

ZONING BOARD OF ADJUSTMENT  
MINUTES OF MEETING  
APRIL 16, 1992

MEMBERS PRESENT: Chris Jacobs, Joyce Bowden, Brenda Whitmore  
Dave Paolini, Bob Callan, Randy Turner

ALSO PRESENT: Tom Clark, Steve Stancel

Meeting brought to order at 7:09.

ITEM #1: Minutes of meeting.

Chris Jacobs made the motion to approve the minutes.  
Dave Paolini seconded.

VOTE U/A

ITEM 2: Old Business

None

ITEM #3: \*H92-2 H. Scott McEwan, trustee of New York Realty Trust, 4-6 New York St., a/k/a Assessor's Map 27, Lot 8, zoned Office and RM-8, requests a variance from (1) the terms of Article X, Section 170-40.A. to increase a non-conforming use (Eating and Drinking Establishment) and (2) the terms of Article XI, Section 170-45.C for relief from the off-street parking requirements for the additional area.

Scott McEwan, Co-owner of the property, represented the application. He stated that he has no means of expanding outward and wants to expand upward. He stated that there are currently two apartments on the second floor. It was suggested to him that the only way to stimulate business is to isolate the dining portion of the business from the lounge area. Also, he has had many requests from patrons for a non-smoking area and there are no means of doing that without expanding.

Chris Jacobs made the motion to accept the case.  
Dave Paolini seconded.

VOTE U/A

Mr. McEwan said that he has a driveway with 2 parking spaces and has a written agreement with the legal office across the street which allows him 12 more spaces. He said that he has a seating capacity of 66 and the addition will add 35 to 40 more seats.

Tom Clark stated the addition would require twenty-two additional parking spaces.

Paul Dietterle, abutter, stated he had mixed comments. He stated that the restaurant is a good business compared to the predecessors. It is a "class act" but there are growth problems. He stated that parking and dumpsters are a problem. He felt that he can not approve of the expansion on just economic need.

Steve Stancel stated that the Planning Department opposed the application because there is already reasonable use of the property as there is a restaurant on the first floor and two apartments on the second floor. The expansion would allow him more use than the surrounding properties. The Police often have to ticket cars in that area and increasing the use would not be in the benefit of the public interest.

Paul Dietterle stated that he has lived through fires and activities of a questionable nature and does not want to see this business jeopardized but would like to see it more an eating and less of a drinking establishment.

Scott McEwan stated that the property is unique as it is split in half by zoning. He said that he tried to deal with the parking for years. He tried to purchase the house beside it to turn it into a parking lot but City ordinances would require a lot of money invested for paving, curbs, etc..

#### Public Hearing Closed

Chris Jacobs stated that the parcel already enjoys full use.

#### 5 CRITERIA

1. The applicant doe not face an unnecessary hardship because he has full use of his property as it is and no hardship was proven.
2. The variance will not deliver substantial justice as evidence to substantiate the fact was not presented.
3. The variance will not be in harmony with the spirit and intent of the zoning ordinance as this is a non-conforming use enjoying a full use. To expand would be detrimental.
4. The variance will not result in a diminution in value of surrounding properties as no evidence was presented.
5. The variance will not be of benefit to the public interest as the growth and expansion would create a more severe traffic problem and would not be beneficial to the public interest.

Chris Jacobs made the motion to deny.  
Dave Paolini seconded.

VOTE U/A DENIED

ITEM #4: \*H92-3 Jeremiah Carberry, Trustee of Herbert Carberry Trust, 146 Central Ave., a/k/a Assessor's Map 12, Lot 1, zoned RM-10, requests a variance from the terms of Article IV, Section 170-12, Table I, Part E. to establish a non-conforming use (Nursing Home) in an existing structure.

Jerry Carberry stated that this use is a shared living home rather than a nursing home. He stated that there is a need for a facility of this type in Dover. He will upgrade the facilities to provide a safe place for residents.

