

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, December 6, 2021

6:30 PM

Council Chambers
City Hall

Members Present:

Joshua Gorman, Chair (arrived at 6:39 PM)
Joseph Hoppock, Vice Chair
Jane Taylor
Michael Welsh
Arthur Gaudio

Staff Present:

Michael Hagan, Plans Examiner
Corinne Marcou, Zoning Clerk
Rhett Lamb, Community Development
Director (retired)

Members Not Present:

John Rogers, Zoning Administrator

I) Call to Order

Vice Chair Hoppock called the meeting to order at 6:32 PM and explained the procedures of the meeting.

II) Minutes of the Previous Meeting – October 18, 2021, and November 1, 2021

Ms. Taylor made a motion to approve the meeting minutes of October 18, 2021. Mr. Welsh seconded the motion, which passed by unanimous vote.

Mr. Gaudio made a motion to approve the meeting minutes of November 1, 2021. Mr. Welsh seconded the motion, which passed by a vote of 3-0. Ms. Taylor abstained.

III) Unfinished Business

Vice Chair Hoppock asked if there was any unfinished business. Mr. Hagan stated that he is not aware of any.

IV) Hearings:

A) ZBA 21-23: Petitioner, Alpine Bike Works, of 2326 US Rte. 4, Killington, VT, owned by Tony Accurso, requests a Variance for property located at 15 King Court, owned by Raette F. Trombly Living Trust, Tax Map #112-022-000-000-000 that is in the Low Density District. The Petitioner requests a Variance to permit a bicycle

shop on a lot located within the Low Density District where a retail business is not a permitted use per Chapter 100, Article 3.3.5; Permitted Uses in the Low Density District of the Zoning Regulations.

Mr. Welsh stated that he needs to recuse himself, because his employer is an abutter, and he recused himself the last time the Board looked at this site. Vice Chair Hoppock replied that he recalls that.

At 6:36 PM, Vice Chair called for a recess to wait for Chair Josh Gorman to arrive. At 6:39 PM, Chair Gorman arrived and the meeting resumed.

Chair Gorman conducted roll call. He introduced Plans Examiner Michael Hagan, who is filling in for Zoning Administrator, John Rogers. He continued that retired Community Development Director Rhett Lamb is also present.

Chair Gorman asked Mr. Hagan to introduce ZBA 21-23.

Mr. Hagan stated that this is an existing, non-conforming property located in the Low Density District. He continued that in 1981 it received a variance from the Board for a change in non-conforming use and in 2018 it received another change in non-conforming use for a fitness facility. The Petitioner is looking to bring it back to a retail establishment, with a Variance under different process now. Under the old Zoning Code there was an application for a non-conforming use; now it is a Variance application.

Chair Gorman asked if anyone had questions for Mr. Hagan. Hearing none, he asked Mr. Phippard to begin.

James Phippard of 185 Winchester St. stated that he is here on behalf of the property owner, Raette Trombly Living Trust, and the Applicant, Alpine Bike Works. He continued that the Applicant is aware that there is a four-member Board tonight and wishes to proceed.

Mr. Phippard stated that the Applicant is seeking a Variance to allow retail sales in the existing building on this property. He continued that this is the third or fourth time over the years that he has come before the Board dealing with applications on this property. The building was built in 1920, on a small lot of 0.28 acres, which became smaller as the State of New Hampshire improved Route 101 and widened the right-of-way in those areas over the decades. It has been a non-conforming property for as long as he can remember, and he has been a Land Use Consultant for 45 years. The property's previous uses included a retail sales business, Indian King Framery, and most recently, a fitness center, which is no longer in business. The building is vacant. It sits on a .28-acre lot and is in the Low Density District, which has not made sense to him in this particular location, close to Route 101. It is an existing brick building over 5,000 square feet in size and was clearly never meant to be a residential structure, and therefore has

always been non-conforming. He has kept coming back, over the years, asking the Board's permission to change the uses in the building, and here they are once again.

