

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, March 4, 2019

6:30 PM

Council Chambers

Members Present:

Joshua Gorman, Chair
Jane Taylor, Vice Chair
Joseph Hoppock
Joshua Greenwald
Michael Welsh
Michael Remy, Alternate

Staff Present:

Thomas Mullins, City Attorney

Members Not Present:

Louise Zerba, Alternate

I. Introduction of Board Members

Chair Gorman called the meeting to order at 6:30 PM, introduced members of the Board, and explained the rules of procedure.

II. Minutes of the Previous Meeting-February 4, 2019

Vice Chair Taylor referred to the type of façade stated in the minutes as “EIFS”. She stated that she does not recall the type of facade stated. Mr. Greenwald explained that Mr. Kelly was referring to the fact that self-storage warehouses today do not have the industrial look they once had and have become much prettier with a façade. The City Attorney stated the recording would be reviewed in order to make any necessary corrections if needed and will be offered at the next ZBA meeting.

Mr. Welsh made a motion to accept the minutes of February 4, 2019. The motion was seconded by Mr. Hoppock, which carried unanimously.

IV. Hearings

ZBA 19-04:/ Petitioner, Willco Realty Corp. of 591 Monadnock Highway, Swanzey, requests an Enlargement of a Nonconforming Use for property located at 11 Production Ave., Keene, Tax Map Parcel #242-002-000, which is in the Industrial District. The Petitioner requests an Enlargement of a Nonconforming Use to enlarge the existing motor vehicle dealership by expanding into a second existing building on the site. The existing Subaru building is 14,400 square feet. An addition of 2,540 square feet was approved in August 2018. This proposal will enlarge the existing approved addition by 420 square feet and by also expanding into the 7,680 square foot building formerly occupied by Monadnock Flooring. The existing motor vehicle dealership will expand from 14,440 square feet to 25,040 square feet.

Vice Chair Taylor notified the Board that she purchased her car from Subaru of Keene. She stated she did not feel it was a conflict where she needed to recuse herself but wanted to inform the Board. With no objection from the ZBA, the hearing proceeded.

Jim Phippard, Brickstone Land Use Consultants of 185 Winchester Street, Keene stated that he was present on behalf of Willco Realty and Bill Fenton. Mr. Fenton is the owner of several car dealerships and Subaru of Keene is one of them. Mr. Phippard stated they are applying for permission to expand the existing Nonconforming Use of a motor vehicle dealership. He stated back in the 1970's this property was initially developed as a permitted use in the Industrial District. He reported that Keats was encouraged to be at this location with their dealership to sell GMC and farm equipment. Mr. Phippard stated the initial development on the property began in the 1970's and they built the first leg of Production Avenue. In addition, City water and sewer was extended to service this area.

Mr. Phippard explained this property became a Nonconforming Use in the 1980's when the zoning regulations were changed and the list of permitted uses was revised. He stated that car dealerships were no longer permitted in the Industrial District and then became a legal Nonconforming Use. Mr. Phippard reported that since that time the Keats property was sold to Willco Realty in the early 2000's. He stated that Willco Realty received permission from the Zoning Board to occupy the property with Subaru of Keene. Mr. Phippard reported that Willco Realty spent several millions of dollars redeveloping the property to create the facility that is there today.

Mr. Phippard stated that Willco Realty did receive an expansion for the Nonconforming Use. He referred to the plan he presented noting the beige area on the plan is the existing building on the site. Mr. Phippard then indicated the second building in beige is the former home of Monadnock Flooring.

Mr. Phippard explained that Monadnock Flooring received a Variance in 2011 to relocate their flooring business. In addition, he stated that Monadnock Flooring also retailed outside furnishings and grills. Mr. Phippard stated that Monadnock Flooring has since vacated this building and Subaru of Keene wishes to expand their operation on the property. He explained they intend to occupy the second building on the diagram entirely and operate part of the Subaru Dealership out of the property. He stated they will be adding three reconditioning bays on the south side of the building and a drive-in and drive-out car wash on the west side of the building.

In addition, he stated they are proposing another expansion at the rear of the west side of the existing Subaru building. Mr. Phippard noted this would give them a grand total of 25,040 square feet.

