

ZONING BOARD OF ADJUSTMENT MEETING  
JUNE 13, 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 May 2, 2013. Attorney Raymond D'Amante, Matt Casey and Chris Nadeau were present for the applicant.

Attorney D'Amante distributed a summary document of their response to the variance criteria. He noted that the Zoning Board (ZBA) had asked the applicant to set forth each and every argument to support each element of the variance application requiring that repeat arguments be set forth for each such element.

***The Board gave the floor to Attorney D'Amante for him to present a detailed review of the criteria, as follows:***

**1. The proposed use would not be contrary to the public interest:**

Attorney D'Amante listed the existing property issues:

1. 30' front yard setback violation
2. 20' side yard setback violation
3. 25' natural woodland buffer from wetlands violation
4. parking and pavement encroachments into the 50' wetland setback
5. building encroachment into the 50' wetland setback
6. the Temple Road curb cut which the applicant will close
7. wetlands and brook crossing to Temple Road
8. wetland setback encroachments at Temple Road
9. moving the leach field further away from the well location, single family homes, wetlands and brook
10. reducing the leach field size from 2,300 gpd to 460 gpd
11. eliminating the leach field at the Carron home
12. reducing the 18,600 s.f school buildings to 9,100 s.f. and eliminating the Carron square footage
13. existing storm drainage runs into wetlands without treatment or controls

14. Dollar General will treat and control the storm drainage run-off
15. add plantings in the wetland buffer
16. resolve the water problems in the Carron basement
17. reduce the size of the curb cut
18. eliminate the Carron driveway
19. random parking field will be eliminated and proper controls and parking layout instituted
20. environmental problems will be remediated

Wendy asked how Dollar General would treat and control the storm drainage runoff. Mr. Nadeau responded that the runoff will be captured in catch basins and put into subsurface pipes below the parking lot and either directed to an open surface grass treatment pond or under the parking lot with mechanical methods. The more efficient way would be the surface treatment. The water would run into an engineered detention pond, would be treated and let out into the wetland area. There are grassed areas outside the wetlands and 50 foot buffer that would be used for treatment.

Attorney D'Amante continued with the retail use. The Dollar General building is 9,100 s.f with 7,355 s.f. devoted to retail sales area. Retail use is permitted in Village District II. The total existing building square footage on the property, including the Carron building, would exceed 20,000 s.f. The total building footprint for the two properties is around 11,000 s.f. and the Dollar General would be around 9,100 s.f. The school property is a large irregular hour-glass shape with close proximity to wetlands which creates unique hardships. The businesses now in place in the Village along with the school building establish the existing character of the area.

Remediation and demolition was the next subject discussed. The cost to remediate and demolish the school building will likely exceed \$200,000. An Environmental Impact Study Level II and Hazardous Materials Survey have been completed. The current estimated cost of the demolition and remediation to date without the Environmental Study is \$193,000. Depending on the results of the environmental study, additional remediation may be required and the costs could exceed \$250,000.

In a January 20, 2013 letter, the School Board presented their attempts to market the property for a permitted use. Another letter from the School Board dated June 6, 2013 was read into the record. There has been little demand for the existing building. The community had a chance to acquire the property and that was voted down.

The leach field contamination is another compelling factor. A prior leach field failed and contaminated abutting wells. The School District maintains the new well and provides other properties with water with a continuing cost that impacts the property. Dollar General has provided the draft well agreement between the School District and Dollar General which supports the costs of providing water service to the properties served by the system. The leach field is reduced from 2,300 gpd to 460 gpd and is a further improvement to the area in terms of future potential contamination.

With regard to the existing building reuse, Attorney D'Amante noted that there has not been any interest in the building. The site needs relief in order to be used. In terms of compliance, the applicant is eliminating the existing encroachments and only the foundation square footage of the building needs relief. The reuse of the building will require multiple and substantial variances and also require remediation of the building which is prohibitively expensive.

Attorney D'Amante referred to the traffic study. Sight distances comply with DOT requirements, Dollar General is not a big traffic generator, there will be no negative traffic impacts from Dollar General, and a driveway permit from the NH Dot has been issued.

The Dollar General use will bring the site into compliance by combining the two properties. Encroachments, zoning violations design issues, and multiple environmental issues will be resolved, and landscaping and buffers added. The Dollar General will add to the character of the Village District. If someone were to try to use the site, there is not enough parking which would cause parking off site.

