ZONING BOARD OF ADJUSTMENT
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MINUTES OF THE BOARD OF ADJUSTMENT PUBLIC HEARING

Tuesday, August 20, 2019 – 7:00 p.m. – Town Hall Conference Room

Members Present: Lindsey Franck, Steve Gerrato, Ron Gross, Leonard Schwab
Members Absent: Liz Cummings
Staff: Jim Marchese – Building Inspector; Charlotte Hussey – Administrative Assistant

Chair Gross opened the Board of Adjustment meeting at 7:00 p.m. and a roll call was taken. The Chair explained the procedures of the Zoning Board of Adjustment, stating that a quorum was present, and the meeting was being recorded. Minutes will be available in accordance with the RSA 91-A, and will also be available on the Town's website.

Chair Gross announced there were only four members present; a minimum of three votes would be needed. The applicant chose to proceed with the hearing.

1. 667 Portsmouth Avenue: U6, 66 – Commercial A, Aquifer Protection Zone
   Request for a Variance
   Owner: GAHVET Realty, LLC
   Applicant: 667 Portsmouth Avenue, LLC
   Section IV – Dimensional Requirements, Section 4.2(a) – Table of Dimensional Requirements of the Greenland Zoning Ordinance requires a minimum lot size of 60,000 sq. ft.; the existing lot is 51,286 sq. ft. Section IV – Dimensional Requirements, Section 4.2(b) – Table of Dimensional Requirements in the Greenland Zoning Ordinance requires 200' of lot frontage; the existing lot has 198.8'.

Joshua Lanzetta, Attorney with Bruton & Berube and representing the applicant, addressed the Board. Also present was Christian Smith, Civil Engineer from Beals and Associates, and Luke Hurley, wetland scientist.

Attorney Lanzetta stated this proposal, although related to the same physical address as the application submitted in June, was completely different and should be considered new. Slides of the property location were shown to the Board. The property is located in Commercial A and the Aquifer Protection Zone. However, the Aquifer Protection Zone only affects the extreme eastern edge of the property. Construction is not proposed in that area.

The area is highly developed: it is a busy rural route and there is a mixture of commercial and residential uses abutting the property. Two uses are currently happening on the property: commercial (veterinary practice) on the first floor and residential use in a residential apartment on the second floor; the two car garage on the north side of the property is used by the tenants. There is a commercial complex that abuts the property on the north; a six unit residential apartment abutting the property on the south.

Attorney Lanzetta noted there are clear site lines and site distances from the north and south. There is zero safety impact with ingress and egress for oncoming traffic.

Attorney Lanzetta pointed out the differences in the June plans and the current plans. They specifically took the Board's recommendation (made in June) to put the structure behind the existing building. They are completely out of the wetland area (noted by hash marks). The new submission completely avoids the wetland area, wetland buffer and aquifer protection zone; there is zero wetlands impact. The wetland scientist was present to answer any questions about the effects or function of the manmade wetlands on the property. Attorney Lanzetta noted on the plan that the aquifer protection zone appears in the southeastern part of the property; the existing and proposed structures are forward of the line. They are not affecting the aquifer protection zone.

They were requesting two Variances from Section IV (Dimensional Requirements) of the Zoning Ordinance: Section 4.2(a) – square footage of the lot and Section 4.2(b) – frontage. Section 4.2(a) requires a minimum lot size of 60,000 sq. ft. Attorney Lanzetta stated it was interesting to note that mixed use developments are expressly permitted in the CA zone; they are proposing a two unit residential building and one commercial building. The lot size is off by approximately 8,000 sq. ft. which is de minimis by almost every standard applied to the Zoning Ordinance. They are off by 1.2 ft. for frontage on Rt. 33.

Attorney Lanzetta explained how the Zoning Ordinance was enacted. Variance criteria are designed to provide relief when zoning creates an unnecessary hardship that impacts property and business owners. They are dealing with an average amount of lineal feet of frontage on Rt. 33. That is an important concept to view this by because the numbers are completely arbitrary; that is the average aggregate of what is found in the district. That is how Greenland's Zoning Ordinance, and that of the entire country, was drafted. The only way to view the project is by the standard of reasonableness.

