

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Tuesday, January 2, 2018

6:30 PM

Second Floor Committee Room

Members Present:

Nathaniel Stout, Chair
Jeffrey Stevens, Vice Chair
Josh Gorman
Michael Welsh
Sean Wallin

Staff Present:

John Rogers, Zoning Administrator

Members Not Present:

John Rab, Alternate
Louise Zerba, Alternate

I. Introduction of Board Members

Chair Stout called the meeting to order at 6:30PM, and introduced the Board members. The ZBA welcomed two new members Michael Welsh and Sean Wallin.

II. Minutes of the Previous Meeting

Mr. Welsh noted a correction on page 22 of 40, second paragraph, the words “some antics” should be change to “semantics”.

Chair Stout noted the following corrections:

On page 10, fourth paragraph, “Chair Stout asked if the Board was opposed...” should be changed to “Chair Stout asked if the Board was opposed to him residing on the Board, in this case knowing this information”.

On page 12, second paragraph, “Attorney Davis said in relevance...” should be changed to “Attorney Davis said in relation to the issue of a group home that the definition speaks for itself”.

On page 14, first paragraph, fourth sentence, “this building can support an access” should be changed to “this building can support in excess”.

On page 13, last paragraph, remove the word “such” so the sentence is read as, “In addition, he stated that Ms. Barnes confirmed that the Prospect House would occasionally have third party providers for services such as physical therapy”.

On page 18, last paragraph, the sentence should read, “With no comment, Chair Stout announced a break and that the meeting would reconvene with public comment from those opposing the application”.

On page 19, first paragraph, the sentence, “Chair Stout read the email to the audience”, should be changed to “Chair Stout read the email to the audience, with assistance from Vice Chair Stevens”.

On page 20 top, first paragraph, third sentence, the words “of injured persons” should be changed to “or injured persons”.

On page 20, last paragraph, the first sentence should read, “He reverted back to the expansion of a nonconforming use. Chair Stout asked if, in Mr. Hoppock’s discussion of a nonconforming use, does one have to assume that they are a healthcare facility?”

On page 12, third paragraph, a reference to Mr. Plenda returning back to the meeting needs to be included. After the sentence, “Chair Stout replied that it was the choice of Attorney Davis.” add the sentence, “Mr. Plenda returned five minutes later”.

On page 24, last paragraph, the words “smoking outback” are corrected to “smoking out back”. Additionally, the following sentence needs to be corrected to, “out back” with these words put in quotations.

On page 25, fourth paragraph, third sentence, “Mr.” needs to be corrected to “Mr. Sovik”.

On page 27, last paragraph, the motion be corrected to state “Mr. Gorman made a motion to continue the public hearing to Wednesday, December 20th at 6:30 PM in the City Hall Council Chambers”.

Vice Chair Stevens made a motion to approve the minutes of December 4, 2017 as amended. The motion was seconded by Mr. Gorman, which carried unanimously.

II. Hearings

ZBA 18-01:/ Petitioner, David Bergeron of Brickstone Land Use Consultants of 185 Winchester Street, Keene, requests a Variance for property located at 828 Court Street, Keene, Tax Map Parcel # 176-01-004, which is in the Commerce District and owned by SS Bakers Co., Inc. of 428 Main Street, Keene. The Petitioner requests a Variance to permit a storage facility/self-storage on a property in the Commerce District where an existing restaurant will remain. Storage facility/self-storage is not a permitted use in the district per Section 102-542 of the Zoning Ordinance.

Mr. Rogers stated that the area of the Variance request is located on upper Court Street up towards the roundabout where 7-Eleven Convenient Store, Pizza Pie Restaurant, Freihofer's Bakery, Savings Bank of Walpole and dentists offices are located. The building owned by SS Bakers Co., Inc. known as Dunkin Donuts is located across the street from these businesses.

Mr. Rogers reported that most of this area is located in the Commerce Zone surrounded by the High Density Zone. He said that there are apartment buildings on both sides of the Dunkin Donuts and Tanglewood Estates is also located behind the property.

