



Town of Hopkinton

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HOPKINTON ZONING BOARD OF ADJUSTMENT MINUTES SEPTEMBER 3, 2014

Chairman Janet Krzyzaniak opened the Hopkinton Zoning Board of Adjustment meeting of Wednesday, **September 3, 2014, at 5:30 PM in the Hopkinton Town Hall**. Members present: Toni Gray, Charles Koontz, Gregory McLeod and Jessica Scheinman.

Note: The Zoning Board of Adjustment's Rules of Procedure was available during the application process and additional copies were available at the meeting for the general public.

I. Application(s).

#2014-5 Christian Nardi/Lisa Porterfield Variance to allow live entertainment at the café located at 14 Maple Street. The property is owned by Rose View Properties LLC, shown in the VB-1 district on Tax Map 101, Lot 7. The application was submitted in accordance with Zoning Ordinance 3.6.1.

Mr. Nardi and Ms. Porterfield addressed the Board explaining that they propose to have live entertainment and an open mic/stage night for the Town at their restaurant. Mr. Nardi lived in New Orleans for many years and learned that in coffee houses entertainment is a great way to bring people together.

For the record, the Applicant's response to the criterion for a Variance as outlined in Section XV of the Zoning Ordinance was as follows:

- 1. The proposed use would not diminish surrounding property values because:**
"Entertainment will take place indoors. The new building is well insulated and has new windows that will keep noise levels low. The entertainment will be similar to what the Covered Bridge Restaurant currently provides and our location is within one-half mile of the restaurant. We are not looking to provide big rock concerts."
- 2. Granting the Variance would not be contrary to the public interest because:**
"Allowing entertainment would benefit the community as a whole. For example: Open mic night gives local residents a common place to gather and share their talents and learn from one another."
- 3. By granting the Variance substantial justice would be done because:**
"By not allowing local residents to express their talents with each other would be an injustice to the community as a whole and does not foster comradery."
- 4. The spirit and intent of the Ordinance will not be broken by granting the Variance because:** "Currently, at the Covered Bridge Restaurant entertainment is offered and they are located less than one-half mile from our location. The spirit of the Ordinance has not been negatively affected by this use, so we do not feel that we would negatively affect anyone."
- 5. Literal enforcement of the Ordinance results in unnecessary hardship.**

- (a) **For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area.**
- (i) **No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** “The general purpose of the Ordinance is to promote convenience and provide for the welfare of residents. In particular, the goal is for the Village to be resident and pedestrian friendly. By allowing us to offer local entertainment in this new building we will enhance the community spirit and comradery of local residents.”
- (ii) **The proposed use is a reasonable one.** “We are located in a commercial district with a new building that has a fire sprinkler system, new windows and insulation. Many restaurants in downtown communities offer live entertainment. Such as the Covered Bridge Restaurant, the Barley House in Concord, and the Country Spirit in Henniker. So, offering entertainment at a restaurant is not uncommon.”

Mrs. Gray inquired as to whether the Applicants will obtain a liquor license. Mr. Nardi replied no, but stated that they do plan on getting a beer and wine license. They will not be operating in a bar setting, but rather in a table setting. The business will still remain as a coffee house with one beer on tap and possibly two wines, along with the possibility of champagne served during brunch. Similar to the way Dimitri’s operates their business with a restriction of three drinks per person. One cannot come in for a drink only. They must have food in order to be served alcohol.

Ms. Scheinman inquired as to the hours of operation for the Café at its new location. In response, Mr. Nardi stated 6:03 AM until people go home. They do not intend to be open later than 11:00 PM; however, if there is a crowd of people at the Café or bus of people from I-89 that stop in they will stay open as later as necessary to feed them. There is no specific end time for the business. Ms. Scheinman asked whether the times would be the same whether or not they offering open mic night. Mr. Nardi replied yes, indicating that the business will be open seven days a week beginning at 6:03 AM with the possibility of closing a total of five days a year.

Mrs. Gray asked for clarification concerning the hours of operation. Mr. Nardi responded by saying “6:03 AM until”. He then suggested that the latest time would be until 1:00 AM because he believed that 1:00 AM is the mandated closing time under State law.

Chairman Krzyzaniak questioned whether the Applicants were asking to be open seven days a week until 1:00 AM. Mr. Nardi responded no, stating that they are asking for permission to have live entertainment such as a jazz brunch possibly once a month and on Tuesdays have open mic night. Some nights it may be poetry, rather than music. Mr. Nardi did not want to limit the number of days for entertainment should someone have a birthday or other occasion in which entertainment would be preferred.

Mr. Nardi then presented a photograph of the area within the building in which they are proposing the entertainment.

Mr. McLeod questioned the reason that the Applicant is before the Board, suggesting that it may be because of the licensing requirements of the State. Mr. Nardi replied no, stating that it was his

understanding that prior to the building being built it was not zoned for entertainment, so now they are requesting permission.

