

ZONING BOARD OF ADJUSTMENT PUBLIC HEARING AND MEETING
October 13, 2009

A public hearing of the Zoning Board of Adjustment was held on Tuesday, October 13, 2009 at 6:30 PM in the Auditorium at City Hall.

Jack Currier, Chair, conducted the meeting.

Members present were:

Jack Currier, Chair
Sean Duffy, Vice Chair (arrived at 7:15 p.m.)
Kathy Vitale
Robert Shaw
Robert Carlson
Gerry Reppucci
Carter Falk, Deputy Planning Manager/Zoning

Mr. Currier explained the Board's procedures, including the points of law required for applicants to address relative to variances and special exceptions. Mr. Currier explained how testimony will be given by applicants, those speaking in favor or in opposition to each request, as stated in the Zoning Board of Adjustment (ZBA) By-laws. Mr. Currier also explained procedures involving the timing light.

- 1. Roman Catholic Bishop of Manchester (Owner) 29 Spring Street (Sheet 32 Lot 17) requesting variance to encroach 6 feet into the 10 foot required front yard setback to relocate an existing ground sign. D-1/MU Zone, Ward 4.**

Voting on this Case:

Jack Currier
Kathy Vitale
Robert Shaw
Robert Carlson
Gerry Reppucci

Attorney Gerald Prunier, 20 Trafalgar Square, Nashua, NH. Atty. Prunier stated that the church was built in 1910, and sometime thereafter a sign was put up with the hours and other information. He submitted some pictures to the Board. He said that years back, Spring Street used to be a two-way street, however, now it is one-way, south to north. He said the sign is

installed on the north side. He said the church wants to take the same sign, and move it from one side of the stairway to the other side. He said the hardship has been the change of circumstances that have evolved over a period of time, he said it shouldn't affect any of the other properties, all the others have signs. He stated that the sign is in conformity with the size, it's just the setback. He said the sign is not illuminated.

SPEAKING IN FAVOR:

No One.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No One.

MOTION by Mr. Reppucci to grant the variance on behalf of the applicant. Mr. Reppucci stated that the variance is needed to enable the applicants proposed use of the property, given the special conditions of the property, in this case, the sign was initially erected when traffic was two-way, it's now a one-way, and the direction of traffic introduces a hardship that requires the applicant to move the sign to the other side of their staircase, so it's reasonable for passers-by with the flow of traffic.

Mr. Reppucci stated that it is within the spirit and intent of the ordinance, the sign has been there for many years without consequence, and there is no reason to think that any restriction would apply.

Mr. Reppucci stated that it will not adversely affect property values of surrounding parcels, it is not contrary to the public interest, in fact, it will help with traffic and won't be a distraction, and substantial justice is served.

SECONDED by Mr. Carlson.

MOTION CARRIED UNANIMOUSLY 5-0.

2. **Donald L. & Frances C. Doucette (Owners) 16 Robert Drive (Sheet E Lot 1542) requesting variance to encroach 17 feet into the 30 foot required rear yard setback to construct a 14'x16' three-season porch. R9 Zone, Ward 1.**

Voting on this Case:

Jack Currier
Kathy Vitale
Robert Shaw
Robert Carlson
Gerry Reppucci

Donald Doucette, 16 Robert Drive, Nashua, NH. Mr. Doucette said they are seeking a variance to construct a 14'x16' three season sunroom, it will allow some privacy. He said it will increase the property values of their home, and for the area. He said if it were on the side, it would be by the main entry to the house is.

Mr. Reppucci stated that from the drawing, it looks as if the encroachment may only be 13 feet, and not 17 feet, so it's less than what was advertised.

Mr. Currier said it's more like 12 feet.

Mr. Currier asked what the encroachment would be if the roof had an overhang.

Mr. Falk said that an overhang can encroach two feet into a setback, such as the second floor of a garrison house.

Mr. Currier asked Mr. Doucette if he is the owner of 64 Pine Hill Road.

Mr. Doucette said he is one of the owners, it is shared with other family members.

Mr. Shaw asked why the porch could not be built on the other side of the house, so it wouldn't encroach into the setback.

Mr. Doucette stated that at the other end, it is where the bedrooms are located.