Mr. Phippard continued that the good news is that Alpine Bike Works is a new business trying to come to Keene, which is what everyone wants. This is a good use for this location. This low-intensity commercial use will fit very well on this property. This property is accessed via King Court. He showed the location on the image, and continued that there is existing parking for 23 cars. The property is serviced by City water and City sewer. This is an appropriate location for a small business. The building is almost 5,200 square feet in gross floor area. The Zoning regulations, as amended in September 2021, reduced the required parking to 21 spaces. This use is thus in compliance with the on-site parking requirements.

Mr. Phippard showed a blow-up of the City's tax map. He continued that the property before the Board tonight is outlined in red. This area is surrounded by mixed uses. There are businesses located directly opposite on Route 101. Keene State College is to the north and west of the site. There are residential buildings along Appleton St. and lower Main St. On King Ct. there are two existing office buildings leading into the site. There have been many types of offices over the years since the barn was converted into offices. They have done well in this location and are not big traffic generators and have not created many issues on this section of lower Main St. All of that is important background information for the Board.

Mr. Phippard continued that Alpine Bike Works is a year-round business, but the hours vary seasonally, which makes sense. In this environment, the primary bicycle season is April through October. That is when they are open seven days a week, 9 AM to 5 PM or 6 PM. From January through March, they have limited hours, mostly three or four days a week instead of seven, five days a week maximum. From October through December, they are open Wednesday through Sunday from 9 AM to 5 PM. There are no nighttime hours, just early evening, so there will not be activity on the property that could bother or become a nuisance to the residential uses located to the north of this site.

Mr. Phippard went through the criteria.

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

Mr. Phippard stated that today this is a vacant building, and vacant buildings, no matter what kind, are not in the public interest. It does not add value to the neighborhood and can quickly become a nuisance property if not properly maintained. It is always good to get a vacant building occupied and becoming a positive entity in the community once again, and that is part of what this proposal does. The fitness center that was in this location, mostly due to the COVID-19 pandemic, was unable to maintain its business and closed almost a year ago. It does not take long for a building to start to deteriorate, so it is important to get another business in this location. It is in the public interest to grant a Variance to allow a bicycle shop in this location. It is a low-intensity commercial use and does not operate at night, so it should not be creating a

nuisance in the neighborhood. Their traffic is not as such that it cannot be handled by King Ct., and they have adequate onsite parking to support their customer base.

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

Mr. Phippard stated that the spirit of the Ordinance is to protect the public health, safety, and welfare. One way of doing that is to allow vacant buildings to become redeveloped and occupied. That would help to maintain the public health and safety in this area. Also, putting in an appropriate use in such a location helps maintain the integrity of the neighborhood and the property values in the area.

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

Mr. Phippard stated that this is a vacant building, which no one wants. The property owner does not want that. It has been difficult to get a user for this building. He came before the Board seven months ago for an institutional use, a homeless shelter, and was denied the change in non-conforming use to allow that request. The homeless shelter was deemed not appropriate for the neighborhood. He believes this proposed use is very appropriate for this area. There is an existing bicycle shop directly to the south, across Route 101, Norm's Ski & Bike Shop, and they have done well in this location. They work as a "gateway business," as this is a very visible location for people coming into the community. These are the types of uses people want.

Mr. Phippard continued that Alpine Bike Works would have some outside displays, as you would expect from a bicycle shop. On the diagram, he indicated the location of the open lawn area, on the west side of the building. He continued that there is plenty of room for Alpine Bike Works to display the variety of bicycles that they carry. The parking is on the east and north sides of the building, to the side and rear primarily, which is a Planning Board guideline they try to follow. All of this is consistent with the City's Ordinance and will allow substantial justice for this property to be redeveloped and put back as a productive property on our tax base. He does not believe there is any benefit to the public to deny such a Variance.

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

Mr. Phippard stated that there are office buildings along King Ct. leading to this site. Those are consistent uses with the type of use proposed for this site. The residential properties along Appleton St. are very well screened from this site by an existing forested area. He believes that the properties along south Main St. would not even be aware that Alpine Bike Works is there. Alpine Bike Works is not a noise generator, nor is it the type of business that generates fumes or odors. They should not be a nuisance at all to any of the properties in the area. They are a fairly low-volume traffic generator. During the summer months, they expect to have an average of about 20 customers per day, and over their 10 or 11 hours of business hours during the summer

months, that is not a lot of traffic. It is not a cause for concern. He does not believe this will have any negative effect on surrounding property values.

