

**TO TOWN OF EPPING, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT MEETING
Epping Town Hall
OR
Join Zoom Meeting
MINUTES**

March 30, 2022

Epping Television is inviting you to a scheduled Zoom meeting.

Topic: ZBA March 30, 2021 @ 6:30

Time: Mar 30, 2022 06:30 PM Eastern Time (US and Canada)

Join Zoom Meeting

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PRESENT: Brian Reed, Kevin Martin, Kim Sullivan, Cassandra Hojaboom, John Horne; Planner Kellie Walsh; Secretary Phyllis McDonough.

CALL TO ORDER: Chairman McNeely called the meeting to order at 6:30 P.M.

PLEDGE OF ALLEGIANCE TO THE FLAG

REORGANIZATION –

Martin moved Sullivan seconded the motion to appoint Reed as Chairman. The motion carried.

Sullivan moved Reed seconded the motion to appoint Martin as Vice Chairman. The motion carried.

Sullivan moved Reed seconded the motion to appoint McDonough as Secretary. The motion carried.

PREAMBLE read by the Chairman.

RULES OF PROCEDURE FOR APPROVAL – Sullivan moved Martin seconded the motion to approve the Rules of Procedure. The motion carried with amendments by Kim.

46 MARTIN ROAD, LLC FOR THE FOLLOWING – Chairman Reed read notice for

1. Variances under Article 3, Section 7(d) of the Zoning Ordinance to permit a multifamily workforce housing development to connect to a private water source whereas municipal water connection is required. (Rehearing)

2. Variance under Article 6, Section 6.10(3)(b) – To permit 9.3 units per 40,000 square feet whereas a maximum of 1 unit per 40,000 is permitted.
3. Variance under Article 6, Section 6.10(2)(d) – To permit four habitable stories whereas a maximum of two habitable stories are permitted.
4. Variance under Article 3, Section 3.6.12 – To permit building height excluding architectural details of 60 feet and including architectural details of 64 feet whereas 35 feet and 40 feet are the maximum permitted.
5. Variance under Article 7, Section 7.4.2 – To permit 23% lot coverage whereas 10% maximum lot coverage is permitted.
6. Special Exception under Article 7, Section 7.4.6(2) – To permit multifamily in the Aquifer Protection District.

Parcel is located at 46 Martin Road Tax Map 036 – Lot 023 in the Industrial Commercial Zone.

Attorney Amy Manzelli came before the Board and introduced the team associated with the project.

Attorney Manzelli referred to a document, NH Finance Housing Authority, pg. 29 & pg. 65

Attorney Manzelli referred to similar variances granted in the past. Elm St 2008 density variance, relief number of stories. Ladd's Lane 2008 density variance.

Attorney Manzelli referred RSA 672:1 III(e).

Martin asked for clarification on the formula used to calculate affordable housing.

Attorney Manzelli cited the formula for affordable housing is rent plus utility does not exceed 30% of household gross income.

Reference was made to the Kavet, Rockler & Associates, LLC report provided by the applicant.

Austin Turner gave a brief overview of the project.

1. **Variance under Article 3, Section 3.8.7 (d) of the Zoning Ordinance to permit the construction of a residential development incorporation workforce housing without municipal water whereas municipal water is required.**

FINDINGS OF FACT

At the Board's request, Attorney Manzelli provided a summary of the responses provided for each of the five variance criteria rather than read verbatim from the application. Full detail response with reference to case law, studies etc. is available in the file at the Town Hall.

1. *The variance will not be contrary to the public interest because:*
2. *The spirit of the ordinance is observed because:*

Attorney Manzelli referred to the Kavet, Rockler & Associates, LLC report and noted the report is specific to fair share housing in Epping. The report states Epping is short at least 192 units for workforce housing and by a different method Epping is short 388 units for workforce housing. She stated this project will fulfill 64 units of the required workforce housing needed in Epping. Serving the public interest and satisfying the spirit of the zoning ordinance; the first two variance criteria.

Sullivan questioned if the town should have their own independent to look at this hydrologist document.

Attorney Manzelli concurred the zoning board is within its right to have an independent consultant review the information provided.

