



Zoning Board of Adjustment Meeting
Monday, October 2, 2017, 7:00 PM
City Hall Council Chambers

MINUTES
Approved 11/6/2017

Call to Order by the Chair

Vice-chair Kier called the meeting to order at 7:00 PM.

I. Attendance/Roll Call

Present & Participating: Richard Collins, Carolyn Towle, James Petrin, Abigail Carman, Tracy Pope, Patrick Howe

Absent: Michael Hurd

City Staff:

II. Minutes of Previous Meeting - August 7,2017

Motion: To approve the minutes

Made by: Mrs. Pope **Second:** Mr. Collins

Vote: Mrs. Towle abstained; all others voted in favor – motion carries

III. Old Business

There was no old business to discuss.

IV. New Business

Mrs. Kier asked Mr. Howe to sit in for Mr. Hurd for applications #ZO 2017-00019, 00020 and 00021.

- A. (ZO 2017-00019) Todd & Pam Johnson, 84 Pleasant Street:** Application for a variance from Sect. 22-1 & 22-387.1 of the City Zoning Ordinance to permit a 535-sq. ft. residential unit at **84 Pleasant Street**. Tax Map 120, Lot 98. Zoning District: MU

Mrs. Kier read the public notice. Mr. McCrory asked Mrs. Kier to read the second public notice so that both cases could be heard simultaneously, which she did.

Planner's Report

Mr. McCrory said the Board has before it a number of applications that pertain to the same property. He said there is some logic behind it and that it stretches back almost a decade. He said he had received an inquiry regarding a charitable game room in a commercial space adjacent to the Pleasant Restaurant. In reviewing the property file in preparation, he found some upper-story apartments that had been properly vetted through the planning process and also the building permit process and satisfied safety

code. Unfortunately, he found no record of variances that were required by the Planning Board at the time. In order to clear the record in preparation for further permitting, the two variances are now before the Board.

The first variance requests approval for an apartment that is less than the required 550 SF (it is 535 SF).

The second variance is for parking. A portion of the parking that was needed (1.5 spaces per unit) was going to be off-site. This required a variance from the parking requirements at the time to do that. Mr. Johnson told Mr. McCrory that he doesn't need the off-site spaces that he currently leases; he can meet all of his parking needs on his own property. Mr. McCrory suggested he apply for a variance from the 1.5 space/unit requirement, which is the application before the Board here.

The Board had no questions for Mr. McCrory at this point.

Applicant's Presentation

Mr. Johnson said the apartments are small and rented to single people. He has not had any problem with parking and hasn't used any of the off-site parking in the last ten years.

Mr. Johnson said he is supposed to have six spaces and he has four. All of the spaces are off-street. There has never been any problem with snow or rubbish removal.

Of the four apartments, only one is below the 550 SF standard. They were put in in 2009.

The Board had no further questions for the applicant.

Mr. McCrory read the abutters roll. Mrs. Kier asked if anyone present would like to speak to the application. No one did, so Mrs. Kier closed the public hearing and called for comments from the Board.

Mrs. Pope said she thought it was a case of the paperwork having been lost.

Mr. McCrory said that he has seen in the past where building permits had been issued without checking to see if all other requirements had been met. He said the department is much more careful about that now.

Motion: To approve the Application for a Variance from Section 22-387.1, Residential Units in the Mixed-Use District, to permit a 535 SF dwelling at 84 Pleasant Street (Tax Map 120, Lot 98) with the following recommended conditions of approval:

1. The proposed structure shall be constructed substantially in accordance with the information provided by the applicant in the Application for a Variance for ZBA Case No. ZO 2017-00019 and testimony during the public hearing for said case.
2. This variance shall be recorded in the chain of title.

