



CITY OF DOVER

ZONING BOARD OF ADJUSTMENT - MINUTES

Meeting Type: Regular Meeting
Meeting Location: **Council Chambers, City Hall** - 288 Central Ave., Dover, NH 03820
Meeting Date: **Thursday, December 20, 2018**
Meeting Time: **7:00 pm**

1. ATTENDANCE

Members Present: Chris Prior (Chair), Bob Hall (Vice Chair), Otis Perry, Frank Landford, Rich Onufry (Alternate), Nick Couturier (Alternate)

Members Absent: George Reagan, Anthony Sillitta (Alternate)

Staff Present: Elena Piekut (Assistant City Planner, Zoning Administrator)

The Chair called the meeting to order at 7:02 p.m. He introduced the Board and staff present to the audience and explained the process used to hear cases.

2. APPROVAL OF MEETING MINUTES OF DECEMBER 6, 2018

Motion: Otis Perry moved to approve the meeting minutes of December 6, 2018 as presented. Frank Landford seconded. Vote: U/A

3. HEARINGS

- A. Z18-19 Applicant/Owner Todd LaFond, 4 Crestview Drive (Tax Map D, Lot 22-2), located in the Medium Density Residential (R-12) Zoning District, requests a variance from Section 170-12.B of the Zoning Ordinance to permit a side setback of 10 feet for an attached garage, where a minimum of 15 feet is required.

Todd LaFond explained he is proposing to build an attached 28'x28' garage. The current garage under the house is only 7' tall and not sufficient for a larger vehicle. The location will prevent removing a retaining wall and landscaping. All of his neighbors are supportive of the proposal. Chair Chris Prior clarified that the neighbor has a garage on the abutting side.

Public hearing opened. No one spoke.

STAFF RECOMMENDATION:

Assistant City Planner Elena Piekut stated the Planning Department doesn't have any objection to granting the variance. There is a stipulation in the ordinance allowing non-conforming lots with a specified width reduced setbacks. This lot is just barely conforming. If it were a little smaller, it could have 10-foot setbacks. Also, if the garage was to be detached, 10-foot setbacks would be allowed.

Public hearing closed.

Chair Chris Prior stated Nick Couturier will be the alternate to vote in this case.

Motion: Bob Hall moved to approve the variance as requested. Frank Landford seconded. Vote: U/A

- B. Z18-20 Applicant/Owner Real McKoy Properties, LLC, 301 Durham Road (Tax Map H, Lot 1), located in the Hotel/Retail (B-4) Zoning District, requests a variance from Section 170-12.A of the Zoning Ordinance to permit an assisted living facility, where assisted living facilities are not permitted in the B-4 Zoning District.

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Attorney FX Bruton of Bruton and Berube presented the case. He said this zoning board granted this variance in June of 2018. The case is back before them because there was an error in notifying the abutters in Madbury. He gave the property location and history. In 2013 an elderly assisted care facility with 12 beds was approved. They are now looking to have an assisted living facility which will still have 12 rooms, but 24 residents. No changes are proposed to the structure that was approved in 2013. The only exterior change is 11 additional parking spaces in the back.

Otis Perry asked for clarification that the State licensing agency has reviewed the proposal. Attorney Bruton said they had.

Chair Chris Prior stated Rich Onufry will be the alternate to vote in this case.

FX Bruton reviewed the five criteria. He said the use would be consistent with similar uses permitted in the zone and nearby overlay district where there is a similar existing facility. He discussed the small nonconforming lot size and shape. He believes there will be no burden to the public and noted that the site has already received approval from the Dover Planning Board and Madbury Planning Board. He stated there will be no increase in traffic. He noted that permitted uses could be more impactful but also would not fit well on the lot. He stated there will be no diminution in value of surrounding properties as the structure already exists and will not change.

Chair Chris Prior addressed concerns from a Freshet Road, Madbury abutter's email that was sent to the board.

