



TOWN OF NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT MEETING MINUTES Tuesday, November 10, 2015 6:30 PM

MEMBERS PRESENT: Douglas W. Lyon (Chair), W. Michael Todd, Vahan Sarkisian, Ann Bedard, Cheryl Devoe, Paul Vance, Frank Anzalone (Alt.), Katherine Fischer (Alt.) and Jerry Coogan (Alt.)

STAFF PRESENT: Lucy St. John, Planning and Zoning Administrator

OTHERS PRESENT: Robert Stahlman, applicant; Applicant Attorney Anna Barbara Hantz of Sheehan, Phinney Bass & Green; Bill Helm, Planning Board Chair; Margaret McPadden (abutter) and Deborah Lambert (abutter).

Call to Order: Chair Lyon called the meeting to order at 6:30 pm. He announced that this meeting is a continuation of the public hearing from the September 29, 2015 meeting.

Roll Call: Chair Lyon called the roll.

Public Hearing

Variance application of Robert L. Stahlman. Property located on Pleasant Street/Gould Road. Tax Map 084-081-000/084-079-000. Variance requested from Article V, Residential District, Permitted Uses (A), a commercial parking lot is not a permitted use in the residential zoning district. Continuation of the public hearing from the Sept 29, 2015 meeting.

Chair Lyon appointed the following to be voting members for tonight's discussion, including himself Douglas Lyon, Vahan Sarkisian, Ann Bedard, Paul Vance and Cheryl Devoe, as was the previous meeting. He referred to the public hearing notice regarding the variance requested. Chair Lyon opened the meeting and reminded the applicant that the only things the Board can consider for a variance are the five (5) variance criteria.

Bob Stahlman noted that he has taken down some trees that a fence is scheduled to be installed, and he submitted a letter this morning to the Town. The letter is dated Nov 3, 2015 from Deborah Lambert of 41 Gould Road, unit # 2- which includes a statement that "Based on the present appearance of the site and the installation of a fence on our side of the parking lot, I no longer have an objection to the parking lot for Robert Stahlman and his office building." The letter also includes a notation signed by Robert Stahlman that reads, "I will install pine trees on the outside of the fence at 8' to 10' spaces." The letter was made part of the public record.

Ms. St. John noted for the record the letter dated Nov 3, 2015 which was received in the morning of Tuesday, Nov 10th. She also received two letters at the start of the meeting this evening from Margaret Mc Padden of 41 Gould Road, unit #1 and a letter from E. L. Stone of 41 Gould Road, unit # 3. Both letters reflect opposition to the variance. Members and Attorney Hantz were provided a copy of the letters.

Attorney Hantz introduced herself and passed out two proposed plans of the property showing:

- The access way to be created to the back piece of the property to be incorporated into the existing Stahlman building and for the parking area.

- The layout of proposed parking.
- The zoning areas of property.
- The plans incorporating a fence.
- A letter indicating that trees are being planted.

Attorney Hantz referred to the letter dated Nov 3, 2015 and the Memorandum in Support of the Variance submitted by Attorney Brad Cook and her. She proceeded to discuss in more detail each of the specific variance criteria.

Attorney Hantz recited how the variance meets the five criteria.

- Granting variance will not be contrary to the public interest for reasons listed:
 - Will provide additional parking with the same design as the current parking lot to alleviate congestion.
 - Consistent with the existing abutting commercial use, will enhance the value of the commercial property creating a tax benefit for the public.
 - The engineered detention pond will manage drainage. Currently there is no management of drainage.
 - There is a newly erected fence screening the activity of the property, protection of the wet lands and screening the residential section from the commercial section.
- Substantial justice will be done making use of the back land. It is not readily useable by its current owner because it is cutoff from frontage and has no access except through the building. The wetlands cut it off on the two sides. Denying renders the property useless.
- Planning Board has approved the subdivision and the annexation of the property to existing commercial use, subjected to this variance.
- Surrounding property values will not be diminished because the proposed parking lot will not increase any adverse impacts. There is no evidence that expanding commercial use by expanding the parking closer to the abutting properties is going to devalue their land. There is a substantial buffer remaining between the residential condominiums to the back. The property to the east south is a multifamily use. On the Pleasant Street frontage and to the southwest there are other commercial uses.
- Literal enforcement of the ordinance will create an unnecessary hardship. The back land is considered useless to the current owners as back land and can't be utilized to expand the parking for the proposed use.