Mr. McLeod stated that the Zoning Ordinance is silent with respect to live entertainment, except for the Overlay District for the Fair where concerts are actually mentioned. He thought that perhaps the reason that live entertainment is not addressed in the Ordinance is in an effort to not micro-manage a private entity's business practice/operation. Mr. McLeod further stated that in reviewing New Hampshire's Revised Statutes Annotated the only reference to live entertainment is under the liquor law regulations.

Ms. Scheinman asked Mr. McLeod if he was suggesting that the entertainment is ancillary to the use of the restaurant. Mr. McLeod responded yes, suggesting that the request could require a special exception as a commercial use, rather than a variance. Mr. McLeod suggested that appealing the Selectmen's decision as an ancillary use to the restaurant would have been appropriate. Mrs. Gray believed that if the use is not mentioned in the Zoning Ordinance then it is not permitted therefore requiring a Variance. Mr. McLeod replied yes, but stated that the Zoning Board of Adjustment is granted "broad powers" in granting Variances. Ms. Scheinman believed that the Webster's definition of a restaurant is narrow.

Mr. Koontz referenced Table of Uses 3.6.F.14 which permits indoor or outdoor for profit recreation establishments or clubs by Special Exception in the commercial district. He suggested that this particular provision may be a consideration to allow entertainment.

Ms. Porterfield stated that while Karen (Robertson) had explained the option of the Administrative Appeal she (Ms. Porterfield) had already began the Variance process.

Public testimony was opened.

Kim Burgess on behalf of the Contoocook Methodist Church addressed the Board with questions concerning the Sunday bunch. In particular, Ms. Burgess inquired about the hours of operation on Sundays and whether there would be music during that time. In response, Mr. Nardi stated that Sunday brunch would be from 9:00 AM to 1:00 PM. The building is air conditioned and heated so most likely the windows will be closed during that time. Entertainment during that time will not include open mic.

Mr. Koontz asked Mr. Nardi if it was his opinion that members of the Church would not be able to hear the music. Mr. Nardi replied yes.

Ms. Scheinman inquired as to the hours of church service on Sundays. In response, Ms. Burgess stated from 10 AM to approximately 11 AM and as late as 11:15 AM.

Louisa Porter, owner of the abutting property at 881 Main Street, addressed the Board explaining that her buildings consist of residential apartments. She wanted to be sure that her tenants aren't bothered by the noise, especially late at night.

Joan Day, owner of the abutting property at 12 Maple Street, questioned whether food would actually be served until 1:00 AM. She noted that most restaurants do not serve food until 1:00 AM, unless they have liquor at the restaurant. Mrs. Day expressed concern with the potential effects that noise from entertainment may have on her tenants, especially given the fact that they have young children.

Ms. Scheinman questioned how parking would be addressed when people come to the restaurant during music event. In response, Mr. Nardi stated that there are six parking spots at the restaurant and plenty of municipal parking available in the area.

Mr. Koontz asked Mr. Nardi if he was aware that there is a Noise Ordinance. In response, Mr. Nardi questioned whether the Ordinance had a restriction of 10:00 PM. Mr. Koontz replied no, indicating that the Noise Ordinance has a limitation with respect to sound decibels. He suggested that Mr. Nardi review the Ordinance.

Ms. Scheinman questioned whether there would be any amplification of the music that is to be played at the restaurant. Mr. Nardi replied yes, indicating that the space to be utilized for live entertainment is limited to approximately four square feet. Ms. Porterfield explained their intentions to not have the music so loud that their patrons cannot hold conversations or to a point that they are annoyed and feel that that have to leave the restaurant. The main focus of the restaurant is the food. Live entertainment will be part of the atmosphere.

Ms. Gray questioned the number of tables that will be in the restaurant. In response, Mr. Nardi explained that they have not actually finalized the placement of the tables; however, he anticipates between 30 and 40 seats with standing room at the pastry counter.

Mrs. Rose wanted to remind people of the activities that had previously taken place at the property when it was a community center.

Public testimony was closed.

Chairman Krzyzaniak expressed concern with two (2) restaurants and a church being located in close proximity to one another and the impact that it will have on traffic in the area. Additionally, she expressed concern with the potential noise level of entertainment regardless of the zoning district; noting that there are many residential units in the area. Furthermore, a use operating with no limitations with respect to hours of operation is unusual. Lastly, she advised of a report made to her of parties that were taking place at the café in which there were people outside drinking, which was especially concerning.

Mrs. Gray didn't believe that the Applicant had successfully addressed the requirements to be granted a Variance. She noted that a Variance is not easily obtainable and that perhaps that is why Karen (Robertson) had also suggested the Administrative Appeal.

Mr. McLeod asked for clarification as to what aspects of the Variance the Applicant has not met. Mrs. Gray responded by suggesting that the proposed use (noise) would impact the surrounding property values. She then suggested that granting the Variance would not be contrary to the public interest; nor would excess noise or parking. Ms. Gray disagreed with the Applicant's statement that denying residents the ability to express their talents would be an injustice to the community. With respect to the Applicants' reference to the Covered Bridge restaurant having live entertainment, Mrs. Gray noted that the Covered Bridge restaurant does not have permission for entertainment at their establishment. Mrs. Gray disagreed with the Applicants' assertion that disallowing music in an establishment is a hardship. Especially given the fact that the Applicants have indicated during their presentation that "it is the food that is important" to the restaurant.