Attorney Lanzetta asked the Board to view the proposal under the "lens of reasonableness". They have an unnecessary hardship with some arbitrary numbers. They have a proposal that fits the exact timbre of the neighbor. They are proposing a mixed use development in a heavily developed commercial area with high visibility. It will provide tax dollars to the Town, increase property values for the abutting properties and in the zone with new construction, and it will bring a local business owner and long-time resident to the table in Greenland. It will also promote many of the State goals that have been enunciated over the last five years: mixed use developments to prevent sprawl and promote the environment, and to add residential units due to the lack of them.

With this proposal they are falling short of some minor points: 14 inches of frontage and approximately 8,000 sq. ft. of lot size. These are both really, really small and show the Ordinance drafted for this property is creating a substantial hardship; it's almost impossible to develop this property. Attorney Lanzetta noted that letters of support from abutters were included in the packet and that there is community support for the project. He felt it would be a benefit to the community to grant the Variances to relieve some of the unnecessary hardship on the property.

C. Smith addressed questions regarding the septic, noting the location of the existing system and the leach field. The system is slightly raised. There are two options for the system: a new septic system can be installed exclusively for the new building or expand the current system; they were unsure which would be the best option. Perk tests have not been done; three test pits have been done for drainage. Once a decision is made on the septic system, more test pits will be done. The seasonal high water table

was between 24" and 36". S. Gerrato noted half of the field shown on the plan is in the aquifer protection zone.

L. Schwab questioned the lot size on the Building Inspector's original denial was 48,630 sq. ft. where 60,000 sq. ft. is required; on tonight's agenda the lot size is 51,286 sq. ft. vs. the 60,000 sq. ft. C. Smith stated that a survey of the property was found; 51,286 sq. ft. is correct. There was a misreference from a plan that was not on record. L. Schwab clarified that 51,286 sq. ft. was the total perimeter. The end points were incorporated into a survey program that computed the area; it was physically surveyed and put on a plat prepared in the mid 2000's. L. Schwab noted that the 198.82 on the southern border was exactly the same as the top border with the jog. Attorney Lanzetta noted the previous application was submitted with the incorrect lot size based on an erroneous survey; it has been corrected with the survey on record. That information was not included on the application before the Board; Attorney Lanzetta was trying to keep the two applications separate for clarity. Attorney Lanzetta stated that the correct square footage is on file with Rockingham County; the traceability is legally at the Registry of Deeds. J. Marchese apologized to the Board for not revising his prior denial to reflect the change in lot size. A plan, not a deed, was used when submitting the previous application. C. Smith noted it was a plan with an incorrect reference; Attorney Lanzetta stated it is common to find discrepancies. C. Smith checked the area using Auto Cad and it was correct.

The setbacks were done referring to the building codes; L. Schwab felt there was an error and referred to Article 4.3, Sub 4: a commercial use abutting a residential use within the CA District shall be set back at least 25 ft., not 20 ft. as shown on the plan. The building next door is a six unit apartment, which is a residential use. J. Marchese stated that in Vision the Town of Greenland recognizes the abutting property as commercial because it is a six unit apartment and rental space, not residential. Therefore, the 20 ft. setback is correct. L. Schwab countered, stating it was a residential use within a commercial zone. Discussion continued, referring to definitions of multi-family and residential use. Multi-family is defined as five or less; there is not a definition of residential use. Attorney Lanzetta felt the article was referring to zone and not use; Chair Gross disagreed. Attorney Lanzetta stated the building could be moved 5 ft. contingent upon approval.

Nothing changes in the animal hospital and the parking lot will remain the same. M. Brown stated that his office will be in the new building. The new parking lot will be for his business and tenants. Chair Gross stated parking spaces and the nature of the business were not the purview of the ZBA.

