

Town of Milford
Zoning Board of Adjustment Minutes
June 5, 2014
Michael Cardoza
Case #2014-09
Variance

Present: Fletcher Seagroves
Laura Horning
Len Harten (Alternate)
Mike Thornton
Joan Dargie (Alternate)

Katherine Bauer – Board of Selectmen’s representative

Excused: Zach Tripp

Secretary: Peg Ouellette

The applicant, Michael Cardoza, along with Claire E. Reeve, Claire E. Reeve 1987 Trust, owner of Map 26 Lot 108, 318 Nashua St, in the Limited Commercial Business (LCB) district, are requesting a Variance from Article V, Section 5.07.1 to change the use to retail sales for a carpet flooring business.

Minutes approved on July 17, 2014

Fletcher Seagroves, having been appointed Chair Pro-tem by unanimous vote of the Board, read the notice of hearing into the record. The list of abutters was read.

M. Cardoza came forward to present his case. He currently has a carpet store on the Oval, where he rents space. He wants to move but stay in Milford, so we purchased a building which is zoned Limited Commercial-Business and would be ideal for a carpet business. There would be very little change to the existing outside of the building. The carpet business will be on the top floor and the bottom would be rented for offices. He will use about 70% of the building and 30% would be used by tenants.

J. Dargie asked if the entrance would change, since Clinton St across the street is a bad area to get in and out of. Also, the worst intersection in Milford is a little to the left of this.

M. Cardoza said he wouldn’t generate that much traffic. They get probably one to two customers every couple of hours but 10:00AM to 12:00PM or 3:00PM to 5:00PM would be the heaviest periods.

F. Seagroves said there was an insurance company in there and this would generate about the same amount of traffic.

J. Dargie inquired about the zoning and a brief discussion followed.

M. Cardoza said it was surrounded by retail; across the street and on the other side of the condos.

F. Seagroves opened the meeting for public comment.

K. Bauer explained that the zoning across the street is commercial and there are plenty of retail uses. This side is Limited Commercial-Business, but this is not new construction. It is an existing building with a lot of commercial uses nearby.

Suzanne Fournier, of 9 Woodward Dr, said the intent of Section 5.07.0, the Limited Commercial district was to promote activity compatible with the surrounding residential neighborhoods and the acceptable uses are clearly listed. Retail was not one of them. She then read from a prepared statement referencing Section 5.07.3 Uses Not Specified of the Milford Zoning Ordinance, the ZBA Handbook, page II-9 and page II-10. She stated that retail would be violating the intent of the Ordinance. In this case, the ordinance is intended to limit the use to those compatible with surrounding residential neighborhoods. It is hard to imagine that a carpet flooring is something that the locals would regularly want to utilize, unlike a doctor or lawyer's office. The Handbook cautions that when the ordinance contains a restriction against the particular use of the land the Board of Adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits a use, granting permission for such activity would be of doubtful legality. The Board cannot, in effect, change the ordinance. Obviously the Board is not trying to change the Ordinance, but you cannot change the effect of the Ordinance. Our ordinance prohibits retail in a Limited Commercial-Business district. Furthermore, the Supreme Court stated that the public interest is related to the spirit of the Ordinance and that the variance must not violate the Ordinance's basic zoning objectives which in this case are clearly defined. The Supreme Court advises to check whether granting the variance would alter the essential character of the locality. It seems clear to me, that a retail store facing the condominiums right next door would change the essential character of the locality. Finally, to address the point about there being retail across the street, where the retail business is allowed, she said that was because the boundary of the district is Nashua St and that is where the commercial exists. On the applicant's side it is Limited Commercial-Business and that is the intent of the Town. The zoning map represents the intent and spirit of the Ordinance. I believe this variance would violate the spirit and intent of the Ordinance and ought not to be granted.

M. Thornton asked whether commercial is less bothersome than retail.

L. Horning said in her view it was more intrusive. The audience member was referring to full-time residences and I don't think there is one within 300 ft of this property, except for the condos, and they are not on top of this property. There is a parking lot in between. There was a brief discussion among the Board members regarding other businesses and mixed uses in the area including mention of the shared parking between the condos and Robin's Nest, the retail business on the other side.

L. Horning said manufacturing can go here and this building is already slated for a certain amount of traffic and the applicant indicated he would not expect to generate the amount of traffic as the insurance agency that was there.