Mr. Phippard then referred to his plan indicating the location of Production Avenue is on the right hand side of the plan and Route 9 is at the top of the plan. He noted that Production Avenue is located at a signalized intersection that is shared with Ashbrook Road. In addition, he noted that going to the north is the entrance to the Monadnock Marketplace. Mr. Phippard stated that across the street from the property is the entrance to Hyundai of Keene and the Volkswagen dealership is to the south. Both dealerships are owned by the Fenton Family. Mr. Phippard noted this has become a common use in this area and that all of the dealerships are doing well.

Mr. Phippard reviewed the criteria for Enlargement of a Nonconforming Use.

1. *Such approval would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious or offensive to the neighborhood.*

Mr. Phippard stated that since the operation has been at this location there has been no history of problems with traffic accidents or pedestrians issues. He stated the appearance of the building has been through the Planning Board and this expansion will have to go back before the Planning Board.

Mr. Phippard stated the existing Subaru building is a masonry building that is concrete block. He noted that some of the blocks are smooth and some are textured. In addition, he noted it has extensive use of EIFS material. He stated that EIFS has been around quite a while and is an engineered insulated finishing system. Mr. Phippard explained that EIFS is a stucco system built over a base layer of insulation and structural mesh is added to support the insulation of stucco. He explained that two or three layers of structure stucco are added to form the base and the top coat is a color coat. He added that it is a well-established system, stands up well in this environment and is the reason why this is used on many sections of the building.

Mr. Phippard then referred to his plan indicating the profile of the building elevation that faces Route 9. He stated the proposed expansion is the area on the right hand side of that elevation and will match the concrete block material on the bottom and the EIFS material. He added that different colors will be used to give the aesthetic effect the owner and architect is looking to achieve. Mr. Phippard stated they think it is an attractive building and fits well in this setting. In addition, he noted that it provides a pleasant view for people entering the City of Keene from the west.

Mr. Phippard stated to the south side of the building that faces away from Route 9 is the end of the property that is closest to the brook. He stated this elevation has been revised once and they were going to have three overhead doors. Mr. Phippard stated since the second building became available the three reconditioning bays are going to be move over to that building. He described this area of the building as a solid wall with a passage door entry. In addition, he stated that block material and EIFS treatment will be used to match the current architecture. Mr. Phippard noted the other elevations of the building will not be changed.

Mr. Phippard stated the second building on the site is an existing metal building that is a shade of green with metal siding and a metal roof. He noted that nothing will be changed on the exterior of the building that is visible from Route 9 and Production Avenue. Mr. Phippard stated on the back side of the building facing away from Route 9 there will be two overhead doors. In addition, they will be adding a third overhead door and two overhead doors on the elevation facing the brook. Mr. Phippard stated on the existing building today there is a car wash that is being removed and that entire area will become a part of the proposed addition. He explained that the car wash is being moved to the other building and this bay will not be a drive thru car wash. Mr. Phippard noted the car wash is for customers and service vehicles only and will not be open to the public. The car wash will have an automatic wash bay that is drive in and drive out. Mr. Phippard reported the car wash is not open to the public due to the liability of vehicles backing out of the car wash.

Mr. Phippard stated they will have paving where there is currently gravel, which was reviewed and approved by the Planning Board. He stated this is an area where car carriers will unload vehicles and store vehicles that are ready for sale. Mr. Phippard stated they believe that enlarging the operation will not have a negative effect on property values and will not be injurious or obnoxious to the neighborhood.

2. There will be no nuisance or serious hazard to vehicles or pedestrians.

Mr. Phippard stated that Production Avenue is accessed via Route 9, at a signalized intersection with dedicated turn lanes for left turning vehicles, right turning vehicles and operates at a level service grade B. He stated the owners will be adding a couple employees and are hoping to add traffic to the facility. Mr. Phippard stated they do not believe the increase of traffic will be significant enough to become a nuisance or hazardous condition.

Mr. Phippard added that there are no sidewalks on Route 9 or on Production Avenue so they do not feel pedestrian activity is an issue at this location.

