



# TOWN OF HUDSON

## Zoning Board of Adjustment



Charlie Brackett, Chairman      Marilyn E. McGrath, Selectmen Liaison

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12 School Street • Hudson, New Hampshire 03051 • Tel: 603-886-6008 • Fax: 603-594-1142

### MEETING MINUTES – January 23, 2020 – approved

The Hudson Zoning Board of Adjustment met on January 23, 2020, in the Community Development Paul Buxton Meeting Room in the lower level of Hudson Town Hall at 7:00 PM.

#### **I. CALL TO ORDER**

#### **II. PLEDGE OF ALLEGIANCE**

Chairman Brackett called the meeting to order at 6:57 PM and invited everyone to stand for the Pledge of Allegiance.

Acting Clerk Dearborn took the roll call. Members present were Charlie Brackett (Regular/Chair), Gary Daddario (Regular), Gary Dearborn (Regular/Vice Chair/Acting Clerk), Brian Etienne (Regular) and Jim Pacocha (Regular). Also present were Bruce Buttrick, Zoning Administrator and Louise Knee, Recorder. Excused was Marilyn McGrath, Selectman Liaison. Alternate Selectman Liaison was not present. For the record, all Members voted.

Mr. Daddario read the Preamble into the record, identified as Attachment A of the Board's Bylaws, that included the procedure and process for the meeting, that copies of the Agenda and Application for Rehearing are on the shelf by the door, the importance of the 30-day time period for appeal as well as housekeeping items regarding cell phones, smoking and talking.

#### **III. PUBLIC HEARINGS OF SCHEDULED APPLICATIONS BEFORE THE BOARD:**

1. Case 165-155 (01-23-20) (deferred from 12-12-19): Keri Demers, 23 Dexter St., Nashua, NH requests a Special Exception for 77 Derry Street, Hudson, NH to allow a Dog Daycare and Boarding facility which will have uses of retail grooming, training, community pet education and kennel/boarding of dogs (day & overnight). [Map 165, Lot 155-000; Zoned Business (B); HZO Article VI, §334-23, Special Exceptions, General Requirements].

Mr. Buttrick read the Case into the record, noted that it was continued from the December meeting so that the Applicant could address seven (7) items,

referenced his Staff Report signed 1/15/2020: (1) meet with the Zoning Administrator and the Animal Control Officer; (2) Review of State Regulations; (3) Incorporate recommendations from Animal Control Officer; (4) Letter from Owner authorizing the space and wanted the owner to explain the relationship that he has with the ownership entity; (5) Meet with the in-mall neighbors to inform them of the proposal; (6) Floor Plan/layout approval by owner; and (7) Address Fire Chief and Town Planner concerns, including an upgrade to the HVAC system, noise control/nuisance mitigation and an Amended Site Plan. Mr. Buttrick noted that attached to his Staff Report were: various emails between the Applicant, Zoning Administrator, Animal Control Officer and State of NH Department of Agriculture; authorization letter from “managing partner” Daniel Gordon of Hudson Vickerry Leasing, LLC and the NH Secretary of State listing of partners of the LLC; and the proposed floor plan signed by Daniel Gordon.

Keri Demers introduced herself and Jess Hepler, Commercial Broker from Bedford, NH. Mr. Hepler distributed a handout that addressed the items of continuance. Before addressing the handout, Mr. Brackett asked Mr. Buttrick to address the discoveries relevant to the State of NH requirements. Mr. Buttrick referenced the email in his Staff Report from Cynthia Heisler of NH Department of Agriculture, Markets & Food, Division of Animal Industry dated 12/16/2019, that there is nothing at the State level for regulating dog daycares, boarding kennels or grooming facilities and that non-enforceable suggestions could be found in AGR 1700. Mr. Brackett expressed surprise that there are no State requirements/regulations considering the surge in dog daycare/boarding business. Mr. Hepler concurred and added that Jana McMillan, Hudson Animal Control Officer, has been their best resource, that a good relationship has been established between her and Ms. Demers and that Ms. McMillan’s suggestions have been incorporated into Ms. Demer’s plan.

