

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, February 3, 2020

6:30 PM

Council Chambers

Members Present:

Joshua Gorman, Chair
Joseph Hoppock, Vice Chair
Jane Taylor
Joshua Greenwald
Arthur Gaudio, Alternate

Staff Present:

John Rogers, Zoning Administrator
Corinne Marcou, Zoning Clerk
Mari Brunner, Planner

Members Not Present:

Michael Welsh
Louise Zerba, Alternate

George S. Hansel, Mayor

I. Introduction of Board Members

Chair Gorman called the meeting to order at 6:30 PM, explained the rules of procedure, and introduced the Board members. Mr. Gaudio acted as a voting member.

II. Minutes of the Previous Meeting – January 6, 2020

Vice Chair Hoppock moved to approve the minutes of January 6, 2020, which Ms. Taylor seconded and the motion carried unanimously.

III. Meet the City's New Mayor, George Hansel

[This was originally item V.A. on the agenda and the Chairman heard it out of order.]

The Chairman welcomed Keene's new Mayor, George Hansel, and congratulated him on a close race between two respected candidates. Mayor Hansel said he is trying to visit all City Committees early in 2020 to introduce himself. He is responsible for nominating new Committee members for election by City Council. He welcomes suggestions from the Zoning Board for new members. Any current Board members should inform the Mayor if they are interested in serving

beyond their current terms, as he supports continuing strong leadership. Mayor Hansel thanked the Board for their volunteerism.

IV. Unfinished Business

V. Hearings:

- a. ZBA 20-03:/ Petitioner, Brady Sullivan Properties of 670 N. Commercial St., Suite 303, Manchester, NH, requests a Variance for properties located at 222 West St., Tax Map #583-012-000, #583-014-000 and #583-015-000 that is in the Commerce District. The Petitioner requests a Variance side set back on side, building set back is supposed to be 20 feet from the property line, in actual will only be 4 feet per Section 102-791 of the Zoning Ordinance.**

Chair Gorman opened the public hearing and welcomed comments from Staff. The Zoning Administrator, John Rogers, used maps to demonstrate the location of the property in question, with respect to Gilbo Avenue, West Street, and Island Street. He also oriented viewers with proposed elevations and site plans for a new mixed retail /office building on the property, which would require a Variance to build within 20 feet of the side setback. If the Variance were granted, several parking lots on the property would be merged as one Tax Map Parcel (TMP).

Vice Chair Hoppock recalled another application for this property (ZBA 19-07) that he thought was for a parking deck/garage. Mr. Rogers said there was a previous application for a self-storage building, though he left it to the applicant to explain their newly proposed retail/office use. Both retail and office uses are allowed in the Commerce District (CD), but the proposed building would violate side setbacks.

Ms. Taylor asked Mr. Rogers to demonstrate where the setback issue was on the site plans. Mr. Rogers demonstrated on the site plan where the northeast corner of the proposed structure would violate setbacks. Ms. Taylor asked if this was considered a side setback because it was a part of the larger site plan. Mr. Rogers said it would be a side setback because this unique corner lot has frontage on three roads and per code, the primary frontage is based on narrowest part of lot, which in this case is West Street, making it the front setback. Ms. Taylor asked if this was all considered one parking lot due to common ownership. Mr. Rogers said the City does not yet consider this as a common lot, which is why there are multiple TMPs listed. Ms. Taylor questioned why Island Street was not the front setback in this instance. Mr. Rogers said that to build the proposed structure, the applicant would have to merge these lots into one TMP because a building cannot cross property lines. Ms. Taylor asked if the concept is to merge the three lots underlying the proposed building as opposed to subdividing it off. Mr. Rogers said the applicant would need to speak to those details but his understanding from the application was that the intent is to merge it all into one parking lot serving the Mill Apartments, Keene Casino, NBT Bank, and the new structure.

