

Town of Exeter  
Zoning Board of Adjustment  
August 16, 2022, 7 PM  
Town Offices, Nowak Room  
Final Minutes

I. **Preliminaries**

**Members Present:** Esther Olson-Murphy, Rick Thielbar, Laura Davies, Martha Pennell - Alternate, and Joanne Petito - Alternate

**Members Absent:** Kevin Baum, Robert Prior

**Call to Order:** Acting Chair Esther Olson-Murphy called the meeting to order at 7 PM. She announced that the applicant for 131 Portsmouth Ave LLC had requested a continuance to September 18, 2022, and the applicant for Riverwoods had requested a continuance until October 20, 2022.

I. **New Business**

A. Jones & Wilson - ZBA Case #18-14 Request for Extension – 173-179 Water Street (former Freedman property) Tax Map Parcel #64-50

Steve Wilson of Kensington, the co-owner of 173-179 Water Street (the old Woolworth's Building), was present to discuss this application. He said that the previous applicant for this property had requested a variance to have residential use on the first floor. They were also considering tearing  $\frac{2}{3}$  of the building down and building a new three-story apartment building with parking underneath. He [Mr. Wilson] and Kevin Jones have a less aggressive plan; they're looking to take what's existing, put a shake roof on it, and preserve the residential use potential for one more year.

Ms. Davies asked if the proposal will change, but they would still like to preserve the residential use. Mr. Wilson said yes, he would use a 60 x 80 space of the front two stories as a retail/office environment, and turn the other 9,600 square feet into 5 or 6 apartments. The Board previously approved 17 apartments. He had a nice new facade approved at the HDC meeting, and is planning to build the units within the existing envelope of the building.

Ms. Davies asked if they would come back before the ZBA before building, and Mr. Wilson said no but they will go before the Planning Board for minor site plan approval.

Ms. Davies made a motion to approve the application for a one-year extension for ZBA case 18-14 for the relief granted to 173-179 Water Street, Tax Map Parcel #64-50. Mr. Thielbar seconded. The motion passed 5-0.

B. The application of Benham Investment for a variance from Article 5. Section 5.5.3 to permit the proposed construction of two (2) principal residential buildings on a

44 7.23-acre parcel located at 28 Newfields Road. The subject property is located in  
45 the RU-Rural zoning district. Tax Map Parcel #38-3. ZBA Case #22-13.

46 Gerry Hamel of 17 Little Pine Lane, the applicant, said this land is on the  
47 corner of Route 85 and Route 101. He got a variance to build two principal  
48 dwellings on the lot in March 2017. With the way the economy was in the last five  
49 years, he didn't get a chance to do anything on the property. He would like to  
50 have this variance reissued. He's looking to get two principals on one parcel. He  
51 came back for an extension already, but then Covid hit and the one year ran out,  
52 so he's starting over with the same plan. There is 225 feet of frontage where it  
53 needs 200 for each parcel in an RU zone, and 200 acres of land.

54 Mr. Thielbar asked if they could get 3 properties on this land, and Doug  
55 Eastman said they would still have to have relief because of the lack of frontage.

56 Mr. Hamel said these would be condos with a shared drive that owned  
57 the land in common.

58 Ms. Olson-Murphy asked for public comment, but there was none. She  
59 closed the public session.

60 Ms. Davies said despite the large size of the lot, with the wetlands, the  
61 proximity to the highway, and the depth of the lot, it's a challenging property. Two  
62 detached condos units close together would be fairly low impact.

63 Ms. Davies went through the variance criteria. 1) The variance will not be  
64 contrary to the public interest and 2) The spirit of the ordinance will be observed;  
65 yes, she does not think that it will be contrary to the public interest or alter the  
66 character of the neighborhood in this rural area. It would be nice to see a couple  
67 of houses on this property. 3) Substantial justice is done; yes, she doesn't see a  
68 harm to the general public or other individuals, and none was mentioned in the  
69 deliberations. 4) The value of surrounding properties will not be diminished; yes,  
70 there's extensive open land at the back of the property and the right side is  
71 abutted by 101. She doesn't think there's any property diminishment from this  
72 low-impact proposal. 5) Literal enforcement of zoning ordinance will result in an  
73 unnecessary hardship; yes, the hardship is the shape and configuration, with  
74 minimal frontage, as well as the wetlands. A two-unit condo is a reasonable use  
75 for this district and neighborhood.

