CITY OF CONCORD, NH
ZONING BOARD OF ADJUSTMENT
NOVEMBER 3, 2021 MEETING
DRAFT MINUTES

Attendees: Chair Christopher Carley, Nicholas Wallner, Laura Scott, Andrew Winters, and Laura Spector-Morgan

Absent: James Monahan

Staff: Ernest Cartier-Creveling, Zoning Administrator
David Hall, Code Administrator
Rose Fife, Clerk of the Board

Meeting commenced at 7:00 pm.

60-21 **Andrew H. Sullivan, Esq. for Hrisi Maloutas:** Applicant wishes to expand an existing non-conforming food establishment use by installing a 6.5 foot x 14.33 foot walk-in cooler and constructing a 7 foot x 7 foot alcove and requests a variance to Article 28-8-4(c)(1), Expansion of a Non-conforming Use, to allow the expansion of a non-conforming use by a combined net area of 122sf +/- (35.6%) where such use is not permitted for property located at 192-194 North State Street in a UT Urban Transitional District.

Testified: Attorney Sullivan. This is a unique property. Behind the building, in the back of the property, there is a river. There are 2 buildings on the lot one of which is a house further north on the property and the other is a small sub shop building. The owner also owns the Gas Lighter. They want to open up a small bistro there. They had to place a cooler in the back, and they did, not knowing that they needed permits. The cooler is 6.5' x 14.3' in size. In the front of the building there is a proposed 49 s.f. heated waiting space. Because it is over 10% and the building is approximately 350 s.f., they need the variance. The hardship is that it is difficult to utilize the building for anything. This is a unique location and a unique building as it is such a small building and it has been there forever. They are asking for two variances. The net square footage will be 61.15. The property is isolated, it is a busy street. You cannot see the building as there are so many trees around. The special condition is that it is a 352 s.f. building and it is not useable for anything else. Relief will create no harm to the surrounding properties and it will not diminish the value of surrounding properties. It will fit in. You cannot see the cooler. There is ample parking. It is a reasonable use. The hardship is the size of the building.

Wallner asked what other building was on the site. Attorney Sullivan explained it is a house on the lot.

Winters wanted confirmation that he was requesting 2 variances, one for the cooler and one for the enclosure. Attorney Sullivan explained that was correct. The second variance is for a 7x7 or 49 s.f. enclosure. Atty S. correct.

In favor: none.

In opposition: none.

Code: none.

Decision: Carley reviewed the testimony as given.
Spector Morgan: She has no issues with either variance request. It is a unique building. This looks more like a reconfiguration of what is there. This will not diminish property values. She feels it meets the criteria.
Winters: Agrees. It is a unique structure.
Scott: Agree. She commends the applicant as the property is nicely cleaned up.
Wallner: Agree.
Carley: Agrees
A motion to approve both variance requests was made by Spector Morgan, seconded by Scott and passed by a unanimous vote.

61-21 **Jonathan Hutchins for Living Hope Community Church of Greater Concord:** Applicant wishes to repair/replace an existing non-conforming entrance stairway and expand the non-conformity by constructing a connected 210 s.f. handicap access ramp, the purpose of which is to assist those who need an alternate entrance option due to mobility impairments and requests a variance to Article 28-8-5(b)(1), Non-Conforming Structures to do so. Applicant also requests a variance to Article 28-4-1(h), Table of Dimensional Regulations to allow such nonconformity to be situated 5 feet from the front property line where 15 feet is required. These requests are for property located at 31 Summer Street (Penacook) and situated in an RN Residential Neighborhood District.

Testified: Jonathan Hutchins. Gary Darby. Mr. Hutchins explained that in 2000 this was requested and approved. The church didn't have the money to complete the project at that time, so they never went forward with it. They have some congregants that cannot get in the church. They would like to put a handicapped ramp in to accommodate those people. There isn't enough room from the building to the sidewalk. There is only 15 feet. The new ramp would be 5 feet from the sidewalk.

Carley commented that he noticed that the ramp designed doesn't conform to code as an accessible ramp due to the pitch. Mr. Darby explained that they were told that the pitch was okay. It could be 1.5 to 1 pitch. Hall explained to the Chair that the Chief Building Inspector deemed it not an ADA ramp, but a convenience ramp.

