

SOMERSWORTH ZONING BOARD OF ADJUSTMENT
MINUTES OF MEETING
OCTOBER 5, 2016

MEMBERS PRESENT: Matt Keiser, Vice Chair, Roland Dumont and John Kennedy, Alternate.

MEMBERS ABSENT: Paul Maskwa, Chair and Don Routhier.

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.

Keiser stated that there are only three voting members present tonight and three votes are needed to grant a request. Stated that the applicants have the option to defer their application to the next meeting in hopes for a full Board. Stated that the fact that there is not a full Board is not a reason for an appeal. Appointed Kennedy as a voting member for tonight's meeting. Stated that Kennedy has a request in to the Mayor to be appointed a full member, not an alternate.

1) APPROVAL OF THE MINUTES OF THE MEETING OF SEPTEMBER 7, 2016.

Motion: Kennedy moved to approve the minutes of the meeting of September 7, 2016.

Seconded by Dumont. Motion carried with a 3-0 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.

Motion: Dumont moved that the request for an appeal of an administrative decision be removed from the Table.

Seconded by Kennedy. Motion carried with a 3-0 vote.

Gregory Wirth with the Law Offices of Gregory D. Wirth, PLLC represented the applicant and addressed the Board. Stated that they elect to move forward with this tonight.

Keiser stated that this is an appeal from an administrative decision but that there are some outstanding issues. Asked the City Attorney to indicate how this will proceed.

Walter Mitchell with Mitchell Municipal Group, PA, the City's Attorney addressed the Board. Stated that he is not here to argue for one side or the other so not to take

anything he says as leaning toward one side. Stated that the only jurisdiction this Board has for an appeal of an administrative decision is for correctness or incorrectness of interpretation of the Zoning Ordinance. Stated that the appeal is from the July 13, 2016 letter written by Code Compliance Officer Joe Devine for 29 Lil Nor Avenue. Urged the Board not to entertain arguments beyond the scope of Devine's letter. Stated that other issues were brought up but the Board can only address what is in the letter. In reviewing Devine's letter, he mentions a home occupation but that he doesn't rule that this is one. Stated that the effect of the letter is that this use is allowed by a variance from 1965. Stated that the Board needs to listen to both sides and decide if Devine was correct or incorrect in making his decision.

Keiser stated that the July 13, 2016 letter is what is being appealed. Stated that the party appealing supplied additional information but the Board is only ruling on what is addressed in the letter.

Public hearing opened 7:07 pm.

Wirth stated that he is here tonight to appeal a letter from July 13, 2016 with respect to a day care use. Stated that the Berrys own 27 Lil Nor Avenue and have been there for several years and the property has been a single family residence since the 1950s. Stated that the subject property at 29 Lil Nor Avenue was built about the same time. Stated that these are not large lots and that this is a single family development with a day care in the middle of it. Stated that no one disputes the fact that they are entitled to the variance from 1965 which allows them to have a kindergarten with no more than 25 children, run from 9:00 am to noon, in the basement of the dwelling and to have no signage. Stated that the variance is very specific and since day cares are prohibited in this district, they only thing they can rely on is the variance from 1965. Stated that they cannot rely on having a home occupation because day cares are not allowed. Stated that a building permit was obtained in 1994 to finish off the garage and use it for the day care but that variance that was granted was to only have the use in the basement and not in the garage or any other part of the house. Passed out a packet of documents and described what is in it. Stated that the licenses from the State indicate that they can have between 0 and 25 children from ages 3 to 12, which is outside the scope of the variance that was approved. Stated that the current State license lists the use as a school and child care center, which is outside the scope of the variance. Stated that he has a printout from www.daycare.com for this use, which shows the hours of operation from 6:00 am to 6:00 pm and indicates 29 children, which is outside of the scope of the variance. Stated that there are day care operations going on between 6:00 am and 6:00 pm. Stated that children are being dropped off by parents, school buses and vans. Stated that this is a single family area and that activity is disruptive to the single family neighborhood and was not what was represented to the City in 1965. Stated that the use is not conducive to this zone and is beyond the scope of the variance. Referred to the pictures that were submitted of the house and the expansion of the parking area. Stated that the photos show a storage shed in the front, which would not be allowed if it were a home occupation. Stated that there are recreation activities going on at the rear of the house, which would not be allowed if this was a home occupation. Stated that there are only two ways to go here; either comply with the variance from 1965 or comply with current zoning. Stated that this does not meet current zoning. Stated that Devine's letter says he is not pursuing this and took the position that what is happening is within the scope of the 1965 variance or was grandfathered. Stated that the use cannot be grandfathered because it is outside of the scope of the variance and the Zoning

