

Zoning Board of Adjustment

November 19, 2015 6:30 PM

**Board of Selectmen's Room/Municipal Building
15 Sunapee Street/Newport, NH**

PRESENT: Ben Nelson Chairman; Melissa Saccento, Vice Chairman; David Lain, Jeffrey Kessler, BOS Representative; Beth Cassorla, Scott McCoy, alternate (non-voting member at this meeting)

ABSENT MEMBERS: none

VIDEOGRAPHER: Louis Cassorla, NCTV

PRESENT FROM THE COMMUNITY: Brian Rossiter, Edith Rossiter, Robert Conway, abutter; Bert Spaulding, David Hoyt, Michelle Pitney

STAFF PRESENT: Julie M. Magnuson, Planning & Zoning Administrator.

CALL TO ORDER: Chairman Nelson called the meeting to order at 6:30 p.m. It was noted that Alternate Scott McCoy would sit on the Board for the hearings, questions and discussion, but would not vote. This was followed by a roll call of sitting members.

AGENDA REVIEW: The agenda was accepted as presented.

MINUTES: July 23, 2015; August 4, 2015

On a motion by Mr. Kessler, seconded by Mrs. Cassorla; *the Board voted to approve the minutes of the July 23, 2015 meeting. The motion passed 5-0-0.*

On a motion by Mr. Kessler, seconded by Mrs. Cassorla; *the Board voted to approve the minutes of the August 4, 2015 meeting with the following typographical correction: page 1, bottom of the page in the motion it should be Mr. Lain and not Ms. Lain. The motion passed 5-0-0.*

Mrs. Maura Stetson addressed the Chair and stated that for full disclosure her name was on the application of Case #1029 as owner. She said if there was no objection from the Board she would continue to record the minutes of November 19, 2015. There being no objection from Chairman Nelson or Zoning Board of Adjustment (ZBA) members, Mrs. Stetson continued as recording secretary.

The Chair acknowledged Mr. Bert Spaulding. Mr. Spaulding addressed Chairman Nelson with a point of procedure. He stated that he had not found any meeting procedures for the ZBA. Addressing the Chair, he asked to be corrected if there were. He stated that they were not posted online. He read from a statute on procedures. Addressing Chairman Nelson he made a verbal request under RSA 91-A of the rules of procedure for alternates of land use boards. Chairman Nelson addressed Mr. Spaulding and stated his request was noted.

Chairman Nelson stated that there were procedures but did not know where they were kept. Ms. Magnuson stated that the procedures were adopted on February 14, 1991. All Board members had a copy. She gave a copy of the rules of procedure to Mr. Spaulding. Chairman Nelson addressed Ms. Magnuson and requested that they be posted on the website.

Administration: none

Continued Business: None

New Business:

Chairman Nelson addressed the applicant and public in attendance and stated that although their names were known, to please state their name for the record before addressing the Board.

Case #1029: Dean and Maura Stetson (Owners) request a Special Exception for mixed use as provided for in Article IV, Section 402 of the Zoning Ordinance to permit the operation of a home business at the owner's residence. The property is identified as Map 218, Lot 023 and is located on 5 Allen St. in the Rural (R) Zoning District.

Chairman Nelson opened the hearing and reviewed the ZBA format. He then acknowledged Ms. Magnuson. Ms. Magnuson read her Administrative review into the record. She stated that the Office of Planning and Zoning (TOPAZ) did not have any concerns with the appeal.

Chairman Nelson acknowledged the applicant and spokesperson for Case #1029.

Mr. Dean Stetson addressed the Chair and Board members and succinctly gave a description of his past and proposed business operations. He distributed product samples for Board members and showed pictures and illustrations to the ZBA pertaining to his proposed business and previous ventures. He also stated that it would require an estimated three years to develop, at which time he would be moving out of the mixed-use (home) environment.

Chairman Nelson addressed the Board and asked for questions.

Mr. Kessler addressed Mr. Stetson and asked what kind of work he would be doing at his home. He inquired if it would be only office and storing of his (peanut) machine. Mr. Stetson stated that he currently stored the peanut roaster in his garage. He did not intend to do business at his property with his peanut roaster, it was used offsite. Mr. Stetson elaborated that he would be doing administrative and engineering activities, product and process development.

For clarification, Mr. Kessler asked if he would be doing home office type work. Mr. Stetson stated yes.

Mr. Kessler continued, and asked if customers would be going to the house. Mr. Stetson stated no. Would there be deliveries from UPS? Mr. Stetson said no and explained some of his business concept. He stressed that while the business was small, it would be home located.

Mr. Stetson explained that it was unique in that there was no market precedence for the product.