In favor: Darrin Greenleaf. It is really important to him to see that they meet the needs of the church. There have been 66 churches for sale in the last year. Whatever they need he is in favor of it. He is a concerned abutter.

In opposition: none.

Code: Ernie Cartier Creveling explained that the existing stairs extend all the way to the sidewalk. The ramp is less nonconforming than the stairs are.

DECISION: Carley reviewed the testimony as given.
Scott: She feels it is a reasonable request. They want to be sure their building is accessible to the public. She has no concerns.
Winters: This is a beautiful church. It is difficult to conform with the current layout. A ramp is important.
Spector Morgan: Agrees.
Wallner: The ramp is less intrusive.
Carley: Agrees.
A motion to grant the request was made by Scott, seconded by Wallner, and passed by a unanimous vote.

51-21 **John J. Flatley Company:** (Recessed Hearing) Applicant wishes to install a third freestanding sign, proposed to be an Electronic Message Center (EMC sign), and requests the following:

1) That the Zoning Board make a determination whether the unshielded illumination from an EMC is prohibited under Article 28-6-7(n), Signs Prohibited, which prohibits an illuminated sign that directs illumination (not reflected light) onto adjacent streets.

Variances to:

1) Article 28-6-9(c)(1), Permitted Freestanding Signs, to allow 3 freestanding signs on the property where a maximum of 1 freestanding sign is permitted,
2) Article 28-6-7(r), Signs Prohibited, to allow an electronic message center type sign when such type of sign is not allowed,
3) Article 28-6-9(a), Table of Maximum Sign Dimensions, to allow a freestanding sign (EMC sign) with a height of 50' and area of 220 s.f., where a maximum height of 20' and maximum area of 100 s.f. is allowed,
4) Article 28-6-9(c)(3), Permitted Freestanding Signs, to allow a freestanding sign to have a horizontal dimension of 22', when a maximum horizontal dimension of 16' is allowed, and
5) Article 28-6-7(n), Signs Prohibited, to permit an illuminated sign that directs illumination (not reflected light) onto adjacent streets. (If ZBA determines relief is necessary),

for property located at 10 Ferry Street on the portion of the property located in an OCP Opportunity Corridor Performance District.

WITHDRAWN

55-21 **Continental Paving:** (Recessed Hearing) Applicant wishes to utilize a road on its property as part of its excavation/quarry business and future development of an asphalt plant on an adjacent property located in the Town of Pembroke, New Hampshire and requests that the Zoning Board overturn the Zoning Administrator's determination that:

1) There is no legal non-conforming right/vested right to utilize the existing private driveway on the property to provide ingress and egress to the existing excavation site and quarry on adjacent land under the same ownership in Pembroke, as it is neither a permitted use in the GWP District nor is there evidence that a legal right to use the property as such was ever established; and
2) There is no legal non-conforming right/vested right to utilize the existing private driveway on the property to provide ingress and egress to a proposed asphalt manufacturing plant on adjacent land under the same ownership in Pembroke, as it is neither a permitted use in the GWP District nor is there evidence that a legal right to use the property as such was ever established,

for property located at 320 Sheep Davis Road in a GWP Gateway Performance District.

If the Board upholds the Zoning Administrator's decision the applicant request the following:

1) Variance to Article 28-2-4(j), Table of Principal Uses, (principal use L-9) to allow an existing private driveway to be used as access to and in support of an existing earth materials excavation and quarry site on adjacent property located in the

Town of Pembroke, when the Excavation of earth materials or quarrying of stone is a use that is not allowed and has not been established on the subject property, and

2) Variance to Article 28-2-4(j), Table of Principal Uses, (principal use L-4) to allow an existing private driveway to be used as access to and in support of a proposed asphalt manufacturing plant on adjacent property located in the Town of Pembroke, when Materials recycling and processing is a use that is not allowed and has not been established on the subject property,

for property located at 320 Sheep Davis Road in a GWP Gateway Performance District.

Testified: Attorney Morgan Hollis whose firm is in Nashua. There are 2 Administrative Appeals. Depending on the decisions, there may be 2 variance requests.

