



Town of Hopkinton

Planning Department

330 Main Street, Hopkinton NH 03229-2627 - (603) 746-8243 – planzone@hopkinton-nh.gov

HOPKINTON ZONING BOARD OF ADJUSTMENT MINUTES JANUARY 4, 2022

The Hopkinton Zoning Board of Adjustment held a meeting on Tuesday, January 4, 2022, at 5:30 PM in the Hopkinton Town Hall, 330 Main Street, Hopkinton. Members present: Acting Chairman Andrew Locke, Jessica Scheinman (remotely), Eric Buck, Kristen Cummings, and Thomas Lipoma. Staff present: Planning Director Karen Robertson.

Motion made by Mr. Buck, seconded by Mrs. Cummings, to allow Ms. Scheinman to join the meeting remotely. Motion carried unanimously. Roll Call: Lipoma-yes, Cummings-yes, Buck-yes, and Locke-yes.

I. Roll Call. Lipoma, Cummings, Buck, Scheinman, and Chair Locke.

II. Applications.

#2022-02 Drew Pond Properties, LLC Variance from Zoning Ordinance 4.2 Table of Dimensional Requirements to establish a self-storage facility with less than the required front and rear setbacks, located off Bound Tree Road, Tax Map 221, Lot 75, B-1 district.

The Applicant delayed review of their application to, tentatively, the April meeting. As a result, abutters will be renotified.

#2022-01 Cedar Street Holdings, LLC Variance from Zoning Ordinance 4.2 Table of Dimensional Requirements to construct a deck with less than the required side setback and exceed the maximum lot coverage, 16 Cedar Street, Tax Map 101, Lot 18, VB-1 district.

Owner Brian Cressy introduced Attorney Maria Dolder of Hebert and Dolder, who presented on behalf of the Applicant.

It was noted that Hopkinton's definition of "Building Coverage" excludes unenclosed porches. As a result, the Variance to exceed the maximum lot coverage is not necessary. The Board agreed that should the Applicant later decide to screen-in the proposed deck, it would then be considered an enclosed structure requiring an application to the Zoning Board of Adjustment.

Attorney Dolder presented the application for Variance to construct a deck having less than the required side setback. The property is within the commercial district and is a corner lot having two frontages and one side. The side yard abuts the Contoocook River. The existing building is currently being used as a restaurant which is a use permitted in the commercial (VB1) district. The Applicant intends to renovate the current

Subject to review and approval.

restaurant and, in doing so, is proposing to construct a deck to provide for outdoor seating. The Variance is to allow the deck to be built along the water.

Attorney Dolder reviewed the criteria for a Variance as outlined in Section XV of the Zoning Ordinance.

1) The proposed use would not diminish surrounding property values because:

"The use itself is not only permitted by right within the VB-1 zoning district but it is already established on the property. The property is a corner lot; therefore, it has two frontages and one side yard. In the VB-1 district, there is no required front yard setback. Although the required side yard setback is 10 feet, in this specific case, the entire side of the property abuts the Contoocook River. Furthermore, the general area surrounding the property is commercial in nature. Accordingly, a waiver of the side yard setback will not have any effect on any neighboring property. On the other hand, the Applicant is proposing an extensive renovation to the existing building, with the addition of outside seating, all of which will increase the value of the property and the neighboring area. Given that the relief being requested shall not have any adverse impact to the neighborhood, but instead is beneficial to the area and the community, the Variance relief would not diminish surrounding property values."