Mr. Gaudio questioned if the three parking lots and the major parcel in question had common ownership. Mr. Rogers said that they are under common ownership at this time and added that both the Building and Zoning Codes would not allow development across property lines.

Mr. Greenwald asked if the process had already begun to merge the three parking lots and Mr. Rogers left answering to the applicant. The Chairman asked if merging the lots would be a condition of this Board's Variance approval. Mr. Rogers said that the applicant would not be issued a Building Permit to construct on separate lots. Mr. Rogers referred to Ms. Taylor's questions about the setback and he said that as it sits currently, Ms. Taylor is correct that would more likely need a rear setback Variance.

Ms. Taylor said she realized that the Mill and Casino buildings are preexisting and that the applicant wants to add this third structure. She asked if there is a requirement for one primary structure on a property in the CD. Mr. Rogers referred to the intent of the CD, which allows different uses on the same lot, such as in a shopping plaza.

The Chairman welcomed the applicant, Ben Kelley of Brady Sullivan Properties of 670 N. Commercial Street, Manchester, and the Property Manager Robert Pearson of Alstead, NH. Mr. Kelley recalled being before this Board in 2019 seeking a Variance for a self-storage facility, which they thought would be a nice amenity for new tenants despite it being a disallowed use in the CD. The developers changed their idea to a retail/office use, which is allowed in the CD. They understand that multiple lots would need to merge for this development to occur and Brady Sullivan wanted to determine if the Board would approve this use before incurring any of those costs. The project is ready to begin quickly if the setback Variance were approved. Mr. Kelley said the parking lot for which they seek a setback Variance is controlled under a historic lease and is currently used daily. He referred to the strip of 15 parking spaces on the southeast corner of the proposed building site. He said it is different from a setback from a neighbor's porch and is more so an organic part of the development through the historic lease. He referred to the proposed building elevations stating the goal to incorporate the development into the Colony Mill so that all buildings on the property face each other in a welcoming way, as opposed to another option for an L-shaped building that was larger but not as continuous with the other buildings.

Vice Chair Hoppock asked about the lease terms and who owns the lease of the parking spaces in question. Mr. Kelley said there is a long-term recorded lease with developers before his time; he could have his paralegal provide that information to the Board. Mr. Pearson demonstrated the two parcels on the property owned by Eversource and leased to Brady Sullivan. Mr. Gaudio referred to the site plans and asked if the property underlying the setback incursion is owned by an associated entity or leased by one. Mr. Kelley said that the setback relief they seek in this instance is also on Eversource property. He said the eight different tax bills for the property would need to merge under one TMP if this development proceeds.

Mr. Kelley responded to the criteria for granting a Variance.

1. Granting the Variance would not be contrary to the public interest because:

Mr. Kelley said that granting the Variance would not be contrary to the public interest because the setback is based on a tree line that abuts a parking lot area and is a natural organic fit with these lots. In addition, he said the setback would allow the building to be laid out in a more inviting fashion, open to the parking and building areas of 222 West Street and the neighboring retail building across the way on Island Street.

2. If the Variance were granted, the spirit of the Ordinance would be observed because:

Mr. Kelley said that granting the Variance is not contrary to the spirit of the Ordinance because of parking lot alignment and the nature of the abutting use would not negatively affect any property abutting the setback. The area would still be used essentially as parking.

3. Granting the Variance would do substantial justice because:

Mr. Kelley said that granting the Variance would do substantial justice because it would allow the building to be sited in a more meaningful and logical way, without intruding on the abutting property and supporting surrounding uses. The plan would allow traffic flow and visitor access.

4. If the Variance were granted, the values of the surrounding properties would not be diminished because:

Mr. Kelley said that introducing a retail building would not diminish surrounding property values and in fact, he said would have the opposite effect. By thoughtfully building a higher-end retail building on the site it should raise neighboring property values, as opposed to a vacant lot.

