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CITY OF CONCORD
New Hampshire's Main Street™
Zoning Board of Adjustment

February 5, 2025
MEETING MINUTES

Attendees: Chair Christopher Carley, Member James Monahan, Alternate Brenda Perkins, Member Nicholas Wallner, Member Andrew Winters

Absent: Alternate Mark Davie, Member Laura Spector-Morgan

Staff: AnneMarie Skinner, AICP, City Planner
Krista Tremblay, Administrative Specialist II

1. Call to order

Chair Carley called the meeting to order at 6:00 p.m.

1.1 Elect Chair for 2025

Alternate Perkins moved to elect Christopher Carley as Chair. Member Monahan seconded. All in favor. The motion passed unanimously.

2. Chairperson's comments

3. Public meetings

4. Public hearings

- 4.1 (continued from January 8, 2025) Andrew J. Tine, on behalf of 11-15 Pierce St LLC, requests approval for a special exception for a rooming house, per Section 28-2-4(j)(B) *Table of Principal Uses – Residential*, at Tax Map Lot 7441Z 51, addressed as 11-15 Pierce St, in the Downtown Residential (RD) District. (ZBA 0236-2024)

Chair Carley stated one of the reasons they tabled the case was to receive information from the police department about the number of calls to this address. Chair Carley asked if staff received that information.

Ms. Skinner reported that in 2023 there were eight police calls, with six police calls in 2024. For fire in 2023, there were three medical calls. In 2024, there were five fire, one gas odor, and four medical calls.

Chair Carley as if they were at the one address.

Ms. Skinner stated yes.

Chair Carley stated they closed the hearing for public testimony before the Board recessed the case. Due to the new information being brought forward, Chair Carley asked the Board if they would like to re-open the hearing to see if anyone has anything to offer in response to what they have heard.

Ms. Skinner read from the last month's minutes the following: "Chair Carley stated there will be another public hearing on this item."

Member Winters asked Ms. Skinner to provide the reasonable accommodation information shared at the meeting on January 29, 2025, for members of the Board that were not present at that January meeting.

Ms. Skinner provided an overview, stating that the deputy city solicitor did not feel there was enough information provided by the applicant to prove reasonable accommodation. Reasonable accommodation is required by ADA and FHA. The applicant has to show certain things for reasonable accommodation.

Member Monahan asked if that is in the context for the record of the Zoning Board of Adjustment's decision or for any litigation.

Chair Carley stated it is the latter. Chair Carley stated the Zoning Board of Adjustment is not responsible for determining the reasonable accommodation.

Ms. Skinner stated correct. The Zoning Board of Adjustment is responsible for making a decision on the special exception. Then, depending upon the Board's decision, the applicant can come back to staff and request a reasonable accommodation and provide all the reasonable accommodation information to staff for staff to review.

Member Winters stated: "His suggestion was both one that the applicant has not shown they qualify, and even if they did it is not in the Board's purview to factor that in."

Ms. Skinner stated right, reasonable accommodation is not a Zoning Board of Adjustment decision.

Member Winters stated it would be a City staff decision, and the Board needs to consider the special exception on its own merit.

Ms. Skinner stated correct.

Chair Carley stated one of the criteria is not being a burden to police and fire. Chair Carley re-opened for public testimony.

Andrew Tine (18 Maple Ave, Ste 267, Barrington, RI 02806)) and Justin Etting (11-15 Pierce St, Concord, NH 03301) presented the application.

Mr. Tine stated they did see the information from police and fire. Mr. Tine thought there would be more detail with dates to see if there was a decrease in activity over time. They wanted to present that information to the Board. If the Board thinks that information is important they would like to request a continuance. They have requested more information but it was not in a timely enough manner to be able to present to the Board tonight. If the Board finds it helpful to see the information with dates and tailing off of the activity they would ask to continue to the March meeting.

Chair Carley asked if any member of the public or staff have any comments. No one had anything to add.

Chair Carley closed the public testimony.

Chair Carley asked for the Board to consider the special exception. Chair Carley noted that at the previous meeting, the Board voted 4-1 to recess this application.

Member Winters stated even with knowing they should give some deference to the accommodation. Member Winters stated 20 people with two to a room is too many. Member Winters noted the emergency response call numbers were not as much as was thinking based on the neighbor's testimony in reference to the police calls. Member Winters stated that many people in the one building fails the special exception standard based on the impact to services.

Member Monahan noted it is a duplex, which is two homes. Member Monahan stated he would like to see a complete record and if there is a decline in City services with the dates. Member Monahan would consider pushing to March if they can get that information.

Member Wallner agrees with Member Winters about the 20 occupants and is not concerned about the police and fire calls.

Ms. Skinner stated they have four rooms and there will be two occupants per room, which is a total of 16, not 20, with eight per dwelling unit.

Member Wallner would be comfortable with 16.

Alternate Perkins asked if this application includes a parking variance.

Chair Carley stated it does not as there was some question about if one would be required. They have not asked for a parking variance.

