

These minutes were approved at the August 12, 2014 meeting.

ZONING BOARD OF ADJUSTMENT
Tuesday, June 10, 2014 at 7:00 p.m.
Town Council Chambers - Durham Town Hall
15 Newmarket Road, Durham, New Hampshire
MINUTES
EXCERPT

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M. **PUBLIC HEARING** on a petition submitted by Tropic Start Development LLC, Hampton, New Hampshire on behalf of Cumberland Farms Inc, Framingham, Massachusetts for an **APPLICATION FOR VARIANCES** from Article XII, Sections 175-54 and 175-55(B); and Article XXI, Sections 175-111(G)(5), 175-113 and 175-116(A) of the Zoning Ordinance to allow for 12 parking spaces for a commercial property where 16 spaces would be required, to allow less than 5% of the parking and driveway are to be landscaped, to allow parking in the rear yard, and to allow an ADA parking aisle within the front yard and a refuse container within the side and rear yards. The property involved is shown on Tax Map 4, Lot 49-0 is located at 3 Dover Road, and is in the Courthouse Zoning District.

Attorney John Arnold, from Hinckley Allen represented Tropic Start Development LLC. He noted that the property had been vacant since about 2005, and said the proposal was to put up a 4 bay garage structure that was intended to be used for auto repair. He said coming in with this new development would help revitalize the area. He said due to the size constraints because it was a quarter acre lot, some variances were needed.

He listed the variances being requested and then spoke more about plans for the site and the variance requests that were related to this. He noted that compact parking spaces were being used in order to include as many parking spaces on the site as possible, and showed these on the layout.

Attorney Arnold also showed the proposed dumpster location on the side and the front access aisle for the ADA parking space in the front, and noted that there was some question as to whether variances were needed for these two things. He said Mr. Johnson had recommended that the ZBA determine whether these variances were in fact needed. He noted that sidewalks were allowed in the front but parking was not, so the access aisle was a bit of a gray area. He also said there was some ambiguity as to whether a dumpster pad for a dumpster was a structure. He said variance requests for the dumpster/dumpster pad and the access aisle would be addressed if the ZBA believed they were necessary.

He noted the variance being requested for parking within the rear yard setback, and explained that having the parking there would be allowed if there wasn't a single family home or duplex abutting the property. He said behind the property was the lot with the Holiday Inn, and also said there were some duplexes at the back end of it. He said the duplexes was already set back from the property and there was parking between them and the subject lot, so impacts would be minimal.

Scott Mitchell noted that he owned the Irving and Dunkin Donuts property, and said he'd been working on the purchase of the Town Hall property. He said the intent was to relocate Mr. York's business to the Cumberland Farms lot, and to then use his existing property to provide good access as part of a development off Route 108 that included the Town Hall lot. He explained that the price of the Cumberland Farms lot was finally reachable and also said he wanted to clean up that area anyway.

Mr. Mitchell said this variance request was part of a bigger deal, but said there were no guarantees that the deal with Mr. York would happen. He noted that there was as backup plan if needed. He said there had been a lot of problems with Irving maintaining the station, and provided details on this, speaking briefly about his plans for maintaining other properties he would own in the area. He said the Town Hall property was under agreement, and said he was trying to do a pharmacy there.

He noted said putting in an access way and leaving Mr. York's business where it was would be the easiest thing to do, but said regardless, he wanted to buy the Cumberland Farms property. He said Mr. York's biggest issue was parking. He provided details on other commercially developments he had done in New Hampshire and Massachusetts. .

Mr. Mitchell said the Cumberland Farms site was a very small property, and said it was very hard to make anything work there without relief, which was why the variances were being requested. Ms. Davis asked if there would be enough parking there for Mr. York. Mr. Mitchell said no, and explained that Mr. York would want to have 8 spaces beyond the Cumberland Farms site.

There was discussion that Attorney Arnold could go through all the variance requests at once, regarding how they met the variance criteria.