5. Unnecessary Hardship

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 because:

ii. The proposed use is a reasonable one because:

Mr. Kelley said that the lot setback is needed for additional access behind the building, while abutting a tree line, which then transitions to a parking area. He said the hardship exists in that there are multiple "natural" setbacks already existing on the site and the site's configuration does not allow a meaningful building layout otherwise. Though he noted that the site is incorporated meaningfully now in that it is used daily for parking.

Ms. Taylor referred to the proposed building elevations provided by the applicant and asked for more details. Mr. Kelley said that the north elevation presented would be the face of the building. He demonstrated how other designs would have limited the property's flow and appeal. Ms. Taylor said if the elevation referred to the front of the building, she did not understand the point about site access being an issue without the Variance. Mr. Kelley said that he was not referring to building access, but rather that the parking spots in question are used daily already. He pointed out where there would be an access lane around the proposed building to facilitate deliveries, for example.

Mr. Gaudio questioned the hardship in this instance. The applicant stated that they considered other building shapes and elevations that could fit on the property. Mr. Gaudio said that if the building were aligned differently the setback violation could be avoided. Mr. Kelley said that the difference is that the vast majority of the proposed building would be placed on currently non-impervious greenspace and that moving the building would diminish parking. Mr. Gaudio asked if parking would still comply with Zoning requirements for the property's uses if the parking spaces in question were eliminated. Mr. Kelley was unsure and said the goal is to balance developments on the property and therefore to build on an undeveloped lot versus eliminating current parking; they would already be losing 19 parking spaces. Mr. Rogers added that the applicant's site plan had a note about parking. If the Variance was granted and this development proceeded, the total required parking on the property would be 279 spaces. Today there are 344 spaces and therefore there would be adequate parking even with this development.

The Chairman said that the setback is tight throughout the whole parking area in question and added that moving the building forward would not improve the situation. He said that spinning the proposed building orientation could affect the continuity of the overall lot. Mr. Kelley agreed and said a lot of hardscaping is already required for the other developments on site and it is not as simple as picking the building up and moving it. The Chairman said it was difficult to see hardship but said the leased lots changed it slightly for him.

Ms. Taylor expressed doubt about unnecessary hardship in this this application because the building could probably be built within setbacks. While designing a building within the setbacks might not be the applicant's preference, Ms. Taylor said that is not part of this Board's consideration. Ms. Taylor continued asking, if the building were constructed on the current greenspace that Mr. Kelley referred to, whether the property would still meet the landscaping percentage required in the CD. Mr. Kelley said they intend to meet those criteria, which would be in question during Planning Board review. Mr. Pearson added that there should be plenty of space to meet landscaping requirements when all six parking lots are combined, in addition to current landscaping around the mill. Mr. Rogers referred to standards in the CD and said that 80% of pavement is the maximum allowed, which the applicant would have to meet.

Mr. Greenwald asked, if the building adhered to setbacks, if the building's entrance would then face Island Street with parking on the side, meaning that patrons would have to walk around the building to access the entrance. Mr. Kelley replied in the affirmative saying that is not an ideal

retail layout and would impede existing parking. Mr. Greenwald said it is not ideal for handicapped patrons to have to proceed a long way around the building.

Ms. Taylor reiterated that it is not this Board's job to design a building or its access but rather to determine if the plan presented by the applicant creates a hardship, which she struggled to see in this case. Mr. Kelley said he viewed the hardship as trying to construct a successful building within the confines of an odd parking lot layout, while adhering to what is allowed on the current Colony Mill site and working around existing greenspaces and curb cuts. Mr. Kelley said that consulting engineers worked on eight iterations of this building plan and almost all versions had setback issues. He said this plan was not just thrown together.