The Board commented and asked questions

- ✓ How is the lot unusable to the existing owner? Can the back land be used for a second garage or shed and can it be accessed? Attorney Hantz explained that the land is part of the residential lot, and is useful as a yard but doesn't add anything because of the configuration. She agreed that it could be used for a shed and there are no plans for any other buildings; access would be limited only through the existing garage; and this is not part of the variance test. She commented the question that should be asked is the proposal reasonable. Therefore, the back lands have marginal use.
- ✓ What physical characteristics of this piece of land distinguish it from the surrounding properties? Attorney Hantz said its placement in that is surrounded by other commercial uses, the Bittersweet Housing complex and wetlands (limited access on two sides). The back portion of the lot has no direct frontage and access is only through the frontage on Pleasant Street. So where it is situated is a characteristic that can be considered per the terms of the Zoning Ordinance. It is a vacant lot, not developed. Commercial property that is undeveloped is surrounding the area. The Town has zoned areas along Pleasant Street for commercial use and the zoning district boundaries are not equally extended to include this property. Referring to the zoning map to illustrate the existing

zoning in the area. The ZBA has the ability to adjust for the property owner to have a reasonable use of his land, relative to other uses in the area. Granting the variance would help in the interim to make the zoning requirements consistent with other uses in the area.

- ✓ Board member asked how is this case even before the ZBA as there is a “zoning defect”. He stated the case is premature to even be presented to the Planning Board, and that ZBA approval must be granted in order to go to the Planning Board. Ms. St. John provided an update to the ZBA, explaining the history of Mr. Stahlman requests and his appearance at previous Planning Board meetings and the Sept 29th ZBA meeting. Mr. Stahlman had decided to purchase the land and had submitted a subdivision application for Planning Board review. The subdivision/annexation plan was approved at the Oct 6th meeting. The mlyar for the approved subdivision would be recorded on Thursday November 12th. She explained that the right to subdivide a property is based on whether it meets the zoning requirement for setbacks and lot size. There are other lots in Town that are split zoned. The applicant has the right to appear before the Planning Board before going to the ZBA for the variance. She explained that Mr. Stahlman has also submitted a Site Plan application for review at the Nov 17th in anticipation of the ZBA granting the variance.
- ✓ The Board asked for an explanation of how this was not a hardship created by the owner, that does not arise from a special condition was asked? The essences of hardship are that it arises from special condition of the property that are unique in its surroundings and prevents the owner from using it in a permitted manner. Attorney Hantz said that buying a property that has a condition that needs variance relief is not a bar in seeking a variance relief. So if you were to buy a property that meets the five criteria for a variance, the fact that you bought it even knowing that it didn't comply doesn't disable you from going to the board seeking relief if you meet the five criteria.
- ✓ Board members referred to court cases referenced in the letter received from Town Counsel, and those includes in the memorandum submitted in support of Mr. Stahlman case. Attorney Hantz clarified points made on each side. The Board referred to Chester Rod & Gun Club v. Town of Chester and asked how is this not a change to the neighborhood. Attorney Hantz conveyed that the area has and is changing/ evolving, including the example that there is a multifamily residential development adjacent to this lot. Attorney Hantz referred to the Farrar v. City of Keene case and the Hill v. Town of Chester case, as explained in the memorandum.
- ✓ Zoning was clarified, noting it is a split zone with commercial zoning along Pleasant Street, and the newly subdivided portion, to the rear is zoned residential (R-1). A Board member commented that the rule, under the ordinance is if the lot is divided by a zoning line, the more restrictive zoning applies to the entire lot. Attorney Hantz commented that the adjacent property is zoned commercial and Bittersweet Housing complex is a commercial use.
- ✓ Board member asked how is this parcel distinguished from others in the area. Board member referred to a zoning change near the end of Cottage Lane, which used to be commercial and was rezoned to residential. Also discussed the Pizza Chef (John and Frank Souliotis) property and the ZBA decision of the early 1990 (Oct 6, 1993), to create additional parking in a split zone. Attorney Hantz explained the Zoning Ordinance does not keep up with changes, and that the ZBA has the authority to review application for variance for this very reason. Furthermore she explained that the zoning boundaries lines in the area are inconsistent in depth and that in many communities zoning boundary lines don't always follow a property line, but often are defined by a specific distance (example 200 feet, 400 feet or some number) from a road.
- ✓ What are the impacts? Attorney Hantz said that Zoning Boards don't deal with general line drawings, they deal with specific impacts on specific properties. None of the residential ordinances will be upset by allowing some parking and it's connected with the existing use. Therefore, there will be no impact on the abutting properties. It's adjusting an arbitrary line that