SPEAKING IN FAVOR:

No One.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No One.

MOTION by Mr. Reppucci to grant the variance on behalf of the owner. Mr. Reppucci stated that the encroachment is going to be 14 feet. Mr. Reppucci stated that the variance is needed to enable the applicant's proposed use of the property, given the special conditions of the property, and the benefit sought by the applicant cannot be achieved by some other method reasonably feasible to pursue, other than the area variance, per testimony, the applicant stated that by moving the addition to another location on the house, where there are bedrooms, and this is the only reasonable place for the applicant to place the addition.

Mr. Reppucci said it is within the spirit and intent of the ordinance, it does encroach into the setback, but there was no testimony in opposition to it, and the abutting property is owned by the applicant. He stated that property values will not be negatively affected, and there was no evidence presented.

Mr. Reppucci said the request is not contrary to the public interest, and substantial justice is served to the applicant.

SECONDED by Mr. Carlson.

MOTION TO AMEND MOTION BY Mr. Reppucci, that the addition is to be 14'x16' as mentioned.

Mr. Currier said it's the plan presented to the Board by Roland Girouard, Land Surveyor, with a date of April 16, 1991.

MOTION CARRIED UNANIMOUSLY 5-0.

3. Robert J. Lewis & Stacey A. Grigas-Lewis (Owners) 35-37 Robinson Road (Sheet 110 Lot 169) requesting special exception to allow an accessory (in-law) dwelling unit. RA Zone, Ward 6.

Voting on this Case:

Jack Currier
Kathy Vitale
Robert Shaw
Robert Carlson
Gerry Reppucci

Robert & Stacy Lewis, 35 Robinson Road, Nashua, NH. Mr. Lewis said they are seeking approval for an in-law apartment, they are not changing the footprint of the house, they are just raising the roof and building up. He said it will be an apartment for his wife's father. He said the garage is 22'x28', and they are raising it up for him, above the garage.

Mr. Currier read the accessory dwelling unit special conditions.

Mr. Lewis stated that they are in conformance with all these conditions.

SPEAKING IN FAVOR:

No One.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No One.

MOTION by Mr. Currier to grant the special exception on behalf of the owner. Mr. Currier stated that the request is listed in the Table of Uses, Section 190-15, Table 15-1 #3. Mr. Currier said that per testimony, by having the in-law apartment above the garage will not unduly create traffic congestion or unduly impair pedestrian safety. He stated that the request will not overload public water, drainage or sewer or other municipal systems, it is served by public utilities.

Mr. Currier stated that the special regulations, all six of those, are fulfilled by testimony, and this request will not impair integrity or be out of character with the neighborhood or be detrimental to the health, morals or welfare of residents, per testimony, the house essentially is staying the same, but a second floor is being built over the garage.

SECONDED by Mr. Reppucci.

MOTION CARRIED UNANIMOUSLY 5-0.

4. **OCW Retail - Nashua, LLC c/o The Wilder Companies (Owner) 213 Daniel Webster Highway (Sheet A Lot 30) requesting variance to exceed maximum wall sign area, 150 square feet permitted, 200 square feet proposed. GB/RC Zones, Ward 8.**

Voting on this Case:

Jack Currier
Kathy Vitale
Robert Shaw
Robert Carlson
Gerry Reppucci

Tom Carabine, Wilder Companies, 800 Boylston Street, Boston, MA.
Mr. Carabine stated that they purchased the property about 2½ years ago. He said they lost a tenant, CompUSA, and have signed a lease with a new store, Buy Buy Baby, which is a division of Bed Bath & Beyond, to occupy the space. He said they are seeking a variance for the size of a wall sign, where 150 square feet is permitted, and 200 square feet is proposed.

Mr. Carabine said that the sign location is approximately 800 feet from Daniel Webster Highway, and from Spit Brook Road. He said there are many buildings that block the view to the sign as well, also, there is topography and landscaping in the way as well. He said it is difficult to see, therefore, they are seeking a larger sign.

Mr. Carabine said the sign will face the parking area to the center, as shown in the package that was submitted. He pointed out some pictures of the shopping center, and a drawing showing what the sign would look like, to scale, in comparison to other signs in the center. He said the Buy Buy Baby sign will be similar to the Marshall's sign in size, and much smaller than the Sports Authority sign. He said the sign is 10' tall, by 20' wide, and the letters will be channel letters.