Vice Chair Hoppock stated his understanding that there would be a driveway from the westerly side of the building that would loop around the southern side of the building before turning north onto the easterly side of the building. He then asked if parking lots would remain to the right of the area where the setback needs a Variance and Mr. Kelley nodded in the affirmative. Vice Chair Hoppock said that then the parking could be accessed from two directions: 1) the drive around the building and 2) from the general Colony Mill parking lot. As such, Vice Chair Hoppock questioned if the additional proposed uses on the property would alter surrounding traffic patterns and density. Mr. Kelley said that the consulting engineers are working on a traffic study to present to the Planning Board on March 11. Vice Chair Hoppock said that he was unsure whether the applicant identified a special condition of the property itself that justified an unnecessary hardship. He said the applicant identified a special condition of the plan layout but not the property, which he found unsatisfactory. Vice Chair Hoppock was also unsure whether the applicant satisfied the condition about affecting the essential character of the neighborhood, particularly with the amount of traffic and parking. While the parking is used today, he said that there would be more parking demand with a new retail establishment, which he found concerning. Mr. Kelley said there is more than enough parking today and added his opinion that adding amenities and a higher-end retail building would positively enhance the neighborhood. Vice Chair Hoppock asked the definition of a "higher-end retail building," to which Mr. Kelley replied a modern Class A building with higher-end materials.

Ms. Taylor asked how many stories tall the proposed building would be and Mr. Kelley said one story. The elevations presented by the applicant appeared as more than one story to Ms. Taylor. Discussion ensued about heights and it was confirmed that the proposed ceiling height was 12 feet, the proposed building would be 22 feet at its highest point, and the proposed cupola would extend higher as unusable space for decoration and scale.

The Chairman welcomed public comments and recognized Anthony Mastronardi of 100 Darling Road, Keene, who owns the abutting property at 70 Island Street. Mr. Mastronardi said there used to be two houses on the greenspace to which Mr. Kelley referred. He recalled opposing the applicant's request in 2019 to build a self-storage unit because it would have been three stories tall and close to his property line. He said that the Colony Mill has been used more heavily in the past when it was full of retail than it is now. Mr. Mastronardi used maps presented by the

applicant to ask questions about the proposed building. When he built his property, the Zoning Board at the time required that he build at the north end of his lot and he was not within the current side setbacks. Therefore, he has little property on the north side and he was concerned when they wanted to build three stories adjacent to the north end of his property. He asked how closed the newly proposed development would be to his property. Mr. Rogers said they would maintain a 20-foot setback for the paving of their travel lane and the building would more likely be 30 feet from Mr. Mastronardi's property line. Mr. Mastronardi expressed support for the Board granting this Variance. He said that the elevation and location, with the building frontage facing north, all looked fine to him.

Chair Gorman closed the public hearing and the Board discussed whether the application met criteria for granting a Variance.

1. Granting the Variance would not be contrary to the public interest because:

Ms. Taylor did not think a retail building would be contrary to public interest in the CD because it is an allowed use, and so she thought the application met this criteria. Vice Chair Hoppock added that he would be interested to see the results of a traffic study but given Mr. Mastronardi's comments, he did not think that granting this Variance would significantly alter the neighborhood's character. Chair Gorman's said his concern about neighborhood impacts was lessened by knowing the actual proposed building height. Ms. Taylor said her only concern for the neighborhood was traffic and that she had no information about whether curb cuts would change, which she said can already be critical being directly across from the CVS entrance. She said that more retail would bring more traffic and while that is partially a Planning Board matter, she thought this Board should consider it as well when discussing neighborhood character and public safety. Mr. Greenwald agreed that there would be less traffic in the area than when the Mill was full, but he said that in a parking lot with many entrances/exits people might not always follow the path of least resistance that the developer prefers. If the developers reoriented the building, people could possibly then enter directly from Island Street, which he thought was contrary to public interest. While he did not know what the new traffic pattern would be, he imagined it would be less than when Colony Mill was full of retail.

2. If the Variance were granted, the spirit of the Ordinance would be observed because:

Vice Chair Hoppock said that this criteria overlaps with the first and he reiterated his comments that the Board does not have enough information about how traffic patterns would change.