Mr. Hepler stated that with regards to the questions of the Property Owner and terms of the lease including outdoor area and any potential conflict with other tenants, Daniel Gordon submitted a letter dated 1/8/2020 stating that he is a Manager of both Hudson Vickerry Leasing, LLC and Property Owner Hudson Vickerry, LLC and authorized to sign for both entities and attested that Ms. Demer’s proposed use of the space is consistent with and does not violate existing lease restrictions. With regard to Ms. Demers reaching out to other in-mall tenants, that did not occur per the direction of the Landlord, as based on their legal counsel, such contact could be construed as a violation of the ‘quiet enjoyment’ clause in existing tenants’ leases and that the compatibility of in-mall tenants is the responsibility of the Property Owner.

Mr. Hepler stated that Ms. Demers is aware that her next step in the approval process is to file for an amended Site Plan with the Planning Board and asked that, even though preliminary considered, the concerns raised by the Town Planner and Fire Chief be pursued at that level. With regards to Inspectional

Services, Ms. Demers is aware and will obtain the necessary permits; however, she has placed the pursuit of the HVAC system on hold until the Special Exception is granted. Mr. Buttrick noted that an approved Special Exception is valid for two (2) years.

Mr. Hepler stated that the last exhibit in his handout is the proposed floor plan, noted that there are four (4) exits, that the outdoor space is identified in green and that Manager Daniel Gordon signed his approval of it on 1/8/2020. When asked about the sentence preceding the signature (“Owner grants *preliminary* approval of this conceptual plan” [italics added]), Mr. Kepler stated that it is subject to Planning Board approval and/or modification and would negate a return visit to the Zoning Board if modified during Site Plan Review.

Public testimony opened at 7:11 PM. No one addressed the Board.

Mr. Dearborn asked if the green area would be fenced. Ms. Demers responded that it would be, that she plans to use sturdy green portable/moveable fencing. Mr. Etienne asked if the outdoor space was included in the lease and Mr. Hepler responded that it is part of the lease. Mr. Dearborn asked for confirmation that the facility would be manned twenty-four hours per day (24 hours/day) and Ms. Demers responded that there would a human on site whenever an animal was in the premise. Mr. Brackett stated that there has been good follow-through and thanked the applicant.

Motion made by Mr. Daddario to grant the Special Exception with the stipulation that the concerns raised by the Fire Chief and the Town Planner be addressed. Mr. Dearborn seconded the motion. Mr. Daddario spoke to his motion stating that the applicant’s follow through on the items was well met. Mr. Dearborn concurred and noted that the key item for him was that the animals would never be unattended. Vote was 5:0. Motion passed. Special Exception granted with stipulation. The thirty-day appeal period was noted.

2. Case 242-068 (01-23-20): Elaine Bettencourt, 26 Gowing Rd., Hudson, NH requests a Use Variance to allow the construction of a 714 SF Accessory Dwelling Unit (ADU) in the lower level of a split level duplex where an ADU is not allowed in two family dwellings. [Map 242, Lot 068-000; Zoned Residential-Two (R-2); HZO Article XIII A, §334-73.3 A, Accessory Dwelling Units, Provisions].

Mr. Buttrick read the Case into the record and referenced his Staff Report signed 1/15/2010 noting that the Zoning Ordinance only allows ADU (Accessory Dwelling Units) in single-family homes, not duplexes /multi-family dwellings.

Atty. Clermont from Dracut, MA., introduced himself as representing the applicant, Elaine Bettencourt, seated to his left. Mr. Brackett stated that in the

interest of full disclosure he knows the attorney as their children went to school together and does not have a conflict but offered to recuse himself if anyone felt otherwise. No Board Members spoke. Atty. Clermont stated that he has no objections.

Atty. Clermont asked for the hearing to be deferred to next meeting to allow time for the applicant to work with Town Officials to explore if their objective could be met without needing a variance. Atty. Clermont stated that the property is a duplex and the owner's daughter lives on one side. Elaine Bettencourt lives with her sister and wishes to have an ADU in the lower level so that they, as court appointed guardians since their parents' passing, can care for their brother, who is developmentally impaired and requires constant supervision. The sisters desire to have separate living units; hence the original pursuit of the ADU; however they are pursuing other alternatives that may not require an ADU, add a potentially third unit to the residence as it is just needed for the care of their brother. If an alternative is possible they will withdraw their application; if an alternative is not possible they would return to the Board for the variance for an ADU for a person, their brother, who has a recognized disability as allowed by RSA 674:33V. Atty. Clermont respectfully asked to defer the hearing to the next meeting.

