

**TOWN OF EPPING, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT MEETING**

Wednesday February 20, 2019

PRESENT: Don MacLaren, Kim Sullivan, John Dold, Joe Bodge, Charlie Goodspeed; Alternate Rob Eldridge; Planner Brittany Howard; Secretary Phyllis McDonough.

CALL TO ORDER: Chairman MacLaren called the meeting to order at 6:00 P.M.

PLEDGE OF ALLEGIANCE TO THE FLAG

POLKA DOT HOUSING, LLC – Chairman MacLaren read notice for Four Variances concerning Article 2.7.3 and Article 6.10.3.a, d, & f, and Three Special Exceptions concerning Article 6.10.3.b, c, & e. Parcel is located at 232 Main Street, Tax Map 022 – Lot 058 located in the Industrial Commercial Zone.

Sullivan moved Goodspeed seconded the motion to continue the hearing to March 27th at 6:00. The motion carried 4 – 1, Bodge voting against the motion.

Sullivan explained after he reviewed the whole package and reading the summary he stated if this application is approved, and based on the outcome of the Town meeting the Board's action wouldn't be needed. He stated he doesn't see the purpose of going through the whole application and noted there's a water restriction and sees no purpose of the board looking at it.

Bodge stated his belief is the applicant put the application in, in a timely fashion within a set amount of time and finds the Board irresponsible not to at least to take action.

Howard explained there's four variances at the beginning that the Board will have to hear now or later, and currently the way the regulations are written they'll need special exceptions. If the article passes in March, they will need variances so the applicant is asking the Board to vote both ways and then after the election would stand by this board and what they didn't need would go away.

PEARSON 03833, LLC – Chairman MacLaren read notice for an Equitable Waiver of Dimensional Requirement Article III, Schedule I. Parcel is located at Exeter Road, Tax Map 030 – Lot 080 located in the Industrial Commercial Zone. Abutters present: Thomas Weisensee, Jessie & Samantha Hysette and Jared Medeiros.

Joe Coronati came before the Board with the proposal. He explained this building was approved by the Planning Board. He stated the loading dock on the east side of the building and the way the setbacks work it doesn't run parallel with the building and the building is very close to the setback line, where they were to build a 10'x10' loading dock one foot in to the corner of the building so it would not go into the setback. He explained they built the loading dock flush with the back wall and it's over by six inches of the setback. Coronati explained he has a stamped foundation certificate that show the back corner of the loading dock is 49.4 feet from the property line where it's supposed to be 50 feet. He explained there is no plan to have any structure over the loading dock.

Criteria for RSA 674:33-a Equitable Waiver were read and discussed:

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;

Coronati explained it was discovered after the foundation had been poured and walls were being constructed.

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;

Coronati explained there was a miscommunication between the general contractor and the concrete company, so the loading dock was constructed into the setback by six inches.

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

Coronati explained there is no public or private nuisance caused by this setback infraction. The only abutters are the existing apartments on Ladd's Lane & 6" in either direction won't make any difference.

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

Coronati stated we feel this is correct. The cost to tear the loading dock off and re-pour it 6" over will outweigh any public benefit.

Abutter Tom Weisensee asked if this proposal will have any impact on any other dimensions. Coronati advised there are no other changes.

Bodge moved Goodspeed seconded the motion to approve the Equitable Waiver. The motion carried 4-0-1. Chairman MacLaren abstained.

ROUTE 125 & 101 INVESTMENTS – Chairman MacLaren read notice for a Variance Article III, Schedule I. Parcel is located at Fresh River Road, Tax Map 029 – Lots 283 – 005 & 006 located in the Industrial Commercial Zone. There were no abutters present.

Robert Graham and Joe Coronati came before the Board with the proposal. Graham explained the need for much of the relief being requested is triggered by internal lot lines that are being created as a result of a subdivision application recently filed with the Epping Planning Board. Graham explained NHPUC dictates that no more than one megawatt of electricity can be produced from any single lot, three megawatts in total and to have an efficient solar array it is important to have the ability to produce more than one megawatt of solar power. Graham noted that separate lots have been created and to maximize the efficiency of the land use, relief is being requested to allow 5-foot setbacks from the wetlands and 10-foot setbacks on all other lot boundaries.

Coronati explained the application is for setback relief for the solar panels on fence posts so they are technically a structure. He stated the setback from the exterior property line request a 10-foot setback along the railbed the other is along Fresh River Road, there's 100-foot setback that is required from the centerline and the request is for 25 feet from edge of pavement, basically 12 feet from right-of-way. He explained there are newly created interior property lines, if this isn't a solar project the lines will be removed.

Graham explained at time of the application they were still looking at the electrical designs asking for an 8-foot setback to interior east/west property lines and 3.3 feet interior setback to north/south lines. Graham informed the Board an as-built will be provided.

Chairman MacLaren asked for clarification of the setbacks; the front request for a 12-foot setback, the rear requesting a 10-foot setback, the side requesting a 10-foot setback, and the interior lot lines as zero? Graham, that is correct.