Carley explained that the question is if the Zoning Administrator is correct or incorrect? And is it a vested right for the owner.

Carley asked Cartier-Creveling if he would like to fill the board in on the rationale as to why this was decided as it was. Cartier-Creveling explained that when Craig Walker did the research on this project, he found no evidence of any permit ever issued for the excavation project. There is a period of time that represents an abandonment under the Zoning Ordinance. If the use is abandoned for that 2 year period, there was no vested right as there was no permit. Even if there was, the use was abandoned and at that point the use of a road used to service a project in Pembroke was not an allowable use. Spector-Morgan asked if this was just for use of the road? And is the excavation happening in Pembroke? Cartier-Creveling said that was correct.

As Carley he understands it, the City's position is that the operation was started without a special exception, which it would have required. When it was in process it was in violation of the ordinance. Cartier Creveling answered that was correct. Carley went on to say that under the ordinance it was not a legal use of the property and it did not create any legal vested rights to use it. Cartier Creveling stated that was correct. The asphalt plant is in Pembroke.

Attorney Hollis testified. Request #1 of Overturning the Zoning Administrator's determination. This property has been utilized for excavation and driveway for over 35 years. Driveway Permits were issued by the State of NH. There have been letters back and forth from the City of Concord about this use. The land owned by Mr. Ladd was all being mined; over 350 acres. Some of the property is in Pembroke. They are coming forward with an asphalt plant in Pembroke which was a permitted use. In 2010 the driveway to an asphalt plant was not a permitted use in the City of Concord. They asked the Town of Pembroke for it and the Court ruled it was not permitted in Pembroke. The zoning changed and going forward Pembroke says the plant is now a permitted use. Concord denied them access. They have received a determination that they cannot have an asphalt plant and they cannot use the roadway as it was never lawfully permitted. They are here tonight to prove that the driveway was there 50 years and the property has been used for excavation for 40 years. They think the Zoning Administrator is in error and they have a vested right to use the driveway. Within the booklets he submitted, there is a memo to Carlos Baia from Craig Walker, dated August 25, 2010 outlining the history of the property and its use. The Zoning Board of Adjustment granted, on March 19, 1958, permission for a gravel pit for 2 lots. It was a nonconforming use. He believes the serious error in Craig Walker's determination is that he stated that no permit was ever issued. But in 2010 he says a permit was issued. Their argument is that a special exception was issued, not for this exact piece but for 2 parcels north of this piece of property. All the land at that time was owned by Levi Ladd. He submitted maps showing the layout of the properties. Levi Ladd owned all land around the property. This use started in 1960. In 1980 there was continuous excavation on the sites. The important dates are 1979 as RSA 155-E:9 was passed which exempts all property owners from local regulations except if a special exception is required. The denial is based on use of gravel operation and it was never permitted. He's shown there is a permit issued as it was referenced in his 2010 letter. It was never abandoned. Was the special exception enough to prove that they had a permit? If so was the driveway part of that legal use. RSA 155-E was referenced. Attorney Hollis argues that Mr. Walker mis-evaluated it. RSA 155-E:1 was cited. RSA 155-E:2 was cited. He argues that he was compliant when the project first began. There was never any notice or hearing which allows regulator to say stop here. That was never done. Therefore, Levi Ladd lawfully continued onto adjacent property. If the property is contiguous you can continue to go forward. The burden is on the applicant to show that activities were continuing as of 1979, that proposed future excavation was intended prior to 1979 and prove the continuous operation does not have adverse effect on neighborhood. RSA 155-E basically says that town boundaries meant nothing up until 1989. There was no notice from anyone in Concord saying this was abandoned. There were letters from Ham Rice, the City's then Code Administrator regarding reclamation. There was something from the Army Corp of Engineers saying that Levi Ladd owns a sand and gravel operation and most of his land is being utilized as such. There is a map showing that there is an existing road/drive in 2010. Robert Cole was the President of Concord Sand and Gravel from 1985 to 2010. Attorney Hollis submitted a signed affidavit. It is in the case file for review. 1985 they were excavating property owned by Levi Ladd who was operating under a special exception granted in 1958. In 2010 the driveway was in existence and used by Continental Paving to access Pembroke property from Concord. The continuous operation does not have an adverse impact on the neighborhood. The property is taxed as a sand and gravel property. Concord's Planning Board was satisfied and happy with their expansion and approved it. There was no firm position that it would have an adverse impact on the neighborhood. The roadway was used for driving trucks in and out of the property was never abandoned. It's continued to this day. It was never abandoned. The rest of the pit is finished. Contrary to what Mr. Walker wrote, it was permitted, it was contiguous land, the expansion occurred without objection. No notice was given or asked for. Not adverse to neighborhood. The driveway was set up by an easement. The driveway can be used without an adverse impact. The driveway is an integral part of a grandfathered use and was not abandoned. The reason they cannot travel out North Pembroke Road it that it is a 10% slope. There is no landing platform at the top. The bridge is being repaired and replaced, but that road is not where you want to be with that grade.