Made by: Mrs. Kier **Second:** Mrs. Towle

Discussion:

1. **Would granting the variance be in accord with the public interest?** Mrs. Towle felt granting the variance would correct the wrong of losing the documentation and does right by the owner.
2. **Would granting the variance be consistent to the spirit of the ordinance?** The purpose is not to negatively impact the surrounding properties or to overburden a single property with too many people on it. However, it seems like this has been the case for a while and it had had some kind of approval from at least the Planning Board prior to this. Mrs. Kier said it definitely keeps within the spirit for these reasons.
3. **Would granting the variance, as requested, do substantial justice?** Mrs. Pope thought it would do substantial justice because she felt the applicant had tried to do everything correctly in the past. Now 10 years later something has come up and we can't find the paperwork, yet it has been alluded to in the Planning Board minutes. The benefit to the public outweighs and there's no threat to public safety or welfare. This apartment has been there for 10 years. Mrs. Kier agreed.
4. **Does the proposed use maintain the value of surrounding properties?** Since the applicant isn't making any changes to the property, it would not affect the value of surrounding properties.
5. **Would denial of the variance by literal enforcement of the ordinance result in unnecessary hardship to the owner under either condition below?** The proposed use and the request are reasonable.

Vote on the motion: Unanimous in favor

B. (ZO 2017-00020) Todd & Pam Johnson, 84 Pleasant Street: Application for a variance from Sect. 22-533 of the City Zoning Ordinance to modify the parking requirements for **84 Pleasant Street**. Tax Map 120, Lot 98. Zoning District: MU

Motion: Approve the Application for a Variance from Section 22-533, Parking Requirements, to permit one (1) parking space per dwelling unit at 84 Pleasant Street (Tax Map 120, Lot 98) with the following recommended conditions:

1. The proposed structure shall be constructed substantially in accordance with the information provided by the applicant in the Application for a Variance for ZBA Case No. ZO 2017-00020 and testimony during the public hearing for said case.
2. This variance shall be recorded in the chain of title.

Made by: Mrs. Towle **Second:** Mr. Collins

Discussion:

1. **Would granting the variance be in accord with the public interest?**
Mrs. Towle said it corrects a wrong where we have no paperwork trail.
2. **Would granting the variance be consistent to the spirit of the ordinance?** Mrs. Pope felt that it is. The City is looking at parking in this area and the Board has

previously granted a variance to allow 1 parking space per unit to another building undergoing renovations in this area. This is not an unreasonable request. It also has a proven history that in the past 10 years the applicant hasn't needed more than one parking space per apartment.

3. **Would granting the variance, as requested, do substantial justice? Does the proposed use maintain the value of surrounding properties?** It was agreed that it would for reasons stated above. The value of the surrounding properties isn't affected at all. (The applicant) is using the same space he currently uses.

4. **Would denial of the variance by literal enforcement of the ordinance result in unnecessary hardship to the owner under either condition below?** The hardship would be requiring the applicant to secure the two extra spaces when he doesn't actually use them or need them. Over the past 10 years, occupancy has tended to be one person per unit. It isn't necessary to have one and a half spaces.

Vote on the motion: Unanimous in favor

C. (ZO 2017-00021) Berkess Carroll & Carla Prinn, 28 Barnes Street: Application for a variance from Sect. 22-387 to permit a charitable game room at **84 Pleasant Street**. Tax Map: 120, Lot 98. Zoning District: MU

Mrs. Kier read the public notice. Mr. McCrory read the abutters roll.

Planner's Report

This is a commercial use in a space adjacent to the restaurant (but not part of the restaurant). If it were part of the restaurant, it might be considered an accessory use and the variance would not be needed. As a stand-alone use, it is not covered in the zoning ordinance. We know that at times churches have charitable bingo games; fraternal organizations have poker nights that may be for a charitable purpose, so the idea is not unreasonable it's just not covered as a stand-alone use in the ordinance. Gaming is regulated by NH state law (Gaming Commission). The application provides details of what gaming will be provided.

Mrs. Kier asked for elaboration of the term "charitable". Mr. McCrory said that according to state law, over 33.5% has to be donated to a charitable cause and that has to be identified. Additional questions were deferred to the applicant.

There are no other charitable game rooms currently in the City. There are occasional tournaments.

The staff, including the police chief, had a discussion on this application. There were no objections. The hours were not part of the discussion.

Mrs. Kier asked what would be required if the applicants wanted to add more tables. Mr. McCrory said in his mind, this is a self-limiting proposition – they have a certain space that can have a certain occupancy.

There were no more questions for Mr. McCrory.

