



TOWN OF EXETER, NEW HAMPSHIRE

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LEGAL NOTICE EXETER ZONING BOARD OF ADJUSTMENT AGENDA

The Exeter Zoning Board of Adjustment will meet on Tuesday, April 11, 2023 at 7:00 P.M. in the Nowak Room located in the Exeter Town Offices, 10 Front Street, Exeter, to consider the following:

NEW BUSINESS: PUBLIC HEARINGS

No new public hearings scheduled.

OTHER BUSINESS:

- RiverWoods Company of Exeter – ZBA Case #22-15 and #22-16
7 RiverWoods Drive & 5 Timber Lane
Request for Rehearing
- Approval of Minutes: January 23 and March 21, 2023

EXETER ZONING BOARD OF ADJUSTMENT

Kevin M. Baum, Chairman

Posted 03/29/23: Exeter Town Office, Town of Exeter website

Town of Exeter
Zoning Board of Adjustment
January 23, 2023, 7 PM
Town Offices Nowak Room
Draft Minutes

I. **Preliminaries**

Members Present: Chair Kevin Baum, Vice-Chair Robert Prior, Clerk Esther Olson-Murphy, Laura Davies, and Martha Pennell - Alternate. Code Enforcement Officer Doug Eastman was also present.

Members Absent: Dave Mirsky - Alternate, Joanne Petito - Alternate,

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

I. **New Business**

A. Continued discussion on the application of RiverWoods Company of Exeter for a variance from Article 2, Section 2.2.26, Definition of “Elderly Congregate Health Care” to permit skilled nursing care off site on related campus. The subject property is located at 7 RiverWoods Drive in the R1, Low Density Residential zoning district. Tax Map Parcel #97-23. ZBA Case #22-15.
[Considered with 22-16 below]

B. Continued discussion on the application of RiverWoods Company of Exeter for a variance from Article 2, Section 2.2.26, Definition of “Elderly Congregate Health Care Facilities” to permit skilled nursing care off site on related campus. The subject property is located at 5 Timber Lane, in the R-1, Low Density Residential zoning district. Tax Map Parcel #98-37. ZBA Case 22-16.

Robert Prior and Martha Pennell recused themselves from cases #22-15 and 22-16. Mr. Baum said he’s reopening the public hearing for these cases. The Board will continue to consider the cases together, and he asked for public comments on both cases at the same time.

Attorney Sharon Somers of DTC was present to represent Riverwoods. Riverwoods CEO Justine Vogel and Interim Executive Director Kim Gaskell were also present.

Attorney Somers presented correspondence from Attorney Mark McCue of Hinckley Allen, who serves as Healthcare counsel for Riverwoods. Attorney Somers said that during the last meeting, the Board asked whether Insurance Commissioner review was required; Attorney McCue definitively indicated that it was not, and said that this proposal is in compliance with the resident contract. Regarding the issue that the variance runs with the land, Attorney McCue said it’s not practical that it would be divided in the future, but we also asked the Trustees to pass a resolution that if Riverwoods is to be conveyed to a third party

45 at any time in the future, then the corporation must convey together all three
46 parcels of land on which the retirement community is operated, and no parcel
47 may be sold individually. This resolution is dated Jan 6, will be effective on the
48 date the variance is granted, and is not appealable or modifiable while the
49 variance is in effect. Attorney Somers added that Administration was contacted
50 by numerous residents at the Woods, who were concerned that the ZBA may
51 have a one-sided view of what residents think of this proposal. Many of them
52 vigorously support this proposal, and there is a petition in favor signed by 140
53 residents of the Woods. Finally, she noted that the application is proceeding
54 tonight with less than a full Board, and she sent a letter to the Select Board that
55 the choice to proceed tonight with less than a full Board is not a substantive
56 choice. Mr. Baum said there is a quorum, but he appreciated her letter because
57 he thinks they need more members on the Board.

58 Ms. Davies asked about the phrase “a going concern reservation” in the
59 letter from Attorney McCue. Attorney Somers said she doesn’t think it has a
60 bearing on this discussion. Ms. Vogel said “a going concern reservation” means
61 you would not be able to continue as a going concern. We could not put our
62 invested assets at risk, we’d have to have enough liquid assets to continue our
63 business.

64 Mr. Baum opened the discussion to the public.

65 Ellen Kingsbury of the Woods said the current Healthcare Facility at the
66 Woods is out of code, and it’s wasteful and unsustainable to have three separate
67 facilities. There’s a standard of care that must be delivered. Nurses must be
68 experts and adapt to new technology. Consolidation would have a positive effect
69 on nursing staff.

70 Nancy Caudette of the Woods read a statement from another Woods
71 resident, Joan Caldwell, who couldn’t be present. Ms. Caldwell’s husband is in
72 the long term care facility at Monadnock, and while visiting him he had dementia
73 patients aimlessly wandering into his room. The facilities are outdated and
74 residents spend time staring out the window instead of being involved in
75 activities. Riverwoods should build one new Healthcare Facility with dedicated
76 memory care and a central space for recreation.

77 Nancy Caudette read another letter from Paul Henchy of 16 Sandstone
78 Way at the Boulders. He and his wife live in a cottage at the Boulders campus.
79 He supports a centralized Healthcare Facility. He has spoken with healthcare
80 staff who talked about the burden of three facilities and how it makes staffing and
81 retention more difficult. Long term quality care can only be ensured if Riverwoods
82 creates a centralized facility.

83 Nancy Caudette said we sent 140 letters, including three from retired
84 MDs and three from residents who have spouses in Monadnock who see the
85 advantage of a combined Healthcare Center. We feel we are one community with
86 three campuses.

87 Deanna Graham of 5 Douglas Way, who is the Director of Community
88 Engagement at Riverwoods, said we pride ourselves on being a vibrant

89 community for both residents and staff. There has been a staffing crisis since
90 Covid that's not going away. This is how we will give the best level of care to our
91 residents.

92 Bob Cully of the Boulders said the Riverwoods campuses are separate
93 communities, not one big community. Boulders residents receive healthcare on
94 the Boulders campus. When he came to Riverwoods, he was told he would have
95 a home campus with on-site healthcare. Centralized healthcare would isolate
96 patients from the Boulders community. There's nothing close to the type of
97 transportation that would be needed to ferry people around. Regarding criteria
98 #3, substantial justice is not done. Residents moved to Riverwoods with the
99 understanding that lifetime healthcare would be provided there. The current
100 congregate healthcare design should not be eliminated based on their general
101 statements. There will be four fewer beds than the combined health centers of
102 each campus, 145 instead of 149, and there will be a 25% increase in the
103 residential population from the conversion of Health Centers to residential
104 facilities. The Riverwoods Exeter resident handbook was updated in Jan 2023,
105 and states the composition of individual campuses, such as healthcare units, and
106 also states that campuses function as individual neighborhoods within the
107 Riverwoods Exeter community. He asked that the variance request be denied.

108 Tracy Jeffers of 12 Ridgewood Terrace, an employee of Riverwoods, said
109 Riverwoods has three campuses in one community. Change is hard. The
110 majority of residents and staff appreciate that this is needed in order to have a
111 state of the art facility and quality care for our residents.

112 Pete Cameron of 15 Sandstone Way at the Boulders said he thought that
113 there were going to be two parts to this hearing. Mr. Baum said no, his intent was
114 to hear both applications together, but they will be deliberated and voted on
115 separately. It was the applicant's choice to present the applications this way and
116 it's the most efficient way to do it. The concerns are very similar for both
117 variances. Mr. Cameron said he's not against optimizing healthcare, but the
118 Board must focus on the five variance criteria and whether Riverwoods has met
119 the burden of proof.

120 Roy Chaney of the Boulders said he believes that people have been
121 getting first-class healthcare. Relocating all healthcare to the Woods, across NH
122 111, is against the public interest because it will create a public safety hazard at
123 that intersection. It will alter the character of the small residential neighborhood
124 adjacent to the campus. More residential housing will also be created, resulting in
125 more traffic. There could be 200 more crossings per day just by residents who
126 have spouses in health care, which was not accounted for in the traffic study. We
127 are permitted as a congregate elderly health care facility; moving skilled nursing
128 off-site from the Boulders campus substantially changes the living environment
129 for current residents. Physically separating loved ones and friends and is a
130 violation of the understanding residents had when they moved in. Without
131 healthcare on-site, the Boulders will become an active adult community, which is
132 not what they signed a contract for. The physical connection and emotional

133 benefits of on-site care can't be duplicated with off-site care, so substantial
134 justice is not done and the request for a variance should not be approved.

135 Ivor Freeman of the Boulders said he doesn't feel that he has enough
136 information to support or oppose this. There will be more need for staff to
137 accommodate the extra independent living residents added, and no presentation
138 has been made on decreased nursing staff or increased residential staff. When
139 he signed up to be a resident, the understanding was that healthcare would be in
140 the same campus as he lived in.

141 Mr. Baum asked the applicant to make closing comments.

142 Attorney Somers said the Board must weigh the evidence on the variance
143 criteria and not the emotional items presented tonight. Regarding comments that
144 we have not met the burden of proof, the resident objections have not described
145 the variance criteria accurately under NH law relative to public purpose, spirit,
146 and intent, diminution of property values, or hardship. Regarding "public interest,"
147 the variance must not be contrary to the public interest by being unduly or to a
148 marked degree violating the relevant ordinances' zoning objectives, which in this
149 case is to ensure that the healthcare service provided is at the locality rather than
150 across town. This ordinance was created many years ago, and they were
151 probably concerned about creating an assisted living facility with healthcare way
152 off-site. The basic zoning objective is to make sure the healthcare provided is not
153 far away. The other half of the variance criteria for public interest is whether it will
154 alter the essential character of the locality or threaten public health, safety, or
155 welfare. That doesn't reflect the comments that have been made by abutters.
156 Riverwoods will still be there, and will still have healthcare and assisted living.
157 The residential perimeter of the facility will still be there.