Alternate Perkins stated 16 sounds like a lot based on the size of the building.

Ms. Skinner stated Assessing has the first-floor gross area as 1,529, the upper story as 899, and the attic finished as 630. The gross area total is 5,750 and the living area is 2,680.

Member Winters asked if that is for the whole building.

Ms. Skinner stated yes.

Member Winters stated it is a duplex but two apartment size.

Member Wallner wonder if each is roughly 1,400.

Alternate Perkins stated a duplex is split evenly.

Member Winters asked if there is a zone where a rooming house is always allowed by right.

Ms. Skinner stated no, it is always a special exception.

Member Winters asked there are any rules on how many people are allowed per room.

Ms. Skinner stated no.

Member Winters asked how they got to the number 20.

Ms. Skinner stated the rule allows for a maximum for 10 people in a rooming house. However, that is

not by room.

Member Winters stated this is about the size of one house and with 10 people it seems like a lot.

Member Monahan stated the City does allow for rooming houses and they are dense.

Member Winters noted the difference in individuals renting a room versus a family with children in a house.

Chair Carley asked Ms. Skinner to read off the criteria for special exception.

Ms. Skinner read as follows: the use is specifically authorized in the ordinance; the use will not create undue traffic congestion or unduly impair pedestrian safety; the use will not overload any public or private water, drainage, or sewer systems or any other municipal systems, nor will there be any significant increase in storm water run off onto adjacent properties or streets; the use will not create excessive demand for municipal police, fire protection, schools or solid waste disposal; any requirements set forth in supplemental standards are fulfilled. The supplemental standards are what has the maximum of 10 people. Where it is related to a non-conforming use, which it is not, the use will not create hazards to the health, safety, or general welfare of the public, nor be detrimental to the use of or out of character with the adjacent neighborhood. The location is appropriate for the use and consistent with the spirit and intent of this ordinance in the master plan.

Mr. Tine asked if they can re-open the public hearing to add a comment on density.

Chair Carley answered no.

Member Winters asked about the supplemental standards and what counts as a house or residence? Do they get 10 or 20 because it is divided into two?

Ms. Skinner stated that was in the definition. The supplemental standard is one sentence. A rooming house shall have facilities to accommodate no more than 10 individuals inclusive of a resident manager or a resident family.

Member Monahan noted it is silent in reference to the square footage.

Ms. Skinner answered yes.

Member Winters noted one of the criteria is that they meet the supplemental standards.

Ms. Skinner stated right, that is the only supplemental standard there is that there be no more than 10.

Chair Carley stated the way he sees it the criteria for the special exception do not account for who is in it. The criteria for special exception do not address density other than the number of people in a unit. The fact that the two rooming houses are attached to each other does not matter. Chair Carley stated from his point of view, although it might be wiser to have the City look at the issue of this type of facility, they meet the criteria for special exception.

Member Winters stated what is difficult is the interpretation of the word "house" in the supplemental standard.

Chair Carley asked if any member of the Board would like to make a motion?

Member Monahan stated he would move to table until the Board receives more information about the impact to City services. From what the applicant has indicated the activity has declined over time. Alternate Perkins seconded.

Discussion

Member Winters stated he would like more time to think about this issue as this is a little ambiguous.

Chair Carley asked if the motion is to recess for next month? Chair Carley asked Mr. Tine if he understands?

Mr. Tine stated he does and thanked the Board.

Motion passed with 3 in favor (Monahan, Perkins, Winters) and 2 opposed (Carley, Wallner).

- 4.2 (continued from January 8, 2025) Ryan A. Martin and Kelly L. Martin request approval for a variance from Section 28-4-1 *Dimensional Standards* and Section 28-5-32 *Accessory Buildings and Facilities*, to allow a 13-foot-tall shed to be placed 5 feet from the side property line where a 15-foot setback is required for an accessory building greater than 12 feet in height, at Tax Map Lot 193P 10, addressed as 43 Alice Dr, Penacook, in the Medium Density Residential (RM) District. (ZBA 0237-2024) **This request has been withdrawn by the applicant.**
- 4.3 Gallagher, Callahan & Gartrell PC, on behalf of Cornerstone Realty Holdings, Inc., requests approval for an equitable waiver of dimensional requirement, per Section 28-9-3(e)(3) *Equitable Waiver of a Dimensional Requirement*, at Tax Map Lot 751Z 24, addressed as 119 Old Turnpike Rd, in the Industrial (IN) District. (ZBA 0240-2024)

