

**Town of Boscawen, NH
ZONING BOARD OF ADJUSTMENT
Boscawen Municipal Complex**

**MEETING MINUTES – Draft
Tuesday, October 24, 2017 at 7:00 PM**

Members Present: Chair Gail Devoid, Edward J. Cherian Jr., Ann Dominguez and Tracy Jo Bartlett.

Others present: Kellee Jo Easler, Planning & Development Community Assistant, Alan Hardy Planning & Community Development Director, Katie Phelps and Rose Fife, Recording Secretary.

Excused: Doug Supry, (Member); Recused: Roger Sanborn, Member, BOS Ex-Officio.

Meeting opened at 7:04 pm.

Roll Call by Secretary

Members voting this evening include Dr. Gail Devoid, Edward Cherian Jr., Ann Dominguez and Tracy Jo Bartlett.

Minutes from 10.17.17: Page 1, eight paragraphs down, line 9, should read ‘opened’ instead of open. Page 2 paragraph 1 line 2 should read ‘there’ not ‘they’. A **motion** to approve the Minutes with amendments as noted was made by Cherian, seconded by Dominguez and passed by a unanimous vote.

Public Hearing

Application for a an **Appeal from an Administrative Decision** submitted by **Elaine A. Clow, 357 Queen Street Boscawen & Andrew Newcomb, 171 King Street, Boscawen** concerning the **Planning Board decision of 08.29.17 voting to accept application for Site Plan Review (Dollar General), concerning Zoning Ordinance Article V, Minimum Dimensional Requirements, Article VIII, Off-Street Parking Requirements, Parking Calculation & Use of Parking Areas for Maneuvering Areas**, on property owned by **The Peach Pond Trust, 100 River Road, Boscawen, NH**, with a location of **169 King Street, Boscawen NH, Tax Map 81A, Lot 42**, in a **COM** zone.

Chair Devoid noted that there will be a time limit of 15 minutes per person for those that would like to speak this evening. The Board will not go past 9 pm.

Attorney David LeFevre, counsel to the applicants. He noted that there were only 4 voting members of the Board this evening. He asked why there was not a 5th member. Chair Devoid explained that there were no other members available. Attorney LeFevre asked if the other members were asked to be available electronically. Chair Devoid explained that that member Roger Sanborn recused himself. Attorney LeFevre has an objection going forward with a 4 member Board. Chair Devoid explained that they have made every effort to have a 5 member Board available and they have not been able to do so at this time.

Attorney LeFevre went through the history of the case. His clients raised the issue that the plan did not comply with zoning. If it does not comply with zoning on any one of the 3 accounts then that would be a determination that the applicant, i.e. Dollar General, would need to come before the Board for variances. He asked the Board to open the Zoning Ordinance to page 13, Article V, Minimum Lot Sizes and Dimensions. The minimum dimensional requirements for a commercial use in this commercial zone would be an 80,000 s.f. lot size. This property is 60,000 s.f. +/- . He understands that the Dollar General filed an application for a lot size variance and

that application was withdrawn. Page 26 of the Zoning Ordinance, Article IX, Nonconforming Uses, 9.05b & c talks about uses that become conforming and lots that become conforming. There was a single family home on that lot at one time and that use only requires a 40,000 s.f. lot size. There was a conforming use on a conforming lot with a single family home. This is a property that is substandard in terms of its size. Their position is that Dollar General need a variance. He submits it is not non-conforming as it was brought into conformity with the single family use.

Second item on page 23, Article VIII Off Street Parking Requirements. It is required under the Zoning Ordinance for retail sales use that there needs to be 1 parking space per 200 s.f. of gross floor area. Gross would mean the entire area of the 7500 s.f. building, which would calculate to 38 parking spaces. The plan only shows 30 spaces. They submit that the Dollar General needs a variance for parking relief. If they put in the additional 8 parking spaces they would exceed the lot coverage which is 40% allowed and Dollar General would need a variance for that.