Steve Haight, Civilworks NE, addressed questions from the board members. He said the closest public water is at the intersection of Mast Road. He said the traffic is unlikely to increase for a memory care facility. He clarified for Rich Onufry how the building will retain a residential appearance.

Public hearing opened.

Sarah Greenshields, 13 South Watson Lane/314 Rt. 108 in Madbury, owner of Little Tree Education, stated her facility hosts 75 children a day plus teachers. She is concerned about their water supply being contaminated by medical drugs and cleaning solutions from the commercial leach field.

Danna Truslow, hydrogeologist, 454 Court St., Portsmouth, reviewed water quality impacts and requested the facility hook up to City sewer. She provided a report to the Board. Otis Perry asked for clarification about the private well and Chris Prior asked for clarification about sewage disposal. Discussion ensued regarding the availability of public or private sewer.

David Greenshields, 13 South Watson/ 314 Rt 108 Madbury explained where their sewer line connects. Steve Haight further addressed the septic design and regulations regarding wells.

Attorney Denis Robinson, Pierce Atwood, Portsmouth described three reasons this application doesn't meet the criteria for variance:

1. It's not consistent with adjacent uses
2. The property doesn't have distinguishing elements—the property is large enough to support an allowed use
3. It's not consistent with the spirit and intent of the ordinance. He provided material from the Zoning Ordinance showing that where permitted, an assisted living facility must be connected to public sewer. He provided a document to the Board.

FX Bruton addressed the residential and commercial uses in the area and addressed the nature of the assisted living facility use. Steve Haight said that it would take half a mile to get to the public sewer.



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Patte Dell Isola, co-applicant, owns the land where the proposed leach field will go. She explained they've worked with all the necessary state regulatory organizations for approvals. They are back before the board due to an administrative error regarding the public notice. The applicant has attended multiple Madbury and Dover board meetings over the past year to fulfill all requirements. Rich Onufry asked what was concluded about connecting to public sewer. Patte Dell Isola said they met with The Elks about connecting to their private main and that there may be a public main extended to the area in the future. She said it was a better choice for them to use a leach field and be on the same side of the road as a potential new sewer line, and that the cost of either option was about the same. Bob Hall asked about the design of the septic system and Steve Haight said the design is currently pending approval from the DES.

Attorney Robinson addressed the distinction between elderly assisted care and assisted living.

Sarah Greenshields clarified that The Elks Lodge has both a septic system and a private sewer. She addressed the order in which applications have been reviewed by the City and State.

STAFF RECOMMENDATION:

Assistant City Planner Elena Piekut stated the Planning Department has been neutral on this variance. It is not an incompatible use with the other uses in that zone. This application has gone through site plan approval and staff review. The Planning Board added a condition of approval for a drug use and disposal plan. Staff recommended they hook up to public sewer, but it could not be required.

Elena Piekut also confirmed for Otis Perry that the reason the case is before the board tonight is due to an administrative error in noticing the case to the abutters. The variance was granted by this board in June of this year, though the additional leach field in Madbury was not a definite part of that plan.

Otis Perry asked whether Sarah Greenshields also addressed her concerns to the Planning Board. Denis Robinson said Madbury was not receptive and that Danna Truslow made a presentation to the Dover Planning Board.

Otis Perry asked what conversations occurred with the City regarding extending public sewer. Steve Haight said it was discussed at Technical Review and the City wasn't prepared to do that, and that it would involve working in the State right-of-way.

Bob Hall asked whether the concern was about the new leach field or the existing leach field. Denis Robinson said the concern is the new leach field and its proximity.

FX Bruton added that the DES has not objected to the current plan and Steve Haight explained how the system works.

Public hearing closed.