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:*

Mr. Phippard stated that this is clearly a unique property, built in 1920, not as a residential building but as some type of business. He does not know what business it was back then, but it was clearly not a residential building. Over the years, it has been changing uses and has come before this Board many times to get permission to occupy different businesses in this location, because it is in the Low Density District. As a low-intensity commercial business, a bicycle shop is a very appropriate use for this location. Because of the site's proximity to Route 101, it will never be used as a single-family home. Therefore, a Variance is needed to allow a reasonable use on this site.

and

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

Mr. Phippard stated that for all the reasons he has already stated, he thinks this is a very reasonable use. He thinks the Board should be thrilled with this type of use coming into Keene in this location. This is a new business, bringing new jobs and new visibility. It is a new interest in Keene that will promote the community. It fits in with many of the community goals regarding promoting recreation and being a destination city.

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. Phippard stated that for all the reasons he has stated, he thinks it clearly is an unnecessary hardship to deny a Variance for this use. This is non-conforming property with a non-conforming building; it will never be residential, as it has never been residential in its 100 years of existence. That creates a special condition for this property that requires a Variance for it to be redeveloped.

Mr. Phippard stated that he would be happy to answer questions. He continued that with him tonight is Tony Accurso, owner of Alpine Bike Works, who can answer questions about the business.

Mr. Hoppock asked what the zoning is where Norm's Ski & Bike shop is located. Mr. Phippard replied that it is the Commerce District.

Ms. Taylor stated that Mr. Phippard said there would be some outside display, and her question is whether there would be outside storage. Mr. Phippard replied no, bicycles would be brought out during the business hours and brought in at the end of the day. He continued that that is typical activity, also seen at Norm's and at the bicycle shop that used to be on Winchester St. His office is right across the street from the latter, and he would see them wheeling the bicycles out in the morning and then wheeling them back in every night. If it was raining, the bicycles would be put on the porch. Nothing was left out overnight. Nothing will be stored outside at Alpine Bike Works.

Ms. Taylor asked Mr. Hagan if this would go to the Planning Board for site plan review, since it is a change of use. She continued that she is definitely not up to speed with the new Code. Mr. Hagan replied that it requires a review of the change of use but he does not think it will need to go before the full Planning Board.

Chair Gorman asked if it is possible that it would just be an administrative process. Mr. Phippard replied that he intends to apply for administrative approval. He continued that they are not proposing any physical changes to the building. They are not changing the awning. They want to put in an entry door that is more appropriate for a retail store, which would be the only physical change visible from the right-of-way. There is plenty of parking. No changes to the site are necessary or proposed. He does not think it will generate enough traffic to warrant additional work or a study. He will apply for administrative approval and believes it will be eligible, but that is not his call.

Chair Gorman replied yes, but at the end of the day, this will have to go through some kind of Planning Board approval. Mr. Phippard replied yes.

Chair Gorman asked for public comment. Hearing none, he closed the public hearing and asked the Board to deliberate on the criteria.

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

Mr. Gaudio stated that he believes this would be in the public interest. He continued that the existence of the vacant parcel of land and the potential for vandalism is a risk they should try to avoid. It would be in the public interest to have this property occupied. Another aspect is that, as Mr. Phippard said, this is a low-intensity business and it will not have anything that is contrary to the public interest. This property has had low-intensity uses for perhaps 100 years.

Mr. Hoppock stated that he agrees, and thinks that the application is consistent with the basic objective of the zone, which is to keep low intensity uses going there. It will be filling a lot that is not being used at all, so he believes it meets the criteria. It would not alter the essential

character of the neighborhood. They heard that there would be no visible changes to the outside, except for bicycles coming in and out, which is the same thing happening across the street. He does not have any problem with these criteria in this application.