76 Mr. Thielbar moved to approve the request from Benham Investment for a variance from Article  
77 5. Section 5.5.3 to permit the proposed construction of two principal residential buildings on a  
78 7.23-acre parcel located at 28 Newfields Road. Ms. Davies seconded. The motion passed 5-0.

- 79  
80 C. The application of 131 Portsmouth Avenue LLC for a variance from Article 5,  
81 Section 5.1.2 to permit the expansion of a non-conforming light industry use on  
82 the property located at 131 Portsmouth Avenue. The subject parcel is located in  
83 the C-2, Highway Commercial and CT-Corporate/Technology Park zoning  
84 districts. Tax Map Parcel #52-112. ZBA Case #22-12.

85 This application was not reviewed at this meeting.  
86

87 D. The application of Phillips Exeter Academy for a variance from Article 4, Section  
88 4.2 Schedule I: Permitted Uses for a proposed change in use to permit faculty,  
89 multi-family housing to occupy the existing structure at 81 High Street. The  
90 subject property is located in the R-2, Single Family Residential zoning district.  
91 Tax Map Parcel #71-97. ZBA Case #22-14.

92 Roy Tilsley of Bernstein, Shur, Sawyer, and Nelson spoke on behalf of  
93 Phillips Exeter Academy. Mark Leighton, Director of Facilities at Phillips Exeter,  
94 and Steve Wilson, current owner of the property at 81 High Street, were also  
95 present.

96 Attorney Tilsley said this is a 2 acre lot with 2 buildings, with the main  
97 building having over 12,000 square feet, in the R-2 zone. A variance was granted  
98 by this board in 2011, and currently the property has multi-family housing with 14  
99 age-restricted (55+) apartment units. The prior use was a nursing home, which  
100 was a pre-existing non-conforming use. Phillips Exeter would like to acquire the  
101 property and use a portion for its faculty housing needs. The applicant is seeking  
102 this additional variance to permit faculty multi-family housing, in addition to the  
103 current use of 55+ multifamily housing. The abutting properties are multi-family  
104 as well. At 12,000 square feet, it's difficult to use the property in compliance with  
105 the zoning as a single-family residence. Adding faculty would allow the applicant  
106 to continue to use this property in a low-impact way as multi-family housing.  
107 They're not proposing any changes to the property other than the tenant mix.

108 Attorney Tilsley went through the variance criteria. 1) The variance will  
109 not be contrary to the public interest and 2) The spirit of the ordinance will be  
110 observed; yes, the proposal does not alter the essential character of the  
111 neighborhood, as it is already multi-family housing, and there is already multi-  
112 family housing throughout the neighborhood, including on each side of the  
113 property. The variance will not threaten the public health, safety, or welfare; there  
114 would be no practical change in the use of the property, and will not increase the  
115 intensity of use in a way that would impact public health safety or welfare. 3)  
116 Substantial justice is done; yes, there are already multi-family apartments here,  
117 so there's no gain to the general public by strict enforcement of the ordinance,  
118 and the loss to the applicant is significant. The applicant will be unable to use this  
119 property for faculty housing, for which the Academy has a legitimate need. They  
120 envision a mixture of 55+ use and faculty housing, and plan to add faculty  
121 housing over several years as tenants leave. 4) The value of surrounding  
122 properties will not be diminished; yes, from the perspective of a neighboring  
123 property, there's no real change of the usage of the property by expanding the  
124 tenant mix to include faculty housing. It's still multi-family housing of 14 units with  
125 the same footprint. 5) Literal enforcement of zoning ordinance will result in an  
126 unnecessary hardship; yes, the Board already found in 2011 that the property is  
127 subject to unnecessary hardship in granting the variance for the age-restricted  
128 multi-family housing. There's no zoning-compliant use for the 12,000 square foot  
129 building on the property. This is a historic building that no one wants to see  
130 demolished to put up a single-family house. The current use of the building is the

