

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, April 4, 2022

6:30 PM

Council Chambers
City Hall

Members Present:

Joshua Gorman, Chair
Jane Taylor
Michael Welsh
Richard Clough

Staff Present:

John Rogers, Zoning Administrator
Corinne Marcou, Zoning Clerk

Members Not Present:

Joseph Hoppock, Vice Chair

I) Introduction of Board Members

Chair Gorman called the meeting to order at 6:30 PM and explained the procedures of the meeting. Roll call was conducted.

II) Minutes of the Previous Meeting – March 7, 2022

Mr. Welsh made a motion to approve the meeting minutes of March 7, 2022. Ms. Taylor seconded the motion, which passed by unanimous vote.

III) Unfinished Business

Chair Gorman asked if staff had any unfinished business. John Rogers, Zoning Administrator, replied no.

IV) Hearings

A) ZBA 22-05: Petitioner, Aaron Wiswell, of 9 White Pine Way, Berwick, ME, requests a Variance for property located at 0 West Street, Tax Map #577-025-000-000-000 that is in the Commerce District, owned by Judy L. Williams, Keene. The Petitioner requests a Variance to permit a building lot consisting of 9,738 square feet in the Commerce District where 15,000 square feet is required, per Chapter 100, Article 5.1.2 of the Zoning Regulations.

Chair Gorman asked to hear from staff. Mr. Rogers stated that this property is on West St., next to where the old Sunoco station was, across from the Keene Inn and Mr. G's Store. He

continued that this was a non-conforming use as well as a non-conforming lot. Previously, it had a two-family home on it, which is not a permitted use within the Commerce District. That structure was demolished in late 2018 and now is a vacant lot. The Commerce District does require a 15,000 foot lot, and though the non-conforming use is gone, the lot itself is still non-conforming regarding lot size. If this Variance were granted, the Applicant would present at the next Planning Board meeting for the proposed site development. The proposed development meets all the other Zoning requirements for setbacks, parking, etc. The Applicant is before the Board for a Variance for the lot size.

Ms. Taylor asked about the changes to the Land Development Code (LDC), questioning if the lot size requirement was the same on the previous Zoning Codes. Mr. Rogers replied yes, that is correct. Lot sizes did not change in the Commerce District with the new LDC.

Chair Gorman asked if the Board had more questions for Mr. Rogers. Hearing none, he asked the Applicant to speak.

Jim Phippard of Brickstone Land Use Consultants stated that he is speaking on behalf of the property owner, Judy Williams, and the Applicant, Aaron Wiswell. He continued that this existing property is located on the south side of West St. as outlined in red on the plan he has shown. This block of properties are all zoned Commerce, which probably happened in the 1970s. Of the 33 existing lots between Pearl St. and the Ashuelot River, 27 are non-conforming due to lot size. That is an indication that all of these lots were created many years prior to the current Zoning Ordinances, making this a legal, non-conforming lot. The original house was created in the early 1900s, and a duplex on the lot was built in the 1920's. Mr. Phippard noted that his father used to live in one of the units in the 1940's. He further noted that the duplex was there for many years before it was torn down. He thinks the demolition Mr. Rogers spoke of was completed in February 2019. The lots were legal at the time they were created and legal when the buildings were built. The lot sizes became non-conforming when this area was zoned Commerce, as West St. is one of the busiest streets in the City, and the Commerce District is very traffic-dependent to support businesses. He believes that is how these lots became non-conforming. The Zoning changed citywide a couple times since then, in the 1980's and 1990's. While he has been in this practice, he has watched many properties becoming non-conforming. As a result, he ends up coming before the Board to ask permission to do different things on those properties.

Mr. Phippard continued that this property is 9,738 square feet and is non-conforming because 15,000 square feet is the required minimum lot size in the Commerce District. The Williams family purchased the property in 1956 with their daughter, Judy Williams, inheriting the property. The property became non-conforming with all of these changes in zoning, but when the Williams purchased it, it was a legal lot with a building already on it, and the duplex was occupied for many years until it became in disrepair and was eventually torn down and removed. Because it is undersized, none of the permitted uses are allowed without a Variance.

Mr. Phippard reviewed the criteria.

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

Mr. Phippard stated that he believes this is true, because this neighborhood is all developed lots, with existing buildings. He continued that some are in residential use and some are commercial use. The lot in question is 0.23 acres. Every other lot on Richardson Court, except for the one at the end, is smaller. All are occupied with single-family, two-family residences, or offices. The lots between Bridge Court and Richardson Court, are all smaller than the existing lot that his clients are asking for permission to build on. The character of the neighborhood has been well established for decades, because these are all older homes and buildings, not new ones that were built recently under the current Codes.

