

SOMERSWORTH ZONING BOARD OF ADJUSTMENTS
MINUTES OF MEETING
August 4, 2021

MEMBERS PRESENT: Matt Keiser Chair, Brad Fredette, Richard Brooks, Keith Perkins, Glenn Garvin-Alternate, Kenneth Vincent

STAFF PRESENT: Michelle Mears, Director of Development Services, and Dana Crossley Planning Secretary

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

Keiser appointed Garvin as a full voting member.

1) Approval of the minutes:

Brooks **MOVED** to accept the July 7, 2021 minutes as presented.

Perkins seconded the motion.

The **MOTION CARRIED** by a 4-0-1 vote (Vincent abstained).

Brooks **MOVED** to approve the July 22, 2021 special meeting minutes as presented.

The **MOTION** was seconded by Fredette.

The **MOTION CARRIES** by a 4-0-1 (Vincent abstained)

2) OLD BUSINESS

A) Any old business that may come before the Board. - NO other old business.

3) NEW BUSINESS

A) **REHEARING: Packy's Investment Properties, LLC, is seeking a variance from Section 19.6.C.1.a, expansion of a non-conforming use of land, to expand an existing mini-warehouse on a property located at 363 Route 108, in the Commercial/Industrial (C/I) District, Assessor's Map 48 Lot 22B, ZBA#07-2021 PUBLIC HEARING**

Keiser opened the public hearing.

Mears stated the ZBA denied the variance request at their June 2, 2021 meeting. She stated the applicant filed for motion for rehearing and the Board granted the rehearing request at a special meeting on July 22nd meeting. She stated the Board has received all the information submitted by the applicant for this case.

Fredette noted for the record, he has used Bruton and Berube Attorney's at Law for personal reasons. He wanted to ensure that all parties did not feel there was a conflict of interest. The applicant and Board did not feel this was a conflict of interest.

Vincent noted that in the past he has used Bruton and Berube Attorney's at Law for business issues. Bruton noted there was no current business with Vincent. The Board did not express issue.

Attorney FX Bruton of Bruton and Berube and Packy Campbell of Packy's Investment Properties, LLC was in attendance to represent the application.

Keiser stated the voting members for this application is the regular members, Keiser, Fredette, Brooks, Vincent and Perkins.

Bruton stated this application has been before the Board for the original public hearing and the motion for rehearing. He stated he will focus his testimony on the criteria that the Board found was not met at the first hearing. He stated that criteria is the spirit and intent of the ordinance and hardship. He stated this lot is 3 acres and has three existing mini-warehouse self-storage buildings. The applicant's intent is to build additional storage and looking for approval to expand the non-conforming use. He noted that when this site was constructed it was a permitted use and at this point due to a zoning change it is a non-permitted use. He stated this use is permitted in the industrial zone and could consider it an industrial use. He stated the CI District does suggest industrial uses be permitted in this area but to be in the back of properties. He stated they are here to expand the use and if approved would be required to go through site plan approval process and those plans would be further refined. He stated they are interested and happy to provide a 15' for this use, there is no close residential use but would be helpful in allowing an expansion of a non-conforming use.

