

**GREENLAND ZONING BOARD
PUBLIC HEARING**

TUESDAY, October 20, 2009

Members Present: Mr. Chris Halligan, Chair
Ms. Liz Cummings, Vice Chair
Mr. Don Arsenault
Mr. Ron Gross, Alternate

Members Absent: Mr. Sean Conner
Ms. Stephanie Glennon

Staff: Mr. Robert Cushman, Building Inspector
Ms. Amy Leonard, Secretary

Chairman Halligan opened the public hearing of the Greenland Zoning Board of Adjustment at 7:02 P.M. and a roll call was taken. He announced the procedures of the Zoning Board of Adjustment and stated they had a quorum; but due to the fact that only four members were present and the possibility of a tied vote, he asked if the applicant wished to continue until the next meeting with a full Board. After the applicant discussed it with his representatives, he stated they wished to proceed with the meeting. Mr. Halligan noted the meeting was being recorded and the minutes would be available to the public when completed.

Public Hearing

1. Appeal from an Administrative Decision, 445 Portsmouth Avenue, Owner/ Applicant: 445 Ports Ave, LLC-Gary Bourassa, (Map U4, Lot 27). Applicant is appealing an administrative decision from Article III, Section 3.5.1 of the zoning ordinance: Interpretation of permitted uses in the Commercial Zone, including "Business Services" and other uses.

David Brown, attorney from Colliander, Field & Brown, and Steve Oles, MSC Civil Engineers, representing the applicant, approached the Board and submitted a site plan (attachment 1) showing the proposed project. Mr. Brown gave a background presentation and stated the purpose of this project is to move the business's contractor facility to the property. This includes parking of trucks in the rear and storage of related equipment on the west side of the property, together with use of the first floor bays for vehicles and to continue the upstairs residential apartment use. He stated he believes this is a reasonable commercial use for the site and a low intensity one, when compared with other allowed uses, which could have much more vehicular traffic in and out of the site all day long. The trucks would be used principally for paving and would leave in the morning and return in the evening. Mr. Brown stated this kind of business was a good use of the property due to the truck bays, as the building used to be the Town Fire Department and felt few businesses would need the use of the tall bays. He noted the property is in the commercial zone and is surrounded entirely by that zone, by more than 100 feet in every direction.

Mr. Brown noted the question is whether or not the uses described as allowed in the commercial zone, fairly, under a reasonable reading of the language, covers and allows the Applicant's proposed use. He referred to Section 3.4.2, which states that the intent of the commercial zone is "...to permit general commercial uses in areas on streets with high traffic volumes...". He felt that on that language, the proposed business fits the zone. He then referred to Table 3.6 G, stating the ordinance reads that all the following are permitted: retail sales, services, business services, professional services and parking lots. Mr. Brown concluded that the first three terms cover the full range of all customary general commercial or business activities and in order to give this a fair meaning, they should conclude that builders, contractors, pavers, etc. are all allowed. He noted the definitions section does not narrow this under a reasonable reading; Business Services includes any business service, not just some and the examples are not said to be limiting. They do include building maintenance and equipment rental and felt it would not be logical to suggest that every business must be listed or it is not permitted given the broad opening and controlling language. Mr. Brown stated the Applicant's work is provided either to a business or to a retail customer. He stated the term "Professional Services" is broad and includes electricians, plumbers, landscapers, remodeling contractors, and others "similar in nature" and felt the Applicant's work is "similar in nature" to those listed. Based on all the reasons spoken about, Mr. Brown asked that this administrative appeal be granted. He proceeded to submit an exhibit list (attachment 2) supporting this request that included: sections of the zoning ordinance in issue, zoning map, realtor's opinion letter, various dictionary definitions, law on Interpretation of Language by Common Meaning and requests for findings.

