

ZONING BOARD OF ADJUSTMENT MEETING
MAY 2, 2013

PRESENT: Wendy Freeman, Chairman, Becky Doyle, David Lage, Marianne Graham, 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. Roger Somero - Submission of variance application:

Mr. Somero submitted a variance application from Article XII, A. of the Zoning Ordinance to permit an addition to an existing building. The addition will fall within the 20 foot side setback requirement. He explained that the existing building is a sugar shack and he is unable to build the addition on any other side of the building. The Board requested that Mr. Somero provide dimensions of the building, the addition and the distance into the setback that the building will extend.

Marianne made a motion to accept the application as complete. Clark seconded the motion and it passed unanimously. The Board scheduled a site visit for June 1, 2013 at 9:00 a.m. The public hearing was scheduled for June 6, 2013 at 7:30 p.m.

7:40 p.m. USA Properties, Inc. - Appeal of an administrative decision:

The Board received an appeal of an administrative decision from USA Properties, Inc. The applicant is appealing decisions made by the Planning Board. David made a motion to accept the application as complete. Becky seconded the motion and it passed unanimously. A public hearing was scheduled for May 23, 2013 at 7:30 p.m.

7:55 p.m. The Zaremba Group for Dollar General Stores - Continuation of public hearing for a variance application:

Attorney Raymond Damante, Matt Casey and Chris Nadeau were present for the applicant.

Mr. Casey distributed a draft water service agreement they are preparing with the School Board. Wendy asked if the discussions on the agreement were held in public sessions. The response was that the agreement was being handled between attorneys. The School Board will be providing the water and once Dollar general purchases the property they will be making improvements to well pumps as needed, will make a donation of \$5,000 to the School Board as fund money and they have agreed to pay \$3,500 per year for costs associated with the well.

Mr. Casey gave a history of the Dollar General stores. Dollar General does market analysis to determine where to locate the stores. They are comfortable that they can operate a successful store in New

Ipswich and are therefore willing to do a large investment for site issues, demolition of the building and substantial remediation. They looked at demographics, traffic, etc. and are willing to invest well over a million dollars for this site.

An interior floor layout of the building was submitted. There are four different areas that are divided into clothing related items, food related items, household items and cosmetic/pharmacy. Fifty percent of the area is dedicated to household items, 25% for pharmacy and cosmetics, and 25% for food related items. Mr. Casey submitted pictures of the inside of the store. The store would be open seven days a week, would employ 8-12 people, and be open 8:00 a.m. to 10:00 p.m. There is one semi truck per week and trucks bringing ancillary products would be on an as needed basis. The lighting for the property turns on one half hour before opening and turns off one half hour after closing; this includes parking lot lights and signage. The only lights left on at night would be on the interior of the building and wall packs for security lighting. All lighting is down cast. There will be six or so pole lights with down cast lighting. The applicant was referred to the sign ordinance for compliance of their sign; they are not asking for any relief from the sign ordinance. There is no pharmacy in the store and only over the counter pharmaceuticals are sold.

Mr. Casey discussed the existing conditions of the site. Currently there is an 18,000 square foot building that has many dimensional violations. If it was to be used as an office, etc., there would be several variances that would be required. Dollar General only needs one variance. Significant demolition needs to be done and environmental contamination issues need to be addressed. There is asbestos in the building. The leach field needs additional testing for contaminants. There are PCBs and oil tanks in the basement that need to be taken care of. Approximately one quarter to a third of the property is impacted with wetlands. The well and well agreements also pose an issue for marketing of the property. The School Board has marketed the site for years and has been unsuccessful. It is estimated to cost about a quarter of a million dollars just for the demolition and environmental plan and fix up of the well system.

Mr. Nadeau pointed out the wetlands and buffer area and the non compliance with current regulations; also he noted that the parking goes all the way to the street which does not comply. The wetlands and wetland buffers make up about 28% of the parcel that cannot be used. The parcel has some unique site restrictions. He submitted a report regarding the adjacent property (lot 11/122) and the wetlands located there prepared by Peter Spear, Natural Resource Consulting Services. Any jurisdictional wetlands on parcel 11/122 are in excess of 50 feet from any proposed building or earthwork being proposed on lot 11/121. The dampness of the lawn area is from an active sump pump and foundation drain discharge from lot 11/121 and overflow from the previous failing leach field on parcel 11/122.

Wendy read a letter from the School Board dated January 30, 2013.

A ten minute recess was held at 9:35 p.m.