3. Granting the Variance would do substantial justice because:

Vice Chair Hoppock said that when denying a Variance, the Board must prove that in doing so the public gain would outweigh the individual applicant's loss; not proving that would be an injustice to the applicant. He was unsure in this case because of not knowing traffic patterns and volume expected. He said the applicant sought a 10,000 square foot building, which he did not

see as a hardship and he could not speak favorably to substantial justice being done by granting this Variance.

Ms. Taylor expressed concern that after reviewing the first three criteria, the Board still had many questions affecting their ability to deliberate. She said it is the applicant's burden to prove their case and she was unsure they had carried that burden because of the remaining questions about parking, traffic, and alternate entrances/exits.

Mr. Greenwald noted that traffic and parking would be nonissues if the building was constructed within setbacks, and while there might still be concerns about the development, those would then not be within the ZBA's purview because no Variance would be needed. The Chairman said the Board might want to consider that the Colony Mill was once a bustling retail center with a consistently full parking lot that many Board members could remember. While there is currently adequate parking, the Chairman was still unsure the application met the first three criteria. Vice Chair Hoppock and Ms. Taylor added that the Board was also missing lease details for the parking spaces on Eversource property, which they said could affect the overall development plan.

With the Board's support, Chair Gorman reopened the public hearing.

Mr. Kelley addressed some of the Board's concerns by listing the following information about the proposed development. He said that today the Colony Mill and all of its outbuildings (Keene Casino, NBT Bank, and Elm City Brewery) are approximately 125,000 square feet in total, most of which has been converted to residential apartments. What remains approximately is 5,400 square feet for Elm City Brewery, 8,000 square feet for Keene Casino, and 2,500 square feet for NBT Bank, which leaves 89 residential units comprising 109,000 square feet. Mr. Kelley said that the newly proposed building would add 10,000 square feet of retail space, resulting in a total 26,000 square feet of retail on the property. He said that when Brady Sullivan owned the Mill at its peak, it was comprised of 65-70% office/retail space, which is more than is currently proposed. Mr. Kelley continued saying that he did not have the Eversource lease end date, though it is publically available through Cheshire County. The lease predated Brady Sullivan's ownership of the Mill. He said it was something to the effect of 99 years or into perpetuity, which was friendly for the developer at the time. If those parking spaces were eliminated the property would still be well within required number of parking spaces, which was part of overall approval for the Mill conversion. The Chairman said that from his point of view, the lease was important and perhaps imperative for this Board to make a fair decision. Mr. Gaudio said a lease would not be in perpetuity. The Chairman said that even if the lease is for 99 years and is renewable, it is still important for the Board to know those lease details, and added that the lease weights on his decision because Brady Sullivan would potentially own the abutting property.

In anticipation of this Variance request being denied, Mr. Greenwald asked how much square footage the proposed building would lose if built in compliance with the side setbacks. Mr. Pearson reported that the proposed building would be 70 feet wide and 129 feet long, and

therefore 1,140 square feet. Mr. Rogers and the Chairman clarified that if the proposed building were built in compliance with setbacks, they would not lose the entire 70 foot width of the building but rather only approximately 35 feet of the building would have to be moved back 16 feet to comply with setbacks. The Chairman further clarified that then they would have to move that 35 feet of building width back 16 feet. They would not lose the 16 feet for the whole width and would therefore only lose approximately 600 square feet. The Board referred to site plans, which can be found in the meeting packet, for clarification in this discussion.

Ms. Taylor reiterated that it is not this Board's job to redesign the proposed development. She imagined the building could be reconfigured to a target square footage and so she did not grasp the hardship in the building design. Mr. Gaudio said that the applicant created a self-imposed hardship by designing the building as such and Vice Chair Hoppock agreed.