Bruton stated he would review the special conditions of the property and the unnecessary hardship existing. He stated this lot is an 'L shape or pork chop' lot, in review of the tax map provided most of the properties are not configured that way. He stated they view that as a unique aspect of the property. He stated the rear portion of the lot is much wider than the frontage and there is a lot of buffering. He stated he would be referencing the *Rancourt v. City of Manchester* (talks about being significant buffering and that is a unique characteristic) and *Rochester v. Rochester* for case law reference. He stated in the case of *Roncourt* the applicants wanted to use a non-permitted use in the rear of the property, that case like this case, discussed the odd shaped lot, narrow in the front larger in the back also with the buffering. He stated this case has that same effect. He referenced an image included in the packet that shows the property coming from Interstate Drive looking at the parcel seeing the existing storage facility. He stated the area of expansion would not been seen form the road, what is existing would be seen which is the abutting property Rymes Oil. He stated beyond that site is the L shape portion of the lot, has a significant buffer, offering to put in additional buffering that would not present to the community. He stated it will be consistent with the CI district, commercial uses are to be in the front but industrial uses should be in the rear of the property, this use is not only in the back but it will have a buffer to prevent being seen. He stated the *Rochester v. Rochester*, there was a parcel of land, there was an existing mobile home park and the adjacent lot was proposed to have a mobile home park, but the first MHP was permitted but the zoning changed to not allow new mobile home parks. He stated the Superior and Supreme Court upheld the granting of the variance, in that case it was found that the ZBA found reasonable special conditions distinguishing it from other properties, irregularly shaped, challenging topographical features, location and configuration of the lot itself positioned near other MHP and Zoning Ordinance rendered that lot not to be able to have a MHP rendered that lot unique to other properties in the area. He stated that is an illustrative and on point case. He stated in this case there is the existing use, the zoning ordinance change and putting the use where they would like is consistent with the *Rochester* case in finding it is unique and granting the variance under the unnecessary hardship test.

Bruton continued that in review of the spirit of the ordinance and the health, welfare and safety and the subsection of the zone, it is to keep industrial behind and commercial in the front. He stated within that context they feel they meet the test, keeping the industrial use in the back of the lot and not creating an issue with health, welfare and safety. He stated by adding the buffer it helps with that in helping the view and think to deny the variance would be unnecessary hardship. He stated the lot is unique in configuration and existing use that was permitted at one time. He stated the other part of the denial was related to the spirit and intent on the zoning ordinance, there is sometimes the thought that if the land can be used otherwise the use variance should not be granted, but that theory in the law went away a long time ago with *Simplex*, that standard was deemed to hard and unconstitutional. He stated in that context look at the spirit and intent of

the ordinance, is there a fundamental change of the characteristics of the neighborhood, do not think you could reasonably say this expansion in the back that will have a buffer and consistent with the existing use would alter the characteristics of the neighborhood. He stated a variance is a check valve and if you meet those tests where it seems to be okay and not infringing on the spirit and intent of the ordinance it should be granted and feels that is the case they have presented.

Keiser opened for public comment:
No comments received.

Garvin stated case law was mentioned that references an L shape lot, larger in the back than in the front of the lot and that was enough for a Judge to consider a lot unique, was there anything else presented besides that the lot is bigger in the back to determine uniqueness.

Bruton stated the case related to the ZBA finding that, the Supreme and Superior Court judges agreed and in his Motion for Rehearing documents he outlined what the Court found and that was one of the characteristics that was considered unique.

Garvin asked what the other items were for uniqueness.

Keiser stated the crux of that case was the shape of the property as the unique feature, the ZBA found it and the Courts agreed.

Bruton stated it is up to the Board to what makes something unique, in that case it was found to be unique and the Courts agreed that was a reasonable way to look at the test.

Fredette stated his understanding of that case was it was about keeping horses and that the parcel was larger than the ones in surrounding.

Bruton stated he would have to see the full case to agree, he is looking at his notes and specifically about the lot was uniquely configured as the rear portion was greater than the portion in the front.

Fredette noted there are different ways a lot can be bigger in the back than front. He stated he views it lacks uniqueness because it appears that a lot was cut off to create this odd shape and the abutting lot does the exact same thing and is a common lot shape throughout the City.

Bruton stated the test is if the lot is unique in consideration of similar lots, similarly zoned, it doesn't say it has to be the only pork chop lot.

There was a brief discussion of the shape of the surrounding lots.

Bruton stated he would find that 3 lots out of 40 lots to be shaped a particular way creates a uniqueness.

Keiser asked how the undeveloped area would be accessed.

Bruton stated it would be through the existing driveway and storage units that can be seen on the plan provided with the original application.

Keiser stated if there was another use, such as a convenience store, put in the back how easy would it be to access that site.

Bruton stated it would be impossible for another use to be there, any commercial use as opposed to an industrial, there is no visibility and would not make sense.

