



**TOWN OF
BROOKLINE, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT**

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**BOARD OF ADJUSTMENT
MINUTES**

Wednesday, June 12, 2013

Present: Peter Cook, Member, Chairman
George Foley, Member, Vice-Chair
Webb Scales, Member, Clerk
Marcia Farwell, Member
Kim Bent, Member

Absent: Charlotte Pogue, Alternate

Minutes

Marcia made a motion to approve the April 10th 2013 Zoning Board minutes. Kim seconded. Vote yes 5-0.

General Business Meeting

In attendance for this meeting Danny and Gina Bent (Applicants), Bob Parodi (Resident), and Brendan Denehy (Resident / Selectboard member)

Attorney Paul Sanderson answers from Local Government Center

Marcia said at the last meeting she had spoken to Attorney Paul Sanderson from the LGC and that Webb had suggested Marcia asks for the answers in writing as the whole Board was not privy to the phone conversation. **Marcia** said she believes Section 502 (n) Personal Services and offices and Section 502 (v) any use which does not offend by emission of smoke, dust, gas, noise, odor, or fumes are the reasons this could have been allowed.

Marcia read the letter with the answers she received from the Local Government Center Attorney. **Marcia** asked "Can a member of a ZBA seek a rehearing of a decision during the 30 day appeal period following a decision of the ZBA?" Attorney Sanderson's answer was: "Yes, see 74 Cox Street LLC v. City of Nashua, 156 NH 228 (2007), which clarifies that the ZBA has the inherent authority to reconsider its own actions during the 30 day appeal period."

Marcia asked "Can the planning board rezone a single parcel of real estate in this zone for the purpose of allowing second floor habitation?"

Attorney Sanderson's answer was: "While the planning board does clearly propose changes to the zoning ordinance to the voters for adoption, it is not possible for a single parcel of real estate within a zone to be treated differently from other parcels in the zone. Even if the voters did approve such an action, it could later be invalidated. See Shadlick v. City of Concord, 108 NH 319 (1967)."

ZBA Minutes
June 12, 2013

Marcia asked: Can a ZBA issue a "Special Permit" to permit a temporary non-conforming use for a period of one year?"

Attorney Sanderson's answer was: " While the ordinance does appear to contain this authority in section 2500, the authority to exercise this power is questionable, given that there is no grant of authority to a ZBA to exercise this type of jurisdiction in RSA 674:33 or 33-a."

Marcia said she also asked about some of the advice that was given to the applicants at the last meeting. Attorney Sanderson stated in his written response: "I have no comment on the ability of staff to offer advice to applicants. Generally, while there is a duty for land use boards to make their processes accessible to applicants, such duty does not extend to offering advice to applicants or abutters or other interested persons about their individual legal rights, obligations, or the strategies they might employ when they seek relief. Applicants are presumed to know about statutes, ordinances, and other regulations applicable to them, and if they are not familiar with these materials, to obtain appropriate professional advice."

Marcia said this is what she reported to the Board at the last meeting. She asked that it be sent in writing for this meeting.

Peter said, to summarize, a hearing was held on April 10th for an appeal from an administrative decision for lot H-104, 73 Route 13. Danny and Gina Bent were appealing the decision of the Building Inspector who denied the building permit to convert the second floor offices into living space. At the last Zoning Board meeting they heard the Appeal from an Administrative Decision application from the Bent's and the Board issued a one year Special Permit to allow them to reside above the commercial venture. Marcia Farwell then requested a rehearing; she felt the Board was wrong in granting the one year permit. The decision to grant a rehearing was granted due to the fact that the original request was never decided on at the first meeting. Holding a rehearing will allow the Board to correct the severe procedural error.