Attorney Arnold first said nearly any development on this site would require some or all of the variances being requested. He also said the proposal to put in the new building on this vacant site and clean up the area would be a great improvement to the area.

Concerning the variance request to allow 12 instead of 16 parking spaces on the site, he said in addition to the parking spaces shown on the plan, with the garage use, cars would be inside of the bays, so would provide 4 parking spaces. He also said the building was designed to have pull-through garage bays, and was geared to quick service for

customers, where customers waited rather than leaving their cars for the day. He also said cars could be double-stacked in ways that didn't really match the parking spaces, given that this was a garage. He noted that mechanics often would juggle cars and move them around, depending on what needed to be worked on when.

Attorney Arnold said that regarding the internal landscaping variance request, the perimeter of the lot would be heavily landscaped, and noted that this was the only area they had to work with in terms of providing landscaping. He said having to include the internal landscaping would knock out some of the parking spaces.

He said, the purpose of the rear yard setback requirement was to avoid putting a parking area close to a residential use. He said that wasn't a concern here because the duplexes in the back were so far away, and there was parking between them.

There was discussion about whether the ADA parking aisle required a variance. Chair Starkey said he thought it did fall within the parking requirements so a variance was needed. Attorney Arnold said even if the access aisle was considered part of the parking, a car wouldn't be parked there, and it would be akin to being a sidewalk. He said having this in the front setback wouldn't cause any different impact than a sidewalk, which was allowed within the frontyard setback. He said it wouldn't have an impact in terms of unsightliness, etc.

Attorney Arnold said that regarding the variance request for the dumpster, the side and rear area would be densely landscaped so would screen the dumpster. He also said there would be a fence around the dumpster, and said the dumpster therefore would not have an impact on abutting properties. He also noted that there wasn't any other place on the site to put it that wouldn't require a variance. He said in the back, it would be out of the way.

He said the purpose of the Courthouse District was to encourage a development such as this. He said it was a reasonable use of the property, and said given the size of the site, there weren't many options in terms of commercial uses the Zoning Ordinance contemplated that didn't require variances. He said the use that was proposed would be a great thing for the Town and would also clean up an eye sore that had been around for quite some time.

Attorney Arnold next went through how the variance criteria were met.

Public Interest

He said granting the variance for the parking spaces wouldn't be contrary to the public interest because 12 spaces would be enough, since cars could be stored in the bays, and also could be double stacked and parked more closely since this would be a garage where cars would be coming and going all of the time.

Mr. Sterndale said this was a different narrative than the ZBA had heard about **Mr. York's** garage. He said Attorney Arnold had described a Jiffy Lube type of operation, but said he didn't envision all car service places as being drive through, wait with the vehicle places.

Mr. Mitchell said Mr. **York** rented space from the Town Hall right now, and said he needed more spaces for cars that had been worked on. He said the way the bays would be set up, he could work on quite a few cars at the same time. He said the intent was not to have a Quick Lube there. There was discussion.

Attorney Arnold said he wasn't trying to dictate how one would run the business, but said the design of the building, with pull through bays, and a waiting room would be more conducive to customers staying at the site while their cars were serviced. There was detailed discussion about accessibility for cars coming to and leaving the site. There was also discussion about landscaping proposed in the front, and the fact that interior landscaping for the parking areas was not proposed.

Attorney Arnold said locating the ADA aisle in the frontyard setback wouldn't be against the public interest because it would have the same impact as a sidewalk would. He also said locating the refuse container in the rear and side yard wouldn't be contrary to the public interest because it would put the container in the location with the least visibility from the street, it would be in a good location for the store, and screening would be provided by landscaping and a fence. He also said allowing parking in the rear yard setback was not against the public interest, because there would be two parking areas separating the applicant's property from the residential lots, so the purpose of the Zoning provision was still being served.

Spirit and intent of the Ordinance

Attorney Arnold first noted that this criterion overlapped a lot with the public interest criterion. He said the purpose of Section 175-113 was to ensure that there was adequate off street parking, and said the proposed parking would be adequate because up to 4 vehicles could be kept inside the building. He also said cars could be double stacked and could be parked more closely to each other than in a typical parking lot.