Sullivan asked what the purpose of this proposal is. Graham explained there will be an offer, and the sale to the Town first. The function of the array is a power generator, and negotiate at a discount and manage the transaction with Eversource.

The Five criteria were read, and responses were attached with the application.

(1) The granting of the requested variance relief will not result in the diminution in value of surrounding properties.

It is likely that few cases come before any Zoning Board of Adjustment where a stronger case can be made that the requested relief will not result in the diminution of value of surrounding properties. The property in question is abutted on one side by the rails to trails corridor while it is essentially surrounded on three sides by significant tracts of land whose use is restricted by conservation easements. The only use of these large fields which might serve a public good and public necessity and have a similarly minimal impact on neighboring land uses would be a cemetery and, unlike a cemetery, a solar array pays taxes. In short, there will be no diminution in value of surrounding properties.

(2) *Granting of the variance will not be contrary to the public interest.*

In *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 581 (2005), the New Hampshire Supreme Court noted that to be contrary to the public interest or injurious to the public rights of others, the variance must unduly, and in a marked degree, conflict with the Ordinance such that it violates the Ordinance's basic zoning objectives. This proposal does not conflict with the Ordinance or violate the Ordinance's basic objectives. In *Harborside Associates v. Parade Residence Hotel, LLC*, 162 N.H. 508 (2011), the New Hampshire Supreme Court articulated two methods of ascertaining whether granting a variance would violate the Ordinance's "basic zoning objectives." One way is to examine whether the granting of the variance would "alter the essential character of the neighborhood." Another approach is to examine whether the granting of the variance would threaten the public health, safety or welfare.

The granting of the requested zoning relief will not violate the ordinance's basic zoning objective of providing appropriate setbacks between structures and uses on abutting properties. Similarly, it will not alter the essential character of this rather intensely developed commercial/industrial neighborhood. It will not threaten the public health, safety or welfare, but will rather promote it.

(3) *The granting of the requested relief will do substantial justice.*

In *Malachy Glen Associates v. Town of Chester*, 155 N.H. 102, 109 (2007), the New Hampshire Supreme Court [Quoting P. Loughlin, 15 New Hampshire Practice, Land Use Planning and Zoning, § 24.11] held that "the only guiding rule [in determining whether the requirement for substantial justice is satisfied] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice."

The loss to the landowner that would result from not being able to locate solar panels in the reduced setback areas is not outweighed by any gain to the public. In fact, it is hard to perceive any gain to the public by enforcing the setback requirements under these particular circumstances.

(4) *The granting of the variance will not be contrary to the spirit or intent of the Ordinance.*

The purpose of setback requirements are to allow adequate air and light between structures and also to avoid concentrations of impervious surfaces along a wetland or property boundary.

The top edges of the solar panels are approximately 10 feet above the ground and the individual panels are generally approximately 3.28' x 6.15' set in rows 16 feet apart. Spacing exists between each individual panel so that they will shed water much like a deck. Their purpose is to collect sunlight in a defined area and they will not interfere with sunlight or air on adjacent parcels.

(5) *The literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.*

- **No Fair and Substantial Relationship:**

RSA 674:33, I(b)(5)(A) provides that for purposes of the variance criteria test, “‘unnecessary hardship’ means that owing to special conditions of the property that distinguish it from other properties in the area”:

- i. no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of the provision to the property; and
- ii. the proposed use is a reasonable one.

The first question that has to be asked is whether there are special conditions about the property that distinguish it from other properties in the area.

Unlike many of the other large parcels in this area, the property, which is the subject of this application, does not have high visibility from Route 101R or Route 125 and its desirability for many purposes is impacted as a result. It is surrounded by high value wetlands which make a benign solar field a particularly appropriate and compatible use at this location. The proposed solar field is in close proximity to wetlands and uplands preserved by this same landowner

- **The Proposed Use is a Reasonable One:**

A use that will generate minimal traffic; minimal surface water runoff; no demand for water, sewer, municipal or school services, but at the same time pays significant taxes and provides a significant amount of sustainably produced electricity for the community at a fair price, is certainly a reasonable use.

Sullivan question the valuation of this project. Graham explained there’s a land portion and a question of how the array is, would continue to pay the land tax.

Bodge moved Goodspeed seconded the motion to approve the variance contingent on it being solar only. The motion carried unanimously.

MINUTES OF JANUARY 30, 2019 FOR APPROVAL – Bodge moved Sullivan seconded the motion to approve the minutes. The motion carried.

MINUTES OF DECEMBER 19, 2018 FOR SIGNATURE – the minutes of December 19, 2018 were duly signed.

ADJOURNMENT – Sullivan moved Eldridge seconded the motion to adjourn at 7:15pm. The motion carried unanimously.

APPROVAL NOTIFICATION: February 20, 2019 - Minutes of January 30, 2019 were approved. Minutes of December 19, 2018 were duly signed.

Respectfully submitted,

Phyllis McDonough,
Zoning Board of Adjustment Secretary