Mr. Kessler asked if there would be outside storage. He was told not at the current time. Mr. Stetson asked, for clarification, if in the future there was a need for storage, would he need a permit. Ms. Magnuson stated he would need a variance.

Mr. Stetson addressed the ZBA and stated that the greatest concern might be how it affected the neighborhood. He explained his tenure of 35 years in the neighborhood and that he did not feel he would be changing it.

Ms. Magnuson addressed the Chair and pointed out that V. Section 505 of the Zoning Ordinances addressed outdoor storage of items. She read the ordinance into the record.

Mr. Kessler asked for clarification of Section 413. The Board had copies in their packets of the 7 sections. There was "yes" written after each section. He had some concerns:

Mr. Kessler read aloud Section 413.3. He asked if the yes meant Mr. Stetson would comply with it or yes there would be exterior storage of materials. Mr. Stetson addressed Mr. Kessler and stated that "yes" meant it was read and understood. Mr. Kessler thanked him.

Mr. Kessler stated he had a similar question with Section 413.4. He asked Mr. Stetson if he understood the limitations; it was not yes we are going to have that. Mr. Stetson again stated it meant read, understood and validated by his initials and date at the bottom of the page.

Mr. Kessler stated he wanted to clarify those two items.

Chairman Nelson addressed Mr. Stetson and asked if at the most he would be making prototypes. Mr. Stetson concurred.

Mrs. Cassorla addressed Mr. Stetson and asked for clarification. She asked if Mr. Stetson would be doing a proof to market, to make sure it was viable; Mr. Stetson would then go the commercial route (outside the house). Mr. Stetson told her he would have to (be outside the house) in order to make sales. Mrs. Cassorla thanked him.

Mr. McCoy addressed the Board members and asked what made the special exception (in Case #1029) when the requirements were covered by a home office. He asked if the applicant was going to have additional buildings. He understood the focus of a special exception from what he had read (he stated it for the ZBA). Mr. McCoy again asked why Mr. Stetson had to go before the ZBA and ask for a special exception. Mrs. Cassorla answered and stated the location was in the rural R-1 district. Mr. McCoy questioned that.

Ms. Magnuson stated that when Mr. Stetson had gone to the Planning and Zoning office and discussed (with her) having machinery in his home, having deliveries and the possibility of employees they had discussed the route he should take. Mr. Stetson addressed the ZBA and stated that it may have been 'overkill' at the time, but he had wanted to discuss all possibilities with the Planning and Zoning Administrator.

Ms. Magnuson stated that the Special Exception would allow him to do all proposed activities. For clarification, Mr. McCoy stated he was covering all bases. Ms. Magnuson concurred.

Chairman Nelson addressed the public present and asked if they had any questions. There were none.

Chairman Nelson returned to the Board and asked if they had follow up questions. There were none.

Chairman Nelson again asked the public present if they had questions or comments. Mr. Bert Spaulding addressed the Board and stated he thought it was great. Mr. Stetson had already stated that when it(the business) was larger, he would be moving. It will be good for everyone.

Chairman Nelson again asked the Board members if they had further questions. There being none, Chairman Nelson stated that they would be entering into Deliberations.

Zoning Board of Adjustment Special Exceptions-Mixed Use

Chairman Nelson ensured that all ZBA members had the Special Exception-Mixed Use worksheet.

He then asked for a motion on section A. A motion was made by Mr. Kessler, seconded by Ms. Saccento that the selected site is an appropriate location for the proposed use and that the standard has been met. **The motion passed 5-0-0.**

Chairman Nelson addressed the Board and Public and stated that he would do a voice vote unless there was a dissension, at which time he would ask for a roll call vote.

Chairman Nelson asked for a motion on standard B. A motion was made by Chairman Nelson, seconded by Mr. Kessler that adequate and safe highway access is provided to the proposed site and that there is adequate off-street parking provided for the proposed use. The standard has been met. **The motion passed 5-0-0.**

Chairman Nelson asked for a motion on standard C.

Ms. Magnuson stated as a Point of Order, that the ZBA members did not have to vote on each standard, they could discuss each and then vote on the overall Special Exception-Mixed Use.

Mr. Kessler stated that he felt that adequate method of sewage disposal was available at the proposed site. Ms. Saccento concurred.

Chairman Nelson read that the proposal will not be detrimental, hazardous or injurious to the neighborhood. Mr. Kessler stated that was the question that he had asked specifically of the applicant.

Chairman Nelson read the proposed use is consistent with the spirit of the Ordinance and the intent of the Master Plan; has standard E has been met. Mr. Kessler stated yes.