Keiser stated one of the few reasonable uses for the land would be the expansion of the storage units.

Bruton stated it is supported in the Rochester case because it was found that since the lot was next to a MHP it is reasonable that it be used as a MHP as well and is related to the unnecessary hardship test.

Vincent stated this lot is very unique. He stated realtors chop up the lots, then if there is a zoning change the property owner is stuck with what exists. He noted there are few properties in that area that are shaped this way. He stated he is in favor of this request.

Bruton noted that his client purchased the lot as it exists.

Garvin inquired where the buffer would be.

Bruton stated the buffer would be along the rear property line of 48-22A and side property line of 48-21. He marked on the plan and noted it would be a 15' buffer and submitted to the record.

Campbell noted that the vegetation exists and would be as a no-cut area.

Keiser closed the public hearing.

Vincent stated he is in favor of the request. He stated with the buffer it would be hard to tell the use was there. He noted that he owns a property that abuts another property owned by the applicant. He stated the applicant takes care of his properties. He stated he has experienced having the zoning changed and feels it is unfair. He stated he feels this lot has special conditions to allow it to be granted, the buffer will be adequate and think it will be a plus for the City and applicant.

Vincent stated he is not a direct abutter for this property, direct abutter to a different property the applicant owns. Nothing that happens to this lot would affect his lot.

Brooks stated at the first hearing there was discussion of the other properties granted variances for similar uses. He stated another lot was granted a variance for the same request this lot is seeking and changes his thought process of consideration. He stated he would be in favor of this variance being granted now. He stated the buffer will help with the use.

Keiser stated in review of the criteria it was denied based on two of the criteria, one of those being the spirit of the ordinance. He stated based on the information presented tonight, the spirit of the ordinance has to do with if the character of the neighborhood is going to change, based on the plan and the existing use, the expansion would not be able to be seen he feels that criteria has been met with the information presented tonight. He stated for the hardship criteria, based on evidence presented and case law presented, it is a unique property with the shape, to use that back portion of the lot could not be a separate commercial use, logically only mini-warehouse storage would work. He feels all the criteria has been met based on the three criteria that was met at the first hearing and tonight's testimony for the remaining two criteria.

Fredette stated he would agree with that statement. He stated the only access to the property is from Route 108. He stated he would be in support with the condition of the 15' buffer as discussed.

Mears stated that can be a condition of approval.

Vincent asked if anyone has spoken against the application.

Keiser stated no.

Garvin noted it sounds like the Board has had a change of hear since the June meeting. He stated the Board has shut down applicants for the same two issues that this applicant was denied for. He stated each lot has a shape and does not feel there is uniqueness. He stated it seems like people that get told no and go hire people the Board seems to change their opinion, he stated he does not see information to change his opinion. He stated he is concerned to why the Board is changing their mind. He stated the condition process does not work.

Fredette stated he understands Garvin's concern. He stated in his standpoint is that he is not versed on all case law. He stated he makes his decision on what is presented to the Board. He stated any applicant has the right to hire an attorney who is more versed on case law. He stated he has to make the decision based on the information presented to him.

Brooks stated he would agree with Fredette's statement. He stated it is hard to find properties shape exactly the same and they all vary, the shape of the property is not what he likes to look at for the unique factor but rather a geographical feature. He stated this is a case by case basis. He stated the hardship here becomes what else could be done with the rear portion of the property, it is unnecessary hardship to say they can just keep doing what they are doing.

Vincent stated he finds that an attorney often brings more information for the Board to review.

MOTION: Brooks stated after review of the application, the file and all the information presented to the Board, I feel that all five criteria have been satisfied because of the unnecessary hardship discussion and other discussions at this meeting and the June 2 meeting and I move that the request of Packy's Investment Properties, LLC., for a variance from Section 19.6.C.1.a, expansion of a non-conforming use of land, to expand an existing mini-warehouse be **GRANTED WITH THE FOLLOWING CONDITIONS:**

- 1. There shall be a 15' buffer provided as shown on the map submitted by the applicant at the meeting. (Along the rear lot line of Map 48 Lot 22A and shared property line with Map 48 Lot 21)**

The MOTION is SECONDED

The MOTION CARRIES by a 5-0 vote.

