

ZONING BOARD OF ADJUSTMENT
July 18, 2017
FINAL MINUTES

1. Call to Order

The session was called to order by Chair Bob Prior at 7:00 pm.

2. Introductions

Members present Rick Thielbar, Clerk, Bob Prior, Kevin Baum, and Alternates Martha Pennell and Joanne Petito were also present. Staff present: Barbara McEvoy and Jennifer Dionne. Members of the public were present as well.

3. New Business

Mr. Prior explained the rules for the evening. He will be altering the order of the agenda and taking one item out of order.

Felder Keuhl Properties LLC- Case #1450, Extension Request for Meeting Place Mixed Use project— Epping Road, Tax Map Parcel #55-75

Michael Donahue appeared before the Board representing Felder Keuhl Properties. They are meeting the conditions of approval for the project, they are in the midst of the process of pursuing finalization of the finance commitment for the NH Housing Authority. There is an uncertainty on regulation changes which has caused tax credit issues. This is affecting process across the country, it is not just this project. They need another year to complete this, ideally, they will not be using the full year.

The Board discussed this extension.

MOTION: Mr. Thielbar moved to grant Zoning Board Case #1450 a one-year extension expiring August 21, 2018. Mr. Prior seconded. The motion passed unanimously.

The application of Ben and Sarah Anderson for a special exception per Article 5, Section 5.2 and Article 6, Section 6.10; and a variance from Article 4, Section 4.2 and/or Article 6, Section 6.10.4 to permit a home occupation and the sale of tickets for certain events (community gatherings) at the Word Barn located at 66 Newfields Road. The subject property is located in the RU-Rural zoning district. Tax Map Parcel # 24-29. Case #17-18.

Justin Pasay representing the applicants from DTC Lawyers appeared before the Board. This is a unique situation, they are requesting a home occupation or in an alternative to seek variance relief from article 4 and 6 from the zoning ordinances. The previous appearances before the Board were discussed. They do believe there is a good argument for a special exception of home occupation. In the event that would fail, they would proceed with the variances. This is a unique situation. This property has been owned by Ben and Sarah since 2013, and they have a passion for the arts and literature. They have a barn structure on their property that they call the Word Barn. Mr. Anderson appeared before the Board and explained the history of the property. They are not looking to expand operations, they would just like to continue to host events on this property. A short video showing the property was shown to the Board.

Mr. Pasay wanted to also mention that they are committed to working with the town and going through the life safety process and being up to snuff on these issues. They are in the RU district where home occupations are permitted. The property is 5.4 acres, it has a significant vegetative buffer. The barn is obscured from view from the road and abutter properties due to this vegetation. Mr. Pasay explained why they believed that this would meet the home occupation special exception criteria. They believe this due to the professions that the applicants are engaged in. Mr. Pasay went on to explain why they believe they meet the criteria, and he explained this at length. The vast majority of ticketed events occur on weekend evenings when the traffic flow is at its lowest and cars would not be backing onto the road. The flow for this was explained at length. In summary, they believe they meet the criteria, this is a novel use but a special exception makes the most sense. They request that the Board grant the special exception and they do that with the knowledge that the applicants will consult with the town on the life safety issues.

Mr. Baum said he is struggling to find the similarity between the listed occupations in the special exception criteria. Ms. Petito also asked what occupation are they calling this. Mr. Pasay said this would have been permitted if they did not want to charge money to offset costs. They are left with discussion things with Mr. Eastman for interpretation. The common thread they are places where people come and gather and many of the uses are listed have more frequent use than the Word Barn would.

Mr. Prior said they do not list this as a performing art, but on the website, it is listed with other performance venues so by virtue it is a performing art. Mr. Prior said their bylaw makes no distinction between for profit or not for profit. Mr. Baum said he is struggling a bit with this being the right fit, the question he has is this a similar enough occupation to what is listed there. Mr. Prior said there is a grey zone. Mr. Pasay said this is just the nature of the law, these types of uses will crop up but zoning ordinances may not take them into account directly. This use has existed for two years without any issues. Ms. Pennell is struggling with the home occupation, and she did some research on this. Bright and Lions is hosting events at the Word Barn, and bringing in nationally known artists and using this as a venue. She has a problem with this. Artists are also advertising classes for a fee at this location.