Motion: Otis Perry moved to refer the variance to the January meeting so Community Services can review the expert witness concerns. Frank Landford seconded. Vote: U/A

- C. Z18-21 Applicant/Owner Sarah McClellan, 410 Middle Road (Tax Map M, Lot 60), located in the Rural Residential (R-40) Zoning District, requests a variance from Section 170-18.H of the Zoning Ordinance to permit a popcorn popping home occupation, where uses such as "restaurants, caterers or bakeries...and others of a similar nature" are not considered customary home occupations.

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Sarah McClellan, owner and operator, requested a variance for a home occupation to pop popcorn. The product will be taken off-site to sell. There will be no changes to the structure and no additional traffic to the site.

Chair Chris Prior reviewed the criteria list with the applicant then stated Nick Couturier will be the alternate to vote in this case.

Public hearing opened. No one spoke.

STAFF RECOMMENDATION:

Assistant City Planner Elena Piekut stated the Planning Department supports the granting of the variance. It is in favor of home businesses. The only reason for the variance is because the business is in the food industry.

Public hearing closed.

Motion: Frank Landford moved to approve the variance as requested. Otis Perry seconded. Vote: U/A

A five minute recess was taken. When the meeting commenced, Chair Chris Prior and Alternate Nick Couturier were no longer seated with the board members. Chair Chris Prior stated he would recuse himself.

- D. Z18-22 Applicant Industrial Tower and Wireless, LLC and Owners Peter and Susan Rousseau, 200 Henry Law Avenue (Tax Map K, Lot 1), located in the Rural Residential (R-40) Zoning District, request a variance from Section 170-22.C(1) of the Zoning Ordinance to permit the construction of a new, 180-foot tall telecommunications tower on the above referenced property, where the construction of new telecommunications towers is only permitted on 15 parcels specified by the Zoning Ordinance.

Bob Hall, Vice Chair requested the applicant grant a 90-day extension to the clock so that proceedings may continue. He also stated there is a quorum of the board tonight, though not a full board. He asked if the applicant wished to proceed.

Attorney Steve Grill represented the applicant and said he will take the request for extension under consideration, but not decide tonight. He confirmed the applicant will proceed with the hearing tonight.

Attorney Grill stated the purpose of the rehearing is to give the applicant an opportunity to present information that led to errors in the decision--not to start the case over again from square one. He requested the entire record from case Z18-07 be incorporated into case Z18-22 as well as the testimony taken in the four hearings held.

Bob Hall stated an additional reason for a rehearing is to present new evidence.

Motion: Otis Perry moved to accept the entire previous record into this case record. Frank Landford seconded. Vote U/A

Attorney Grill stated there are two main issues: whether there is a significant gap in coverage and whether feasible alternative locations were sought.

Attorney Grill stated that:



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1. IDK confirmed there is a gap--there is an area in Dover where there is an "in-building" gap. The roads in the gap are significant roads. It's in a residential and business area where 1600 people live, which is 5% of Dover's population.
2. They looked at the 15 allowed sites and they were not feasible from a technical aspect--they wouldn't cover the gap. They checked if there were existing tall structures in the gap they could use. The silo is too low. 101 Back Rd was discussed but negotiations broke down regarding that lot.
3. He thinks a new tower at 101 Back Road would require a variance and wetlands would be impacted.
4. Nothing that it was reported Mr. Binnie said contradicts what Industrial Tower said. Mr. Binnie has never gotten in touch to continue negotiation. T-Mobile wouldn't share their business judgments with a Zoning Board. The Board shouldn't second-guess T-Mobile's decision.
5. He thinks the Board should have suggested other lots and they weren't given the opportunity to analyze other locations.
6. There were four large lots to the north owned by the State and subject to conservation easements. They also slope down to the river. A tower would not be allowed on conservation land.
7. A 180-foot tower at 101 Back Road would not have provided coverage as well as 200 Henry Law Avenue because it is lower.