131 most appropriate use of the property. A variance is necessary to allow a  
132 reasonable use of the property. Expanding the tenant mix to include faculty in  
133 addition to 55+ housing ensures that the multi-family use will continue, and will  
134 allow the property to remain viable in a historic and renovated condition. The  
135 proposed use is reasonable, as multi-family has existed on the site for 10+ years,  
136 and expanding the tenant mix to include faculty is a reasonable request given the  
137 unnecessary hardship of having the historic buildings on the property.

138 Ms. Davies asked about the occupancy history since the property's  
139 conversion to apartment units. Mr. Wilson, the current owner, said it's had a good  
140 mix of tenants. It has to allow appropriate under-55 in order not to practice age  
141 discrimination. He was able to sustain relatively low rent because of low interest  
142 rates, but with the rise in interest rates, the only options to maintain the property  
143 in its current state would be to raise the rent significantly or condominiumize it.  
144 The Academy can do the maintenance to it for a much lower cost and don't pay  
145 the same interest rates for mortgages. He's spoken to some of the people  
146 currently renting the property, and they won't be able to pay the market value for  
147 the rentals.

148 Ms. Davies asked where the hardship is to justify taking the housing off  
149 the market for the general public when there's a 1% vacancy rate. Attorney  
150 Tilsley said legally, the unnecessary hardship looks at what can be done with the  
151 property under the zoning ordinance, so the 2011 finding of hardship still applies.  
152 It's reasonable to expand the type of users. Faculty will be housed in this  
153 community, whether at this property or not. It will not change over the day after  
154 closing, we're looking to change the project through attrition. We can do this  
155 without throwing the existing people out.

156 Ms. Davies asked if the Academy would entertain the condition of a  
157 maximum number of units for faculty. PEA Faculties Director Mark Leighton said  
158 we'd be open to that if it was necessary to make this project go forward. It's hard  
159 for us to project exactly what the needs are for housing, but we have a near-term  
160 need of 5-7 housing units over the next 3-5 years. Regarding taking housing off  
161 the market, we're renting four houses right now. We don't have a huge amount of  
162 land that we could continue to build on.

163 Ms. Petito asked whose hardship the Board is considering. In the  
164 application it says if PEA doesn't get this variance, they can't use the building,  
165 but they don't own the building right now. Should we be looking at the hardship to  
166 the current owner? Mr. Thielbar said this is a contingent sale. Ms. Davies said  
167 the hardship is related to the property, not to the owner. Attorney Tilsley said the  
168 hardship is the use of the 12,000 square foot building. Once you acknowledge  
169 that, is it reasonable to extend the units to faculty in addition to 55+? The  
170 hardship is the tenant restriction.

171 Mr. Thielbar said presumably if all the faculty they wanted to extend this  
172 to were over 55, the applicant wouldn't have come before the Board. He's  
173 concerned that if we pass this variance, all restrictions are gone. Would they be  
174 willing to consider a restriction on the number of inhabitants in each unit? Ms.

175 Davies said she doesn't know if the ZBA can do that. Ms. Petito said there could  
176 be complaints for discrimination against families. Mr. Thielbar said if we can do  
177 55+, why not 35+ or 25+? Attorney Tilsley said there's a legal allowance to have  
178 55+ in the community without age discrimination, but to take a different number  
179 would likely run afoul of the law. We're not asking to open this to all multi-family.  
180 Part of the approach of having faculty housing is that they don't typically have  
181 large families. These are not going to be heavy users of the property. The  
182 academy has the resources to put a large family in more appropriate housing if  
183 necessary. Right now, the owner has to have ¼ of the units available to anyone  
184 to comply with the law. Ms. Olson-Murphy said in 15 years if the Academy sells,  
185 then anyone can live there. Attorney Tilsley said if that happened, it goes back to  
186 55+. Ms. Davies said the 55+ restriction was created because they wanted to  
187 give the opportunity for older people to live in a community that is comfortable for  
188 them. These people might not want to be around children, they may want a  
189 quieter environment. Faculty housing with a lot of young people around is a  
190 different atmosphere. Her greater concern is taking more units off the market for  
191 general housing. Attorney Tilsley said the faculty are already in rental housing.  
192 One alternative is to condominiumize this property, which would take more  
193 housing off the rental market than the current proposal. Right now the Academy  
194 doesn't need the whole thing. As long as the Academy has the right to come  
195 back to the Board later if needed, we'd be open to the restrictions.