Mr. Pacocha asked if questions could be asked before the Board makes a motion whether or not to acknowledge the deferment request. Mr. Brackett stated that it would not only be inappropriate but that any answer could change in the coming month.

Motion made by Mr. Etienne and seconded by Mr. Daddario to accept the applicant's request and defer the hearing on this Case until the Board's next meeting on 2/2/2020. Vote was 4:1. Mr. Pacocha opposed. Motion carried.

Mr. Brackett stated that in the interest of full disclosure, the Town received a letter/email recently (yesterday or today) that is available to the public.

3. Case 147-016 (01-23-20): Alfred Sapochetti, 3B Yale Ct., Hudson, NH requests a Use Variance for 181 A Webster St., Hudson, NH to prepare food (hot & cold) on site for take-out and serve ice cream for take-out, a use not permitted. [Map 147, Lot 016-000; Zoned Residential-Two (R-2); HZO Article V, §334-21, Table of Permitted Principal Uses].

Mr. Buttrick read the Case into the record and referenced his Staff Report signed 1/16/2020 and noted that the Applicant is seeking the variance at the direction of the Town's Building Permit denials, Zoning Determinations and current Code Enforcement actions. Attachments to the Staff Report included Minutes from several meetings held with the Applicant (1/5/2020, 12/4/2019, 10/9/2019); acknowledgement of existing violations on the site; and comments

from Town Engineer, Fire Chief, Town Planner and Zoning Administrator. Mr. Buttrick noted that even though the store is not a Permitted Use in the Zoning District, it is not a non-conforming use as it was obtained by Variance through the ZBA in 1964 and further confirmed by a 1990 Court Consent Decree and advised the Board to confine review of the Variance to the convenience store.

Tony Basso, PE from Keach Nordstrom & Associates, Inc., introduced himself as representing the landowners and, seated to his right, Vatche Manoukian who is a principal of the Property Owner, Derry & Webster, LLC. Mr. Basso distributed an Existing Condition Plan of the entire site, dated today, 1/23/2020, and stated that there is a lot happening on the property, noted that these activities have been going on for years and referenced the 1990 Court Consent Decree that identified what is allowed on the site. Mr. Basso stated that there was no plan on file and there is now a plan. Mr. Basso acknowledged that violations exist on the site and added that they are being addressed, that meetings have been held with Mr. Buttrick and Town Council and the Town Planner and progress is being made.

Mr. Basso stated that the new owners have spent approximately one hundred thousand dollars (~\$100,000) in renovations and that the Zoning Determination (#19-019 dated 3/12/2019) should have been appealed but the time lapsed and they are now before the Board for a variance to prepare food (hot and cold) on site for take-out and serve ice-cream for take-out even though both have been offered in the past.

Mr. Brackett asked Mr. Buttrick if the other uses on the property are part of tonight's hearing and Mr. Buttrick responded that they are not, that despite the existing multiple uses and buildings on the lot, what is before the Board is just the expansion of the use of the store, a nonconforming use previously granted by variance and acknowledged on the Assessor's Card, to prepare food onsite and serve ice cream for take out consumption and added that the renovations to the store went through the Building Permit process and received a Certificate of Occupancy. Mr. Buttrick added that investigation into the uses of the property is under investigation for compliance/Zoning Determination and that there is no Site Plan Review on this property. Discussion arose on whether another use was being added to the site versus an expansion of an existing, and permitted, use. Mr. Brackett expressed concern for the piecemeal approach and that, in his opinion, the ZBA should be looking at the entire lot, not just the store. Mr. Basso noted that the existing uses have been on site since forever, like the landscaping business, and added that the entire site is under review, that a plan of the entire site has been prepared and the existing residence on site is under dispute whether it is for two or three units, that clean up has been ongoing and needs to continue and that was is before the Board tonight is to legitimize the expanded use of the store to prepare and sell food and serve ice cream. Mr. Dearborn noted that included in the meeting packet is notice of a Final Inspection for 4/1/2020 and asked if that is just for

the store or the whole property. Mr. Buttrick responded that it is a Code Enforcement inspection for the entire lot.