Mr. Rogers noted that the property located at 828 Court Street is located in the Commerce Zone. He explained the reason why the applicant is before the ZBA is because a self-storage facility is not a permitted use in this zone.

Mr. Gorman asked which zone does permit self-storage facilities. Mr. Rogers replied the Industrial Zone and the Commerce Limited Zone.

David Bergeron, Brickstone Land Use Consultants of 185 Winchester Street, Keene, stated that he was representing the owner of SS Bakers Co., Inc. and who are the owners of Dunkin Donuts.

Mr. Bergeron referred to the site plan that displayed the location of Court Street. He indicated the location of the Dunkin Donuts building and the entrance to building where the traffic circulates around the building. In addition, he noted that there was parking in the front and two sides of the building. He indicated the location of the drive-thru is on the left side of building. Mr. Bergeron explained that this building's prior use was a bank and was the reason for all of the parking. He noted that Dunkin Donuts does not have a need for all of this parking.

The area located directly behind the building is part of the three acre lot. He noted the big wooded area in the back of the lot is currently unused. Mr. Bergeron stated that the topography in this area on Court Street is slopping up and raises about 10-12 feet across the frontage of the property. In addition, he noted that the area is pretty steep heading up top toward the roundabout.

Mr. Bergeron said that the proposal is to do some reconfiguring with the parking so all of the parking is around the building itself. He stated that the same driveway would be utilized for the mini storage facility. The mini storage will be surrounded by a fenced in area with a gate for entrance/exit. Mr. Bergeron noted the units would be built in phases.

He stated that they have utilized an area to control storm water runoff for the development. Mr. Bergeron noted that this review has yet to be completed but will be when they go before the Planning Board.

He said that the lighting will be strictly building mounted lights and that there would be no pole lights. Mr. Bergeron explained that there would be limited lighting with some lights in the drive isles, with lights along the building. The access for the facility would be 24 hours a day. If a space is rented, a code for the gate would be provided and the tenant would have access to the unit at any time.

Mr. Bergeron provided the Board with a Google image of the property to give an overview of the whole area. He indicated the location of the building site as well as the condominium development, the American Legion and a new existing building that was recently purchased to put in a sports facility. In addition, he indicated the location of 7-Eleven, Tanglewood Estates, Freihofer's Bakery, Walpole Savings Bank, Keene Housing Authority Building, and the housing for the elderly.

Mr. Bergeron explained that they were requesting to build a mini storage facility in this area because it is an area that does not have good visibility being a commercial lot. He noted a good commercial lot would want to have something that had good visibility for businesses such as retail. Mr. Bergeron explained that the visibility is not there due to the topography of the lot. He explained that the initial reason for buying the property was to in order for the owners convert the building to a Dunkin Donuts for the visibility and the use of rear of the property. Additionally, he noted that the proposed use seemed to be a good fit for the property due to the low intensity use, as far as traffic is generated by this type of use.

Mr. Bergeron provided the Board with a copy of the traffic study that was titled, "Estimated Traffic Based on the Institute of Traffic Engineers" and based on the, "Trip General Manual 9th Edition". He stated that this is the fourth mini storage project that his company has worked on and all of his clients have stated that the numbers from this traffic study are high. Mr. Bergeron explained that when the entrance/exit gates to the mini storage facilities are installed they have counters installed. He reported that based on the square footage of the proposed facility it would be an estimated 42 vehicle trips per day based on the use. In addition, he reported that there would be two vehicles in the AM peak hour and four vehicles in the PM peak hour visiting the facility. He referred the Board to the traffic study report that indicated there would be 8,800 vehicles per day on Court Street in this area. Mr. Bergeron noted that these numbers were based on a count by the Department of Transportation. In addition, he said that the additional traffic from the proposal would be less than half a percent per day to traffic increase on Court Street. He also noted that during the peak hours the numbers were also low.