With no further questions for the applicant, Chair Gorman closed the public hearing. The Board agreed there was no need to discuss criteria 1-3 again and they continued with those remaining.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished because:*

Chair Gorman and Vice Chair Hoppock agreed that they saw no evidence either way and felt it okay to breakeven and grant this criteria.

5. *Unnecessary Hardship*

- 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 because:*
 - ii. *The proposed use is a reasonable one because:*
- 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.*

Mr. Gaudio reiterated that any hardship in this instance was self-imposed by the applicant's building design. He said the building could be redesigned to fit within the setback dimensions and as such, Mr. Gaudio thought the applicant violated this criteria. Vice Chair Hoppock agreed and added that the applicant did not meet the burden of identifying a special condition of the property that created a hardship, and therefore he did not think the fifth criteria was met. The Chairman agreed that this criteria was not met and while he thought the Eversource lease had potential to create a special condition of the property, the Board did not have that information.

Ms. Taylor said that she did not find a hardship but rather that the applicant prefers this particular building design. She did not think anything prevented the applicant from building without violating setbacks. She did not think the applicant met criteria 5.A. or 5.B.

Ms. Taylor moved to approve ZBA 20-03 for the Petitioner, Brady Sullivan Properties of 670 N. Commercial St., Suite 303, Manchester, NH, to grant a Variance for properties located at 222 West St., Tax Map #583-012-000, #583-014-000 and #583-015-000 that are in the Commerce District. The Petitioner requests a Variance for a side setback, where the building set back is supposed to be 20 feet from the property line but would actually only be 4 feet per Section 102-791 of the Zoning Ordinance. Vice Chair Hoppock seconded the motion. The Board voted on the findings of fact.

1. *Granting the Variance would not be contrary to the public interest because.*

Passed with a vote of 5-0.

2. *If the Variance were granted, the spirit of the Ordinance would be observed.*

Denied with a vote of 0-5.

3. *Granting the Variance would do substantial justice.*

Denied with a vote of 0-5.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished.*

Passed with a vote of 5-0.

5. *Unnecessary Hardship*

- 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.*

The fifth criteria was denied with a vote of 0-5.

With a vote of 0-5, the motion to approve ZBA 20-03 failed.

Vice Chair Hoppock moved to deny ZBA 20-03, which Mr. Gaudio seconded and the Zoning Board of Adjustment carried with a unanimous vote of 5-0.

VI. New Business

[This discussion ensued out-of-order, after Communications & Miscellaneous below.]

Mr. Greenwald informed the Board of an effort to create a state appeal board for any zoning applications denied by local zoning boards, as opposed to going to court. Mr. Rogers said that Staff stays up-to-date with any House and Senate bills. Vice Chair Hoppock did not know the status of the bill at the time of this meeting but added that someone in the NH house must have been displeased when a zoning appeal was denied in court. Mr. Gaudio said that many states have special courts dedicated to zoning matters. Ms. Taylor recalled that last term, a special housing appeal board was defeated by both the House and Senate but was slipped into the budget last minute without funds allocated, and so there is legislation to repeal. She thanked Mr. Greenwald for the information and he said there is a lot of support throughout the state for such a board. Ms. Taylor thought that part of the problem is that applicants can have a long wait time for matters to be heard in the court system and the Board agreed. Mr. Greenwald questioned the effect such a board would have on the ability to undermine the purview of local municipalities.

VII. Communications & Miscellaneous

Mr. Rogers referenced an email Staff received about the spring Planning and Zoning conference on May 30. If members want to attend, they should contact Staff to register.

VIII. Non-Public Session (if required):

IX. Adjournment

There being no further business, Chair Gorman adjourned the meeting at 7:35 PM.

Respectfully submitted by,
Katryna Kibler, Minute Taker
February 6, 2020

Respectfully revised by Katryna Kibler on February 25, 2020

Reviewed & edited by,
Corinne Marcou and Jane Taylor