

Town of Exeter
Zoning Board of Adjustment
April 11, 2023, 7 PM
Town Offices Nowak Room
Final Minutes

I. **Preliminaries**

Members Present: Chair Kevin Baum, Clerk Esther Olson-Murphy, Laura Davies, Theresa Page, Dave Mirsky - Alternate, and Laura Montagno - Alternate. Deputy Code Enforcement Officer Barb McEvoy was also present.

Members Absent: Vice-Chair Robert Prior, Martha Pennell - Alternate, Joanne Petito - Alternate

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

I. **New Business**

A. No public hearings were scheduled.

II. **Other Business**

A. RiverWoods Company of Exeter – ZBA Case #22-15 and #22-16 7 RiverWoods Drive & 5 Timber Lane Request for Rehearing

Mr. Baum said the Board will discuss and deliberate on this request, but there are no comments from the public. The decision is whether there were errors of law made or if there is new information that was not available during the hearing.

Ms. Montagno asked if the intent is to build a new building at RiverWoods for the facility, or are they moving everything to an existing building. Mr. Baum said it would consolidate and be in a new building that is separate from what's existing there now. Ms. Davies said we haven't seen a site plan, but this approval is relative to the use, so it's not really relevant. Our understanding is that it would be a new building on the Ridge campus.

Ms. Page said we should deal with the procedural question of whether we can proceed with a quorum with the option to continue to the next hearing. Mr. Baum said three members is a quorum. The reason we allow applicants to continue when there's three is that you need a unanimous vote with three. He doesn't believe there was any error of law. The applicant went forward with three members which is a quorum. The request for rehearing seems to say that it put them at a disadvantage. This application lingered for six months, and they went forward voluntarily. Having a full Board would provide a broader view and more voices, but would that justify a rehearing? He doesn't think it's a legal obligation. Mr. Mirsky said it's not a due process error. Ms. Montagno said she's reading in the State guidelines that if there's not a full Board, it will not be grounds for rehearing in an appeal, unless there are other grounds. That can't be the sole

45 reason. This is part of the explanation alongside the section in RSA 674:33 that
46 states “The concurring vote of any three members of the board shall be
47 necessary to take any action on any matter on which it is required to pass.” The
48 explanation says that “a hearing before three or four member Boards will not
49 grounds for rehearing in the event the application is denied.” Mr. Baum said
50 that’s not statutory, but the applicant did go forward with that understanding.

51 Ms. Davies said in evidence submitted [by the applicant] on page 2, it
52 says “the ordinance was intended to provide health care in the same locality as
53 the residences and amenities, and not across town.” Ms. Davies said it’s not
54 stated anywhere that it doesn’t have to be across town. The definition of elderly
55 congregate care facility says its primary feature is the provision of lifetime
56 supportive services at each stage of a senior’s life. The facility is intended for
57 persons 55 or older which provides *on-site* nursing home facilities as licensed by
58 the State of NH. It’s quite specific that it does need to be on-site.

59 Ms. Montagno said she looked up “facility” and “locality” to see what the
60 difference between those words are. A facility is a building and a locality is
61 surrounding or nearby region. Those are two very different terms.

62 Mr. Baum said he read that claim as advocacy. Ms. Davies said she did
63 too. This is the basis for why we don’t agree that we erred. She read the
64 applicant’s claim that “the essential character of the locality and abutting
65 residential area will not be altered because health care will still be available to
66 residents within the RiverWoods Community.” Ms. Davies said she believes the
67 essential character *will* be altered by the construction of an entirely new building
68 that is not residences but a health care facility with staff coming and going, and
69 closer to the public entrance from Route 111. Ms. Olson-Murphy said it would
70 also impact RiverWoods itself as a neighborhood.

71 Mr. Baum said the ordinance does not require that the facility be
72 attached. A new facility on the Ridge could be constructed by right. Ms. Davies
73 said yes, it only says “on-site nursing.” Mr. Baum said he reads that as being on
74 the property, not as a connected building. They do have the right to construct a
75 new building. The question is whether RiverWoods has the right to serve the
76 other campuses with that building. Ms. Davies said she understands, but she still
77 thinks it would change the essential character of the neighborhood. Mr. Baum
78 said certainly there would be more use. Ms. Davies said the centralized care at
79 the Ridge would be across Route 111 from the Woods, and Route 111 has an
80 average daily traffic count of 5,900.

81 Ms. Davies said regarding item J, the applicant mentions that “additional
82 beds will be used to serve new independent apartments.” Ms. Davies said she
83 thinks that there could be a discussion of where and how many. The applicant
84 didn’t discuss the plan for the new independent units.

