covenants in Londonderry, and they are  
149 enforceable. The financing is tied to tax credits which require these to be in place.  
150 Mr. Monahan does want to develop the commercial property, that's his goal.

151 Mr. Prior closed the public hearing and the Board entered deliberations.

152 Ms. Davies said the intention of the zoning and the TIF was part of the earlier  
153 discussion. The commercial component, and the quality thereof, was important to her  
154 vote in favor of the approval. Now that the property has been subdivided, it can be  
155 subject to any commercial use. How can we ensure that this is a significant, better-  
156 quality commercial property? Mr. Thielbar said someone who buys that property will  
157 want to have it produce as much as possible. Ms. Davies said certain uses might be  
158 willing to pay more for the land but would have lower-quality jobs. Mr. Prior said if the  
159 project had not wanted to put in residential, it would never have appeared at zoning.  
160 If he had wanted to put in a Maaco transmission dealership, it would not have come  
161 to this Board. The concerns of this Board are limited to the residential portion. Ms.  
162 Davies said the residential portion was a trade-off. She had expectations of what the  
163 commercial portion would be. She would like to ensure that this is the kind of  
164 commercial we were promised. Mr. Prior said we didn't specify it would be a two  
165 story office building, we said "as was stated in the application." The application is  
166 unchanged.

167 Mr. Thielbar asked Ms. Davies to read the special exceptions allowed in the  
168 Epping Road commercial zoning on 4-4. Ms. Davies read "gasoline and/or service  
169 stations, sexually-oriented business use, light industry, medical rehab facility, elderly  
170 congregate facilities, churches and places of worship, community buildings, social  
171 halls, clubs, lodges, fraternal organizations, or heliports." Mr. Thielbar said none of  
172 those are the wonderful developments that Ms. Davies is suggesting. Mr. Prior said it  
173 would have to come back to us for a special exception, so we do still have a degree  
174 of control. What we were asked to do in 2019 was facilitate workforce housing, and  
175 nothing has changed, except that it's no longer tied to a commercial development.

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Mr. Prior made a motion that we approve the request for a clarification and modification of the decision that was made May 22, 2019 regarding tax map parcels #47-6 and #47-7 that we no longer consider that the residential development needs to be tied to the commercial development in terms of the timing of the development, and further that we confirm all the conditions of approval that were granted in 2019, and next that we agree that the residential portion of this application refers to #47-7, and we grant a one-year extension to the decision, so that the approval now runs through May 22, 2023. Ms. Pennell seconded. Mr. Thielbar, Ms. Olson-Murphy, Mr. Prior, and Ms. Pennell voted aye, and Ms. Davies voted nay. The motion passed 4-1.

B. The application of Exonian Properties LLC for a variance from Article 5, Section 5.1.2.B. for a change in the purpose of a non-conforming use to permit a multi-family residential use of the existing structure on the property located at 43 Front Street; and a variance from Article 5, Section 5.6.6 for relief to provide no on-site parking where 24 spaces are required. The subject property is located in the R-2, Single Family Residential zoning district. Tax Map Parcel # 72-198. ZBA Case #22-5.

Attorney Sharon Sommers of DTC spoke representing Exonian Properties LLC; the principals of Exonian Properties, Florence Ruffner and David Cowie, were also present. Attorney Sommers said we are seeking relief to allow parking on the street for a multi-family housing project, and to change one non-conforming use, a church, to a new non-conforming use, multi-family residential.

Attorney Sommers went through the variance criteria. 1) The proposed change will not threaten the public health, safety, or welfare. The properties around this site include residential, the Historical Society, and the educational services, dormitories, and churches on Elm Street. A multi-family residential unit will not alter the character of the neighborhood or threaten the public health, safety or welfare. 2) The spirit of the ordinance will be observed; yes, this is considered with #1 and has already been addressed. 3) Substantial justice is done; yes, the benefit to the applicant is that the existing church structure can remain intact with a viable use of multi-family residential, and there is no known detriment to the public. 4) The value of surrounding properties will not be diminished; yes, the residential use will be consistent with other nearby uses, and we're unaware of any evidence that this will diminish property values. 5) Literal enforcement of zoning ordinance will result in an undue hardship; yes, the property was constructed as the First Baptist Church in the 19th century. The applicant would like to keep the church building there and has obtained approval from the HDC to do so. The special condition arises from the focus on keeping the church intact in a viable way. The permitted uses, such as single-family dwellings, public schools, recreation facilities, or open space developments, don't work in the confines of this existing structure. The proposed use is compatible with other nearby uses. There is no fair and substantial relationship with preventing negative impacts and how the ordinance is applied to this property.

220 The proposed use is a reasonable one; yes, none of the permitted uses will work  
221 within the existing structure. The proposed use will be compatible with neighboring  
222 properties and will also help keep the church intact, and is reasonable.

223 Ms. Davies asked if it will be 11 residential condo units, and Attorney  
224 Sommers said yes.

225 Mr. Prior asked if any members of the public wished to speak, but there was  
226 no public comment. Mr. Prior closed the public session and the Board entered  
227 deliberations.

228 Mr. Merrill asked why someone would want to do all this and not just sell the  
229 property to the Academy. Ms. Olson-Murphy said it's not the Board's concern.

230 Ms. Davies said given the site size, location, and zoning, there aren't a lot of  
231 great options other than conversion to residential. She's happy with the use. Mr.  
232 Prior said regarding the use variance, he's satisfied with the presentation and sees  
233 no need to go through the five criteria again.  
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235 Ms. Davies moved to accept the application of Exonian Properties LLC for a variance  
236 from Article 5, Section 5.1.2.B. for a change in use to permit 11 units of multi-family  
237 residential use in the existing structure at 43 Front Street as proposed. Mr. Thielbar  
238 seconded. Mr. Thielbar, Ms. Olson-Murphy, Mr. Prior, and Ms. Davies voted aye, and  
239 Mr. Merrill voted nay; the motion passed 4-1.