B) The BeFree Church is seeking a Special Exception from Table 4.A.2 to allow a Place of Worship and Related Religious Facilities on a property located at 47 Washington Street, in the Residential Multi-Family (R3) District, Assessor's Map 10 Lot 153, ZBA#09-2021 PUBLIC HEARING

Keiser opened the public hearing.

Mears stated the applicant is seeking a special exception to utilize the existing space for a Place of Worship and Related Religious Facilities. This use requires a special exception in the R3 District. She stated in the research of this property there was a site plan approved in 1985 for 7 residential and 2 commercial units, and a variance was granted in 1985 for the 7th residential unit.

Fredette stated he would be recusing himself from this application as he is an owner of a directly abutting property.

Keiser appointed Garvin as a full voting member.

Tim Monahan, Lead Paster, of the BeFree Church was in attendance to represent the application.

Monahan stated he had a written testimony and would submit that for the record after the hearing. He stated the previous use at this site was the Laney's Café and are seeking to open a House of Worship. He stated they believe they meet the requirements for a special exception. Noted that due to COVID had lost their prior location and looking to establish a central location that would allow them to be present in the City of Somersworth. He noted that the Church has been present in partnering with the City to help paint the blue wall downtown, aiding with the Somersworth Children's Festival and Pumpkin Fest. He stated they hope to be partners with the City in bringing energy and engagement to Somersworth. He stated he understands the use was previously a restaurant that has been vacant for almost two years. He stated their use would be the least intrusive use. He stated the primary goal is to establish a Place of Worship on Sundays but would also like to have additional ministries to serve the City that include afterschool tutoring, a deaf ministry or TESOL program. He stated at this time those are hopes. He stated they would be a benefit and contribute to the vitality to the City being they are a young church body (25-35 year old), mostly Somersworth residents but

some from outside the communities, the members naturally explore, experience and dine in Somersworth. He stated they are young church body would add to the vitality and vibrancy in the continued vision of Somersworth to become a destination. He stated they hope to partner with the surrounding businesses. He stated most New England communities have downtown places of worship, such as Exeter, Newmarket, Dover and Rochester, and they hope to add to this list. He stated their goal is partnership with the City, to establish a 'home base' for the church family and be active participants in the community.

Keiser opened the public hearing:

Ed Levasseur, Pleasant Street: stated he is hopeful that this Church will open up. He stated he is not a member of this Church but is encouraged that someone has an interest in renovating and utilizing this space. He noted that the Form Based Codes were passed recently in this area and unsure that impact for the site. He stated there is ample parking in that area and would not be a burden to the neighborhood with the use.

Brad Fredette, 3 Blackwater Rd: stated he owns an abutting property and understands this is a special exception request. He stated his only concern is with the property owner and the lack of property maintenance that is done for the site. Specifically if there are any conditions put on the approval getting the property owner to uphold the conditions would be a challenge. He stated it is great to see the Church trying to do something in the community but has concern with the property owner in general.

Keiser clarified the applicant is not the property owner.
Monahan stated no.

Keiser asked how many people they expect would fit in their space.
Monahan stated comfortably about 100 but they would need to have the space formally looked at. He stated there are two spaces, the café area and the banquet room area. He stated they hold services differently with couches etc.

Keiser clarified who determines the occupancy.
Mears stated the Fire Department. She noted this use would require site plan approval depending on the SF of the change of use, if under 10,000 it would be minor site plan.

Vincent stated occupancy is based 7.5SF per person, 15SF with tables and chairs, from when he was part of the Fire Department.

Keiser inquired how many members the Church has.
Monahan stated at their peak prior to COVID they had 70, at this time they have about 58 active members and estimated 66 members.

Keiser stated he does not know how the use of the property is divided for the parking lot since it is owned by two properties. Do they have allocated parking spaces.
Monahan stated that has not been allocated just been told they would be able to use the parking lot. He stated there are more than enough spaces in the lot and on-street parking.