Applicant's Presentation

Berkess Carroll presented the application. He said maximum capacity is 70 seats. Parking will be on-street and in two municipal lots within walking distance. He said “most people carpool”.

Mrs. Kier asked if there was any concern for the hours of operation and the apartments upstairs. Mr. Carroll said no, the parking is on the side and on-street parking. It doesn't affect the tenants in the building.

There won't be any music, only conversation from the people playing cards.

Mrs. Towle asked for clarification of the location relative to the restaurant. Mr. Carroll said it would be in the former screen-printing place. It has its own entry door right on Pleasant Street.

Mr. Howe asked what constitutes “high stakes”. Mr. Carroll said he would consider it a 10-20 game, a 25-50 game. NH has a \$4.00 max bet law. Mr. Howe, “So it has to do with the bet size, not the pot size?” (The application states there is a \$4.00 max per bet.) Mr. Carroll said there is a \$400 max per day. “One cannot buy more than \$400 for the whole day. Most of the tournaments are going to be \$120 max tournament. You just buy in and you get chips that have no value and you play the tournament. All the money goes into a prize pool. If we get 50 people in a tournament, \$120 per person would be \$5,000. You have to take away the 33.5% for the state; half of that would go to first place, then you divvy it down to the players. It is basically Texas Hold 'em.”

Mrs. Towle asked how the state lottery commission would get their money from the applicant on a weekly basis. Mr. Carroll said, “Every night you do an audit. They have cameras anywhere that cash is transacted – there's only two places that cash is actually transacted – you don't play at the table for cash – you go to the cash cage, which is all cameras, they /you have to see everything – cameras watch everything – there's no room for error with the state – they're on you, they DVR it – they have to be able to live-watch it – it's a live feed – they have access to everything, and then they just take their commission. You do an audit every night and – I'm not really sure how they take it, but they control it.”

Mrs. Towle asked, “How does that work into a 501(C)?” Mr. Carroll said, “We have charities lined up – we pick the charities - so our money goes to the charity and then the state gets their money. They don't take a cut or anything like that, it goes right to the charity. We only pay the state for the fees and the licensing and for the dealer badges. To my knowledge, 33.5% goes directly to the charities. We have to have them lined up a year in advance.” He wasn't clear how the charities actually get their money.

Mrs. Towle asked Mr. Carroll if he would include Keno (if it becomes available in the City). Mr. Carroll said he didn't have space for it.

Gaming would be held Tuesday through Saturday, same days that the restaurant is open, between the hours of 1:00 PM to 1:00 AM.

He said he is hoping the restaurant will provide food and drinks. Mrs. Pope asked if the gaming space has access to the restaurant. Mr. Carroll said there is none at this time. If this application is approved, they will make an access from the bar into the staging area.

Mrs. Pope asked Mr. McCrory if the access to the restaurant was provided, would it make the gaming an accessory use to the restaurant? Mr. McCrory said it wouldn't because they are two separate entities.

Mrs. Kier asked if the restaurant would need to alter their liquor license in order to provide alcohol to the gaming use. Mr. McCrory said that if it is required, it will be done.

Mr. Howe asked if proceeds from the sale of food and liquor would go to charity. Mr. Carroll said it would just go to the restaurant.

Mr. Collins asked how big the building is, because he wasn't clear how that many seats could fit into it. Mr. Carroll said that the building inspector had looked at it and said "it was perfect for it". He said the fire department had also seen the space. The departments did not give him letters stating as such. Mr. Carroll said he had been told to put up two additional LED-lit exit signs and change the back door so it opened out instead of in.

Mr. McCrory said these departments offer a preliminary assessment and that's what this was. They walked the building and identified what issues they saw. They don't act on any of the permits until after the zoning is done. He said he could confirm what the applicant had just said.

The age limit for poker is 18, according to the applicant. The limit for alcohol is 21. Mr. Carroll said he would have "under-18 wrist bands". He said this is more for a "30+ crowd – there's not a lot of kids in there. But we do have all the amenities to make sure they're not drinking."

The Board had no further questions for the applicant.