Emily Goering (214 N State St, Concord, NH 03301) is present to represent the application. The property is located at 119 Old Turnpike Rd and is in the Industrial (IN) District. They are here for an equitable waiver of dimensional requirements. Specifically, they are looking for relief of Section 28-4-1(d) for minimum yard requirements. In the IN District, there is a 30-foot rear setback and a 25-foot side setback requirement. That is why they are here tonight seeking relief from those minimum setback requirements. The current owner acquired the parcel in 2022. When the current owner purchased the property, it was developed in a hodge podge way. There are a couple of aging buildings that are used for tenants, some aging asphalt and impervious surfaces, some gravel and dirt, an unfinished parking lot, overgrown vegetation, and scattered storage units. Ms. Goering referenced a photo titled "aerial 2023" in the packet, which shows the condition of the property when it was purchased. Ms. Goering stated after the purchase the owner started making improvements of the aesthetics and order of the parcel, including trimming vegetation and paving neglected gravel areas so there is one cohesive surface and replacing aging storage units with newer containers and organizing along the existing retaining wall. There is a photo in the packet titled "aerial 2024" to show the work the current property owner has done to make a more orderly presentation of this parcel. There is also a series of photographs that depict the storage units and how they have been arranged. In the 2024 aerial you can see in the lower left-hand corner there is a white rectangle and those are all of the units together. Also, in the packet are photos so the Board can see what those units look like.

Alternate Perkins asked if these already existed from the previous business.

Ms. Goering stated other storage units existed. It is Ms. Goering's understanding these are replacement storage units replaced in the same location and the same type of style. It is these storage units and the retaining wall that they abut that are the topic at tonight's meeting. These are 20 identical units that are placed in an orderly rectangle side by side against an existing concrete retaining wall that was on the

property at the time of purchase. If you look at the photographs that depict the units you can get a good appreciation for how far off the boundary line. They are about 15 feet off the side boundary line. There is an area of grassed yard, vegetated buffer and security fence installed by the City. In April of 2024 the City contacted Cornerstone Realty Holdings to make aware of potential code violations on the property. An abutter had complained about conditions at the subject parcel. They did not complain about the storage units or the retaining wall. When Code Enforcement went out to investigate the other complaints, they realized the storage units were likely within the side and rear setbacks. Once notice was received from the City they retained council and started working with the City. They commissioned a survey to find out if there were encroachments. The survey is in the packet for the Board to review. It did confirm a modest side yard encroachment and minor rear setback encroachment.

Alternate Perkins asked about the quantity of the encroachment.

Ms. Goering stated on the side yard there is a 25-foot required setback and they are about 15 feet off the boundary with about 10 feet of encroachment. Ms. Goering stated it is a small portion of the rear setback.

Chair Carley asked about the height of the retaining wall.

Ms. Goering believes it is probably a foot or two high. They are large concrete cinder blocks that are sunken into the surrounding earth around it. All of the storage units abut into that area.

Alternate Perkins asked if they were to move the storage units inward 10 feet if that would impede access to the driveway.

Ms. Goering stated it is not the driveway to get in, but movement would cut into the paved area that people can use to come and go. Ms. Goering stated there are members of the public coming and going. If you move 10 feet forward then you are moving into other areas where vehicles might be operating. Right now, they are tucked into an area within the retaining wall. Ms. Goering stated in the staff memo there are other issues that have been raised. Ms. Goering stated Cornerstone Realty Holdings is working with the City. This is the first of the issues they are trying to resolve.

Alternate Perkins asked for clarification on the location of City property.

Ms. Skinner stated there is an encroachment on City property. Part of the recent paving they did is on City property.

Ms. Goering stated the abutter is the City and there is a security fence that keeps anyone from getting onto City property. Ms. Goering noted it is her understanding that the City property is used for fire or emergency training.

Member Winters wanted to know how paving occurred if there is a fence.

Ms. Goering stated that is elsewhere. Where they are talking about the paving there is a little triangle piece and another issue entirely from the storage units. The storage units are on the westerly side of the property with a fence that runs along the border.

Member Winters asked if it is a different part of the City property.

Ms. Goering stated exactly. Ms. Goering stated the City does not have issue with this application and the relief being sought.

Alternate Perkins asked if Ms. Goering is referring to the retaining wall.

Ms. Goering stated exactly, noting that it is stacked concrete a foot or two high that was there at the time of purchase.

Ms. Skinner stated for the Board's information a retaining wall that is less than 4 feet high can be in the setback area. The retaining wall is not the issue.

Chair Carley asked if the issue are the containers.

Ms. Skinner confirmed that the issue is the containers.

