City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, June 7, 2021 **6:30 PM** **Hybrid Meeting**
Council Chambers/Zoom

Members Present:
Joshua Gorman, Chair
Joseph Hoppock, Vice Chair
Jane Taylor
Michael Welsh
Arthur Gaudio

Staff Present:
John Rogers, Zoning Administrator
Corinne Marcou, Zoning Clerk

Members Not Present:

Chair Gorman read a prepared statement explaining how the Emergency Order #12, pursuant to Executive Order #2020-04 issued by the Governor of New Hampshire, waives certain provisions of RSA 91-A (which regulates the operation of public body meetings) during the declared COVID-19 State of Emergency. He called the meeting to order at 6:33 PM.

I) Introduction of Board Members

Roll call was conducted.

II) Minutes of the Previous Meeting – April 20, 2021, and May 3, 2021

Mr. Hoppock made a motion to approve the April 20, 2021 meeting minutes. Mr. Welsh seconded the motion, which passed by unanimous vote.

Mr. Hoppock made a motion to approve the May 3, 2021 meeting minutes. Mr. Welsh seconded the motion, which passed by unanimous vote.

III) Hearings

Chair Gorman stated that Petitioner Jaime Dyer, of 44 Pierce Ln., Westmoreland, is requesting a Motion to Re-hear ZBA 21-11, located at 110-120 Main St., owned by R&M Weinreich, LLC, of Keene, Tax Map 575-062-000, which is in the Central Business District.

John Rogers, Zoning Administrator, stated for clarification, this is for the Board to discuss and as this is not a public hearing, there will be no public comment. He continued that as a Motion to Re-hear must be submitted 30 days after the action of the Board by the Petitioner, the Board has 30 days once it is received to discuss the re-hearing. This was the first opportunity for that; otherwise, the Board would have had to call a special meeting later in the month. Staff felt tonight was a good time for the Board to discuss the matter.

Mr. Hoppock stated that RSA 677:2 governs the standard for review for a Motion for Re-hearing, and provides for 30 days from the date of the decision, which was May 3. He continued that if this Motion to Re-hear was received on June 4, it is not a timely application. A timely application would have been received on or before June 2.

Mr. Rogers replied that if that is a mistake, that was a mistake on staff's part, regarding the recommendation they gave the applicant. He continued that his math was wrong. Chair Gorman stated that given that, the Board will take the application for a Motion to Re-hear as being timely by the request of staff.

Ms. Taylor stated that she is glad Mr. Hoppock made that point. She continued that she does not mind discussing this, but thinks the Board should decline to hear it, because it is not timely, regardless of staff's advice. That being said, she thinks they should still discuss whether the Board would be in favor or opposed to this on other grounds, not just timeliness.

Chair Gorman stated that he thinks what Mr. Rogers is saying is that he (Mr. Rogers) advised the applicant that he had until Friday, June 4, so he (Chair Gorman) thinks the Board should hear this. Ms. Taylor replied that is why she suggested they discuss it. She continued that she does not think they need to debate municipal estoppel at this point, but it is still not timely filed. The applicant is charged with having knowledge of what his responsibilities are.

Mr. Hoppock stated that RSA 677:2 governs the Standard of Review, and it is a simple standard: re-hearing is granted if good reason is stated in the motion. The question is, is there good reason in this motion? He continued that he agrees with Ms. Taylor that this is not timely filed and that the burden is on the applicant to know when the deadlines are. Setting that aside for a moment, in reading this application dated June 4 and received on that date, he does not see good reason stated. The applicant seems to be trying to say, "I should have mentioned this at the first hearing" and trying to get another bite at the apple. The letter from the insurance folks is simply an example of new evidence being submitted with this, to try to address something that was not addressed, apparently, on May 3. He is not persuaded that "good reason" is stated in the motion, so for that reason, he would deny the motion.

Ms. Taylor stated that she agrees. She continued that the Board has to look at whether there is new evidence and look at whether the Board made a mistake. She does not agree that a letter from an insurance company constitutes new evidence. Insurance agents are there to sell policies, and just because something is insurable, does not mean it is relevant to the Board's decision as to whether it

met the standard for a Special Exception. Additionally, she would say the Board was correct in their decision, because based on the evidence presented, with regard to the facility's layout and use, they did not see any evidence that the facility was designed to provide the proper operation with the use of alcohol being permitted. Additionally, there are two places in the minutes where Mr. Weinreich [addressed this]: he stated that the applicant said he could run the business just fine without alcohol, and that his lease would include a prohibition against alcohol; and stated that one of the great things about the proposal is that there will not be any alcohol. Thus, she is not sure what the issue is. She thinks the Board properly decided on the application and therefore she would not support the Board re-hear this or reconsider their decision.