Mrs. Kier asked if any abutters would like to speak on this application. Mr. McCrory read the following email into the record:

We are owners of property located at 88 Pleasant Street, Claremont, NH. I am emailing you regarding the application for a gaming room at 84 Pleasant Street. I am inquiring about type of gaming, age of gamers, hours of operation, parking situation, the impact on my tenants. Basically, the security and sensitivity to the needs of the neighbors. Thanking you in advance for you time, Tom & Annie Bellofatto Unity Springs Road

Newport, NH.

Mr. McCrory said he had responded to the email with the information that was provided in the application. He said Ms. Bellofatto did not contact him again after his response.

Mrs. Kier asked Mr. Carroll if he was planning to provide any security – bouncers, etc. Mr. Carroll said, “It’s not really that kind of a crowd. If it makes everyone feel better I can hire someone like that, but it’s not really that kind of a crowd. All the money that’s going to be there is going to be set into the farthest back corner of the building; there’s no access, there’s no view of money anywhere.”

Mrs. Towle said, “I think you’re going to be surprised. What kind of security are you using to secure the location with?” Mr. Carroll, said, “A floor-mounted safe, a drop-box – all the money is dropped right in there – there’s no access to getting in to the money. There’s required video cameras everywhere there’s money in play. Both doors will have cameras.”

Mrs. Towle asked, “How are you going to secure your doors? Your entry doors?” Mr. Carroll said he planned on putting steel caging on the casing on the back door. He said the front door is a steel door that is secure already. The office where the money is kept is in the furthest corner of the building. You would have to be in the building for a long time to get in there.”

Mr. Petrin said he was still concerned about the parking based on how hard it is to get a parking space when the restaurant is open. Mr. Carroll said he could ask his regulars to use the municipal lot. He also said he would be willing to approach the owner of the lot across the street about leasing some spaces in that lot. He also said he could talk to the bank about using their spaces when the bank is closed. He said he is going to open at 1:00, but he won’t run the tournament until 5:00. He said he knew parking was going to be an issue, but he thought it would work out “fine”.

Mrs. Kier asked Mr. McCrory what he would recommend for the number of spaces. Mr. McCrory said it could be researched. He said currently commercial uses in the downtown mixed-use district rely on-street parking and municipal lots. It’s when we get into residential parking where people need their spaces overnight or in the winter when there are parking bans on the streets (Mr. Carroll said he has a plan to alter his hours in the winter when the parking ban is in effect), that’s when it becomes an issue of knowing where the spaces will be. He felt the existing parking facilities would be sufficient.

If this variance is approved, it will stay with the land regardless of ownership so long as it remains in continuous use. The variance ceases if the use is abandoned for 12 months.

Mrs. Kier asked the Board for their thoughts.

Mr. Petrin said he thought it is a good idea, but he remains concerned about the parking. He said it is “quite hectic” there.

Mr. McCrory reminded the Board that they are just looking at the use. He said parking may be a part of one of the determinations, but not a sole reason.

Mrs. Kier said the hardest part for her is that there is nothing in the ordinance for it, which makes it prohibited. She felt “this is a very large distinction to make and kind of precedent-setting in a way.”

Mrs. Towle said that whenever she has any kind of questions, she likes to go for a site visit. She said there is no tentative floor plan and some of her questions have led her to want to look at the site. Mr. Petrin agreed.

Motion: To continue this application to November 6th and conduct a site visit before the meeting.

Made by: Mrs. Towle **Second:** Mr. Petrin

Vote: Unanimous in favor.

Mr. Carroll thanked the Board for what he felt was a good meeting.

Motion: To take a 5-minute recess.

Made by: Mrs. Kier **Second:** Mrs. Towle

Vote: Unanimous in favor

D. (ZO 2017-00018) Ricky Chambers, 12 Sunset Street: Application for a variance to permit construction of a porch in the front setback at **12 Sunset Street**. Tax Map 154, Lot 116. Zoning District: B2.

Mrs. Kier read the public notice and asked for an abutters roll call. Mr. McCrory read the roll.

Mrs. Kier asked Mrs. Pope to sit in for Mr. Hurd on this application.