Chair Stout asked what the visibility was from all other angles of the entire proposal in reference to a vegetative boarder. In addition, he asked if the proposed facility would be highly visible from the west or the south. Mr. Bergeron replied that the way the parking lot is configured is that the proposal would stay within the existing tree line. He noted that the other uses in the area are also in wooded areas and the trees that they would be cutting would not be opening up the view that much in these other areas.

Mr. Bergeron reviewed the criteria:

- Mr. Bergeron said that granting the Variance would not be contrary to the public interest because this is the rear portion of a commercially developed lot with very limited visibility from Court Street. The existing commercial building contains a restaurant, with a drive thru. Directly across the street is another restaurant, a wholesale business with a retail outlet and a medical supply company. The large undeveloped rear yard area faces the rear of the commercial building. It is in the public interest to encourage large vacant portions of developed lots to be utilized rather than force new development into undeveloped areas. It

will improve the property value and add to the city tax base. In addition, he noted that there are a lot of people in the area that could utilize this type of use.

- He stated if the Variance were granted, the Spirit of the Ordinance would be observed because the Spirit of the Ordinance is to protect the public health, safety and welfare. The proposed self-storage facility would be located at the rear of a commercial site and will have only limited visibility from Court Street. The site has a shared commercial access driveway from a major street with adequate capacity to serve this use. The storage facility site is surrounded by commercial uses and multifamily residential and to the rear is a mobile home park. The proposed use will not create a threat to public health, public safety or public welfare.
- Mr. Bergeron stated that granting the Variance would do substantial justice because the rear of this commercial lot is vacant and faces the rear of the existing building. It has limited visibility from Court Street. There is no other marketable use for this area because of these site constraints. Granting the Variance will allow the landowner to utilize his property in a manner which is unobtrusive and inoffensive to the neighborhood. It will increase the value of the property and result in additional tax revenue for the City of Keene.
- Mr. Bergeron stated if the Variance were granted, the values of the surrounding properties would not be diminished because the area for the proposed storage facility is the rear of a commercially developed lot. He said that across the street is residential uses and to the rear is a mobile home park. The site has limited visibility from Court Street. Self-storage facilities do not generate excess traffic and do not generate excess noise, dust fumes or light. Granting the Variance will lead to improved property value on this lot and will help to sustain adjacent property values.
- He stated that 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 because this is a developed commercial lot with a large undeveloped area located behind the existing building. The useable area faces the rear of the existing building and has limited visibility from Court Street. This is a unique site feature that makes this area unmarketable for any other commercial use. It is unfair and an unnecessary hardship to restrict this property when allowing a self-storage facility will fulfill the general public purposes of the ordinance by maintaining property values without being a nuisance or hazard to the neighborhood. Mr. Bergeron stated that the unique features of this property are the access and low visibility from Court Street. The topography of the lot and the rise of Court St. give this property low visibility. Since the proposed use is in the rear of this property and is mostly blocked by the wooded area, as well as the neighborhood businesses and residents, there are a number of people who could take advantage of this use. This use will not be any hazard to the neighborhood.
- He stated that the proposed use is a reasonable one because it will utilize an existing vacant land area in a manner that is compatible with the neighborhood. There is adequate onsite parking for the proposed uses. The existing utilities and streets have adequate

capacity for the proposed uses. The proposed use will not diminish surrounding property values. Residents of the adjacent multi-family uses may wish to use the self-storage units and find it convenient and useful addition to the neighborhood. It is fair and reasonable to allow a self-storage facility under these conditions.

- Mr. Bergeron stated that this is a developed commercial lot with a large undeveloped area located behind the existing building. The useable area faces the rear of the existing building and has limited visibility from Court Street. This is a unique site feature that makes this area unmarketable for any other commercial use. It is unfair and an unnecessary hardship to restrict this property when allowing a self-storage facility will fulfill the general public purposes of the ordinance by maintaining property values without being a nuisance or hazard to the neighborhood.