Mr. Gaudio stated that he has similar question about whether there is enough new information. He continued that there is no additional information here about how protection is going to be provided at the facility when people are drinking alcohol potentially to the people who might be injured, the number of people who will be providing protection, how they would do it, and so on and so forth. He would have thought they would go to the Police, or some law enforcement authority, and bring evidence about the number of episodes of intoxication at one of these facilities in another place. If it had been low, that would have been good evidence. If not, it might not have been good evidence.

Mr. Welsh stated that like Ms. Taylor, he was struck by the difference between the minutes/testimony from last time and the desire to be able to sell alcohol expressed this time. He continued that he was not necessarily compelled that anything else had been exchanged, except for the desire to change the nature of the business. He is not compelled to approve the Motion to Re-hear. The main thing he thought was different was the imagination of the facility being used as a rented out facility for parties, weddings, and so on and so forth, where alcohol is not necessarily sold but it is permitted to be brought in. Had that been discussed last month he may have been sympathetic, but the idea of selling on facility is something he would rule the same on based on the evidence he has seen.

Chair Gorman stated that he has mixed feelings on this. He continued that he thinks it is sort of a 180 by the applicant here, compared to what the Board heard initially, which is bothersome, but he wonders if the Board perhaps put that on to him because the Board members were the ones who brought up the alcohol. He also thinks that as a function use such as a bowling alley or something similar that people reserve for a venue, he would consider BYOB, to echo what Mr. Welsh said. He thinks there is more information to be heard. He does not think the Board had a clear path to what the applicant wanted. He thinks maybe the applicant did not know he needed to apply for the right to serve alcohol, since it would already be permitted at that location. With all of those things said, he would be fine to re-hear it, and hear what the applicant actually wants to do.

Ms. Taylor stated that the Board members brought up alcohol in the context of the hearing because prior to the public hearing, the newspaper article brought it up. Thus, the Board was requesting more information. She continued that it was not something that the Board brought up out of thin air. She recalls a brief discussion in the minutes about renting it out.

Mr. Welsh stated that from his reading of the minutes and from his recollection, alcohol was a topic brought up by Mr. Weinreich himself. He continued that line 106 of the minutes is the start of a paragraph and states: *"One of the great things about the proposal is it will not have alcohol in the mix, so he will be able to have 6-10 year old children there with their parents. It is a great family-type activity."* That, to him (Mr. Welsh), was one of the compelling visions of the facility.

Chair Gorman asked if anyone else had further comment. Hearing none, he asked for a motion.

Mr. Hoppock made a motion to deny the request for the Motion to Re-hear ZBA 21-11. Ms. Taylor seconded the motion.

Chair Gorman asked if the motion should first come in the affirmative. Mr. Rogers replied that most times, a motion is for a positive action first, but since this is a discussion just amongst the Board it is okay to have the motion as Mr. Hoppock stated it.

The motion passed with a vote of 4-1. Chair Gorman was opposed.

IV) Unfinished Business

A. Revisions to the ZBA Regulations, Section II, I-Supplemental Information

Mr. Rogers stated that the Board can take up the Supplemental Information discussion that Ms. Taylor has presented. He continued that all Board members have received the proposed language. He showed the current language in the Rules of Procedures, on page 7, item I. He continued that it has some limitation. In his opinion, the current language gives the Board a little more flexibility than the proposed language, for a couple reasons. One reason is that as the Board has experienced, sometimes someone will bring in/email information to staff on the day or the meeting. Sometimes one page of information is technical and complex and requires more time, and other times, it is just one page and not too much to absorb and the Board might be able to take that in. He believes the language Ms. Taylor proposed also does as well, but one of the issues he is not sure about is *"C. No such submission limitations shall be imposed upon an abutter or other party wishing to submit comments or information about the subject application at the public hearing."* That could be a problem for the Board. An abutter could bring a packet of, say, real estate values, which the Board gets sometimes. An abutter could hire someone to do a real estate valuation to show that the applicant would reduce the abutter's property value. The Board might want to put that off and continue the public hearing. Thus, he thinks C. might be problematic. He believes that the current language is sufficient. It does give the Board some flexibility to do as needed. He is not sure this revision is needed. However, that is for the Board to discuss, and they can let staff know if they want staff to bring back a new Rules of Procedure with the language changes as so desired.

