

**SOMERSWORTH ZONING BOARD OF ADJUSTMENT**  
**MINUTES OF MEETING**  
**DECEMBER 7, 2016**

**MEMBERS PRESENT:** Paul Maskwa, Chair, Matt Keiser, Vice Chair, Roland Dumont and Don Routhier.

**MEMBERS ABSENT:** None.

**STAFF PRESENT:** Shanna Saunders, Director of Planning and Community Development and Tracy Gora, Planning Secretary.

The meeting was called to order at 7:00 pm.

Maskwa stated that there are only four members present tonight and that the applicant may request to be tabled until the next meeting in the hopes that there will be a full board.

**1) APPROVAL OF THE MINUTES OF THE MEETING OF NOVEMBER 2, 2016.**

**Motion:** Dumont moved to approve the minutes of the meeting of November 2, 2016.

Seconded by Keiser. Motion carried with a 4-0 vote.

**2) OLD BUSINESS**

A) Any old business that may come before the Board.

None.

**3) NEW BUSINESS**

A) Todd & Jennie Berry are seeking an appeal from administrative decision regarding the use at property located at 29 Lil Nor Avenue, in the Residential Single Family (R1) District, Assessor's Map 24, Lot 36, ZBA #21-2016.

Saunders stated that this is a rehearing of the application that the Board first heard at the October ZBA meeting. Stated that the task is to hear the entire application again as if it is new and to make a decision as if the Board never made a decision on this application before.

**Public hearing opened 7:03 pm.**

**Gregory Wirth** with the Law Offices of Gregory D. Wirth, PLLC represented the applicant and addressed the Board. Stated that the Berry's live in a single family home in a single family district and have for several years. Stated that the issue is their neighbors who also live in a single family home in the single family district. Stated that this neighborhood is part of a subdivision from the early 1950s and that all the houses are similar. Stated that in 1965 Connie Ferland requested, and received, a variance to run a kindergarten in the basement of her home. She asked the ZBA that it be conducted in her basement, limited to 25 children, hours of operation to be from 9:00 am to noon, and to have no sign. Stated that they are here now because five of the seven variance stipulations are being violated in gross fashion. Stated that, for example, the

variance allows children from 9:00 am to noon but children begin showing up at the property at 6:00 am and are on the premises until 5:30 or 6:00 at night. Stated that is far beyond what is allowed by the variance, which was admitted by the Gagnon's. Stated that the Gagnon's admitted to having as many as 29 children but the Berry's have seen well into the 30s. Stated that on 10/28/2016 there were 39 vehicles going to the house before 9:00 am that morning and 31 cars after noon. Stated that it wouldn't be an issue if it was within 15 minutes of the allow times but it happens all the time and the first vehicle in the morning was there at 6:03 am and the last was at 5:28 pm. Passed out a packet of information that had been passed out at the October meeting. Explained what was in the packets and stated that there are copies of licenses from the State of NH which allow for 40 children. Stated that the number and age of children are beyond the scope of the variance and confirms that there are violations. Stated that the variance says that the children will be dropped off and picked up by their parents but there are school buses that show up and take children to schools when buses aren't otherwise seen in this area. Stated that the printout from the daycare's website shows number of children and hours of operation being outside the scope of the variance. Stated that the decision they are appealing is from the July 13, 2016 letter from Code Compliance Officer Joe Devine. Stated that he found that what was happening was within the scope of the variance. Stated that what is happening is not allowed by current zoning so they can only rely on the variance but that five of the conditions have been violated. Stated that they have no choice but to overturn Devine's decision and that the variance be enforced. Stated that the variance was granted for the kindergarten to be in the basement of the home but that it has expanded to the garage, which is not in the scope of the variance. Asked that the letter be overturned because the Somersworth Zoning Ordinance says that a use allowed by a variance cannot be expanded without going back to the ZBA.

**Tom Gagnon**, owner of 29 Lil Nor Avenue addressed the Board and stated that he and his wife reside at the subject property and that they have been lifelong residents of Somersworth and very rooted in the community. Stated that his wife has worked for the daycare for over 30 years and that when the daycare was closing years ago they considered taking it over. Stated that they purchased the property and were very concerned with making sure everything was legit and legal. Stated that they had all City and State inspections done and that they have copies of all the documents. Stated that they are visited by the State at least every three years. Stated that they have City approval to operate the daycare. Stated that he understands that there are some stipulations that they did not know about. Stated that they have talked with the former owners and that they will address those issues at a future hearing. Stated that they purchased the property thinking that everything was legit and that they have all their signoffs. Stated that they have letters of support. Stated that they do have a few students between 6:00 am and 7:00 am. Stated that some students are there for half days and that most are gone by 2:30 pm. Passed out copies of letter of support that were originally presented at the October hearing.