Mr. Currier said the application is very complete and thorough, which is well-appreciated by the Board.

Mr. Shaw asked how large the former CompUSA sign was.

Mr. Carabine stated that he did not know. He said they are re-doing the façade where CompUSA used to be.

Mr. Currier asked what the impact would be if the sign were to be 150 square feet instead of 200 square feet.

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Mr. Carabine said the 150 square foot sign would only be 17 feet long by 8½ feet tall.

Mr. Currier stated that it didn't seem like the advertising would go all the way down to Daniel Webster Highway, as the hill and other stores are in the way, so it's for the drivers in the parking lot.

Mr. Carabine said it will help drivers in the parking lot maneuver to the new store.

Ms. Vitale asked what the new peak will look like.

Mr. Carabine stated that the picture in the upper left is what it will look like, it will be comparable to the Marshall's sign as far as the peak, but the Marshall's one is a bit bigger.

SPEAKING IN FAVOR:

No One.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No One.

Further discussion ensued by the Board.

MOTION by Ms. Vitale to grant the variance on behalf of the applicant. Ms. Vitale stated that the variance is needed to enable the applicant's proposed use of the property, given the special conditions of the property, and the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance, she said that per testimony, the applicant has shown that due to the distance from the roadway, 800 feet was mentioned, that this is a reasonable variance.

Ms. Vitale said it is within the spirit and intent of the ordinance, it will not adversely impact the property values of surrounding parcels, it is not contrary to the public interest, and substantial justice is served.

SECONDED by Mr. Carlson.

MOTION CARRIED 4-1 (Mr. Currier).

Mr. Currier announced that Mr. Duffy has arrived.

5. **Tomas Pujols & Maria Rincon (Owners) 94¹/₂ Bowers Street (Sheet 27 Lot 93) requesting the following: 1) special exception to allow an accessory (in-law) dwelling unit; and, 2) variance to exceed maximum gross floor area of accessory dwelling unit, 30% allowed, 48% requested. RB Zone, Ward 7.**

Mr. Currier stated that voting on this case will be Mr. Reppucci, Ms. Vitale, Mr. Carlson, Mr. Duffy and Mr. Currier.

MOTION by Mr. Currier to take this case off the Table from the 9-22-09 meeting.

SECONDED by Mr. Reppucci.

MOTION CARRIED UNANIMOUSLY 5-0.

MOTION by Mr. Currier to suspend the rules to allow additional testimony from the applicant.

SECONDED by Mr. Reppucci.

MOTION CARRIED UNANIMOUSLY 5-0.

Edison Lopez, 96 Ledge Street, Nashua, NH. Mr. Lopez said that the owner, Mr. Pujols, cannot be here tonight, but said that whatever Ms. Rincon wants to do, he is ok with. Mr. Lopez confirmed that Ms. Rincon wants to go with her original application of a special exception for the in-law apartment, and the variance for the size.

Mr. Reppucci said that Ms. Rincon would have to live in one of the units.

Mr. Lopez said that she understands.

Mr. Duffy asked if they are still interested in the space downstairs with the two bedrooms, and the 48% size.

Mr. Lopez said that is the plan they are going with.

Ms. Vitale said in this case, the 48% is very reasonable to ask for, she said it would be difficult to break up the space so that part of it would be used by the upstairs. It is logical the way they are breaking up the space.

Mr. Reppucci agreed.

Mr. Currier said he is not supportive, this is not the typical accessory in-law apartment, it is a small lot, and would be the smallest house he's ever seen to have an in-law apartment.

Mr. Carlson said he is supportive, it provides an opportunity for someone to live in a decent fashion.

Mr. Duffy stated that he believed the request is within the spirit of what the ordinance is.

MOTION by Mr. Reppucci to grant the variance on behalf of the owner. Mr. Reppucci stated that the variance is needed to enable the applicant's proposed use of the property, given the special conditions of the property, and the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance, he stated that the Board had considerable discussion on exceeding the allowable space and it was the opinion by the members of the Board that in this specific circumstance, it is reasonable to extend the space to 48%.