Ms. Goering is seeking an equitable waiver to leave the storage containers where they currently exist, which is roughly 15 feet off of the shared boundary as opposed to the 25 feet that is required by the ordinance. They have provided a narrative that walks through those criteria. Ms. Goering stated the first consideration is that the violation was not discovered or noticed until after the structure or condition that was in violation was completed. These were already moved and in place before the complaint came in to the code officer. Ms. Goering stated the next criterion is that the violation is caused by a good faith error that was caused by the owner or the owner's agent. Ms. Goering stated as it pertains to the retaining wall that was already there and not a condition created by the applicant. Ms. Goering noted the storage containers were already in the area when the applicant purchased the property. That lead the applicant to believe it was okay to have the storage units in this area. Ms. Goering stated the next consideration is that the violation does not constitute a nuisance, diminish surrounding property values, or adversely affect the present or future usage. Ms. Goering stated this does not abut a residential area. It is up against a commercial area owned by the City. Ms. Goering noted this is made a much more orderly lot than what existed there previously from an aesthetics standpoint. Ms. Goering stated this is a more pleasing commercial lot than it was before the units were moved. Ms. Goering noted there is no evidence to suggest this would impact the surrounding property values. Ms. Goering stated this would increase surrounding property value as this is less of an eyesore. Ms. Goering stated the location of the containers also does not limit current or future uses on the property. It is a significant effort to move the storage containers. If some future development requires they be moved it is something, albeit costly and time consuming, that is feasible. Ms. Goering stated the current location of the containers does not prevent any of the current uses or neighboring uses. Ms. Goering stated the next consideration is a weighing of the cost to correct this condition versus the public benefit. Ms. Goering noted there is no public benefit in requiring the property owner to move the storage containers. Ms. Goering stated at most they would move the storage containers 10 feet. Ms. Goering stated moving the storage units would create a more congested situation on this lot to put them elsewhere. Ms. Goering noted if the retaining wall needed to be removed because of its height it would create more earth disruption creating an unsightly situation. Ms. Goering stated conversely it would require the owner to pay a crane operator to find a new location for the storage containers. Ms. Goering pointed out all 20 of the storage containers are stacked closely. Ms. Goering noted it would be a pretty big endeavor. Ms. Goering noted the last criteria identified in the ordinance is an alternative criteria about whether or not the condition has existed for more than 10 years. Ms. Goering stated they do not know when the retaining wall went in or when the preexisting containers were first placed. Ms. Goering noted they are aware they were there at the time the applicant purchased the property. They do know if they have been there for a full decade. Ms. Goering stated from our prospective all of the criteria for an equitable waiver are met here and as a result appropriate to grant the application to allow these to remain in place.

Chair Carley stated it is mentioned in the paperwork of interference of a right-of-way. Chair Carley asked if that is a part of their request tonight.

Ms. Goering stated it is not a part of their request. It is something that was identified by staff. Ms.

Goering noted there is a sanitary easement that runs diagonal through this property.

Chair Carley asked if it is an easement instead of a right-of-way.

Ms. Goering stated yes, there was a right-of-way to access the sewer pipes if need be but it operates as a sanitary easement. Ms. Goering noted to the extent that the staff report identified manhole covers that were covered in asphalt, they will open those up. Ms. Goering stated their perspective is that the shipping containers do not impact or frustrate the easement in any way. Ms. Goering noted the easement language authorizes there could be improvements in the easement area and contemplates that paving will happen over the easement area. Ms. Goering pointed out you cannot erect structures in the easement area. Ms. Goering stated the storage containers do not satisfy the definition of a structure under the ordinance or common definition of a structure. Ms. Goering stated their perspective is that the easement allows storage containers because they are not a structure. Ms. Goering noted if at some point in the future there was a need to access the pipes that required some sort of disruption to the storage units they would consider moving them at that point.

Alternate Perkins asked why they are here tonight.

Ms. Goering noted they are here tonight for relief for the rear and side setbacks. Ms. Goering noted the staff memo did raise the fact that there is an easement. Ms. Goering respectfully disagrees with staff's position that this frustrates the purpose of the easement.

Chair Carley asked if they are not asking the Board to resolve that.

Ms. Goering answered no, they are not asking the Board to resolve that. Ms. Goering noted if that feels like a make or break question for the Board about how the easement factors in, whether or not the storage units are structures as the easement is concerned, then Ms. Goering would ask the Board to continue to give an opportunity for the City Solicitor to weigh in and get a clear understanding of if the storage containers are structures for the purpose of the easement. Ms. Goering does not believe they are.

Member Winters asked if there are two lots they are up against and if both are owned by the City.

Ms. Skinner confirmed that is correct.

Member Winters asked if they considered asking for a variance with the City as the reasoning is that this is the best spot for the containers.

Ms. Goering stated because of the fact that this is an existing condition and they are not proactively asking for permission to do this that it is not a variance. It was done and realized after the fact that it is not in conformance with the ordinance. Ms. Goering noted an equitable waiver is to approve after the fact is the most appropriate route to take.

Member Winters noted part of what they are saying as the reason to not move is it would be too expensive to move and install in a less desirable spot. Member Winters pointed out they want the tenant to be able to get into the space and access the units.

Ms. Goering stated exactly. Right now, that area is an opened paved area and it would create an odd situation if you moved those units further in towards the other development. Then you would have this odd amount of pavement between the existing retaining wall and the back side of the units that becomes unusable space.

Member Winters asked how they are fixed to the ground.

Ms. Goering stated they are not fixed to the ground. Rather, they are on concrete blocks.

Member Winters asked if they were to move them, they do not need to tear anything up and would just need a crane and the expense involved.

Ms. Goering stated it is expensive and time consuming. There could be damage to the units now that they are stacked in so tightly there could be damage if they were moved. Ms. Goering noted there is no public benefit. Ms. Goering understands why setbacks are important. There is already a natural buffer. These are not sitting on the boundary lines.