3. Adequate and appropriate facilities (i.e., water, sewer, streets, parking, etc.) will be provided for the proper operation of the proposed use.

Mr. Phippard stated the site is serviced by City water and sewer and there is plenty of capacity for this proposed use. He noted the heaviest amount of water is used for washing cars. In addition, he noted that all of these buildings are set-up with sprinklers for fire protection.

Mr. Phippard stated they have more than adequate parking onsite and there are 80 parking spaces dedicated to employees and customers. He noted that only 70 parking spaces are required by the Zoning Ordinance and there are nearly 200 parking spaces on the property that are used mostly for displaying vehicles.

Mr. Welsh asked Mr. Phippard to clarify if the prior approved addition of 2500 feet in August of 2018 was approved by the ZBA. Mr. Phippard replied in the negative. He stated that it was

approved by the Planning Board and they should have come to the ZBA to ask for an enlargement. Mr. Phippard noted that City staff is aware this was done out of order. Mr. Welsh asked if that is in addition to the 420 square feet of approval. Mr. Phippard replied that is a new addition that the Planning Board has not seen. Mr. Welsh asked Mr. Phippard to indicate on his plan where the 2,540 square feet of addition and 420 square feet of approved addition is located. Mr. Phippard indicated the area on his plan. He explained the 420 square foot addition will be used as a new tool room for the service bays.

Mr. Welsh stated as he was looking at the Industrial permitted uses he did not see motor vehicle retailer but did see garages of various sorts. He stated he also saw business garage listed in the Industrial Zone. Mr. Welsh read the definition of a business garage from the Zoning Ordinance as follows, "*A salesroom or showroom for motor vehicles in which any vehicle is kept with gasoline in its tank shall be classed as a "business garage," and also any building in which motor vehicles are kept in dead storage for profit*". Mr. Welsh asked how a motor vehicle retailer is different than a business garage. Mr. Phippard replied he has had this discussion many times with Code Enforcement. He explained that a business garage use is something such as Thomas Transportation where they provide limousine service and transportation service. He stated it is not a motor vehicle dealership where someone can go in and buy a new or used car.

Mr. Hoppock asked for the rear setbacks. Mr. Phippard replied the rear setbacks are 50 feet from Ash Swamp Brook. He noted they are well inside the usable area.

Mr. Hoppock asked if there was a wetland issue and if there are any concerns about the brook. Mr. Phippard responded the brook is a jurisdictional wetland and they are required to maintain at least a 30 foot separation from the brook. In addition, it is also subject to the Shoreline Protection Act which is 250 feet. Mr. Phippard stated they do have to get a Shoreline permit from NHDES before they can build the addition because they are breaking ground and altering the terrain in that area. Mr. Hoppock asked if this permit has been applied for. Mr. Phippard replied they have received it and are modifying it because they are changing the size of the addition.

Vice Chair Taylor asked if there are no setback requirements from the easement and just from the property line and the Shoreline Protection Act. Mr. Phippard responded the easement is for access to the brook by Public Works.

Mr. Welsh stated the various uses that are being expanded are all things like creating space so that a car can be washed, repaired and creating functional accessory uses to an automobile dealership. He noted the uses being expanded could be described as repair and maintenance of automobiles and not sales and showcasing of automobiles. Mr. Phippard responded that he agreed with Mr. Welsh's characterization that the uses are accessory and are not the primary use. He added that Mr. Welsh was looking at the list of permitted uses for a repair garage. He stated a repair garage is a primary use that could be allowed here without Zoning Board approval. Mr. Phippard explained that it is really accessory uses to the car dealership which is the primary use on the property. Mr. Welsh stated that if this was only proposing the kinds of uses that are being sought and not accessory to the dealership itself the applicant would probably not be before the ZBA tonight. Mr. Phippard replied in the affirmative.

With no further comment, Chair Gorman welcomed public comment.

With no comment, Chair Gorman closed the public hearing.

The Board began deliberations.