Wendy stated everyone agrees that the present school is not useable and one way or another the building will come down. Attorney D'Amante stated the School has a reasonable right to a return on their property and this is a reasonable use of the property. He added that Dollar General will employ 8-12 people and bring jobs into the area.

In conclusion, all the issues that are being resolved with the existing building, elimination of encroachments, design issues and environmental issues demonstrate that the applicant meets the first standard. The existing conditions are unique to this site and no precedence is being set. Wendy noted that with a special exception the store could be located in the rural district; there is no restriction of the size of the retail space in that district. What is being proposed in Village District II is retail space six times the size of what is allowed.

Attorney D'Amante responded that 1,500 s.f. is what is allowed in the Village District and anything bigger is out of character; he disagreed and stated that it was not out of character. He referred to the Zoning Ordinance and what is allowed in the district by special exception. He submitted a picture of the building as an auto service center and noted that it is permitted by special exception; the only change was the title of the building from retail store to auto service center. The building and parking are permitted in the Village District and 1,500 square feet is not totally prohibited in the district. It is permitted for certain uses and this type of commercial use could be more intrusive depending on siting and activity. Fifteen hundred square feet is not an absolute number in the district and could be achieved by changing the title of the use. The spirit of the ordinance would permit a building of this size for a different commercial use.

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

Attorney D'Amante continued that a building of 1,500 square feet cannot absorb the costs of the remediation and demolition and a building of significant size is needed to accomplish that. A building of 1,500 square feet cannot absorb those costs. The spirit and goal of the Zoning Ordinance is also 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 disposal on site and other provisions. The applicant is achieving all of those goals. All of the property issues in Exhibit 1. A are being resolved which is consistent with the spirit of the ordinance; the property will become more in compliance with the Zoning Ordinance. A goal of the Conservation Overlay District is to protect natural resources. Dollar General has achieved those goals which include the existing property issues, remediation and demolition work, leach field contamination issues and resolution and the water well situation. The building style is consistent with other existing uses in the village district. However, he invited the ZBA to provide refinements on the building design if they felt it was needed to make it more compatible.

There is no relief being sought for signage. Marianne stated she had visited Dollar General stores with temporary signs and banner signs across the front of the store and asked if this was a practice of Dollar General. Mr. Casey responded he could not comment on those stores; however, he noted the sign would be in keeping with the sign ordinance.

Attorney D'Amante further stated the protection of the wetlands is in keeping with the spirit of the ordinance and this proposal would achieve that. Reuse of the building will require multiple variances which is not consistent with the spirit of the ordinance. The Dollar General would have lower potential impacts on the site, the environment, abutting properties and the wetlands and includes all items listed in Exhibit 1, paragraph A. The new septic system is for 460 gal/day and will be moved away from the well and brook and have a longer life.

Attorney D'Amante continued that granting the variance would be consistent with the spirit of the ordinance because all of the applicable goals of the Zoning Ordinance would be achieved and the site would become more in compliance with the ordinance by the proposed retail use.

Wendy stated Village District II was created in 1987 beyond the time that the school and the other businesses had been built. In the Master Plan it states that it is seeking through the ordinance to improve Village District II and to meet all objectives as stated in the Zoning Ordinance. She stated she was trying to reconcile how to fit the building into a historic district knowing there are other location alternatives. The spirit of the ordinance is clear and she questioned how a retail store of this nature improves the character of the district. Mr. Casey responded the footprint of the building is being replaced with the identical size of the building but they are solving all the current issues. Dollar General wants to be part of the community and they are willing to make that investment.

Attorney D'Amante responded that some of the uses in the district were created before the Zoning Ordinance but they do establish the character of the district. One of the goals of the Zoning Ordinance

is to improve Village District II and the application complies with that goal. There are 20+ improvements that are being made to the site, with remediation and demolition on top of that. An auto use is permitted by special exception in this district. The site is not limited to 1,500 square feet of commercial; it depends upon the kind of commercial. An auto repair garage would not be as compatible in the district as Dollar General. The character of the district is not going to be violated by putting in Dollar General; the spirit of the ordinance will be met because of all the improvements.

Wendy asked if the Board could have input on the Dollar General building such as color, sign, etc. Mr. Casey responded that they were willing to work with the Board on those issues.