Chair Stout asked Mr. Bergeron to explain who owned SS Bakery Co., Inc. Mr. Bergeron replied SS Bakery Co., Inc. is owned by Teo Salema. He stated that Mr. Salema owns other Dunkin Donuts restaurants in Keene and Swanzey. Chair Stout asked how many restaurants Mr. Salema owned. Mr. Bergeron replied that he owned two locations in Swanzey and three locations in Keene. Chair Stout asked if there was any reason why Mr. Salema was not present at the meeting. Mr. Bergeron replied that he was out of town.

Chair Stout welcomed public comment.

With no comment, Chair Stout closed the public hearing.

Chair Stout stated that a number of years ago the City did approve a Variance for a warehouse structure behind where Paul's Choice was once located. He noted that this Variance was never followed through. Additionally, Chair Stout stated that the Board approved a setback Variance for a building that was slightly off of the property. He said that this area was one of the major neighborhoods looked at in the Master Plan. Chair Stout noted that the Master Plan was still in place.

Mr. Welsh asked if a Variance were to be granted for a specific proposal would it be a Variance that identifies the permitted use from some other array such as Commerce Limited. He said the reason he asks is because it strikes him that a storage facility is not a warehouse and storage facilities as defined in the Zoning Code have specific restrictions that also affect consistency with neighborhood. Mr. Rogers replied the application is put forth as a self-storage which does fit in the Industrial Zone and is a permitted use that is allowed. He said in the Commerce Limited District, it is allowed with a Special Exception at which time that criteria would need to be met. Chair Stout read the definition of a storage facility, self-service, *“means a building or group of buildings in a controlled access area that contains varying sizes of individual, compartmentalized, and controlled access stalls or lockers for the enclosed storage of customer’s goods, wares, or material”*.

Chair Stout asked Mr. Rogers if the Board was granting in perpetuity the ability to run a storage facility. Mr. Rogers replied that the Board would be granting what the applicant is applying for

which is a self-storage facility. He explained that under the definition the applicant would have to adhere to those conditions listed under self-storage.

Chair Stout stated that it was his understanding that there was only one access way into storage facility and there was not a plan to see any access from any other side of the building. He said if he approved the criteria it would be based on the access way as described by the applicant. Chair Stout asked how an informal entrance would be handled. Mr. Rogers replied that this would be a decision made by the Planning Board as opposed to the Zoning Board.

Mr. Gorman asked Mr. Rogers if the Board would be able to put those restrictions on any approval. Mr. Rogers replied that he would be hesitant for the Board to put site plan restrictions on a property.

Chair Stout stated that it was important for the Board not to interfere with the purview of the Planning Board.

Vice Chair Stevens made a motion to approve ZBA 18-01 as proposed by the applicant. The motion was seconded by Mr. Gorman, which carried unanimously.

The Board reviewed criteria.

Granting the Variance would not be contrary to the public interest:

Vice Chair Stevens stated his initial reaction was that this was a big project and by looking at the topographical map it looks like a big impact. He said that when you really look closely, it is large in size but not necessarily in use or traffic. Vice Chair Stevens said that when he drives by other storage facilities in the City he rarely sees one or two cars at a time at those facilities. He said it is a light use much less than what is allowed currently in the district and was going backwards in terms of intensity.

Vice Chair Stevens said one of the things heard in this neighborhood is the intensity of the use and the problem typically associated with a high intensity. He noted that this district allows a much higher use than the proposal. Vice Chair Stevens stated that he thinks the proposal fits more to what the neighbor's desire as opposed what could be at that location. Chair Stout state that he would agree the usage seems low intensity in comparison to what usages could be.

Mr. Wallin stated that he considers the public to be all of Keene and not just that neighborhood. He asked if he was correct. Chair Stout replied in the affirmative.