Mr. Hoppock referred to the criteria, "*There will be no nuisance or serious hazard to vehicles or pedestrians*". He stated the absence of a sidewalk may actually increase the hazard to pedestrians because they do not have anywhere to walk. Mr. Hoppock stated that he tended to think that not many people walk in that area. Mr. Hoppock added that what the Zoning Board did not have was an analysis or information about the volume of increased use this expansion will result in. He stated that he finds it difficult to assess whether a nuisance is created or a serious hazard to vehicles or pedestrians would be generated if they do not know how much of the use will expand by virtue of this expansion. Mr. Hoppock stated their goal is to sell more cars and more people will be coming. He noted that he does not have any problem with first or third criteria.

Chair Gorman stated that he would agree on the first and third criteria. He noted there are City services that would be adequate. In addition, he stated as far as a use it appears to be in line with what is occurring in that location and in his opinion it is not going to be diminutive.

Mr. Remy commented on the second criteria stating there is no means to get there by walking and that there are no sidewalks on the street. In addition, he noted there are no sidewalks leading there which would not be a sudden loss of the ability to walk on the side of the road. Vice Chair Taylor stated in that regard she thinks if there is going to be any kind of pedestrian back and forth between the two buildings it would need to go before the Planning Board. She noted now that it is going to be two major building sites as opposed to one, the Planning Board is going to need to determine whether or not they want a designated pedestrian route between the two buildings. Chair Gorman stated that he would agree with the onsite portion but would also agree with the traffic portion raised by Mr. Hoppock. He added that the Board does have minimal knowledge of what kind of traffic Monadnock Flooring may have generated as well as what this new venture may or may not generate. He stated that what they did know is the car wash is not for retail use but is for customer use for both of Mr. Fenton's dealerships.

Chair Gorman asked the Board if they objected to reopening the hearing for Mr. Phippard to engage in a traffic discussion. With no objection, Chair Gorman reopened public hearing.

Mr. Phippard stated they are not adding another dealership and will just be the Subaru of Keene. He stated what they are adding are the reconditioning bays and service bays to better service their existing customer base. Mr. Phippard stated the parking along the frontage has already been reviewed by the Planning staff and they requested this not be made a vehicle display area. He stated the only additional area for new cars is about 18 spaces on site. Mr. Phippard reported they sell between 150-200 cars a month and are hoping to increase these numbers by 10%.

Mr. Phippard reported that most of their traffic is not occurring during peak hours at the intersection, which are morning and evening commute times. He stated the busiest times are on during the weekend on Saturday's, where they are doing most of the transactions. The dealership is also open on Sunday's.

Mr. Phippard stated that he does a lot of work with the Institute of Transportation Engineers Trip Manual. He stated when he talks to a traffic engineer he explained the numbers that come out of the manuals are much higher than what occurs in the real world. He stated that he can pull out the information and cite reliable sources but thinks that it is meaningless to give numbers when it is false information. Mr. Phippard believes there will be a modest increase in vehicle trips due to the increase in volume of traffic.

Mr. Phippard reported that the nature of the business is changing so fast. He explained that so many people will shop online and then go to a local facility to test drive the car and then order the car online. Mr. Phippard reported that half of their sales are done on line and then they deliver to location. He noted in many instances the customer has never stepped foot on the property. Mr. Phippard stated that he does not see traffic as a big concern given the nature of how the business is changing.

Chair Gorman stated the Board should keep in mind there was a retail establishment there that is now being turned into an onsite recon facility. Mr. Phippard stated the primary activities will be the recon bays, car wash and service bays.

Chair Gorman asked if the traffic count may even be decreasing as compared to the traffic to Monadnock Flooring. Mr. Phippard replied that it is possible.

Mr. Gorman asked if Mr. Fenton will be using the recon facility for his Hyundai dealership. Mr. Phippard responded that he can because he does not have room to expand over at that dealership. He added they may use the car wash and may close the wash bay at the Hyundai dealership. Mr. Phippard noted that car washes have also changed over the years by primarily recycling water.

Mr. Welch asked if the retail facility that was in the building to the south was also a Nonconforming Use. Mr. Phippard replied in the affirmative and stated that they received a Variance in 2011 for them to occupy the space. Mr. Welch asked if to describe the trajectory of Nonconforming Uses and their degree of nonconformity they are heading more in the direction of conformance as they go from carpet retail to the various uses of this building. Mr. Phippard stated that he would agree.