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241 Attorney Sommers spoke regarding the parking variance application. We seek to  
242 have no on-site parking, and to have the 24 spaces required by the ordinance covered  
243 either by people parking on the street or at nearby municipal parking lots. She went  
244 through the variance criteria. 1) The variance will not be contrary to the public interest;  
245 yes, having parking on the street will not threaten the public health, safety, or welfare.  
246 The essential character is residential uses, the Historical Society, educational uses, and  
247 churches. The parking needs of those uses are met in part by on-site parking and in part  
248 by using street parking. Adding the parking spaces for 11 residential units to the existing  
249 municipal and street parking will not change the essential character of the neighborhood  
250 or cause any public health, safety, or welfare concerns. 2) The spirit of the ordinance will  
251 be observed; yes, this has been addressed with #1. 3) Substantial justice is done; yes,  
252 the benefit to the applicant of allowing off-site parking is that it will allow the proposal to  
253 proceed, and there is no detriment to the public given the off-site parking already in the  
254 area. 4) The value of surrounding properties will not be diminished; yes, this is  
255 consistent with nearby uses, and we're asking for a modest amount of street parking  
256 we're asking for. The improvements to the property will stabilize or improve the  
257 surrounding property values. 5) Literal enforcement of zoning ordinance will result in an  
258 undue hardship; yes, from the survey presented with the application, the Board can see  
259 that there's no ability to park on site. The applicant could demolish the site and build  
260 something with a smaller footprint to create some on-site parking, but the applicant  
261 wishes to maintain the historical structure, which necessitates finding parking off-site.  
262 The special condition is that to keep the property intact, we need to find parking offsite.  
263 The town has granted the building an occupancy of up to 460 people as a church; the

264 parking needs of that many people would be greater than the at most 24 cars on the  
265 street or in a municipal lot. There is no fair and substantial relationship between the  
266 ordinance and the request. There is a great volume of parking available, some very  
267 close by, such as on Spring Street. At most it would be within a block. The proposed use  
268 is a reasonable one; yes, we seek to keep this church intact and make it a multi-family  
269 residential use, and those people need to park somewhere. Given the amount of street  
270 and municipal parking, we believe the proposal is a reasonable one.

271 Mr. Prior said it would be possible to have parking on-site on the ground floor.  
272 Has that been discussed? Mr. Cowie said we explored underground parking, but it  
273 wasn't economically feasible and there were radius concerns about it being able to wrap  
274 around within the footprint. Putting it on the street level would greatly diminish the  
275 number of units possible, which would also not be economically viable. Ms. Davies  
276 asked if there would be a loading area with short-term parking. Mr. Cowie said we would  
277 use the rear of the church as a drop-off area and handicapped access, but it would not  
278 be used as parking.

279 Mr. Merrill said the buildings at 43 Front Street are condos that already have  
280 difficulty parking. For four months out of the year, you can't park on the street. Where will  
281 these people go? Ms. Davies asked if there had been a parking study. Attorney  
282 Sommers said we did not prepare a parking study. There was a municipal parking study  
283 done several years ago. There are times when Spring Street is empty. The condos there  
284 have at least some parking on-site. There are also spaces along Front Street and in front  
285 of the church. Mr. Prior said the applicant will have a discussion with their investors  
286 about whether you can market a condo with no parking. These are not issues that  
287 concern the Zoning Board. Attorney Sommers said the Board should look at the impact  
288 of 24 cars on the parking needs of the other elements of Exeter. Ms. Davies asked if the  
289 municipal lot allows overnight parking. Mr. Eastman said there are 15 spaces there for  
290 overnight parking in the winter. Ms. Olson-Murphy said the municipal lot on Center  
291 Street is only 24 spaces. Mr. Eastman said there is permitted overnight parking there but  
292 only for 10 spaces. Ms. Davies said she would like to see more of a parking plan. Mr.  
293 Prior pointed out that if it were still a church with 100 people, that would be temporary  
294 parking, not overnight.

295 Ms. Ruffner said there is a municipal lot behind her office building. Ms. Olson-  
296 Murphy said there are 20 spots there, but she doesn't know how many of those are  
297 overnight spots.

298 Attorney Sommers said that the applicants will study the issue further and come  
299 back to the Board. Ms. Davies said if they could secure some dedicated parking spaces  
300 elsewhere that might help. Mr. Prior suggested giving up some space underneath the  
301 building for parking to minimize the impact.

302 Attorney Sommers requested a continuance until the next meeting, April 19th,  
303 where they will provide additional information.

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305 Mr. Merrill moved to approve a continuance of the hearing to April 19, 2022. Mr. Thielbar  
306 seconded. Mr. Thielbar, Ms. Olson-Murphy, Mr. Prior, Ms. Davies, and Mr. Merrill voted aye,  
307 and the motion passed 5-0.

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311 **II. Other Business**

312 A. Approval of Minutes: February 15, 2022

313 Mr. Thielbar moved to approve the minutes of February 15, 2022 as presented. Mr. Merrill  
314 seconded. Mr. Prior, Ms. Olson-Murphy, Ms. Davies, Mr. Thielbar, and Mr. Merrill voted aye,  
315 and the motion passed 5-0.

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317 **III. Adjournment**

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319 Mr. Thielbar moved to adjourn. Ms. Davies seconded. The motion passed 5-0 and the meeting  
320 was adjourned at 9 PM.

321

322 Respectfully Submitted,

323 Joanna Bartell

324 Recording Secretary