Attorney Grill stated that 200 Henry Law is unique because:

1. There is a power line easement
2. Proximity to 101 Back Rd
3. Size of the parcel
4. Location and elevation

Attorney Grill said lots along McKone Lane are all small and some of them are subject to conservation easements. Locations further out or located downtown are too low in elevation, outside the search ring, close to existing facilities and were not feasible, but they weren't asked to look at those. He said it's not unusual for the Board or abutters to suggest alternative locations but not a single lot was brought to their attention except 101 Back Road. They assumed everyone thought there were no feasible alternatives. Any location would still be objected to by neighbors.

Attorney Grill said the applicant has agreed to a condition of approval for a 160ft tall tower rather than 180ft. He corrected that there are more locations from which the tower could be seen than the five he said there were. He thinks a reduction in height would result in less visibility to some. He said it will not be visible from many locations in town and there are other towers that are visible from downtown.

Attorney Grill said that Ryan Monte de Ramos, Gerry Squires, Kevin Fadden, and Kevin Delaney were available to answer questions.

Rich Onufry asked if Attorney Grill sees a difference in the visual impact of a tower to an area zoned for that type of development compared to areas that are not. Attorney Grill said his remarks were specific to this area and that they had a limited area to work with and anywhere in that area would be objectionable. He said abutters would still get notice of the Planning Board process for a tower in a permitted location. He said generally speaking, people don't want to see towers.

Otis Perry asked for details about the investigation made into alternative sites and why they were turned down. He asked about the process the company uses and whether there are notes or discussions on each property. Attorney Grill said it varies from case to case and that they discussed the process at the first hearing. T-Mobile identifies the need to close the

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gap, then issue a “search ring,” or an area that they determine would be suitable for a new facility. That is issued to companies like Industrial Tower and Wireless, and they go out and look for sites. Existing structures are easiest. He said typically they look at the tax map for large lots in the search ring and talk to the owners. He said in this case tax records referred to conservation easements and they didn’t approach those property owners. Small lots under about three acres that couldn’t accommodate a fall zone were also eliminated. Otis Perry clarified that he wants to know if there are written criteria and a record of which lots were looked at, which were rejected, and why. Attorney Grill explained that his motion for rehearing include information on lots that were considered but that the information came from a discussion, not a written record. He said he doesn’t think the process is that formal and that the search ring establishes the criteria. Otis Perry asked if the company continues to evaluate more sites once they have an agreement with a property owner. Attorney Grill said it depends but where the identified sites were so ideal they probably did not continue looking. Otis Perry noted that the Applicant has said that they believe a tower at 101 Back Road would require a variance, but 200 Henry Law Avenue also requires a variance. Attorney Grill explained that he brought that up because staff said 101 Back Road did not need a variance and he found that outrageous and decide to prejudice the case against the Applicant. He said 101 Back Road would also require wetland permitting. He said every site has good and bad, but it’s better if you can use a site that already has tall structures. Discussion ensued over what was written in the staff memo.

Bob Hall asked about 105 Middle Road. Attorney Grill said it was lower in elevation. He thinks a tower at that location will be over 200 feet. Bob Hall noted the overall height would not exceed that of a tower at a higher elevation at 200 Henry Law Avenue. Attorney Grill said the ordinance allows a waiver for a height over 180 feet but a site where a 180 foot tower will work is preferable. He said they try to keep all facilities under 200 feet so that they don’t need a light. Bob Hall said he doesn’t think it’s up to the Board to tell the Applicant where to look, and his impression is they haven’t looked at other lots.

Attorney Grill said it is very unusual that Dover only allows towers on specific lots, so those are what they considered as alternatives but none were feasible. He said they may have looked at more if that wasn’t the case. He said the proposed lot is the most in character for a tower and is the best site. He said he felt like they were presented with a moving target. He said onther than 101 Back Road there were no other sensible or feasible alternatives.