Member Monahan noted typically when they have these things the abutter will state "this will be fine with me." Member Monahan asked if the abutter has representation.

Ms. Goering stated the City is the abutter and not sure how that would work.

Kevin Cotterly (3 Lawrence St Ext, Concord, NH 03301), spoke in opposition. Mr. Cotterly stated they did work on the property last year. Mr. Cotterly went to the City Code Enforcement. Mr. Cotterly shared pictures to the Board of what he was looking at until they made changes to the property. Mr. Cotterly voiced concern about the noise of the trucks going in and out that are parked. Mr. Cotterly hears back up truck noises at 6 a.m. Mr. Cotterly stated he feels his property value has gone down.

Alternate Perkins asked about the fencing shown in the pictures.

Mr. Cotterly stated that is his fence. However, they took down all the trees that buffered the noise. Now there is no privacy.

Member Wallner asked if the trees that were removed were on their property or City property.

Mr. Cotterly stated he did not know.

Member Monahan asked Mr. Cotterly if the pictures were of his house.

Mr. Cotterly stated they are of his backyard looking at the property.

Member Monahan asked who took the trees down.

Mr. Cotterly stated their construction crew took the trees down when they were grading the lot and putting down new pavement. Mr. Cotterly stated he has been dealing with this since April. Mr. Cotterly asked the Board to do something about that before they grant the waiver.

Member Winters asked about use of the property before the new owner purchased the property, and if the activity level was similar.

Mr. Cotterly stated they could not see the property. There was greenery.

Chair Carley asked if anyone from the public would like to speak and with no response asked Code for any more information.

Ms. Skinner stated Mr. Cotterly called her earlier today to report his concerns and she advised him of the complaint process to address the buffers. However, that is a separate issue.

Member Winters asked about the complaint process.

Ms. Skinner stated it would be to the Planning Division. Ms. Skinner stated the zoning ordinance is under the purview of the Planning Division, noting that there are two code enforcements. There is the zoning code and all other portions of the municipal code, other than the zoning code portion. Ms. Skinner stated the Planning and Zoning Inspector in the Planning Division takes care of code enforcement for the zoning code portion of the municipal code. Ms. Skinner stated his complaints are possible zoning code violations. Ms. Skinner stated it is possible there are other code violations from other portions of the municipal code, and those would be handled by the Code Administration Division. Ms. Skinner noted that Chapter 28 is the zoning ordinance, which is under the Planning Division. All of the rest of the chapters in the municipal code are under the Code Administration Division.

Alternate Perkins asked if the City would address trees cut off City property.

Ms. Skinner stated with the buffer being taken down if it was on the City property but someone other than the owner removed them from the property that is not a code enforcement issue.

Member Monahan asked if it was not the City-owned property and another residence.

Ms. Skinner stated that would be a civil matter. Ms. Skinner also read the definition of structure. Ms. Skinner stated in the building world and Planning and Zoning world they do consider the storage units as structures. If they were not considered a structure, then there would not be a setback violation and this would not be a Zoning Board of Adjustment matter. A structure is a combination of materials assembled at a fixed location to give support, shelter such as a building, tower, frame work, platform, bin or the like. Dumpsters are structures and cannot be in the setback. It is standard protocol that a storage container is a structure.

Member Winters asked if a shed is a structure.

Ms. Skinner stated yes, sheds are structures as well. If the easement does not allow structures in the easement whatever portion of the container is in the easement has to be removed.

Member Winters asked if the easement is for the City.

Ms. Skinner stated yes, the easement is for the City.

Chair Carley closed the public testimony. Chair Carley asked for thoughts of the members.

Member Wallner stated this is an “after the fact” situation and he might be more lenient about granting it.

Member Monahan stated he is struggling to get to a “yes” on this. The owner should have known not to put a structure against an easement. Member Monahan noted the longer piece against the easement where it is 15 feet and should be 25 might give a “yes” to that. However, with regard to the back side of the structure at the retaining wall it does not bode well.

Member Winters has a concern about the criterion that the violation was not an outcome of ignorance of the law, ordinance, or failure to inquire. Member Winters stated there are some other issues and looking like they are acting first and asking for permission after the fact. Member Winters stated this particular violation seems pretty minor and that they made a pretty good case for a variance based on the position of the units. They cannot stop the City from enforcing the easement.

Ms. Skinner stated Engineering and General Services has already indicated they want the easement cleared. Ms. Skinner stated they can approve it. However, the three on the end will have to be moved.

Alternate Perkins agreed that they are doing what they wanted and then asking for permission after the fact. Alternate Perkins noted with all of the other things that are going wrong with the property this is not as big of a concern and she could go either way.

Member Wallner pointed out what they did to improve the site based on the aerial photos from when they purchased the property.

Chair Carley stated you can certainly make the case that this was inadvertent. The wall itself was built and effectively defined a place where you can put stuff and was done for that reason. So, over they went with the bins. Chair Carley stated it is impossible to know what is in their minds. Chair Carley noted they cannot assume nefarious intent, so he is inclined to grant the equitable waiver with the confidence that the issue of the easement is a separate question. Chair Carley stated the granting of the equitable waiver is not suggesting in any way that the Zoning Board of Adjustment considers the easement to be waived.