85 Ms. Davies said item K says that “a degree of discomfort was shared by
86 the residents.” Ms. Davies said it wasn’t discomfort, it was opposition, and it was
87 pretty articulate. There was significant testimony and letters sent. Saying it’s not
88 a detriment or a loss is advocacy. She does recognize that the contracts between

89 the residents and RiverWoods are not the Board's jurisdiction, but her concern
90 regarding "substantial justice" is that RiverWoods residents are individuals that
91 are part of the community who would be negatively impacted by approval of this
92 application. Regarding the facilities being adjacent to each other, "adjacent"
93 means next to, bordering, or with a common point of contact. These are not
94 adjacent properties. Mr. Baum said the Boulders and the Ridge are adjacent.
95 There were two variance requests. Did we conflate the two? We heard the
96 applications together, which he still thinks made sense for efficiency and the way
97 it was presented by the applicant. With respect to the Boulders, did these same
98 failures to meet the criteria apply, given that they are adjacent? Ms. Davies said
99 her recollection is that we denied the Woods application on two points of
100 variance criteria, while the Boulders was just denied on one point, and the
101 difference was that the Boulders was adjacent to the Ridge. Mr. Baum said the
102 denial for the Boulders was for hardship, although there may have been some
103 differing opinions. Mr. Baum said in the minutes [of January 23] line 361, for
104 Esther the issue was more criteria 5, which is hardship, and she asked if they
105 should amend the motion; Ms. Davies said [in the minutes] if she supports one
106 criteria, that's all they need. Ms. Davies asked if she [Ms. Davies] said substantial
107 justice and hardship were not met, and Ms. Olson-Murphy said only hardship?
108 Mr. Baum said that is his understanding.

109 Ms. Davies said regarding item 12 on page 7, "the Board never
110 articulated that the applicant did not meet its burden regarding substantial benefit
111 criteria," she thinks the Board articulated that the benefit to the applicant would
112 be outweighed by the harm to the existing residents.

113 On page 9, item 4 likens RiverWoods to a college in that it's all one
114 community even though it's different campuses. Although they use the word
115 "campuses," it's not like a college because it's for elderly people, many of whom
116 have mobility issues, and distance does matter. Mr. Baum said he thought there
117 was enough crossover between the three campuses to treat it as one overall
118 community or site, but there was conflicting testimony on that point. The
119 applicant indicated that there were certain events that everyone went to, but
120 several residents spoke to the contrary.

121 Mr. Baum said in terms of the transportation plan, one of the criteria for
122 rehearing is that there is additional information available, but this could have
123 been available at the hearing and he wishes it had been. Having more
124 information would have helped in the decision. The plans didn't seem fully
125 thought through. We were asked to make a big decision with limited information.
126 His opinion is that providing the transportation plan on its own, although helpful,
127 is insufficient for a rehearing. Ms. Olson-Murphy said it still seems to be a little
128 vague and incomplete. Ms. Davies said she agreed.

129 Ms. Olson-Murphy said she didn't see any gross errors. That second
130 motion could have benefited from a little extra clarity, but she doesn't think it's not
131 understandable.

132 Mr. Mirsky said the applicant's complaint that there wasn't enough
133 discussion because there weren't enough members there is kind of negated by
134 their application where they raised everything they wanted to raise. They raised
135 things they can put in their appeal to a superior court if they want to. They didn't
136 show any due process violation. They were told they had 30 days to appeal the
137 Board's decision, and they did. They were told they didn't have to go forward,
138 and they did. They went forward thinking they were going to appeal this and
139 include some things that didn't get addressed because they didn't present it, like
140 the transportation plan. That came in at the last minute and wasn't argued or
141 discussed in the hearing. Putting it in that way and having it be vague is a way to
142 not have it properly considered. Hearing the Board members say they didn't feel
143 like things were fully articulated at the time, when the applicant has the ability
144 and the burden to put forward everything, and has excellent Counsel, he doesn't
145 see that as contributing to error. The standard for determining justice given on
146 page 5 shows that it was done properly. It says it's not possible to set up rules
147 that determine justice; each case must be determined by the Board members,
148 and that's what they did. There's mention in paragraph 7 that the Board didn't
149 understand the balancing test and that they relied on their opinions and personal
150 feelings about a small group of residents, but he doesn't think that's what they
151 did. Chairman Baum was on the opposite side of the majority decision and would
152 have pointed out anything legally erroneous in the decision. When an applicant
153 asks for a reconsideration, rather than point to an error, of a case that had
154 months to go forward, and they chose to go forward with that number of people
155 there, that's their decision. It shouldn't give them extra bites at the apple. He
156 doesn't see errors here or people applying prejudicial views or emotionally
157 inappropriate views. When we're weighing substantial justice, people use their
158 perceptions and say what they've decided. He knows Laura [Davies] and Kevin
159 [Baum] well, and he knows that they know all of this. The fact that they came
160 down on opposite sides of this is a sign that it was a fair hearing and legally
161 appropriate.