Mr. Basso addressed the criteria for the granting of a variance. The information shared included:

1. *not contrary to public interest*
  - creating an opportunity for the public to pick up fresh made food or ice cream while shopping and save driving out of the neighborhood
  - its use has existed in the past
  - it is supplemental/incidental use of the store
2. *spirit of Ordinance observed*
  - the spirit and intention of the Ordinance is to allow for reasonable expansion of a business
  - this is a reasonable growth expansion
  - the sale of sandwiches has been part of the store for thirty (30) plus years
3. *substantial justice done*
  - substantial justice would be done to the property owner for all the reasons previously stated
4. *will not diminish surrounding property values*
  - letter submitted from a local realtor in the Nashua area testifying that there is no adverse impact - Linda N. Babigian of Crestwood Ridge Realty, LLC
5. *hardship*
  - the store has existed since the 1960's
  - it is in the R-2 Zone, which requires a variance for practically anything that is not residential
  - this is a reasonable expansion

Mr. Basso stated that as to how it relates to the rest of the lot, the store has its own parking and has its own sign and even though it shares the lot with other uses they are all separate operations and do not infringe on one another. It is an incidental use to the store, it is not a separate distinct use outside of the store, occupying another building. The store has been renovated and meets Fire Code. The distinction is that the store will make fresh sandwiches instead of selling prepackaged made elsewhere sandwiches like other convenience stores and be able to sell ice cream.

Public testimony opened at 7:46 PM. The following individuals addressed the Board:

- (1) Lee Makara, tenant at 181 Webster Street stated that when he first moved there twenty two (22) years ago, Tamposi owned the property and everything that is there now was there twenty two (22) years ago.

The store back then sold sandwiches and grilled foods and baked goods, like Mac & Cheese all prepared in the store.

- (2) Richard Lynch, 5 Madeline Court, abutter across the street, stated that he has been watching the property is please with its new appearance, does not know Mr. Manoukian, just the people in the store and even his wife has commented on how nice it now looks in there. It is fair to let the store make and sell sandwiches. The driveway is a disaster. In response to Mr. Brackett, Mr. Lynch confirmed that previous store owner/operators made and sold sandwiches.
- (3) Steven Bease, 18 Scenic Lane, directly across from the property third house down, stated that as a homeowner he welcomes an option other than pizza and that, in his opinion, from an entrepreneurial aspect it seems to be splitting hairs especially when he can go to a 7/11 and buy a premade sandwich. He has witnessed the improvements and it is welcomed.
- (4) Ms. Twining, Shepherds Hill, stated that she has been in Hudson for thirteen (13) years but didn't know this Board or this side of Hudson's government, but she knows the people and knows the care and the pride that has already been introduced into this project. The option, as it stands now, would be to bring in pre-packaged foods, "plastic" food versus freshly prepared food from these people who care about ingredients to provide a quality healthful product.
- (5) Rick Stevens, Shepherds Hill, stated that he can speak to the quality of the food and is looking forward to being able to enjoy it and having other options than pizza.

Being no one else to speak, public testimony closed at 7:53 PM.

Mr. Buttrick explained that the Table of Permitted Uses identifies specific Uses and whether they are Permitted by Right, require a Special Exception or are not Permitted and require a Variance for each Zone and why a convenient store, like a Cumberland Farms or a 7-Eleven, can offer onsite sandwich making and seating because it is allowed in a particular Zone; recapped his findings, which included the Fire Department's 7/18/2008 letter to cease the onsite cooking of breakfast sandwiches, that led to his Zoning Determination of 3/12/2019; noted that the store at this location received a Variance when it morphed from a farm stand but it is still a non-conforming Use and the request to offer onsite cooking/preparation of food and the selling of ice cream is an expansion of the non-conforming store Use and requires a Variance; and noted that the inclusion of ice cream selling changed the category of Use from a D7 to a D16 in the Table of Permitted Uses that will now necessitate Site Plan Review by the Planning Board.