They are here tonight starting over with the appeal of the Administrative Decision of the Building Inspector. **Gina** said she doesn't want to say that the Building Inspector was wrong by denying the permit. She believes she was uninformed as to how to fill out the application for the appeal from an administrative decision. She was under the impression that the Board would work with them collectively to find a way to work with the zoning ordinance and allow them to stay. In her mind, the last meeting became an incredibly chaotic and unmanaged meeting. She has learned over the last several months that she didn't fill out the application correctly. She can't hang the Building Inspector for something that she didn't fill out properly. **Gina** asked to defer the application for rehearing and get to the variance application. **Marcia** asked if they could table it. **Webb** and **George** agreed; they don't have to hear the case in order. **Peter** said they can move onto variance application case 371 and then come back to the rehearing.

Case 371

Peter read the hearing notice:

The first application is for a **Variance** from Brookline Zoning Ordinance section 502 (n) to allow the applicants to act as caretakers/security personnel for their business over which they wish to reside. The second application is a request for a **Special Exception** from Brookline Zoning Ordinance section 502 (n) and 502 (v) to allow the applicants to live in the apartment above the business located at 73 Route 13 for the purpose of protecting the property from further theft and/or vandalism. **Lot H-104-1 is located at 73 Route 13**, consisting of 3.058 acres in the Commercial/Industrial Zone."

Peter said the applicants are essentially seeking relief from all of section 502 and you would like a variance that would allow you to act as the caretakers / security personnel. **Marcia** said that is what they have listed and if you read the definition of personal services from the legal dictionary online it states "Personal Services n. in contract law, the talents of a person which are unusual, special or unique and cannot be preformed exactly the same by another." **Peter** said the definition in the zoning ordinance for Personal Services is "Establishments primarily engaged in providing services involving the care of a person or his or her personal goods, or apparel, such as beauty shops, dry cleaners and domestic services." **Peter** said the Board is beholden to the Ordinance. **Marcia** said she does not agree there is more than one definition. **Marcia** said she doesn't believe the definition in the zoning ordinance is the only definition that we can go by. **Peter** said the definitions in the ordinance are for clarifying the ordinance. **George** said if they were not there you could turn to another definition. **Kim** said it states involving the care of person or his or her personal goods isn't their home part of their personal goods. **Webb** said he doesn't think the provision of personal services for yourself comes under the purview. **Peter** asked if the abutters were notified and fees paid. **Kristen** said yes to both. **Peter** asked the applicants to state their case.

Gina went through the variance application.

1. Public Interest:

There have been numerous thefts in this area and their presence on a 24/7 basis would deter this criminal activity.

2. Spirit of the Ordinance: While commercial enterprises are allowed in some cases according to our ordinance. In the residential zone, the reverse is not addressed as uses permitted in the Commercial/Industrial zone. Allowing a residence in this zone is much less detrimental than the reverse.

3. Substantial Justice. The Bent family owns plenty of land (only 1 acre required commercial and 1.8 acres required residential; they own in excess of 3 acres plus an adjoining lot. They have a good well and an acceptable septic system for the use planned and they have no place else to live.

4. Values not diminished: The surrounding property owners all support the granting of this variance saying their safety and security will be improved by the Bents living there full time this enhancing the values of their properties not diminishing them.

5. Unnecessary Hardship A.i. The restricting of residential use is not shared equally by all abutters i.e the property they formally resided in was zoned Commercial/Industrial yet they were allowed to live there. Mary Fessenden property, across the street, residence allowed; the Front End Shop residence allowed; Commercial use of Pelletier land plus residence on the same piece of land. Etc.

i i Reasonable use: The Bents had been living in an adjacent property, which, according to town records, is zoned commercial and they have been residing there for many years. They would have nowhere else to reside.

B The criteria in paragraph A has been established. However, unnecessary hardship exists as it is zoned Commercial/Industrial and by section n of 502.00, personal services are allowed; yet the Zoning Board denied that use. The character of the neighborhood will not be altered by the adding a resident's full time. Safety and security, will in fact, be enhanced in the neighborhood.

Marcia said you have 6 letters of support from abutters, not one objection to this case. **Gina** said not one abutter she spoke to objected.

Peter said this application addresses Section 502 in general. They are seeking relief from the restrictions of the whole list. **Danny** said they don't plan on making anything bigger than what is there now. **Marcia** said she would like to add that the Bents have received advice from an attorney and they don't have any other avenue of relief other than a variance. According to attorney Sanderson we can't rezone it. **Webb** said there are other avenues that can be explored; the ordinance can be changed by the Planning Board.