Ordinance says that nonconforming uses cannot be expanded. Stated that the Zoning Ordinance is restrictive and they cannot expand to another part of the lot, which they have done. Stated that this comes down to the use violating the 1965 variance in numerous respects. Stated that this is not grandfathered and it is not an allowed use. Stated that his client is requesting that the City enforce the 1965 variance to its terms. Stated that they are requesting that the decisions from the July 13, 2016 letter be found in error and that the City take action to enforce the 1965 variance.

Tom Gagnon of 29 Lil Nor Avenue addressed the Board and stated that he and his wife were both born and raised here and have roots in the community and that his wife Karen has worked at the day care for over 30 years. Stated that they purchased the property in 2006 after the former owners were thinking about closing the day care. Stated that they went to the City and to the State to see what is needed to keep the day care going. Stated that they had all their required inspections and everything they did was legal and conformed. Stated that this is the first he has heard of there being something wrong with how they are running the business. Stated that Little Folks child care is well-established and has been operating for over 50 years. Stated that there have been no complaints in the past and that this is the first time they have had issues with the neighborhood. Stated that he is not sure where to go from here and is not sure if this is more of a legal battle. Stated that it seems more about defending a letter from July 13, 2016 which states that a variance was granted. Stated that he will need more time to prepare if they are going to talk about the scope of the variance. Stated that he has a rebuttal for each appeal item. Stated that some incorrect things were stated, regarding the hours of operation and that there is only one bus in the morning and one in the afternoon. Stated that the shed on the front of the property is a trash shed. Stated that regarding parking, they were unable to get a driveway permit but they were told they can park in areas that are not paved. Stated that they have tried to eliminate parking on the street for the neighborhood. Stated that they do not have a pool this year. Stated that since they have purchased the business they have decreased the number of children by 40 percent. Stated that they have been licensed for 29 children but they don't have more than 25. Stated that they have decreased the square footage of the use to 1400 square feet and have decreased their income also. Stated that they have done what they thought was right and that this is the first he has heard of this having to do with the July 13, 2016 letter. Stated that he thought this was just in response to the letter submitted by the attorney. Stated that he was here when the appealing neighbors bought their property and that he has a letter from the prior owners saying that they had no issue with the use. Stated that he has copies of inspections and stated that he is confused with what they are addressing tonight. Stated that the use is allowed because they have a variance. Reviewed Devine's letter item by item. Stated that they are not a home occupation and that they have more than one employee that does not reside on the property. Stated that they can adjust where they park the vehicles and that people can park on the street. Stated that the sign exceeds one square foot but that it now has been taken down. Stated that they have no more than 25 students. Stated that, regarding offensive traffic, there is an influx of children in the morning and that they have opened at 6:00 am when necessary, but mostly they show up between 7:00 am and 8:45 am. Stated that they may have 15 parents dropping off their children but that he doesn't think that is excessive. Stated that there isn't a lot of traffic coming in and out. Stated that the variance makes clear what type of business they can have and they haven't changed that. Stated that his wife worked here for 30 years and that they use less space now. Stated that this is how the business has always been run.