S. Fournier listed the uses that are allowed in the district, but there is no manufacturing allowed in Limited Commercial. There is a long list allowed in the Commercial district across the street but a big difference between shorter list allowed in the Limited Commercial-Business. We have districts with boundaries and the intent is listed at the top of each district.

L. Horning stated that this Board is here to grant relief for those intents and apologized for her statement that commercial could go here.

S. Fournier said she was not here to argue, but referenced the Handbook and the Ordinance, which states *Any uses of land and/or structures not specifically included in the Limited Commercial-Business District as acceptable, acceptable by Special Exception or acceptable by Conditional Use Permit shall be considered as not permitted.* It doesn't say permitted by variance. This is an issue she asked the Town to take up and recommended that the Zoning Board also look at that issue. We need

clarification as to what the Town really means, one way or the other; I don't want to be arguing the same point over and over again.

F. Seagroves said the ZBA doesn't change zoning, we can only make recommendations to the Planning Board and he has already talked to staff who will do some research on the wording.

K. Bauer said she believed that prohibition was put in because some people would read the ordinance and say if it was not listed anywhere, then they could do it. Secondly, she would classify the Holt Insurance building as an office.

F. Seagroves closed the public portion of the meeting and asked the applicant to read his application into the record.

1. Granting the variance would not be contrary to the public interest because:

The character of the neighborhood will not change from the proposed use. The neighborhood is a mix of business and commercial use, including retail sales across the street.

2. The use is not contrary to the spirit of the ordinance because:

The use maintains the existing structure which is compatible with the neighborhood. There will be no impact on public health, safety or welfare.

3. Granting the variance would do substantial justice because:

It will allow for a very low traffic generating business to relocate to a vacant building (vacant for 5 years) and help to revitalize this commercial property.

4. The proposed use would not diminish surrounding property values:

Retail sales already exist across the street and nearby on the same side. The location has historically been a business use. The proposed business operates during normal business hours.

5. Denial of the variance would result in unnecessary hardship.

A). "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 because:

The permitted use of this property does not lend themselves to utilize the building because of its limited size and shape due to Nashua Street, the Souhegan River, existing structures, and limited area for parking.

ii) and; The proposed use is a reasonable one because:

The carpet and flooring business is reasonable because the location is in the middle of a commercial corridor. The business does not generate heavy traffic and the site was used for many years as an insurance agency which generated similar amounts of traffic from customers.

B) If the criteria in Section (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. A variance is therefore necessary to enable a reasonable use of the property because:

The only reasonable use allowed in the LCB zone is office. This office building has been vacant for 5 years so if it were desirable for office use it would have been taken years ago. The site and building are appropriate for the proposed use.

There were no further questions from the Board, so they proceeded to discuss the criteria.

1. Would granting the variance not be contrary to the public interest?

L. Horning said it would not be contrary to public interest. It is in a spotty area between different zones. It is a changeable area where businesses have come and gone and the building has been empty for a number of years. A vacant building doesn't do the public any good. This

is a viable business, so she believes that granting the variance would not be contrary to the public interest.

M. Thornton felt granting the variance would not be contrary to public interest for the same reasons, and also this kind of retail is more in keeping with the idea of this district, not like a CVS.

J. Dargie said granting the variance would not be contrary to the public interest. The general area is retail. The only reason the condos are there is because the zoning allowed 55 and over and we allowed the density. Otherwise it would be retail or a museum or something in there. The condos went into a retail area, not the other way around.

L. Harten agreed, he didn't believe it would be contrary to the public interest and referred to the Handbook, about altering the character of the neighborhood or threatening the public health, safety and general welfare. He didn't see a problem with that.

F. Seagroves also referred to the Handbook which says there must be demonstration that the public would benefit if the variance was not granted. He didn't see the public gain if they denied it.

2. Could the variance be granted without violating the spirit of the ordinance?

M Thornton said yes, it could because the ordinance is to keep us from doing something contrary to the spirit of what was desired when zoning was set up. He didn't believe there was a conflict.

L. Horning said she didn't believe there was a conflict. The spirit would be recognized in this case as far as health, safety and welfare of the community. The fact that the building has been vacant creates a health and safety issue. An abandoned building on a public road is not conducive to health and safety and speaks to fire, safety, mechanical, adequate lighting and air, so having a business do the improvements and bring it up to code will address some of those concerns.

