

**Town of Milford
Zoning Board of Adjustment
Case #2015-23
Rymes Propane & Oil
Variance
November 5, 2015**

Present: Zach Tripp, Chairman
Fletcher Seagroves
Michael Thornton
Joan Dargie
Kevin Johnson

Excused: Len Harten, Alternate
Katherine Bauer – Board of Selectmen’s representative

Secretary: Peg Ouellette

The applicant, Rymes Propane & Oil owner of Map 31, Lot 3, located at 425 Nashua St, in the Limited Commercial District, is requesting a Variance from Article V, Section 5.07.1, to install a propane storage tank.

Minutes Approved on 11-19-15

Zach Tripp, Chairman, read the notice of hearing into the record as well as the list of abutters. Applicant was present. No abutters were present. He then invited the applicant forward to present the case. John Rymes said they wanted to tear down an abandoned house on the property and clean up the property right next door and situate a propane storage tank in back. He said it met all setback requirements for fire code. They were struggling with having enough storage in the area to serve needs of the community and need this tank. There is asbestos siding on the house and they have remediation figured out. Some people in town would be happy to see it gone.

Z. Tripp asked when they bought it.

J. Rymes said last November. It was part of Fred Fuller oil transaction that took place last winter.

Z. Tripp asked whether storage of propane was any different from heating oil. Did it need to be treated differently from legal or requirement standpoint?

J. Rymes said it has different requirements for setback. It is a gas rather than a liquid. It is stored as a liquid but it is considered a gas with DOT. It is the handled the same.

Z. Tripp wanted to clarify that what they have stored there now is heating oil.

J. Rymes said yes. There was history of storing gas there with similar flammabilities. They don’t have gasoline there.

Z. Tripp asked about federal and state requirements for setback and distance to other buildings.

J. Rymes said all are black and white - either you need or not. Have to hire certified fire engineer which they have done with FSC Engineering which has done projects across the state and on Martha's Vineyard. Meticulous about meeting federal requirements which have been adopted by State and town. Their plans meet every one or exceeding their expectations.

Z. Tripp asked where they were in the process of approvals.

J. Rymes said this is their first meeting. He didn't see a lot of hurdles. Property use has been there many years. Neighbors around corner received a variance to do similar. They are in infancy, but would like approval as soon as possible to start work.

Z. Tripp said Bill Parker made note in application, "Project will require Planning Board site plan approval for change of use from residential to commercial." Lot is currently zoned Residential?

J. Rymes said from what he read in the agenda it was Light Commercial.

Z. Tripp said that was what the meeting notice said, but Bill's comment.

J. Rymes said he goes to lots of towns. Town of Milford has been unbelievably great to deal with as far as scheduling meetings and having people attend. First meeting they were told all they needed was a permit. Then they called back and said they thought they needed to go before the Planning Board. They have no problem following the rules.

K. Johnson said he looked and it was Limited Commercial and also part of the Nashua St. Overlay District.

Z. Tripp said, so it is currently Limited Commercial.

K. Johnson said yes.

J. Dargie asked if there was any response to his question.

K. Johnson said Bill Parker at Community Development Office sent it at 2:30 and he received it at 5:30 today. In looking at the forms, and his understanding of the process, he sent a question re e-mail "In reviewing Case 2013-23 it would appear that the more appropriate route for Rymes would be to voluntarily merge Lots 31-3 and 31-4 pursuant to RSA 674.33.A and then request a Special Exception for the expansion of an existing nonconforming use. Is there a reason this was not done?" Bill said that "when the Rymes people were in the office a while back to talk about the process, I had mentioned that there was the option to merge the lots as Kevin mentions below. They took that thought back and then decided to turn in the variance instead. I don't know the reason they went this way. It may have something to do with keeping all of the parcels inherited from Fuller Oil separate for legal reasons or it may be necessary for the long-range plans they have for their operation." He wanted to ask that question to applicant, especially in light that special exceptions have clearly laid out standard that if they meet them they are required to grant it. Variance has more stringent criteria and applicant may or may not qualify based on views of members of the Board and the five criteria for the variance.