Mr. Nadeau continued and noted that the proposed building is a 9,100 square foot building with 36 parking spaces. Adding the Carron property to the school the structures are shifted out of the wetland buffer. Vegetation will be enhanced within the buffer to protect the wetland. He compared the size of the proposed building to other businesses in the area and the 1,500 square foot requirement. Trees will be planted in the buffer area to the wetlands. Stormwater runoff will be captured in catch basins and naturally treated by vegetation before being discharged into the brook. There is a single point of access on Turnpike Road and the Temple Road access will be removed. They are not planning to remove the culvert and crossing on Temple Road; trees will be planted in that area. The preference would be to plant grass at that site. Wendy noted she would like to see the area restored with natural vegetation to protect the wetlands. There is an existing septic system in the back which will be removed and replaced with a 460 gallons/day system.

David asked if there would be curbing along Turnpike Road and Mr. Nadeau responded that it was not their intention. The drawing depicting the building showing curbing was not accurate. Currently there is a drainage swale coming down Turnpike Road that would have to be maintained; details on the drainage would be provided to the DOT.

Mr. Nadeau noted that with the smaller leach field lots located in the back may be able to have their own well systems. A more detailed landscaping plan will be developed. Mr. Casey added that this was a good proposal for the ZBA; they are eliminating impacts to wetlands, increasing landscaping, taking care of environmental issues, putting money back into the School Board coffers, all dimensional requirements are taken care of, they are a strong retailer able to operate successfully, and the Town is dealing with Dollar General directly.

Attorney D'Amante addressed the Board on the application. He noted that all of the written materials plus the testimony at the last meeting are all part of the presentation. He referred to the Hannaford versus Bedford case. The NH Supreme Court held that injury resulting from competition is a natural risk in our free enterprise economy and that an appeal of the ZBA decision is not a weapon that could be used to stifle business competition. Competition is not a factor in the ZBA case. The case stressed the character of the locality and showed that you need to look at the property, the conditions and the unique characteristics of the property in trying to decide whether or not to grant relief. The Dollar General proposal will bring the site into greater compliance with existing conditions. It eliminates many zoning violations. Attorney D'Amante distributed a handout on Supreme Court case Harrington v. Warner. The case looks at the unique conditions of the site. The Court held that under the circumstances of the site and the problems with the site, relief was granted.

Attorney D'Amante continued and addressed hardship and restrictions that apply to the property and if they interfere with the use of the property by the owner. The efforts by the School Board to market the property was in good faith, and there were multiple efforts; there was no interest whatsoever. If the variance is not granted, there will be a huge financial loss for the School Board. The Supreme Court has held that a landowner has the right to reasonable use of their property. The Village District permits retail as a permitted use and retail is part of the characteristics of that area. Granting the variance

requested will not negatively impact the area. The area will be improved by removing the building, removing and replacing the septic system, and bringing the wetlands into compliance. The School Board has a right to a reasonable return on their property. Substantial justice would be done by granting the variance.

Attorney D'Amante stated it was important to look at Article V. of the Zoning Ordinance and the purpose of the Village District. Article VI. refers to the intentions of the rural district and Article X. refers to the wetland overlay district and its purposes. The proposal is providing wetlands protection, preserving the natural wetlands, protecting wetlands from surface waters, and improving the quality of the surface water. The Zoning Board of Adjustment handbook notes that you have to look at the special conditions of the property, how they impact the area and what is being done about them. Attorney D'Amante then addressed the criteria for granting the variance.

1. The proposed use would not be contrary to the public interest - There is an 18,000 square foot building on the site used as a school that is no longer grandfathered. The building is an overuse of the site physically. It violates all the setbacks that have been noted. If someone came in to use the building in the existing configuration, there would be many issues to consider. The cost to make the building residential would be prohibitive and the layout does not lend itself to that use. If retail, parking would be an issue as well as the design of the building. Parking would spill over into the neighborhood which would be a negative impact. Reuse of the site would not be consistent with the Zoning Ordinance. The existing building is contrary to the public interest but the proposed use has corrected all the negative factors. The proposal goes from a worst case scenario of existing conditions to a best case scenario and that is good for the abutters. The reuse of the existing building is not possible. A proposal for a 1,500 square foot building would not be feasible.

Wendy stated that if it was not Village District II the improvements to the site are fantastic. The school is pre-zoning. The Village District was created to maintain a small town character and the Master Plan goes into that detail. She added that today a school would not be built on that lot. She noted that despite the improvements, she wondered how the 9,100 square foot size of the proposed building in Village District II is not contrary to the public interest. The zoning ordinance was developed after the school was built as well as the pizza shop, the market and gas station, and the 1808 House. Further she stated that she had trouble reconciling how the proposal is going to be consistent with what the Board envisions for the district.

David stated that this is a Historic District and the applicant wants to put in a retail facility. There are other areas in the town that would be better suited. Mr. Casey responded that the ordinance for the Village District is looking to condense retail into this area. Wendy responded that it is looking to condense residential and not meant to condense commercial. Attorney D'Amante read the intent of the Village District. Consideration of existing conditions of the site has to be given. The question is how can a 9,100 square foot building be better than a 18,000 square foot building on the site; is a 9,100 square foot building that enhances the district better for the public interest than a 18,000 square foot building with all the site and building violations.