Third item is on page 24. There is a paragraph after the table speaking of minimum parking standards and they need to provide continuance access and adequate maneuvering area and you cannot use parking spaces for storage or maneuvering vehicles. Page 45 of the Ordinance "parking space" is a defined term. He showed the Board a copy of the plan that the applicant submitted to NHDOT for a driveway permit. They brought to the attention of the Planning Board that the Zoning Ordinance says you can't use parking areas for maneuvering turns. That would interfere with continuous access. He submitted that plan to the Board for their review. The Dollar General is proposing using those parking areas to maneuver to the loading area. They raised those issues to the Planning Board. The Planning Board was given the advice that they can't consider this as it has already been decided. This parking/maneuvering was never a subject of an administrative decision. There were two letters regarding the minimum lot size and parking spaces. One was dated 5/20/16 regarding the minimum lot size and nonconforming use and one was dated 11/27/16. His clients were never given copies of those letters. His clients never knew about those letters. When the Zoning Board of Adjustment acts in an official capacity it needs to give notice. He reviewed the meeting Minutes. In those Minutes there is a conversation that happened about the letters and the public did not know. At that point the applicant withdrew their request. The time bar put upon that appeal is not correct.

Chair Devoid recapped what Attorney LeFevre submitted. He touched points on the lot not being a nonconforming lot as it was conforming in the first place. He said based on regulations they need 38 parking spaces and thirdly the parking spaces maneuvering is not possible without infringing on other parking spaces. Attorney LeFevre said that was correct. He noted that whether or not this lot is conforming or nonconforming depends on what it is being used for. You cannot take a lot that was conforming and then treat it as a nonconforming lot. Chair Devoid noted that they could use it with a variance. Attorney LeFevre agreed. The applicant needs a variance. The Planning Board should not have accepted the plan as the plan doesn't comply with zoning. If the Board agrees with him, the applicant needs to come back before the Zoning Board of Adjustment and apply for a variance. Chair Devoid asked if he was appealing the Zoning Board. He said no, he was appealing the Planning Board decision. Chair Devoid noted that nothing was granted or denied by Zoning Board of Adjustment as the request was withdrawn.

Dominguez asked about the lot being conforming with a single family home and about it becomes nonconforming with a business and smaller size lot. Because it is commercial vs. residential why doesn't it conform? Attorney LeFevre explained. The Ordinance says that if your property was used in a conforming way you can't then go from conforming to nonconforming. So there was a conforming residential use and if they want to replace that use, it would not need relief. As it is proposed to be used in a commercial way, they do not get to go back.

Bruce Crawford of 353 Queen Street spoke. He gave the Board handouts. He spoke about net floor area vs. gross floor area. He submitted the letter that was written allowing 30 parking spaces vs. 38 based on net floor space vs. gross floor space. (Page 1 handout.) He never saw the letter. He noted that the 'Planners Dictionary' had many notations of 'floor area'. Using gross area the building would require 38 parking spaces. Using the net floor area the building would require 30 parking spaces. He gave an example. What is the entire area of the building open to the public? The only thing that can be deducted from that floor area contains merchandise. His point is that all the floor area, gross floor area, in any retail establishment is considered. The parking area requirement states that the parking spaces may not be used for storage, display, and signage or for maneuvering areas for loading docks or bays. He submits that a tractor trailer will impinge on parking spaces. He submitted a drawing showing that scenario. The deliveries are an issue. One delivery a week will not be what takes place. There are vendors, other than Dollar General, that come several times per week to stock the shelves.

Andy Newcomb, 171 King Street. He'd like to reserve the opportunity to speak at a later time. He would like to yield his time to his attorney so that he can continue his testimony. Chair Devoid will stick to the schedule and he has 15 minutes to speak at this time.

Elaine Clow, 357 Queen Street. She would like her attorney to represent her.

Bill Devine, 150 King Street had his name on the list, but would prefer not to speak.