J. Rymes said answer is simple. It is an older piece of property that has monitoring wells on it for State. They didn't think it was a good idea to combine them because of liability. In order to keep the liability separate, many years ago it there has been some releases over the years, prior to their ownership. In speaking to their counsel, it was decided to get the variance. They would like to keep it separate to keep liability separate from that piece of property.

Z. Tripp asked for any other questions from the Board. There were none. He said the only letter received was one Kevin read. He opened meeting for public comment.

James Vanetti of 44 Riverview St. in the east Milford area of proposed propane tank. On short notice he went around the neighborhood twice for thoughts on having two storage tanks there and started a petition for pretty much the whole east Milford area and others who wanted to volunteer their say on opposing this. It is near a park, near St. Joseph's. Not a prime location. Ciardelli Fuel had to move theirs across town. He didn't think it was right to have in a residential area. He gave petition to the Chair.

Z. Tripp said the petition was dated Nov. 3, 2015. He read "We the undersigned request the Town of Milford deny Rymes Oil Company any zoning variance for construction of a propane storage area. We feel the proximity to a highly populated area is a danger and possibly a health hazard to property and homes in the surrounding area." He didn't take time to read all the signatures.

Marian Elise of 44 Quarry Circle said she wanted to add her name to that petition. One of the questions she had on a list she would be giving the clerk – we have a Master Plan that clearly states we are trying to preserve character, rurality and residentiality of the town. She didn't understand why they continue to have conversations about granting variances to residential area. She was not aware of this propane until tonight.

K. Johnson said this was not a residential area. It was Limited Commercial with pre-existing residential in it. The State as well as the federal government have ruled that if you are going to create zoning laws you must have some way to grant relief when those regulations enacted become onerous to the landowner. The landowner has right to use his land. Not an absolute right to do anything, but there has to be some relief to the zoning law, which is what the variance and special exception exist for.

M. Elise understood. Not trying to stop progress. In this case there was a home there.

K. Johnson agreed.

M. Elise said there are surrounding homes.

K. Johnson said in the eyes of the law that is irrelevant.

M. Elise understood the law; not arguing the law. She was arguing the moral obligation of the people in the town. There is a park and homes there. Propane tanks are pretty significant change in the purpose of that property.

K. Johnson said that was why they were there, to discuss this particular property. This has come up in a number of previous cases. They are not there to do what is right or what it moral. They are there to do what is legal. State Supreme Court has ruled that they are a quasi-judicial body bound by the law.

M. Elise said they have also been elected.

Z. Tripp said he didn't want to turn this into a debate and said if she had any other questions.

J. Dargie said they are not elected; they are volunteers.

K. Johnson said the zoning ordinance is created by the Planning Board and voted on by the town.

However, law rightly allows individual citizens opportunity to make changes to it as they see fit. All that is required is getting 25 signatures to have changes put on the ballot. If the town agrees, it becomes law. They as a board are specifically prohibited by law from changing it. Have to follow what is written in the ordinance and state statutes.

Z. Tripp said good discussion, but didn't want to turn it into a discussion. He asked public to keep to comments on why they support the application or why they think it should not be supported.

Bonnie Vanetti of 48 Riverview St. asked if Ciardelli Fuel was considerate enough not to put their tanks in a residential neighborhood, wouldn't Rymes have some other location not so close to so many people's homes? Isn't there an alternative plan? They have rights, but don't homeowners have right to be safe?

Z. Tripp said those are some of the criteria the Board had to answer.

B. Vanetti asked about it going to the town and having the whole town decide.

Z. Tripp said this it is by this Board which have volunteered to take their time to help work through these issues on behalf of the town.

B. Vanetti has seen it before. If Ciardelli can be considerate enough to move their tanks, can't Rymes be considerate? They might be on the other side of the street. One side is a park and the other is a business. St. Joseph's did get a variance, but they were for medical help. Can't Rymes look for an alternative location in a less populated area?

K. Johnson asked if Rymes had ever had a significant propane accident.

J. Rymes said no, they have had trucks roll over, but never a significant accident. They have more storage in NH per gallon than any other company in NH.