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

Chair Gorman stated that he thinks Mr. Hoppock spoke to this criterion already, saying that this use does in fact placate the intent of the Ordinance, being low intensity.

Mr. Hoppock stated that the other piece to this criterion is whether it would pose a threat to the public health, safety, or welfare, and he does not see any basis in the application where you could make that connection between what the applicant proposes to do and those concerns for public safety. He does not see any problem here.

Ms. Taylor stated that she does not think there would be any harm to the public from this type of use. She continued that it is clearly a commercial building, not intended for residential use, and again, it is low-intensity, so the residential neighborhood should not have a great deal of impact.

Chair Gorman stated that he agrees with all of that.

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

Mr. Hoppock stated that this property, as Mr. Phippard pointed out, is not one that the Board is unfamiliar with. He continued that he is not saying they are tired of seeing all of the applications for this property, just that they are not unfamiliar with it. By virtue of the fact that it has been before the Board so often, there is a strong case to be made that the Applicant will suffer loss if the owner has to continue doing this every time a use changes. That seems to him to be the history of this property. He sees a loss to the individual that is significant if the Variance is not approved. The loss to the public, if the Variance is not approved, can also be equally problematic, in terms of the vacant building. There is a win/win here, where the owner, applicant, and public can gain.

Chair Gorman stated that he agrees.

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

Chair Gorman stated that he thinks Mr. Phippard made a good argument for this criterion, with this building being vacant for a year. A vacant building certainly can degrade property values. He thinks Mr. Phippard is accurate in saying that the City would be lucky to have this use for this building. It is going to be a use, as they have all agreed, that will require a Variance. He sees that this use can benefit surrounding property values.

Ms. Taylor stated that even though they do not have any direct evidence, it appears that such things as traffic, whether vehicular or pedestrian, will not really change from what the historic use was when the building was occupied. She continued that based on that historic perspective, she does not think there will be a diminution of property values.

5. *Unnecessary Hardship*

A. *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:*
and

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

Mr. Hoppock stated that he thinks that the size of the building in relation to the size of the lot is a special condition. He continued that the fact that it is a 5,000+ square foot building near residential homes, and its obvious inconvertibility to a residential use without a significant cost, is another special condition. In its history, no one has ever tried to use it as a residential home. He thinks those special conditions justify a Variance to the terms of the Ordinance.

Ms. Taylor stated that she thinks they probably have not seen a more clear example of the lack of relationship between the zoning, which is low density residential, and this actual parcel, which as far as anyone can determine, has never had a residential use. She thinks that says it all, and the use does appear to be reasonable.

Mr. Gaudio stated that with regard to the lack of relationship, this is a property that should have been, in his opinion, zoned the same as the other side of the road. There is a problem with drawing the line down the middle of the street rather than through the backyards. He does not believe there is any importance to maintaining the use of this as a residential property. As was pointed out, no one wants to have a bedroom next to a major highway. This would probably not be usable at all as a residential property.

Chair Gorman stated that given that the Board thinks the application meets 5.A., they will not move on to 5.B. He asked for a motion.

Mr. Hoppock made a motion for the Zoning Board of Adjustment to approve the Applicant's request for ZBA 21-23 for a Variance to permit a retail business in the Low Density District per Chapter 100, Article 3.3.5 of the Zoning Regulations. Mr. Gaudio seconded the motion.

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

Met with a vote of 4-0.

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

Met with a vote of 4-0.

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

Met with a vote of 4-0.

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

Met with a vote of 4-0.

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 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:*

and

ii. *The proposed use is a reasonable one.*

Met with a vote of 4-0.

The motion to approve ZBA 21-23 passed with a vote of 4-0.

V) New Business:

A) Update to the Rules of Procedure

Mr. Hagan stated that the back of the agenda packet has a proposed change to the Rules of Procedure, to come more in conformance with the new Land Use Code. He continued that they want to conform to the definition of an abutter stated in Article 28, so that it says the same thing. Currently they are required to go to the other side of a right-of-way or stream for the abutters list, which can make the abutters list quite long. Tonight's case, for example, had a long abutters list because they had to jump across the street. For some other City Boards, that is not a requirement. They want it to be uniform throughout the City Boards. Another section needs to be stricken from this paragraph, which is the 200 feet. They would bring it back for review. "...properties located within 200 feet..." would also be stricken from that Section. If the Board wants, Staff can provide a draft to review. Rather than piecing it together, they will give it to the Board fully rewritten. If the Board wants to adopt that change now, they can.