Ms. Taylor stated that she drafted this in response to the Board's frustration that many times, applicants do not submit information in a timely fashion, so that it is virtually impossible for the Board to consider the information appropriately. She continued that she should add that this

[proposed] rule is not entirely original; she lifted parts of it from other municipalities in NH that have a similar rule. All the ones she looked at had a 10-day advance period, with the theory being that they could then distribute the information appropriately to the Board members with the application in preparation for the meeting. The second paragraph [B.] provides that opening, so that if there *is* late information that the Board should be considering, the Board can determine whether they should hear it that night, or if it is too much and they need to postpone. There are certain studies that the Board does need more time to look at, not just a few hours [before the meeting]. The third paragraph [C.] is one she found in several other municipalities. Abutters generally do not have the information in as timely a fashion as the applicant does. The purpose of C. is to ensure that an abutter will not be deterred from speaking up at a public hearing. If someone submits a map and an abutter says "But that map isn't correct; this is what's correct," she does not think the Board should discourage that from being presented at a public hearing. She supposes that any information the Board gets would be subject to hearing at a future meeting. There is nothing in the rules and nothing in the statutes she is aware of that says the Board cannot continue a hearing on an application if they feel they need more information. They have done that in the past. Ms. Taylor continued that she is not wedded to this language, but she thinks that the current rule as it is drafted is very squishy.

Mr. Hoppock stated that the way he reads A. and B. together, it seems that the two options are for the Board to either accept the supplemental information and do nothing and consider it, because it is not so voluminous or complicated as to be a concern; or to grant a continuance. He continued that that would be only if the material was filed within the 10 days. B. is not clear about that. For example, if staff receives supplemental information 11 days before the public hearing, it should be okay, and presumably, the Board would receive it either that day via email, or within enough time to study it. B. should be clearer about that 10-day timeframe. If it is outside the 10 days, the applicant ought to be informed that they will lose their right to a prompt hearing because they filed it late. He cannot remember what the rule is about this – if a person files an application do they get a hearing within 45 days? Ms. Taylor replied something like that. She continued that as she said, she has no problem with the Board amending her proposed language or taking it to wordsmith and bringing it back next time.

Mr. Gaudio stated that he has three suggestions, one of which Mr. Hoppock just made. He continued that B's second line is about whether to accept the supplemental information, and he suggests adding *"submitted after the deadline of subsection A.,"* which goes directly to this point. He also has a suggestion for C., if the Board wants to keep C. He suggests *"The limitations in subsections A. and B. shall not be imposed,"* so it is clear. He is bothered by the last sentence of A., which states that an applicant's failure to submit supplemental information within 10 days of the public hearing "may" result (in the information not being considered at the public hearing), but it may not. He suggests deleting that sentence, because B. takes care of the other side of that coin. Ms. Taylor replied that those are all good suggestions.

Chair Gorman asked Mr. Rogers what the current limitation is. He continued that this seems less restrictive. Mr. Rogers replied that it currently states, *"Any information and/or evidence that is*

provided after the submittal deadline, which the Board determines to be material and necessary, may result in a continuation of the public hearing in order to allow the Board an opportunity to review the information and/or evidence and/or to have the City staff, legal counsel, abutters, or other interested persons review and provide input or advice to the Board in regards to such information and/or evidence."

Chair Gorman asked, when that references the deadline, is it referencing the deadline that the applicant has? In other words, it abandons all supplemental information post-application. Is that accurate? Mr. Rogers replied that many times the deadline date is when a lot of applications come in the door. He continued that basically it would be supplemental information staff received from the applicant anytime from that deadline. As the Board is aware, sometimes staff gets information the day of the meeting. The current Supplemental Information covers any of that from the deadline to anything submitted right up until the meeting, which gives the Board the ability to make that determination, as they have in the past, as to whether they need more time to review the information or not. He thinks that what Ms. Taylor has submitted does the same thing. What he is not 100% sure about is C., regarding abutters and people at the meeting being able to bring material in. He thinks the Board should still have the ability to make that same decision, regardless of whether it is coming from the applicant or the public.