Mr. Reppucci stated that the request is within the spirit and intent of the ordinance, it will not adversely affect property values of surrounding parcels, there was no testimony that it would.

Mr. Reppucci said that it is not contrary to the public interest, by going through the proper procedure, the in-law apartment will be meeting all the City codes and properly inspected, and substantial justice is served to the applicant.

SECONDED by Ms. Vitale.

MOTION CARRIED 4-1 (Mr. Currier).

MOTION by Mr. Reppucci to grant the special exception on behalf of the applicant. Mr. Reppucci stated that the use is listed in the Table of Uses, Section 190-32. He said it will not create

undue traffic congestion or unduly impair pedestrian safety, there is no reason to believe it will overload public water, drainage or sewer or other municipal systems by adding one unit, and all the special regulations have been fulfilled, and it will not impair the integrity or be out of character with the neighborhood, or be detrimental to the health, morals or welfare of the residents.

SECONDED by Ms. Vitale.

Mr. Shaw said it should be articulated into the motion about the special conditions of the accessory dwelling unit, that they are met, only to the extent that the area variance covers the special condition number one.

Mr. Currier said that two weeks ago, it was gone over with the applicant, and said that perhaps it should say by previous testimony that the applicant has testified that they will meet them.

AMENDED MOTION by Mr. Reppucci that the special regulations are fulfilled, which incorporates the Board previously granting the variance for it to allow exceeding the square footage of the in-law unit for 48% requested, 30% allowed. He stated that for the special conditions, they were read through two weeks ago, and the applicant testified that besides the first one, that the others will be adhered to.

SECONDED by Ms. Vitale to the amended motion.

MOTION CARRIED 4-1 (Mr. Currier).

6. Donald J. & Jody L. Valcourt Rev. Trust (Owners) 10 Algonquin Lane (Sheet E Lot 865) requesting variance to encroach 13 feet into the 20 foot required setback to install an in-ground swimming pool. R9 Zone, Ward 1.

Voting on this Case:

Jack Currier
Kathy Vitale
Robert Shaw
Robert Carlson
Sean Duffy

Donald & Jody Valcourt, 10 Algonquin Lane, Nashua, NH. Mr. Valcourt said they want to put a pool on the right side of the house, which is the street corner, he said it's the only reasonable spot to put it. He said the left side has an extensive garden, and the proposed area is the best area for it.

Mr. Reppucci asked if any trees would have to be removed, he said there are a couple big trees there.

Mr. Valcourt said that there are two trees that would need to be removed. He said his neighbors have no concerns with the request.

Mr. Currier asked if there was an above-ground pool there, as shown on our GIS Map.

Mr. Valcourt said it's been removed, about 10 years ago.

Mr. Duffy asked if they know exactly where the property lines are.

Mr. Valcourt said he's aware of the property line. He said they don't want the pool to be so close to the house, this back corner is the best place for the pool.

Ms. Vitale asked about the deck area that is identified as "to be determined", and asked where it will be and what it will be made of.

Mr. Valcourt said it will be cement, with crushed stones in it. He showed the Board a picture of it.

Ms. Vitale asked if there will be fencing around the pool.

Mr. Valcourt said they just installed a privacy fence all around that area. He said it is a wooden cedar fence.

Mr. Currier asked what the setbacks are for fences.

Mr. Falk stated that there is no setback for fences, they can go right up to a property line.

Mr. Duffy asked if there are any utility lines on that side of the house.

Mr. Valcourt said there are not, they run out from the side of the house.

SPEAKING IN FAVOR:

No One.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No One.

MOTION by Ms. Vitale to grant the variance on behalf of the owners. Ms. Vitale stated that the variance is needed to enable the applicant's proposed use of the property, given the special conditions of the property, and the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. She said that per testimony, the other side of the yard is already developed into gardens, so the proposed location is logical area for the pool to be placed.

Ms. Vitale said it is within the spirit and intent of the ordinance, it will not adversely affect property values of surrounding parcels, we have not received any testimony one way or another, it is not contrary to the public interest, and substantial justice will be served. She said it would be a good idea for the applicant to have a survey completed, so they know exactly where their property lines are, and are placing their pool as indicated in their design presented to the Board.