Walsh recommended the Board discuss if an independent study/review by a consultant is necessary in order to proceed with remaining water variance criteria and potential motion on the application.

The Board discussed and decided to proceed with the remaining criteria.

3. *Substantial justice is done because:*

Attorney Manzelli stated she believes their evidence shows this workforce housing project does substantial justice.

Manzelli discussed the substantial justice criteria the Board should consider.

Manzelli stated there is no water at this site unless the water comes from this site. She stated to deny the project water would be to deny use of this property. The loss to the applicant is large and the loss to the public is significant as well because the housing needs will not be met. The “missing middle” will not be satisfied.

4. *The values surrounding properties are not diminished because:*

Manzelli stated it is widely understood that a development of this nature will increase property values. This property is being used to its highest and best potential and generally using a property this way will increase surrounding property values. There is no evidence this project is going to diminish values.

5. *Literal enforcement of the provisions of the ordinance would not result in an unnecessary hardship because:*

Attorney Manzelli stated if denied this variance it does create an unnecessary hardship.

Manzelli stated there is no water, unless water comes from this site due to the lack of availability of municipal water.

The location of the site and attributes discussed make the site unique. Unique issues that all result in unnecessary hardship.

The literal enforcement is undertaken for this property it creates an impossibility; the water and sewer commission has stated the property cannot connect to municipal water, if the ZBA denies the variance for private water it means we cannot have water on the site. It means the Town of Epping has deprived 46 Martin Road, LLC of any reasonable use of the property, which is a hardship. The applicant should be able to develop the proposed workforce housing project as it a reasonable use of the property.

Manzelli stated there are many legal references in the application package but in the interest of time she will not read through them and is confident the Board members have read the materials provided.

Chairman Reed opened for discussion among Board members.

There was no discussion.

Chairman Reed opened the public hearing.

Michele Curtis (10 Fremont Road) spoke in opposition to the project stating the original intent was for industrial and the reason it was not pursued was due to ongoing concerns with the town of Fremont and Shirking Road. She stated she does not believe the developer did their due diligence prior to purchasing

the land to understand the current state of the area and there is still an option to do an industrial use on the site instead of a large residential project. She said she does not see a hardship for the applicant. Mary Hosel (1 Fremont Road) spoke in opposition to the project stating concerns about the number of units and the impact to the water supply and aquifer. Martin noted the applicant will go through a state approval process if granted a variance for the private well.

Mike Fecteau asked about the existing condition of the sewer capacity and if the Board has spoken with the water and sewer commission about sewer for this site.

Sullivan asked if the project has received sewer approval and when the sewer will be available.

Manzelli stated sewer approval was given to the project with conditions.

Dave McClain, Verdantas Licensed geologist, spoke about the preliminary studies done so far on the site and the required state approval process related to the private well.

Chairman Reed closed the public hearing.

The Board discussed the request.

The Board voted 3-2 to grant the variance, on a motion made by Kevin Martin and Seconded by Kim Sullivan. Kim Sullivan and Cassie Hojaboom voted in opposition.

- 2. Variance under Article 6, Section 6.10(3)(b) of the zoning ordinance to permit 9.3 units per 40,000 square feet whereas a maximum of 1 unit per 40,000 square feet is permitted.**
- 3. Variance under Article 6, Section 6.10(2)(d) – To permit four habitable stories whereas a maximum of two habitable stories are permitted.**
- 4. Variance under Article 3, Section 3.6.12 – To permit building height excluding architectural details of 60 feet and including architectural details of 64 feet whereas 35 feet and 40 feet are the maximum permitted.**
- 5. Variance under Article 7, Section 7.4.2 – To permit 23% lot coverage whereas 10% maximum lot coverage is permitted.**

Manzelli confirmed with the Board that she should proceed directly into the five variance criteria as it relates to the variances for density, habitable stories, height and lot coverage.

The Board concurred.

Manzelli reiterated the same state laws and criteria cited in the overview of the project provided in the first variance request for water and that all of the same information cited applies to this request.