Chairman Nelson asked for a motion on a collective standard A, B, C, D and E for Case #1029. He stated there were no conditions being requested for the Special Exception-Mixed Use. On a motion by Mr. Kessler, seconded by Mrs. Cassorla; **the Board voted to approve the request for a Special Exception-Mixed Use variance as presented for Case #1029. The motion passed 5-0-0.**

Chairman Nelson addressed the applicant and stated he had his Special Exception and wished him good luck.

Ms. Magnuson addressed Chairman Nelson and requested that he sign the Notice of Decision for case #1029. The applicant would receive the original and she would keep one copy for his case file. Ms. Magnuson presented Mr. Stetson with the Notice of Decision. Mr. Stetson thanked her and the ZBA.

Mr. Kessler made a request of the TOPAZ office. He asked if they could print all forms and information double-sided. Ms. Magnuson stated they would comply with the request.

Case #1030: Bert & Jacqueline Spaulding (Owners) & Kymberly Kenney (Agent) request a Variance from Article II, Section 206B-1 of the Zoning Ordinance to permit a Center-based childcare program at property identified as Map 234 Lot 31-3 and located at 648 John Stark Highway in the Kelleyville (K) Zoning District.

THE CASE ABOVE WAS ORIGINALLY POSTED AND RECORDED AS 636 JOHN STARK HIGHWAY. This was a typographical error and was corrected when it was discovered. All of the other information was and is correct.

Chairman Nelson opened the hearing. He then acknowledged Ms. Magnuson. Ms. Magnuson read her Administrative review into the record. She stated that the Office of Planning and Zoning (TOPAZ) did not have any concerns with the appeal.

Chairman Nelson addressed the applicant and asked her to address the Board. Mrs. Kymberly Kenney addressed the ZBA and stated that the variance request was to permit a center-based childcare program in the Kellyville (K) Zoning District located at 648 John Stark Highway, Newport, NH 03773.

Chairman Nelson addressed the Board and asked for questions.

Ms. Saccento addressed the applicant and asked for an overview of number of children, hours of operation and her proposed use of the area.

Mrs. Kenney addressed the ZBA and explained she would give a proposed overview of the facility and its usage. The fire inspector had approved 45 children as the capacity of the building. She stated that when the state licenser, Helen Dombroski, inspected the facility she was expecting the number to be lower.

The facility would offer preschool services, general daycare services, before and after school programs, summer programs and an educational training site for teachers. Ms. Kenney continued, stating that the operational hours would vary from early morning until late night, depending on the parents work schedules and some educational training would be at night and on weekends.

Ms. Saccento asked for clarification of training. She was told it would be for staff and made available to the community.

Chairman Nelson asked about the number of employees. Mrs. Kenney stated that if they were at maximum capacity, the number of employees would be between six and eight. She then told the ZBA members the state guidelines for student vs staff ratios in a daycare setting.

Mr. Lain addressed Mrs. Kenney and asked how many employees she would have per day. She explained it would be determined by the enrollment. He then asked for days of operation. Mrs. Kenney stated day care would be Monday-Friday. Ongoing education would be at night and on weekends. She then addressed the Board and gave scenarios of future plans at the site. Mr. Lain asked the applicant if the facility was adequate for the proposed number of employees and children. He was told yes.

Mrs. Kenney stressed that the State inspector would set the limit of employees and children. As a licensed facility they would be bound by her decision and it would be monitored annually by the State.

Mr. Lain asked if the area would be fenced in. Mrs. Kenney stated it was already fenced in.

Ms. Saccento asked how many parking spaces there were. Mr. Spaulding stated that the parking lot was approved for thirty four (34). He explained further and stated that for the center based childcare program he would be making a barrier to ensure that the traffic flow went behind the building for drop off and pick up of children. In this way access to and from vehicles would be away from the John Stark Highway. He illustrated the traffic flow for the ZBA on the room's whiteboard.

Mrs. Cassorla asked if the parking lot and area of traffic flow existed. Mr. Spaulding said yes.

Ms. Saccento asked if an appropriate safety play area would be set up within the fenced area. She was told yes.

Mrs. Kenney explained to the ZBA that she had run a day care previously and explained she was aware of the dangers. She gave other safety examples that would be used.

Ms. Saccento asked for clarification the phases Mrs. Kenney had to go through to open her daycare. Mrs. Kenney explained the steps. Ms. Magnuson stated she would not need to go to the Planning Board; the applicant would get a change of use permit from the TOPAZ office. There was further explanation of the granting of the variance.

Mrs. Cassorla asked what Kellyville was zoned. She was told K-1. There was a brief discussion of the various establishments that had been in the building and the need for action by the ZBA for each.