158 Regarding traffic, she looked at the traffic study, and it was prepared
159 solely for the purpose of studying the impact of the 35 potential independent
160 living units, not the impact of having a centralized health center. It was included
161 when they thought they needed a variance for those additional units, but they
162 don't, and perhaps it should not have been included in the materials. The traffic
163 issue will be examined by the Planning Board if this variance is granted, and a
164 further study done at that time will examine traffic and the impact to abutters.

165 There was some concern in resident letters about there not continuing to
166 be a "mini health care center" on each campus, but that service will continue.
167 Another resident concern is that the nursing shortage is being exaggerated or is
168 temporary, but statistics presented at a recent Hospital Association meeting, a
169 statement from the Chairman of the Reserve, and a recent report by McKenzie
170 and Company projecting nursing shortages in 2025 suggest otherwise. Lots of
171 opinions have been presented by residents, but when it comes to contracts,
172 according to NH case law, pure opinion cannot supersede evidence. Also
173 according to case law, any comments made as part of marketing are not to be
174 considered part of residential contract agreements.

175 Attorney Somers said regarding resident support, we haven't done a poll,
176 but we have 600 residents; we had no comments from the Ridge, 140 from the

177 Woods in support, another 20 from the Boulders in support, and 10 from the
178 Boulders against, which indicates how the residents feel. The concern that
179 residents would not be able to visit those in the healthcare center and the
180 uncertainty of transportation will not apply, because the language of the criteria of
181 whether the benefit to the applicant will be outweighed by the detriment or loss to
182 any individual. It's not a question of degrees of discomfort expressed; that is not
183 a detriment or loss. The benefit to the applicant is moving forward with what it
184 has determined will provide the best care possible, with consistent nursing staff.
185 It's not a loss, since there would be the same or even a better level of service. A
186 sense of disappointment is not a loss.

187 Attorney Somers said regarding the idea of a poll, this is not a condo
188 association where people vote on how they want to operate. Riverwoods is run
189 by a nonprofit manager with a duty to current and future residents. The
190 transportation element we recognize as an issue. We will commit to having a
191 transportation plan for the Planning Board submittal.

192 Attorney Somers said that Riverwoods has as a matter of right the ability
193 to merge the Boulders lot and the Ridge lot, meaning that one facility could be
194 created for both of those campuses without ZBA approval.

195 Attorney Somers said there's a sense of disappointment expressed by
196 some people. If they confer with us, Riverwoods would try to address that
197 disappointment in a way that's tailored to the individuals. However, that's not the
198 Board's jurisdiction; their only consideration should be whether they meet the
199 criteria, and she thinks they do.

200 Ms. Davies said she thought this was about the consolidation of skilled
201 nursing beds, but does this also include all assisted living? Attorney Somers said
202 yes, "Health Center" includes both skilled nursing and assisted living. Part of the
203 confusion may be in the terminology of the ordinance, which references a
204 "nursing home facility" needing to be on the same lot of the service. Ms. Davies
205 said it reads "on-site nursing home facilities as licensed by the State of NH", but
206 that doesn't say all assisted living and skilled nursing would be consolidated into
207 one place. Attorney Somers said the Health Centers currently contain all assisted
208 living and skilled nursing. We talked about it extensively at the last meeting, and
209 also indicated that it would include memory care. The purpose is to centralize
210 everything for the purpose of efficiency.

211 Ms. Davies asked how many units are currently in assisted living. Ms.
212 Vogel said 150, including assisted living and nursing. We haven't determined
213 how many units would be in the centralized building, but an actuarial study
214 suggested we need 27% of population number, which is 111 units for the current
215 population. Mr. Baum said that doesn't account for any increased units, and Ms.
216 Vogel said that's correct. Currently, Riverwoods sells the extra 30 units to people
217 who are not Riverwoods residents, but in the future we would allocate those beds
218 to Riverwoods residents. It will be less than 150 units, but it will be an appropriate
219 number for our population. Ms. Davies said there's a big difference between
220 assisted living and skilled nursing, will they have a certain number of each type of

221 unit? Ms. Vogel said we will have the appropriate number for each, although we
222 can provide a higher level of care for a resident without them moving units. We
223 started out projecting 144: 36 memory support beds, 20 skilled nursing beds, 60
224 assisted living 2, and 28 assisted living apartments. Some of the numbers may
225 be a little lower, but not lower than the actuarial minimum that we need, including
226 projections for a future increase in residents.

227 Mr. Baum asked if the new facility will be at the Ridge, and Ms. Vogel said
228 yes, it will be on the Ridge parcel, likely on the site of a current Admin building,
229 not attached to the Ridge building. Based on feedback, the residents of the Ridge
230 preferred it in the separate location.

231 Ms. Vogel said the requirement is that we have a nursing home on site.
232 We've come to ask for a variance for the Woods and Boulders because there will
233 no longer be a nursing home there. Ms. Davies said there will no longer be one
234 as part of the Ridge building either. Ms. Vogel said we hear resident
235 disappointment, but we have to consider what's right for the whole in the long
236 term, which is centralizing healthcare in a new building that provides the kind of
237 amenities that allow residents to live their best lives. We will work out the details
238 of transportation etc.

239 Recused Board member Robert Prior asked to speak as a member of the
240 public, but Mr. Baum said public comment was closed.

241 Ms. Gaskell, the Interim Executive Director of Riverwoods, said involving
242 residents doesn't mean that they are the ultimate decisionmakers moving
243 forward. We've done our due diligence to evaluate whether or not this is worth
244 moving forward on. We heard resident feedback in the Ridge because they didn't
245 want to move twice, once during construction and once it was complete. With this
246 proposal, we can move all healthcare residents when needed. We had design
247 charettes where we brought in our architects to talk to residents. We have a
248 dedicated email for feedback and we have 44 pages of suggestions submitted by
249 residents. There will be a resident task force to help us solve challenges with this
250 proposal. There are five resident Trustees that are full Board members. She
251 added that Riverwoods is one community that needs to move forward with one
252 health care facility.

253 Mr. Baum closed the public session and brought the discussion back to
254 the Board.

255 Ms. Davies went through the variance criteria. 1) The variance will not be
256 contrary to the public interest and 2) The spirit of the ordinance will be observed;
257 the ordinance is clear that there has to be a nursing facility associated with these
258 communities. Although they like to call it one community, it's three parcels on two
259 sides of a State route, and they can't be tied together as a single entity. Mr.
260 Baum said they are tied together as a single entity. He agrees that this is
261 contrary to the ordinance, which is why they are here for the variance, but this
262 sounds like there is significant overlap between the campuses in ownership and
263 activities. Does this meet the spirit of the ordinance by providing nursing facilities
264 as part of the overall facility of Riverwoods? It's not what the members bought

265 into, and they have a valid argument, but ultimately we can't pass judgment on
266 what their contract says or what was marketed to them. Mr. Baum said he does
267 think this meets the criteria. Ms. Davies said it's not about emotional issues,
268 these are real concerns related to real estate and zoning. This ordinance was
269 created for Riverwoods, and they are the only ones in town under it. She
270 understands the need to find a solution to the shortage of healthcare workers, but
271 it's not something we can resolve with a variance. This doesn't fit "the spirit of the
272 ordinance is observed," because the heart of this special exception was that the
273 levels of care be available to residents in the same facility. Mr. Baum said it's the
274 same "site," not the same "facility." It does not have to be attached to meet the
275 definition, which is why no variance is required at the Ridge. He's comfortable
276 considering the three campuses as a site, given the overlapping administration.
277 He would be more comfortable if there were more details to the plan. Ms. Olson-
278 Murphy agreed, saying they're saying "we'll figure it out," "we'll have security do it
279 on weekends", there are so many little details that should be fleshed out to prove
280 there will be the same level of safety and care. Ms. Davies said the labor
281 shortage also affects food service, housekeeping, and transportation. For the
282 Board to make a permanent change in the only user that avails itself of these
283 provisions, it affects a lot of people. This is a management and workforce
284 problem, and the variance is not a tool to address that. Mr. Baum said it makes
285 sense to give the applicant flexibility to manage that. It comes down to the intent
286 of this provision; was it only that these smaller distinct facilities based on the lots,
287 or does it contemplate a larger unit? If they were adjoining, it would be an easier
288 decision. He'd like to have a traffic study, but this is a constant battle in ZBA and
289 Planning Board; the Planning Board is in a better position to consider this aspect
290 and can put in conditions of road and intersection improvements.