Ms. Cummings stated their zoning ordinance does have a definition of business services and asked if that plays a role in the courts determination. Mr. Brown responded the courts do look at that. Ms. Cummings stated this particular business is not listed in the definition of business services, but does fit under professional services. Mr. Arsenault felt this business does fit under the business service definition, as it reads: "Establishments primarily engaged in rendering services to business establishments on a fee or contract basis...". Mr. Arsenault spoke of another paving company in Town who had to obtain, and was granted, a use variance a few years back and noted the Building Inspector was most likely basing his denial on that previous decision. Mr. Cushman agreed. Ms. Cummings asked how long the building had been vacant prior to the Applicant purchasing it. Mr. Cushman responded he did not remember it ever being vacant; it has always been some sort of commercial business. The Board had no further questions.

Chair Halligan opened the hearing for public comments. Bob Arens, 440 Portsmouth Avenue, asked about the scope of the business and how many trucks there would be. Gary Bourassa, applicant, responded there would be 6 dump trucks, a pick-up, a one-ton and various paving equipment, which totals roughly 10 vehicles. Hearing no other comments, the hearing was closed and the following motion was made:

Motion 1: Don Arsenault moved that the Board uphold the Building Inspector's decision that this business does not fit the business services definition. Lizbeth Cummings seconded the motion.

Mr. Gross questioned what the motion was based on. Mr. Arsenault responded he based the motion on the fact that the business is not listed under the business services definition, as well as, the previous decision regarding the need of the same variance for the other paving company. Mr. Gross thought this business could fit under the professional services definition. Mr. Cushman stated this application is identical to the other paving company, who needed a variance for a business service and felt that previous company set the path for them. Mr. Gross again stated he felt this proposal fits the professional services definition and questioned why they were only focused on the business services definition. He did not agree with the Building Inspector's decision. The following amendment was made to Motion 1:

Motion 1 (amended): Lizbeth Cummings moved that the Board uphold the Building Inspector's decision of October 1, 2009, where the building permit was denied, based on Section 3.5.1, which states "Any use that is not specifically permitted, is prohibited". Chris Halligan seconded the motion.

Mr. Arsenault still felt the Building Inspector was correct with his determination. Mr. Gross did not agree, as he felt this business was similar to a landscaper, which is listed as a professional service. Ms. Cummings did not think this proposal was similar to a landscaping business. After the discussion, a vote was taken on Motion 1, as amended.

There was a vote of 3 in favor and 1 against (R. Gross). MOTION CARRIED.

a). Appeal from an Administrative Decision, 445 Portsmouth Avenue, Owner/ Applicant: 445 Ports Ave, LLC-Gary Bourassa, (Map U4, Lot 27). Applicant is appealing an administrative decision from Article IV, Table 4.2, Section 4.3, Explanatory Note 5 of the zoning ordinance: "Commercial/Residential buffer" interpretation and applicability of 50' buffer.

Mr. Brown stated the Applicant is appealing the Building Inspector's interpretation of the 50' Commercial/Residential buffer. He noted the question is whether or not the provisions of the Commercial/Residential buffer of 50' as provided in the referenced sections applies, as it is difficult to determine such, where the zone lines do not meet. He stated the Applicant believes it should not apply because: (1) based on the language used, a fair reading of the intent is to apply it to lots where commercial zones and residential zones meet (not the case here) or to apply, apart from situations where such district lines meet, where a commercial use sits in a residential zone due to some historic practice (not the case here). Some towns impose this type of buffer but only where such situations exist. He felt it does not lead to a logical result to impose a buffer within the middle of a commercial zone. (2) As to the particular facts of this location and its placement of the surrounding lots to the back and to the west (the directions in which the Commercial Zone eventually ends), there is more than enough buffer already. In the back and beyond the property's rear

line, there is about another 150' before the Commercial Zone ends and to the west, there appears to be more than 50' more before the Commercial Zone ends. Mr. Brown noted zoning regulations of this sort should yield in favor of an existing developed lot that has been used for decades to avoid a harsh result to grandfathered situations. Additionally, the property to the west behind the front abutter is of irregular shape, largely an access to the majority of the lot way to the rear, and is believed to be vacant with no existing residential use. Based on all the reasons spoken about, Mr. Brown asked that this administrative appeal be granted.