Request #2 of Overturning the Zoning Administrator's determination regarding the asphalt plant. This decision hinges on a determination that the owner didn't meet his burden of nonconformity to use the road as ingress and egress to the quarry and proposed asphalt

manufacturing plant. They maintain this interpretation is an error. It is not a use. They submitted exhibits showing the use of a gravel driveway.

Board member Scott wanted to take request #1 and #2 individually all the way through to decision. The Board conceded.

Carley advised the board that they need to decide if they agree with appellant or Mr. Walker. The key point in his case is that state law allowed gravel pits in 1979. When the law said "contiguous", that implied that if you got a permit to mine gravel on a piece of property, every piece of property that bordered that property was eligible to be excavated so long as it was under the same ownership as the permitted parcel.

Comments from Code: Hall and Cartier-Creveling had none. Walker's letter is clear that the use was abandoned and that the limits of the town restricted the use into Pembroke by right. He didn't disagree they could expand in Concord, but not into Pembroke. Carley asked Attorney Hollis if they were using that road to get to Pembroke. Attorney Hollis said they were, since 1985. The statute that Mr. Walker was relying on was amended in 1989.

Scott asked if the driveway was still being used. Atty Hollis said it was being used. Continental Paving owns both properties.

Winters: This is super complicated, both factually and legally. Walker overlooked the fact that as of 1979 Mr. Ladd had a right, regardless of town lines, to continue to use the property to mine for gravel. Walker is no longer available to speak to the Board. He feels he doesn't feel he has enough information.
Spector-Morgan: Agrees with Winters. She noted the 2010 memo referencing the 1979 law. This road has clearly been used for excavation since the '50's. The land is contiguous and thinks the road could still be used.
Scott: She is familiar with the operations as she was the Planner in Pembroke for a time. She was not in agreement with Walker's determination reading the packet. It hasn't been abandoned.
Wallner: Same. References were made to 3 special exceptions. He's taking that as fact.
Carley: In Walker's letter of August 2020, tab 1, section II, he says there is no evidence that the property owner ever established a legal right in accordance with the Concord Zoning Ordinance. But what he is hearing that he did establish the quarry. He's inclined to support a motion not to uphold the Zoning Administrator's interpretation as he believes he was in error and a variance is not required.

Spector-Morgan made the motion to not uphold the Zoning Administrator's interpretation, which was seconded by Wallner and passed by a unanimous vote.

Asphalt: Attorney Hollis explained that Mr. Walker made a determination in a letter to Carlos Baia. Activities are wholly separate from excavation of earth materials. Pembroke approved a plan for an asphalt plant. They have a plan and are ready to go. Carlos Baia's letter was an official determination which was summed up in paragraph 4 of his letter. Carley asked if Mr. Walker issued a similar memo. Attorney Hollis said he did not. This is a flexible easement. The driveway is not the principal use of the Concord Sand and Gravel lot. Access to the asphalt plant does not make the driveway a primary use. He referenced the Huckleberry Case. Trucks go back and forth; it is a driveway. There is a state permit to allow trucks going from Route 106 to Pembroke. The total gain of trucks on that site would be 8%. Just because you have a driveway doesn't mean it is the use of the property. They are asking to allow use of the driveway to lead to another piece of property. He also referenced Granite State Minerals Case. That case talks about expansion of a nonconforming use. Tab 9 of the materials he submitted shows the Planning Board's concerns. On the Concord property, there is no manufacturing taking place. It is simply a driveway. Same trucks and different material are utilizing that driveway. Liquid asphalt is not a hazardous material. They do not believe it is a principal use. They do not think they need a variance. They feel that the Zoning Administrator made an incorrect assumption that it wasn't a vested right.