If the Variance were granted, the Spirit of the Ordinance would be observed:

Vice Chair Stevens stated that the Spirit of the Ordinance is to protect the public health, safety and welfare. He explained that there was not a lot of excessive traffic that would cause problems, was not a noisy operation and that the lighting would be minimal. In addition, he stated that it seems to fit with other storage units that he has seen. Vice Chair Stevens stated that there was also enough of a tree buffer to prevent light from being a problem. Mr. Gorman stated that he

agrees with Vice Chair Stevens because of the lack of intensity coupled with the intensity that could occur. In addition, he stated that in no way shape or form could the proposal be obnoxious or offensive to people living in the neighborhood. Chair Stout stated that the intent of the spirit is stated in Section 102-541 under Commerce District. He read this Section, 102-541, as follows, “*The intent of the commerce (COM) district is to provide an area for intense commercial development. The sites are typically accessed by vehicles, and more than one business in a building would be typical, as would shopping plazas*”. Chair Stout stated that he did not think that the Board was violating anything within the statement for that intent relative to the Commerce District. Mr. Wallin stated that the argument with the Spirit of the Ordinance is that he sees is the visibility to the public’s health, safety and welfare. He stated that he did not think those are points that support the Spirit of the Ordinance. Mr. Wallin stated that the Spirit to the Ordinance was to make this area a Commerce Limited District.

Granting the variance would do substantial justice because:

Chair Stout stated that substantial justice is tied into the uses that are available to the applicant under the current zone. He said that there are lists under the Commerce District such as private club, private school, research development, publishing/printing, restaurants, etc. Chair Stout stated that it was hard to find any way any of those uses could be used. He said that substantial justice is provided in this case based on what he sees as other options available according to the Ordinance. Mr. Gorman said that the site is privy to some specifics in terms of visibility that would limit some of the allowed uses whereas this use does not necessarily need the same amount of visibility to succeed. He stated that granting the variance does do substantial justice to allow that use. Mr. Welsh stated that he went through the same list of possible uses thinking whether they are reasonably applied to this site. He noted that he too came up with the same difficulty and it seems like this is a creative alternative when the list of permitted alternatives seems very limited. Mr. Stevens stated that he would agree Mr. Welsh.

If the variance were granted, the values of the surrounding properties would not be diminished because:

Vice Chair Stevens stated that there would not be much of an impact, positively or negatively. He said that the impact of the use is pretty key to that point. Vice Chair Stevens noted that if there was a large increase in traffic that it would have impact on the surrounding properties. Mr. Gorman stated that he thinks that a mini storage facility could diminish the surrounding property values in certain situations. However, he stated in this particular situation the Dunkin Donuts serves as a buffer and if the facility was located directly on Court it could have an adverse effect on the surrounding properties. Mr. Gorman noted that the primary use in the area was Commerce. Mr. Wallin stated that on one side of the proposed facility are condominiums and when those trees are removed there will be substantial amount of trees removed. He stated that he was concerned that during winter when the leaves fall off the owners of the condominiums will see a storage facility rather than forest. Chair Stout stated that the Planning Board will weigh in those issues and noted that there is a sizeable buffer in that location. In addition, Chair Stout noted that the condos are closer to the existing structure compared to the structure to be built. According to the site plan, Chair Stout stated that it looked like there was a 50 foot buffer between the property line and the nearest structure either on the south or east side. Mr. Rogers

stated the project would still have to meet all of setbacks and the applicant would have to still maintain the distances to the property line. He noted the applicant was not asking for any dimensional Variance. Mr. Gorman stated that regardless of use they are free to cut down trees even in doing nothing with property and there is no mandate for ensuring the trees shield the condominiums. He asked if he was correct. Mr. Rogers replied in the affirmative. Chair Stout stated the Planning Board could restrict cutting vegetation.

Unnecessary Hardship

Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:

ix. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:

The Board discussed how the NH legislature is considering adjusting the language for the five criteria. Chair Stout recommended that the Board contact the local representative to share their suggestions or comments.

Chair Stout stated that no fair and substantial relationship exists between the general public purpose.