196 Mr. Leighton said students don't go to faculty housing. We're intending to  
197 respect that these are 1 or 2 bedroom apartments. We'll try to find the right fit.  
198 We intend this to be "postdorm," meaning that when a person has done their  
199 dorm commitment for 10-15 years they could be moved here. The property we're  
200 building on High Street is also intended to be post-dorm.

201 Mr. Wilson discussed the history of the 55+ restriction on the property,  
202 which was a voluntary restriction from the Zoning Board after it was converted  
203 from a nursing home.

204 Ms. Pennell said she's concerned about losing apartments for the over-55  
205 people. If this is housing for the Academy, people will lose the ability to move into  
206 Exeter. Mr. Wilson said he can't just raise the rent, since most of the tenants are  
207 on fixed incomes. If he doesn't sell to the Academy, he will likely sell this as  
208 condos and then the town would lose all the rental housing, whereas the  
209 Academy proposal preserves some rental housing for the public.

210 Mr. Thielbar asked if the units all rent for the same price, and Mr. Wilson  
211 said no, they vary in size from 700 square feet to 1300 square feet, with a \$500-  
212 600 difference between them.

213 Attorney Tilsley said the Academy would never condominiumize this  
214 project, because if they're going to have faculty in the building, they want to have  
215 some control over who else is in the building. They would agree not to use half of  
216 the units for faculty housing and not to come back for five years to change that.

217 Ms. Olson-Murphy asked if there'd been thought put to not raising the rent.

218 Attorney Tilsley said the Academy is not acquiring this property as a landlord

219 maximizing profits, it's looking to meet its faculty housing needs. He doesn't think  
220 there's any intent to go in and jack up the rents.

221 Ms. Olson-Murphy asked if anyone from the public wished to speak.

222 Taran Allen of 92 High Street said the people who live there have made it  
223 part of their neighborhood. She's concerned about what the Academy will do with  
224 this property and what's going to happen in the future. The Board should  
225 consider what will happen to the community.

226 Attorney Tilsley said the intent is to bring faculty in through normal  
227 attrition. We won't come in with eviction notices or jack up the rents. This  
228 proposal may be the best opportunity to keep it similar to what it is now.

229 Ms. Olson-Murphy closed the public session and brought deliberations  
230 back to the Board.

231 Ms. Davies said the Academy is a good steward of property they own, but  
232 her concern is losing rental apartments at a time that they are desperately  
233 needed. Ms. Olson-Murphy said the alternative is to turn them into condos, in  
234 which case we lose all of the rentals. Ms. Davies said that's one thing that might  
235 happen. Another option is to raise rents to market level. Her concern is the  
236 hardship part of it. In 5A of the variance criteria it says there's no fair and  
237 substantial relationship between the general public purposes of the ordinance  
238 provision and the specific application of that ordinance to the property. It's related  
239 to the property, not the buyer. The hardship was addressed 10 years ago when  
240 the previous variance was granted: the fact that the building isn't suitable for  
241 single family housing. Ms. Petito said we should consider that it will not be able to  
242 be maintained as a rental property. Ms. Davies said she doesn't see that there's  
243 a new hardship here.

244 Mr. Eastman said that there was a member of the public who was locked  
245 out of the building who wished to speak on this issue. Ms. Olson-Murphy  
246 reopened the public session.

247 Richard Harmon of 95 High Street said he thought there was a restriction  
248 on the deed to keep it as elderly housing. It's already gotten away from how it  
249 was supposed to be used. The Academy tends to start off something one way  
250 and go to something higher density. He hopes that if this is approved, it's limited  
251 from further expansion. This is a single-family residential neighborhood.