He said Section 175-116(A) concerning parking lot landscaping was intended to enhance the appearance of parking lots. He said the applicant believed that the purpose of the Ordinance was served because the areas to the north and east of the parking lot would be densely landscaped, and said this landscaping would be a vast improvement over what was there now.

Attorney Arnold said allowing the ADA access aisle in the front yard was consistent with the purpose of Section 175-55(B) of the Ordinance because it would have no different

impact than a walkway would, which was an allowed use in the front yard. He also said allowing the refuse container to be located within the side and rear yards would not violate the spirit of the Ordinance because of the nature of abutting uses and also because of the extensive screening that would protect abutters.

Substantial Justice

Attorney Arnold said substantial justice was done where granting a variance would not cause harm to the general public that outweighed the benefit to the applicant. He said without the variance for the number of parking spaces, the applicant wouldn't be able to build the development because there wasn't room on the site for 16 parking spaces. He said having 12 instead of 16 spaces wouldn't harm the general public because the spaces being put there for this use were believed to be adequate.

He said the benefit to the applicant of granting the variance concerning interior landscaping was substantial because it would allow maximizing of parking on the site. He said requiring internal landscaping in the parking lot would eliminate parking spaces, which would probably harm the public more. He said reduced landscaping would not harm the general public because the applicant would landscape the site as much as possible on this very small site, and it would look better than what was there now.

Attorney Arnold said allowing the ADA aisle would allow one more parking space to be put in and he provided details on this. He said this aisle would not harm the general public, noting that a sidewalk would be an allowed use, and said the impact of the aisle would be the same.

He said the benefit to the applicant of being able to locate the refuse container in the side and rear yards would provide utility to the store, and would not harm the general public, because the proposed location minimized visibility from the street and would be well screened from neighbors. He said allowing some parking in the rear yard setback would create one additional parking space, and said the impact on the public would be negligible because the duplexes to the rear would be separated by two parking areas.

The value of surrounding properties is not diminished

Attorney Arnold said granting the variance would not diminish surrounding property values because the project would result in the redevelopment of a property that had sat vacant for several years. He said it would enhance the appearance and utility of the property, and would help businesses in the area, which should help drive up property values.

Unnecessary Hardship

Attorney Arnold said literal enforcement of the provisions of the Ordinance would result in unnecessary hardship. He said there were special conditions of the property that distinguished it from other properties in the area because of the small quarter acre lot in a prominent location in the Courthouse District, which was a prime business location. He said the purpose of the Ordinance was to encourage different service and professional uses, but said it would be tough to get such a use without granting some or all of the variances, due to the size of the lot.

He also said another uniqueness to consider was the use the property was being put to. He said the design of the building, with pull through bays, the waiting room, etc. encouraged customers to wait with their cars more than they otherwise would, and said this related to the number of parking spaces being requested. He said another unique factor was that the property abutted duplexes but these duplexes were set back across two parking lots, and were already exposed to the parking lot on the duplex site.

Attorney Arnold said the proposed use was reasonable. He said it was an allowed use in the Courthouse district, and said the proposed redevelopment would be a benefit to the area.

Mr. Sterndale asked if the building needed to be this big, and if the need for all of these variances would go away if there was a 3 bay garage. Attorney Arnold said it might go away, but said there was the question of having a viable business there. He said a lot of the design resulted from discussion with Mr. York about what was needed concerning this. Mr. Mitchell agreed, and noted the importance of encouraging work to be done inside the bays, not outside. He said Mr. York wanted 6 bays but they couldn't be fit on the property. He said 4 bays was a compromise.

Mr. Sterndale said the lot was tiny, but said it would really benefit from having some internal landscaping. He said the view driving or walking by would be comparable to looking across the Irving lot to the dumpster at Dunkin Donuts. He said it was asphalt a long way back. There was discussion. Mr. Mitchell noted other projects he was doing and the landscaping involved.