2) Granting the Variance would not be contrary to the public interest because:

"To be contrary to the public interest, the Variance must unduly, and in a marked degree conflict with the Ordinance such that it violates the Ordinance's basic zoning objectives. To ascertain whether granting the Variance would violate basic zoning objectives, you must examine whether it would alter the essential characteristics of the neighborhood or would threaten the public health, safety or welfare of the public. The Applicant's requested Variance does neither. As stated, the use itself is not only permitted by right within the VB- zoning district, but it is already established on the property. The general area surrounding the property is also commercial in nature and shall not be impacted by the proposed deck. In fact, in the VB-1 district, there are no front setback requirements. Since the property is a corner lot, having two frontages, it is not required to meet any setbacks on the portion that is along the roadway. The only area of the property that is required to comply is the side yard, which abuts the Contoocook River. Therefore, a reduction in the required side setback will not have any impact on the area. The granting of the relief requested shall have no impact on public safety, health, or general welfare of the public and will not be contrary to the public interest. Instead, granting the Variance will allow the property to be utilized in a reasonable manner, consistent with the intent of the Zoning Ordinance."

3) By granting the Variance, substantial justice would be done because: "One of the guiding rules in evaluating substantial justice is that any loss to the individual that is not outweighed by a gain to the public is an injustice. The Applicant clearly satisfies this requirement. The use itself is not only permitted by right, but it is already established on the property and fits in with the general commercial uses in the area. Accordingly, it will not have any adverse impact on the neighborhood. Since the portion of the property where the setback relief is requested abuts the

river, such a reduction in the required side setback will not have any impact on the area. Similarly, the addition of outside seating for restaurants has become a critical issue and important to the public welfare. By granting the Variance relief, substantial justice will be done since a denial would be a tremendous loss to the Applicant without any justified gain to the public.

Substantial justice is also achieved by granting variances that do not adversely impact nearby property owners and which allow a property to be used reasonably. Even with the requested relief, the difference between that required under the Zoning Ordinance and that being proposed is so minimal that it shall not create any adverse effect on the adjoining neighborhood. With the pandemic, outside seating has become increasingly important for restaurants and their customers. Given the configuration of the lot, the Applicant cannot reasonably accommodate outside dining while maintaining the side setback and the current lot coverage. Since the proposed use will not adversely impact nearby property owners but alternatively will allow the property to be used reasonably, granting the relief requested would result in substantial justice."

- 4) **The spirit and intent of the Ordinance will not be broken by granting the Variance because:** "Once again, the use itself is permitted by right under the Zoning Ordinance and is already established on the property. The general area surrounding the property is commercial in nature and consistent with this use. Although the Zoning Ordinance does require a 10-foot side setback, in this case, the entire side yard of the property abuts the river and shall have no impact on surrounding properties. The deck will be constructed along the waterfront and shall provide critical seasonal outdoor dining. As a result, there is no conflict with the proposal and the intent of the Zoning Ordinance. One of the general purposes of the Zoning Ordinance is to encourage the most appropriate use of land throughout the Town. In this particular case, granting the relief would be consistent with such a purpose."

- 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 property is certainly unique in several ways. First of all, as already stated a number of times, the property is located within the VB-1 district where the proposed use is permitted by right and in fact, is already established on the property. The lot is a corner lot, which has two frontages and one side, which abuts the Contoocook River. Even though the lot itself is larger in size than the .17 acres required in the Zoning Ordinance, given the existing location of the building, the required side setback unreasonably impact the Applicant's ability to construct the deck and provide outside dining. With the pandemic, outside seating became critical for restaurants and has remained an important feature for customers, and their conform. It is also important to once

again point out that the area of the property where the setback relief is being requested directly abuts the river and shall have no impact on the neighboring area. On the other hand, the proposed use will allow the Applicant to utilize the property in a reasonable manner. The relief being requested by the Applicant is the minimum relief required in order to allow the Applicant to reasonably use the property and to provide critical outside seating. It is also important to note that even with the proposal, the proposed use will not alter the essential characteristics of the neighborhood or the property. Accordingly, there is no fair and substantial relationship between the general purpose of the Zoning Ordinance and the specific restrictions on the property."

ii) The proposed use is a reasonable one. "As stated, the use of the property is permitted by right under the Zoning Ordinance and is already established on the property. The addition of outdoor seating in connection with a restaurant is not only reasonable but has also become an important feature. The Applicant cannot add outdoor seating without encroaching into the 10-foot setback."