Mears noted that his property is located in the special parking overlay district and they are not required to have on site parking.

Keiser stated a unique factor of a church is that everyone comes out at the same time rather than intermittent in a restaurant. Trying to understand the flow and impact to the neighborhood.
Monahan noted that the church is very young, many of the members are children.

Keiser noted that there are residential units surrounding this use, how much noise will the church create.

Monahan stated they intend to be the best guests possible, would look at their worship locations to limit the neighboring noise impact, use would be from 8-12 on Sundays and possibly 2 hour blocks in the evening. He stated they are part of the multi-church community that could assist with noise dampening in the space.

Vincent inquired the other uses in the building and clarified the layout.

Keiser inquired if the City has any concerns.

Mears stated not at this time. She stated she has had discussions with the applicant about expanding the use from House of Worship to include additional support services that could require additional approvals as it would be considered a different use.

Keiser inquired if they could offer after school tutoring.

Mears stated something like recovery support would require additional review.

Brooks clarified the upstairs residential that accesses from High Street would be separate.

Monahan stated yes, their primary egress is the parking lot from Washington.

Keiser closed the public hearing.

Brooks stated his one concern is the rented property rather than the owner seeking approval.

Mears stated it does not matter because the applicant received property owner permission to submit the application.

Keiser inquired if the Special Exception could be granted only for the BeFree Church.

Mears stated yes.

Brooks stated his one concern is the group of people coming and going at once. He stated there is a large parking lot that could handle it but depending on the times, does not think the abutting uses have hours on Sundays but weekday use would it have an impact. Noise if there is music or something, a crowd brings noise and it would be during daylight hours and not late into the night and does not consider it would be too much of a problem.

Vincent stated those are his concerns as well. He asked if there is any type of exemption for Church or Place of Worship, they are not exempt correct.

Mears stated this use requires a Special Exception. The property is located in the Form Based Codes overlay but no process for the Conditional Use is set forth, which is why the use is before the ZBA.

Garvin inquired the special exception as needed because it is an R3.

There was a brief discussion of the current zoning.

Keiser inquired if there is a noise ordinance.

Mears stated there are requirements within the Site Plan Review Requirements.

Keiser stated he is in support of the request and feels the applicant meets the special exception requirements.

Perkins stated he feels they meet the criteria. He stated there are several different ways people can leave this property to access different locations and does not think the traffic would be an issue.

MOTION: Brooks stated, after review of the application, the file and all the information presented to the Board, I feel that all the Special Exception Criteria have been satisfied because of discussion and testimony from the applicant and I move that the request of BeFree Church for a special exception from Table 4.A.2 for a place of worship and related religious facilities **be GRANTED WITH THE FOLLOWING CONDITIONS:**

1. **The use shall be limited to the tenancy of the BeFree Church.**

The MOTION is SECONDED by Perkins.

The MOTION CARRIES by a 5-0 vote.

Keiser noted Fredette would be joining the board as full voting member, Garvin stepped down to alternate.

- C) Getty NH Sites Inc, is seeking a Special Exception from Table 4.A.5 to allow gasoline sales-self-service (Auto Convenience Market) on a property located at 463 High Street, in the Residential/Commercial (R/C) District, Assessor's Map 40 Lot 59, ZBA#10-2021 **PUBLIC HEARING**

Keiser opened the public hearing.

Mears stated the applicant is before the Board tonight because they need a special exception to re-activate the Auto Convenience Market (gasoline sales, self-service). She stated she has reviewed the historic files and found the following information:

- This property received a variance in 1977 to move building back 26 feet put in island for four gas pumps/storage tanks with an overhead canopy.
- This property received Site Plan approval in 1988 for Getty Petroleum Corp. to convert the existing building into a "Mini Mart" approved with the conditions that hours of operation for the "Mini Mart" shall be limited from 7 am to 11 pm.
- The property received Site Plan approval in 1999 for relocation of existing canopy and fuel dispensers and the construction of 1,600 SF building.