Mr. Hoffman asked if any existing trees would be removed. Mr. Mitchell said he didn't believe any trees were being cut. There was discussion that the trees in the back were not on the Cumberland Farms site. Mr. Hoffman said the buffering to the rear and side were important, and also said he thought what was proposed was the highest and best use of the property, and that developing it was in the public interest.

Mr. Mitchell said this type of use probably had the least amount of trips of any commercial use that could be put in there. He said he knew what Durham wanted, and said this was a great use for the property.

Mr. Hoffman asked what material would be used for screening. There was discussion. Jim Mitchell said they could use Azac, a polymer lumber material. He also noted that they would create a storage area on the second story of the building to accommodate auto parts, which would avoid having trailers on the site.

Chair Starkey asked if there were any members of the public who wished to speak in favor of the application. There was no response. He then asked if there were any members of the public who wished to speak against the application.

Steve Godin, General Manager of Holiday Inn Express, said as an abutter, Olympia Equity Investors, which owned the Holiday Inn property, opposed the variances being requested. He said an auto service facility was not viewed as an improvement to the existing condition, and would likely have a negative impact on any guest staying in rooms at the Hotel that faced the site.

He said parking on the site already required management in order to keep non-hotel guests from using spaces, and said this was a major issue. He said the hotel was a welcoming point to the Durham community, and said it maintained the landscaping every year, including landscaped islands in the parking area, which was consistent with the Ordinance. He said the plan for the applicant's site didn't appear to offer dense enough landscaping, especially if the applicant intended to locate refuse containers there as well. He said guests would have a view of auto-care refuse.

He said the statement that the value of surrounding properties would not be diminished wasn't necessary true. He said parking congestion and views of the refuse area could result in noise and bad views, and would be likely to limit the Hotel's ability to charge high rates, and might decrease satisfaction within the facility.

Attorney Arnold said the concerns of the Holiday Inn were appreciated, and said they would work with them to be good neighbors. He said none of the variances being requested were on the Holiday Inn side of the property, and said the setback there would be maintained. Mr. Mitchell said the situation at the Cumberland Farms site would be better than what was there now.

Mr. Toye asked if the applicant had met with the Fire Department regarding access for fire trucks. Mr. Mitchell said no, but said he would be meeting with the Technical Review Committee as part of the site plan application.

Ms. Davis asked if the bay doors would be open so hotel guests would be looking into them. Jim Mitchell said part of their agreement would be to provide an HVAC system so the doors could be closed. There was discussion.

Tom Toye MOVED to close the Public Hearing. Chris Sterndale SECONDED the motion, and it PASSED unanimously 5-0.

Chair Starkey said it was a really small lot, and said the fact that someone was trying to redevelop it was worth noting. He said he believed the ADA compliant loading area proposed required a variance because he thought it was part of the parking. He also said he believed the dumpster pad needed a variance. Ms. Davis said the concrete pad for the dumpster was a structure. Other Board members agreed that these two variance requests should be decided on by the ZBA.

Chair Starkey recommended going through the variance requests together, in regard to each of the variance criteria.

He first addressed whether granting the variances was contrary to the public interest. He said 16 spaces were required, based on 3 spaces for each of 4 bays, and 1 space per employee with an estimate that there would be 4 employees. He said the proposal was to have 12 spaces, two of which would be behind the building. He said he had thought that the two spaces in back would block the right of way, but saw with the proposal that the building had pass-thrus. He said he thought the Planning Board might have an issue with this depending on what the Fire Department said because rear access to the building would be deterred.

He said he looked at this development as having 10 spaces because he didn't think the spaces behind the building would be allowed. Mr. Toye noted that some of the parking spaces proposed on the site were small. Chair Starkey said the applicant did a good job of trying as much as possible not to encroach into the setbacks, and said where there was encroachment, there were vegetative buffers in place already, toward Gibbs.