Bob Callan made the motion to accept the application.  
Chris Jacobs seconded.

VOTE U/A.

Tom Clark stated that there is nothing in the ordinances for Shared Homes, licensed as independent care facilities with 24 hour supervision. He stated that Nursing Home came closest to the use.

Mr. Carberry stated that the third floor would be used for the 24 hour supervisory person. He said the barn would not be taken down. He said as far as parking is concerned, they prefer that the residents do not have cars.

Mr. Carrier stated that beyond the driveway there is plenty of room for parking.

Tom Clark stated that the required number of spaces would be six spaces. He said that if approved, they would then have to go to TRC.

Mr. Carberry stated a ramp will be installed and two downstairs rooms will be set up for the handicapped.

Charles George, stated that he pursued a shared home not very long ago and was unable to find suitable care in the City of Dover. He stated that this home offers residents independence yet safeguards meal preparation, medicine etc..

Steve Stancel stated that the Planning Department is in favor of this use. The population is growing older and this is a new way of housing older residents. The ordinances don't match the needs that are out there. He stated that this use is more in the character of the neighborhood than other uses.

Public Hearing Closed.

#### 5 CRITERIA

1. The applicant does face an unnecessary hardship because

the current zoning doesn't include this use of Independent Ambulatory Care Facility and this creates a hardship.

2. The variance will deliver substantial justice as it will allow this building to be used for multi-resident use within the framework of single family.
3. The variance will be in harmony with the spirit and intent of the zoning ordinance as the ordinance allows for multi-residential dwelling.
4. The variance will not result in a diminution in value of the surrounding properties as no evidence was presented.
5. The variance will be of benefit to the public interest as a much needed facility to care for an aging population within the City and, furthermore, property values will be maintained.

David Paolini made the motion to grant the variance with the condition that it meet TRC approval.

Chris Jacobs seconded.

VOTE U/A

Randy Turner arrived at 8:03 PM.

Meeting recessed at 8:03 to allow a stenographer to set up equipment to take minutes for Attorney LaBoe.

Meeting called to order at 8:10 PM.

ITEM #5: \*H92-4, Harold Fulton, 8 Deerfield Dr., requests an Appeal from an Administrative Decision in connection with an interpretation regarding the definition of accessory use.

Joyce Bowden explained that the Board was there, not to hear about the traffic, or noise, but to determine if this is an Accessory Use. She stated that she had to withdraw from the case and the Board would have to elect a Chairman.

Joyce Bowden withdrew from the Board.

Bob Callan nominated Chris Jacobs as Chairman.

Brenda Whitmore seconded.

VOTE U/A

Chris Jacobs, Chairman.

Chris Jacobs reiterated by saying that the noise, hours and traffic would not be factors for discussion and the Board can only decide whether this is an Accessory Use or a Principal Use.

Atty. J.P. Nadeau, represented Mr. Fulton and John and Robert Torr. He stated that in his opinion this does not comply with the State Regulations nor the local regulations. He said it must be subordinate and minor and must have a reasonable relationship to the principal use and it does not. A concrete plant is not subordinate to a sand pit. He stated that according to the Dover Zoning Ordinance, the use cannot be designed to serve the general public. He quoted Tom Clark's letter of February 3, 1989 where Tom stated that in the opinion of his office, a bituminous concrete plant cannot be considered an accessory use to a gravel pit. Mr. Nadeau stated that the City of Dover's ordinances are of the "permissive" variety and since a concrete plant is not listed, then it is not permitted. He stated that the current administrative decision made by the Building Inspector's Office, that the proposed Proulx concrete plant qualifies as an accessory use to the existing gravel pit operation on the Martel property is contrary to the common law of the State of New Hampshire. He stated it is also contrary to the City of Dover's own zoning ordinances, and to past decisions of the City's Building Inspection Office. Mr. Nadeau stated he is asking for a reversal of the decision.