S. Gerrato noted they changed the location of the residential units. They were proposing a two family unit, up and down, rather than side by side. S. Gerrato stated they would need 90,000 sq. ft. Attorney Lanzetta responded they had asked for a zoning opinion from J. Marchese specifically for this application and wrote the application based on that opinion. They considered this a mixed use building, not a duplex; that required 60,000 sq. ft. Chair Gross commented the Board had stated they did not want to see anything in the aquifer or buffer zone. No pre-approval was given. They were looking at this as a new application. Attorney Lanzetta and J. Marchese had corresponded about the new application to meet what was asked of them. He continued that the planning phase was where these types of questions would be addressed, plans are manipulated and the applicant complies with the requests of the town. S. Gerrato stated it looked like a duplex had been created on the new plan. Attorney Lanzetta respectfully disagreed; they were creating a mixed use structure. S. Gerrato insisted it was a duplex.

L. Schwab questioned the line between the buildings on the plan. M. Brown stated it connected the buildings and was heated space; Attorney Lanzetta added it was one building connected with a like foundation. There would be one commercial use and two residential uses. S. Gerrato stated there were

two buildings, one of which was a duplex. Attorney Lanzetta stated the entire project was mixed use in a commercial zone. S. Gerrato stated the intent of the rule was for apartments above and business below; that was mixed use. Attorney Lanzetta responded it would be a Planning Board discussion; they were trying to show the Zoning Board a footprint. It was a contiguous structure with two separate uses proposed: commercial and residential. It was one structure, one like foundation; it can't be categorized as a duplex. It was not a function of the Zoning Board to define where the uses in a structure are; they were showing square footage and a proposed use. A different ridge pole in different parts of the building did not make it two buildings.

L. Franck commented that it is a heavily screened area. She asked if they would be able to keep their word to the neighbors and keep it screened. Attorney Lanzetta responded it was their intent to leave as much screening as possible and add more screening for the abutters.

Chair Gross clarified his understanding was that mixed use is primary non-residential and primary residential; S. Gerrato was calling it a duplex. Chair Gross read the definition of "duplex" from the Ordinance. Mixed use does not indicate the structure type; the duplex does but does not specify the building can be used for something else. Attorney Lanzetta stated when a mixed use development is done, there may be commercial on the bottom and residential on top. If it were just residential, he would agree it was a duplex. If that was a concern, a slight configuration could be considered. As far as zoning the Board needed to consider the reasonableness, which was square footage of the lot and frontage.

Chair Gross stated mixed use is considered if it is on the same site or building. Two separate residential buildings would be considered a duplex. By combining them, does that change the rule on what is considered a duplex? Attorney Lanzetta felt it did and referred to the definition of mixed use. Chair Gross clarified if they weren't in the same building, it would be a commercial building and duplex. By being combined into one building, the Board has to look at it differently. Attorney Lanzetta stated that common heating space, common walls equals building. Discussion continued at length about duplex vs. mixed use. Members felt that a building with two residential units was considered a duplex. Attorney Lanzetta stated that in the canon of construction if a word is omitted, it is not part of the drafted language; that is the basic tenet of all statutory construction. Chair Gross stated that one of the constraints of the Variance: is it the intent of the Ordinance. Attorney Lanzetta read Article 1.2 – Purposes, into the record; ……"encourage the most appropriate use of land throughout the Town, and to promote efficiency and economy"….. They can alter the design during the planning phase; they were looking at the Ordinance as drafted, because they are arbitrarily drafted. It is the average aggregate of the property as zoned.

The lot is 51,286 sq. ft. where 60,000 sq. ft. is required; that is the hardship of the property. It's unnecessary in keeping with the timbre of the neighborhood. This is why there are Variances. It's not the job of the Board to find a way to say "no" to M. Brown; we're looking at it to say "is it reasonable" to have an 8,000 sq. ft. deficit and a 14" deficit. The argument would be it was beyond reasonable. There was a discussion whether 15% was de minimis. Chair Gross stated over the years, the Town has spoken. Townspeople did not want two family homes built on small lots and the reason it was changed to 90,000 sq. ft.