**Richard Berry** of 27 Lil Nor Avenue addressed the Board and stated that the ZBA makes laws for the City to protect the community. Stated that it's about knowing the ordinance and following it. Stated that the variance was to Connie Ferland with stipulations. Stated that the variance was for a kindergarten, not a daycare. Stated that there was a letter sent to the City in 1983 complaining about having 50 students and the City responded with a letter. Reviewed times and how many students are being dropped off and picked up. Stated that Mrs. Gagnon drives students to school in the morning and

picks them up. Stated that there is a lot of traffic. Stated that the Gagnon's have a license for 29 students but they have said they will drop it down to 25. Stated that it is very noisy. Stated that the variance was limited to the basement but that they utilize the garage and more than 25% of the house. Submitted pictures showing traffic at different times of day.

**Richard Brooks** of 18 Linden Street addressed the Board and stated that he took care of his nephew for a few years and he brought him to this daycare for two years. Stated that he has nothing but good things to say about them and that he really liked it. Stated that they are responsible daycare owners. Stated that there must be a lot of regulations to follow from the City and State and that they have never been reprimanded in the past. Stated that this seems petty to him and that he would like to see this stay as a good daycare.

**Coleen Smead** of 31 Lil Nor Avenue addressed the Board and stated that this is not about whether they are good or not but that there are children there before and after the times they are allowed. Stated that the children are very loud in the summer. Stated that if she had a variance for her shed she wouldn't be allowed to just change it without permission. Stated that this is about following the rules.

Maskwa read letters of support into the record.

Wirth stated that he wants to reiterate what one of the last speakers said; that this is not about the daycare people being bad. Stated that some of what was in the letters are not pertinent to the variance. Referred to case law. Stated that the minutes from the 1965 variance are clear of what the scope of the variance is and that the Zoning Ordinance says that a variance cannot be increased without permission. Stated that there is a process here. Stated that if they want to run the daycare from 6:00 am to 6:00 pm they may be allowed but that they have to go through the process and address the concerns. Stated that the Berry's know what the scope of the variance is and that the Gagnon's have admitted that the hours and the number of children is beyond the scope of the variance. Stated that the scope of the variance needs to be enforced.

Gagnon stated that he would like to clarify a few things. Stated that they do not have more than 25 students at one time. Stated that they thought they could have more but they have scaled on the number of students by 40%. Stated that they reduced the area they use for the daycare by 30%. Stated that they are doing what they can and that they were under the impression when they purchased the property that they were all set. Stated that this is how it has always been run from the former owners. Stated that they have student attendance records if needed. Stated that they are willing to modify the original variance.

Berry stated that Mr. Gagnon said that he only has 25 students at any given time but that there are more and it is all day long.

Smead stated that there was another abutter at the October hearing that is unable to be here tonight and she supports that this has gone beyond the scope of the variance.

Keiser stated that he understands that they are appealing the decision in the July 13 letter and asked why they think the City was wrong. Stated that the City was correct in the answer that the use is allowed.

Wirth reviewed the July 13 letter and stated that the variance only allows for a kindergarten. Stated that item number two was true. Stated that the use exceeds 25% of floor area, which in part is correct but that the variance only allows for the use in the basement. Stated that the variance doesn't refer to 25% of floor area but it says only in the basement. Stated that there are at least ten aspects of the Home Occupation regulations that they do not meet but that is not what they are looking at; they are just looking at the variance. Stated that there is nothing in the variance allowing for the driveway to be expanded. Stated that the part of the letter regarding the sign is accurate. Stated that Devine was accurate in reading the variance. Stated that the traffic is creating noise. Stated that it is clear what kind of business can be there. Stated that Devine is combining the existence of a variance with if there should be a variance. Stated that he should just be referring to the variance that was granted. Stated that three or four of Devine's points are just wrong.

Keiser stated that there were elements from the variance that Devine did not mention in his letter.

Wirth stated that Devine's letter was in response to complaints that were made. Stated that the daycare use has expanded to the garage and to the outside.

Routhier asked if the kindergarten is still in the basement.

Wirth replied that it is.

Routhier asked if he interprets the variance to mean that the children cannot leave the basement.

Wirth replied obviously not because they have to get there but not the daycare is occurring in the basement and the finished garage. Stated that technically it is a violation for being in the garage and outside. Stated that the Zoning Ordinance doesn't allow for the variance to expand and they have to abide by that.

Routhier mentioned that there is case law about the natural development of a nonconforming use.

Wirth stated that an ordinance can be more restrictive than a court case.

Routhier stated that there was a fire in 1975 and that repairs were done then.

Wirth stated that the Gagnon's admitted that they use the garage for the daycare.

Routhier stated that he was confused about what was said about traffic and offensive noise. Routhier stated that he understands that the Zoning Ordinance was enacted in 1987 and asked what the kindergarten was like before that.