Member Winters made a motion to grant the equitable waiver to allow the storage containers within the 25-foot and 30-foot setback areas where otherwise it would not be allowed because they meet the criteria of equitable waiver. Member Winters included in the motion to adopt the applicant's findings of fact as the Board's findings of fact. Member Wallner seconded. 4-1 The motion passed with 4 in favor (Carley, Perkins, Wallner, Winters) and 1 opposed (Monahan).

Findings of Fact

The violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value. The applicant was not aware of the setback violation at purchase and until the City's Code Administrator raised encroachment concerns in the letter dated April 29, 2024. The encroachment of the wall, and the storage units, were later confirmed by property survey.

The violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority. The violation was caused by the applicant's predecessor by placing preexisting block retaining wall into the side setback without appropriate zoning relief. This placement was a condition of the property inherited by applicant, which has not been moved nor exacerbated by the placement of the containers. In other words, the existing block wall has not been moved.

The physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property. The setback encroachment is adjacent to nonresidential lands (Map 751Z, Lot 23-1) of the City of Concord and within the City's industrial district. The City's parcel is surrounded by a security fence to prohibit trespass. The applicant's pavement and placement of the storage container units, albeit into the setback, has not moved the preexisting wall and has dramatically improved the orderliness and aesthetic of the subject property. Therefore, the encroachment does not diminish the value of properties in the area, nor does the violation affect or limit permissible future uses of the subject property or the City's

adjacent and nonresidential land. To the contrary, applicant's improvements and site stewardship would, if anything, enhance surrounding property values.

That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected. The storage container units were placed immediately side-by-side by crane. Relocating the units would require rental of another crane and operator, and would not result in any meaningful public benefit. Meanwhile, the cost of relocation and correction to the applicant would be substantial. Put differently, spending thousands of dollars to move the wall and containers ten feet (10') would not amount to a material improvement over existing conditions.

In lieu of the findings in Sections 28-9-3(e)(3)a. and b., the violation has existed for ten (10) years or more and no enforcement action has been commenced against the violation during that time. While the precise timing or date of construction of the block retaining wall cannot be readily determined, GIS imagery indicates that the wall predates applicant's period of ownership.

An equitable waiver of a dimensional requirement granted in accordance with this Section shall not be deemed to establish a nonconformity pursuant to Article 28-8 Nonconforming Lots, Uses, and Structures, of this ordinance. Applicant understands and appreciates that the granting of an equitable waiver would allow the block wall and container units to remain in position and as currently placed, but that such relief would not apply to, nor authorize, other or future acts and occurrences on the property – all of which would require appropriate approvals.

- 4.4 Gallagher, Callahan & Gartrell PC, on behalf of Onyx Partners, Ltd, Onyx Steeplegate Concord, LLC, Onyx TD Concord, LLC, and MH Concord, LLC, requests approval for a variance from Section 28-4-1(c) to allow frontage to be derived from two streets where the ordinance requires that lot frontage be a continuous, unbroken line street, at Tax Map Lot 61Z 9, addressed as 277 Sheep Davis Rd, and Tax Map Lot 611Z 41, addressed as 260 Loudon Rd, in the Gateway Performance (GWP) District. (ZBA 0243-2024)

Emily Goering (214 N State St, Concord, NH 03301) and Ian MacKinnon (85 Portsmouth Ave, Stratham, NH 03885) presented the application. Ms. Goering stated they are here tonight for two separate parcels – one is 277 Sheep Davis Rd and they can think of that as the bank lot with TD Bank presently occupying that lot; the other lot is 260 Loudon Rd, which is the Applebee's lot. Ms. Goering stated they are here tonight to seek relief from the requirement that there is a 300-foot minimum lot frontage. Specifically, that the frontage needs to be measured on one continuous unbroken line on one street. Ms. Goering noted right now the parcels are held as land condominium units. As part of the redevelopment, the goal is to take the Applebee's lot and the TD Bank lot and subdivide those off and dissolve the land condominium. Then, there will be three separate lots with separate ownership. A precursor to doing that is to make sure they obtain a variance from the frontage requirements for those two lots. Ms. Goering noted this came before the Board in May of 2024 and it was withdrawn at that time due to friction with the land condominium owners. All of those issues have been worked out in the intervening months. Now everyone is collaboratively working to effectuate this subdivision.

Member Winters asked if their group bought the TD Bank lot.

Ms. Goering stated yes.

Mr. MacKinnon stated Onyx Partners purchased the lot upon which TD Bank sits.