Planner’s Report

Mr. McCrory said the need for a variance was discovered when the applicant applied for the building permit. The deck would be within the front setback. Mr. McCrory said he did a site visit. The map in the packet came from DPW. It provides data on the right-of-way for Sunset Street. Mr. McCrory determined that the house is approximately 35 feet from the right-of-way. The porch would extend 8 feet from there and be 25-27 feet from the right-of-way.

This lot is in the B-2 zone (which was designed for commercial development) and requires a 50-ft front setback. Hence the need for the variance. He said the house is an existing nonconforming structure.

Mrs. Kier asked if the area was zoned before all the other houses on the street were built because they all seem to be close to the road.

Mr. Mr. McCrory said he has been finding a lot of cases and neighborhoods like this one. He said it appears there is need to do an assessment to determine if these properties are properly zoned.

Mrs. Pope said that if this neighborhood hadn't been included in the B-2 zone, it would probably be an R-1 or R-2 zone and the setbacks would be "perfectly fine".

The proposed porch would fit without a variance if the setback was 25 feet instead of 50 feet.

Applicant's Presentation

Mr. Chambers said he thought everything on the application was fairly straight forward. He said he has contracted with a professional builder to do the job. He said he wasn't aware of the situation until Mr. McCrory went through the measurements with him. He questioned how the house was built without a variance.

Mrs. Towle asked how many other houses on the street have front porches. Mr. Chambers said one neighbor has a carport. There are some variations to what they were discussing. There are other structures that are located in the setback.

There were no other questions for the applicant.

Mrs. Kier asked if any abutters wished to speak – no one was present. She asked Mr. McCrory if any emails had been received. There were none.

Mrs. Kier closed the public hearing.

Motion: Approve the Application for a Variance from Section 22-229, Yards in the Business Two Zoning District, to permit a roofed deck within the front yard setback at 12 Sunset Street (Tax Map 154, Lot 116) with the following conditions of approval:

1. The proposed structure shall be constructed substantially in accordance with the information provided by the applicant in the Application for a Variance for ZBA Case No. ZO 2017-00018 and testimony during the public hearing for said case.
2. The applicant shall obtain and receive all necessary permits and approvals as determined by the Local, State and Federal governments. No work is permitted to commence until such permits, or appropriate statements of compliance with Local, State and Federal regulations, are submitted and approved by the Planning and Development Department.
3. This variance shall be recorded in the chain of title.

Made by: Mrs. Pope **Second:** Mr. Petrin

Discussion:

1. Would granting the variance be in accord with the public interest?
Mrs. Pope said the hardship is in that this development/neighborhood was built before the B-2 zoning was applied to this area, so the setbacks would have been approved in a residential zoning area. However, that has changed and it's now the business two district and those setbacks are totally different. The B-2 setbacks were created for bigger businesses and commercial use and not residential use. She believed that makes a

hardship for the applicant while his building this front porch is going to be similar to other houses in this development that have structures in the setback.

Mrs. Kier said these points speak to spirit of the ordinance, it would do substantial justice; she didn't think it would devalue any of the surrounding properties. Mr. Petrin felt the porch would make the property better. Mrs. Kier felt the hardship is in having a residential development within a commercial zone.

2. Would granting the variance be consistent to the spirit of the ordinance?
3. Would granting the variance, as requested, do substantial justice? (Is the loss to the applicant outweighed by the benefit to the public if the variance were denied; would granting the variance threaten the public health, safety or welfare?)
4. Does the proposed use maintain the value of surrounding properties?
5. Would denial of the variance by literal enforcement of the ordinance result in unnecessary hardship to the owner under either condition below?

Vote on the motion: Unanimous in favor.

E. (ZO 2017-00017) Ian & Tonia Gates, 8 Bessie Avenue: Appeal of an administrative Notice of Violation at 8 Bessie Avenue. Tax Map 129, Lot 66. Zoning District: R1.

Mrs. Kier read the public notice and asked for an abutters roll call. Mr. McCrory read the roll. Mrs. Kier asked Mrs. Pope to sit in for Mr. Hurd for this application.

Planner's Report

Mr. McCrory said that about 18 months ago, Mr. Gates had applied for after-the-fact variances for expansion of a garage and construction of a deck, both in the setback. Both applications were denied. Mr. Gates' request for a rehearing was not granted.