L. Harten agreed. It could be granted without violating the spirit.

J. Dargie said the spirit of the ordinance is observed. They are not doing anything contrary to what is in the rest of the area.

F. Seagroves said he didn't see any threat to the health, safety or general welfare. There is not much traffic and he didn't see a problem with it.

3. Would granting the variance do substantial justice?

L. Harten said yes. The Handbook first paragraph indicates any loss to the individual is not outweighed by gain to the general public.

L. Horning said granting the variance does substantial justice. The building has been is vacant and needs improvement. Board members must determine each case individually that any loss to the individual is not outweighed by the general public. The public will gain with the business owner's desire to be located in this building and to do improvements.

M. Thornton said it does justice to the town as well as the applicant. Both would benefit and neither would have any detrimental effect.

J. Dargie said it would do substantial justice because it gets the building occupied which is better than having it sit empty.

F. Seagroves agreed with Len and Laura. A loss to the individual which is not outweighed by the general public is an injustice. He didn't see gain to the public by denying.

4. Could the variance be granted without diminishing the value of the abutting property?

M. Thornton said it will increase the value of the abutting properties by not having a vacant structure which is an attraction to vandals.

J. Dargie said it wouldn't diminish value of the surrounding property.

L. Harten said granting would not diminish the value of the surrounding properties. Across the street and further down the street you have commercial uses. He didn't believe a retail carpet store would diminish surrounding area.

L. Horning agreed. It would accentuate property. There will be improvements to the entrance and some life will be brought back to this building.

F. Seagroves agreed. It will help value of the abutting property by having somebody in there.

5. Would denial of the variance result in unnecessary hardship taking the following into consideration:

A) 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;

ii. The proposed use is a reasonable one.

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.

L. Horning said no fair and substantial relationship exists between the Ordinance and the provisions and purposes of the Ordinance. The applicant is looking for relief for this particular building which happens to be stuck into a boot of a zoning ordinance line. It is surrounded by the same types of business, not all retail. Denial would create a hardship

L. Harten said denying it would create unnecessary hardship. The proposed use is a reasonable one, he believed it was reasonable request taking into consideration the other business commercial operations in the area. There wouldn't be any diminution of any property value in the area. It was proper use by the applicant and was reasonable and the variance should be granted.

M. Thornton said denial would result in unnecessary hardship. Because the proposed use was reasonable and no fair and substantial relationship existed between the general public purposes of the ordinance provision and the specific application. It wouldn't make sense to deny this and not have the public benefit in some way.

J. Dargie agreed, denying the variance would create unnecessary hardship and agreed with that particular use. It is a small building and what he wants to do there is better.

F. Seagroves said the proposed use was reasonable. No fair and substantial relationship exists between the general public purposes of the ordinance and the specific application of that provision, he believed this was almost like Simplex, where they had a commercial business across the street. This use was reasonable.

F. Seagroves called for a vote on the criteria:

1. Would granting the variance not be contrary to the public interest?

L. Horning-yes; M. Thornton-yes; L. Harten-yes; J. Dargie-yes; F. Seagroves-yes.

2. Could the variance be granted without violating the spirit of the ordinance?

M. Thornton-yes; L. Harten-yes; J. Dargie-yes; L. Horning-yes; F. Seagroves-yes.

3. Would granting the variance do substantial justice?

L. Harten-yes; J. Dargie-yes; M. Thornton-yes; L. Horning-yes; F. Seagroves-yes.

4. Could the variance be granted without diminishing the value of the abutting property?

J. Dargie-yes; M. Thornton-yes; L. Harten-yes; L. Horning-yes; F. Seagroves-yes.

5. Would denial of the variance result in unnecessary hardship taking the following into consideration:

A) 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;

ii. The proposed use is a reasonable one.

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.

L. Horning–yes; M. Thornton–yes; L. Harten–yes; J. Dargie–yes; F. Seagroves-yes.

L. Horning made the motion to approve Case #2014-09.

L. Harten seconded the motion.

Final Vote

L. Horning–yes; L. Harten–yes; J. Dargie–yes; M. Thornton–yes; F. Seagroves-yes.

Case #2014-09 was approved by unanimous vote.

F. Seagroves reminded the applicant of the thirty (30) day appeal period.