FINDINGS OF FACT

- 1. The variance will not be contrary to the public interest because:***
- 2. The spirit of the ordinance is observed because:***

Manzelli stated overall none of the four requests will be contrary to public interest because section 3.8 of the Epping zoning ordinance provides the flexibility to ensure the opportunity for reasonable and realistic workforce housing in accordance with the state's workforce housing laws. She referenced a recent case (2021) before the Housing Appeals Board in which the appeals board said in addition to the declared

statutory policy, the statute further states that the development of such housing shall not be prohibited or unreasonably discouraged by the municipal planning and zoning powers or by the unreasonable interpretation of such powers.

Manzelli referenced the dimensional requirements require a safety valve when reviewing workforce housing projects, to allow these projects to go forward.

Manzelli said the state law specifically calls out density; density requirements should be varied in the role of a workforce housing project 674:59 (I). She said this is in keeping with the public interest and spirit of the ordinance especially given the deficit (192 units) of workforce housing in Epping.

Manzelli said the coverage is due in large part to the parking ratio required according to the site plan regulations and the conceptual discussion with the planning board. The planning board made clear the expectation is for the applicant to comply with the parking regulations. Complying with the amount of parking spaces needed based on the site plan regulation formula, causes a large amount of impervious coverage.

Manzelli said complying with the regulations and planning board requirements is in keeping with the public interest and spirit of the ordinance.

Manzelli said the design proposed maintains a large amount of vegetation and open space on the property. The design is compact, efficient and successfully implemented in other communities. The design maintains the natural features of the property.

Manzelli said there is no evidence that a project of this nature is going to increase Epping's population or school population. She said it is current residents who wish to live in these units. She referenced materials in the application package that reflect this with data.

Hojaboom asked about school impacts.

Manzelli referenced the data from the application.

Manzelli said the number of habitable stories and the height requested provides the maximum ability to expand workforce housing in Epping and to concentrate this development near the existing travel corridors and the commercial and retail areas across the rail trail. It would not be in the public interest or the spirit of the ordinance to sprawl the development across the entire property. Mature vegetation would be lost, open space would be lost and it would be in the public interest or spirit of the ordinance to develop the site in that manner. To efficiently develop a multifamily property in a realistic and reasonable way, four habitable stories is what makes the most sense which results in building height of 64 feet. Manzelli referenced previous cases granted by the zoning board related to height.

Manzelli spoke about fire safety, stating it is one of the applicants' primary concerns. Protecting life safety as well as the structure. She stated the applicant wishes to work collaboratively with the town and fire department to address any concerns.

Manzelli referenced the flexible use development ordinance and its purpose.

Chairman Reed opened to the Board for discussion.

Sullivan said combining all the requests is out of scope in terms of what the current requirements are. He said he does not think they meet the criteria for criteria one and two for the height, stories and density requests. He stated although he knows the applicant is concerned about the structure and safety, he is more concerned about the residents and would like input from the fire department.

Martin said he has concerns about the four habitable stories and if emergency personnel needed to reach the fourth floor and provide adequate assistance in an emergency.

Martin asked about the 23% coverage and how many total acres it is.

Turner said it is about 9 acres.

Martin said he does not believe the four habitable stories complies with the character of the town. He said he is aware of three-story structures but not four.

Manzelli referenced state law and that the law states workforce housing projects are within the public interest. NH is short about 30,000 workforce housing units; Epping needs at least 192 units. This specific relief requested is what is needed to make this project economically viable. Economic viability is required by state law.

Manzelli referenced the need and demand for employees to the local business and businesses within Epping and surrounding area. This project provides the housing needed for the employees. She referenced many letters of support from Epping residents including large businesses in the community.

An exhibit was shown providing an overview of what it would look like if the density of 1 unit per 40,000 square feet were applied as well as the character of the area.

Manzelli referenced the State's "Stay, Work, Play" initiative. This project is the "stay" portion of that initiative.

Manzelli referenced the Meeting Workforce Housing Challenge Guidebook pages 20-23. She summarized the guidebook reviews the financial aspects of workforce housing projects and requirements of the developer to prove to lenders that the project will make money (profit margins 20% or more). Manzelli said the guidebook discusses the developer's financial risk when proposing a workforce housing project and that this factor must be considered when a Board is reviewing the application. She said the developer has done this calculation for economic viability and without the relief requested, the project will not be economically viable.