Mr. Anderson explained that Bright and Lion is him, and they use multiple venues. They open their home as a gathering place for community members, friends and neighbors. These are not outside entities using the property. Ms. Pennell said there is a schedule of monthly shows until October, will this be year-round. Mr. Anderson explained that they stick to fall and winter and there is no fixed schedule. Mr. Prior said that there is a business being run here, if it is classified differently. The fact that tickets are sold online is what is raising this to a different level, and he hopes the applicant understands this. Mr. Baum asked about the life safety issues, and what they would be completing. Would they receive permits, or take recommendations? Mr. Anderson explained they had a walk through last week, and he did not observe major issues and had some minor recommendations. They would then go to the current life safety officers and meet all required criteria. Mr. Pasay explained the idea would have a binding discussion with the life and safety officer if approved. Mr. Eastman said his recommendation to the Anderson would be to hire a fire protection engineer, and determine the occupation load and get a firm number on this. 100 people in this location seems high, he can almost guarantee that to do this number they would need a sprinkler system. Mr. Baum asked if they do accept this how do they condition this. Mr. Eastman said they could just condition it, the applicant will have to hire someone to present to him they meet all the codes.

Mr. Baum said regardless of approved use, they cannot hold any activities unless they comply with all of the life safety recommendations. A condition along these lines would be sufficient. Ms. Pennell asked Mr. Eastman how can they be allowed to continue. Mr. Eastman said they probably can't. Ms. Pennell asked about previous owners, were there any plans or permits granted for them. Mr. Eastman said not that he was aware of. Ms. Pennell asked if this barn was rebuilt with no permits, Mr. Eastman said they cannot find any permits for this. Ms. Pasay said they understand the concerns of the Board and he wanted them to know that if the use is approved they will meet all regulations required.

Mr. Prior wanted the public to know the discussions tonight are not questioning the quality of the performances, or how nice they are or how good the music is. This is not about any of that, this is about the questions they are asking about the life safety issues, etc. He asks members of the public to speak but limit the comments pro or con the matter that is really before them. Mr. Thielbar explained the use isn't only granted to the Anderson's it's granted to the property, so they have to take this into account.

62 Park Court: She said she attended the Word Barn with her husband and the driveway was easy to navigate, and the parking was easy. Entry way was very accessible. The space was well lit and appealing and easy to maneuver.

Doug Flockhart, 62 Park Court: The space he was in, is roughly the size of this room and there is a small platform. All the seats were filled, he can't conceive how they would get 100 in there. He has seen just about 35 people in there. It is invisible from the road and easy to get in and out.

Dan Chartrand, 63 Jady Hill Ave: Wanted to point out that we are not holding our own town government to the same standards the Anderson's are being held to. The concerns are valid, he asks them to stretch and give the benefit of the doubt to this project. He hopes they allow this to happen.

Andrea Roenick, 51 Newfields Road: Over the course of this going on, she never had any knowledge of something happening across the street from her. There is no inconvenience to any neighbors.

Mike Nelson, Portsmouth: Has read at the Barn and attended faithfully, the Andersons are wonderful and the venue is great. It is small, folksy and quiet. It's wonderful.

Anthony Swan, 7 Marlboro Street: The Andersons are here to try to do the right thing and meet the regulations. They are being transparent. There are comments about it being a novel use, but it would be worth stepping back a little on this. The use proposed is not incredibly intense. From a layperson's perspective the occupation for this, the Anderson's main job is to promote the arts. He is unsure on what the controversy is there. He also did not want them to let a website cloud their judgement on this property. As far as buying tickets, he knows they are applying the criteria before them but there are things that happen in this town where regulations are not up to speed on them. In regard to life safety, why would this be a condition for approval. If rules are in place, he did not want standards applied here that do not apply to others.