Mr. Etienne asked if the cold storage was inside the building and Mr. Basso confirmed it was. Mr. Etienne asked if the food operation has been inspected

and licensed and Mr. Buttrick stated that would result from the State of NH Division of Health Services and that will be pursued if this Variance is granted.

Mr. Pacocha asked if there would be tables and chairs inside the store and Mr. Basso responded that there would not, there would just be a counter to place an order and confirmed that there is no intention of placing any tables or chairs in the future. Mr. Pacocha asked about ice cream and Mr. Basso responded that it would be at the same counter.

Discussion continued on the historical serving of food at this location, whether or not it was permitted, whether or not it was prepared on site ultimately led the current owner to believe it could continue and became part of the total renovation of the store.

Mr. Dearborn inquired about the parking lot noting that it is in serious need of repair. Mr. Manoukian stated that it is his hope to fix it this coming spring and Mr. Basso noted that it would become part of Site Plan Review with the Planning Board.

Mr. Daddario stated that the applicant has done a good job at addressing several of the criteria for the granting of a Variance, that the public support means a lot to him but, by law, hardship is only applicable to the land, that there has to be something unique about this property to meet this criteria. Mr. Basso responded that this store exists by Variance since 1964, that a reasonable expansion of the business requires ZBA review and approval, that the business property is in the midst of the Residential Zone located on a very busy street and serves all the residences in the neighborhood, spot zoning is not allowed and the lot cannot be rezoned.

Mr. Brackett stated that one of the very few times he's been into that store was to rent a U-Haul when he first moved to Hudson, that it was more like a general store with a farm stand (Garrison Farm) and like several developments the farm was converted to homes and noted that there was no opposing testimony received, there would be no physical expansion of the store and it seems that the hardship would be not to allow food preparation which, as Mr. Basso has pointed out, is incidental to the store, which was granted by variance. Mr. Daddario stated that it could be assumed that hardship criteria, by strict interpretation, was satisfied when the original variance was granted and could be relied upon for the expansion of use.

Mr. Buttrick referred to the Town Staff Review Comments: Town Engineer noted need for grease trap and parking to be designated and include handicap; Fire/Health Department stresses need for Inspectional Services and State licensing; Town Planner recommended Site Plan Review prior to issuance of Certificate of Occupancy and input from Town Counsel as other site violation issues are resolved; and Zoning Administrator who supported the need for Site



Plan Review by the Planning Board and continued resolution of the code enforcement issues on site.

Mr. Basso stated he agreed with most, especially the with the need for Site Plan Review for the ice cream portion changing the use category and needing outside tables for the consumption of ice cream; however, does not believe the sandwich prep aspect should be held up for Site Plan Review but included in with the Certificate of Occupancy for the store. Discussion arose. Mr. Basso stated that he would like to avoid having to come back to the ZBA to fine tune or negate a condition of approval. Mr. Daddario stated that the ZBA need not stipulate or distinguish between sandwich prep and ice cream requiring Site Plan Review, just that Site Plan Review is required procedurally.

Board reviewed the criteria for the granting of a Variance. Comments included:

1. *not contrary to public interest*
  - Mr. Etienne: an existing and known use
  - Mr. Daddario: existing & known use – community supported
  - Mr. Pacocha: if located in another Zone it would be okay
  - Mr. Brackett: serves the public interest – originally a farm
  - Mr. Dearborn: impressed with Public testimony – just moving forward
2. *spirit of Ordinance observed*
  - Mr. Etienne: Zone changed - have 1990 Consent Decree
  - Mr. Daddario: no material/physical change to business/building or neighborhood
  - Mr. Pacocha: proposed use is customary to type of business
  - Mr. Brackett: an unusual situation- zoning was created around the property – existence legitimized with a variance
  - Mr. Dearborn: noted that the other component of the criteria – *no threat to public health or welfare* – is also met
3. *substantial justice done*
  - Mr. Etienne: store has existed 40+ years, no harm to public
  - Mr. Daddario: historical evidence of store's existence with variance and Consent Decree and no harm reported from public
  - Mr. Pacocha: owner benefits from variance – wanted by public
  - Mr. Brackett & Mr. Dearborn: concurred
4. *will not diminish surrounding property values*
  - Mr. Etienne: none reported – Realtor testament of no impact
  - Mr. Daddario: professional opinion submitted – public supported
  - Mr. Pacocha: store has been renovated and other improvements are being made on the lot
  - Mr. Brackett: no impact from variance – been a good faith effort working with Town Officials to clean up the lot
  - Mr. Dearborn: if impacted, would have received five opposing testimonies, but only favorable testimony received