Keiser inquired if the site plan condition for the hours of operation of a mini-mart would remain in effect or should be included as a condition of approval.

Mears stated it would remain in effect.

Vincent noted he feels it is a no-brainer and wondered if they had to go through the hearing process.

Keiser stated the process must be followed to ensure opportunity for a fair hearing for the applicant and abutters.

Phillip Sewall of Getty NH Sites, INC. was in attendance to represent the application.

Sewall stated he would not be opening a convenience store, they would sublet the space for another use. He stated they will run the gas pumps and sublet the building. He stated there are several other gas stations around and it is basically the same thing that is on the street. He stated by taking it over the site will look better, landscaped, clean and inviting.

Keiser opened the public hearing;

Steve Beaudoin, representing James Youngren 459 High Street: stated he wanted to clarify the existing conditions this station operated under in the past would still be in effect for the 7am-11pm. Would that apply to a store. Also inquired if the building would be changed in any way.

Sewall stated they do not intend to modify the building. He stated he was unaware of the condition of the hours of operation, usually the gas stays open for 24hrs.

Mears stated it was specified for the mini mart.

Keiser inquired if the Auto Convenience Market covered the convenience store use or just gas sales.

There was a brief review of the definition in the zoning ordinance for the auto convenience market.

Brooks clarified it would be an unattended gas station.

Sewall stated he will need to find a tenant, he is not the property owner but has grown up in this business, owns two other stations.

Fredette asked if there are any other variances required if this would be other than a convenience store.

Sewall stated he has not, but has reviewed the ordinance.

Mears stated if the use was not permitted they would need to return to this Board.

Keiser stated in his review he feels the use meets the special exception requirements, it has been a gas station before and the area is appropriate for a gas station. The applicant would need to meet the requirements of a mini-mart that are established if they operate that use. He asked if the Director had any other concerns.

Mears stated no.

Keiser closed the public hearing.

Fredette stated he is in support of this request. He stated he does not think there should be an hour restriction, High Street was very different in the 70s-80s, and the hour operation would be undue hardship.

Vincent stated the appreciates the expressed concerns for lighting and noise, there would be no change but see a request for a change because a non-attende operating station operates 24hrs a day. He stated he is in favor of the request.

Brooks stated he is in favor of the request, the site is still set up for a gas station, on a busy road and can handle the traffic.

Keiser noted that the only restriction is that a mini-mart use shall be operated from 7 am to 11 pm not the gas stations. He stated this is the only gas station that abuts a residential property.

There was a brief discussion of the lighting on site.

Mears noted that this use would need to come back before the Planning Board for site plan review and lighting would be reviewed.

Fredette asked if the applicant is able to extend the hours of operation or if it would be barred.

Mears stated that was a Planning Board decision and under the PB jurisdiction.

Garvin inquired why it is seeking a special exception rather than variance.

Keiser stated that is what the regulation requires.

Garvin asked if the property has to follow the current City Ordinances, as far as noise ordinance.

Mears stated yes the property would need to follow the site plan requirements, the use has not be active for a number of years and will need to go through that process.

Garvin stated this must be a property in compliance and not non-conforming, because if it is non-conforming, is it true they do not have to follow City ordinances. He stated as long as they have to follow the ordinances the residents will be protected to some degree.

Vincent clarified there is a low lighting ordinance after a certain time frame.
Mears stated yes those requirements are in the site plan requirements.

MOTION: Fredette stated after review of the application, the file and all the information presented to the Board, I feel that all the Special Exception Criteria have been satisfied because as discussed and I move that the request of Getty NH Sites, Inc. for a special exception from Table 4.A.5 to allow gasoline sales-self-service (Auto Convenience Market) at 463 High Street **be GRANTED**

The MOTION is SECONDED by Brooks.

The MOTION CARRIES by a 5-0 vote.

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

Vincent **MOVED** to **ADJOURN** the meeting.

Perkins seconded the Motion.

The **MOTION CARRIED** 5-0 at 8:33 PM.

Respectfully Submitted,

Dana Crossley, Planning Secretary