- b) If the criteria in subparagraph (a) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is, therefore, necessary to enable a reasonable use of it.** "This property is certainly unique in several ways. First of all, as already stated a number of times, the property is located within the VB-1 district where the proposed use is permitted by right and, in fact, is already established on the property. The lot is a corner lot, which has two frontages and one side, which abuts the Contoocook River. Even though the lot itself is larger in size than the .17 acres required in the Zoning Ordinance, given the existing location of the building, the required side setback unreasonably impacts the Applicant's ability to construct the deck and provide outside dining. With the pandemic, outside seating became critical for restaurants and has remained an important feature for customers and their comfort. It is also important to once again point out that the area of the property where the setback relief is being requested directly abuts the river and shall have no impact on the neighboring area. On the other hand, the proposed use will allow the Applicant to utilize the property in a reasonable manner. The relief being requested by the Applicant is the minimum relief required in order to allow the Applicant to reasonably use the property and to provide critical outside seating. It is also important to once again note that even with the proposal, the proposed use will not alter the essential characteristics of the neighborhood or the property. Accordingly, the property cannot be reasonably used in strict conformance with the Ordinance, and a Variance is, therefore, necessary to enable a reasonable use of it."

Mrs. Cumming inquired about Lots 18 and 19, questioning whether they had been merged. In response, Attorney Dolder stated that they had assumed they had been combined but recently realized that it had not been done. The Applicant has agreed to merge the two lots when applying to the Planning Board for Site Plan Review.

Ms. Scheinman suggested that the rear deck is unnecessary as the plans also include a proposed patio and deck on the side of the building. The proposed side patio and deck would be larger than the proposed rear deck.

The Board briefly discussed the renditions presented as it appeared to show footings or posts supporting the side deck, while cantilevers support the rear deck. Also, based on the plans submitted, it appeared that one corner of the rear deck would be non-conforming. The remainder of the rear deck will comply with the 10-foot setback.

Mr. Lipoma inquired about the NHDES Shoreland Permit and the property line when abutting a river. While there was discussion about the high-water mark being the boundary line, Mr. Buck explained that there is a boundary (reference line) that NHDES will require to be shown the plan for the Shoreland Permit.

Ms. Scheinman asked about the maximum seating allowed for the restaurant and whether it is based on Fire Department standards. Attorney Dolder assumed it is based on available parking, explaining that the Applicant will review seating and parking during Planning Board Site Plan Review.

Ms. Scheinman noted that the renditions included with the application appear to show the footings or posts of the side deck along the edge of the river. Mr. Lipoma concurred and questioned whether the rear edge of the building was at the setback line. In response, Mr. Cressy stated that it would depend upon the river's height.

Mr. Buck inquired about the Shoreland Permit from the NH Department of Environmental Services (NHDES). In response, Attorney Dolder explained that they are presently working on the application.

Mrs. Cumming asked if the next step with NHDES would encompass the riverbed itself. Attorney Dolder replied yes.

Ms. Scheinman asked about the proposed outdoor patio shown on the front lot line, which is not subject to the setback requirement. The patio will provide outdoor seating. A plan review showed the proposed side patio and deck at the lot line.

Chairman Locke opened the public hearing portion of the meeting for comments.

The Board received letters of support of the application from Leeanne Vance and Dimitri Tsihlis, owners of businesses in the Village.

Abutter Scott Crathern, the owner of 25 Cedar Street, spoke in support of the application. He suggested that the proposed deck would not affect the residents in the area as it would be on the rear of the building.

Seth Greenblott of 442 Briar Hill Road, owner of 44 Cedar Street, and an alternate member of the Zoning Board of Adjustment, spoke in favor of the application. He is confident that Mr. Cressy will be an excellent steward and that the community will be proud of the project.