Tom Clark stated that out of 6 pits within a certain radius, 4 had batch plants, therefore, it was determined to be customary. Also, the gravel pit is not dependent on the batch plant but the batch plant is dependent on the gravel pit. He stated that the decision he made regarding Brox was challenged and was overturned, which established bituminous plants as an accessory use to a gravel pit. He stated that therefore, we drew to a conclusion that a batch plant is an accessory use. He stated that Scott Woodman, City Attorney, concurred that this product is an accessory use.

David Paolini made the motion to accept the case.

Bob Callan seconded.

VOTE U/A

Joyce Bowden was recognized by the Chairman and stated that each case should be heard on its own merit. She stated that just because one decision was made, it should not sway the Board.

Chris Jacobs stated that the Board is not bound by any previous decision.

John LaBoe, Attorney for Mr. Proulx, stated that the plant will only occupy three acres of the 38 acre pit owned by the Martels. It does bear a reasonable relationship to the gravel pit and is customarily associated with the principal use. He stated that the Brox case which has been revealed here sets a precedence in favor of accessory use. He stated that traffic wise, having the batch plant in the sand pit

~~will eliminate the volume of heavy traffic going through the community.~~ He said that the batch plant only weighs the product, it is mixed in the trucks on the way to the site. He listed the following pits as having batch plants:

Iafola, Ports.; Dover Sand & Gravel; A.J. Coleman, Conway;; Brox Concrete, Rochester; Tilcon, Keene and Lebanon; Harris, Peterboro; and Granite State, Milford. He stated that Manchester and Exeter have batch plants in the City but most are based in sand pits. He stated that Mr. Proulx is a lessee, not an owner. He said it is an accessory use.

Paul Martel stated that the life of the pit depends on the economy and can't give a definite answer but it could last 20 or 30 years. He said that he sells sand, gravel and top soil. He stated that they have the potential to crush and screen stone.

James Miller asked if Mr. Proulx will buy some of the sand from Martel or all of it.

Paul Martel stated that it depends on what Mr. Proulx wants and hopes to provide all of the sand.

Tom Clark stated that that was one of the concerns. He stated he was told the Martels could supply all the sand but maybe not all the aggregate.

James Miller stated that if he can't supply all the sand it is not an Accessory Use.

Paul Martel stated that they do have enough material to supply all of the sand.

Willard Bujor stated that concrete is six parts stone and 3 parts sand and 1 1/2 parts cement. He said the sand must be washed because it can't have any loam in it.

Dick Proulx stated that he has been in the cement business all his life and that mix would not hold up.

Herbert Milo, 21 Lisa Beth Circle, stated he was opposed.

Chris Jacobs stated that once Martel got his gravel permit he could haul in anything he wants.

John Clark, 44 Bridal Path, Paddock, stated that manufacturing a product must be done in an industrial park. He felt that it should be investigated as to whether the nine plants mentioned met the zoning laws. He felt that zoning it as a manufacturer should be looked into.

Ellen Kilty asked how many of the batch plants were put in as an accessory use.

~~Atty. LaBoe stated that the plant only measures, the mixing is done in the trucks.~~

Atty. J.P. Nadeau stated that he want to bring the focus back on Accessory Use. He asked that everyone use common sense. He stated that two wrongs don't make a right. Just because there are 17 in the State does not mean we should allow it. He again stated that an Accessory Use cannot serve the general public. He said that light industry is prohibited in an R-40 zone so it is a prohibited use. He stated that each application must be judged on its own merits. Atty. Nadeau then supplied the Board with a memo stating his arguments.

Jim Church, Lisa Beth Circle, stated that Dover won't die if this plant is not approved.

Linda Davis, Paddock, stated that 51% of the material is not a majority to her. She stated that the question is, do they move from one three acres to the next three acres and so on until all the 38 acres are used.

