



CITY OF DOVER

ZONING BOARD OF ADJUSTMENT – STAFF MEMO (Z13-10)

Application Type:	Variance
Applicant:	Robert F. Fisher
Owner:	Anne E Tucker Revocable Trust
Location:	49 Littleworth Road (Tax Map G, Lot 29C)

INTENT: Applicant proposes to operate a lunch cart on the subject property. A variance is required to permit the lunch cart which is not a permitted use in the zoning district in which the property is located (R-20).

LOTS/UNITS PROPOSED: n/a

AGENDA ITEM #: 3D

ZONING DISTRICT: R-20

EXISTING LAND USE: Residential

PROPOSED LAND USE:
Residential and Commercial

SURROUNDING LAND USE: Single-family residential, industrial and commercial

PREVIOUS ZBA ACTION:

- Variance sought to permit an eating and drinking establishment in a residential zoning district (Case Z00-9). Variance denied per Notice of Decision dated April 20, 2000.
- Variance sought to permit a lunch cart on the property where lunch carts are not a permitted use in the R-20 District (Case Z12-09). Variance denied on November 14, 2012. Request for rehearing granted on April 18, 2013.

PLANNING BOARD APPROVAL REQUIRED: No

APPLICATION IS COMPLETE: Yes

NOTICES AS REQUIRED: Yes

STAFF RECOMMENDATION:
The Planning Department does not support the variance request.

Summary of Request and Background

The subject property is located at 49 Littleworth Road and is improved with a multi-family dwelling unit. The applicant has requested a variance to operate a “lunch truck” on the property which is a non-permitted commercial use of the property. A similar variance request for a “mobile lunch truck” was made in 2000 (Case Z00-9), at which time the property was located in the R-40 District. The variance request was denied by the ZBA.

For your reference, below is a timeline of events related to this application:

- 2000 – variance denied for an eating and drinking establishment (lunch truck)
- May 29, 2012 – application submitted by applicant for variance to permit a lunch truck (Case Z12-09)
- November 15, 2012 – hearing on Case Z12-09, request denied
- December 6, 2012 – request for re-hearing submitted by applicant
- April 18, 2013 – request for re-hearing granted
- June 20, 2013 – hearing for Case Z13-10, case continued to permit property to be posted

Reason for Staff Recommendation

Staff believes that there are no special conditions of the property that distinguishes it from any other property similarly zoned. The property is already being used for a multi-family residence, and there are several other uses permitted in the R-20 District that the property could be used for, if desired. A similar request was made to the ZBA in 2000 and was denied where the ZBA concluded that the application failed to meet all five (5) of the variance criteria.

Recommendation

The Planning Department recommends the Board hold the public hearing, and deny the variance.

ATTACHMENTS:

- Tax Map
- Draft Findings of Fact and Conclusions of Law
- Application for Case Z12-09
- Aerial photo submitted at 11/14/12 hearing for Case Z12-09
- Case Z12-09 Notice of Decision
- Case Z 12-09 Re-Hearing Request (12/6/12 letter from applicant)
- Case Z00-9 Application

CASE Z13-10

FINDINGS OF FACT

1. The subject property is located at 49 Littleworth Road, identified as Tax Map G, Lot 29C, and is located in the Low Density Residential (R-20) District.
2. The property is improved with a multi-family structure which is currently occupied.
3. The applicant proposed to operate a "lunch truck" on the property.
4. A lunch truck would be considered an "eating and drinking establishment" under Chapter 170 of the Code of the City of Dover ("Zoning Ordinance").
5. An eating and drinking establishment is not a permitted use in the R-20 District and therefore a variance is required from Section 170-12.A and the R-20 District Table of Use to permit the proposed lunch truck to be operated on this property.
6. The property is surrounded on three sides by other properties located in the R-20 District, as depicted on the City of Dover Zoning Map. Across Littleworth Road, the properties are located in the Rural Restricted Industrial (I-2) District. Eating and drinking establishments are permitted in the I-2 District.
7. The uses in the immediate vicinity include residential, low density industrial, and a lawyer's office across the street. The nearest retail is the Dover Paint & Varnish located at 25 Littleworth Road, located approximately one-half mile from the subject property.
8. A similar variance was sought in 2000 to permit an eating and drinking establishment in a residential zoning district (Case Z00-9). The variance was denied per Notice of Decision dated April 20, 2000.

CONCLUSIONS OF LAW

1. THE VARIANCE WILL BE CONTRARY TO THE PUBLIC INTEREST AND THE SPIRIT OF THE ORDINANCE WILL NOT BE OBSERVED. The surrounding neighborhood consists of primarily residential and industrial uses, with the nearest retail located approximately one-half mile away. The introduction of an eating and drinking establishment is fundamentally out of character with the surrounding neighborhood and, therefore, would alter its essential character. Indeed, the separation of distinct categories of uses into separate zoning districts (e.g. commercial, residential, and industrial) is one of the most basic and core components of traditional Euclidean zoning. As a result, the proposal does not meet the spirit and intent of the ordinance and public interest criteria.

2. THE VALUES OF THE SURROUNDING RESIDENTIAL PROPERTIES WILL BE DIMINISHED. No evidence was presented by the applicant that demonstrates the value of the surrounding properties will not be diminished by the proposed use, other than the applicant affirming that no such diminution will take place. Since the grant of this variance would result in a severe deviation from not only what is permitted by the Zoning Ordinance but also from what the actual surrounding uses consist of, it is not clear that the operation of a lunch truck on this property will have no effect on the property values of the abutting residential uses.

3. SUBSTANTIAL JUSTICE WILL NOT BE DONE. Under New Hampshire case law, any loss to the individual which is not outweighed by a gain to the general public is an injustice. Also, the court will examine whether the proposed development is consistent with the area's present use. New Hampshire Office of Energy and Planning Zoning Board of Adjustment Handbook, October 2012, p. II-11, *citing Malachy Glen Assoc. v. Chichester*, 155 N.H. 102 (2007). Here, the property is already being used in a manner entirely consistent with what the Zoning Ordinance permits and with the actual use of the surrounding residential properties. Therefore, there is no "loss" to the applicant by not permitting a commercial use of the property which bears no relationship to any permitted use in the R-20 District and is wholly inconsistent with the existing surrounding uses. It is important to note that the grant of the variance would permit a commercial use *in addition* to the existing multi-family residential use of the property. The variance would, in other words, permit a "bonus" use of the property for no other reason than the fact that the applicant wishes it.

4. LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE WOULD NOT RESULT IN AN UNNECESSARY HARDSHIP. There are no special conditions of the property that distinguish it from other properties in the area that are similarly zoned. The property is zoned for residential use and that is how it is used, as are the other surrounding properties located in the R-20 District. There is nothing special or unique about this property that would justify granting a variance for a completely unpermitted use, or which would create a hardship were the variance to be denied. The proposed use is unreasonable in that the property is already being utilized with a permitted residential use, there are no other similar uses in the area, and there would be no hardship suffered were the ~~variance to be denied~~