Chair Starkey said even if there were only 3 bays, 9 parking spaces would be required plus one space would be needed for each of 4 employees, so the applicant would need 13 spaces, which was more than the 12 spaces he said he could provide. He said putting anything there would push what the lot could handle. He said the requirement could be met if there were 2 bays, but said that would be a Jiffy Lube. There was discussion that a two bay garage wasn't viable.

Chair Starkey said that was not the hope of what this property could become, and said the hope was to replace what already existed on a different lot with a garage on the Cumberland Farms lot in order to be able to use that other lot for a different purpose. He said he saw the vision.

Mr. Sterndale said he got that vision and respected it, but said he didn't know that this was justification for approving the variances. Chair Starkey said the applicant was doing

what he could do to meet the public interest in providing parking with the limited room he had.

There was discussion about the variance request for interior landscaping. Chair Starkey said he believed that other than the apartments and the hotel, there wasn't interior vegetation at sites in the Courthouse District. He said he heard the concerns of the hotel regarding the fact that it had put in interior landscaping. He said if a bay was removed from the proposed garage, vegetation could be added, but said he didn't think they could get to the 5% coverage unless another parking space was removed. There was discussion on the 5% coverage requirement. Chair Starkey said he thought the spirit and intent of this Ordinance provision was for larger parking areas that needed to be broken up with vegetation.

He reopened the public hearing, and Attorney Arnold stated for clarification purposes that parking was allowed in the side yard. He said the issue regarding parking in the back was because of the duplexes on the abutting property. He said the variance request in the front was regarding the ADA aisle issue. There was further discussion by the Board about the two parking spaces in the back, and possible restriction of access to the building as a result of this.

There was further discussion on the number of parking spaces that would be possible on the site. Chair Starkey and Mr. Sterndale discussed the idea of requiring a minimum number of parking spaces as part of any approval by the ZBA. Mr. Sterndale said he was fine with going with the 12 spaces the applicant was stating. Mr. Hoffman said he wouldn't want to go with anything less than that. Chair Starkey said the Planning Board could change this number, require the two spaces someplace else, etc. Mr. Toye said the compromises made had been carefully thought out.

Chair Starkey said he understood the spirit and intent of the Ordinance in terms of the amount of parking required, but also said he understood the applicant's belief that that amount of parking wasn't needed. Mr. Sterndale said it would be their business, and they would find out if it would work or not. It was noted that Mr. York currently rented some parking spaces at the Town Hall lot. There was discussion.

Chair Starkey said the spirit and intent of the Ordinance concerning interior landscaping of parking lots was to avoid massive parking lots being put in with no vegetation. He noted that the hotel met that requirement. A calculation was done that indicated that including the required interior landscaping would use up 2 parking spaces. Chair Starkey said he didn't think it was worth it to provide this landscaping on the site. Mr. Toye said this provision was intended for larger parking areas. Ms. Davis said the applicant wanted to do as much landscaping on the perimeter as possible, and said this should be helpful. Mr. Hoffman said it was in the public interest to be fairly flexible with this site. He also said there were some substantial Planning Board issues with this site. He said he didn't

think granting the variances would decrease the value of surrounding properties, but said he thought the proposed use might. He said a possible incongruous use was something for the Planning Board to address, not the ZBA.

There was discussion that the proposed garage was a permitted use. Chair Starkey said he could also hear what the hotel was saying concerning rooms looking out on this use, and said they would probably prefer to see a park there. There was further discussion. Mr. Toye noted that the hours of operation was something to consider.

There was further discussion on how many parking spaces the ZBA would approve. It was noted that if a ZBA approval of the variances referenced the plan that had been provided and that plan then changed, the applicant might have to come back to the ZBA. Mr. Sterndale said he thought the Board's vote now should be on allowing 12 spaces, as was stated in the application and referenced when the public hearing was opened.