Mr. Arsenault asked Mr. Cushman if Note 5, under Section 4.3 related to the building alone. Mr. Cushman stated the building is set back 50 feet from a residential use; he was concerned with the vehicles parking within the 50' setback. Mr. Oles stated there would be no buildings within the 50' setback, only vehicle parking. The Board and Mr. Cushman agreed the property is approximately 250' from the residential zone. Mr. Gross asked if a fence was considered a structure. Mr. Cushman responded no, unless it is over 6' high.

Chair Halligan opened the hearing for public comments. Mr. Syphers, Portsmouth Avenue, is an abutter and was asked by the Board what the strip of land that runs along the proposed business is used for. Mr. Syphers responded that it is just a right-of-way to get to the field in the back of this property. Hearing no other comments, the hearing was closed and the following motion was made:

Motion 2: Lizbeth Cummings moved that the Board grant the administrative appeal and find that the Building Inspector erred in his denial, relative to Article IV, Table 4.2, Section 4.3, Explanatory Note 5. The Board finds the existing building is not within the 50' setback. Don Arsenault seconded the motion. All were in favor, with a vote of 4 for and 0 against. MOTION CARRIED.

At 8:00 P.M., the Board took a 10-minute break. The hearing reconvened at 8:10 P.M.

b). Request for a Use Variance, 445 Portsmouth Avenue, Owner/Applicant: 445 Ports Ave, LLC-Gary Bourassa, (Map U4, Lot 27). Applicant is requesting a use variance from Article III, Section 3.5.1 of the zoning ordinance: The applicant proposes to operate a contractor facility with truck parking and related equipment storage in Commercial Zone.

Mr. Brown repeated that he feels this site is ideally suited to what the Applicant is proposing. He stated variance law has changed dramatically in New Hampshire over the last few years, starting with a case involving land in Newington, Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001). Since that time the New Hampshire Supreme Court has wrestled with subsequent issues and much has been decided as to the different criteria for use variances and area variances as in Boccia v. Portsmouth, 151 N.H. 85 (2004). The focus of this has been the troublesome "unnecessary hardship" criterion. The cases have generally shown an attitude of more relaxed approach to variances to allow reasonable proposals more so than in the past. Mr. Brown proceeded to review the variance criteria: 1. The proposed use would not diminish surrounding property values because: This is in

the commercial zone. The lot is surrounded by the Commercial Zone and there are other commercial uses next door. The plan shown will improve the use of the site and make it more attractive. Common sense indicates no values will be diminished. No abutter is close to the rear area (the rear abutter is a vacant parcel); 2. Granting the variance would not be contrary to the public interest because: The public interest is embodied in the text of the Zoning Ordinance which recognizes that commercial uses are the best use of land in this area. The proposed improvements would further such use and make for a productive use of the outdoor areas. Thus, this would be in the public interest and not contrary to it; 3. Denial of a. the variance would result in unnecessary hardship to the owner because: . the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment such that: The use is low intensity and a traditional business of a "commercial nature", b. that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because: The outdoor storage area is a reasonable use of the property, the side and rear portion of the storage will not be seen due to its location and fencing to be added, c. the variance would not injure the public or private rights of others since: The variance will be zero effect on any abutter and none to the public as the storage area will be screened off and not visible; 4. Granting the variance would do substantial justice because: The lot is essentially an old grandfathered lot and commercial use. As to the dimensions and the narrow width, it is very difficult to make reasonable commercial use of the site without some relief. Importantly, no new buildings are proposed and no new paving, just usage of the existing outdoor areas (the "open space" variance arises just from storage on the present ground). Also, importantly, the new use would not be visible from the street. The present condition is very non-conforming as to setbacks and other features. One could say it has "de facto" variances. The lot is such that with all the overlapping setbacks, there is only a sliver of land to use (even outside the building) - much too small for any use without variances. The New Hampshire Supreme Court has ruled that variances are necessary to avoid an oppressive and unreasonable result where special circumstances exist and property rights would otherwise be confiscated. In examining the "substantial justice" test, the Board should (1) balance the rights of the Applicant versus the abutters' or the public's rights and (2) consider whether the proposal is reasonable or unreasonable in kind or scope. On balancing all of these interests, justice (fairness) calls for granting the relief. Denial would cause great harm to the Applicant and would provide no benefit to the public. All the activity is in the rear, or will be screened on the side from view. Variances are the "safety valve" to avoid a harsh result by a denial. Variance relief is justified where only a small building envelope exists. See Sprague v. Acworth, 120 N.H. 641 (1980) where the property owner's lot only had a small "building envelope" and the variance was justified. The public would not gain by denying the variances and keeping the grandfathered de facto variances therefore substantial justice is satisfied. Malachy Glen Associates v. Town of Chester, 155 N.H. 102 (2007). It would be an injustice to cause a loss to the Applicant where there is no public gain to outweigh that loss. Farrar v. City of Keene, ___ N.H. ___ (May 7, 2009). Here, the request is a reasonable one - to allow a typical business use. The proposal will improve the use of the property without harming the