Code: Hall explained that the driveway was looked at as a principal use by the City of Concord. Walker restricted the drive for Concord only. Carley asked if the board were being asked to confirm that the driveway is not a principal use and the Huckleberry case was the supporting legal case. Spector-Morgan noted that she was involved in Huckleberry case and it is the exact same thing.
Scott: Regardless of Huckleberry Case, her opinion is that they have already decided the driveway is there. She sees no difference between using it for gravel or asphalt.
Spector-Morgan: The use of a road is not the use of a property. There is no manufacturing happening on the road. It's an accessory use. It is legal nonconforming.
Winters: In Walker's analysis he doesn't parse out the different reasoning between asphalt and gravel.
Wallner: Agrees.
Carley: Huckleberry case is quite persuasive. He doesn't believe there is anything in the ordinance that says a driveway cannot go anywhere you want so long as it does not violate the requirements for lot coverage or setbacks.
A motion to not uphold the Zoning Administrator's determination was made by Spector-Morgan, seconded by Winters and passed by a unanimous vote.

57-21 **20-22 Church Street, LLC:** (Recessed Hearing) Applicant wishes to merge two adjoining lots, 20-22 Church Street and 26 Church Street, resulting in a single lot maintaining two existing principal residential uses and maintaining the existing number of driveways. Further, the applicant wishes to expand the use of the merged lot to create a new parking area for the benefit of the residents, their guests, and to nearby property owners. Therefore, the applicant requests variances to:

1) Article 28-2-4(h), Multiple Principal Uses on a Single Lot, to allow a merged lot that contains two existing principal uses, a Single-family detached dwelling (principal use 28-2-4(j), use A-1) and a 4-unit, legal non-conforming Multi-family dwelling (principal use 28-2-4(j), use A-4), where one principal use is allowed,
2) Article 28-7-8(b), Separation of Driveways in Residential Districts, to allow the continued use of three driveways on the merged lot, where only two driveways are allowed, and
3) Article 28-4-1(h), Table of Dimensional Regulations, to allow a maximum lot coverage of 52%, where a maximum lot coverage of 50% is allowed, and
4) Article 28-2-4(h), Multiple Principal Uses on a Single Lot, to allow an additional (third) principal use on the merged lot to provide for the proposed establishment of a Public or commercial parking lot (principal use 28-2-4(j), use K1), where only one principal use is allowed,
5) Article 28-2-4(j), Table of Principal Uses, to allow for the operation of a Public or commercial parking lot (principal use K1), where such a use is not allowed, and
6) Article 28-7-7(h), Surfacing and Drainage, to allow the use of an alternative to the paved surface, where a paved surface is required,

For property resulting from the merger of 20-22 Church Street and 26 Church Street, in an RN Neighborhood Residential District.

Chairman Carley recused himself from this case as he did not sit for the original hearing. He explained to the applicant and his attorney that if they were willing to be heard by a four member board, they could move forward this evening. He also explained that with a four member board if the vote was not in the applicant's favor, it would not constitute grounds for an appeal under state statutes. The applicant and his attorney agreed to move forward with a four member board.

Wallner was appointed Acting Chairman. This case was heard by a four member board which included Wallner, Scott, Winters, Spector-Morgan.

A motion to open the recessed case was made by Winters, seconded by Scott and passed by a 4-0 vote.

Testified: Attorney Peter Imse of Sulloway and Hollis. Fred Potter.