Wirth stated that it wasn't in the garage then because the garage wasn't finished at that time. Stated that it is clear from case law that they are locked in from the 1965 decision. Stated that the only thing that would have been grandfathered in 1987 was the permitted use.

Routhier asked what his clients are looking to do. Asked if they are looking to close the daycare down.

Wirth stated that they are just looking for the variance to be enforced as it was approved. Stated that they don't want to shut them down but that they are entitled to what was approved in 1987.

Dumont stated that they talk about the number of students being 25 but that the Berry's say there are 40. Asked if they exceed 25 students at any one time.

Wirth stated that it is possible they do.

Dumont stated that they are not exceeding 25 so he doesn't see the problem.

Wirth stated that if people are saying there is a kindergarten in the R1 district then there is the thought to maintain the character of the neighborhood. Asked if it maintains the character if the students are changing every 15 minutes. Stated that he feels that the variance is for the use from 9:00 am to noon without the students changing out all the time. Stated that he doesn't feel that was the intent in 1965 and that they are torturing the language of the variance.

**Public hearing closed 8:00 pm.**

Maskwa stated that they are here to look at the letter from July 13 and that he feels the letter improperly cites the home occupation ordinance so it is not addressing the issue correctly.

Keiser asked why the letter addresses the home occupation ordinance.

Maskwa stated that the violations were cited as home occupation violations and that was incorrect.

Routhier asked if the complaints cite the home occupation ordinance.

Saunders stated that when the complaints first started coming in staff didn't know there was a variance so it was first addressed as a home occupation. Stated that it was discovered that there is the variance.

Maskwa stated that he doesn't think the letter is an appropriate response from the City. Stated that some comments don't address the issue. Stated that there may be some issues with compliance from the 1965 variance that the City needs to look into. Stated that the City has to look into this and make a better decision on it. Stated that there is also the option for the Gagnon's to come back and request an amendment to their current variance, ask for a new variance or alter their operation to come into compliance.

Routhier stated that he thinks that the Board wears different hats for different functions and that tonight they have to look at the appeal. Stated that the code officer issued a letter and the Board needs to decide if the code officer made the wrong findings. Stated that they need to see if Devine made a mistake in his analysis and he feels that for the most part his findings were correct. Stated that the variance doesn't say how many children can be dropped off at once. Stated that the number of children will be lowered

to 25. Stated that there is nothing in the variance indicating that the use won't create offensive noise or odor and that is subjective and not sure if it is enforceable. Stated that he doesn't think that Devine was wrong and doesn't feel this should be overturned.

Dumont agreed.

Maskwa stated that he doesn't necessarily disagree with the comments but that he is not sure the City should have a letter based on incorrect information. Stated that he feels that the City would be better served with a better letter based strictly on the variance. Stated that the owner admitted that there are not more than 25 students at any one time. Stated that it appears that the variance gives parameters on how the business should run. Stated that concerns have been raised that the City should look into.

Keiser stated that it isn't for this Board. Stated that the hours of operation are not in this letter so they cannot look at that.

Saunders reminded the Board that they met with legal counsel to walk through the process and agreed that they had to make their decision based on this letter. Stated that she feels that because the letter does address the variance then the Board can encourage the City to enforce it.

Routhier stated that he agrees with Keiser and that the Board's job is not to enforce the variance or code but to determine if Devine was wrong and that he doesn't think he was. Stated that he has specific obligations and that he feels the letter is sound.

Maskwa stated that he would be more comfortable if the letter was recrafted with the correct references and the citations in the proper order.

Keiser stated that the Board has to make a decision and not pass it off.

Maskwa stated that he is not suggesting that but that he is a little uncomfortable with using the wrong language in the letter. Stated that the home occupation ordinance should not be cited in the letter.

Keiser stated that he agrees but this is the letter they have.

Maskwa stated that he is not sure the Board can ask Devine to recraft the letter. Asked if the City is comfortable with the wrong citations in the letter.

Saunders stated that she feels that it is clear that this letter is a hybrid and that this is one step in the process and not the end of this.

**Motion:** Routhier moved that after review of the letter and all information that the decision stands and the appeal be **DENIED**.

Seconded by Keiser. Motion carried with a 3-1 vote with Maskwa opposed.

Keiser stated that the City will take action to review compliance with the 1965 variance.

B) Any other new business that may come before the Board.

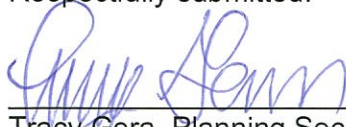
Saunders informed the Board that regarding the appeal for Bonfire, the courts upheld the ZBA's decision.

**Motion:** Dumont moved to adjourn the meeting.

Seconded by Keiser. Motion carried with a 4-0 vote.

Meeting adjourned at 8:20 pm.

Respectfully submitted:



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Tracy Gora, Planning Secretary  
Somersworth Zoning Board of Adjustment