C. Smith stated that the duplex ordinance was looking at the square footage required for a single family home or the duplex home requires the additional land area for more soil capacity for septic. The lot loading on this lot meets the State requirements for septic and is large enough to handle the flow. L. Schwab felt they were asking for an aggressive form of development. With some changes, there might

be some common ground making it less aggressive. Attorney Lanzetta stated it was not aggressive development. Otherwise, they would raze the buildings and go to maximum capacity; that would be unreasonable. The State has legislated this into our statute; there is not enough living space in this county. L. Schwab responded that was lobbying; Attorney Lanzetta stated it was not and he wanted it on the record if this went to court. The judge would look at the statute and agree it was a reasonable use; everything else was a Planning Board function. They were willing to horse trade the Town of Greenland until they had no horses left. They were willing to move things around and reconfigure the building, push it forward, push it backward; M. Brown was willing to do it at his own cost. He has also offered to add a sidewalk linking Cumberland Farms to this property at his expense. This is a community development project that adds places to live and a local business. It is promoted by our State laws. It is not a duplex; there is no judge in this State that would say this was a duplex. This is a mixed use development. It is a hardship; the only way to develop the property is to bulldoze everything. It's a very reasonable use and it will add value. A denial can only be based on "is it unreasonable". They are at 15% and 14".

The lot coverage has not been run, but C. Smith didn't think they exceeded 35%. They were willing to work with the Town to ensure it was a stellar development in the pre-existing, heavily trafficked Rt. 33. It's a reasonable use; that is the purpose of a Variance.

M. Brown addressed the Board. He is a Greenland resident and is proud of the Town. He has the support of 100% of the abutters. He understood the Board had to do their job. As a resident, he thought Greenland was missing the development of downtown, putting sidewalks in and making more of a community. The Variance was not out of the ordinary for this zone.

Attorney Lanzetta stated there is a hardship created as the ordinance was drafted. The proposed use is reasonable and a supported project in this Town.

L. Franck asked J. Marchese if the land was vacant and not 60,000 sq. ft., could anything be built there. J. Marchese explained that it has been an existing non-conforming lot of record for a long period of time. Because it is an existing non-conforming lot of record and taxes have been paid, it could be developed as long as all requirements were met.

Responding to a statement by S. Gerrato, Attorney Lanzetta stated they were willing to work with the Planning Board on issues not within the purview of the Zoning Board. They would work with the Planning Board to put up a sturdy building.

Chair Gross asked if they considered it a hardship because they required it to be a mixed use facility with two residential units in order for it to be a viable building use. Attorney Lanzetta responded that the land itself was the hardship; mixed use is permitted. A Variance is needed because of the size of the lot. Chair Gross stated a Variance has to be granted based on whether the Board feels this meets the five criteria, and part of that reflects on what the Town wanted to see on Rt. 33. He agreed it was mixed use, but they were trying to develop a non-conforming lot. A lengthy discussion continued regarding the mixed use and the hardship created by the property.

Attorney Lanzetta stated that "when we get to court, you'll find you're at a de minimis percentage". Chair Gross responded that the Board couldn't make a decision based on the fear it would fail in court. Attorney Lanzetta stated this was a de minimis proposal. Again, discussion continued about the reasonableness and unnecessary hardship. L. Schwab asked if mixed use meant a commercial development and a residence on the same lot. Attorney Lanzetta explained that mixed use is a general

zoning term that is used when different uses are mixed or combined that would normally be in separate zones; separate zones create sprawl. He continued that mixed use in the Ordinance has a clear aura in that definition. A Variance cannot be denied based on this concept; it is expressly permitted in the CA Zone under Article 3.6. Chair Gross agreed, but added there was a question of clarity of whether this was considered a duplex or not. He felt there was a potential issue with interpretation as well as the definitions. Attorney Lanzetta stated again, there is a mixed use building on the property. Mixed use is expressly permitted in this zone. The applicant was willing to make adjustments to the location of the residential and commercial units. Chair Gross noted the lot was not big enough. Attorney Lanzetta and the Board continued debating mixed use vs. duplex vs. reasonableness.