Attorney Imse was able to put together a short letter to respond to Mr. Walker's communication. At the last meeting they had not received the landscape renderings. He submitted those renderings today. Several of the parking spaces back up to the street with no screening and they will be screened. They also have another abutters letter in support, which they submitted. Walker raised the concern that representations were made in prior hearings regarding 135 N State Street, the former Governor's Manse and carriage house. They reviewed the records. The application process for redevelopment of the site span the period of 2018 and 2020. Mr. Chorlian handled the early years of the application and last year. There is nothing that shows the applicant made no mention that they would never need the parking. If a board imposes conditions to a variance, the applicant is bound by it. An applicant always has the right to come back to the board and say things have changed and they need more relief. Mr. Walker's letter isn't supported by the law.

Fred Potter testified. He's confident in the record. He wanted to thank Mr. Walker for meeting with him. Spector-Morgan also stated that Mr. Walker also reached out to her. Potter explained that as the parking currently exists, there is no way to make it better. They showed the map of what the lot looks like now and how it will look after.

Cartier-Creveling submitted a letter from an abutter to the Board.

In favor: James Dougherty. He testified last month. Mr. Potter provided him with the landscape plans, which the Board hasn't shown. The benefits to him is that it will change the traffic flow. He abuts 26 Church Street. He cannot see the parking lot from his house. His opinion is that the landscape plans are better than what is there now. He thinks it's in the best interest of the neighborhood to allow the parking lot to go forward. It will look better.

In opposition: Lyndsay and Natalie Harrington, 19 Church Street. Mr. Potter dropped off the rendering yesterday. She submitted the views from her house via photographs. Hardship is still a question. Their general concern is that a large parking lot will alter the character of the neighborhood. Mr. Potter has done a nice job with other projects in the neighborhood. This will impact the values of their property. Generally, its used by residence and anyone cutting through to get to other side streets. There is not a ton of traffic right now. The board asked last time how many spots would be needed and they shared 10. So, this lot would hold mostly commercial parking. They have safety concerns due to the increased traffic. The entrance to this driveway is directly across from their driveway.

Matthew Vicinanzo, 21 Church Street. He also submitted a letter from himself and his wife. Other developments Mr. Potter have done in the neighborhood have turned out nice. Overall, they are happy with the developments in the neighborhood. They have traffic concerns as he has 2 small children. He doesn't want to lose the residential character. They do not want to lose their view of Old North Cemetery, which is directly across from their home.

Code: Cartier-Creveling clarified that they will only have 1 driveway when done.

Public hearing closed.

DECISION:

Spector-Morgan has no problems with requests #1 and #2 to permit merged property, condos and driveways as there is case law. As far as request #3 for a commercial parking lot in a residential area, there is no hardship. Supreme Court has held that isn't a hardship. It will change the character of the neighborhood. It could diminish property values. She's not concerned with the 52% lot coverage.
Winters: Agrees. He doesn't doubt the good faith of Mr. Potter. This is a situation where it's a transitional neighborhood, but in that tucked back side street it is really residential. There is a potential to have extra traffic. He feels it will change the character of the neighborhood.
Scott: Agrees. The first 2 requests are just about ownership. She does agree that creating a commercial use for an off site property is creating its own hardship. It's not the uniqueness of the land. She has a hard time supporting this request.
Wallner: He feels it will change the character of the neighborhood.
A motion to approve request #1 and #2 was made by Scott, seconded by Spector-Morgan and passed by a 4-0.
Request #4: A motion to deny the request was made by Spector-Morgan as there was no hardship, granting would violate the spirit of ordinance, it is contrary to the public interest, it would diminish property values, and no substantial justice would be done. Motion was seconded by Scott and passed by a 4-0 vote.
Request #3: A motion to deny the request was made by Winters has he found no hardship. Motion was seconded by Spector-Morgan. No vote was taken.

Attorney Imse stated that his client was willing to withdraw requests #3, #5, and #6. No further action was taken on those requests.

MINUTES:
A motion to approve the Minutes from 10/6/21 was made by Scott, seconded by Winters and passed by a 4-0 vote.
A motion to approve the Minutes from 10/13/21 was made by Scott, seconded by Winters and passed by a 3-0 vote.

Motion to adjourn the meeting was made by Spector-Morgan, seconded by Scott and passed by a unanimous vote.

Respectfully submitted,
Rose M. Fife, Clerk
Zoning Board of Adjustment