K. Johnson asked if he knew if Ciardelli had significant accident.

J. Rymes couldn't recall any. They have hundreds of tanks at their office as well as propane trucks.

Kathy Bauer asked Chair to list the criteria the Board has to answer in the affirmative so everyone would know the criteria that the case has to meet.

Z. Tripp listed the five criteria and their definitions.

Tom Quinn, attorney representing Edward Medlyn, an abutter, he presented to the Board. Mr. Medlyn requested he come and register his opposition. Reasons are set forth in the accompanying letter. They just went through the five criteria necessary for granting variance. First is that the resulting variance not be contrary to public interest and the spirit of the ordinance. Case in 2007, Malarkey Glen Associates, the Supreme Court indicated the first two are substantially related frequently treated together, so he would do the same. The zoning ordinance places property in Limited Commercial District. Intent of that is to preserve area for business activity compatible with surrounding residential neighborhood. The zoning ordinance 5.07.1 sets forth 15 permitted uses and 7.2 provide additional six permitted either by special exception or by conditional use permit. In addition to single-family, residential, offices, schools, medical facilities, etc. the flavor the neighborhood is residential with mix of small business. That is the way the neighborhood is developed – not zoned that way, but way it is developed. There is one property in the middle which he assumed the application stated is a legally existing nonconforming use. That is on an adjacent property. The proposal is to create a separate fuel storage facility. Their position is that would violate the basic objective of the zoning ordinance, which is to keep intense business and industrial uses prohibited from Residential, and it would also alter character of the neighborhood. It also poses serious threat to public safety and welfare. 30,000 gallons is a lot of propane. Although the application states the site will be conducted in accordance with all regulations, accidents can happen. Equipments malfunction, employees make errors. Hoses can rupture, valves damaged, tanks overfilled, employees can drive off from fueling with the hose still attached, all of which releases propane into the air creating a combustible situation that doesn't take much to ignite. He wasn't present at the site but represents someone who does snowplowing and once inadvertently damaged a valve on a thousand-gallon tank in Hollis. Response to that required evacuation of almost a mile. With a 30,000 gal. tank you would be required to evacuate within a mile. Tanks must be filled every day or more often. This would be done by bringing in three 10,000 gal. trucks, sometimes lined up because it takes time to fill a tank. He has 3,000 gal. trucks coming and going – a lot of trucks on Nashua St. which is already congested and in residential neighborhood. One of the breaks the applicant got was that the abutters are few in number. But a little to the northwest are very significant residential neighborhoods – not abutters to be given notice, but they are close and would have to be evacuated in event of an incident.

Z. Tripp asked if by northwest he meant the other side of the park.

T. Quinn said yes. There are a lot of these tanks in West Milford. He showed pictures to show how big 30,000 gal. tanks are. Three in Milford – one is Suburban Propane – has three. Hollow Oak Lane where Ciardelli has three or four tanks. Bottled gas has facility on Hollow Oak Lane. Away from residential communities on the bypass with trucks coming and going is not a problem. Trying to squeeze into this site makes as much sense as putting it on the Oval. Third requirement is substantial justice. Have to look at the burden on applicant vs. benefit to the public. His client position is that the obvious negative impact.

K. Johnson said he presented pictures, they go with the case.

Z. Tripp asked if he wanted board to retain them.

T. Quinn agreed. He submitted picture of the nature of the residential surrounding properties. In considering that introducing this facility in this neighborhood would have significant negative impact and pose significant safety impact. It should be denied. Countering that the applicant says property would be enhanced. That is true. It is an eyesore. Solution is to take down and rehab structure and clean up the lot. Fact that is has gone to seed is not justification for a variance. Other fact is property next door may be legal nonconforming use. That is irrelevant to consideration of whether this lot should be granted a variance to do the same thing. He felt propane posed more threat to safety than oil tanks. Fourth criteria are that the proposal will not diminish value of surrounding property. People are at hearing because they realize this will diminish value of their property. His client is right next door. He will sit on his porch and his view is the tanks.

