

ZONING BOARD OF ADJUSTMENT
JULY 18, 2013

PRESENT: Wendy Freeman, Chairman, Becky Doyle, Marianne Graham, David Lage, Clark Baldwin, Joanne Meshna

The meeting was called to order at 7:30 p.m. at the Town Office. Clark was appointed as a regular member for this evening's meeting.

7:30 p.m. The Zaremba Group for Dollar General Stores - Continuation of public hearing for a variance application:

The hearing was continued from June 13, 2013. The Board had begun deliberations at that meeting and continued them tonight.

2. The use is not contrary to the spirit of the ordinance:

David referred to the applicant's Variance Elements Introduction, p. 11, and that the spirit and goal of the Zoning Ordinance is to relieve the pressure of growth on the Rural District, provide for greater density in the Village District, promote proper water quality discharge and provide for private sewage. He noted that the project would help in those areas. Further he stated that the ordinance does promote the Village District as the business area but within parameters of 1,500 square feet which also has to be taken into account.

Wendy stated the ordinance is more about establishing the village concept with small businesses intermingled with homes to create that New England small village feel and that a 9,100 square foot box store does not fit into that concept let alone given the historic nature of Village District II. She stated most of the non-conforming issues were there prior to the Zoning Ordinance and the Master Plan goes into discussion about improving the district. She commented if the project improved the district she would be all for it but that it was not going in the right direction from a historic district perspective. She added she had not seen any amendment to change the 1,500 square foot requirement to increase the size and by allowing the variance the Board would be essentially creating a new ordinance.

Marianne stated she appreciated the fact that the applicant has made offers to improve the property. She noted there is already an EPA grant to work on the stream on the abutting property and that there are other options for remediating the property.

Wendy stated a majority of the pollution comes from Route 124 and that runoff from the highway is the primary reason for grant; it didn't have anything to do with the school.

Marianne noted this is the historic district and the intent of the Master Plan is to create a community where you live and work (smart growth). She stated that putting in such a large building does not fit in a district that is promoting residential dwellings in a walking community.

David noted it is contrary to the spirit of the ordinance.

Becky commented that if the application is allowed in Village District II, it opens the door for other opportunities like that and the rural character of the town is lost; this is not consistent with the spirit of the ordinance.

Wendy stated Village District II needs some work but this box store is not what it needs.

Marianne stated it goes against the spirit of the ordinance in that district.

Becky noted a separate historic village district was set up and questioned if it is was not the intent also to preserve it. Also, she stated from 1,500 square feet to 9,000 square feet is a big jump.

Clark noted the Article calls for small retail only.

Marianne stated the nature of a school building is part of a community and part of supporting a village concept, which is different than a large box store.

3. Granting the variance would do substantial justice:

Wendy stated the existing building is a problem and has to be torn down and remediated; it is not reusable. Further she stated something new needs to be built that can be financially viable.

David noted substantial justice will be done in that the building will be taken down; however, substantial justice for the variance means not only taking in down but putting it back up again.

Wendy stated the removal of the building, remediation and clean up of the site and reducing the size of the leachfield is positive.

Marianne stated there is no substantial justice to other property owners in the district but it does get the Mascenic School Board off the hook for a lot of issues.

David stated the applicant pointed out that this would be a business paying property taxes to the town. Further he stated that the Board needs to look at what happens there and what replaces it.

Becky stated it is an economic benefit to the town.

Wendy questioned if the Board was giving too much away to get a little bit.

David commented the project is equivalent to four new homes in town but would not call it substantial justice.

Wendy noted the handbook states "any loss to the individual which is not outweighed by a gain to the general public is an injustice".

David noted there is no loss to the School Board as they had it two years ago and they still have it.

Clark stated that the School Board is us.

Wendy noted that the handbook also states "the court will examine whether the proposed development is consistent with the area's present use"; cites court case Malachy Glen Associates v. Chichester, 2007. This is not remotely close.

Clark noted there is no present use.

Wendy responded that the present use is a school or vacant.

Wendy noted if the owner loses more than the general public gains then it is an injustice to the applicant.

David stated the gain to the public is maintaining the strong character of the Village District.

Wendy noted if the Board grants this, the School Board and Dollar General are going to come out far ahead of the general public; the school gets to sell the building.

David stated the other reason they gave for approval is that they would sell it and the School Board would not have to incur maintenance costs, and if they did not get approval, they would have to get a warrant article for demolition.

Marianne stated the Board needs to look at substantial justice for the community; we all lose as a community if we lose the sense of downtown in the historic village district and lose the opportunity to create a community and develop it better.

David stated we need to look at what it is--this is a rural town and he did not see what the town would gain by making an exception for that size of a store. It is not going to be outweighed by having it there.

Clark stated he could not deny on the basis of 3.

Becky stated it was hard to interpret and hard to make a determination in either direction.

4. The proposed use would not diminish property values:

Marianne stated she would have liked to have had some information presented.

Wendy noted the Board did hear from three different real estate agents.

Becky stated there was no hard data to support their standing.

Wendy stated the Board had not received anything from Dollar General showing that it is not going to diminish property values. Further, the applicant had said once this goes in then other adjacent homes could become commercial properties and thereby increase their value. Wendy continued that this defeats the purpose of the Village District and Master Plan and if the box store goes in there we are going in the opposite direction of where the town wants to go. She stated by approving the application they would be degrading what the town already has.

David stated if the property to allowed to decay, the values will go down.

Becky stated the proposal is not in keeping with the character of the Village District.

Wendy commented she knew what it takes to keep up a older house and she would hate to see property values go down with the option of asking for relief because it is no longer a historic district.