Debbie Kane, 7 Holly Court: She has been a patron and spoken there. There is a bathroom, and she wanted to point out that at the Master Plan Workshop that requested an address of cultural opportunities. She hopes the Board supports the Word barn.

Suzanne Stone, 21 Forest Street: In regard to the traffic issue, it is not something to worry about on the property. It is not an issue. She would not take her kids to a place she felt was unsafe, and she is not

concerned about this. As a town, they should be saying than you to the Anderson and how can we help you.

Rob Richards, 25 Cass Street: He is the chair of the theater dance department at Phillips Exeter. His mother was a puppeteer and they performed similar shows in a barn on their property. His parents retired in Exeter, if they were still here they would be anxious to attend these gatherings. Speaking for himself, artists and teachers are important members of a community and the building is the venue. Towns needs the arts as much as schools do.

Mr. Prior wanted to note before closing public session, they have letters from Katharine and Bruce Norton, who has raised concerns. There was also an anonymous letter received stating the relationship between Mr. Anderson and Bright and Lion. There were also several letters of support from Suzanne Stone, from Laurie Swan and Chris Donovan.

Mr. Pasay wanted to say he had not received the letters in opposition so he could not respond to them.

Mr. Prior closed the public session and entered deliberations. Mr. Baum said his biggest concern is the life safety, given a condition and what was discussed tonight he is feeling comfortable with the process to put this in place. He is comfortable that the Andersons will do this. Ms. Petito concern is one of the conditions is public safety, can it be a condition of approval even though it's in the conditions. Mr. Baum said they could condition this and explained how this would be met. Mr. Prior wanted to follow up with Mr. Thielbar's comment on the approval running with the property. Mr. Prior said the approval runs with the property it must be an identical use. So, there is no fear that an approval at this stage would be blanket approval for all home occupations. Mr. Thielbar said this is why how wonderful the Anderson's are does not play in here because it runs with the property. Mr. Baum said one nice thing about home occupation requires that it be within a dwelling unit or another structure. The noise has to be contained to a structure. Mr. Thielbar said if Mr. Eastman felt comfortable with the traffic situation, he could have granted permission without coming to them at all. Mr. Baum said if they are concerned about traffic, there has been no evidence presented that it is a problem.

Mr. Prior felt it was important to go through the special exception criteria, Mr. Baum said his biggest concern is if this meets the home occupation. Mr. Prior said this is where they were asked to have a broader definition of home occupation. Mr. Thielbar said we know Mr. Eastman's view, that this does meet this. Mr. Baum said this is not a medical office where many people would come throughout the day. He thinks this is a fair statement to say it is less intensive then a medical office which is on the list. The Board continued to discuss the criteria at length.

Ms. Pennell had concerns on not making conditions on how many performances could occur in a week. Mr. Prior felt comfortable with leaving it open, he was not sure they have the right to say how many they can have in a given time frame. Ms. Pennell disagrees, she thinks that this concept is catching on and it's going to be just beginning. Ms. Petito said it sounds like a great thing right now, but it runs with the land and so if no limits now there is no limits on the next owners. She also wonders what kind of precedents it would set. This was discussed at length. Ms. Petito has concerns about granting a special exception because of the precedent set for other properties in town that could have similar uses. Ms. Petito would consider voting against this because she does not fit within a home occupation to her. It seems home occupation is a specific category. She is not sure that this fits the occupations listed here. Mr. Baum had some of the same questions, but is now comfortable with it.

MOTION: Mr. Baum moved to grant the application for special exception per article 5 section 5.2 and article 6 section 6.1.0 to permit a home occupation for certain events at the Word barn located at 66 Newfield's road with the condition that the code enforcement officer confirm that the property meets all state and local building and life safety code requirements and state septic requirements. Mr. Thielbar seconded. Motion failed 3-2. Mr. Prior and Mr. Baum voted aye. Mr. Thielbar, Ms. Pennell and Ms. Petito voted nay.