291 Ms. Davies continued with the variance criteria: 3) Substantial justice is
292 done; she does think the applicant is genuinely trying to solve a problem.
293 Independent units are more profitable than assisted living or skilled nursing, and
294 consolidated units would be a benefit to management, but she thinks their
295 overriding concern is how to serve their community. However, she doesn't know
296 if this proposal as a zoning variance will solve problems of management and
297 workforce. This is a big change to what many residents wanted when they
298 bought in. Ms. Olson-Murphy said this variance will fix one issue, but there are a
299 lot of other issues that will come behind it, and she would feel better if there were
300 plans to address those. Mr. Baum said he can live with it given the suggested
301 conditions by the applicant that the transportation plan be part of the Planning
302 Board review. They need this first approval before they make a major investment
303 in design. Ms. Olson-Murphy said she had first-hand experience of a shortage of
304 care units there. Mr. Baum said that's a reason to give them flexibility on how and
305 where they provide this. Regarding substantial justice, the benefit to the applicant
306 is not outweighed by the harm to the general public. The applicant showed that
307 there is a benefit to them. We've had vocal opponents speak to us, but there's
308 also a counter. Ms. Olson-Murphy said she can see that they're meeting this

309 criteria. Ms. Davies said there's room to agree, but it's not clearcut. 4) The value
310 of surrounding properties will not be diminished; Ms. Davies said she's not
311 worried about this criteria. Mr. Baum said there had been no testimony on this
312 point. 5) Literal enforcement of zoning ordinance will result in an unnecessary
313 hardship; Ms. Davies said that one part of the definition of "unnecessary
314 hardship" is that the property cannot be reasonably used in strict conformance
315 with the ordinance. Mr. Baum said that isn't the case, since it's currently being
316 used in conformance. Ms. Davies said there is a hardship here but it comes from
317 a workforce concern and not from the property. Mr. Baum said this is the hardest
318 criteria. It comes down to whether you think it's reasonable to consider the three
319 campuses as a "site" according to the intent of the ordinance, given the close
320 location and common administration between the three campuses. Ms. Davies
321 asked if Mr. Baum would have an issue if he were being asked to create the
322 whole of Riverwoods as a single site, and Mr. Baum said that's why they need a
323 variance. When we vote, we should break out the two requests. The Boulders
324 request is far easier, as they are adjoining and could be merged. The three
325 parcels have common ownership and administration. There are residents that go
326 between campuses. The intent of the ordinance is to provide care in close
327 proximity and not have people being shipped off-site. It's harder for the Woods,
328 but it's a short jump between the two in terms of transportation. Ms. Davies said it
329 makes sense to have a central memory care facility. That's not part of the
330 requirements of the ordinance. She does have trouble with the hardship piece of
331 it. Ms. Olson-Murphy said she has an easier time with hardship with the Ridge
332 and the Boulders because they're in close proximity. The Woods is across the
333 street. Ms. Davies said it's a big process to leave a building and go to a separate
334 building when you're in that stage of life. That's why this ordinance was created.
335 Mr. Baum said leaving the building isn't a factor, this is about "on-site nursing
336 facilities." Ms. Davies said being in the same building was in the Planning Board
337 language, but she agreed that the ordinance only said "on-site."

338 Ms. Davies moved to deny the application for a variance from Article 2, Section 2.2.26,
339 Definition of "Elderly Congregate Health Care" for 7 Riverwoods Drive, ZBA Case #22-
340 15, based on not meeting variance criteria 3 and 5. Ms. Olson-Murphy seconded. Mr.
341 Baum asked her to elaborate the reasons. Ms. Davies said regarding criteria 3, it's
342 difficult to weigh the benefit to the applicant and whether it's outweighed by harm to
343 individuals, especially existing residents. It would be a benefit to the applicant and some
344 members of the community, but other members of the community have said it would be
345 a harm to them. Regarding 5, she doesn't think there are special conditions unique to
346 the property that create a hardship. There's a hardship related to the labor force and the
347 management of the facility, but it's not a property hardship. Ms. Olson-Murphy said
348 they're currently operating it, so it can't be a hardship in that way. Ms. Davies and Ms.
349 Olson-Murphy voted aye, and Mr. Baum voted nay. The motion to deny passed 2-1.

350
351

352 Ms. Davies moved to deny the application of RiverWoods Company of Exeter for a
353 variance from Article 2, Section 2.2.26, to permit skilled nursing care off site on related
354 campus for property is located at 5 Timber Lane, ZBA Case 22-16, for the same
355 reasons, that it doesn't meet criteria 3 and 5: the benefit to the applicant would not
356 outweigh the harm to individuals, and the property does not meet the hardship criteria.
357 Ms. Olson-Murphy seconded. Mr. Baum asked if the reasoning was the same. Ms.
358 Olson-Murphy said criteria 3 regarding impact is not as clear-cut for her because of the
359 proximity of these parcels. Riverwoods could make these one parcel if they chose,
360 whereas the other property is across the way. The impact on residents here would be
361 less, since it is just an extra 100 feet to get from the Ridge to the Boulders. For her, the
362 issue for this application is more criteria 5. Ms. Olson-Murphy asked if she should amend
363 the motion. Ms. Davies said if she supports one criteria to deny, that's all she needs to
364 vote aye. The reasoning was included for clarity to the applicant. Ms. Davies and Ms.
365 Olson-Murphy voted aye, and Mr. Baum voted nay. The motion to deny passed 2-1.

366
367 Mr. Baum told the applicant that their applications had been denied, and
368 they have 30 days to request a re-hearing. The Board took a brief recess and
369 reconvened at 9:24 PM. Mr. Prior and Ms. Pennell rejoined the Board.

- 370
371 C. The application of 107 Ponemah Road LLC for a special exception per Article 4,
372 Section 4.2, Schedule I: Permitted Uses and Article 5, Section 5.2 to permit the
373 conversion of the existing single-family dwelling and attached barn located at 50
374 Linden Street to a three-family home. The subject property is situated in a R-2,
375 Single Family Residential zoning district. Tax Map Parcel #82-11. ZBA Case #22-
376 17.

377 Mr. Baum said this applicant has asked to continue the application to the
378 meeting of Feb 21.

379 Mr. Baum made a motion to continue ZBA Case #22-17 to the meeting of February 21,
380 2023. Ms. Olson-Murphy seconded. Ms. Davies, Ms. Olson-Murphy, Mr. Baum, Mr.
381 Prior, and Ms. Pennell voted aye. The motion for continuance passed 5-0.

- 382
383 D. The application of River Bend Trust (Peter Mahar and Keri Marshall, Trustees)
384 for a special exception per Article 4, Section 4.2 Schedule I: Permitted Uses to
385 permit the existing single family home (with an in-law unit) at 2 River Bend Circle
386 to be converted to a two-family residential structure. The subject property is
387 located in the R-2, Single Family Residential zoning district. Tax Map Parcel
388 #104-34. ZBA Case #23-2.

389 Applicants Keri Marshall and Peter Mahar, the owners of 2 Riverbed
390 Circle, were present to discuss the application for a special exception. Ms.
391 Marshall said the property was constructed in 1985 as a two family home.
392 There's a breezeway that connects a garage to the main house. The smaller unit
393 is to the back of the garage, so it's not visible from the front of the property, and
394 nothing will change with respect to that. There will be no exterior changes to the

395 property. The tax card says both that it's a two-family and a single-family with an
396 in-law. In the zoning ordinance, she didn't see a definition of an in-law. She's
397 proposing that the home be converted into two condominiums.

398 Ms. Marshall went through some of the special exception criteria: A) The
399 use is a permitted special exception as set forth in Article 4.2, Schedule 1; yes,
400 this is in the R2 zone, which allows condominiums. Another property about ½
401 mile away has three condominiums, and there are other two-families on Court
402 Street. B) That the use is so designed, located and proposed to be operated that
403 the public health, safety, welfare, and convenience would be protected; yes, the
404 minimum lot size is 15,000 square feet, while this lot is 29,990 square feet. Most
405 of the property is fenced. Each unit has separate laundry facilities and kitchens.
406 The small unit is 864 square feet, and the large is 2400 square feet. D) That
407 adequate landscaping and screening are provided; yes, the front yard is a bit of a
408 wreck but that will be addressed in the spring. The septic line was clogged up
409 with trees, so we dug that up. There are new sills, roofs, skylights, and siding.
410 We want the place to look as good as possible. Having separate condominiums
411 will improve the integrity of the neighborhood because of pride of ownership of
412 each property. E) That adequate off-street parking and loading is provided and
413 ingress and egress is so designed as to cause minimum interference with traffic
414 on abutting streets; there are separate doors with a common breezeway. Use of
415 the garage would be split down the middle. There's plenty of parking, with two
416 spots inside the garage and more spots outside. Mr. Eastman said three spots
417 are required.

418 Mr. Prior said it meets the guidelines for an accessory dwelling unit. Was
419 it approved as an ADU by the Zoning Board? Ms. Marshall said she didn't know.
420 When the initial permits were taken, it was built with this as a separate unit. Mr.
421 Prior said until two years ago, it was required that an ADU be less than 700
422 square feet, but now this meets the definition. As an ADU, it requires one of the
423 two units to be owner-occupied. With the condo unit, neither is required to be
424 owner-occupied, so it would not increase pride of ownership. Ms. Marshall said
425 she would write into the condo docs that they can't be rented. Mr. Prior asked if
426 she were planning on occupying one of the units herself, and Ms. Marshall said
427 no.

428 Mr. Baum asked if it was under single ownership with an in-law, it
429 wouldn't need to be permitted? Mr. Eastman said that's correct. It does meet the
430 conversion criteria and could be either rentals or condos. If it's rentals, one has to
431 be owner-occupied, but condos would not. Ms. Pennell asked if the initial permit
432 when it was constructed was for a two-family house, and Mr. Eastman said no.
433 The understanding is that it was for an in-law and was not a two-family. Mr. Prior
434 said on the tax card, it's a two-family, so at some point the deed must have been
435 changed. Ms. Pennell said on the tax card, it says "number of kitchens: 1." Mr.
436 Eastman said what happened in 1985 is irrelevant, we're trying to clean this up.
437 Mr. Baum said the property meets size and open space requirements.

438 Mr. Prior said that Ms. Marshall mentioned other uses on Court Street
439 that are condos, would this be the first on Riverbend Circle? Ms. Marshall said
440 yes, she thinks so.