Colleen Smead of 31 Lil Nor Avenue addressed the Board and stated that she lives next door. Stated that there is a lot of noise and traffic from the day care and that she has to put cones at the end of her driveway because there is significant traffic. Stated that there are people with big trucks that gun it down the street. Stated that she had to put up a fence.

Cheryl Labrie of 26 Tate's Brook Road addressed the Board and stated that when this was owned by the Ferlands it was a day care and school and there were no children there during the summer. Stated that now there are kids during the summer and that she works second shift and the noise is unbearable with all the screaming and yelling. Stated that she can't enjoy her screen porch in the summer because of the noise. Stated that she has approached the owners about this because of her work schedule. Stated that the former owner would keep the children inside but now they are out really early.

Richard Berry of 27 Lil Nor Avenue addressed the Board and stated that he resides with his son at 27 Lil Nor Avenue. Stated that it is very, very noisy and that there is lots of traffic all day long. Stated that they said they have 25 children but they have more although maybe it is not all at one time. Stated that cars are constantly coming in starting at 6:00 am. Stated that there is a lull mid-morning and mid-afternoon but other than that it is nonstop and you can always hear vehicle doors slamming. Stated that the use should be allowed but somewhere else because this is a huge business. Stated that the hours start at 6:00 am and that is not part of the variance. Stated that they have no license from the City. Stated that he is dedicated to the City and that just by living here for so long doesn't mean you are allowed to violate the Zoning Ordinance. Stated that they have more than 25 children but that it is in a rotation throughout the day. Stated that this is very tough to deal with and that his own grand children can't go in the backyard because of sleeping children. Stated that the City should do something about this. Stated that regarding employees, they have five people rotating throughout the day. Stated that this has gotten out of hand and that he wants them to go back to the variance from 1965 or go somewhere else.

Gagnon stated that he would like to correct some things and that they have had children all summer since the 1980s. Stated that the children don't do outside to play until 11:00 am and then again at 2:30 pm. Stated that it may be noisy at 27 Lil Nor Avenue but the prior neighbors didn't have a problem. Stated that an addition was put on at 27 Lil Nor Avenue and now they are ten feet from the property line and their bedroom is right there. Stated that they have reduced the number of students by 40 percent.

Keiser stated that the purpose of this is that he Board is going to state if they agree with Devine's letter from July 13, 2016. Stated that the decisions from the letter were appealed.

Irene Berry of 27 Lil Nor Avenue addressed the Board and stated that she has photographs. Stated that statistics tell a lot and that her husband has made a matrix for the noise and the cars at the property. Stated that she has pictures showing the cars in the road and in the yard. Stated that they have four parking spaces and that they added four more. Stated that a week before the City came to inspect they put in plantings to eliminate the parking spaces. Stated that it is never ending. Passed out the photographs.

Gagnon stated that there seems to be some controversy. Stated that they are required by law to have attendance records and that they can show when each child comes and goes. Stated that as far as parking, they have never expanded more than two spots. Stated that he can submit pictures as well and that they are not hiding anything. Stated that he did plant new grass this summer.

Keiser read the abutter letter from the Watmans and from the Minors into the record.

Public hearing closed 7:52 pm.

Dumont stated that he would like to speak to the owner of 27 Lil Nor Avenue and asked if he was aware of the day care when they purchased the house.

Todd Berry of 27 Lil Nor Avenue addressed the Board and stated that he was not aware. Stated that he bought the house in the winter and there were no kids outside.

Dumont asked about the sign they had.

Berry stated that he didn't really notice it. Stated that he wanted a house in a residential neighborhood and that is what he bought.

Dumont stated that he would have assumed that he would have checked out the neighborhood before they bought the house. Asked if he filed complaints about this before his parents moved in. Stated that he has lived there for two years.

Berry stated that whomever lives with him is not the point here.