public or any abutter; 5. The use is not contrary to the spirit of the ordinance because: The existing use and the proposed activity - business services with some equipment storage in a Commercial Zone (which allows business services, professional services, retail sales and services and parking lots) is within the intent and spirit of the ordinance, in this zone, as natural commercial growth. Commercial uses exist in the neighborhood. Zoning should "encourage the most appropriate use" of land, and the intent of commercial zone is to encourage reasonable economic returns and to maximize the tax base. These improvements further such goals. The request allows the property to be updated to meet present business needs. Finally, it appears to be within the scope of traditional allowed uses in the Commercial Zone, which includes other paving companies and similar business. After explaining the reasons supporting the variance criteria, Mr. Brown asked the Board to grant the use variance as requested.

Mr. Arsenault asked if the trucks would be parked for the night by 5:00 P.M. Mr. Bourassa responded yes. Mr. Arsenault asked what the 1st floor would be used for. Mr. Bourassa responded it would be used strictly for storage; no maintenance would be done on site and no plows would be stored there. He stated he sees this site as an annex to his business, not the primary location. Ms. Cummings asked if the residential apartment on the second floor had an occupancy permit. Mr. Cushman stated he has had no reason to investigate; it has been a residential apartment for years.

Chair Halligan opened the hearing for public comments. Stephen Gerrato, Post Road, asked where the septic system was and if the trucks would be driving over it. Mr. Oles showed him the location on the site plan and responded no trucks would be near it. Mr. Gerrato further commented that when this applicant presented the proposal to the Planning Board, there were only three dump trucks, now they have changed the number to six. He felt the trucks would have to back into the street and stated it would be a safety hazard. Hearing no other comments, the hearing was closed.

Ms. Cummings stated she was concerned that they are only looking at the proposal as a commercial entity and felt it is a big change to the property itself. The following motion was made:

Motion 3: Don Arsenault moved to grant the use variance, as requested to operate a contractor facility with truck parking and related equipment storage in commercial zone. Lizbeth Cummings seconded the motion.

Mr. Arsenault went through the criteria and agreed with all the reasons stated. He felt the use was acceptable in the district. Mr. Gross felt this proposal had safety issues, considering the fact that cars fly around the corner off Post Road and could potentially collide with these slow moving dump trucks and trailers pulling off the property. Mr. Gross did not feel the hardship criteria had been met. Mr. Halligan also did not feel the hardship criteria had been met, but stated there's nothing stopping the applicant from parking the trucks there, as parking lots are allowed. Ms. Cummings noted if they deny this, the Board is saying that a paving company is not a professional use. After the discussion a vote was taken on Motion 3.

There was a vote of 1 in favor (D. Arsenault) and 3 against. MOTION FAILED.