441 Ms. Pennell said she drove by and saw a chimney. Ms. Marshall said
442 that's the vent for the furnace for the small unit, which is in the garage. There's a
443 fireplace in the main house, but not in the garage or the smaller unit. Ms. Pennell
444 asked how the garage will be separated, and Ms. Marshall said the smaller unit's
445 furnace is on the left, so the left side will go to the smaller unit, and the right side
446 will go to the bigger unit.

447 Mr. Prior went through the special exception criteria: A) The use is a
448 permitted special exception as set forth in Article 4.2, Schedule 1; yes. B) That
449 the use is so designed, located and proposed to be operated that the public
450 health, safety, welfare, and convenience would be protected; yes, there's really
451 no difference between the existing usage as an accessory dwelling unit and the
452 proposed use as a condominium or residential two-family conversion. Mr. Baum
453 said he agrees. It's also screened from the neighborhood and there's plenty of
454 parking. C) That the proposed use will be compatible with the zone district and
455 adjoining post-1972 development where it is to be located; Mr. Prior said there
456 are many ADUs in the R2 zones and some condominiums on Court Street, so
457 he's a little shaky on this one but it's ok. Ms. Davies said there's no physical
458 change. Mr. Baum said it won't impact the neighborhood. The lot's large enough.
459 Mr. Prior asked if as a condominium, the individual owners would have the right
460 to make exterior changes to their property, and Mr. Baum said it would be up to
461 the condominium docs, not the ZBA. D) That adequate landscaping and
462 screening are provided; Mr. Prior said this doesn't really apply as there are no
463 exterior changes. Mr. Baum said the unit is screened by the garage anyway. E)
464 That adequate off-street parking and loading is provided and ingress and egress
465 is so designed as to cause minimum interference with traffic on abutting streets;
466 yes, ingress and egress are immaterial and we've heard testimony that off-street
467 parking is sufficient given the number of bedrooms. F) That the use conforms
468 with all applicable regulations governing the district where located; yes, it seems
469 to. G) The applicant may be required to obtain Planning Board or Town Planning
470 approval; he does not believe this review would be required, since there's no
471 external change being made. H) That the use shall not adversely affect abutting
472 or nearby property values; yes, we've had no testimony to that effect. I) and J) do
473 not apply.

474 Mr. Prior said for conversions, there are additional 8 criteria that have to
475 be met: 1) The number of spaces for off-street parking comply with article 5.6; it
476 does comply. 2) Minimum lot size; it does meet that. 3) The structure shall have
477 been a residence for 10 years; it has. 4) The lot must meet a minimum of 20%
478 open space; it does. 5) For conversions intended to be rental units, one of the
479 units must be owner-occupied; that is not an issue here, since they are not
480 proposed to be rentals. 6) The proposal may require Planning Board review;
481 that's not appropriate here, because there's no site plan for the outside of the

482 property. Conversions of three or more units require Planning Board approval;
483 this is for two. 7) We may allow expansion to an existing structure for the purpose
484 of providing additional area to the units; that's not part of the proposal. 8) Septic
485 requirements; Mr. Baum said it's on public sewer. Ms. Davies added that they
486 fixed the issue with the pipe.

487 Mr. Prior said it does meet all of the criteria for a special exception.
488

489 Mr. Prior made a motion to approve the application of River Bend Trust for a special
490 exception to permit the existing single family home at 2 River Bend Circle to be
491 converted to a two-family residential structure. Ms. Davies seconded. Ms. Davies, Ms.
492 Olson-Murphy, Mr. Baum, Mr. Prior, and Ms. Pennell voted aye. The motion for approval
493 passed 5-0.

494
495 **II. Other Business**

496 A. Approval of Minutes

497 1. December 20, 2022

498 Ms. Davies said regarding one of the residents who testified, in line 184, "Colley"
499 should read "Cully."

500 Ms. Davies moved to approve the minutes of December 20, 2022 as amended. Mr. Prior
501 seconded. Ms. Davies, Ms. Olson-Murphy, Mr. Baum, Mr. Prior, and Ms. Pennell voted
502 aye. The motion passed 5-0.

503
504 **III. Adjournment**

505
506 Mr. Prior moved to adjourn. Ms. Davies seconded. All were in favor and the meeting was
507 adjourned at 10 PM.

508
509 Respectfully Submitted,
510 Joanna Bartell
511 Recording Secretary

512
513

Town of Exeter
Zoning Board of Adjustment
March 21, 2023, 7 PM
Town Offices Nowak Room
Draft Minutes

I. **Preliminaries**

Members Present: Vice Chair Robert Prior, Clerk Esther Olson-Murphy, Theresa Page, Joanne Petito - Alternate, Dave Mirsky - Alternate, and Laura Montagnano - Alternate. Town Code Enforcement Officer Doug Eastman was also present.

Members Absent: Chair Kevin Baum, Laura Davies, Martha Pennell - Alternate

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

I. **New Business**

A. Mr. Prior said that Riverwoods would like to table their request for a rehearing.

Ms. Olson-Murphy moved to table the discussion on the request for rehearing on ZBA Case #22-15 and #22-16 to the Board's next meeting on April 11 as requested by the applicant. Ms. Montagnano seconded. Mr. Prior recused himself from the vote. The motion passed 5-0-1.

B. The application of Jim Ouellet and Jane Woodward for a special exception per Article 4, Section 4.2 Schedule I: Permitted Uses and Article 5, Section 5.2 to permit the conversion of an existing single-family residence into three residential condominiums. The subject property is located at 155 Court Street, in the R-2, Single Family Residential zoning district. Tax Map Parcel #104-36. ZBA #23-3.

Applicants Jane Woodward and Jim Oullet were present to discuss the application. Ms. Woodward said they have one multi-family property on Carroll Street and bought this property in September 2022. There's a forested area across the street. There are a few homes next to it, but it's more rural than a neighborhood. They're not looking to change the building's footprint. They would like to convert a single-family residence into two apartments. The existing accessory dwelling unit would be the third residence condo/apartment. Mr. Prior asked if it would be a condo or apartment, and Ms. Woodward said a condo.

Ms. Woodward went through the special exception criteria. A) The use is a permitted special exception as set forth in Article 4.2, Schedule I; yes, the proposed use is to convert it to three condominiums. Multi-family units are on the list of permitted special exceptions. B) That the use is so designed, located and proposed to be operated that the public health, safety, welfare, and convenience would be protected; yes, this is already a residence, so there would be no change to the public health, safety, welfare, and convenience. C) That the proposed use will be compatible with the zoned district and adjoining post-1972 development where it is to be located; yes, this is compatible with the residential nature of the zoned district. D) That adequate landscaping and screening are

45 provided; yes, we've already begun cleaning up the landscaping, and will
46 continue to do so. We're not taking anything down. E) That adequate off-street
47 parking and loading is provided and ingress and egress is so designed as to
48 cause minimum interference with traffic on abutting streets; yes, there remains
49 adequate parking. There are already seven spaces and we have plans to pave it.

50 Mr. Prior asked if she's looked at the parking guidelines. Ms. Woodward
51 said there will be three units, and it's required to have two spaces per unit plus
52 one, which is seven.

53 Ms. Woodward continued with the special exception criteria. F) That the
54 use conforms with all applicable regulations governing the district where located;
55 yes, it does conform with the relevant regulations for the R2 zone. G) The
56 applicant may be required to obtain Planning Board or Town Planning approval;
57 Mr. Prior said that the applicant didn't need to address this. H) That the use shall
58 not adversely affect abutting or nearby property values. Ms. Woodward said that
59 when we tried to get a loan for this property, the appraiser said the house was
60 uninhabitable, so the value of the property was pretty low. We've already put
61 \$40-50,000 into it to make the first apartment habitable. We're intending to
62 increase the value of the property dramatically. Mr. Prior said that I) and J) do not
63 apply.

64 Mr. Prior said there are six Board members, but only five will vote on this
65 case. Mr. Mirsky volunteered to not vote.

66 Ms. Montagno asked how many bedrooms are in the accessory dwelling
67 unit. Ms. Woodward said there's one bedroom in the ADU, two bedrooms on the
68 first floor in the main house, and one bedroom on the upper floor of the house.
69 Mr. Eastman clarified that it's not an Accessory Dwelling Unit, it's an in-law
70 apartment.

71 Ms. Page asked if the application is for three units, does it need to go to
72 the Planning Board automatically? Mr. Prior said it does not need to go
73 automatically; the only reason to do it would be a change to the footprint of the
74 building.

75 Ms. Montagno asked if the property shares a driveway with the home
76 behind it. Ms. Woodward said the neighbor has a right of way, but they also have
77 their own driveway. They haven't used it since we bought it.

78 Mr. Prior asked if this property and the one behind it were carved out from
79 a one-family. Mr. Eastman said yes, it was split off. The house in the rear was
80 formerly a family member. He added that the right of way was more about utility
81 easements.

82 Ms. Montagno said she went to the site and it appeared the right of way
83 was being used. Without having a site map with the designated parking spaces,
84 it's not clear to her where the cars will park. Ms. Woodward asked Mr. Ouellet to
85 respond to the concern.