162 Ms. Page said she doesn't think that proceeding just on a quorum is a
163 basis for rehearing. A parking plan doesn't constitute new evidence. It's not a
164 change in circumstance that has happened since the hearing and it could have
165 been available at the time. Given the amount of discussion on both sides and
166 that the criteria were addressed in a methodical way, there is substantial
167 evidence that was made for the record with the vote. As Board members, we give
168 our interpretation or offer our personal experience, but there were also tempered
169 discussions that were made and the Board was clear that they weren't making
170 emotional decisions. She's not seeing an error that would rise to the level of
171 rehearing.

172 Ms. Montagno said she agrees. The area where she struggles in their
173 petition is page 4 number 2, on the evidence submitted by the applicant. The
174 hearing was the applicant's opportunity to articulate how this change was going
175 to reduce hiring and retention issues and how that would allow for more

176 consistent, stable, high-quality healthcare, and it wasn't clearly articulated. Mr.
177 Baum said there wasn't a lot of questioning of those statements; the difficulty with
178 that was applying it to the variance criteria. Ms. Davies said she does believe that
179 there's a significant challenge of labor shortages in a lot of areas, and we
180 discussed that pretty clearly in the hearing. The purpose of this use being
181 included as a special exception goes to including three levels of care. It's in the
182 definition and seems to be the central purpose of this exception. To try to break
183 that for an operational matter, even if it's significant, is a long way to go.

184 Ms. Page said the ordinance is focused on the elderly care facility. There
185 are special considerations that go along with moving services away that don't
186 exist when you have a college that's able-bodied youthful people that don't have
187 the same considerations. The hardship is not a feature of the land or the
188 property, it's coming from a labor shortage. Ms. Olson-Murphy said that's an
189 organizational issue, not a land issue. Ms. Davies said the property has operated
190 successfully for decades. Ms. Page said even if the second motion could have
191 had more detail, the application really needs to meet all the criteria.
192

193 Ms. Davies moved to deny the request for rehearing from RiverWoods Company of
194 Exeter, ZBA cases #22-15 and #22-16 for properties at 7 RiverWoods Drive and 5
195 Timberwoods Lane. Mr. Mirsky seconded. Mr. Baums said the scope of review is
196 whether an error in law was made in the application of the criteria to the request;
197 whether there was new information that wasn't otherwise available; whether there was a
198 change of circumstances; or whether there was some due process issue. What he heard
199 in discussion was that there were none. Ms. Davies said we reviewed the request for
200 rehearing as well as our minutes, and feel we did not make an error. The new evidence
201 presented is a transportation plan that could have been available at the time the decision
202 was made, and doesn't rise to the level of enough new evidence to challenge the
203 decision. Mr. Baum said he appreciates the applicant's position on having to go forward
204 with three members, but there was a quorum and it's legally binding. Per the State
205 guidance, it's not reason enough on its own to rehear. Ms. Davies, Mr. Mirsky, Ms. Page,
206 Ms. Olson-Murphy, and Mr. Baum voted aye; Ms. Montagno did not vote. The motion
207 passed 5-0 and the rehearing was denied.

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209 B. Approval of Minutes

210 1. January 23, 2023

211 Corrections: Ms. Davies said in lines 39-40, where it reads "the Board asked
212 whether Insurance Commissioner review was required; Attorney McCue
213 definitively indicated that it was not," it should read "Attorney Somers
214 characterized Attorney McCue's opinion as definitively indicating it was not".
215 It also says "Attorney McCue said it was not practical that it would be divided
216 in the future," but she doesn't believe he commented on that in his letter. Mr.
217 Baum said he thinks that was Attorney Somers speaking. Attorney McCue's
218 letter only indicated that it didn't need to be reviewed by the Insurance
219 Commissioner.

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Ms. Olson-Murphy moved to approve the January 23, 2023 minutes as amended. Ms. Davies seconded. Ms. Davies, Mr. Baum, and Ms. Olson-Murphy voted aye; Mr. Mirsky, Ms. Page, and Ms. Montagno abstained, as they were not present on January 23. The motion passed 3-0-3.

2. March 21, 2023

Ms. Olson-Murphy said on line 181, it reads “Ms. Petito said she doesn’t see new evidence in the letter,” but it should read “Ms. Olson-Murphy said she doesn’t see new evidence in the letter.”

Ms. Olson-Murphy moved to approve the March 21, 2023 minutes as amended. Ms. Page seconded. Mr. Mirsky, Ms. Page, Ms. Olson-Murphy, and Ms. Montagno voted aye; Mr. Baum and Ms. Davies abstained, as they were not present on March 21. The motion passed 4-0-2.

III. Adjournment

Ms. Davies moved to adjourn. Mr. Baum seconded. All were in favor and the meeting was adjourned at 7:45 PM.

Respectfully Submitted,
Joanna Bartell
Recording Secretary