Chair Gorman stated that he agrees with Mr. Rogers about that. He continued that as Ms. Taylor mentioned earlier, there was nothing withholding the Board from continuing a hearing based on new information. However, with this language, The Board might think, "Oh, there *is* something from precluding us from [continuing the hearing based on new information]," because they are openly stating [in C.] that the Board allows submissions from anyone who is not an applicant, whenever they want. It is actually rare that the applicant is creating the problem. Many times, the abutters are the ones submitting information/materials late. Through the years he has been on the Board, he thinks the few times they have had to continue a hearing have been due to extreme volume from the public that comes pouring in late. He thinks C. could put them in a compromising position. He recalls the Water St. application had to be postponed because they received over 100 letters. There have been a few other, high-profile hearings throughout the years where they have received strenuous amounts of materials to review. Most Board members have day jobs. Receiving 30, 40, or 50 letters the day before the meeting poses a problem. For him to get on board with Ms. Taylor's proposed changes there has to be some wiggle room for the Board, in terms of public input, too. Whether it is five days or up to the discretion of the Board, there needs to be something, just in case.

Ms. Taylor replied that it is fine to get rid of C. She continued that however, she wants to note that people submitting letters is similar to people making an appearance at a public hearing. She does not think it is quite the same thing as a submission. She will not quibble about it if the Board wants to just remove C. She does think there is a serious issue with the way the current rule reads. Maybe staff should be taking a harder line, so that people know that if they are going to submit an application they need to have information in by X day, such as 10 days prior to the hearing or whatever the number is. That is a certain issue of fairness for the applicant as well. Her sense is

that applicants feel they can just submit whatever they want to, right up until whenever they come and appear at a public hearing. That is unfair to the Board, and unfair to the public, whether they are abutters, interested parties, opponents, or whoever. She thinks they need a more solid rule for when items that are going to be entered into evidence at a public hearing need to be submitted. If someone cannot submit something prior to that 10-day period, then the applicant can always ask for a continuance because their study has not arrived on time or they cannot get their survey done, or whatever the cause. The Board needs to assist but they do not need to just drop everything.

Mr. Gaudio stated that he thinks there are two different kinds of information that the abutter or another party might be supplying. One would be information in response to the applicant's original petition. The other is information that is in response to supplemental information provided by the applicant. Information that is responsive to the original application, in his opinion should be supplied within the same 10 days. The responsive information to the supplemental information should be later, whether it is, say, three days before or maybe no days before. If it is responsive information there ought to be some time for the abutter to be able to deal with that.

Chair Gorman asked how the applicant would reply to the abutters. He continued that if the applicant has a certain amount of time, then the abutter has a certain amount of time and brings something three days prior that is "responsive information," the applicant [does not have time]. To him, this is less restrictive. Currently, Mr. Rogers can just tell the applicant "This is what you have, this is what you gave us, and anything else you come in with [later] is up to the Board." Whereas [what Ms. Taylor proposes] says, "Here you go, thanks for applying; now you've got many more days to come bring more stuff."

Mr. Rogers stated that the 10 days that Ms. Taylor proposed would put the timeline pretty close to the deadline as it sits now. He continued that Corinne Marcou could speak to this better than he could, because she knows the dates very well. If the Board desires, the 10 days is not a bad number for staff. Chair Gorman replied that it seems like it is fairly parallel with the current language then. It is just more specific, which could be a good thing. Mr. Rogers replied that is correct.

Mr. Rogers stated that it is up to the Board's discretion, but if they want, staff could take the language Ms. Taylor has proposed and incorporate it. He continued that the Board could give staff direction regarding whether they want to include C. Staff can look at the meeting minutes, take some of the Board members' suggestions for possible changes, and wordsmith this a bit, and then bring it back to the Board at next month's meeting.