3. Substantial justice is done because:

Manzelli read the supreme court rule which states "perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." she said substantial justice is done because the applicant will provide 64 of the 192-388 needed workforce housing units for Epping to meet its statutory obligation. There is no individual interest being damaged by the accessibility of workforce housing for the Epping community. Allowing for increased density, building height, number of habitable stories and lot coverage will help this community grow and thrive, diversify housing opportunity and meet the town's statutory obligation for workforce housing. This is the state's policy as well as the policy expressed in Epping in the zoning ordinance and master plan. New Hampshire common law states appropriate workforce housing is by definition a benefit to Epping (10 Harris Road LLC Case) "appropriate workforce housing is a benefit to the town since it increases the town's available housing stock consistent with RSA 674:56-58.

Chairman Reed opened discussion to the Board.

Martin said all of the responses were based on workforce housing. He said the Board can't view workforce housing only when acting on the variances.

Manzelli said their position is that there is no harm to any individual or the public by granting these variances which is the substantial justice test.

Martin said the project is adding 251 non-workforce housing units. He said the number of workforce housing units needed will decrease slightly but will also go up because non-workforce units are being added.

Manzelli said there is no evidence stating the number of workforce housing units needed will go up, there is only evidence that it will go down.

Manzelli said the Kavet Rockler report references the market rate rental situation has had a zero percent availability for a number of years. This shows there is also a large demand for market rate component of the project.

Martin asked if they were one or two bedrooms. Manzelli confirmed one- or two-bedroom units.

Sullivan said he does not think granting the variances would do substantial justice for the rest of the community. He said the increase in population, school population, traffic and impacts will not benefit the town.

Manzelli said part of the economic viability of the project is that the 251 market rate units fund the 64 workforce housing units. That is how the developer can afford and is incentivized to do workforce housing units. Therefore, those two parts of the project are inseparable.

Manzelli said potential impacts of the project will be addressed at the Planning Board process as required. Specifically, a fiscal impact analysis and full traffic impact analysis in addition to the full site plan review.

Martin said the density variance granted in 2008, referenced earlier, was an existing apartment complex that was redesigned.

Manzelli said it was demolished completely and then rebuilt.

Chairman Reed pointed out the time 8:40PM. He poled the Board on how they wish to proceed given the rules of procedure state the Board will adjourn at 9PM.

Walsh recommended the Board proceed with the remaining criteria for this application and the public hearing and then make a decision on next steps.

The Board decided to proceed with the remaining two criteria and public hearing.

4. The values surrounding properties are not diminished because:

Manzelli said the project will not diminish the values of surrounding properties because when a property is converted to its highest and best use (as discussed earlier) economics say the values of surrounding properties increases.

Chairman Reed opened to the Board for discussion.
No discussion.

5. Literal enforcement of the provisions of the ordinance would not result in an unnecessary hardship because:

Manzelli said the literal enforcement of the provisions of the ordinance will result in an unnecessary hardship. She referenced the special attributes of the property are the same in which she discussed before for the first variance.

Manzelli said the variances for density, height, stories and coverage are necessary to achieve economic viability of this project. There should be no doubt that the ZBA ought to consider economics as part of the hardship analysis. She referenced the Gendron Case 2021 which states “economics can play a role in a necessary hardship determination.” She referenced a case Harrington vs. Town of Warner in which the supreme court held that “unnecessary hardship can include a reasonable return on investment. It is particularly relevant in a workforce housing request since statutory restrictions require affordability which can impact a reasonable return on investment. In the workforce housing arena economics directly impact unnecessary hardship and must be fairly considered along with the other allowable hardship standards.” Manzelli said given this information the board needs to consider and focus on economic viability when reviewing hardship. She said the applicant cannot achieve economic viability (20% return on investment) without the dimensional relief requested.

Manzelli noted an update to the workforce housing guidebook and the emphasis placed on economic viability. She read a quote from the guidebook “New Hampshire’s workforce housing law requires municipalities to provide reasonable and realistic opportunities for the development of workforce housing. For an opportunity to be reasonable and realistic workforce housing must be economically viable, meaning that it must return a reasonable profit to the developer. If it doesn’t return a reasonable profit, it will not be the reasonable and realistic opportunity required by the law.”