There was further discussion that the spirit and intent of the Ordinance concerning the amount of parking required was that a business should not have too few parking spaces so that the parking overflowed the site onto nearby properties. Chair Starkey said it couldn't be assumed that policies and procedures would be in place to manage scheduling of repairs and managing parking so that this overflow wouldn't occur.

He said the spirit and intent of the Ordinance was that there should be enough parking so that it wouldn't be an issue. He said he could understand the concern of an abutter concerning possible overflow parking. Ms. Davis asked about the idea of requiring onsite parking management, and Chair Starkey said that shouldn't be required for a business this size. He noted that Durham Marketplace enforced parking for its own purposes.

Ms. Davis asked whether if they approved 12 parking spaces, this meant they had to approve some other variances too because these were needed in order to fit the 12 spaces on the site. There was discussion. Chair Starkey said the project was well designed considering what they were working with in terms of space. He noted that a maximum of 80% of the site could be impervious cover, and said what was proposed was 79.3%.

Mr. Toye said there was a reason this site had sat empty for so long. Mr. Hoffman said the price was a big factor, but agreed that the site wasn't conducive to having a business there. Mr. Toye said the price tag on the property dictated an intense use to support the land value.

Chair Starkey said it was hard to say either way whether granting the variances would decrease the value of surrounding properties. He said some people would say it might hurt abutters and others would say it could help abutters, but said there wasn't enough information on this one way or the other. Mr. Sterndale said considering surrounding

property values wasn't just about abutting properties, and said the site would be seen as an improvement for the vast majority of properties around it.

Chair Starkey went through the hardship criterion and whether it was met for the variance requests. He said that regarding the issue of no fair relationship existing between the general public purposes of the ordinance provision and the specific application of that provision to the property, this was a tough question in regard to the parking.

Mr. Sterndale said a question to ask was whether the full application of the Ordinance (requiring 16 parking spaces) to this particular property was necessary in order to promote a public purpose. Chair Starkey said a public purpose could be something as simple as whether the property could actually be used, and Mr. Sterndale agreed. Chair Starkey said the proposed use was reasonable. Mr. Sterndale said the purpose of the Courthouse District was to promote development, noting that it was part of Durham's commercial core.

Mr. Toye noted that the hardship criterion included 3(A) and 3(B), and said only one of them had to be met. He said while meeting 3(A) was a tough one, there was also 3(B) "owing to special conditions of the property that distinguished it from other properties in the area, the property could not be reasonably used in strict conformance with the ordinance...." There was discussion about the size of the applicant's lot relative to other commercial properties in the area.

Chair Starkey said if ZBA members had issues with any of the variances being requested, the Board should vote on them individually. There was discussion. Mr. Sterndale said he was comfortable voting on all of the variance requests together.

There was additional discussion about the purpose and intent of the Ordinance concerning requiring interior landscaping. There was discussion about the fact that the parking proposed in the back would be located next to a parking area on the abutting lot. There was further detailed discussion on the variance requested concerning the ADA aisle in front.

Ruth Davis MOVED to approve a petition submitted by Tropic Star Development LLC, Hampton, New Hampshire on behalf of Cumberland Farms Inc., Framingham, Massachusetts for an APPLICATION FOR VARIANCES from Article XII, Sections 175-54 and 175-55(B); and Article XXI, Sections 175-111(G)(5), 175-113 and 175-116(A) of the Zoning Ordinance to allow for 12 parking spaces for a commercial property where 16 spaces would be required, to allow less than 5% of the parking and driveway area to be landscaped, to allow parking in the rear yard, and to allow an ADA parking aisle within the front yard and a refuse container within the side and rear yards, as shown on the plans included in the application dated 5/30/14, Jones and Beach Engineers, Inc. The property involved is shown on Tax Map 4, Lot 49-0, is

***located at 3 Dover Road, and is in the Courthouse Zoning District. Chris Sterndale
SECONDED the motion.***

Chair Starkey said one would be hard-pressed to put anything on this lot and meet the maximum parking requirements in the current Zoning Ordinance.

The motion PASSED unanimously 5-0.