Dumont stated that there didn't seem to be a problem when he purchased it but now there is a problem when his parents moved in. Stated that he has heard from abutters that it is better than what was there before.

Berry stated that it is a very destructive place.

Kennedy asked what is destructive and what has been broken.

Berry stated that his window has been broken. Stated that he is being grilled when he shouldn't be.

Saunders stated that the questions have to be pertinent to the letter and the appeal.

Keiser stated that there are eight items addressed in the July 13, 2016 letter and asked if the Board should go over them individually or what the process is. Stated that Director Saunders' memo mentions a home occupation and asked if it applies here or not.

Saunders stated that the letter referenced Section 8 of the Zoning Ordinance regarding home occupations. Stated that they didn't know there was a variance as first and then found that Section 8 doesn't apply here because it is not a home occupation. Stated that the use is permitted via variance. Stated that is why the letter referenced home occupations as some point.

Keiser stated that all eight issues in Devine's letter are from the home occupation section of the Zoning Ordinance but that it is the City's opinion that that section is not applicable because it wasn't in effect in 1965.

Saunders stated that they are not exempt from the Zoning Ordinance but that they still fall under the 1965 variance.

Dumont stated that he feels there is no reason to grant the appeal and that there is no case here. Stated that the letter was correct and that the Board should stick to the July 13, 2016 letter.

Keiser stated that any other issues in the letter the City has to address and is not for the ZBA tonight.

Saunders stated that the City will address those things. Mentioned that legal counsel is here.

Dumont stated that he would want to ask if the Board is on the right track.

Saunders stated that they can work with the attorney to craft a decision for next time.

Keiser asked if the Board want to table this for tonight.

Saunders stated questions for the legal counsel need to be during the public meeting but they can table this to work with legal counsel to craft a motion.

Dumont stated that he would like to have a discussion with the attorney to be sure everyone is on the same page.

Mitchell stated that he wants to make sure the Board understands his role. Stated that he is not the decision maker here. Stated that if the Board wants to meet privately to discuss legal issues than that is okay but the Board can't meet to deliberate or come to a decision.

Dumont stated that he is already comfortable with denying the appeal.

Keiser asked if there are specifics that need to be put in the motion.

Mitchell stated that as he read the July 13, 2016 letter, Devine has ruled that the day care is operating within the parameters of variance from 1965. Stated that if you agree with that then vote to deny the appeal but if you disagree then vote to grant the appeal.

Motion made by Kennedy: After review of the application, the file and all the information presented to the Board, I feel that the administrative decision stands and I move that the request of Todd and Jennie Berry for administrative appeal of the 18 sections of the Zoning Ordinance cited in their application be **DENIED**.

Seconded by Dumont. Motion carried with a 3-0 vote and the appeal was denied.

B) Marc & Karen Hiller are seeking a variance from Section 6.B.1.a of the Zoning Ordinance to increase a nonconforming structure on property located at 3 Lenox

Street, in the Residential Duplex (R2) District, Assessor's Map 22, Lot 57-2Z,
ZBA #23-2016.

Saunders reviewed her memo (see attached) and stated that this item has changed a little since writing her memo after it came to light that the property was developed under a cluster development and that are not actual setbacks. Stated that she has the approved site plan from 2003. Stated that this corner property is not subject to side and rear setbacks but the development has an exterior boundary setback of ten feet that runs along the back lot line. Stated that this proposal must meet the ten foot exterior boundary from the cluster subdivision and the proposed deck encroaches by two or three feet.

Keiser asked the applicant if they would like to move forward with only three Board members.

Public hearing opened 8:10 pm.