Chairman Nelson asked if there were questions from the public. Mr. Robert Conway, abutter, stated he was affected the most by the proposed daycare facility. He stated his concerns: the noise level. Would playground noise be constant throughout the day, or at specified times? He was told it would be set at specific times. He asked for intervals and length of time. Mrs. Kenney stated the children would have a morning recess, afternoon recess and occasionally (weather permitting) at the end of the day.

Mr. Conway stated he was in the rental business. His building would change its use from time to time. Therefore, his second question to the ZBA was if by granting the use of a child care facility abutting his property, would it prohibit him from renting to an individual who owned a gun shop in the future. Mr. Conway continued, saying that if he was limited on his uses he should be compensated for that. If he was going to be limited on what he could do, he wanted it clarified by the ZBA at the November 19, 2015 meeting. Mr. Conway stated he had owned his building for several years and he didn't feel that he should be penalized.

Ms. Kenney stated that there were no restrictions as to where to have a child care facility. There were no stipulations which would jeopardize the use of his property. Mr. Kessler stated there was nothing in the Newport Zoning Ordinances that would prohibit that (example of having a gun shop next to a childcare facility).

Ms. Saccento stated that any business that went into Mr. Conway's building would be judged on its own merit and not because it was next to a daycare. Mr. Conway stated he wanted to make sure it was in the minutes and (addressing the recording secretary) stated he wanted a copy of the minutes.

Mr. Conway explained that when people went in for a variance people frown on (gun shops) them. He wanted to cover all bases. He explained possible scenarios with difficulties to the ZBA members.

The Chair asked for other comments. He acknowledged Mr. Spaulding. Mr. Spaulding addressed the Chair and stated that as an abutter the daycare will be an improvement from the bar that was previously located there. He explained further and then stated his dissatisfaction with the ZBA and the absence of some Zoning Ordinances in the Kellyville area.

Mr. Lain asked if the daycare was classified a school. Mr. Kessler stated it was in the Zoning Ordinances as center based childcare. Mr. Lain stated that schools had restrictions of what could be near them. Mrs. Kenney stated it would be under center based childcare which was overseen by the state. There was a discussion on its definition. Mr. Kessler read the Zoning Ordinance in full. Chairman Nelson stated that what Mr. Lain was referring to was what would be prohibited near a school and that would be the sale of drugs.

Mr. Conway assured the ZBA that he did not have a problem with Mrs. Kenney having a daycare; it was an improvement over the bar. He stated he did not understand why the daycare was not on the permitted use of properties.

Chairman Nelson addressed Mr. Conway and stated the fence was six feet tall. Mr. Conway concurred and stated that he wanted to know the hours of operation and the hours the children would be there. He also wanted to know the approximate intervals during the day for recesses, etc. He reviewed different aspects of all businesses and stated he did not expect the daycare to be exempt from them.

Mr. Conway reiterated that he did not want the ZBA in the future to negatively judge a business that he would like to have in his building because of the daycare facility. That would not be fair to his property.

Chairman Nelson asked if there was anything else from the public. He acknowledged Mr. Spaulding. Mr. Spaulding reiterated what Mr. Kessler had read.

There was a general discussion among the Board and Ms. Magnuson on daycare/school facilities in Newport.

Mr. Spaulding stated that the Board had not gone through the attachments in their packets. He asked if they would like him to read them into the record. There was short discussion after which Mr. Kessler stated that the ZBA would be going through each aspect of the variance when it voted. With further insistence by Mr. Spaulding, Chairman Nelson stated they could be attached to the minutes of the meeting. Ms. Magnuson stated due to space constraints, she preferred to not have attachments on the minutes. She stated that the application and additional information was part of the official record and would be on file permanently.

Chairman Nelson asked if there were further questions from the Board. There being none, Chairman Nelson closed the meeting to the public and opened to the Deliberations.

Variance Statement of Reasons and Discussion

Chairman Nelson gave instructions for the Deliberations. He then stated that one condition he would like to see was to have the daycare entrance and exit marked.

Chairman Nelson asked for a motion on question number one.