86 Mr. Ouellet said a paving company dug out seven full spaces in gravel in
87 the backyard. We could park 10 cars there. Mr. Eastman said the Board can
88 make a site plan a condition of approval. Mr. Ouellet said with regard to the right

89 of way, he's spent hundreds of hours at the property, and he's never seen the
90 other house use the driveway. One of the residents of that back house was sick
91 and needed deliveries, so they asked us to keep that open, but we haven't seen
92 anything recently. They seem to use their own driveway. Mr. Prior asked if they
93 were to park seven cars, would it impede access to the back? Mr. Ouellet said
94 no. Ms. Page asked if any of the seven cars could get out or if there would need
95 to be shuffling around. Mr. Ouellet said there's a 15-20 feet wide driveway that
96 goes all the way to the back building. On the right, in the backyard, is where the
97 parking spaces are. We will have it paved and lined in the fall.

98 Mr. Prior asked for public comment, but there was none.

99 Mr. Prior closed public comment and brought the discussion to the Board.

100 Ms. Petito went through the special exception criteria. A) The use is a
101 permitted special exception as set forth in Article 4.2, Schedule I; yes, she
102 believes that it is. B) That the use is so designed, located and proposed to be
103 operated that the public health, safety, welfare, and convenience would be
104 protected; yes, she doesn't think that's an issue. The parking situation seems to
105 have been taken care of. The neighbors have the right of way, but they also have
106 their own drive. Mr. Prior said there would be no additional curb cuts or anything
107 going into Court Street, so that should be ok. Ms. Petito continued with the
108 criteria: C) That the proposed use will be compatible with the zone district and
109 adjoining post-1972 development where it is to be located; yes, she doesn't think
110 this is an issue. Mr. Prior said we had a request for a conversion to two
111 condominium units at 2 Riverbend Circle, so there are other multifamily units in
112 the area. It is compatible. Ms. Petito continued with the criteria: D) That
113 adequate landscaping and screening are provided; yes, there is landscaping with
114 trees and shrubs there. E) That adequate off-street parking and loading is
115 provided and ingress and egress is so designed as to cause minimum
116 interference with traffic on abutting streets; yes, she doesn't think there's any
117 interference. It doesn't go to Court Street. Mr. Prior said it does go to Court
118 Street, but there are no additional curb cuts requested. Whoever makes a motion
119 should add a condition that the applicant provide visual evidence of the correct
120 number of parking spots. Ms. Petito continued with the criteria: F) That the use
121 conforms with all applicable regulations governing the district where located; yes,
122 it's a residential area, so a condo multifamily conforms. G) The applicant may be
123 required to obtain Planning Board or Town Planning approval; the Board said
124 that that's not an issue. Mr. Prior said he doesn't believe we need it as a
125 condition of approval because there's no exterior change to the property. Ms.
126 Petito continued with the criteria: H) That the use shall not adversely affect
127 abutting or nearby property values; yes, given that it fits in with the other types of
128 residences that are in the area, and we haven't heard any testimony to that
129 effect, she doesn't think it would adversely affect nearby property values. It's a
130 rundown property that's being restored. I) and J) do not apply.

131

132 Ms. Petito made a motion to approve the application of Jim Ouellet and Jane Woodward for a
133 special exception per Article 4, Section 4.2 Schedule I: Permitted Uses and Article 5, Section
134 5.2 to permit the conversion of an existing single-family residence into three residential
135 condominiums, subject property located at 155 Court Street, in the R-2, Single Family
136 Residential zoning district, Tax Map Parcel #104-36, with the condition that the applicant
137 provide a map or other visual aid to show that adequate parking has been provided for the
138 adequate number of spaces. Ms. Olson-Murphy seconded. Mr. Prior, Ms. Olson-Murphy, Ms.
139 Page, Ms. Petito and Ms. Montagno voted aye, and the motion passed 5-0.

140
141 **II. Other Business**

142 A. Request for Rehearing, Samuel Lightner, #ZBA Case 23-5

143 Mr. Prior said there is a request for rehearing from an abutter to the Samuel
144 Lightner property on 25 Clover Street, an application that was heard last month.

145 Ms. Petito said she would not vote on this request.

146 Mr. Prior said if approved, the applicant would be forced to come back next
147 month and re-present an application. There would have to be new evidence that has
148 arisen or the Board feels that an error was made.

149 Mr. Mirsky said he thinks a rehearing is appropriate because he doesn't think the
150 evidence that came in about safety was accounted for in the Board's decision. The
151 abutter should have the opportunity to present their side of this and the applicant should
152 have the opportunity to prepare for that criticism. It's a good use of the rehearing. From
153 his perspective, any time safety is raised the Board should be careful about it.

154 Ms. Montagno said if we bring it back, the Board should look closely at what the
155 regulations are for it to be a safe corner. She understood from what Mr. Eastman said
156 that there had to be 30 feet from both corners on a diagonal for visibility. She's walked
157 that street many times, and there's a big tree on the corner blocking the view, not the
158 building or the proposed addition.

159 Mr. Mirsky said we should look at the case based on this neighborhood, not just
160 the regulations. The Board is asked to examine the facts. Ms. Montagno said this is one
161 person's opinion. We need to do it within the constructs of what is considered a safe
162 corner, not just "I don't think it's safe." Mr. Mirsky said that's the language that this
163 person used, but it wasn't strictly a matter of the rules. The abutter was talking about
164 something that he has also been concerned about in that neighborhood. The public
165 interest, the spirit of the ordinance, and substantial justice are all addressed by the
166 testimony that this person gave regarding her concerns. While the issues of these
167 regulations came up at the hearing, he doesn't think the Board can strictly apply the
168 regulations. We have to consider how this proposed project will affect these
169 considerations.

170 Mr. Prior said we have to put it in the context of the variance criteria. Did we err
171 because the applicant does not meet criteria 1, 2, and 3? Mr. Mirsky said yes, and there
172 was also the issue of the value of surrounding properties, but he doesn't think they
173 brought in that evidence.

174 Ms. Petito asked if there was an issue about the height of this structure. Ms.
175 Olson-Murphy said there was an issue about it being distracting because it would be

176 taller than surrounding properties. Mr. Prior said the majority of houses are one-story,
177 but this house already has a significantly peaked roof, so he doesn't think it's about the
178 height. It's about how far towards the street it would go and whether that blocks the
179 visual. There's a stop sign at the corner that would not be impeded, but is the line of
180 sight obstructed by the approved construction?

181 Ms. Petito said she doesn't see new evidence in the letter. The abutter is raising
182 the same concerns about safety she discussed in the meeting, and four out of five of us
183 did not agree with that. If we want a rehearing, we can't do it based on new evidence.

184 Ms. Page said the justification for the request was that the Board erred on the
185 decision in the hardship criteria, since there were other options for the addition, but that
186 issue was given a healthy amount of discussion with the tree to the side and the child's
187 play area in the back. She agrees that new evidence wouldn't be the basis for rehearing,
188 and she's having trouble with the reasons they've given.

189 Mr. Mirsky moved to grant a rehearing of the application of Samuel Lightner, ZBA case #23-5,
190 25 Clover Street; the request for rehearing was by the abutter. The motion was not seconded.

191
192 Ms. Olson-Murphy moved to not grant a rehearing of the application of Samuel Lightner, ZBA
193 case #23-5, 25 Clover Street. Ms. Page seconded. Mr. Prior, Ms. Olson-Murphy, Ms. Page, and
194 Ms. Montagno voted aye, and Mr. Mirsky voted nay. The motion passed 4-1.

195
196 B. Approval of Minutes: February 21, 2023

197 Mr. Mirsky moved to approve the minutes of February 21, 2023 as presented. Ms. Olson-
198 Murphy seconded. Mr. Prior, Ms. Olson-Murphy, Ms. Montagno, and Mr. Mirsky voted aye, and
199 the motion passed 4-0.

200
201 **III. Adjournment**

202 Mr. Mirsky moved to adjourn. Ms. Olson-Murphy seconded. All were in favor and the meeting
203 was adjourned at 7:37 PM.

204
205 Respectfully Submitted,
206 Joanna Bartell
207 Recording Secretary



CELEBRATING OVER 35 YEARS OF SERVICE TO OUR CLIENTS

LIZABETH M. MACDONALD
JOHN J. RATIGAN
DENISE A. POULOS
ROBERT M. DEROSIER
CHRISTOPHER L. BOLDT
SHARON CUDDY SOMERS
DOUGLAS M. MANSFIELD
KATHERINE B. MILLER
CHRISTOPHER T. HILSON
HEIDI J. BARRETT-KITCHEN
JUSTIN L. PASAY
ERIC A. MAHER
CHRISTOPHER D. HAWKINS
VASILIOS "VAS" MANTHOS
ELAINA L. HOEPPNER
WILLIAM K. WARREN
BRIANA L. MATUSZKO

RETIRED
MICHAEL J. DONAHUE
CHARLES F. TUCKER
ROBERT D. CIANDELLA
NICHOLAS R. AESCHLIMAN

February 21, 2023

Kevin Baum, Chair
Exeter Zoning Board of Adjustment
10 Front Street
Exeter, NH 03833

Re: Motion to Rehear for The RiverWoods Company, Case 22-15 and 22-16

Dear Chair Baum and Members of the Board:

Enclosed please find a request to rehear the variance applications on the above matters which were denied on January 23, 2023. We ask that this matter be scheduled for discussion and decision at the Board's meeting of March 21, 2023 and we ask that a full board be in attendance to make the decision as to whether or not to grant the motion to rehear. Should the motion to rehear be granted, then we ask that it be placed on the agenda for the April 18, 2023 meeting of the Board.