A: The proposed use is a reasonable one:

The Board agreed to move to answer part (B) to answer how a variance is necessary to enable a reasonable use of it.

B: Explain how, 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 Board agreed that an unnecessary hardship does exist and moved forward with voting on the criteria.

Chair Stout explained that the Board would go through each criteria, read it again and then vote on each criteria. He noted that if anyone voted against any of the criteria they would have to vote against the motion. The Board moved forward with voting on the criteria.

After the Board voted Mr. Welsh stated that he wanted to make a statement before making his final vote. He said that he, in prepping himself in membership of the Zoning Board of Adjustment, educated himself on the differences between use variances and area variances. In addition, he stated the public's interest is something that is consistent with the greater community and not just the neighborhood. Mr. Welsh stated that he finds all of those things highly compelling and important but at the same time the discussion undertaken have moved him

in the direction of approval of the variance. Mr. Gorman pointed out to Mr. Welsh that he voted in opposition to the first criteria and that based on that Mr. Welsh would have to vote “no” on granting the variance. In addition, Mr. Gorman explained that Mr. Welsh would have to vote in approval for all criteria in order to vote in favor of the application.

Chair Stout apologized and stated that there was a procedural mistake by voting on the criteria before a motion was made. He asked if there was any objection from members of the Board to vote on the criteria again. There was no objection and the Board reviewed the Findings of Fact again.

Vice Chair Stevens made a motion to approve ZBA 18-01 as proposed by the applicant. The motion was seconded by Mr. Gorman, which carried unanimously.

Chair Stout reviewed the Findings of Fact:

Granting the Variance would not be contrary to the public interest: Granted 4-1, Mr. Wallin opposed

If the Variance were granted, the spirit of the Ordinance would be observed: Granted 4-1, Mr. Wallin opposed

Granting the Variance would do substantial justice: Granted 4-1, Mr. Wallin opposed

If the Variance were granted, the values of the surrounding properties would not be diminished: Granted 4-1, Mr. Wallin opposed

A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

- 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:*
- ii. The proposed use is a reasonable one because* Granted 4-1, Mr. Wallin opposed

B. Explain how, 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. Granted 4-1, Mr. Wallin opposed.

With a vote of 4-1, The Zoning Board of Adjustment approved ZBA 18-01. Mr. Wallin opposed.

V. New Business:

Chair and Vice Chair Voting

Chair Stout explained that the elections for Chair and Vice Chair last for twelve months and that there would need to be a nomination for Chair and Vice Chair.

Mr. Wallin made a motion to nominate Mr. Stout as Chair of the ZBA. The motion was seconded by Mr. Stevens, which carried unanimously.

Chair Stout made a motion to nominate Mr. Gorman as Vice Chair of the ZBA. The motion was seconded by Mr. Welsh, which carried unanimously.

VI. Communications and Miscellaneous

Chair Stout asked if there was a report available for the Rules and Procedure. Mr. Rogers replied not at this time.

Chair Stout discussed how the Board has demonstrated an unwillingness to take in information from people on the day of a meeting because the Board has not had a chance to absorb this information. He explained that as a rule, the Board has stated that they would allow submission of written materials during a public hearing only when a delay of any decision on that case would be acceptable in order to allow Board members to study submitted materials. Mr. Rogers stated that the appropriate procedures in regards to this matter would be contained in the Rules of Procedure. In addition, Mr. Rogers stated that the Board would be reviewing this information for approval.

Chair Stout thanked Mr. Stevens for the many years of service and his willingness to step forward for the Board.

Chair Stout asked if someone from the City could meet with the ZBA in regards to official report on the whole rezoning in the City. Mr. Rogers stated that he will speak with the City Manager and Mr. Lamb, Planning Director, to set-up a time for the rezoning review.

VII. Adjournment

Hearing no further business, Chair Stout adjourned the meeting at 7:45 PM.

Respectfully submitted by,
Jennifer Clark, Minute Taker