Ms. Taylor stated that before they vote on this, she would like them to double check what the State statute says, because she does not remember. Mr. Hagan replied that the State statute is referenced in the abutters section. Ms. Taylor stated that her recollection is that the State statute does reference the across the street and across the stream, so she is concerned that when they

have something like this where across the street is more than 200 feet they will not be in compliance with the State statute. Her recollection may be incorrect.

Chair Gorman asked Rhett Lamb if he had any information about that. Mr. Lamb replied that he recalls that the new definition of “abutter,” which applies across the board now, is the State statutory language. He continued that in some cases, the 200 feet requirement is that for each Board there are specific requirements, which might add on to what the State law requires. The definition of “abutter” is, effectively, the State law.

Chair Gorman asked if it would be fair to say that currently, the Board is more stringent than the State RSA, and what they are trying to do is align with it and unilaterally align the Planning Board and Board so that the same requirements are introduced to an Applicant through all those procedures. Mr. Lamb replied yes. He continued that also, there are unique circumstances, like the one they had tonight, where it is more than 200 feet to get across that highway, and thus, to comply with State law might be *more* than 200 feet, even though the City’s line stops at 200 feet.

Ms. Taylor stated that she looked it up, and the State statute, 672:3, defines an “abutter” as “any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board.” She continued that her concern is, again, using today’s example, that if you have a property that is across the street that is more than 200 feet away, they will not be noticed.

Mr. Lamb replied that is not true. He continued that they *would* notice that, even if it were more than 200 feet away, because it meets the definition of “abutter” in the State law. The language Ms. Taylor just read is identical to what is in the Land Use Code. Each Board has its own section in the Land Use Code, and that is where the 200 feet comes in. The Boards that require 200 feet, which include the Planning Board and the Zoning Board, have a section that says there is a requirement to meet the State’s “abutter” definition, plus 200 feet. It is the overlap of the 200 feet plus the State law. The Historic District Commission does not use 200 feet; it just uses the State’s definition.

Chair Gorman thanked Mr. Lamb and asked the Board if there were any more questions. Hearing none, he asked if the Board wanted to vote on this tonight and let Staff move on with the amendments. Ms. Taylor stated that she would like to see the amendment first. Chair Gorman replied that they will put this item on more time, and if Staff gives the Board a draft of the amendment, they will be prepared to vote on it at the next meeting.

B) 2022 Calendar

Chair Gorman asked if there were any objections to the calendar. Hearing none, he asked for everyone in favor of the calendar to say “aye.” The calendar was approved.

C) Board Memberships

Ms. Marcou stated that Mr. Hoppock's and Ms. Taylor's first terms are up at the end of December. She continued that their names are being presented to the City Council, at the Council's next meeting on December 16, as nominations to serve a second term.

Mr. Hoppock asked if he and Ms. Taylor's nominations will have been approved by the time the Board meets in January 2022. Mr. Lamb replied that even if not, members' whose terms have expired continue to serve until they are replaced.

Ms. Taylor stated that the State law changed about six years ago to say that if a replacement has not been found, the member whose term expired have to stay, if they are willing. Chair Gorman replied that he is glad Mr. Hoppock and Ms. Taylor are both willing. He continued that they will be down to a four-member Board, so if anyone knows someone who would be interested, capable, and qualified, they should give names to the Mayor.

Chair Gorman took a moment to thank Mr. Gaudio very much for serving on the Board. He continued that they will miss him. He has been a real asset.

VI) Adjournment

There being no further business, Chair Gorman adjourned the meeting at 7:18 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Reviewed and edited by,
Corinne Marcou, Zoning Clerk

Reviewed and edited by,
Jane Taylor, Board Member