Chris Jacobs stated that Proulx agreed to lease three acres. He stated that more than 50% means majority.

Linda Davis stated that she looks at 75% to be a majority not 51%.

Leon Boyd, Lisa Beth Drive, stated there is a limitation on how many plants could be put on a property. He stated that this does not support a primary use, it can't possibly apply.

Tom Clark stated that there will only be one plant.

Steve Stancel stated that the Council makes the ordinances and the Planning Department interprets them and forms an unbiased decision. He stated that looking at the definition of Accessory Use, it is important to look at the seventeen plants located in gravel pits. He stated that subordinate was looked up in the dictionary and it means dependent and the plant is dependent on the pit. He said it is unrealistic to say that all aggregate must come from on site. He stated that a batch plant can be put in an industrial zone but all aggregate must be trucked to it. He stated that each case must be heard independently but if the circumstances are similar, it is important to be consistent. He stated that the Department would recommend that the majority of the aggregate should come from the site. The pit comes up for renewal each year and we could ask for some kind of accounting.

J.P. Nadeau stated that the plant must not serve the general public. Mr. Proulx would have to sell all the mix to Martel and Martel would sell to the public.

Steve Stancel stated that if it is determined that it is an accessory use, the Planning Board will then continue with their process and will look at the traffic, noise, air pollution and other concerns. If it is determined to be a principal use it stays any decision by the Planning Board and will probably be pursued in court. Mr. Proulx could also come back seeking a Variance.

Peter Losapio, Bellamy Road, felt everything comes back to the majority of the material coming from on site. He stated that he visited the Townsend site and everything was trucked in.

Jack Beland, 72 Bellamy Road, stated he is opposed.

Cliff Lake, Lisa Beth Drive, stated that the Board has Accessory Use and Primary Use backward.

John Torr stated that he sees nothing but sand in the pit and very little stone.

Bob Callan asked if Martel has a crusher on site.

Paul Martel stated that he does have a crusher and can make the stone that Mr. Proulx requires.

Public Hearing Closed

Randy Turner asked if Brox owned the gravel pit that the bituminous plant is in.

Tom Clark stated that the plant and the pit were in the same ownership.

Dave Paolini asked if the lease agreement stated that Proulx would buy his materials from Martel.

Proulx stated that there is an agreement stating he would buy all the aggregate from Mr. Martel but it has not been signed yet.

Paul Martel stated that he has brought in loam to sell.

Randy Turner asked if Martel can buy from someone else.

Paul Martel stated that he can buy from someone else but the more he sells from his pit the better off he is.

Turner stated that it makes sense, but he feels that if Martel was bringing in the plant he would have no problem.

Bob Callan stated that he attended the Brox public hearing and didn't see anyone from this area there. He stated that

it is a "not in my back yard" issue. He stated that he feels it is an accessory use.

Randy Turner said he was still stumbling over the two separate owners.

Tom Clark stated that the use does not address ownership as a criteria.

Brenda Whitmore stated that there will be times when Mr. Martel will not have access to the materials for the batch plant. She said that both businesses can cohabitate independently. She stated that in her mind they are two independent operations.

Chris Jacobs asked if there can be two principal uses on the same property. He stated that this plant can stand alone.

Dave Paolini stated that he has no problem with one cement plant and all materials being bought from Mr. Martel.

Linda Davis stated that she cannot see Mr. Martel trucking in all the materials for Proulx to make cement.

Chris Jacobs asked for a vote. He stated that a YES vote repeals the administrative decision and makes it a principal use and a NO vote stays the administrative decision and continues it as an accessory use.

VOTE 3 - 2 ADMINISTRATIVE DECISION UPHELD

YES - 2 - Chris Jacobs, Brenda Whitmore

NO - 3 - Bob Callan, David Paolini, Randy Turner

Randy Turner made the motion to adjourn.

Bob Callan seconded.

VOTE U/A

Meeting adjourned at 10:30 PM.