There being no further comments, Chair Gross closed the public hearing. S. Gerrato believed that the mixed use ordinance was not designed to sprawl out on a lot and the reason he was against the Variance; it wasn't mixed use. He felt the Planning Board would uphold that decision. He considered the two family unit a duplex; 90,000 sq. ft. was required. It wasn't unreasonable for the Board to ask for the 60,000 sq. ft. L. Schwab believed that multi-family and duplex were not mutually exclusive; it was clarified that multi-family was not being discussed. He felt the residential units were a duplex; to find common ground, it should be a single residential unit. They should also abide by the 25 ft. side yard setback because the abutting property was a residential use. In his opinion, that would be satisfactory middle ground. L. Franck agreed. The people of Greenland wanted 60,000 sq. ft. She was concerned because 8,000 sq. ft. was a big number. L. Franck felt the entire Town should be taken into consideration and not just the abutters. The Board did not have a concern about the frontage request.

MOTION: S. Gerrato moved to deny the Request for a Variance for 667 Portsmouth Avenue for the lot size of 51,286 sq. ft. where 60,000 sq. ft. is required. Second – Chair Gross; three in favor, one against (L. Schwab). MOTION CARRIED

S. Gerrato discussed the criteria:

1. The Variance would not be contrary to the public interest: It would be quite contrary to public interest; it looks like a mess. It's going back 50 years putting houses behind houses; it's old fashioned and we do not want that kind of construction look in Greenland.
2. If the Variance were granted, the spirit of the ordinance would be observed: No, because they did not have the 60,000 sq. ft. If there were not so many buildings added to this little piece of land, S. Gerrato would say "no". He would not have a problem with one structure and 15% less. It was getting messy with the veterinary building, mixed use and commercial buildings.
3. Granting the Variance would be substantial justice: No. Nothing says they have to do a mixed use building. They already have a lot with a building on it.
4. Granting the Variance will not diminish the value of the surrounding properties: Probably not.
5. Unnecessary hardship: There is already a building there. The Board could not determine the hardship. They wanted to add a lot more, going from two units to five units. Chair Gross stated the hardship was the lot size of 51,286 sq. ft.

MOTION: S. Gerrato moved to grant the Variance for 667 Portsmouth Avenue for 198.8 ft. of frontage where 200 ft. was required. Second – L. Franck; all in favor. MOTION CARRIED

Discussion: S. Gerrato stated that going from 200 ft. to 198.8 ft. will not be contrary to public interest. The Variance is consistent with the spirit of the ordinance. Substantial justice will be done by granting the Variance. Granting the Variance will not diminish the value of the surrounding properties. There is no hardship by granting the Variance.

2. Approval of Minutes

a. Tuesday, June 18, 2019 - L. Schwab made the following amendments to the minutes: Page 4, change "impervious" to "pervious"; Page 5, change "done" to "built".

MOTION: Chair Gross moved to approve the minutes of Tuesday, June 18, 2019, as amended. Second – L. Schwab; three in favor, one abstain (L. Franck). MOTION CARRIED

b. Tuesday, July 16, 2019 – Continued to the next meeting.

3. Other Business

Upcoming workshops were reviewed: Land Use Law on Saturday, October 05, 2019, Concord; there will be a discussion on the ZBA Decision Making Policy (link: https://www.nhmunicipal.org/event/nhmaosi-fall-2019-land-use-law-conference-formerly-known-municipal-law-lecture-series). There will also be a public input session on coastal flooding in September.

There was a brief discussion about possible upcoming applications. Alternates were also discussed; L. Cummings will not be seeking re-election.

4. Adjournment

MOTION: Chair Gross moved to adjourn at 8:55 p.m. Second – L. Schwab; all in favor. MOTION CARRIED

NEXT MEETING

Tuesday, September 17, 2019 – 7 p.m., Town Hall Conference Room

Respectfully Submitted: Charlotte Hussey, Administrative Assistant

Approved _____