In response to Mrs. Gray's comments, Mr. McLeod stated that he didn't agree with Mrs. Gray's opinion concerning the Variance criteria. He believed that the desire of the owners of the business to offer their customers an enhanced experience doesn't diminish surrounding property values unless there is an issue with noise. Furthermore, Mr. McLeod did not believe that the matter of parking is a matter for the Zoning Board of Adjustment. He noted that the Applicants had already addressed the parking with the Planning Board. Lastly, Mr. McLeod wasn't convinced that a Variance should be required for entertainment other than the fact that when the Applicants try to secure a liquor license from the State they will require that permission is obtained from a Town entity, which could be the Select Board. Finally, Mr. McLeod suggested that substantial justice would be served by allowing entertainment given the fact that the Ordinance does not address live entertainment with the exception of concerts at the fairgrounds. Mr. McLeod then expressed his opinion with respect to the remaining criteria to be granted a Variance; suggesting that while the Applicant's response to the criteria may not be sufficient there are other specific conditions in which the Board could grant the Variance, such as imposing a condition with respect to the hours of entertainment in an effort to elevate the concerns of abutters.

Ms. Scheinman questioned whether it would be feasible for the Applicant to go back and reconsider the reasons for which they submitted their application to the Board. Other members of the Board concurred with Mr. Koontz suggesting that the Applicant consider applying for an Administrative Appeal and/or Special Exception.

Mr. McLeod suggested the Board could table the application to allow the Applicants to seek an alternative remedy to the situation. The majority of the Board disagreed. Instead, the Board discussed the Applicants ability to withdraw their application.

Mr. Koontz stated that the matter of noise is addressed under the Noise Ordinance in which the Applicant should be aware. Chairman Krzyzaniak agreed, but stated that she would prefer that the Applicants come back before the Board after operating the restaurant for at least six months so that the Board can determine how the use of on-site parking and the municipal parking is working. In response to Chairman Krzyzaniak's comments, Ms. Scheinman noted that the Applicants already have permission to operate the restaurant. She believed that whether or not there is entertainment would have the same effect on the traffic in the area. Chairman Krzyzaniak agreed, but suggested there could be more people because of the music and therefore people may decide to park alongside Maple Street rather than at the municipal parking lots.

Ms. Scheinman concurred with what was previously stated by Mr. McLeod. She did not believe that the entertainment would impact the traffic in the area by way of creating traffic congestion. She would prefer the Applicant apply for an Administrative Appeal as an ancillary use to the restaurant or Special Exception under another provision of the Ordinance.

Chairman Krzyzaniak readdressed the Applicants asking if they wished to move forward with their request for a Variance. In response, Mr. Nardi suggested that they should withdraw the Variance application and operate the restaurant "doing whatever it takes" to bring people in such as music, video games and television. Mr. Nardi then questioned whether he could resubmit the application for a Variance at a later date. Chairman Krzyzaniak replied yes.

In response to Mr. Nardi's comments concerning withdrawal of the Variance and the operation of the restaurant, Ms. Scheinman noted that in the interim the Select Board has denied the request for entertainment. She informed the Applicants that if they wish to have entertainment they would

have to apply for an Administrative Appeal, reapply for the Variance or speak with Karen to determine whether there is a provision in the Ordinance for Special Exception.

At this time, Mrs. Gray recommended withdrawal of the Variance. By withdrawing, the Applicants would preserve their rights to reapply. Should the Applicants wish to submit an application for Administrative Appeal, Chairman Krzyzaniak explained the process by which the Applicants would come before the Board of Adjustment to explain why the Select Board erred in denying their request.

Following discussion, Mr. Nardi and Ms. Porterfield withdrew their application for Variance.

II. Review of the Minutes and Notice of Decision of the June 3, 2014 meeting.

Mr. Koontz, seconded by Mr. McLeod, moved to **APPROVE** the Minutes and Notice of Decision of June 3, 2014. With five members voting, four voted in favor (Gray, Koontz, McLeod and Krzyzaniak) and one voted in abstention (Scheinman).

III. Adjournment.

With no further business to come before the Board, the meeting was **ADJOURNED** at 6:45 PM. The next scheduled meeting of the Zoning Board of Adjustment is Tuesday, October 7, 2014, at 5:30 PM in the Town Hall.

Karen L. Robertson
Planning Director

Pursuant to New Hampshire RSA 677:2, any party to the action or proceedings, or any person directly affected thereby, may apply to the Zoning Board of Adjustment for a rehearing. Application, in writing, must be submitted to the Zoning Board of Adjustment within thirty (30) calendar days beginning the date upon which the Board voted to approve or disapprove the application. Such a request must set forth the grounds on which it is claimed the decision is unlawful or unreasonable. The Board must decide to grant or deny the rehearing within thirty (30) days.