Please contact me if you have any questions.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC

Sharon Cuddy Somers
SCS/sac
Enclosures

cc: The RiverWoods Company
Erik Saari, Altus Engineering

S:\RA-RL\RiverWoods Company\Health Center & Woods Expansion 2022\Request for Rehearing\2023 02 21 ZBA Letter.docx

DONAHUE, TUCKER & CIANDELLA, PLLC
16 Acadia Lane, P.O. Box 630, Exeter, NH 03833
111 Maplewood Avenue, Suite D, Portsmouth, NH 03801
Towle House, Unit 2, 164 NH Route 25, Meredith, NH 03253
83 Clinton Street, Concord, NH 03301

RSA 677:2 Motion for Rehearing
The RiverWoods Company, at Exeter, New Hampshire
7 RiverWoods Drive, Exeter, NH

This constitutes a Motion for Rehearing by The RiverWoods Company, at Exeter, New Hampshire (“RiverWoods”) from the Zoning Board of Adjustment’s (“ZBA”) denial of RiverWoods’ Applications for Variances on January 23, 2023, pursuant to RSA 677:2 and RSA 677:3. This motion is timely filed pursuant to the requirements of RSA 677:2 and Bosonetto v. Town of Richmond, 163 N.H. 736, 742 (2012).

I. Factual Context

RiverWoods’ Applications for Variances were both denied by the ZBA on January 23, 2023. RiverWoods filed its first application for Variance on August 1, 2022, and filed an additional application on September 30, 2022.

The first Application for Variance for 7 RiverWoods Drive, ZBA Case 22-15, was for a variance request from Article 2, Section 2.2.26 of the Exeter zoning ordinance, to permit skilled nursing care at The Woods campus off site at a related campus.

The second Application for Variance for 5 Timber Lane, ZBA Case 22-16, was for a variance request from Article 2, Section 2.2.26 of the Exeter zoning ordinance to permit skilled nursing care at the Boulders campus to be located off site at a related campus.

Both Applications were filed as part of RiverWoods plan to move The Woods Health Center and the Boulders Health Center (made up of assisted living and nursing level services) to the Ridge campus and to create one centralized health care facility for all of its residents.

Pursuant to RSA 674:33, attached hereto as “Exhibit 1,” the ZBA shall have the power to:

1. Hear and decide appeals if it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and
2. Authorize, upon appeal in specific cases, a variance from the zoning ordinance if:
 - a. The variance will not be contrary to the public interest;
 - b. The spirit of the ordinance is observed;
 - c. Substantial justice is done;
 - d. The values of surrounding properties are not diminished; and
 - e. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
3. For the purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- a. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
 - b. The proposed use is a reasonable use.
4. If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

After deliberating on both applications, the Board determined that the variance pertaining to the Woods campus should be denied because it did not meet the substantial justice criteria nor the hardship criteria. The Board also determined that the variance pertaining to the Boulders campus should be denied because it did not meet the hardship criteria.

II. Argument

A. Standard for Granting a Motion for Rehearing

The “rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals filed with the court.” Loughlin, New Hampshire Practice, 15 Land Use Planning and Zoning § 21.19. In general, requests for rehearings should be granted “only if the petitioner can demonstrate that the Board committed []error or that there is new evidence that was not available at the time of the first hearing.” Id. at § 21.18. The ZBA may grant such a rehearing if in its opinion good reason is stated in the motion.

B. Evidence Submitted

1. The following evidence was submitted by the applicant which meets the burden of proof to show substantial justice will occur if the variance is granted¹:
 - a. The ordinance was intended to provide health care in the same locality as the residences and amenities, and not across town, and a centralized health care center will offer a better level of service at Riverwoods to all its residents.

¹ Note that the listed evidence also has applicability to the public purpose and spirit and intent criteria, but the Board found that the applicant met its burden with regard to these two criteria. Further, the listed evidence applies to the “fair and substantial relationship” element of the hardship criteria and the “special conditions” of the hardship criteria.

- b. The essential character of the locality, that is RiverWoods and the abutting residential area, will not be altered because health care will still be available to residents within the RiverWoods community.
- c. The proposed site of the centralized health care center is on the Ridge campus, which is central to all three campuses.
- d. A petition in support of this proposal was signed by 140 residents of The Woods and 20 residents from the Boulders. Further evidence was submitted that while no poll was conducted, there are 600 residents total, with no residents from the Ridge providing comments and, in addition to the letters of support, letters from 10 residents in the Boulders in opposition. See Jan 23 minutes, Ins. 175–178.
- e. RiverWoods acts and operates as one community with three parcels of land. It has one Tax ID Number, one Medicare number, and one Resident Council for the entire community.
- f. RiverWoods is not like a condominium association and does not operate in a manner consistent with such where owners have the right to vote on operations. Rather, RiverWoods, a 501(c)(3) Charitable not for profit organization is governed by a volunteer board of Trustees with the fiduciary duty to ensure it meets its obligations in the long term and is managed on a daily basis by a professional team which provides for operations. Residents are encouraged to provide input on a variety of issues by means of the Resident Council, which is comprised of residents from all campuses who are selected by their peers.
- g. The centralized health care center will contain skilled nursing, two levels of assisted living, and memory care. The current health care centers on each campus contain both nursing home level and assisted living units, but do not contain memory care. The Ridge campus health center contains Medicare licensed “skilled” nursing as well as assisted living units.
- h. The design of the centralized health care center will incorporate larger and more welcoming spaces to encourage longer visits with loved ones.
- i. There are currently 149 skilled nursing and assisted living units in total.
- j. In response to questions as to whether a consolidated health center will have enough beds to support the residents of the Woods, the Ridge, and the Boulders, evidence was provided that there will be more than enough in the proposed building. An actuarial study done in 2021 suggested a need for beds for 27% of

the independent living units (392)—which is 111 beds for the current population. The current health center utilization is below that projection. Additional beds will be used to serve new independent apartments and as a small cushion. Based on historical utilization over its nearly 30 years of existence, and the Actuarial projections, the Applicant believes there will be ample units in the new centralized health center to serve all of its residents.

- k. A degree of discomfort expressed by a small number of residents regarding the change in location of a centralized health care facility is not a detriment or loss which would support a finding that the substantial justice criteria is not met.
 - l. How the onsite healthcare was marketed or presented to residents is not within this Board's jurisdiction to consider. Further evidence was submitted from Attorney Mark McCue to indicate that the proposed centralized health center complies with the provisions of the residents' contracts.
 - m. No traffic study has yet been completed regarding the impact of the central health center to be located on the Ridge campus, although one will be completed as part of the Planning Board site review application. While the Planning Board has jurisdiction over this issue, the Zoning Board of Adjustment does not.
 - n. Nonetheless, we offered, as a condition of approval, to provide a plan demonstrating how we would provide transportation among the campuses and that we would do so contemporaneously with our site plan submittal to the Planning Board, and that we would do so after conferring with the Resident Council. For further reference see infra, Section E, Transportation Plan of this notion.
2. Evidence was submitted by the applicant which meets the burden of proof to establish the "reasonableness" of the proposed use which is the third component of the hardship test.
- a. Statistics provided by a recent Hospital Association meeting, comments from the Chairman of the Federal Reserve Board, and a recent report by McKinsey & Company address the very real labor shortage crisis, especially in healthcare, as well as the aging population.
 - b. A centralized health center will help confront workforce shortages by reducing the hiring and retention issues felt within the three facilities and will ensure consistent, reliable, and quality healthcare.

- c. RiverWoods has, as a matter of right, the ability to merge the Boulders lot and the Ridge lot to create one health care facility for those two campuses.

C. The ZBA's Conclusion that Substantial Justice Would Not Be Done If the Variance was Granted Was Erroneous

1. "It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members." Loughlin, New Hampshire Practice, 15 Land Use Planning and Zoning § 24.11. "Perhaps the only guiding rule on this factor is that any loss to the individual (applicant) that is not outweighed by a gain to the general public is an injustice." Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 515 (2011) (quotation and citation omitted). The Court also looks "at whether the proposed development [is] consistent with the area's present use." Id.; Loughlin, New Hampshire Practice, 15 Land Use Planning and Zoning § 24.11 ("Besides examining whether any loss to an individual (applicant) is not outweighed by a gain to the general public and thus constitutes an injustice, courts will look at whether the proposed development is consistent with the area's present use.")
2. The Court has addressed the issue of substantial justice on only a few occasions. In Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007), the Court upheld the trial court's conclusion that the proposed storage facility project worked a substantial justice because it "pose[d] no further threat to the wetlands[,] ... [was] appropriate for the area[,] and [did] not harm its abutters[;] [therefore,] the general public [would] realize no appreciable gain from denying this variance." Id.
3. In Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508 (2011), Harborside operated the Sheraton Portsmouth hotel on its site for many years and Parade intended to operate a Residence Inn by Marriott directly abutting it. As part of this plan, Parade sought a variance to allow it to install two parapet signs on its property, even though such signs are not permitted in Sign District 3, and two marquee signs, each with a sign area of approximately thirty-five square feet, even though the maximum sign area allowed per marquee sign is twenty square feet. Id. at 511. The ZBA found that the substantial justice criteria was met and the Court upheld the findings stating that "it was reasonable to have a landmark sign capable of identifying the location to the public at large," "[t]he parapet itself helped aesthetics by blocking rooftop units," "the signs would enable visitors to identify their destination and that Parade's proposal was reasonable and not overly aggressive," and the signs would not "negatively impact surrounding property values." Id. at 516-17.
4. To avoid error, the Board should have utilized the analysis used in the Harborside case to determine whether substantial justice was met. Had they done so, they could have concluded that the Applicant had met its burden for substantial justice. Evidence was

presented that creating a centralized health care center for all three campuses at one location within the RiverWoods community would allow for the consistent and stable high level healthcare the residents are accustomed to receiving, but also would create larger personal living spaces, additional common space, more current and appropriate small home design and a designated memory care unit. Doing so will increase the quality of life for residents and increase the quality of interaction among family and friends who visit those residents in the centralized health center. Thus, a benefit will be provided to RiverWoods residents.