George read from the ZBA handbook Page II-10 "However, when the ordinance contains a restriction against a particular use of the land, the board of adjustments would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial use in a residential neighborhood, granting permission for such activities would be of doubtful legality. The Board cannot change the ordinance." **Bob** said that is what a variance is for, to vary the terms of the ordinance, not to change it. **George** said a residential use in the commercial district is prohibited and by granting a variance you are changing the ordinance. **Bob** said that's why you ask for a variance from the terms of the ordinance, you are varying the particular case from the terms of the ordinance. If you continue to think of it like that then you will never grant a variance. **Webb** said they can vary the terms of the ordinance but they cannot completely violate the spirit of it. **George** said the spirit is to separate the two zones commercial/ industrial and residential/agricultural. The spirit of the ordinance is to keep the two zones separate. **Marcia** said they are here to adjust things when an applicant comes to us. **Peter** said they have requested a variance from the entire section 502.

Peter reread question 1 and asked if anyone had any discussion.

Webb said he is taking it on faith that the commercial and residential zones are separated for many reasons. He believes this would go against the zoning ordinance and against the best interest of the town. **Danny** said there are houses in the commercial zone all along Route 13. **Marcia** said she believes a residential use in a commercial zone is not detrimental to the public interest at all.

George said the fundamental issue is that is that we separate the commercial from the residential zones. **Peter** said the big assumption is that the existing residential uses in the Commercial zone are grandfathered. **Webb** said the only exception in the Ordinances is a parsonage. **Marcia** said that is a residence. **George** said the fact is if it isn't permitted it is prohibited. **Peter** said in section 502 (v) it states "any use which does not offend by emission of smoke, dust, gas, noise, odor, or fumes." He believes this would be considered "any use". **Webb** said the implication for this whole section is that it is commercial. **Peter** said it does not specifically say commercial; it says any use.

George read from the Zoning Board Handbook Section 2 page II 10 "However, when the ordinance contains a restriction against a particular use of the land, the board of adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial uses in a residential neighborhood, granting permission for such activities would be of doubtful legality. The board cannot change the ordinance." **George** said in our case it's the reverse by trying to grant a residential use in a commercial area. **Bob** said that it is what a variance is for. **George** said we can't change the ordinance and by granting a residential use in the commercial zone it would change the ordinance. **Bob** said that's why a variance exists; you're asking for a variance from the terms of the ordinance. You're not changing the ordinance you are varying the terms of the ordinance for a specific case. **George** said according to that paragraph changing the Ordinance is exactly what we would be doing. **Bob** said if that is the view you're taking, then you won't be able to grant a variance ever. **Webb** said they can vary the terms but they can't completely violate the spirit of it. **George** the spirit is to separate the

Commercial/industrial from the residential zone. **Marcia** said they are the Board of Adjustments and they are here to vary the terms for applicants that come in front of us. **Peter** said the Bents are requesting a variance from the entire zoning section 502.

Section 502 of the Brookline Zoning Ordinance states:

502.00 Uses Permitted

- a. Excavations (as per Section 1000)
- b. Establishments offering goods for sale including dry goods, foods, hardware, clothing and apparel, motorized vehicles, and other general retail commodities
- c. Farming & Forestry
- d. Lumber Yards and lumber mills
- e. Health care facilities
- f. Theaters
- g. Hotels/motels
- h. Warehousing, assembling & manufacturing
- i. Office parks
- j. Residential dwelling units existing prior to March 14, 1992 and home businesses within these units subject to the provisions of Section 1700
- k. Banks and financial institutions
- l. Restaurants
- m. Professional offices
- n. Personal services and offices
- o. Churches and associated parsonages
- p. Public, private, or non-profit recreational facilities, fraternal orders, or membership clubs
- q. Schools, nurseries and day care centers
- r. Funeral homes
- s. Automobile fueling, service and repair stations t. Post offices
- u. Police and fire stations
- v. Any use which does not offend by emission of smoke, dust, gas, noise, odor, or fumes
- w. Telecommunication towers and co-location of telecommunication facilities on existing towers or structures which are in compliance with Section 1900 and subject to Planning Board review and approval under the Non-Residential Site Plan regulations
- x. Adult sexually oriented businesses in accordance with Section 504.00 of this Ordinance