He continued that he believes allowing this lot to be developed is in the public interest. It is currently a vacant lot, and over time, vacant lots can become unkempt and possibly un-mowed, and collect trash and/or become hangouts. It is in the public interest to allow vacant lots to be re-developed, especially if it can be done in accordance with the latest Zoning requirements, which is possible with this property. His clients propose a commercial development on this property that meets all of the other zone dimensional requirements, including the setbacks, lot coverage, and pavement setbacks. Everything complies with the requirements of the Commerce District except for the lot size. The lot size is the critical component. Without a Variance, his clients cannot do anything on this lot, regardless of other uses proposed. It is in the public interest to allow this to be re-developed in a manner consistent with the current zoning.

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

Mr. Phippard stated that the spirit of the Ordinance in the Commerce District is to allow commercial development that is highly traffic dependent. A location like this on West St. is the epitome of a commercial lot. West St. has the highest traffic counts in the city, and highest visibility for businesses. The spirit of the Ordinance would be to build a new business on this property that can comply with the rest of the requirements in the Commerce District. They can do that here.

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

Mr. Phippard stated that this is where you weigh the benefit to the public versus the benefit to the Applicant. He continued that there is no benefit to the public to deny a Variance to allow this property to be utilized, but there is certainly a benefit to the landowner, to allow this property to be re-developed as a commercial interest the way the Zoning calls for.

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

Mr. Phippard stated that he believes this is true. All of the properties in this area are developed, and this is the vacant lot. He continued that the Board is not voting on the development plan he is showing them now, as this is a concept plan for a business, which will go before the Planning Board if his clients get the Variance they need. However, this concept plan shows that even though it is an undersized lot, it can be developed in a manner permitted by Zoning. The Applicant, Mr. Wiswell, owns several Aroma Joes throughout New England and was excited to find this lot as Aroma Joes' buildings are small and do not have seating indoors or outdoors. There are walk-up or drive-up windows to place and pick up orders, and then customers leave the property. With no seating, Aroma Joes is entirely reliant on public access through sidewalks or vehicle traffic into the site. [He showed on the concept plan and stated that] this is a narrow, undersized lot, with one-way driveway entrance, and a customer would drive around the building and place an order, pick it up, then exit onto West St. They propose an approximately 800-square foot building, which meets the front, side, rear, and pavement setbacks, and complies with lot coverage requirements. He expects the Planning Board would approve a plan like this, if his clients are granted the Variance.

Mr. Phippard continued that he does not think this type of development would diminish the surrounding property values. His clients would provide screening with solid fencing and additional landscaping. The property today is un-mowed and unkempt, with trash starting to accumulate. This will prevent that from happening; it would become a well-maintained property and a new business for the city.

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 a special condition exists on the property, created by the Zoning changes. The City created these special conditions inadvertently when they changed the dimensional requirements for the Commerce District or when they zoned this as Commerce, because when the house was built and the property was lived in, it was all conforming. It met all the Zone requirements. Now, this special condition exists, as it does for other nearby properties. Nothing can be done on this property without a Variance, creating a uniquely special condition.

Mr. Welsh asked about the structure that was on the site prior, questioning the undersized lot and if it would have been possible to also make the claim that it was in compliance with all of the necessary setbacks, or was it larger than the permissible setbacks?

Mr. Rogers replied that Mr. Phippard might have information about that, but he himself can say that the prior building probably did not meet the setbacks. He continued that it did not meet the front setback, as it was very close to the sidewalk on West St., and it is questionable whether it met the side setback on the east side. He thinks it met the side setback on the west side.

Chair Gorman asked Mr. Rogers if it is accurate that it would not have even been an allowed use in today's Zoning Code. Mr. Rogers replied that is correct. He continued that the Commerce District does not allow for single-family or two-family homes. That is why all of the other properties, as Mr. Phippard explained, are legal, non-conforming homes.

Mr. Phippard stated that Mr. Rogers is correct; the previous duplex was too close to the front line, too close to the east side line, and had a non-conforming use because residential use is not a permitted use in the Commerce District. He continued that there were several zoning requirements that were non-conforming other than the size of the lot. He believes that because of the zone changes over time, that special condition was created, and because this lot can serve no other purpose without a zoning Variance, that is a difficult situation. A Variance is required to allow any development of any kind on this lot.

ii. The proposed use is a reasonable one because:

Mr. Phippard stated that the proposed use, Aroma Joes, is reasonable because it meets all the other zone dimensional requirements. He continued that his clients have applied to the Planning Board. He continued that they have done a professional traffic report as this type of use in particular, a drive-through coffee shop, relies entirely on the pass by traffic on the street. The traffic engineer estimates 90% of the vehicle trips are generated out of the traffic already driving on West St. Thus, people are not leaving home and driving to Aroma Joes just to get a cup of coffee; they are stopping on their way to work or passing by doing other errands, which is the type of business Aroma Joes relies on. He provided traffic data from several existing Aroma Joes shops to prove that is true. Mr. Phippard continued that Mr. Wiswell owns several Aroma Joes and stated this is a reasonable use at this location with West St. having the highest traffic generation in the city, which Aroma Joes relies on pass by traffic.