Mr. Welch referred to the section of code that describes things that need to be satisfied in order to enlarge a Nonconforming Use. He asked if there is a requirement that dimensions on the new Nonconforming Use all comply with what is specified in code for this zone. In addition, he asked if all the dimensions on this expansion are consistent with the requirements of the Industrial use. Mr. Phippard replied in the affirmative.

With no further comment, Chair Gorman closed the public hearing.

The Board reviewed the criteria for a Nonconforming Use.

1. *Such approval would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious or offensive to the neighborhood.*

Vice Chair Taylor noted that it is not just an existing use, it is one of several similar uses on the same street in the same zoning district. She stated that it would not reduce the value of other property in the neighborhood. In addition, she stated that it would not be injurious, obnoxious or offensive to the neighborhood.

2. *There will be no nuisance or serious hazard to vehicles or pedestrians.*

Mr. Hoppock stated that his concern about traffic is resolved after the comments from Mr. Phippard.

Mr. Welsh stated the Board has been advised there is a section of the code to look at when evaluating but noted there are also a set of common law concerns. He asked if the Zoning Board is obliged to go through the entire list. The City Attorney responded the common law rules came out of the *New London* case where there was not a lot discussion in that case with respect to the underlying zoning ordinance. He stated the question at that point was that the underlying zoning ordinance in the *New London* case probably did not deal with this question very well. He explained the court came in and looked at the factors. The City Attorney stated the biggest one being the question of substantiality. He explained the idea of whether there is substantial expansion or not is one of questions about being in the eye of the beholder. The City Attorney stated the ways the courts have evolved are the later cases where the court looked at an expansion of a Nonconforming Use. He noted one case in particular was over in Portsmouth going from a single story office building to a four story building in an office park combination. He stated the City of Portsmouth said, "No" and that it was too substantial. The City Attorney stated it is not only a size thing it is also how that substantially impacts the overall neighborhood. He stated that it would be a good idea given the case law to have some discussion with the idea of the whether the Board thinks the application is impermissibly substantial and also in terms whatever impact it may have on the neighborhood.

Vice Chair Taylor stated when she looks at a Nonconforming Use and the whole concept of whether or not it is a substantial change is whether or not the addition would not just change the footprint but also change the nature of the building. She stated in this case it seems the new construction expansion is not changing the nature of the building either for use or architecturally. She stated the other expansion building is already there. Vice Chair Taylor stated she would view it differently if the building that was Monadnock Flooring if they wanted to expand their Nonconforming Use by having a completely new structure of that size. She stated that since it is an existing structure she thinks this is a slightly different take on the substantiality concept.

Chair Gorman stated in light of the fact the property is becoming more conforming he thinks it is a contraction of a Nonconforming Use, which decreases the substantiality of the scope. He

stated the addition in terms of the physical expansion does not seem that cumbersome given the accumulative number of square feet in correlation to what is being added.

Mr. Hoppock stated that he does not think there is a substantially adverse impact on the neighborhood from this plan based on the information provided.

3. *Adequate and appropriate facilities (i.e., water, sewer, streets, parking, etc.) will be provided for the proper operation of the proposed use.*

Chair Gorman stated there are adequate and appropriate facilities provided for the operation.

Mr. Hoppock then made a motion to approve ZBA 19-04. Mr. Greenwald seconded the motion to approve ZBA 19-04.

The Board reviewed the Findings of Fact.

Such approval would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious or offensive to the neighborhood. Granted 5-0

There will be no nuisance or serious hazard to vehicles or pedestrians. Granted 5-0

Adequate and appropriate facilities (i.e., water, sewer, streets, parking, etc.) will be provided for the proper operation of the proposed use. Granted 5-0

On a vote of 5-0, the Zoning Board of Adjustment approved ZBA 19-04.

V. New Business:

No new business was presented.

VII. Adjournment

Hearing no further business, Chair Gorman adjourned the meeting at 7:15 PM.

Respectfully submitted by,
Jennifer Clark, Minute Taker