*On a motion by Mr. Kessler, seconded by Ms. Saccento; that:
Granting the variance would not be contrary to the public interest because: it will serve the need of the community. Chairman Nelson asked for discussion. Mrs. Cassorla stated it was a good use for the space and it served the need of the community. Chairman Nelson called for a vote. **All voted yes.**

*On a motion by Mrs. Cassorla, seconded by Mr. Kessler; that:
The spirit of the ordinance would be observed because it provided childcare to the greater Newport/Claremont area. Mr. Kessler added that it fit the spirit of Kellyville. Mrs. Cassorla stated she would like to make that part of her motion. Chairman Nelson called for a vote. **All voted yes.**

*On a motion by Mr. Kessler, seconded by Ms. Saccento; that: Granting the variance would do substantial justice because it addressed a need that is lacking in the community. The Chair asked for discussion. Ms. Saccento stated it was a very good location for a daycare; it had a fenced-in area, a building that would serve it well and adequate parking. Mrs. Cassorla stated that the proposed daycare would be quieter than the building's previous use. The Chair asked for a vote. **All voted yes.**

*On a motion by Mrs. Cassorla, seconded by Mr. Kessler: That:
The values of the surrounding properties would not be diminished. The daycare would not impede any use of any of the properties around where it was located. There was no discussion. Chairman Nelson called for a vote. **All voted yes.**

Unnecessary hardship

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

*On a motion from Ms. Saccento, seconded by Mr. Kessler: There is not a fair and substantial relationship between the general public purpose of the ordinance provision and the specific application of that provision to the property because family based daycares are allowed in this area and in this zoning district and it seems somewhat of an oversight that a group daycare would not be allowed also. Chairman Nelson asked for discussion. There was none. He then called for a vote. **All voted yes.**

AND:

*On a motion from Mr. Kessler, seconded by Mr. Lain: The proposed use is a reasonable one because: it addresses a need of the community. Chairman asked for discussion. There was none. He then asked for a vote. **All voted yes.**

On a motion by, Mr. Kessler, seconded by Mrs. Cassorla; *the Board voted unanimously to grant a Variance for Case #1030 to permit a Center-based childcare program (or group preschool center) at 648 John Stark Highway in the Kelleyville Zoning District with the provision that the entrance and exit driveways be clearly marked.* There was no discussion. *The motion passed 5-0-0.*

Ms. Magnuson asked Chairman Nelson to write out and sign the Notice of Decision with its condition at the November 19, 2015 meeting. After discussion, Chairman Nelson stated he would sign the Notice of Decision when the draft minutes were completed.

Ms. Magnuson stated a typed Notice of Decision would not be available until after the five day time limit. Mr. Spaulding addressed the Chair and stated they (he and the applicant) would waive the five day requirement for the Notice of Decision.

There being no further business in the public meeting, Ms. Saccento made a motion to adjourn. Mr. Spaulding interjected and stated that in the Rules of Procedure for the ZBA it stated under number nine Communications and Miscellaneous. Mr. Spaulding stated that communication from individuals in the community. All Board agendas should all have a communication item for the public. Ms. Magnuson addressed the Chair and stated she had asked legal counsel concerning a public participation line item in the ZBA agenda. She had been told that the ZBA did not have one. It only met to review cases. There was a discussion on the topic by the Board members and Mr. Spaulding.

Chairman Nelson requested that Mr. Spaulding not appeal the Administrative Decision. The ZBA would put the subject on the agenda of the December 2015. He addressed Ms. Magnuson and asked if the ZBA had any cases to hear in December. She stated no. Ms. Magnuson addressed Chairman Nelson and asked if he would like to get a written legal opinion from the Town attorney on the subject. Chairman Nelson said yes and asked to put the subject on the agenda for the next meeting. Ms. Magnuson said she would have it if it was available for the next meeting. She was happy to ask the question and have the

attorneys counsel the ZBA. Mr. Kessler asked if Ms. Magnuson could go to LGC instead of going to the Town attorney. There was a short discussion concerning using LGC instead of the Town attorney. Ms. Magnuson stated she would contact whoever the ZBA would like her to. She stated she would call after December 3, 2015.

Chairman Nelson acknowledged Mr. Spaulding. Mr. Spaulding said that state law and Rules of Procedure stated that the ZBA had to have a monthly meeting. He further expressed items in the law and rules of procedure.

Chairman Nelson addressed Ms. Magnuson and stated that the topic of having a monthly meeting could also be included in the next agenda. Chairman Nelson addressed Ms. Magnuson and requested that she research required meeting times and bring it to the next ZBA meeting. Ms. Magnuson requested that the ZBA get an opinion from an attorney regarding the topic before there was any more discussion in more or less an open forum. Ms. Magnuson stated it was Chairman Nelson's decision; she would be happy to get an opinion from legal counsel on the topic. Chairman Nelson concurred.

Ms. Saccento reiterated her motion to adjourn. Mrs. Cassorla seconded it. ***The Board voted unanimously to adjourn at 7:42 pm.***

Respectfully submitted,

Maura Stetson
Scribe