SECONDED by Mr. Carlson.

MOTION CARRIED UNANIMOUSLY 5-0.

7. Joseph R. & Cheri L. Natalino (Owners) 109 Manchester Street (Sheet 57 Lot 23) requesting variance to encroach 4.5 feet into the 6 foot required accessory structure setback to construct an 8'x12' shed. RA Zone, Ward 3.

Voting on this Case:

Jack Currier
Kathy Vitale
Robert Shaw
Robert Carlson

Sean Duffy

Joseph Natalino, 109 Manchester Street, Nashua, NH. Mr. Natalino stated that they are requesting to place a shed on the side yard, there is a shared driveway with the neighbor, and the property line goes right down the middle of it, and there is a fence right down the edge of the property, but due to the grade of the property, it drops off suddenly, and there's really no other place to put the shed that would be accessible to the rest of the house.

Mr. Natalino stated that the next door neighbor is fine with the request, and the lots are large, and wooded. He said the shed is 8'x12', and would match the same construction of the house, which was recently renovated. He said the shed will allow for less yard clutter as well.

Mr. Duffy asked if the shed could be further away in the lot.

Mr. Natalino said they'd prefer it to be closer to the house and driveway, where it will be the most logical location, and the most convenient.

SPEAKING IN FAVOR:

No One.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No One.

MOTION by Mr. Currier to grant the variance on behalf of the owner. Mr. Currier stated that the variance is needed to enable the applicant's proposed use of the property, it is a long thin lot, with topography going down, and a shared driveway, with that situation, it warrants to encroach 4½ feet into the 6 foot side yard setback with that shed being situated just beyond the tree at the side of the driveway.

Mr. Currier said that the request is within the spirit and intent of the ordinance, the fact that the driveway is shared, it doesn't look like its right up against the property line, with the topography going down, it won't be seen too much from the street.

Mr. Currier said it will not adversely affect property values of surrounding parcels, it is not contrary to the public interest, and substantial justice is served.

SECONDED by Mr. Carlson.

MOTION CARRIED UNANIMOUSLY 5-0.

8. **Barrett J. Warhola (Owner) 573 South Main Street (Sheet A Lot 71) requesting special exception to work within a 40-foot "other" wetland buffer to demolish and remove an existing structure. RA Zone, Ward 7.**

Voting on this Case:

Jack Currier
Kathy Vitale
Robert Shaw
Robert Carlson
Sean Duffy

David Beati, AA Engineering, Dunstable, MA. Mr. Beati stated that there is a structure already in the 40-foot wetland buffer, and the applicant is proposing to remove the structure, which was condemned due to a fire. He stated that a new structure will be built on the lot, but it will be outside of the wetland buffer.

Mr. Duffy asked how much fill will be placed in the lot.

Mr. Beati said that they calculated that approximately 795 square feet of the lot would be affected. He said he's not sure of the volume of fill that would be required to bring it up to grade.

Mr. Bob Pace, Contractor. Mr. Pace said that the existing foundation is coming out, and the house will be placed back about 25 feet, so it's outside the buffer. He stated that the fill in the new foundation will go in the old foundation. He said about 800 square feet, approximately four to five feet deep.

Mr. Currier asked if any of the house could be saved.

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Mr. Pace said no, it had too much damage. They will remove it from the rear, so they won't have to work within the buffer to remove it.

Mr. Currier went over the nine special wetland conditions of approval.

Mr. Pace agreed with all of them, they will all be fulfilled, if applicable.

MOTION by Mr. Currier to approve the special exception on behalf of the applicant. Mr. Currier said the use is listed in the Table of Uses, Section 190-112. He stated that the use will not create undue traffic congestion or unduly impair pedestrian safety, by moving the home, no change to the public water, sewer, drainage or other municipal system, actually, it will help the drainage by putting the wetland buffer back to what it was. He stated that the nine special wetland stipulations are fulfilled per testimony, and the application will not impair the integrity or be out of character with the neighborhood, or be detrimental to the health, morals or welfare of the residents, and it helps the neighborhood by improving the wetland buffer and moving the house back.

Mr. Currier said for the special conditions, per testimony, there will be approximately 800 - 1,000 square feet of fill moved from the new foundation to the old foundation to restore that.