Becky noted one real estate person said it was not going to diminish values and two said it would but neither had documentation to support either way other than knowledge of the system; the Board has to rely on what we know about the area and she thought it would decrease property values.

Marianne commented if she was a newcomer looking to buy a home to renovate, she would not choose a neighborhood with a big box store because it is not consistent with the image of a historic village district.

David questioned if you want the historic homes to look nice who is going to buy and keep investing there?

Wendy noted the only alternative is to sell as a commercial property.

David stated the Master Plan wants to keep the rural feel of New Ipswich and also attract commercial business to appropriate areas; if businesses are small, they can go here, and if bigger can go into another section of town.

5. Literal enforcement of the ordinance would result in unnecessary hardship to the owner because the following special conditions of the property distinguish it from other properties in the area:

David stated 5a. says no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property. Further, if there was a vacant lot across the street in his opinion that would not change; it is not the unique characteristics of that property.

Wendy stated the applicant is saying that the existing violations, design and environmental issues are a hardship.

Becky referred the Board to the NH Planning and Land Use Regulation handbook, page 507, "The criterion for unnecessary hardship to warrant the issuance of a zoning variance was not the uniqueness of the plight of the owner but the uniqueness of the land causing the plight.", *Rowe v. Salem*; "A "hardship of the type needed for a zoning variance resulted only if use of the particular property was unduly restricted by the zoning ordinance because of special conditions unique to that property which distinguished it from all other similarly restricted." *Quimette v. Somersworth*; p. 508, "The unnecessary hardship referred to in the statute must have related to the owner and not to an option holder." *Welch v. Nashua*; "The hardship referred to in the same statute must have been one to whom the provision was designed to protect, and the statute was not designed to afford relief to a mere option holder of land as to which use variance was sought." *Conery v. Nashua*; "An unnecessary hardship was one suffered as the result of interference with the right to use property as the owner saw fit, although no public or private rights were injuriously affected thereby." *Vannah v. Bedford*. Becky stated she did not see the hardship because it is land not a building and the owner is not the option holder.

David commented the property does not have any unique characteristics that make it any different than any other property especially since the applicant is looking to merge the properties.

Becky stated if you look at the land only, you could put in a 1,500 square foot building without having zoning violations; the land itself does not give it any special features that make it unique.

Marianne referred to the zoning handbook, page 508, "Financial hardship in and of itself did not warrant the granting of a variance from the terms of a zoning ordinance." ; the applicant continued to mention the burden on the school board.

Wendy responded it is not exactly true now.

David stated 5a. says if there is something unique that qualifies the hardship, something unique with the property that does not apply to other properties and in this case it does, and 5b. says if 5a. is not met then "The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provisions of the ordinance from which a variance is sought is a restriction on use, a dimensional or

other limitation on a permitted use, or any other requirement of the ordinance." Further, he stated that there is no hardship; if there is a dimensional control in the ordinance that made the property unique, the variance cannot be denied, but if there is nothing unique on that property versus all the other properties in the district, then the dimensional controls can still be enforced.

Becky stated the applicant established hardship by noting the Mascenic Regional District's unsuccessful marketing attempts, but she did not think that applied. The applicant then lists setback encroachments, zoning violations, design issues and environmental issues and it is hard to find that applies.

David noted the applicant mentions the unique hourglass shape of the property.

Wendy added the unique hourglass shape doesn't exist if you consider both properties.

David stated there is nothing unique about the property. Further, the stream is on the left hand side and the property goes around it; the rest of the property can be developed.

Wendy commented when discussing a fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of this property, there is a large relationship between the ordinance provision and the restrictions being created against this property. She disagreed with the applicant that the Dollar General store would improve the village area and that the use in Village District II is not reasonable at all. Further she stated that items 5a. and 5b. are not met and if the criteria in 5a. and 5b. are not met, the property cannot be reasonably used in strict conformance with the ordinance and in this case the property can be used; if the school was not there, it would not be considered a hardship.

David stated 5a. says if the property is not unique, there is not a hardship.

Wendy responded the property is only unique because there is a school that is not usable and questioned if the financial cost of the removal of the building offsets destroying Village District II.

David noted the district has gotten their money's worth out of the building and should have probably taken it down when they built the new school.

Wendy questioned why would you put a building that cannot be used on the open market.

David replied there may be someone out there who is creative enough to come up with a use for that building.

Marianne referred to page 20, and questioned how can the applicant can say that "this establishes that a 9,100 s.f. building is not prohibited in the Village District II by the Zoning Ordinance."

Wendy noted it was permitted by variance.

David stated it does not meet 5a. and 5b.

Becky agreed.

Wendy stated she did not agree with the statement that the School Board tried to sell the building in multiple good faith attempts without success; they were trying to sell a piece of property with an old school building on it.

David noted they are eluding to the fact that it got offered to the town.

Wendy stated it is a short term benefit to a long term headache and that they are going in the wrong direction with the building. She questioned if the town could ever reverse course if the building was allowed and noted that the Board would be rewriting the ordinance.

Clark stated the applicant is asking the Board to change the Zoning Ordinance and he could not do that.

David made a motion to deny the applicant's request for a variance for the building size based on not clearly meeting any of the five variance criteria. Becky seconded the motion and it passed unanimously.

8:55 p.m.:

Joanne presented information from Grace Shaw and her day care center on Thayer Road. Because of a change of use, she is required to apply for a special exception.

The meeting adjourned at 9:00 p.m.

Respectfully submitted,

Joanne Meshna, Land Use Manager