Austin Turner, Bohler Engineering. He gave an overview. On the 3 points that were raised he submits the following. The item discussed relative to lot size: There are a number of allowed uses in this zone. Some of those require different lot areas. What Mr. Hardy's interpretation, as noted in Article IX, relative to nonconforming uses states that a nonconforming lot can be built on if it was allowed at the time of the enactment of the Ordinance. A retail use is allowed by right. Mr. Hardy's interpretation was that the use was allowed by right, but because the lot was nonconforming, it could not be restricted as the lot size was that way for a very long time. The Board then took a formal vote at the hearing. That request was thoroughly documented. The second item was relative to the number of parking spaces and the determination as to how the Ordinance would be applied. As noted in the letter that was written by Mr. Hardy, there is a portion of the building that is not a retail component of that building. This area would not be considered part of the gross floor area as it was not being used as a retail sales area. It does not say in the definition 'gross floor area of the building'. They debated the merits of that decision at multiple hearings. They withdrew the application for those items as Mr. Hardy's interpretation was that it was not needed. The third point regarding maneuvering; this issue was talked about at other Board hearings. The delivery truck will maneuver interior to the property. They show that the truck is not using the parking spaces to maneuver but the truck is not a permanent fixture that impedes one's ability to access the parking spaces. It's no different than any other parking area that has vehicles coming or going. The Ordinance does refer to continuance access and adequate maneuvering area. They did show graphics to DOT as to how the vehicle will maneuver and unload. There will be 12-14 feet of room between parking area and truck. It may require extra dexterity or caution. The Zoning Ordinance uses the terms adequate and sufficient. He may interpret those terms different than the appellant.

Chair Devoid asked if the truck were pushed over to the curb would people be able to back out. Austin Turner said correct. DOT was involved in the location of the driveway and whether or not the turning radius was sufficient and they determined that it was. This is the 6th or 7th appearance before this Board and all of this was discussed at great length.

Paul Bauer, Counsel for Boscawen Dollar General, LLC. Minimum lot size issue: Mr. Hardy issued a 5.20.16 letter with a determination. At the 6.28.16 meeting the Board unanimously agreed with Mr. Hardy's determination. A Certificate of Zoning Compliance was issued. This determined was that 30 parking spaces

were determined to be sufficient. Parking spaces can be accessed. Dollar General is committed to using the smaller sized truck, (WB 50). To the issue of Notice; Attorney LeFevre suggested that the notices were deficient so therefore his clients didn't have sufficient notice. The Courts speak about an 'actual notice'. Attorney LeFevre's clients were here and present at the meetings. They knew about the decisions and discussions that were had. Chair Devoid noted that she read the letters into the record. Attorney Bauer said that there is NH case law on this point.

Ed Maloof, of 55 DW Highway. He thinks there is misinformation here. What happens if Dollar General's vision of a busy store comes to fruition and every one of those parking spaces are full about the time that the truck is to come in. A truck is easily moved in a full parking lot. The people trying to push this thing through are trying to do so with the best of intentions but they are not using the worst case scenarios, which he believes needs to be considered.

In favor: none.

Opposed: none.

Public in favor: none.

Public opposed: none.

No further comments from Alan Hardy.

Attorney LeFevre gave rebuttal. The zoning Statute is pretty clear when it talks about the notice. If this Board is to meet about something, whatever that subject matter is, and it will affect the abutters, notice of that has to be given in advance. The Statute is very clear. It has to be a 'meaningful notice'. If someone was here at the meeting and was not given advance notice, they had no time to prepare; that is not notice. The parking calculation should be based on the size of the building as per the Ordinance; not based on what portion of the building is being used for retail sales. What is the parking calculation for the rest of the building? He argues that 'gross' building should be the entire building for parking area calculations.

Public hearing was closed at 8:09 pm.

DECISION:

Cherian stated that there were a lot of good points made. The decisions were made by the Zoning Board over a year ago and the time frame for an appeal has long since passed. The Planning Board does not making Zoning determinations. The lot being nonconforming was carefully looked at. It is a nonconforming commercial lot. That determination was made over a year ago and the time to appeal that has gone past. There was not a variance granted to appeal. The Board met quite a few times on the parking issues and maneuverability. The Planning Board has also addressed some of these issues. There was a long discussion by this Board and they felt the applicant addressed those issues. Despite the merits, there is not much of a choice as the deadline to appeal is long past.

A **motion** to deny the request was made by Chair Devoid, seconded by Dominguez and passed by a unanimous vote.

A motion to adjourn the meeting at 8:14 pm was made by Cherian, seconded by Bartlett and passed by a unanimous vote.

Respectfully submitted,
Rose Fife