Peter read through the application:

Question 1 "Granting of the requested variance will not be contrary to the public interest:"

Peter said he takes the position that caretaking does not offend by emission of smoke, dust, gas, noise, odor, or fumes. **Webb** said he believes that they have separated the residential and commercial zone for a variety of reasons. The spirit is pretty clear; they don't allow residences on a commercial lot. **George** said according to town counsel if it is not in the ordinance it is prohibited. The Board cannot change the ordinance. **Marcia** said if it is not listed under Section 502 a thru x, it is not allowed at all. **George** said that is correct. **Danny** said there are a lot of commercial properties up and down Route 13 that have houses on them. **Gina** said they are enhancing the neighborhood not hurting it. **Webb** said if zoning was created in favor of public interest it is not the spirit of the ordinance to go against it. **Marcia** said that Webb is still trying to hold the zoning ordinance to a "T" we are here to vary the terms of the ordinance for the application that is put before us. **Webb** said he believes section 502 v "any use that doesn't offend" that Peter is referring to is referencing a Commercial use. He also has an issue with the owner being the caretaker. **George** said he agreed with Webb; it is not like an 8-hour shift; he will be residing at the location. **Peter** said there will be a greater incentive if the caretaker lives at the location. **Kim** said the abutters must agree that the Bents residing on site would be better. **Marcia** and **Kim** agreed that caretaking won't be contrary to the public interest. **Bob** said he believes that all the Bents are asking is why is it that the ordinance allows a home business in a residential zone but it doesn't allow the opposite. They are not changing the use, they are requesting an additional use in conjunction with the existing venture.

Peter read question 2 "The proposed use will observe the spirit of the ordinance:" **Peter** read the applicants answer: "While commercial enterprises are allowed in some cases according to our ordinance, the residential zone, the reverse is not addressed as uses permitted in the Commercial/Industrial zone. Allowing a residence in this zone is much less detrimental than the reverse."

Webb said the spirit of the ordinance is to separate the Commercial from the residential. **Peter** said he believes that caretaking would be one of the uses allowed under section 502 v; any use that does not offend and this would be any use. **George** said they have two different zones and that is not a use permitted for the commercial zone. **Marcia** said she believes the spirit of the ordinance would be upheld. **Kim** agreed.

Peter read question 3 "Substantial justice would be done to the property-owner by granting the variance:"

Marcia said per the Bents submission they have a sufficient well, septic, and plenty of land. She believes that substantial justice will be done with the granting of this variance. **Peter** said he believes that substantial justice would be done if granted. **George** agreed he thinks substantial justice would be done if granted. The loss to the applicant would be greater than the loss to the town. Later in the meeting **Webb** agreed with George.

Peter read question 4 "The proposed use will not diminish the values of surrounding properties:" **Peter** agrees it would not. **Marcia** said she thought this would enhance the neighborhood.

Peter read question. 5. Unnecessary Hardship

A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

i. No fair and substantial relationship exists between the general public purposes of the ordinance

provision and the specific application of that provision to the property because:

George said they have to find what the special condition of this property is that distinguishes it from other properties in the area. **Marcia** said restricting the residential use of this lot would be an unnecessary hardship.