Z. Tripp asked if client was a direct abutter.

T. Quinn said yes. He asked how eager one would be to be the house next to a propane tank. We have seen the reaction to the pipeline because of the risk. Whether it is real or not, the perception is it is less

safe. Besides being less safe, it is an eyesore. Value of that property will certainly be diminished. The last requirement is the applicant must show denial would result in unnecessary hardship. Has to show there are distinguishing characteristics of the property that distinguish it from others in the area. Nothing in the application addressed that. It meets zoning requirement, a 20,000 or more SF lot. It has 169 SF of frontage in zone that requires 150. It is flat, without wetlands. Outside of being next door to the existing facility he didn't see anything that distinguished it. If you don't meet that question, you don't get to the others. Assuming for the sake of discussion that you get there the applicant has to show that the requirements of the ordinance are not fairly and substantially related to the use of the property; that there is something about this property that makes it unfair or unreasonable to require it comply with the zoning – that it can't be used as a house, school, daycare center, or any of the other listed uses. No reason it can't be used for a legally permitted use. Assuming you pass the threshold of special conditions, you have to prove use is reasonable one. He didn't think it was. It is in residential neighborhood with mixture of businesses. Zoning ordinance doesn't allow it there. Other areas are more reasonable. Didn't think applicant met burden on any of the five criteria. On behalf of his client he was asking them to deny this variance.

Z. Tripp asked for any questions. There were none. He gave applicant a chance to respond to Mr. Quinn. J. Rymes said it does meet requirements. If not, they wouldn't be at this meeting. He understood a lot of people think it might lessen the value of their property. No evidence that ever happened. He is probably only one there who has actually installed propane tanks. Never seen property value diminished because of a propane tank. Attorney brought up great points about hazards with propane. Tank he brought up was a residential. If he wants to outlaw residential propane, then they definitely don't need a 30,000 gal. Tank But tank they are installing has a lot more safeguards.

Z. Tripp asked him to talk about difference between propane tank on a residential lot and this one re safety. For instance, T. Quinn brought up if there is a disconnect causing a fireball.

J. Rymes said the neighborhood propane at oil business has hundreds of tanks and trucks. It is illegal to lock the cover, so anyone could just turn one of them on.

Z. Tripp asked him to compare difference between residential and this.

J. Rymes said these are residential. If you are filling one and truck rolls away really only one safeguard at the truck that will limit the volume released. It was mentioned about a truck pulling away. If that happens there are valves and hoses called smart hoses that would shut it off. Propane is very safe. That is why everyone is installing it in their home. Looking at tanker traffic mentioned, he would argue there will be a lot less traffic. Propane will be coming to this area. Instead of 20 deliveries, it will be one truck. Safeguards are immense. They couldn't bring up any of the catastrophes mentioned because they don't exist. Federal government with help of fire departments has done a good job putting these in. They have been built throughout the years so they are extremely safe.

Z. Tripp asked about federal regulating limit for distance between 30,000 gal. tanks and residential houses

J. Rymes thought it was 50 ft. but would have to look it up. It clearly meets it. He would argue there are other s in the area in town with tanks. Doesn't think it is in best interest of town having it all in one area and one zone. This lot is next to their property so they can keep an eye on it. They have met all five requirements. Competitors up the street were given the same variance.

J. Dargie asked if that was for 30,000 gal. tank.

J. Rymes said no, for other oil. It is reasonable. It is nice neighborhood. It is main road in town with number of businesses. Attorney poked fun that he's trying to beautify area. He's not saying this is one of the criteria, but he is trying to beautify the area so when the neighbor is on his back steps he isn't looking at an abandoned house.

Z. Tripp asked in what zone the propane tank would be allowed?

J. Rymes said no.

Z. Tripp said the closest he found in the ordinance was filling stations in Integrated Commercial district.

J. Rymes said sometimes it is not really spelled out because most homes have propane tanks.

Z. Tripp said in Limited Commercial, closest is public or private utilities. Not sure if propane qualifies as utility.

J. Rymes said they went over it with the town because they are regulated by the Public Utility Commission and State Fire Marshall and have to meet criteria.