Mr. Pasay asked the Board in the purpose of moving forward with the variance request for this property that they keep the information already presented to the Board still applies here, in the request for a variance from article 4, 4.2. There will be no implications to the character of the neighborhood. They are not proposing any intensification of the use. Mr. Pasay went through the criteria for a variance and explained how this project met these in detail. Mr. Baum said they asked for a variance for .2 ad/or 6 or 10.4? Is it their position that they only need 6.10.4 to continue use? Mr. Pasay said they want relief from 4.2 and 6 within. Would the applicant agree to a condition that it remains within an accessory structure? They did not have any objection to this.

Mr. Prior asked for public comment.

Debbie Kane, 7 Holly Court: Asked if the anonymous letter is that something they consider if people who do public comment have to give their address. Mr. Prior explained they do not have to give the same weight which is why he mentioned it was anonymous.

Andrea Roenick, 51 Newfields Rd: She wanted to make it clear that the events here are not contributing to the traffic at the blind curve.

Rob Richards, 25 Cass Street: They ticketed events at his house, to be sure for safety reasons to know how many was attending. In terms of traffic, there doesn't seem to be an issue here.

Dan Chartrand, Jady Hill Ave: Wanted to point out that over the last two months, well over 100 people have sat through these meetings because they believe so firmly in this mission. You have not heard the enthusiasm in this community for this venue. It is really a testament how many people attend these meetings and he asks them to consider what these folks are supporting.

Suzanne Stone, 21 Forest Street: Read a letter she wrote, and mailed to the Board previously. She feels this setting is magical and what is going on here is amazing. It is unique and it is special. Her only disappointment is that she has not been able to bring her kids. She understands this Board is confronted with rules and regulations but she knows many people in town want these types of change. She is grateful for this Boards time and energy but she knows they can figure out a way they can do this with the applicants.

Tim Horvat, Stratham: He wanted to speak very briefly to the analogy of a round peg in a square hole. Setting a precedent for future opportunities, and if this would cause people to follow in their footsteps. The Andersons bring care to this, they are not just trying to change the nature of the rules, they are bringing something to the town. They have been very willing to go through everything they need to, to do this right. What they are doing is setting a precedent for a high bar for this type of project.

Lauren D. Ferment, Dover NH: She has never had any issues getting in or out of the property. She read a poem to the Board in favor of the project.

Mr. Prior closed public session. Mr. Pasay echoed the sentiments already expressed and notes that the special exception was nuanced, the variance request is not as complicated. He also wanted to say that it is not such that if a variance is set it would set a precedence because each property is unique. It is not the status of the law in NH.

Mr. Thielbar said counsel has gone through the criteria to his satisfaction. They went through the variance criteria at length. Mr. Baum said they have already discussed the life safety, his only question if they think there is a need to include 6.10.4 as a condition. Mr. Thielbar and Mr. Baum felt it wasn't right to include it. They felt it should just be a variance to 4.2 and articulate the requirement it all be within the existing structure.

Ms. Pennell wanted to request that they ask the Planning Board change some of their recommendations. Ms. Petito believes the motion is well worded and accounts for everything that they need.

MOTION: Mr. Baum moved to grant the variance article 4 section 4.2 to permit the use of the property as requested in the application for community gatherings within the existing accessory barn identified as the Word Barn subject to the condition that the code enforcement officer confirm that the applicant met all state, local and federal health, building and life safety and septic code requirements. Mr. Thielbar seconded. The motion passed unanimously.

The application of Robert Gray Construction for a variance from Article 5, Section 5.1.2 for the expansion of a non-conforming use to permit the proposed construction of a second story addition to an existing garage and deck structure with less than the required minimum side and rear yard setbacks. The subject property is located at 6 Grove Court, in the R-2, Single Family Residential zoning district. Tax Map Parcel #83-71. Case #17-20.

Bob Gray, from Gray Construction appeared before the Board to represent the applicants for this project. The showed plans to the Board in detail. Mr. Gray said there is no change to the footprint, there is a small change to rear deck. But they would be building on top of that footprint. They would be building up on the existing footprint. The project was discussed at length.