George asked what the lot is to the north. **Danny** the Sunoco Station and on the other side is the lot he owns and wanted to put the carwash on it. This lot is surrounded by commercial use. **Danny** said one of the abutting properties was the house they lived in and that is in a commercial zone. They had to come to the Zoning Board to get a variance for the front porch. It was not a residence before. **Marcia** said that is a commercial zone with a residence on it. **Danny** said all South Main Street on the side toward Route 13 is all in the commercial zone and are all residences. **Peter** said he believes that the special condition of the property is it's the only property that has on site security personnel. **Bob** said you also have other properties in the area that are residences in a commercial zone regardless of how they got there. It doesn't state this lot has to be unique; you just have to find what distinguishes it from other properties. **Peter** said it is also special because of the one year special permit issued at the last Zoning Board meeting allowing this to be a residence for one year which allowed them to get a building permit to convert the offices into living space and is now a legal residence. **Peter** said he think that makes it distinguishable from all other lots in the area. **Brendan Denehy** said, speaking as a resident of town and not as a Selectboard member, the south end of town is all commercial and we are talking about a lot that borders another zone if someone had requested a variance to do industrial work in a residential part of town, there would be an understanding that that they cannot run three shifts a night with trucks in and out of the property at all hours of the night. If we allow a residential use in a commercial zone it should also have an understanding that there are businesses around them. This gives us some flexibility that should allow a residential use in a commercial zone. **Peter** said a commercial use in a residential zone is laid out in the ordinance but it is not laid out in the reverse, residential use in a commercial zone. **Webb** said there is no provision listed for it. **Brendan** said he believes that this is what a variance would allow is a residential use in the commercial zone. **Bob** said the purpose of the ordinance is the health, safety, and welfare of the general public.

Peter said it states in your application that this would prevent further thefts. Have you had thefts at this location? **Danny** said yes car broken into but not since we moved in. **Bob** asked what kind of crimes have you had on the property. **Danny** said vehicles have been broken into, stealing equipment, tools in the yard, and copper. **Bob** asked if any neighbors had the same problem.

Danny said he did not know.

Peter read:

ii. The proposed use is a reasonable one because:

B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Webb said he is still stuck on splitting the commercial and residential zone, as long as they have a commercial zone a residential use is an unreasonable one. **George** said we gave them permission for a year so they could work it out with the Planning Board. That is what he voted for at the last

meeting. **Webb** said the Board granted a non conforming temporary use. **Peter** said it's the only property in the area that has that. **Marcia** said that certainly distinguishes it from other lots. **Bob** said this does not violate the health, safety, or welfare of the town by granting this variance. It is not violating the spirit of the zoning by granting this variance. **George** said that would make historical districts, commercial zones, and residential zones irrelevant then. **Bob** said it is unique because it is the only property that has the right to have a residential use on a commercial lot surrounded by commercial lots. You allowed them to put a residence there. **George** said it goes away at the end of the year per the terms of the special permit. **Peter** said they can reapply. **Marcia** said they have a residence right now at this location. **Kim** said that is why we need to grant them the variance to straighten this out. **Peter** said he is content that it is a unique enough situation and that the proposed use is a reasonable one. That is where he stands at the moment. **Marcia** and **Kim** both agreed with Peter. **George** said he does not believe there is unnecessary hardship. **Webb** said he has trouble with the proposed use why would we have a commercial zone if people can live there?

Marcia made a motion to grant the variance requested by Danny and Gina Bent from section 502 of the Brookline Zoning Ordinance to allow an owner-occupied caretaker apartment/residence on the commercial property located at 73 Route 13 in the Commercial / Industrial District. Kim seconded. Vote yes 3-2.

Peter, Marcia, and Kim voted yes and George and Webb voted no.

George asked the applicants what they wanted to do with the two remaining applications. **Danny** said he would like to withdraw them both.

Webb said they should make a motion to revoke the special permit they issued at the last meeting.

Bob asked if they could defer that until the appeal period runs out.

Webb made a motion to revoke the special permit in light of the fact that it should be made mute due to the granting of this variance effective once the appeals period has run out assuming no appeals have been made. George Seconded. Vote yes 2-3. Motion defeated.

George and Webb voted yes. Peter, Marcia and Kim voted no.

Marcia made a motion to adjourn at 9:25 pm. Peter seconded. Vote yes 5-0.

Peter Cook, Member, Chairman _____

George Foley, Member, Vice-Chair _____

Webb Scales, Member, Clerk _____

Marcia Farwell, Member _____

Kim Bent, Member _____

Minutes submitted by Kristen Austin