### **3. Granting the variance would do substantial justice:**

Attorney D'Amante stated the letters from the School Board of January 30 and June 6 outline the unsuccessful marketing attempts and problems with the building. The property would be returned to the real estate tax base and provide significant tax revenue. Other benefits include those noted in Exhibit 1. Eight to twelve new jobs will be created. The School Board will realize a reasonable return on their property and realize income that will substantially pay for its obligations to provide water to neighbors. For those reasons, substantial justice will be done by granting the variance.

Marianne stated she did not see substantial justice in that district to the neighbors and other local retailers. Attorney D'Amante referred to page 14, paragraph 4, which state that the benefits to the town include Exhibit A, all the property issues that are being resolved which are benefits that do substantial justice to the site. David asked about the leach field contamination and noted that was a historic, not current issue. Attorney D'Amante responded that the wells of property owners are contaminated and they rely on the School Board to provide water. Wendy noted they use a well on the school property and that well is not contaminated. David stated it comes across that there is a contamination problem there now which is not the case. Attorney D'Amante responded that by reducing the leach field from 2300 gal/day to 460 gal/day and moving it further away from the well provides substantial greater assurance that there will not be future contamination.

Attorney D'Amante noted in the Harrington (later corrected to Hannaford) case the Supreme Court stated that competition is not a factor in determining a case, that the Zoning Board cannot consider competition among businesses when deciding a variance. Marianne noted she would be not be looking at competition but at the characteristics of a historic village and a small retailer; there is a significant difference between the characteristics of a small historic village and a small retailer and a big box store.

Wendy stated substantial justice to her was gain to the property versus gain or loss to the general public.

Attorney D'Amante explained when a use completely complies with the Zoning Ordinance the issues of substantial justice do not come up. If there is an existing use that is in violation of zoning, and at this

site there are substantial violations, it would follow that bringing it more in compliance would provide substantial justice to the site and the community and not diminish property values. The application brings the site more into compliance in 15-20 different ways and only one issue is left. There is nothing sacred with the 1,500 square foot. Bringing the site into 95% compliance is something that does substantial justice to the property owner, the site, the community and the area.

Wendy referred to the ZBA handbook and a guiding rule for substantial justice as being any loss to an individual (Dollar General) that is not outweighed by a gain to the general public is an injustice.

Attorney D'Amante responded in this instance if the zoning variance is denied there would be a loss to the school district and questioned if that loss has an offset gain to the public. He stated It does not have a gain to the public but perpetuates site conditions that are in violation of the Zoning Ordinance and has a negative impact on the village district. The school district loses but zoning violations are perpetuated which is not a benefit to the public. Granting the variance provides justice to the school board and the community because the zoning non-conformities are eliminated.

#### **4. The proposed use would not diminish property values:**

Attorney D'Amanate stated the existing, abandoned, unused and deteriorating school building and its impacts and conditions presently reduces property values of abutting properties. The negative impacts include existing property issues, remediation and demolition, unsuccessful marketing attempts, leach field, water wells and existing building reuse impacts on the area. If adherence to the Zoning Ordinance requirements helps maintain property values, then multiple zoning violations, environmental problems, setback encroachments and other problems with the property diminish property values. The Dollar General use will resolve the multiple issues set forth in Exhibit 1. Their proposal to resolve the issues will help enhance property values as they relate to the impact of these multiple issues.

Wendy noted a school in a community increases property values and there are historic homes in the area that have been significantly updated and maintained. She questioned how a Dollar General building of this size would impact the property values. Attorney D'Amante responded that is not the issue because there is no longer a school there and there is no application before the Board for a school. The Board needs to look at the impact of the building in its current circumstances and should it be used for wholesale, retail, or professional and what those impacts might be.

Wendy stated there is no expert testimony of what a retail store of this size is going to do to a residential community on Turnpike Road and asked if there was any to be presented.

The Board recessed from 9:00-9:15.

Attorney D'Amante introduced Marc Tieger, a real estate agent from Jaffrey who has been trying to sell the property. He noted when trying to sell the school building and not knowing what it might become, it

is difficult to know if the use will require variances, etc. With Dollar General it is a known versus an unknown in that if the variance is granted the Board knows what will be there. Mr. Tieger could not speak to the impact on property values in the neighborhood.