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 the same reasons of 5.A. apply to 5.B. This property became non-conforming due to zoning changes over the last 120 years. An older property existed that was legal at the time of creation but, with the more recent changes, it is unfair and unreasonable to the property owner not to be allowed a use for his property. The zoning inadvertently took away those uses; therefore, a Variance is required.

Chair Gorman asked if the Board had questions for Mr. Phippard. Hearing none, he stated that there are no members of the public present, so he will close the public hearing and will reopen it if needed. He asked the Board to deliberate.

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

Ms. Taylor stated that she has real concerns with this, continuing that her comments might simultaneously address the first, fifth, and third criteria. There is a large series of zoning laws, in large part created for good or bad by the NH Supreme Court. There is a long series of cases that began with something that Justice Souter wrote, but was updated in 2006 and 2007. It says, in summary, that if a parcel is not different from all the surrounding properties, the parcel is not considered unique just because it cannot be built on or developed in the way someone wants. It is not distinguished from the other properties. Her concern here, when she talks about the public interest, is that Mr. Phippard's presentation under the first criteria says 27 out of 33 existing lots are non-conforming, which indicates to her that this lot is not unique in its area.

Ms. Taylor continued that she is also concerned with an additional, high-traffic, commercial use. She is familiar with Aroma Joes and they put out a very nice product, however, traffic is already a nightmare on West St. She is concerned with how much of a public interest is the traffic that would be generated going through that site. She continued with her concerns with the stacking of vehicles while people are waiting for their orders, especially during high traffic times, and potentially adding another left-hand turn out of that particular site. She realizes that traffic is a Planning Board issue, but she has concerns that it would not be in the public interest to add another potentially high-traffic and traffic conflict site.

Mr. Welsh stated that Ms. Taylor raised some good points, and the thought of making a left-hand turn off the site is something he would think twice about, depending on the time of day. He continued that one of the things he is hopeful about is that he thinks the Planning Board will look at this closely, and with reference to the traffic study Mr. Phippard mentioned. Regarding the public interest and what is contrary to it, he thinks about why the Board is looking at this proposal in the first place. He thinks it is because the building was demolished and if it had not been, then they would be looking at rebuilding an existing, non-conforming structure. He thinks demolishing the building was in the public's interest. He thinks this is the best solution to their situation of looking at new construction on this otherwise very difficult site, and Mr. Phippard presents a good argument for public interest.

Chair Gorman stated that he looks at it in the complete opposite direction than Ms. Taylor does when it comes to the traffic count as it is his opinion that the traffic already exists. He does not disagree that it is less than favorable to try making a left-hand turn off of this property, but the fact remains that it is a lot and it is entitled to some form of use. He thinks the Court would agree with that, however, the City's zoning does not permit a use. It will end up being *something*, and he thinks that this use has only a small amount of traffic increase. To Mr. Phippard's point, he does not think people are making Aroma Joes a destination. It is a drive-by activity, so it complements the already high, difficult to manage traffic count. Regarding the uniqueness, he agrees with Ms. Taylor that it is not unique in its size, but by way of not allowing a use for it, you are separating it from everything else, and he thinks that is where the injustice

arises. The fact that every other similar property has a use, and this one does not, makes this situation unique.

Mr. Clough stated that West St. is on the Ten Year Plan for the NH Department of Transportation (NHDOT) and a major reconfiguration has been projected, including a median down the middle, which would create very limited access in very specific spots. He continued that when they say "Ten Year Plan," literally, it might be ten years from now when NHDOT would actually do this construction, so it is still early, but it has passed a few hurdles. That potential reconfiguration would mitigate many of the turning issues. He agrees that doing a left-hand turn into or out of that, from the wrong lane or the wrong direction, would be a nightmare. He continued that they need to be aware that that is an issue on the whole street as this lot is one of many. Many times, trying to pull into the Savings Bank of Walpole, he waits so long he loses patience, which is not good, either. He concluded that he can see the traffic concerns.

Chair Gorman stated that he thinks the only place you cannot do a left-hand turn is the parking lot for the plaza where Panera Bread is. Mr. Clough replied yes, there is a curb cut there so drivers can only turn right, and there are times, especially close to Starbucks, when you want to be able to go the other way. Chair Gorman stated that he agrees that this concern exists on the whole street. He continued that there probably is a way to correct it, but it would involve a redesign of the street. He does not think that eliminating this one use of Aroma Joes, they are coming anywhere near to solving the problem, or that by allowing the use, they would be creating a new problem. He thinks the size of the building is beneficial here, given that it will be small and does not allow seating, so it would just be transient customers coming and going.