He also stated that the Board has the October 6, 2009 Conservation Commission meeting letter, with four stipulations of approval as well, that the applicant will abide by, per testimony.

SECONDED by Mr. Carlson.

MOTION CARRIED UNANIMOUSLY 5-0.

9. Robert C. & Jennifer A. Hartley (Owners) 312 Lake Street (Sheet 104 Lot 34) requesting special exception to allow an accessory (in-law) dwelling unit. RA/RB Zones, Ward 6.

Voting on this Case:

Jack Currier

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Kathy Vitale
Robert Shaw
Robert Carlson
Gerry Reppucci

Robert & Jennifer Hartley, 312 Lake Street, Nashua, NH. Mr. Hartley stated that they are seeking approval for an in-law apartment, so his wife's grandmother can live there. He stated that they meet all the requirements, and the square footage is less than 700 square feet and the 30%. He said there will not be any structural change, because the previous owner had already made all the changes, so it won't affect the character of the house.

Mr. Carlson asked what the house was represented as when it was for sale.

Mr. Hartley stated that it was told to them that it was a two-family.

Mr. Currier went over all the accessory dwelling unit special conditions.

Mr. Hartley confirmed that they meet all the conditions.

SPEAKING IN FAVOR:

No One.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No One.

MOTION by Mr. Currier to grant the special exception on behalf of the applicant. Mr. Currier stated that the use is listed in the Table of Uses, Section 190-15, Table 15-1 #3. Mr. Currier stated that the proposal will not create undue traffic congestion or unduly impair pedestrian safety, per testimony, the house will not see any more activity than now. He stated that it will not overload public water, drainage, sewer or other municipal systems.

Mr. Currier stated that the special regulations are met, per testimony of the applicant, and the use will not impair the

integrity, or be out of character with the neighborhood or be detrimental to the health, morals or welfare of the residents.

SECONDED by Mr. Reppucci.

MOTION CARRIED UNANIMOUSLY 5-0.

REHEARING REQUESTS:

1. **Nashua Assembly of God Church (Owner) Bishop Guertin High School, Inc. (Applicant) 91 Farley Road (Sheet I Lot 47) requesting use variance to allow a private, outdoor recreation facility, including athletic fields, tennis courts, a multi-purpose building and related improvements. R30 Zone, Ward 1.**

Voting on this Case:

Jack Currier
Kathy Vitale
Sean Duffy
Gerry Reppucci
Robert Shaw

Mr. Currier asked if there was any procedural error, including improper notice, or denying someone the right to be heard.

Ms. Vitale said she voted on the case impartially, she saw no reason to recuse herself just because she is running for Alderman.

Mr. Duffy said he didn't believe the Board made any procedural errors.

Ms. Vitale stated that she didn't make her decision to run until three days before the nomination needed to be filed at that time.

Mr. Duffy said he didn't believe that there was any problem with Ms. Vitale participating or voting that would infer that there was anything inappropriate.

Mr. Shaw said he didn't see any procedural errors, he said that Ms. Vitale was just doing her job as a quasi-judicial member of the Board, and saw this as a totally unwarranted and baseless

point, even insulting, to Ms. Vitale and this Board, and that this request has no bearing.

Ms. Vitale said she called Corporation Counsel and asked how she should approach this issue. She said she hasn't discussed this case with anyone, and gave no opinions on the case. She said she acted with integrity to the City, to the Board, to be very careful.

Mr. Reppucci said he saw no procedural errors, and saw no foundation for any procedural error, and accepts Ms. Vitale's answer to participate and vote on the case.

Mr. Currier stated that he agrees, and saw no issue with Ms. Vitale voting on the case. He said that if she was voting to gather votes, she would have voted against it, not in favor of it. He said he didn't have any issue with her voting on the case.

Mr. Reppucci said from the letter, point number 1, that the letter said it was a special exception then it identified it as an area variance, but in fact it was a use variance, so the letter had errors. He said that he believed that he referenced some correct law cases in the letter.

Mr. Currier said he didn't believe the Board made an error in hearing the case as a use variance.

Mr. Currier stated that the Board did not feel like there was a procedural error.