Z. Tripp asked for further comments from the board re the public comments.

F. Seagroves said they really need to have an expert come in and explain safety. Maybe Fire Chief to explain if something happens what they would do, how far away. It is written there, but they have a right to have their own experts come in.

K. Johnson said the board had power, if necessary, to subpoena expert testimony.

F. Seagroves said he knows answer to the question, but would like to have expert explain to him.

J. Rymes said, to clarify, they did meet with Fire Dept. and Fire Dept. is comfortable with the engineer they used and as long as they meet criteria they can't require anything more. They do more than that – they use fittings that aren't required. Fire Dept. is content with the plan and the engineer firm the used. Would be happy to have the engineering firm come after facility is built to stamp that it meets federal requirement.

Z. Tripp asked if anyone from public who hadn't had opportunity to speak.

Mike Nelson of 32 Olive Street, on other side of the park asked if they were talking about propane tank or tanks. It says on the New Business "tank" but he has heard plural.

Z. Tripp said that was a very good question.

J. Rymes said the gentleman who passed out flyers around town said "tanks" but they are asking for one tank.

Z. Tripp said the plan shows one tank and three trucks.

J. Rymes said what they feel will operate out of there will be three trucks.

M. Nelson asked approximate dimensions of the 30,000 gal tank.

Z. Tripp said it wasn't clearly labeled, but guessed it about 35-40 ft. long.

J. Rymes said 109 in. diameter and by the time it is all dressed out, about 60-65 ft.

Z. Tripp said 65 ft. long and 109 in diameter.

M. Nelson said, as he lives across the street and has been dealing with issues with previous owners his concern is safety especially with leak potential. However small that chance, most of the property there slopes down toward the river, and with the medical center sunk down in there, there is a downward slope and propane would follow that down. It is major concern of him and neighbors. Asking them to take that into consideration.

Z. Tripp asked about federal regulation for soil retention. Would they have to put in some sort of drain and underground tank for some sort of spill?

J. Rymes said no. Because it dissipates into the air. Fire safety analysis had to be done by Fire Dept. and work with them with what they have for water flow and hydrants, pumping capacity for trucks, etc. The fire safety analysis is required and will be done.

M. Elise asked if this would look like Suburban Propane at other end of town. Same kind of facility?

K. Johnson said from the plan submitted it is nothing like it. Suburban Propane has multiple delivery tanks and multiple filling tanks. This has one storage tank. The plan they have been given is what they would be approving. It is not like they say they got one tank, and then put five or six on the property.

Z. Tripp showed her the plan.

M. Elise asked if Rymes had plans to put more than one or expand into the adjacent.

Z. Tripp asked, what adjacent property?

M. Elise asked if they didn't own the adjacent property?

K. Johnson said the one with the fuel oil on it. They have no room there to expand.

M. Elise asked if they had plans to expand.

K. Johnson said they would have to come back and justify putting additional tank on the property.

Z. Tripp said they would approve one 30,000 gal. tank.

M. Elise said if they approve one, what would be argument for not putting another? Doesn't know they could logically say that.

K. Johnson said they could. They could say they could put it in back and put in visual screening. Putting in others would encroach on that. Lots of reasons they could say no to a second tank.

M. Elise re criteria on property values, what criteria would be used, besides somebody says so. What determines that?

K. Johnson said two areas – personal knowledge or what happens when things like this occur. They can accept testimony of the attorney and the applicant and balance those. They can accept independent testimony, i.e. if applicant or attorney had gone to an appraiser and had done research that showed that when propane went in values fell. Since neither the applicant nor attorney presented that, they fall back on testimony and their knowledge.

Z. Tripp asked for further public comments.

T. Quinn said there had been discussion about what is safe and what the fail safe is. That is something they may bring in experts. But you don't get to that stage until you show unnecessary hardship. Some special condition of this property that distinguishes it from all others in the area. He didn't see anything in the application that remotely approached that.

K. Johnson repeated that there are five criteria. They will weigh each one. All five must be met before you consider granting a variance.

Z. Tripp said three or more members have to find all five criteria are met..

Z. Tripp closed the public portion of the meeting and asked the applicant to read the application into the record.

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

Not only removing the existing abandoned house and upgrading the general appearance, installing propane storage in Milford better provides competitive pricing to residential and commercial businesses.