Wendy referred to Article V. and noted that there are uses in the district that can be in excess of 1,500 square feet. What are restricted are office buildings, banks, small retail and medical facilities. If any of those are to be put into Village District II, they need to be small because of the footprint that is required. The Master Plan and Zoning Ordinance seek to improve the district over its current status and this is not a permitted use of a restaurant, funeral home or instructional facility but a retail store.

Becky asked how the applicant could reconcile the historic character of Village District II with a 9,100 square foot building. Attorney D'Amante stated that the building being proposed is far more consistent with the architectural character than with Dollar General's normal building. Compared to the school building it is far more in compliance. Looking at the site, part of the pavement will be removed and restored with grass; the site will be more in compliance with the Village District.

Marianne stated that she was concerned about the character of Village District II. Something has to be done with the school but there are other options. It is a very difficult site for any developer but there are other options such as taking the building down and turning it into green space. She did not feel that it is in their purview to make an argument for the amount of return on investment. She did not agree that this was the only option for the site and wanted to hear more comment on the district and how the size of this building will change the nature of what is seen; the entire nature of a small town is changed forever.

David stated that the applicant keeps comparing Dollar General as a 9,100 square foot building and the school as a 18,000 square foot which is inaccurate. The school is 9,000 square feet but two stories. The footprint of the building is approximately the same. Further, David noted that the Village District has a minimum lot size of 1 acre versus 2 acres in the rural district to meet the density goal. Attorney D'Amante responded that it is necessary to look at the 18,000 square foot building and the impacts from that size. The Hannaford case and the Harrington case as well as the zoning handbook say to look at the site and its specific characteristics. The existing conditions include the 18,000 square foot building that cannot be parked. It is important to address the impacts that relate to square footage.

Attorney D'Amante noted that Dollar General has reached out to design a building that has characteristics in keeping with the neighborhood. He added that if the Zoning Board has other suggestions they should bring them up. It is not a cement box building. Further, Attorney D'Amante stated that the return of investment was a vital part of their argument. The Supreme Court has said that a landowner has a right for reasonable return on their property; it is a constitutional right. Marianne responded that they are not talking about private ownership and interests but what is the best use of the property to be in compliance with the best public interest for the village. Wendy added that even the letter from the School Board states that the building needs to be demolished. This is a building owned by the taxpayers of the school district of Greenville and New Ipswich which is of no use.

Attorney D'Amante agreed that the physical structure is of no use and has to go. The fact that the building has to come down is a compelling physical characteristic of the property. For the district to get a reasonable return on their property they have to have a use that cannot be done in a 1,500 square

foot building. The school district does not give up its right as a property owner just because it is public and has a right to a return on its property; the school district does not lack constitutional rights.

At 9:55 there was a ten minute recess.

Attorney D'Amante continued with the variance criteria.

2) The use it not contrary to the spirit of the ordinance - Attorney D'Amante stated that the proposal is improving the district over its current status. The proposal provides for proper water quality discharge, private sewage on site with far less impact than what is there now, and wetlands protection. The natural resources are being protected. Five variance violations are being eliminated. Wetlands will be restored. The goals of the overlay district are met and exceeded. All setback violations will be remedied with the proposal.

Wendy stated that the spirit of the ordinance is more than correcting the wetland violations; it is also the spirit of the ordinance of a greater than 1,500 square foot retail building in village district II. Attorney D'Amante responded that they are improving the characteristics of the site as it relates to existing conditions. The comparison is an 18,000 square foot building versus the impact of a 9,100 square foot building. Clark noted that the 18,000 square foot building has no impact at all currently. Attorney D'Amante responded that it is not being reused yet and the property owner has a constitutional right to get a reasonable return and have a reuse of the site. The building has to be demolished and with the environmental studies, etc. the expenses are high. Dollar General has agreed to give the district a \$5,000 payment for the well as well as pay \$3,500 towards the cost of the pumps at no cost to the School district.

Architecture is a factor. The proposal is for a building that has a village type character to it. The layout of the site reduces the impacts to abutters. The leach field and well are being improved. If the existing building was reused the impacts would continue and be contrary to the spirit of the ordinance. Granting the variance is consistent with the spirit of the ordinance.

David made a motion to continue the hearing to June 13, 2013 at 7:30 p.m. Marianne seconded the motion and it passed unanimously.

The hearing scheduled for June 6 for Roger Somero will be moved to June 13 at 7:00 p.m.

The meeting adjourned at 10:40 p.m.

Respectfully submitted,

Joanne Meshna, Land Use Manager