Karen Hiller, property owner and applicant indicated that she would like to move forward tonight and passed out pictures of the backyard. Explained the pictures and stated that the entire backyard is fenced in. Stated that the existing deck cannot be seen from the street. Stated that her and her husband moved to Somersworth looking for a house to live peacefully and that this is the last house they are going to buy. Explained the interior of the house and stated that the only thing missing is a screened in porch and that she has wanted one for a long time. Stated that they need a variance but she doesn't fully understand why and that building this porch won't affect anyone. Stated that the side yard between the house and the street is wooded and that there is an empty lot in the rear. Stated that they asked permission from the Housing Authority to put up part of the fence on their land and that they have a letter for that. Stated that the backyard was fenced in and permitted by the City. Stated that she doubts that the neighbors will have a problem with this. Stated that the porch would help as they age and provide fresh air and protection from bugs because she is worried what you can get from bugs. Stated that the builder of her development made many mistakes like never getting the bylaws registered with the State. Stated that they never finished the development so they never knew where the property lines were. Stated that no one is negatively impacted.

John MacDonald of 7 Lenox Street addressed the Board and stated that he shares a property line with the applicant. Stated that he doesn't know what size they are talking about but most patios are 12'x12'. Stated that he is okay with the screened in porch. Stated that he doesn't have a fence like they have but he might put up his own someday. Stated that he is not offended by this porch and that he is not against granting the variance.

Keiser stated that the application talks about sheetrock and insulation.

Hiller stated that there will be windows so it is more of a three-season room.

Keiser confirmed that the house is about 18 feet from the property line.

Saunders stated that is an approximation that she got from the aerial photo.

Keiser asked if they know for sure that the deck is within setbacks.

Hiller stated that the existing deck is 12'x12' and that it goes into the setback by about two feet.

Keiser mentioned that the back property line is slanted.

Hiller stated that they want to make the existing 12'x12' deck into the porch and extend the deck. Stated that the deck is nonconforming and they want to extend it by four feet. Stated that the deck would just be extending along the house.

Keiser stated that it will make the new part of the deck closer to the property line than the existing deck.

Saunders stated that she was not clear that the new screen porch was over the existing deck and that she thought it was in addition to. Stated she can't exactly answer how far they are into the ten foot setback.

Keiser stated that they do not know exactly how far they are encroaching.

Hiller stated that she was told that the deck is nonconforming when she applied for the building permit.

Keiser stated that the variance would only apply to the subject property and that they have to meet all five criteria. Stated that they have to determine if there is a hardship. Stated that the back property line does not run parallel to the house.

Hiller stated that a lot of people have changed their deck into a porch but because the building was built as it was they have an issue.

Public hearing closed 8:27 pm.

Dumont stated that there is a hardship with the lot line being skewed and it is a cluster development.

Keiser stated that 12'x16' is reasonable.

Dumont agreed. Stated that no one is against this and he feels it meets all five criteria.

Motion made by Dumont: After review of the application, the file and all the information presented to the Board, I feel that all five criteria have been satisfied and I move that the request of Marc & Karen Hiller for a variance from Section 6.B.1.a of the Zoning Ordinance to increase a nonconforming structure be **GRANTED**.

Seconded by Kennedy. Motion carried with a 3-0 vote.

- C) Cumberland Farms, Inc. is seeking a variance from Section 20.B.34 of the Zoning Ordinance regarding the definition of sign area on properties located at 208 & 216 Route 108, in the Commercial Industrial (CI) District, Assessor's Map 62, Lots 9 & 11, ZBA #24-2016.

FX Bruton with Bruton & Berube, PLLC represented the applicant and addressed the Board. Stated that he would like to move forward tonight with only three Board members.

Saunders stated that the applicant had six sign variance requests at the last ZBA meeting and the Board granted three, denied two and tabled one of those requests. Stated that the request that was tabled has been withdrawn and now they are looking for a variance for the definition of sign area. Stated that the Zoning Ordinance defines the stripe along the canopy as being part of the sign area.

Public hearing opened 8:32 pm.