Ms. Goering stated that has streamlined the process. The owners of the Applebee's lot have given their

consent for this and they are all collaborating together on the subdivision plan. Ms. Goering stated the Applebee's lot is on the upper left hand of the plan and is an existing corner lot with 473 linear feet of frontage along Loudon Rd and D'Amante Dr. The TD Bank lot in the lower corner has existing frontage along Sheep Davis Rd and it will have frontage on the "proposed road one" that runs along the right-hand side of that lot. In total it will have 305 linear feet of frontage. Ms. Goering stated they are seeking the variance because the method of calculating frontage in the ordinance is that it needs to have an unbroken line on one street. Ms. Goering noted they have an unbroken line it just happens to go around the corner. Ms. Goering stated they exceed the minimum frontage for both lots but with a strict reading of the ordinance they need this relief to calculate it based on two roads. Ms. Goering stated they provided a narrative for the Board in the application materials. Ms. Goering asked to quickly run through the variance criteria so there is a good record. Ms. Goering stated as to hardship these properties are already uniquely situated in that they are already fully developed and operating. Ms. Goering noted they do have the adequate frontage, but with a technical reading of the ordinance you have to measure along one street as opposed to two streets that abut each other. Ms. Goering stated if they were to reconfigure these lots to get the 300 feet of continuous frontage along one line you are disrupting the parking, driveways, and configuration of the lots as they currently exist. It would also make irregular shaped lots to get the 300 feet of frontage, which impacts the rest of the design.

Member Winters asked how would they get the 300 feet.

Ms. Goering stated they would have to reconfigure them in an odd shape.

Mr. MacKinnon stated they looked at for example TD Bank if you consider this "roadway one" as a hard line on the right. They would have to provide additional frontage on Sheep Davis Rd which is the portion of 126 linear feet from the end of the red line to about the midpoint of the curb. Mr. MacKinnon stated they wanted to show the two pieces that make up the frontage that make up the total. Mr. MacKinnon stated yes, they can come up with a lot shape and have some additional parking easements. Mr. MacKinnon noted both lots exist as existing condo lots but they have their own tax, map, and lot number. Mr. MacKinnon stated they are both increasing in size slightly by cleaning up those lot lines. Mr. MacKinnon noted they all have their own dedicated parking spaces and proposed to keep their parking amounts.

Alternate Perkins asked if the proposed road side is 305 feet.

Ms. Goering stated in total the road is 305.

Mr. MacKinnon stated the red line is the proposed frontage between both sides.

Member Winters asked if this is required for newly acquired TD Bank lot or the whole redevelopment of the mall.

Ms. Goering stated it is necessary for the Applebee's lot and the TD Bank lot for them to subdivide into three separate parcels.

Mr. MacKinnon stated they have proven that the lots that will be a part of the subdivision will all comply with the minimum 300 feet whether on the proposed road one or the existing streets shown tonight.

Alternate Perkins asked if both businesses have the required amount of parking to stand independently

Mr. MacKinnon stated that is something they looked at parking variances. They did make sure any relief for Applebee's or TD Bank relief was included in the previous various approvals.

Member Winters stated the prior approval was only for the two Loudon Rd properties.

Mr. MacKinnon stated it was a number of the proposed lots there and part of the proposed subdivision.

Member Winters stated it was not the TD Bank lot.

Mr. MacKinnon stated TD Bank has its own parking meets the parking requirements. Mr. MacKinnon stated they included the Applebee's in the overall relief. Mr. MacKinnon stated that will certainly be checked by staff.

Chair Carley stated what Mr. MacKinnon might be thinking of is that a representative from then owner of TD Bank was that they were relying on parking off their site.

Mr. MacKinnon stated the existing land condo's do both have frontage. Applebee's has frontage on D'Amante Dr and does not comply with zoning. The mall property goes around Applebee's to get to that site. The TD Bank only has frontage less than 126 on Sheep Davis Rd. Uniquely neither one of them have a driveway on either road and they all have rights to access through the property today. As part of the subdivision they will be establishing access through deeded access easements.

Chair Carley asked if they escaped this problem before because the entire condominium complex had frontage.

Ms. Skinner stated yes.

Chair Carley clarified that dissolution of the condominium is triggering the frontage requirement.

Mr. MacKinnon stated yes, that is correct.

Ms. Goering stated it is just the legal ownership changing.

Alternate Perkins asked if the properties can be owned independently.

Ms. Goering stated yes, and no longer under the condominium structure.

Member Winters asked why the code asks for continuous as opposed to corner lot and frontage?

Ms. Skinner stated she is unclear as to who wrote the code and why they did so. Ms. Skinner noted in the interim ordinance that is under review, she has proposed to strike that measurement requirement.