5. The evidence presented establishes that this proposal is supported by a number of residents from the Woods and thus, presumably benefits them. It benefits the Applicant because it allows RiverWoods to fulfill its fiduciary duty to its residents. In contrast, there is no appreciable gain to the general public in denying the Variances, nor was there any evidence presented that there is any articulable loss to the small minority of residents from the Boulders who take issue with the proposal.
6. The Board agreed that there was a substantial benefit to granting the variance in that the Applicant is attempting to resolve operational issues associated with having three separate health centers instead of one. The Board erred by not concluding that granting the variance will address serious concerns raised by a large number of residents and that such concerns raised outweigh any anxiety about internal transportation, especially as these concerns will be assuaged by the Applicant's submission of a transportation plan upon approval of the Variances.
7. The Board erred in finding that the good which comes from granting the variance is outweighed by the detriment or loss to the small portion of individual residents who voiced opposition to the project. The Board misunderstood the balancing test in this instance and focused on the impact of the change that some residents claimed it would have on them, specifically that a central health center was not what they signed a contract for. The Board also erred in finding that granting the Variances is something that will alter the final investment in life for residents, all to their detriment.
8. Only one abutter in the adjacent residential areas has come forward to voice any concerns about the proposal. Further, to the extent that the RiverWoods residents can be considered part of the "neighborhood" themselves, the Board erred in focusing only on the small number of residents opposed to the centralized healthcare center and did not sufficiently weigh the gain to the large number of residents who support it. To the extent weight is given to both the opponents and proponents, substantial weight should be given to the resident proponents of The Woods, as they are the group of people most impacted by the proposal. The Board erred in relying exclusively on their opinions and personal feelings about a small group of residents who object to the proposal and the

benefit of their bargain, instead of looking at the evidence presented and the collective benefits of approving the variances to both the Applicant and the collective body of residents.

9. While the Board is “entitled to rely in part on its own judgment and experience in acting upon applications for [] approval,” Durant v. Town of Dunbarton, 121 N.H. 352, 357 (1981), “its decision must be based on ‘more than [the] mere personal opinion . . . of its members,’” Barrington East Owners’ Assoc. v. Town of Barrington, 121 N.H. 627, 631 (1981). In Lane Constr. Corp. v. Town of Swanzey, 2012 N.H. Super. LEXIS 32, *21–24, the court noted that “[t]he fact that the board was disappointed by the conclusion reached by the experts does not excuse ignoring it” and found that “the Board acted unreasonably, RSA 677:15, V, because it relied on personal opinion or knowledge when that knowledge lacked evidentiary support and was contradicted by evidence in the record.”
10. The Board took issue with the numbers presented in the actuarial report and stated they felt more beds were needed because, based solely on Board member experience, residents were moved around because there were not enough beds in skilled nursing or assisted living units to accommodate everyone that required services.
11. The Applicant presented uncontroverted evidence that the proposal does not violate the contract, yet Board members made statements that implied the residents would not be receiving what they bargained for if the centralized health care center was built and would thus experience harmful change. Accordingly, the ZBA did in fact consider the contract issue in making its decision, which is expressly prohibited under New Hampshire law.
12. The Board erred in denying Application for Variance for 7 RiverWoods Drive, ZBA Case 22-15 because it never articulated that the Applicant did not meet its burden regarding the substantial benefit criteria. The only thing the Board articulated was that it was a difficult task to weigh and that it wanted more information on how residents on other campuses would get from their residence to a centralized health center. This point was alleviated by the fact that the Applicant has already agreed to provide a transportation plan once the Variances are approved.

D. The ZBA's Conclusion that the Hardship Variance Criteria Was Not Met Was Erroneous

1. The Board referenced the "explanation column,"² where it states the following explanation for the unnecessary hardship factor:

The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other similarly situated property.

- i. Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction as applied to the property does not serve that purpose in a "fair and substantial" way.
- ii. The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.

As an alternative to (a) and (b) above, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.

2. The Board should have relied on Harborside, the guiding principle for the unnecessary hardship criteria, as pointed out by the Applicant during the hearing. In Harborside, the ZBA found that the special condition of the property was "[t]he sheer mass of the building and the occupancy by a hotel." 162 N.H. at 517. The ZBA further impliedly found that "the general public purpose of the ordinance was to reduce visual clutter and determined that the marquee signs would 'not be disruptive to the visual landscape' and could 'actually enhance the streetscape.'" Id. The ZBA concluded that the marquee sign proposal was "reasonable and not overly aggressive." Id.

² This is an excerpt from The Five Variance Criteria in the 21st Century entitled "Requirements for Granting a Variance: A Suggested Approach" prepared in 2010 and includes the requirements that must be met by an Applicant in order to receive a variance, as well as an explanation of what those requirements are. A copy of same was sent to the Applicant by the Town and is attached hereto as part of "Exhibit 1." To the extent these criteria diverge from the language in RSA 674:33, then the language of the statute must control.

3. Here, evidence was presented that RiverWoods does have special conditions in the property itself in that it is the only Continuing Care Retirement Community (CCRC)³ in the area and in the Town of Exeter. It is comprised of three campuses that operate as one larger community and all campuses either abut or are adjacent to each other.
4. RiverWoods acts as one community with three distinct, but related campuses, all of which are in close proximity to each other. Much like a college or university campus which has dormitories or “houses” and the like, RiverWoods has centralized management and operations that service all aspects of the community. Like a college campus, residents and services on all three sites are co-mingled and are treated as belonging to one unified community. Thus, the special condition of the property consists of the proximity of the land parcels to each other coupled with the utilization of the land parcels as an undivided unit. The Board erred in failing to recognize this fact.
5. Chairman Baum stated this was the hardest factor to analyze and correctly noted that it came down to whether they believed it was reasonable under the language of the ordinance to consider the three campuses as one site, which would meet the intent of the definition. He stated he was able to get there given that RiverWoods is treated as a single site, the close locations of the three properties including the adjoining lots of the Ridge and the Boulders, and given the common ownership and administration of the three campuses. Further, he stated he was convinced the intent of the ordinance is to provide care in close proximity, which with the three campuses in close proximity to one another, is achieved, even if it requires transportation. Unfortunately, other Board members erred in not reaching the same conclusion as Chairman Baum.
6. Chairman Baum further stated this factor was much easier for the Variance for 5 Timber Lane, ZBA Case 22-16, because the Boulders and the Ridge were adjoining lots and can be merged as a matter of right. Both Ms. Davies and Ms. Olson-Murphy agreed with this as to the Boulders.
7. Ms. Davies stated it was harder for her to make this argument for The Woods, despite admitting it made sense to have a centralized memory care unit. Ms. Davies took issue with the fact that residents would now have to leave their building in order to go to the centralized health care facility, but as Chairman Baum pointed out, the ordinance says “onsite nursing home facilities” and does not specify that it must be in the residents’ building.
8. Some Board members grappled with the issue of “special conditions” and concluded that the workforce issue cannot constitute a “special condition.” In doing so, the Board

³ This is defined in the Town zoning ordinances as an “Elderly Congregate Health Care Facility (ECHCF).” Exeter Zoning Ordinance, Article 2, Section 2.2.26.

committed error because they conflated the need for centralized health care, which is based, among other things, on labor issues, with what constitutes a “special condition” of the property. The need for the use speaks to the element of the hardship test regarding whether the proposed use is reasonable while the aspects of the property itself speaks to the “special conditions.”

9. Other Board members seemed unsure, but ultimately they said she did not believe there was a hardship on the property since the Applicant was “currently doing it on those two parcels without issue, a manpower issue, but physically no . . . “
10. Despite the confusion, the Board denied both Applications.
11. The Board erred in denying Application for Variance for 7 RiverWoods Drive, ZBA Case 22-15 because it did not meet the unnecessary hardship factor. The Board erred in determining that the labor shortage was the hardship that burdened the property and ignored that there is no similarly situated property (no other CCRC), and even if there are, there are none in this area. Unlike RiverWoods having three campuses in different parts of town, the close proximity of all components of RiverWoods meets the intent of the ordinance. Based on the uniqueness of the property and pursuant to the Harborside case, the Board should have determined the Applicant met the unnecessary hardship criteria.
12. The Board erred by focusing on the fact that the separate campuses are currently functioning, albeit with labor shortages, and to do so is not consistent with the current standard of hardship.
13. The Board erred in denying Application for Variance for 5 Timber Lane, ZBA Case 22-16 because it did not meet the unnecessary hardship factor. The Board agreed that not only are these two lots adjoining, but that they can be merged as a matter of right and the Applicant has that as an option moving forward. The Board has failed to articulate why this specific Application failed the hardship test.

E. Due Process Concerns

1. The Board only had three members present at the hearing: Chair Kevin Baum, Clerk Esther Olson-Murphy, and Laura Davies. Both Vice-Chair Robert Prior and Alternate Martha Pennell recused themselves. In the case of Vice Chair Prior, the recusal was based on the fact that he is an abutter and in the case of Alternate Martha Pennell it was because she is a resident at RiverWoods.