was set according to property boundaries. Attorney Hantz reminded the board that there is still a 40' buffer between the residential and the proposed parking lot.

- ✓ Board member noted that this is not an accessory use and that the primary function of zoning is to segregate the use of the land and asked how this will be consistent with the spirit of the ordinance. Ms. St. John explained that a commercial parking lot is not a permitted use in the residential zoning district, and this is why the applicant submitted the variance request. Attorney Hantz commented that this is an accessory use, as parking is an accessory use to a commercial use of a property, in that any commercial use has a certain amount of parking associated with the use, and that the courts can define what is an accessory use. She also explained that zones always have permitted and unpermitted uses, but the courts have also allowed innovative land use controls provisions. Board members asked if the site meets the current parking requirements, the response was yes.
- ✓ Board asked how is this not "spot zoning". Board members referred to a case in Exeter and a Bacon vs. Enfield case. Attorney Hantz referred to the Simplex Technologies Inc., v. Town of Newington case and that zoning has to be reasonable. Board member stated that each case needs to be reviewed on a case by case basis, and questioned can the ZBA rezone property.
- ✓ Board members asked about the value of the surrounding property and tax base, noting that abutters have expressed opposition to the variance. Board members also noted that the burden of proof is for the applicant, not the Board to demonstrate that each variance criteria has been met. Some board members expressed that the applicant has created this situation and that the criteria have not been met. A board member noted that the sequence of events is not correct, and this is forcing the ZBA to make a decision. Attorney Hantz commented that landowners have pressure to respond to a need, and Mr. Stahlman has a need for more parking.
- ✓ Board member referred to the Malachy Glen vs. Chichester case. Attorney Hantz discussed the presumption of validity and the need to look at the specific impact on specific properties.

Chair asked if there were any additional comments from the board and audience. There were none.

Public Hearing Closed

Motion

**IT WAS MOVED (Michael Todd) AND SECONDED (Cheryl Devoe) to discuss.
THE MOTION WAS APPROVED UNANIMOUSLY.**

Board Discussion Opened

- Mr. Sarkisian stated that Mr. Stahlman's request is reasonable, according to the brief submitted. Need to be respectful. This is how the Town gets itself into legal problems, referring to two legal cases he had previously with the Town and won. He's trying to keep his business flourishing and it's important for the community. He's just leveling the ground and putting up a fence and trees. The employees come to town, buy gas and give business to the town. Therefore, it is in the public's best interest. This won't hurt the neighbors and aren't we here to help the town.
- Mr. Anzalone commented that he is not a voting member, and at the last meeting noted for the record his wife works in the building. If the board doesn't think he meets the five variance criteria and it is denied, there is an appeal process.
- Ms. Bedard said her struggle is with the spirit of the ordinance because residential lots cannot be used for commercial parking. She referred to the previous Pizza Chef decision.