Manzelli reiterated without these dimensional variances the project will not be economically viable or a profit to the developer and therefore a hardship.

Manzelli requested the Board make motion on these four requests and defer the special exception if possible.

Chairman Reed opened to the Board for discussion.

Sullivan said he believes there is a failure on public interest and spirit of the ordinance for the density, height, habitable stories and lot coverage variances.

Chairman Reed opened the public hearing.

Fire Chief DeAngelis stated the fire department has been in communication with the applicant about the department’s expectations for the project. He said if the project moves forward Lt. St. Cyr and Asst. Chief Lombardo will be working with the applicant to make sure all work is completed per code and public safety. He said automatic sprinkler systems, stand pipe systems and having a fire protection engineer put in cisterns and fire pumps to match the hazard. A perimeter road was discussed and is shown on the concept plan. He said elevators of width large enough for stretchers were requested. He said the applicant met all the criteria that was asked for and also discussed the potential of the applicant assisting with acquiring a ladder truck for the department.

Sullivan said it is unfortunate the fire department did not provide something in writing.

Walsh stated during the planning board process meetings are held with all municipal departments and the applicant to review the project and the expectation of the town. At that time, written comments are provided.

Martin asked if more personnel would be needed to cover the project.

DeAngelis said the department has adequate personnel at this time. He also referenced the mutual aid system which Epping is a part of.

Chairman Reed said if this Board grants the requests, he encourages anyone to attend the planning board hearings and meetings at which most of these details will be discussed.

Mary Hosel (1 Fremont Road) spoke in opposition. She asked about the number of buildings, proximity of buildings to one another. She referenced the Stonybrook fire and Raymond NH and concerns about fire spreading in buildings of close proximity. She said she does not want to see a four-story building next to her house. She has concerns about traffic.

Turner said five buildings and a small clubhouse. The building distances is a variable but are approximately 60 feet apart.

Michele Curtis (10 Fremont) spoke in opposition. She does not think the spirit of the ordinance is being met. The ordinance needs to be upheld. The applicant should have done due diligence regarding height, occupancy limits. She said the hardship is self-inflicted because due diligence was not done upfront.

Jeremy Robosa (59 Pleasant Street) spoke in favor. He spoke about the density of the project and the increased density is essential in providing the affordable housing he is currently seeking. He said he would like a single-family home in Epping and appreciates the rural character but he needs an alternative affordable option. He is in favor of the density being condensed on this site and location as opposed to sporadic dense developments across town.

Martin said the apartments are about \$1,400 for rent.

Chad Curtis (10 Fremont Road) spoke in opposition. He agreed affordable housing is needed however he is concerned about the 64 units of workforce housing fluctuating. He is concerned about the number of variances being requested.

Erna Horton (22 Chandler Lane) spoke in favor of the project stating there is a need for affordable housing in Epping.

Susan Jarosz (16 Fremont Road) spoke against the project stating she understands the need for affordable housing but does not agree with the location of this project. She noted the rural character of the area and the need to preserve it. She does not prefer to see large buildings, traffic etc. across from her residence. She also noted safety concerns for the pedestrian traffic that uses the road to access bike trails in the area.

Mike Fecteau asked about procedure and the applicant discussing all the variance requests together. He said there is a need for each request to meet all five of the criteria on its own.

Walsh said the applicant has presented the five criteria for the four requests. The Board has paused after each criterion and had opportunity to comment and state their thoughts on each. The Board will vote on each variance request separately.

Manzelli responded to several comments made by the public. She said the intent of the project design is to not be very visible from along the roadway and adjacent neighborhoods given the elevations and vegetation buffers being taller than the project. She said the applicant did their due diligence prior to purchasing and it is their position that we provided the evidence to satisfy the requirements to receive the zoning relief being requested which is and was part of the due diligence that the applicant performed.

Manzelli said the application before the board is for 64 workforce housing units, she noted there has been some discussion of possibly increasing that number to a larger number of workforce housing units. If that were to happen it would be at the planning board stage. She said they would never go below the 64 units of workforce housing.