2. The Applicant noted at the outset of the hearing that the Applications were proceeding with less than a full Board and referenced a letter sent to the Select Board ahead of the January 23, 2023 meeting stating the choice to proceed at the meeting was not a choice with any real meaning due to the fact that vacant positions, coupled with periodic absences, means that there is no mechanism by which a full Board could sit.
3. Chairman Baum stated there was quorum for the meeting, but also that he appreciated the letter because he believes they need more Board members.
4. As noted in a January 12, 2023 letter to Chair of the Select board Niko Papakonstantis, there have been recurring challenges with the ability for RiverWoods to proceed with a full board present.
5. RiverWoods filed its application for relief on August 1, 2022 and filed its additional application on September 30, 2022. The applicant declined to go forward at the August 16, October 18, and November 15, 2022 meetings because there was not a full board, resulting from absences or recusals.
6. Prior to the December 20, 2022, the Applicant was informed once again that there would be less than a full board due to the death of the late Rick Thielbar. RiverWoods elected to proceed at the December 20, 2022 meeting despite there not being a full board present because of significant internal pressure as a result of the substantial health care issues motivating the proposal.
7. At the conclusion of the December 20, 2022 meeting, the matter was continued to the January 17, 2023 hearing.
8. On January 11, 2023, the Applicant learned that one of the members who sat at the December meeting was unlikely to be in attendance at the upcoming meeting due to illness and a fourth member of the Board who was not present at the December meeting might also be unavailable for the January 17, 2023 meeting.
9. In response to this information, the Applicant sent its January 12, 2023 letter and suggested the Select Board appoint additional sitting members and alternate Board members to ensure an operational governmental board. In the absence of such action, and in the absence of an applicant being provided a meaningful choice as to whether to move forward with an application at any given meeting, substantial issues of fairness and procedural due process are implicated.

10. Although there was a quorum with three Board members present on January 23, 2023, there was arguably a lack of meaningful discussion in which the members could fully flesh out the issues presented.
11. The Board has an important role in the community and a large responsibility to make decisions about complicated land use issues. These decisions must not be made in a vacuum and must include a diverse and full panel of Board members from the community who bring their unique opinions and experiences to the table.
12. The Board therefore committed error by proceeding in the January 23, 2023 hearing with less than a full Board.
13. Since the January 23, 2023 Board meeting the Selectboard has had the opportunity to appoint two new members thus creating the opportunity to correct due process problems if a rehearing is granted

E. Transportation Plans

1. Evidence was presented that a traffic study was done by Stephen G. Pernaw, P.E., PTOE, on behalf of RiverWoods, solely to address the impact of additional independent living units.
2. This traffic study was prepared only for the purposes of studying the impact of the thirty-five (35) potential independent living units and not the impact of having a centralized health care facility.
3. This issue is not within the ZBA's jurisdiction to consider; it is a Planning Board issue.
4. As noted by the Applicant, a traffic study is not required at this stage, and the issue of traffic and transportation and its impact on residents and abutters would be the subject of a further traffic study regarding the impacts of the centralized health care center and which would then be examined by the Planning Board.
5. The Board voiced its concern regarding the impact a centralized health care facility would have on the residents who would be traveling from The Woods and Boulders to the proposed site at the Ridge.
6. Even though there is no requirement for a plan to be produced for the ZBA, RiverWoods commits to presenting such a plan to the ZBA for their review if this rehearing is granted.

III. Conclusion

Under the circumstances, the ZBA's decision was unlawful and unreasonable. The ZBA committed errors by determining the Applications do not meet the criteria set forth above. The ZBA also committed error in proceeding with less than a full Board. Further, although not required at this stage, the Applicant can provide further traffic information number information to the Board to demonstrate how transportation will be provided from different campuses to the centralized health care site. There are compelling reasons to grant a rehearing.

Respectfully submitted,

THE RIVERWOODS COMPANY, AT EXETER, NEW
HAMPSHIRE
BY ITS ATTORNEYS
DONAHUE, TUCKER & CIANDELLA, PLLC

2/21/2023

Date

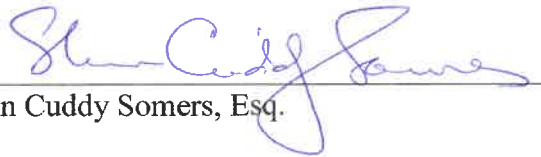

Sharon Cuddy Somers, Esq.

EXHIBIT 1

TITLE LXIV

PLANNING AND ZONING

CHAPTER 674

LOCAL LAND USE PLANNING AND REGULATORY POWERS

Zoning Board of Adjustment and Building Code Board of Appeals

Section 674:33

674:33 Powers of Zoning Board of Adjustment. –

I. (a) The zoning board of adjustment shall have the power to:

(1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and

(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

(A) The variance will not be contrary to the public interest;

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

(D) The values of surrounding properties are not diminished; and

(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(b)(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

(c) The board shall use one voting method consistently for all applications until it formally votes to change the method. Any change in the board's voting method shall not take effect until 60 days after the board has voted to adopt such change and shall apply only prospectively, and not to any application that has been filed and remains pending at the time of the change.

I-a. (a) Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

(b) The zoning ordinance may be amended to provide for the termination of all variances that were authorized under paragraph I before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that variances authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or

in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

III. The concurring vote of any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.

IV. (a) A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance.

(b) Special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception.

(c) The zoning ordinance may be amended to provide for the termination of all special exceptions that were authorized under this paragraph before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

V. Notwithstanding subparagraph I(a)(2), any zoning board of adjustment may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

(a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.

(b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision.

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.

VIII. Upon receipt of any application for action pursuant to this section, the zoning board of adjustment shall begin formal consideration and shall approve or disapprove such application within 90 days of the date of receipt, provided that the applicant may waive this requirement and consent to such extension as may be mutually agreeable. If a zoning board of adjustment determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the board may, in its discretion, deny the application without prejudice, in which case the applicant may submit a new application for the same or substantially similar request for relief.

Source. 1983, 447:1. 1985, 103:20. 1987, 256:1. 1998, 218:1. 2009, 307:6. 2013, 93:1, 2, eff. Aug. 19, 2013; 267:9, eff. Sept. 22, 2013; 270:3, eff. Sept. 22, 2013. 2018, 75:1, 2, eff. July 24, 2018; 168:1, 2, eff. Aug. 7, 2018; 214:1, eff. Aug. 7, 2018. 2022, 272:74, eff. Aug. 23, 2022.

2010 VARIANCE & SPECIAL EXCEPTION CRITERIA

2.2.75 Variance: The zoning board of adjustment shall have the power to:

(a) Hear and decide appeals if it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and

(b) Authorize, upon appeal in specific cases, a variance from the zoning ordinance if:

1. The variance will not be contrary to the public interest;
2. The spirit of the ordinance is observed;
3. Substantial justice is done;
4. The values of surrounding properties are not diminished; and
5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

A. For the purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

ii. The proposed use is a reasonable use.

B. If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

2.2.71 Special Exception: A use permitted within a District only after a determination by the Board of Adjustment that certain conditions specified in the Zoning Ordinance have been met.

A. That the use is a permitted special exception as set forth in Article 4.2, Schedule I thereof.

B. That the use is so designed, located and proposed to be operated that the public health, safety, welfare and convenience will be protected.

C. That the proposed use will be compatible with the zone district and adjoining post 1972 development where it is to be located. Adjoining principal uses in existence prior to 1972 (generally referred to as grand-fathered uses), that are not permitted uses as listed in 4.2 Schedule I: Permitted Use, shall not be considered in determining the compatibility of an applicant's proposed use.

D. That adequate landscaping and screening are provided as required herein.

E. That adequate off-street parking and loading is provided and ingress and egress is so designed as to cause minimum interference with traffic on abutting streets.

F. That the use conforms with all applicable regulations governing the district where located, except as may otherwise be determined for large-scale developments.

G. As a condition of Special Exception approval, the applicant may be required to obtain Town Planner review and/or Planning Board approval of the site plan. Additionally, the Board of Adjustment may require the applicant to obtain Planning Board approval of the site plan prior to rendering a decision on an application for Special Exception.

H. That the use shall not adversely affect abutting or nearby property values.

I. That if the application is for a Special Exception for the bulk storage of a material which is, in the opinion of the Planning Board, potentially explosive, than landscaping, per Article 5.20, shall be deemed to include such blast containment, blast dampening or blast channeling features as the Board may require.

J. That if the application is for a use in the "Professional/Tech Park District," such exception will not:

1. Affect the water quality of Water Works Pond or other water supplies;

2. Constitute a health hazard to the community;

3. Permit temporary structures;

4. Permit the recycling, disposal or transfer of materials defined as hazardous waste and set forth in Article 5.10.5 of this ordinance.

(The applicant shall demonstrate that handling, storage and containment of any chemicals or substances defined as "hazardous" will be handled in strict accordance with the regulations and recommendations of the EPA and/or any other governmental body charged with enforcing compliance with any laws or statutes regulating hazardous substances).

Requirements for Granting a Variance: A Suggested Approach

THE APPLICANT MUST ESTABLISH *ALL* OF THE FOLLOWING.

Requirement	Explanation
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights."
2. The spirit of the ordinance is observed.	
3. Substantial justice is done.	The benefit to the applicant should not be outweighed by harm to the general public or to other individuals.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
<p>5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship means:</p> <p><i>Because of</i> special conditions of the property that distinguish it from other properties in the area:</p> <p style="padding-left: 40px;">(a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; <i>and</i></p> <p style="padding-left: 40px;">(b) The proposed use is a reasonable one.</p> <p><i>Alternatively</i>, unnecessary hardship means that, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance.</p>	<p>The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other similarly situated property.</p> <p>(a) Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction as applied to the property does not serve that purpose in a "fair and substantial" way.</p> <p>(b) The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.</p> <p>As an alternative to (a) and (b) above, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.</p>