At 8:55 P.M., the Board took a 5-minute break in order for the Applicant to speak to his representatives about proceeding with the rest of the variance requests. The hearing reconvened at 9:00 P.M. and the following motion was made:

Motion 4: Lizbeth Cummings moved to deny the request for a use variance at 445 Portsmouth Avenue to operate a contractor facility with truck parking and related equipment storage in commercial zone. Ron Gross seconded the motion. There was a vote of 3 in favor and 1 against (D. Arsenault). MOTION CARRIED.

Mr. Brown informed the Board that the Applicant was not going to proceed with the other variance requests.

Note: Ms. Leonard submitted hand-written notices of decision to Mr. Brown, but stated a more formal letter would follow.

c). Request for a Use Variance, 445 Portsmouth Avenue, Owner/Applicant: 445 Ports Ave, LLC-Gary Bourassa, (Map U4, Lot 27). Applicant is requesting a use variance from Article IV, Table 4.2, Section 4.3, Explanatory Note 5 of the zoning ordinance: Use within the Commercial/Residential Buffer of 50'.

This request was not needed, due to the administrative appeal being granted.

d). Request for an Area Variance, 445 Portsmouth Avenue, Owner/Applicant: 445 Ports Ave, LLC-Gary Bourassa, (Map U4, Lot 27). Applicant is requesting an area variance from Article IV, Table 4.2, Section J of the zoning ordinance: Open Space of 48% where 60% is required.

The Applicant did not proceed with this request, due to the use variance being denied.

e). Request for an Area Variance, 445 Portsmouth Avenue, Owner/Applicant: 445 Ports Ave, LLC-Gary Bourassa, (Map U4, Lot 27). Applicant is requesting an area variance from Article IV, Table 4.2, Section F of the zoning ordinance: Side-yard setback of 5' where 20' is required.

The Applicant did not proceed with this request, due to the use variance being denied.

2. Any business that may legally come before the Board but does not call for public hearing, including: review of previous meeting minutes, consideration of their approval, consideration of timely-filed motions for rehearing, and consideration of further motions.

1) The Board discussed the request for a motion for reconsideration (attachment 3), in the matter of: Thomas and Allison Brackett, 22 Brackett's Point Road. Ms. Cummings stated per RSA 677:2, the applicant needed to have had the document submitted by October 16, 2009, in order for it to be timely filed and noted it was not received

until October 20, 2009. She proceeded to read RSA 677:2 and quoted: "This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 144 hours of the vote pursuant to RSA 676:3 II, the person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefore, within 30 days after the date on which the written decision was actually filed." Ms. Cummings stated the minutes, as well as the notice of decision was filed and available to the public on September 21, 2009, which was within the 144 hours requirement. The rest of the Board agreed and the following motion was made:

Motion 5: Lizbeth Cummings moved to not hear the Motion for Reconsideration in the matter of Thomas and Allison Brackett, 22 Brackett's Point Road, based on the fact that it was not filed in a timely manner, per RSA 677:2. Don Arsenault seconded the motion. There was a vote of 3 in favor and 1 abstained (R. Gross). MOTION CARRIED.

2) The Board reviewed the minutes of September 15, 2009. There were no suggested changes made to the minutes and the following motion was made:

Motion 6: Lizbeth Cummings moved to approve the minutes of September 15, 2009 as submitted and Don Arsenault seconded the motion. There was a vote of 3 in favor and 1 abstained (R. Gross). MOTION CARRIED.

Being no further business, the meeting was adjourned at 8:32 P.M.

Motion 7: Lizbeth Cummings moved to adjourn the meeting at 9:10 P.M. and Don Arsenault seconded the motion. All were in favor, with a vote of 4 for and 0 against. MOTION CARRIED.

Recorded, transcribed and typed by:

Amy Leonard
Secretary, Zoning Board of Adjustment

Attachments:

1. Site Plan, re: 445 Portsmouth Ave., LLC
2. Exhibit List, re: 445 Portsmouth Ave., LLC
3. Motion for Reconsideration, re: Tom & Allison Brackett
4. Agenda, dated 10-20-09

Approved by the Greenland Zoning Board on March 3, 2010.