Mr. Casey stated when they are looking at buying residential properties for commercial uses, commercial pays more than residential does on a house sale. Wendy asked if the houses across the street would have a higher property value because of Dollar General and Mr. Casey responded that it would be because of commercial use being able to buy the houses.

**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:**

Attorney D'Amante referred to the unsuccessful marketing attempts, the existing property issues and non-conformities, unique characteristics of the site, hourglass shape of the property, physical conditions and hardships on the property. There is no demand for the reuse of the building. Literal enforcement to limit the 1,500 square foot would be an unreasonable and a hardship on the site.

**5a. 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:**

Exhibit A lists existing property issues and non-conformities. That the use is a reasonable one is demonstrated by all the non-conformities being resolved and convenience factors to the community.

**5b. The proposed use is a reasonable one because:**

All non-conforming factors are resolved. There are convenience factors for the community for general shopping.

**If the criteria in 5a and 5b are not met, the property cannot be reasonably used in strict conformance with the ordinance because:**

The existing building cannot be used without substantial variances. There is not enough useable space on the property to accommodate additional parking for the full potential reuse of the existing building. The adverse and unique physical conditions of the property justify the variance requested. Other uses may have greater negative impact and burden on the area. With the resolution of the existing problems the property would be better used by granting the variance.

Wendy stated one of the criteria is that there is no relationship between the general public purpose of the ordinance and the specific application being proposed. She was trying to understand the general public purposes of the ordinance to limit small retail to 1,500 and asked how there was no relationship between that and the proposed use. Attorney D'Amante responded that the uniqueness of the property

and the hardship of those factors must be taken into account. The property will become more consistent with the general public purpose than less consistent. There is no current interest in the property to be used as any other use. This is a reasonable proposal that brings the site into compliance and it is in the public interest and grants relief to the property owner.

***Abutters and interested parties were invited to speak:***

Joe Fionda stated there are other uses for the site such as a park, or the town could remove the building. Further, he noted there is \$75,000 in refuse that could be gained.

Margaret Lee stated she was concerned about her property value and noted it was difficult to keep up an older property. She added she was opposed to change that has an impact to property she has tried to save.

Patricia Lage distributed a handout which she read (in record) against the application.

Jim Coffey asked where the ZBA hearing ends and the PB site plan begins. The Planning Board does the site plan review.

David Cotzin asked if there was an authorization letter from Tom Carron and there is one in the record.

Greg Hanselman noted there is no information from the applicant on how property values will be affected and questioned if building lots in the village are assessed higher than other areas in town. He further stated he believed property values would diminish.

Brian Somero stated he was taken back with how demonized business is and added that business is needed in town to help the tax base. He encouraged the Board to help out the school board.

Troy Matson noted that his wife and children would like to shop at Dollar General.

Ann Shaw stated once you construct a building you are stuck with it and noted that if the building was assessed at \$1M, \$.05 would have been saved on the tax rate. Further she stated that the building is too big for the area.

Jeff Salmonson commented with regard to the historic and Village District and noted that Main Street is a more historic area.

Ruth Bernier stated Dollar General would not be detrimental to the community and that it meets all the criteria.

Ann Shaw questioned how truck traffic would flow.



Joe Fionda questioned if the Board should have legal advice.

Brian Somero questioned if Dollar General is going to devalue property values, does it matter where they locate in town?

Margaret Lee questioned if there was value to the town for houses built 200 years ago.

Becky read letters from the Mascenic Regional School District dated June 6, 2013, an e-mail from Alice Chemerynski dated May 8, 2013, an e-mail from Judy Spring dated June 11, 2013, and a letter from David Person dated June 2, 2013.

Greg Hanselman stated that the historic district is much larger than stated and there are more like 150 buildings in the historic district with 35 non-contributing buildings. He added that it was unnecessary to question a ZBA member's position on the Board.

Joe Fionda suggested figures be checked noting that the project could have a major impact in town.

Becky had questions on the traffic study. She referred to Figure 3, Build Traffic Volumes, and compared them with 2012 existing peak hour traffic volumes and noted that some of the numbers are lower than what exist now. She asked how the build led to lower traffic numbers. Mr. Casey responded they had not brought their traffic expert back as they understood that part of the hearing was closed. Becky apologized that she did not have the questions when the expert was present and added that she had gone back and re-read the study and was looking for clarification. Becky continued and noted she could not figure out what numbers were used for the information in the summaries. Mr. Nadeau responded that he would have to get the answers from Ms. Rauseo.