Mr. Hoppock suggested adding a section D. that says, "Nothing herein will deprive the Board of its discretion to rule on the admissibility of the additional information or whether to continue the hearing so the Board has sufficient time to review it." He continued that he thinks Chair Gorman is right that C. has the potential to open up floodgates (although that word may be overstating the case) of information from abutters and others. He has never seen an abutter bring voluminous amounts of documents to the Board to consider at a hearing. Sometimes pictures, but not such a

voluminous amount that the Board cannot process it as they are sitting in the meeting. Mr. Gaudio mentioned the expert appraisal example – if an abutter says they have an appraiser who says their property value will go down, on a Variance case, that is something the Board wants to read. They might not be able to read it in five minutes during the meeting while the case is being heard. Therefore, something that preserves the Board's discretion to continue the hearing if they think that is appropriate is probably a good fourth section in this draft.

Ms. Taylor asked Mr. Hoppock if B. does that. Chair Gorman replied it does not accomplish that with the abutters, though, only the applicants. Mr. Hoppock replied that he was really speaking about the abutters. He continued that B. accomplishes that with the applicant or the applicant's agent, but not with the abutters. Mr. Gaudio stated that he thinks they would have to either place B. after C. and make it broad to say both, or do an A. and B. for applicants and a C. and D. for abutters.

Chair Gorman stated that the situations he is thinking of are the high-profile cases where the abutters do have a real dog in the fight. He continued that the Board has received Police reports from abutters, professional appraisal opinions, and large droves of people showing interest in a hearing and submitting letters that the Board might miss something in if they just quickly comb through them. He agrees that with 99% of the hearings, none of those issues arise, but he thinks C. offers some problems when they do arise. Maybe they could consider five days for part C., for final submittal from abutters. That gives them five days advance for a situation like Mr. Gaudio described, and the Board would still be able to accept the information. Inside the five day window the Board would decide for themselves if it was too much or not. If it is five small letters they can obviously take it, but if it is a slew of professional opinions, they would have to reconsider.

Mr. Rogers stated that the only issue he sees with the five days is that many times the abutters are not noticed until five days before the meeting. He continued that therefore, by the time the notices get to them, they would have no time to do any research or produce documentations to submit. Mr. Gaudio replied that goes to the question of whether there is enough lead time in the whole process, or if it should be longer. Ms. Taylor replied that is partially the statutory time limits.

Chair Gorman suggested having no restrictions for abutters, but that the Board still has the right to consider whether the information is too much. He continued that if they just add that, that it is up the Board's discretion, as Mr. Hoppock was saying. It could be that all submissions by abutters have no time restraint; however, the Board does reserve the right to take extra time to review. Ms. Taylor replied that the only problem is they could potentially, since this is a public hearing, run into procedural due process issues. Chair Gorman replied that they have done that before, though. They canceled the whole Water St. hearing the night of because they had too much information. Ms. Taylor replied that it is one thing to postpone, and another thing to just simply deny. Chair Gorman replied no, he was talking about a continuance if they took in too much information from abutters.

Mr. Gaudio stated that he worries that allowing an abutter to bring in a swarm of information with five minutes to go is a good way of delaying the process, if someone was thinking strategically. Chair Gorman replied that that would be up to the Board, if they thought that was the play being made. Mr. Gaudio replied that it would be okay as long as the Board had the ability to deny as well as postpone. Ms. Taylor replied that she is not sure they could have the ability to deny submission at a public hearing. Mr. Gaudio replied that if it does not meet the deadline they could, but they were talking about not having a deadline.

Mr. Rogers stated that as a Board member mentioned, there are not many times when the Board receives a ton of information from abutters. He continued that most times it is letters of support or opposition to an application. At this point, staff's recommendation is to allow staff to draft something for the Board to consider, now that staff has heard this discussion. They could discuss it further next month with some proposed language. Chair Gorman replied that that sounds good to him.

Mr. Welsh replied that he is in favor of that, too. He continued that all of the comments he has heard are very interesting and he is confident in staff's ability to weight and balance between them when they conflict. One that he would like to see emphasized is the preservation of the discretion of the Board to continue or not, based on the Board's comfort with the evidence provided.

Mr. Hoppock stated that he assents as well. Chair Gorman replied that they will await staff's draft. Ms. Taylor replied that is fine with her, too.

V) <u>New Business</u>
VI) <u>Communications and Miscellaneous</u>
VII) <u>Non-Public Session (if required)</u>
VIII) <u>Adjournment</u>

There being no further business, Chair Gorman adjourned the meeting at 7:20 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Edits submitted by,
Corinne Marcou, Zoning Clerk