Bob Hall asked about 1600 people living in the area that would be served by a tower, and how many live in the gap. Ryan Monte de Ramos said he maps census data along with the coverage area. He discussed how coverage improves for the area and those already covered by existing sites by adding a new site. He said he could identify the number of people in the gap, but that is not what they usually do. Bob Hall reiterated that the issue is the need in the gap but he doesn’t understand how many people are actually without sufficient coverage.

Bob Hall said he is bothered that all discussion about 101 Back Road has all been verbal and there has been no documentation of anything and he doesn’t know what to believe. Attorney Grill described their testimony as an “offer of proof” and that Chris Parker’s notes on a conversation with Bill Binnie are objectionable as being testimony taken outside a hearing. He described the effect of different techniques of asking questions. Bob Hall reiterated his desire for written communications. Attorney Grill repeated that T-Mobile does not want to share its negotiations and pointed out that there are consistencies between both parties’ statements and there is no question that eight months of negotiation were not fruitful. He said further negotiations may have worked, but they did not.

Rich Onufry said that 101 Back Road was a viable location, and agreed with Bob Hall that he doesn’t understand why things didn’t work out. He asked the Applicant if they started with that location and then began looking for other sites. Attorney Grill explained that Mr. Squires had pursued the property over a couple years. Industrial Tower was also looking

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for something in the search ring and began negotiations with the Rousseaus. He believes that began before negotiations with 101 Back Road ended. Rich Onufry asked whether the onus is on Bill Binnie to contact the Applicant to resume negotiations. Attorney Grill said it was odd that he said he didn't know why negotiations stopped and didn't try to find out. He said maybe Mr. Binnie was not serious and said he made many changes to the deal. The Applicant made a business decision not to continue negotiations after eight months.

Public hearing opened.

Peter Rousseau, 200 Henry Law Avenue stated the tower is going up whether people like it or not. He needs to do it to pay the taxes and run the farm.

Tom Hackett, 43 Samuel Hanson Avenue has an issue with the gap and the fact that no residents have supported this tower due to lack of coverage while there were customers who said they had services. He noted that building materials impact in-building coverage and questioned what adequate coverage is. He asked whether the applicant considered adding height to the tower at 292 Middle Rd. He requested the ZBA deny this application.

Bob Hall invited Attorney Grill to comment and he said that in-building coverage is a given today and that the peer reviewer said that the signal level threshold used in the analysis was typical for the region. Ryan Monte de Ramos addressed T-Mobile's existing facilities and their upgrade to smart antennas which have less loss, and some sites have fiber. He discussed how terrain affects coverage even with increased heights.

Norm Fracassa, 1 Penny Lane said the gap area includes 1600 people total in that area and they are not all T-Mobile customers. It's more likely less than 280 people are affected based on the company's market share. It is not the abutter's burden to help the applicant find locations. There are other places in Dover that need coverage but they are focused on this area, and even with the proposed tower they will not achieve "seamless coverage."

STAFF RECOMMENDATION:

Assistant City Planner Elena Piekut stated she had no comments and deferred to the recommendations of special counsel due to the complexity of the case and the laws involved.

Public hearing closed.

Motion: Otis Perry moved to deny the application for a tower based on the written statements from the original hearing and the fact that testimony tonight did not add or refute any previous statements. Frank Landford seconded and said there was no new information presented tonight.

Rich Onufry added that there is too much speculation, and he is not convinced that feasible alternatives were pursued. Bob Hall agreed with Otis Perry and stated nothing was presented to change his mind from the previous hearing and previous decision.

Vote: U/A

4. OTHER BUSINESS

Elena Piekut (Assistant City Planner, Zoning Administrator) reiterated the Land Use board meet and greet will be Tuesday January 8th. Also, goal setting with the Planning Board occurs in January regarding amendments to the Zoning Ordinance so if any ZBA members have issues they need to bring them forward.

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5. ADJOURN

Motion: Otis Perry moved to adjourn. Rich Onufry seconded. Vote: U/A. Adjourned: 10:18p.m.