Ms. Goering stated this is technically a continuous line it just happens to wrap around a corner. Ms. Goering wanted to make a clear record of the criteria looking at whether or not this is a reasonable use and that both the bank and the restaurant are permitted uses. They are long-standing existing uses and will continue as those uses. Ms. Goering noted they are reasonable and harmonious with the neighborhood. Ms. Goering noted speaking to public interest there is a strong public interest in generally revitalizing underperforming properties. Ms. Goering stated there is public interest in this project. Ms. Goering stated granting this variance and allowing the parcels to be subdivided is a step towards redeveloping this property. Ms. Goering stated conversely there is no public interest in requiring the frontage to be calculated only on one street. Ms. Goering stated the average member of the public will have no idea that there is any difference and that frontage was calculated around the corner as opposed to a singular street. Ms. Goering noted as to the spirit and intent of the ordinance the big issue with frontage requirements is making sure you have control of the development and have safe means of access to the property. Ms. Goering stated they are existing lots and demonstrated to be safe

with adequate means of access. Ms. Goering noted they are not over-developed parcels and will exist as they do today. Ms. Goering stated they are in the Gateway Performance District and the purpose of this district is the encourage multi-use development. Ms. Goering stated allowing this variance is one of the key steps to having this major redevelopment project go forward. Ms. Goering stated there is no evidence there will be impact to property values in any way.

Chair Carley asked if any member of the public would like to speak and for further comment from code enforcement. With no response, Chair Carley closed the public hearing.

Alternate Perkins stated she does not have an issue. Alternate Perkins is not sure if there is a way for the Board to say it needs to be a deeded right-of-way.

Member Winters stated the primary purpose is the access of frontage. Here there is plenty of access from the mall areas, which will be generally open for people to drive through on the mall property. Member Winters asked if this should have been two cases.

Ms. Skinner stated technically Member Winters is right and it should have been two individual cases, but both properties were noticed under the one case number.

Alternate Perkins suggested to vote on them separately.

Chair Carley stated they need to vote as presented and noticed.

Ms. Skinner stated it was noticed with both addresses.

Member Monahan stated he is fine with it. Member Monahan noted it is similar to someone that comes in with two front yards. It is just the definition of frontage.

Member Wallner stated corner lots are a reason enough for a hardship requirement.

Member Monahan moved to **grant the variance from Section 28-4-1(c) Minimum Lot Frontage**, to allow frontage to be derived from two streets where the ordinance requires that lot frontage be a continuous, unbroken line along one street, at Tax Map Lot 61Z 9, addressed as 277 Sheep Davis Rd, and Tax Map Lot 611Z 41, addressed as 260 Loudon Rd, because all of the criteria under RSA 674:33 have been met based on the record before us, and to adopt the applicant's proposed findings as the Board's findings of fact. Member Wallner seconded. All 5 in favor (Carley, Monahan, Perkins, Wallner, Winters), 0 opposed. The motion passed unanimously.

Findings of Fact

The variance will not be contrary to the public interest. The public interest in redeveloping underperforming properties (i.e., the Steeplegate Mall) greatly outweighs any concern relating to the requirement that road frontage be located along two streets instead of one.

The spirit of the ordinance is observed by granting the variance. The requested variances would be consistent with the spirit and intent of the ordinance in that mixed-use redevelopment in the Gateway Performance District is encouraged, and the variances facilitate an otherwise conforming and desirable project in a recognized performance district.

Substantial justice will be done by granting the variance. Mixed-use redevelopment in the Gateway Performance District is encouraged, and the variances facilitate an otherwise conforming and desirable project in a recognized performance district.

The values of surrounding properties will not be diminished. There is no evidence to suggest that the immediately surrounding properties will suffer any material devaluation as a result of otherwise compliant frontage requirements being derived from two connected streets rather than one unbroken street. Put differently, there is no reason to conclude that frontage requirements cannot accommodate corner lots functioning well in an existing condition. Additionally, redevelopment of the long-neglected Steeplegate Mall site would only enhance market values by facilitating an attractive, allowed mixed-use infill redevelopment.

Denial of the variance would result in unnecessary hardship because: The proposed Lots 9 and 41 would accommodate the existing TD Bank facility and the existing Applebee's Restaurant, which are to remain as currently improved and be located on independent parcels. Shaping the proposed lot to accommodate frontage along "one street" would be inconsistent with current parking and driveway improvements, and would result in oddly-shaped parcels that would complicate the adjacent redevelopment plan. Variances would recognize the unique circumstance of these "corner lots" located at existing or proposed public intersections and that have adequate frontage if measured "around the corner" and along two streets instead of one.

5. **Review and acceptance of Minutes from January 8, 2025**

Member Wallner moved, seconded by Alternate Perkins, to approve the meeting minutes from January 8, 2025, with a correction. All in favor. The Board voted unanimously 5-0 to pass.

6. **Any other business that may legally come before the Board**

Alternate Perkins stated that duplexes were often made into condominiums in the early 2000s, so they were two individual units. Otherwise they would be viewed as one building with two living spaces. The number of people in each unit would be more of a legal question.

Member Winters suggested that this topic of conversation is more of a deliberation.

Alternate Perkins was not sure if this was a question for the attorney as to how to view a duplex.

Ms. Skinner stated she does not think it is a legal question. A duplex cannot be sold separately. It is sold as one building with two units, unless it was condominiumized and only then can each unit can be sold separately.

7. **Adjourn**

On a motion made by Member Wallner, seconded by Alternate Perkins, the Board unanimously voted 5-0 to adjourn at 7:32 p.m.

Respectfully submitted,

Krista Tremblay

Krista Tremblay

Administrative Specialist II