Greg Sagris of 32 Granite Valley, owner of a restaurant in Town, a member of the Planning Board, Economic Development Committee, and Chamber of Commerce, spoke in support of the application. Speaking as a business owner, Mr. Sagris believed using the Town's natural resources is beneficial to all. He suggested that the restaurant, once known, will bring people into the community that will also patronize other businesses.

Steve Lux of Little Tooky Road spoke in support of the proposal. Mr. Lux did not believe that the 10-foot setback was reasonable when abutting a river.

With no further comments from the public or rebuttal testimony from the Applicant, Chairman Locke closed the public portion of the hearing.

Chairman Locke stated that the Board's responsibility is two-fold: Consider the project and ensure that the Board honors the Zoning Ordinance as written. He then suggested that the property is unique due to its location and use.

Ms. Scheinman expressed concern with the requested zero setback to the river. The river is a natural resource that is vulnerable to impacts. The renditions included with the application show the posts that support the proposed deck to be at the river's edge. While Ms. Scheinman agreed with the proposed concept, she expressed concerns. She then suggested that the outdoor patio proposed to the side of the building provides outdoor seating and doesn't impact the 10-foot setback to the river. Mr. Lipoma agreed that using the proposed deck and patio to the side of the building would not require a Variance.

Mr. Lipoma noted that the boundary line to the river is unclear. In response, Mr. Buck stated that the property line is the reference line. Mr. Lipoma questioned whether the reference line could change over time. Mr. Buck replied no, indicating that the reference line is available at NHDES. It is not the water line. While the water line can change, the reference line (boundary line) is a fixed GPS location. The distance from the proposed deck to the reference line will not change over time. Mr. Lipoma then suggested that the issue of how the deck is constructed in relationship to the river is more of a concern of NHDES.

At this time, the Board reviewed the Applicant's response to the criteria for a Variance, with a majority of the Board agreeing that the proposed deck would not decrease property values in the area.

Ms. Scheinman was concerned that the deck would be contrary to the public interest with a zero setback to the river. Other members noted that the proposed deck would hang into the 10-foot setback rather than impact the ground and that it is the corner of the deck, rather than the entire deck, that would be within the setback. Lastly, it was noted that there was a considerable amount of public interest in favor of the proposal.

Ms. Scheinman did not believe that substantial justice is accomplished by granting the Variance as the Applicant does not need the Variance to build outdoor space towards

the side of the building. Mr. Lipoma agreed that a sizeable portion of the deck would not require a Variance based on the site plan presented. It appeared that half of the proposed rear deck meets the 10-foot setback requirement. At the same time, the proposal seems more logical than constructing only a portion of a deck.

The majority of the Board agreed that the spirit and intent of the Ordinance would not be impacted by granting the Variance, especially if NHDES agrees that the deck will not affect the river. Encouraging this type of use in the area is supported by the Ordinance.

Concerning hardship, the Board unanimously agreed that they need to be consistent with similar requests if they were to grant or deny the application. There must be something unique about the property. In response, Mr. Lipoma questioned whether anyone contemplated the river when developing the setback requirements, suggesting that the property is unique. It was then noted that there would be zero setback if it were not a river and instead was a road.

Again, it was reiterated that outdoor seating is permitted on the proposed side deck and patio without requiring a Variance. While the proposed rear deck is not necessary for the operations of a restaurant, a large portion of the proposed rear deck, along with the side deck and patio, meets the setback requirement. Eliminating a small section of the deck off the back of the building may be unreasonable.

At this time, Chair Locke reopened the public portion of the hearing so that the Applicant could clarify the location of the deck support posts in relation to the river.

Property owner Brian Cressy stated that the plans or renditions are conceptual; however, the size of the proposed deck is accurate. He then noted that there would not be pylons or other support posts in the ground. Instead, the rear deck will be cantilevered to the building. The side deck will have support posts in the ground.