252 Ms. Davies said that she appraised this property and doesn't know of any  
253 endowment. Mr. Harmon said that's his understanding, that this was not what  
254 was intended for this property. Attorney Tilsley said he's not aware of any deed  
255 restrictions, but even if there were, that's a matter between whomever owns the  
256 property and whomever has the right to enforce it, and shouldn't factor into the  
257 Board's deliberations. There's no proposal to expand this building or make  
258 physical changes to the property. Mr. Wilson said he ran the title and there are  
259 no deed restrictions. There was a foundation that ran it when it was losing  
260 money, but that didn't affect the deed.

261 Ms. Olson-Murphy closed the public session.

262 Ms. Olson-Murphy said the Academy is renting housing elsewhere, so  
263 we're losing that many units either here or elsewhere. She'd rather keep all the  
264 Academy people together versus them having random apartments in town.

265 Ms. Petito asked where the hardship is. Ms. Olson-Murphy said that 25%  
266 of the building is not age-restricted anyway, so could the Academy put older  
267 professors in and use the 25% for younger faculty? Ms. Davies said she'd never  
268 heard that 25% have to be not age-restricted.

269 Mr. Thielbar said the proposal is too big and we don't have a clear sense  
270 where it's going. If you put a restriction, it's difficult to see how that restriction will  
271 play out. There's also no hardship. He would vote against this application.

272 Ms. Pennell said she also doesn't see what the hardship is.

273 Ms. Petito said it's not feasible to maintain it as it is now as rental  
274 housing. It's going to be converted. Ms. Davies said it's not feasible to maintain  
275 the current rents, which may affect the tenants, but we can't control that. It's  
276 inconceivable in the current market that it can't remain rental housing, given the  
277 current demand. Ms. Olson-Murphy said she would rather see seven units  
278 available to rent rather than have it turned into condos. Mr. Thielbar asked if it  
279 were condoized, if the 55+ restriction would go away, and Ms. Davies said no,  
280 that runs with the land. That's what cured the hardship for the property.

281 Ms. Petito went through the variance criteria. 1) The variance will not be  
282 contrary to the public interest and 2) The spirit of the ordinance will be observed;  
283 yes, it doesn't seem like it alters the essential character of the neighborhood. Ms.  
284 Davies said removing the 55+ restriction is a fine line. It would allow the  
285 Academy in where it wasn't before. Ms. Petito said she doesn't think it impacts  
286 the public health, safety or welfare. 3) Substantial justice is done; the benefit to  
287 the applicant is another source of housing, and the harm to the general public is  
288 a loss of rental units. Ms. Pennell said the applicant has other properties that  
289 they could use. Ms. Olson-Murphy said if they had other properties available to  
290 house faculty, they would use them. The problem is they need more. Mr. Thielbar  
291 said they're building new stuff now. Ms. Olson-Murphy said they're renting out  
292 other properties, so there's clearly a shortage. Ms. Davies said they own a large  
293 portion of property in town, and likely have the means to pursue other options. 4)  
294 The values of surrounding properties will not be diminished; yes, we haven't  
295 heard any evidence on that. Ms. Davies said that in her professional opinion, it's  
296 unlikely to have any impact on property values. 5) Literal enforcement of zoning  
297 ordinance will result in an unnecessary hardship; because of special conditions  
298 of the property that distinguish it from other properties available in the area, there  
299 is no fair and substantial relationship between the general public purposes of the  
300 ordinance provision and the specific application of that provision to this property,  
301 and the proposed use is a reasonable one. We know that the property is unique,  
302 it's a large historic building with a lot of units. The 55+ restriction was put in to  
303 preserve rental units for that age group in the community, and we would be  
304 losing some of those. Mr. Thielbar said the only hardship in the application is the  
305 age restriction, and that's not a hardship for the property. Ms. Petito said the

306 property is being used successfully. Ms. Davies said the current owner is saying  
307 there's economic hardship, but she has a problem with that because demand is  
308 so high. The existing tenants may have an issue with market rent. Mr. Thielbar  
309 said condos could be done without coming before the ZBA. Ms. Olson-Murphy  
310 said then they'd lose all the rental units. Ms. Petito said regarding "the proposed  
311 use is a reasonable one," the proposed use is to provide faculty housing, which  
312 does seem reasonable. There's an alternative unnecessary hardship, that due to  
313 special conditions of the property, it cannot be used according to the ordinance,  
314 but that doesn't apply since it's currently being used. We're having a hard time  
315 pinning down the unnecessary hardship and we're iffy on the first three.