Mr. Currier asked if the Board members believed it was an illegal decision, in other words, did the Board fail to address each of the points of law required for the special exception and/or variance.

Mr. Reppucci said he believed the Board did make an error. He referred to page 2, the second paragraph. He agreed that they referenced the correct case, Garrison, and briefly described it. He said there was no presentation by the applicant that there was a hardship in the land. He said the presentation was more towards that we should make an exception because #218 allows for the use they're requesting for public use, and the only differentiation is that the applicant is a private use. He stated that he thought that is fundamentally incorrect. He said

that this use would be allowed if it were used by the public, and not a private entity, which was the fundamental reason why we should see a hardship, and he found that to be completely wrong. He said the zoning doesn't allow parks and recreation use in specific sites throughout the City, the Ordinance doesn't allow for a park in an industrial zone, and not in a private zone, the Ordinance allows it everywhere if it's for a public use. He thought the more appropriate use would be #219, which is a private country club, which does not allow this use in an R40 zone. He said the Board found the site to be unique, but not the Simplex standard.

Mr. Duffy said he disagreed, but one of the things we did hear in testimony, and in deliberation, was the fact that this piece of property, not only its size, but it was already approved for a nonconforming use for a variance, so hardship was already found in the land for that property, even though it was twenty years ago, it goes with the land.

Mr. Reppucci stated that he thought it was a mistake for the Board to contemplate that because the idea that the variance was granted on the property twenty years ago, that somehow is applicable to the application for a variance that we are specifically looking at, is wrong, it's a mistake to associate the two requests. He said it's a mistake to combine the two.

Further discussion ensued.

Mr. Currier asked why the Code has it being acceptable for public use, but not for private use.

Mr. Falk said he wasn't aware why it was written that way, where a public use is permitted in all zones, but a private use is not.

Mr. Currier said he agrees with the way the ordinance was written, and agrees with Mr. Reppucci's argument that there is no hardship in the land for R30 zoning, if our threshold has to be a hardship in the underlying zoning, he didn't feel it's there, and didn't believe the applicant claimed it was there, and didn't think any of us thought it was there either. He said the struggle the Board had was the public vs. private. He said by definition, the 501-C, which falls on the private side, and that's when City staff says that the use is not permitted, but, it's a school with kids playing sports, and that's why it's

before us. He said that if there were 18 homes built here, with no buffers, big homes, it would have a lot of people, and a lot of noise. He said with 18 homes, there, it would forever change the character of the neighborhood. He said it would forever change even more if it were developed with the underlying zone. He said that even with the strict restrictions on BG's proposed use, it is still a less intensive use of the land, and the roads than it would be with the 18 homes. He said the request is an acceptable exception in this site, and therefore, an illegal decision was not made.

Mr. Shaw concurred with Mr. Currier's statements.

Ms. Vitale said she didn't remember the discussions about the public vs. private use of parks, but she didn't feel like it was an illegal decision, she thought that the Board addressed all the points of law, and said she didn't feel where the Board made an error in this point.

Mr. Reppucci asked if the Simplex standard should be the one we were supposed to use in this application, or is there some question to that.

Mr. Currier said he struggled to see how Simplex applies to this, as it's zoned for this, but because over time, the land has grown in this direction, i.e. commercial, it's ok to go a little bit further. He said he didn't feel that Simplex didn't apply to this case.

Mr. Reppucci said the Simplex standard should be applied to use variance applications.

Mr. Duffy said Simplex talks to the essential character of the neighborhood. He described the Simplex case. He said the Boccia case created the area variance criteria.

Mr. Reppucci said the Boccia standard differentiated a use variance from an area variance, because the Court was saying that basically, if it's a permitted use and the only reason it can't be approved is because of a physical space requirement, it's not that it's not a permitted use, it's that they don't have the permitted space to do it. He thought the best way for us to approve this is by the Aldermen passing a resolution for the school to intend to have a private park facility to be in

Use #218, then, he said he wouldn't have a problem with this. He said that the law does not allow us to rezone the land.

Mr. Currier said he disagreed, because of the #218 and #219 situation. He stated that if 218 and 219 wasn't there, BG wouldn't be here, they'd be doing it. He said they're here because the argument is 218 and 219 are right next to each other, and they fall on the fence of private, therefore, this is the Board that reviews this request by law.