Again, Ms. Scheinman stated that the Applicant is able to reasonably use the proposed side deck and patio for outdoor seating. Therefore, she did not believe that the Applicant successfully met the criteria outlined in 5(a) and 5(b) for a Variance. She then questioned whether the supports would be within the 10-foot setback. In response, Mr. Lipoma said that it appears based on the renditions provided with the application that the supports for the side deck that go into the ground will be in alignment with the building; therefore, they will not be within the 10-feet. Mrs. Cummings and Mr. Buck agreed that it appears that the deck will hang within the 10-foot setback and that there will be no supports in the ground within the setback.

Ms. Scheinman wanted the Applicant to stipulate that only the deck will be cantilevered into the setback. Mr. Cressy agreed, stipulating that there would be no construction at ground level within ten feet of the river.

Eric Buck, seconded by Thomas Lipoma, moved to **APPROVE** Application #2022-01 as presented with the following conditions:

- 1) There shall be no excavated supports for the deck within the 10-foot setback.

- 2) The Applicant shall meet NH Department of Environmental Services' Comprehensive Water Quality Standards, and
- 3) The Applicant shall merge Lots 18 and 19 when applying for Site Plan Review.

Motion passed unanimously. Roll Call vote: Lipoma – yes, Cummings – yes, Buck – yes, Scheinman – yes, and Locke – yes. The Applicant successfully addressed all criteria to be granted a Variance as outlined in Section XV of the Zoning Ordinance.

Reasons for approval:

- 1) Property Values:
 - There was no evidence that surrounding property values would diminish because that part of the deck would encroach into the setback.
 - There would be no encroachment at ground level as the deck would be cantilevered to the building, and therefore, that part that is to be non-conforming will hang into the setback.
- 2) Public Interest:
 - There was no evidence that the public's interest would be negatively affected.
 - The non-conforming portion of the deck is to be located to the rear of the building.
 - There was a considerable amount of public interest in favor of the proposal.
- 3) Substantial Justice:
 - The public would realize no appreciable gain from denial of the Variance.
 - A large portion of the rear deck and the side deck and patio meet the setback requirements.
- 4) Spirit and Intent:
 - The building will continue to be utilized in the same manner (restaurant).
 - The nature and character of the surrounding properties will not change as the abutting properties are used for commercial and residential purposes.
 - Requiring the Applicant to limit the size of the rear deck to only that part that conforms to the setback is not necessary in order to give full effect to the purpose of the Zoning Ordinance as there will be no impact at ground level.
- 5) Unnecessary Hardship:
 - Literal enforcement of the Ordinance will result in unnecessary hardship as the Applicant would only be permitted to construct a portion of the rear deck.
 - A part of the rear deck will hang within the 10-foot setback with no supports in the ground.
 - The supports for the side deck that go into the ground will align with the building and meet the setback.
 - It would be unreasonable to only allow a part of the rear deck to be constructed based on the design.

III. Minutes and Notice of Decision of December 7, 2021. As presented, Jessica Scheinman, seconded by Thomas Lipoma, moved to approve the Minutes and Notice of

Decision of December 7, 2022. Motion passed unanimously. Roll Call vote: Lipoma – yes, Cummings – yes, Buck – yes, Scheinman – yes, and Locke – yes.

IV. Adjournment. Seconded by Kristen Cummings, Thomas Lipoma moved to adjourn the meeting at 7:20 PM. Motion passed unanimously. Roll Call vote: Lipoma – yes, Cummings – yes, Buck – yes, Scheinman – yes, and Locke – yes. The next scheduled meeting of the Board is Tuesday, February 1, 2022.

Karen Robertson
Planning Director

Ordinance §15.10. "Representations made at the public hearing or material submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking, or uses which are subject to regulations pursuant to subsection 15.8.2 or 15.8.3 shall be deemed conditions upon such special exception or variance."