Over the ensuing months there was some correspondence with Mr. Gates about bringing things into compliance. Just recently the garage has been brought into compliance, so that violation has been abated. The deck has not been abated. Both the garage and deck were on the Notice of Violation.

This hearing is for the Board to determine if City staff made the right call, interpretation of the zoning, or any administrative process. Mr. McCrory said he consulted the City's attorney about the parameters of the appeal. The parameters are to focus on the Notice of Violation (the letter from August 9th). The actual substance of the variance case is subject to debate. It is only the Notice of Violation itself.

Mrs. Kier said the applicant is claiming that the adjacent lot is not a buildable lot based on our ordinances, so therefore this ordinance shouldn't be applicable to this area. She said we haven't had that as a reason not to uphold an ordinance before. Mr. McCrory said no, it is all subject to the property boundaries themselves, regardless of the validity of being able to build on an adjacent lot.

Mr. Howe asked how it could be that the garage was abated and not the deck. Mr. McCrory said the piece that had been added to the garage was removed. (The garage is an existing nonconforming structure.)

Mrs. Towle said she and some other Board members had been to the site to see the structures.

Mrs. Pope said, "Right now we should be voting on the administrative decision that you (Mr. McCrory) made to send the letter that went out to him (Mr. Gates).

Mrs. Pope asked if this appeal was granted, could Mr. Gates come back with a variance application with the hardship that the deck has been there for eight years.

Mr. Collins said the problem was not knowing where the boundaries of the property are. Someone asked if the lot had been surveyed yet. Mr. McCrory said it is immaterial how the case played out – it was denied. A new variance could be presented if it is a substantially different application. The City attorney said that the Board should not hear anything that pertains to the original variance application. If there is a way to remedy the setback issue, that's a solution. As it stands now, variance was denied and the deck is not in compliance.

Applicant's Presentation

Mr. Gates said he understand what this part of the process is for, that the Board could not rule on the variance because they have already gone through that process. He said he had intended to come with a survey that is complete. "I have a contract ready to execute for that purpose, but I didn't execute it once I heard that there was a potential for denial. I didn't feel it was prudent to make that investment at the time, until potentially now that I know once this decision is made there is a way to remedy it with a survey. Absolutely you guys did what you were supposed to do before, correctly, and as I said, I have a contract here that is ready to execute with a surveyor out of Keene. So as long as the Board is going to allow an appeal on the variance for the side deck once I can present this information for the property boundary lines, then I will move forward with that."

Mrs. Kier said, "What you will have to do going forward is, after this, however this goes, he would be able to submit a new application with, as long as there was substantial difference from the original." She asked Mr. McCrory to confirm that.

Mr. McCrory said the original application was for a deck in the setback. The new application will be for a deck in the setback, so in his opinion, it's not going to be substantially different.

Mrs. Kier asked if it would be substantially different if we learn that the setback is not where we originally thought it was?

Mr. McCrory said he and Mr. Gates could look at the survey once it's done, but looking at the site and any reasonable indication of where the property boundary is – the house was built up to the edge of the setback. And the deck is fully within that setback. It may mean a smaller deck, it may mean altering the property boundary. But he said he couldn't direct where this could or should go. The option of obtaining a survey is closed for this case. We

have reached the limit of administrative appeals and due process at the City level. It can go to superior court.

Mrs. Pope said that in her mind, having survey is new information that they didn't have before. Mr. McCrory said that would have been a great thing to present in a rehearing. And that opportunity has been denied. And one cannot apply for the same variance twice.

There were no further questions.

Motion: To uphold the administrative decision in reference to case #ZO 2017-00017, the appeal of the administrative decision.

Made by: Mrs. Pope **Second:** Mrs. Towle

Vote: 4 in favor, 1 opposed – motion carries

V. Communications

The Board has received the latest issue of *Town and City* magazine. The annual conference is coming up, November 15th and 16th in Manchester, NH. The City will help cover the cost of the registration, but not any hotel fees.

VI. Other Business

There was no other business to discuss.

VII. Adjournment

Motion: To adjourn the meeting

Made by: Mrs. Pope **Second:** Mrs. Towle

Vote: Unanimous in favor

Respectfully submitted,

deForest Bearse