Manzelli referenced the workforce housing guidebook which states zoning limitations and the use of property are sometimes out of proportion with what is actually needed to fulfill zoning objectives. This has dramatically limited the ability of developers to build housing that is affordable to low- and moderate-income households. She referenced legal challenges of workforce housing and compliance with the workforce housing statute is not optional. The only exception under the statute is for municipalities who can demonstrate that their fair share affordable housing has been provided. There is no evidence that Epping housing stock does this. To the extent that any zoning ordinance prescribes minimum dimensional and density standards for residential use, compliance with the workforce housing may require a municipality to revisit the zoning ordinance to make sure there is a rational nexus between the true character of the land and the minimum dimensional and density requirements.

Manzelli said it is the applicant's position is that what is truly needed to comply with the workforce housing law and to satisfy the variance criteria are the variances requested before the Board tonight.

Chairman Reed noted the time 9:10PM. He poled the Board on how they wish to proceed. The Board agreed to proceed to act on each of the four variances.

- 2. Variance under Article 6, Section 6.10(3)(b) of the zoning ordinance to permit 9.3 units per 40,000 square feet whereas a maximum of 1 unit per 40,000 square feet is permitted.**

The Board voted 3-2 to grant the variance, on a motion made by Kevin Martin and Seconded by Kim Sullivan. Kim Sullivan and Cassie Hojaboom voted in opposition.

- 3. Variance under Article 6, Section 6.10(2)(d) – To permit four habitable stories whereas a maximum of two habitable stories are permitted.**

Martin made a motion to grant the variance, Sullivan seconded. Motion passed 3-2 with Sullivan and Hojaboom voting in opposition.

Martin made a motion to rescind the motion, Hojaboom seconded. Motion to rescind passed 5-0.

Kevin Martin moved Kim Sullivan seconded the motion to deny the variance for the number of habitable stories. The motion to deny carried 2-3. Kim Sullivan, Cassie Leigh Hojaboom, and John Horne voted in opposition.

- 4. Variance under Article 3, Section 3.6.12 – To permit building height excluding architectural details of 60 feet and including architectural details of 64 feet whereas 35 feet and 40 feet are the maximum permitted.**

The Board voted 5-0 to continue deliberations on the variance related to building height to the April 19, 2022 meeting, on a motion made by Martin, seconded by Sullivan.

5. **Variance under Article 7, Section 7.4.2 – To permit 23% lot coverage whereas 10% maximum lot coverage is permitted.**

The Board voted 5-0 to continue deliberations on the variance related to lot coverage to the April 19, 2022 meeting, on a motion made by Martin, seconded by Sullivan.

6. **Special Exception under Article 7, Section 7.4.6(2) – To permit multifamily in the Aquifer Protection District.**

The Board voted 5-0 to continue the public hearing for the special exception to the April 19, 2022 meeting, on a motion made by Martin, seconded by Sullivan.

DAB TAMARACK ENTERPRISES, LLC –for Variances from Article 6, Section 6.10.3.b maximum density; Article 6, Section 6.10.3.c minimum frontage; Article 6, Section 6.10.2.d maximum number of stories containing habitable space; Article 7, Section 7.2 minimum lot size and minimum frontage. Parcel is located at 80 Hedding Road Tax Map 017 – Lot 010 located in the Rural Residential Zone.

The Board voted 5-0 to continue the public hearing for the DAB Tamarack Enterprises, LLC application to the April 19, 2022 meeting, on a motion made by Martin, seconded by Sullivan.

MINUTES OF MARCH 2, 2022 FOR APPROVAL & SIGNATURE – Martin moved Sullivan seconded the motion to approve the minutes. The motion carried.

The Board voted 5-0 to approve the meeting minutes of 3/2/22, on a motion made by Martin, seconded by Sullivan.

ADJOURNMENT – Sullivan moved Martin seconded the motion to adjourn at 9:30 pm. The motion carried unanimously.

The Board voted 5-0 to adjourn at 9:30PM, on a motion made by Martin, seconded by Sullivan.

APPROVAL NOTIFICATION: March 30, 2022 - Minutes of March 2, 2022 were approved and signed.

Respectfully submitted,

Kellie Walsh,
Planner