Ms. Taylor stated that her point is that it is a matter of degree, in that it is an already terrible traffic situation, in her opinion, and she thinks that the Aroma Joes use would make it worse. She continued that it is not a matter of the building or building size.

Chair Gorman stated that he thinks this discussion so far has addressed other criteria, but they will continue their review.

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

Mr. Welsh stated that he is convinced that the spirit of the Ordinance, as the Applicant has stated, is to encourage vehicular traffic and vehicular use, and this use is consistent with that, since it is a drive-through. Chair Gorman stated that he agrees.

Ms. Taylor stated that she cannot cite pages or recite chapter and verse, but, the whole concept of increasing vehicular use is against what the Comprehensive Master Plan says, regarding becoming a more walkable city. She continued that she is not so sure this application is within the spirit of the Ordinance.

Chair Gorman stated that he thinks that the fact that it is the Commerce District, and this is a commercial activity, is a fair point and it probably meets the spirit of the Ordinance other than the size of the lot. He continued that at the end of the day, if the lot was bigger, the Board would not be discussing the amount of traffic it was going to generate.

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

Ms. Taylor stated that she thinks it is a detriment to the public that outweighs the benefit to the property owner. She continued that again, she goes back to the anticipated traffic use. She is not a traffic engineer, but she cannot guarantee that 90% of Aroma Joes traffic will be from people already on West St.

Mr. Welsh stated that he certainly sees the benefit to the Applicant. He continued that regarding detriment to the public, if measured by degree of compliance with the Zoning Ordinance, this strikes him as more in compliance, as a whole, than the vacant lot or the lot as it used to be. This use would move the property in the direction of more compliance, which, one could argue, is a direction that is of benefit to the public.

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

Chair Gorman stated that strictly from a value standpoint, he thinks that putting a finished property on site, if anything, would raise the values of surrounding properties, as a vacant lot does not help surrounding values since a newly constructed, properly planned development should raise values in a Commerce District. He thinks it will have a positive effect.

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 because:*

Ms. Taylor cited a portion of *Garrison v. Town of Henniker*, a 2006 case: “*To demonstrate unnecessary hardship, applicants must show that the zoning restriction as applied to their property interferes with the reasonable use, considering the unique setting of the property in its environment.*” She continued that a later case says, “*They must demonstrate that the proposed site is unique compared to surrounding lots.*” She thinks it is a threshold issue. This lot is clearly not unique in comparison to its surrounding lots, demonstrated by the Applicant. Whether it is reasonable or not is something that, to her, becomes a secondary inquiry, and she is not sure that it is a reasonable use.

Mr. Welsh stated that regarding reasonableness, it is a permitted use, and a way of making a permitted use out of that small drive-through. He continued that he cannot imagine how you could locate any of the other permitted uses on a structure of that size on a lot of this sort. He is convinced that it is reasonable and that 5.A.i. is also satisfied.

Chair Gorman stated that he thinks some of his earlier commentary touched on his stance on 5.A. He continued, adding that the use is reasonable, given that if the lot were a few thousand square feet bigger, Aroma Joes could be built tomorrow.

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.

Chair Gorman stated that he has no struggle with 5.B., since there is no use allowed in the Zoning Code for this property without a Variance. He continued that he thinks it is safe to say that 5.B. is satisfied, in that a Variance would be necessary for anything other than keeping it a vacant lot.

Ms. Taylor stated that she is not convinced that if this use were not allowed, there would not be another use that might be reasonable. She continued that she cannot say affirmatively that just because there is one proposal she does not believe would be reasonable that no other reasonable use would be allowed.

Chair Gorman replied that a Variance would be required for any use. Ms. Taylor replied yes.

Mr. Welsh made a motion to approve ZBA 22-05. Mr. Clough seconded the motion.

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

Met with a vote of 3-1. Ms. Taylor was opposed.

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 3-1. Ms. Taylor was opposed.

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 because:*

Met with a vote of 3-1. Ms. Taylor was opposed.

The motion to approve ZBA 22-05 passed with a vote of 3-1. Ms. Taylor was opposed.

V) New Business

Chair Gorman asked staff if there is any new business. Ms. Marcou replied that the only item is a reminder that the spring 2022 Planning & Zoning Conference is two free, online conferences, Saturdays April 30 and May 7, from 9 AM to 12 PM. She continued that she emailed the Board the details, so they can register if they would like. Ms. Taylor requested the email be resent to her; Ms. Marcou replied yes. She continued that the online sessions will also be recorded, for people who cannot make it and would be interested in reviewing them at a later date.

VI) Communications and Miscellaneous

VII) Non-public Session (if required)

VIII) Adjournment

There being no further business, Chair Gorman adjourned the meeting at 7:14 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Reviewed and edited by,
Corinne Marcou, Zoning Clerk