316 Mr. Thielbar said the ask is vague. We don't know how any restrictions  
317 will be applied or what the future will bring. Ms. Davies said she didn't think it was  
318 more vague than any other application. If we restrict the faculty to 50% of units,  
319 that's as specific as we ever get.

320 Ms. Pennell said she'd be happier if she had a real estate market  
321 assessment on the building and what the current rental rates are. Ms. Davies  
322 said the NH Housing Finance Authority publishes a state-wide housing  
323 assessment, and their recent report said vacancy is very low, 1-3%, and rents  
324 are very high. 5% is healthy and under that is tight. Ms. Pennell said she would  
325 still like to see an analysis of this particular property. She would prefer to  
326 continue this to next month and have the applicant come back with more specific  
327 information. Attorney Tilsley said they'd be willing to come back. Ms. Pennell said  
328 she'd like to hear about any deed restrictions and any restrictions from the  
329 Eventide Trust. Ms. Olson-Murphy said she doesn't think those things matter. If  
330 we say they can do it and it turns out a deed says they can't, then they can't. Ms.  
331 Pennell said she'd also like an analysis from a local realtor. Ms. Olson-Murphy  
332 said if he feels like he needs more money, he can raise the rent. These things  
333 won't impact the decision. What he's charging for rent is not in our purview. Mr.  
334 Thielbar said we can't deal with the renters' hardship, the question is whether  
335 you can rent the property at a level to make a profit.

336 Ms. Davies said she's sympathetic to the application, but she doesn't see  
337 a hardship.  
338

339 Ms. Davies made a motion to deny the application for a variance from Article 4, Section 4.2  
340 Schedule I: Permitted Uses at 81 High Street, case #22-14, specifically because of a lack of  
341 hardship. Ms. Petito seconded. Ms. Davies, Ms. Pennell, Mr. Thielbar, and Ms. Petito voted aye,  
342 and Ms. Olson-Murphy voted nay. The motion passed 4-1 and the application was denied.

- 343  
344  
345 E. The application of Riverwoods for a variance from Article 4, Section 4.3 to permit  
346 the elimination of 60 skilled care beds and add 35 independent living units where  
347 such units would exceed the allowed density of three (3) dwelling units per acre;  
348 and a variance from Article 2, Section 2.2.26 to permit skilled nursing care off site  
349 at related campus. The subject property is located at 7 RiverWoods Drive in the

350 R-1, Low Density Residential zoning district. Tax Map Parcel #97-23. ZBA Case  
351 #22-15

352 This application was not reviewed at this meeting.

353

354 **II. Other Business**

355 A. Approval of Minutes, May 17, 2022

356 Ms. Davies made a motion to approve the minutes of May 17, 2022 as presented. Mr. Thielbar  
357 seconded. Ms. Petito abstained, as she was not present at the May 17 meeting, and the motion  
358 passed 4-0-1.

359 B. Ms. Davies said Mr. Baum has been in discussion with Dave Sharples about  
360 expressing the Board's concern about certain zoning changes and ordinances to  
361 the Planning Board. She asked if any Board members were interested in  
362 attending such a meeting. Several Board members were interested, so it will be  
363 planned as a public meeting, likely some time in October.

364

365 **III. Adjournment**

366 Ms. Davies moved to adjourn. Mr. Thielbar seconded. All were in favor and the meeting was  
367 adjourned at 9:08 PM.

368

369 Respectfully Submitted,

370 Joanna Bartell

371 Recording Secretary

372

373