Bruton stated that they were in front of the Board last month with six variance requests and that the two that were denied were regarding the freestanding sign and that the one that was tabled was for the height of the freestanding sign. Stated that the applicant decided that it would look awkward to have a larger freestanding sign when the numerals are small so decided to withdraw that request and bring the sign down to 16 feet. Stated that the desire is to have a small green band along the canopy and showed on the plan where the canopy is on the property. Stated that the Sign Review Committee hasn't ruled on this yet. Stated that the unique thing about the green band is that is that it is on the reveal of the canopy and is 3¾ inches in height. Stated that a reveal is a portion of the structure that is recessed back. Stated that because of this, the green stripe is not on the same portion of the canopy as the sign and is not attached. Stated that it was discussed at the last meeting what other gas stations in the area do for their canopy. Passed out pictures of other stations in the area. Stated that all the other stations have a little sign with a stripe going around the canopy. Stated that the applicant here is doing something different since the stripe is not actually connected to the sign so he is not sure a variance is even needed in this case. Reviewed the criteria for a variance and stated that this won't diminish property values but will upgrade them. Stated that this is a muted part of the project and will add character. Stated that this won't be contrary to the general public and won't alter the character of the locality. Stated that this would be a hardship if the variance is denied. Stated that the justice criteria is a balancing test and the loss to the applicant won't be outweighed by the gain to the public. Stated that this is keeping with the spirit of the ordinance since the spirit is to promote the use of land.

Todd Levesque of 15 Pinkham Avenue and owner of Todd's Touch located across the street from the applicant addressed the Board. Stated that he thinks this is a great idea and good for the City for tax purposes. Stated that there has been a lot there and that they have dealt with a lot of sign issues. Stated that there is a lot of traffic there. Stated that right now he just sees that old place across the street but that Cumberland Farms will be great. Stated that he is in favor of this. Stated that he wants to see the corner look beautiful and that Key Auto looks nice and the mobile home park has been removed. Stated that this would be a great thing for taxes and asked the Board to let them come in and do this.

Roger Saucier of 213 Route 108 addressed the Board and stated that he is totally in favor of the project. Stated that he won't mind seeing this sign from his house at all. Stated that he doesn't think the lights are on 24 hours a day. Stated that the existing Global sign is larger than what they are proposing. Stated that he will see the sign every day and doesn't have a problem with it.

Saunders stated that it has now become clear what the green stripe is. Stated that she feels that the original thought was that this was just a white area but now that she sees that it is recessed and doesn't think it is part of the sign. Stated that her opinion is that the green area is not part of the sign area and feels that a variance is not needed. Stated that the Board does have to look at each property individually and that she feels that in this case this is not part of the sign area. Stated that she feels that the Board should not move on the variance request and can make the decision that the green stripe is not part of the sign.

Dumont stated that he can see from the pictures that were passed out how the stripe can be considered part of the sign but that he feels it is not in this case.

Bruton stated that he agrees with Saunders but that he doesn't want to withdraw his application but ask the Board to make a ruling that it is not part of the sign and that a variance is not needed. Stated that he is not looking to change the ordinance but would like a specific ruling.

Public hearing closed 8:49 pm.

Dumont stated that he feels that the green stripe is not part of the sign and that there is no need for a variance to be granted.

Kennedy stated that he agrees that it is not part of the sign at all.

Keiser stated that the green stripe is in the reveal and so it is not part of the sign.

Motion: Dumont moved that the green stripe is not part of the sign area and a variance is not required. This is in accordance with the amendment presented tonight.

Seconded by Kennedy. Motion carried with a 3-0 vote.

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

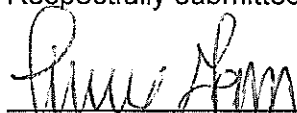
None.

Motion: Dumont moved to adjourn the meeting.

Seconded by Kennedy. Motion carried with a 3-0 vote.

Meeting adjourned at 8:52 pm.

Respectfully submitted:



Tracy Gora, Planning Secretary
Somersworth Zoning Board of Adjustment