There was no public comment and the Board moved to deliberations. Mr. Baum said this is an existing non-conforming use.

MOTION: Ms. Pennell moved to approve the application for a variance from Robert Gray construction as presented. Ms. Petito seconded. The motion passed unanimously.

Other Business:

Varsity Wireless Investors, LLC – Case #17-16 Request for Rehearing – Proposed wireless communication tower 8 Kingston Road, Tax Map Parcel #81-49.

Varsity Wireless is requesting a re-hearing after the negative decision from last month's meeting. Mr. Prior said if they do a re-hearing they have fresh public hearings. Mr. Thielbar said if they say no again and the applicant is still unhappy they would have to go somewhere else. Mr. Baum said typically re hearings are granted if errors are made, or new information is presented. The idea is not to re think the decision. The Board would have to look at this and say they were wrong. The other thing that they can do, is that one of the reasons they request this is that the Board failed to articulate the reasons for

denial. So, they could hold a limited re hearing to do this. Mr. Baum said there is a law that talks about minutes, some towns say the recording counts as well but he doesn't want to make an assertion one way or the other. Mr. Baum thinks they discussed this thoroughly and the record has adequate discussion.

Mr. Prior feels the decision is in writing because of the minutes of the meeting and the written decision itself. The real question is, was there an error made by the Board. Ms. Petito did not feel an error was made when she viewed the video from the meeting. Mr. Baum did not feel a re-hearing would change the decision. Mr. Prior was not at the last meeting, but he was at the meeting in May when much discussion took place. The bottom line is that the application failed on two parts, while he disagreed with one and not the other the bottom line would not have changed. Ms. Pennell has a problem with the definition of essential services. She had concerns about adequate screening; how can you screen a tower? Mr. Thielbar said you can't, they could have selected a location that could screen it from neighbors. Mr. Thielbar said they have an obligation to consider alternate locations, and the only locations they considered were the two next door neighbors. Mr. Thielbar said essential services are allowed on all residential places and he is not an advocate of the tower, and he feels it is not necessary to have the tower. He felt that they made no sincere effort to find another location. Mr. Thielbar said that in order to get coverage they would need they would need even more coverage and he does not feel this meets essential is because of a distinction between voice and data. He feels the law is talking about voice.

Mr. Baum said the key decision tonight is do they think the Board made a mistake of law in this decision, and they need to revisit this. Ms. Petito said they do not believe they did. Ms. Petito said one of the things that justifies putting one of these is a gap of coverage, and she knows at the first meeting she asked for numbers on people without service in this area, and it was not included in the next meeting either. It was not quantified for her. Ms. Pennell said an abutter from Westside Drive who said they had no problems in the neighborhood getting service with T-Mobile. Mr. Baum wanted to note that the decision was not based on that evidence.

Mr. Thielbar had an issue with them not sending any 3rd party experts and only employees for Varsity Wireless. Mr. Baum said that no one else could speak to the locations so he did not have a problem with this. Mr. Prior wanted to summarize that they have not heard anything that gives them compelling reasons they need to re hear this case. The Board agreed.

MOTION: Mr. Thielbar moved to reject the request for rehearing, Ms. Pennell seconded. The motion passed unanimously.

Approval of Minutes:

JUNE 20, 2017: There were some spelling errors that needed correcting.

MOTION: Mr. Baum moved to approve the June 20 minutes as amended. Mr. Thielbar seconded. The motion passed 3-0-2. Mr. Prior and Ms. Petito abstained.

Mr. Baum wanted to say that the pending changes were vetoed by the Governor for the voting on the variance criteria as separate items. Ms. Pennell wanted to request officially that the town planner review the zoning about community buildings and address the issues regarding language. Specifically, community buildings and home occupations.

Adjournment

There being no other business before the Board this evening, Ms. Pennell moved to adjourn at 10:11, seconded by Mr. Baum, and the vote was unanimous. The session was adjourned by Mr. Prior.

Respectfully submitted,

Jennifer Dionne
Recording Secretary