- Ms. Devoe agrees that the spirit of the ordinance is not clear to her, as a commercial parking lot is not a permitted use in a residential zone. She also doesn't think they have demonstrated the hardship criteria.
- Mr. Todd said that moving of the line is not consistent with the spirit of the ordinance because of its uses. Secondly he is not convinced that the surrounding properties will not be diminished, since we have letters from the abutters who are not in favor of the project. Lastly, the hardship argument has not been met, as the applicant has not distinguished how the property is different and what the hardship is.
- Mr. Lyon said his concerns are those expressed by the abutters and changing the character of the neighborhood and allowing a clearly unpermitted use in an R-1 zone changes the nature of the character of the neighborhood. The hardship has been created by the owner and although that is not a veto issue it is something we need to consider. What prevents any owner from buying up land that is not zoned to his liking and says "I now have a hardship?" The courts have specifically said there has to be unique physical characteristics of the land that prevented the owner from using it for a permitted use. There are no physical characteristics seen that separated it from the other residential properties and clearly the owner is asking for a non-permitted use. The spirit of the ordinance is not met by arbitrarily changing the borders. The changing of rezoning belongs to the town meeting and legislative authority.
- Board members asked for clarification on the voting, referring to the training session discussion.

The voting will be done with a majority of the vote for each criteria.

- Would not be contrary to the public interest – voting that this was met included Sarkisian, and voting that it is not in the public interest – Bedard, Devoe, Vance and Lyon.
- Will not be contrary to the spirit of the ordinance- voting that this was met included Sarkisian, and voting that it is not in the public interest – Bedard, Devoe, Vance and Lyon.
- Granting the variance substantial justice will be done- voting that this was met included Sarkisian, Bedard, Devoe, Vance, voting that it was not met – Lyon.
- No diminution of surrounding properties- voting that this was met included Sarkisian, Bedard, Devoe, Vance, voting that it was not met – Lyon.
- Literal enforcement would result in an unnecessary hardship – voting that this was met Sarkisian and voting that this criteria was not met – Bedard, Devoe, Vance and Lyon.
- The motion failed. Request for the variance was denied.

Motion

IT WAS MOVED (Doug Lyon) AND SECONDED (Cheryl Devoe) to DENY the Variances for said use for the following reasons:

- Surrounding properties may have diminution in value and abutters opposed the variance request.
- The character of the neighborhood would change.
- The owner created his own situation and personal financial hardship and this is not a factor the Board should consider.

- The owner did not demonstrate that the variance hardship criteria were met, as there are no specific physical characteristics of the lot that separate it from other residential properties in the neighborhood.
- Would be contrary to the public interest and the spirit of the ordinance. A use variance is granting a use not voted in by the voters and the ZBA does not support this approach to changing zoning boundaries and this does not support the spirit of the ordinance. A commercial parking area is not allowed in a residential zone, this would open the door for other such uses.

THE MOTION PASSED UNANIMOUSLY

Motion to Adjourn

IT WAS MOVED (Chair Lyon) AND SECONDED (Vahan Sarkisian) to adjourn the meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

Motion to Re-adjourn for limited purposes

IT WAS MOVED (Michael Todd) AND SECONDED (Frank Anzalone) to re-adjourn the meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

Approval of Minutes

IT WAS MOVED (Chair Lyon) AND SECONDED (Michael Todd) to approve the minutes of September 29, 2015, as circulated. THE MOTION WAS APPROVED UNANIMOUSLY.

Motion to Adjourn

IT WAS MOVED (Chair Lyon) AND SECONDED (Michael Todd) to adjourn the meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

Meeting adjourned at 8:07 pm.

Respectfully submitted,

Dianne Richtmyer, Recording Secretary
Town of New London