5. *hardship*

Mr. Etienne: hardship is that it is in the R-2 Zone, created after it existed but they have a Variance to exist and what is proposed is incidental to that business

Mr. Daddario: concurred, the operation exists at present because a variance was granted and it is safe to assume that the hardship criteria was met then and what is proposed is normal growth for this type of business

Mr. Pacocha: concurred

Mr. Brackett: began as a general store, has offered food in the past, offering food is incidental to the store, to take that away would cause a hardship

Mr. Dearborn: ready to make a motion

Motion made by Mr. Dearborn to approve the Variance with the following stipulations: (1) that there be no inside seating for eating at all; and (2) Site Plan Review approval from the Planning Board as needed. Motion seconded by Mr. Pacocha. Vote was unanimous at 5:0. Applause received from the public.

Board took a ten (10) minute break at 8:39 PM while the room cleared. Mr. Brackett called the meeting back to order at 8:45 PM.

**IV. REQUEST FOR REHEARING:**

No requests were received for Board consideration.

**V. REVIEW OF MINUTES:**12/12/19 Minutes

Board reviewed the edited version presented and made no further changes. Motion made by Mr. Dearborn and seconded by Mr. Etienne to adopt the 12/12/2019 Minutes as edited and presented. Vote was 5:0.

**VI. OTHER:**1. Election of Officers

**Chairman:** Motion made by Mr. Dearborn and seconded by Mr. Daddario for Charlie Brackett to remain Chairman. Vote was 4:0:1, Mr. Brackett abstained.

**Vice Chairman:** Motion made by Mr. Pacocha and seconded by Mr. Brackett for Gary Dearborn to remain Vice Chairman. Vote was 4:0:1, Mr. Dearborn abstained.

**Clerk:** Discussed. Mr. Etienne stated that he feels he is too new to the Board to be considered. Normally an Alternate Member is elected as Clerk but there are no Alternates on the Board. Confusion expressed over actual function and

requirements for the Clerk especially since the change was made to the Bylaws. Decision made to hold a training session at 6:30 PM on 2/27/2020. Motion made by Mr. Brackett and seconded by Mr. Dearborn to nominate Gary Daddario as Clerk. Vote was 4:0:1, Mr. Daddario abstained

2. Proposed Zoning Ordinance amendments going to ballot.

Board reviewed the three (3) draft proposed Zoning Amendments reviewed at the 1/8/2020 Public Hearing held by the Planning Board. The three (3) items going to ballot were: (1) Building Height – to be uniform throughout the Industrial Zone; (2) Definition of Duplex to eliminate a loophole; and (3) the adoption of the Wetland Conservation Overlay District eliminating the need for a Wetland Special Exception from the ZBA and requiring a Conditional Use Permit (CUP) from the Planning Board.

3. ZBA-9/24/09 Use Variance granted w/stipulations for 35 Hazelwood Rd: Completed- \$2,500 septic bond released.

Board reviewed and discussed the material provided by Mr. Buttrick. Bond to be released with interest.

4. ZORC Reactivated ?

Mr. Brackett stated that the Planning Board is the creator and modifier of the Zoning Ordinance and have three (3) of their Members assigned to rewrite the Zoning Ordinance in 2020, so ZORC will not be needed this coming year. Suggestion made that the items under ZORC consideration be given to the Planning Board for their consideration into the re-write.

5. NH Planning and Land Use Regulation 2019-2020 Edition

Mr. Buttrick distributed the latest edition to every Member.

Motion made by Mr. Daddario, seconded by Mr. Pacocha and unanimously voted to adjourn the meeting. The 1/23/2020 ZBA meeting adjourned at 9:12 PM.

Respectfully submitted,

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Charles J. Brackett, Chairman