Patricia Lage distributed a handout to the Board on pertinent legal cases.

Attorney D'Amante stated the building that is approved by the ZBA and Planning Board will be the one built. Remediation is highly regulated and has to be done correctly and has oversight. The site is a unique one and does not set a precedent. There are twenty non-conformities on this site and he did not believe there would be other sites in the area with that amount making this site unique. Wendy disagreed and used the 1808 Corporation building as an example of a lot that she believed had more non-conformities than the school lot. Attorney D'Amante responded her reference was to existing commercial buildings and the comment had been made that residences would be turned into commercial; there would not be a domino effect. The average house does not have that number of non-conformities.

Wendy asked if Attorney D'Amante had any more to add regarding the traffic questions asked and property values. He did not. She noted she had hoped to begin deliberations this evening and Attorney D'Amante agreed.

Mr. Casey added that if Board thinks that the variance itself is fine pending traffic and a review of residential appraisal, they would like to be deliberated.

Wendy stated that she had done as much as she could do regarding the 4th criteria to let the applicant know that she did not have enough information to determine impact to property values. All five criteria need to be met. The public hearing can be closed but she noted that for her personally they had not proven their point for property values of surrounding properties. Mr. Casey responded that he understood.

Becky asked if the removal of the school from the Historic Registry would matter and Mr. Hanselman responded that it would be swapping one non-contributing building for another.

At 10:30 p.m. David made a motion to close the public hearing and enter into deliberations. Marianne seconded the motion and it passed unanimously.

The Board took a ten minutes recess and then began deliberations. Each criteria was discussed as follows:

**1) The proposed use would not be contrary to the public interest:**

Wendy noted the cost to the taxpayers for demolition is being offset by the sale. The building is not useful with water issues, safety issues, etc. Dollar General will employ 8-12 people. There will be tax revenue generated from the store and the store will provide for local shopping. She stated this is the historic district and zoning was created after the school was built. She did not consider Dollar General an example of condensed retail. Wendy added that the Master Plan describes the Zoning Ordinance as seeking to improve the current characteristics of the district over time as opposed to seeing it diminish.

David stated there is public interest in seeing the building removed and seeing something else come but he questioned if tourists and residents want to see the start of development in the center of New Ipswich.

Becky referred to Master Plan priorities, "attract commercial and industrial development consistent with community wishes for maintaining rural character" and questioned if it is in the rural character to have a box store in the center of town.

Marianne stated there was a problem with the size of the building in that location. She noted there had not been any discussion about other options for the site and that there are grants available.

David noted the Board had recently approved small retail in the district and that business was located in a house so there was no change in view. The proposed building would have an impact on view.

Wendy stated the proposed building will not improve the look of down town.

David stated it was great to have a business come into town and generate revenue but the Board should not be short sighted to remove the barriers and allow the use.

Wendy stated there had never been a change made to the 1,500 square foot requirement by the Town. She added the Board should not be so short sighted to get that revenue by removing all barriers and allowing it.

Clark reminded the Board small retail is allowed by petition only. He stated that the applicant is asking the ZBA to change the ordinance and approve a building six times the size allowed.

Wendy stated the Board is being asked to weigh the benefits of getting rid of the school and adding money to the coffers of the school as a short term benefit, but questioned long term benefits to the public. She did not see any benefit to the historic district.

Becky stated the project addresses non-conforming issues but it is hard to disregard the 1,500 square foot issue.

Marianne stated in the past there was a community school which is different than retail. She added that creative options for the building have not been discussed and that grants are available that could be applicable.

David stated the School Board is short sighted; they have fiduciary responsibilities, liability, etc. but questioned if they thought about having something else go there? Further he stated that the property itself is nothing unusual.

Summarizing, the Board stated fixing the existing property issues contribute to public interest. There is a problem with a building of 9,100 square feet in the district which allows only 1,500 square feet. It is important to the spirit of the public interest to maintain the 1,500 square feet within reason as the district is residential and historic.

Becky made a motion to continue the hearing to July 18, 2013 at 7:30 p.m. Marianne seconded the motion and it passed unanimously.

The meeting adjourned at 11:10 p.m.

Respectfully submitted,

Joanne Meshna  
Land Use Manager