Mr. Reppucci said the Planning Department made that interpretation that BG does not fall under #218. They believed that it wasn't covered by anything, that's why they applied for a use variance.

Mr. Currier said if Mel's Park in Litchfield wanted to build the same site here, which would be clearly a private concern, he'd have a problem with that in this neighborhood, because it's a for-profit private enterprise. He said that #219 is properly worded, it's in effect, it has to come before us.

Mr. Reppucci said that without identifying a hardship, the Board cannot approve a use variance.

Further discussion ensued.

Mr. Currier agreed that they didn't present a hardship in the land, but they did come in and compare and discuss #'s 218 and 219, we have a problem with this, we fall under the private, but it meets the spirit and intent of the ordinance, it meets the spirit and intent of the Master Plan, it's less intensive than R30, and there's two abutters that don't like it.

Mr. Currier stated that a reason to re-hear this case is to have the applicant try to persuade the Board that even though there's no hardship in the land, we are here because of the 218 and 219 uses. He stated that he thought its ok to approve something like this, even though they presented no hardship.

Mr. Shaw said they cited use #224, "recreation, city, outdoor" as the permitted use.

Mr. Duffy said we heard a lot of testimony, and came up with a substantive finding that was thought to be of reasonable nature,

it was a less intensive use that was already approved through a variance.

Mr. Reppucci stated that there is no fundamental association between the previous hardship found in the previous use and the proposed use. He said the two uses should be isolated. He said that if this use was allowed somewhere in the City, in and R18 zone for example, but not allowed in R30, the arguments could be significantly different, then we would be talking about differentiating between the differences between the two zones, and is it reasonable in another zone.

Mr. Shaw said this use is not referenced as a use from the table, that's why it is here for a use variance.

Mr. Duffy said this code, or any code, cannot possibly list every single use.

Mr. Currier said he's been struggling with a reason to re-hear the case, to further discuss the idea that it doesn't meet the hardship prong, but it's here because of what category does it fall in, and is it a reasonable use of the land. He stated that perhaps they should re-hear it, err on the side of caution. He said the argument that goes against it, is that it is a lot more cost for everyone involved, and it very well could be the same decision. He said he didn't mind re-hearing the case again to further discuss this, it's a more cautious, conservative approach to re-discuss it again, even if we come to the same conclusion again.

Mr. Currier said he didn't think it's an illegal decision. He said there is some question out there that some people think it's an illegal decision, and to accommodate that and discuss it more, he said he'd be willing to re-hear it on that regard.

Mr. Currier said under #4, perhaps there is something that would cause him to change his mind. He said that re-hearing it falls on the side of caution, conservatism, and may help later.

Mr. Shaw said by re-hearing it, it would reinforce the proper criteria where judged that have been met, and the information was judged, so perhaps this would be just another time where we may come up with the exact same conclusion.

MOTION by Mr. Duffy to grant the rehearing request because this Board feels that there would, could, or possibly might be a different decision reached, and as in the case of Cox Street vs. Nashua, this Board will always try to err to making sure it has the first chance and first choice to review all the procedures and testimony the first time before it would be needed to brought to another venue.

SECONDED by Ms. Vitale.

MOTION CARRIED UNANIMOUSLY 5-0.

Mr. Reppucci asked if the posting of the sign could be placed in a position where it is not down the driveway, but to be seen from Farley Road.

Mr. Falk said the signs should not block traffic visibility, also, the person who was granted the rehearing request must pay the fees, not Bishop Guertin.

Mr. Currier said this case should go first on the agenda.

MINUTES:

September 8, 2009:

MOTION by Mr. Currier to waive the reading of the minutes and place on file the minutes as presented, with no corrections.

SECONDED by Mr. Duffy.

MOTION CARRIED UNANIMOUSLY 5-0.

REGIONAL IMPACT:

The Board did not see any cases that had regional impact.

ADJOURNMENT:

Mr. Currier called the meeting closed at 10:04 p.m.

Robert Shaw
Clerk

ZONING BOARD OF ADJUSTMENT PUBLIC HEARING AND MEETING

October 13, 2009

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Taped Hearing