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

Rymes is adding onto an existing heating oil infrastructure. Current plans comply with town, rail, and federal regulation.

3. Granting the variance would do substantial justice because:

Previous Fuller & Draper Oil was a legal non-conforming use that have been in existence prior to the town adopting zoning regulations in the 1970's (Map 31/Lot 4). By esthetically enhancing the property along with propane storage, there is nothing but gain to the property.

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

Removal of the existing abandoned residence along would increase the property's value. With additional parking for customers and participants of the local ball field, upgraded lighting, and professional landscaping to enhance the property's appearance, all increases value.

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:

Map 31/Lot 4 is already an operational fuel storage facility. This variance would not alter the essential characteristic of the neighborhood, and would coincide with the existing business practices of Rymes Propane & Oil.

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

Rymes promotes the delivery of propane and heating oil in the town of Milford. Due to the most recent growth, storage of propane is essential in this market, not to mention keeping propane pricing competitive.

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:

In order for Rymes to build a propane infrastructure, adjacent to their existing zoned Limited Commercial-Business, a change from the planning board from residential to Limited Commercial-Business would be necessary for Map 31/Lot 3.

C) Notwithstanding paragraph (B) above, a Variance may be granted without finding a hardship arising from the terms of the Zoning Ordinance when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

i) The variance requested under this paragraph shall be in harmony with the general purpose and intent of the Zoning Ordinance because:

Properly displayed designated handicap accessible parking signs and well lit areas will be recognized for physically disabled persons on the premises.

Z. Tripp had two questions. He said the plan shows the propane tank and the storage facility will be fenced?

J. Rymes said yes.

T. Quinn asked if they were re-opening the hearing.

Z. Tripp said no.

T. Quinn objected to public testimony, the Board asking questions of the applicant, since the public portion of the meeting was closed.

Z. Tripp said he closed the public portion.

T. Quinn asked if that didn't include the applicant?

Z. Tripp said no.

T. Quinn said in his view it did. It permits discussion by the Board, but not discussion by the Board and the applicant that nobody else could address.

K. Johnson said their rules allow them to ask the applicant questions at any point during discussion.

T. Quinn noted his objection. He believed once the hearing portion was closed, discussion was limited to the board members.

Z. Tripp said in the past they have asked questions as they came up. He asked about lighting.

J. Rymes said the plan is low impact light. They met with the town offices to make sure it met all requirements.

Z. Tripp asked if they would be lit 24/7. Or only during business hours?

J. Rymes said some will be on 24/7. This time of year, it is needed during business hours. Most vehicles coming in have their own lights, so it is not an area needing a lot of lighting.

Z. Tripp then moved on to discussion of the case. He said F. Seagroves had a concern about bringing in experts. Did the board want to address that, or go through the criteria first?

J. Dargie wanted to go through the criteria.

K. Johnson said, to see if it was needed. Z. Tripp said, or if any additional items come up.

Z. Tripp proceeded to discuss the criteria for a variance.

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

F. Seagroves – not sure he could answer because discussing no harm to the public until he has more information.

Z. Tripp, to clarify, until he had independent analysis of safety of propane in this location?

F. Seagroves said because it says establish the character of the neighborhood or threat to health, safety or general welfare of the public.

K. Johnson – would not be contrary. Repeating what Fletcher said, and from the handbook, "Does the variance alter the essential character of the neighborhood?" In his case, it would not. It is Limited

Commercial and part of the character is that former Fuller and now Rymes exist in that area. It continues “or threaten the health, safety or general welfare of the public.” There are enough safeguards in place with local, state and federal, fire, hazardous material handling that the neighborhood would be as safe as possible, given that any vehicle traveling down Nashua St would threaten safety. Has to be balance. If they say anything could threaten, they would have to deny every variance.

M. Thornton- it is not contrary to public interest for the same reasons Kevin stated. Also, he felt that one 30,000 gal tank is safer than 60 individual tanks. Regulations on that tank are more stringent than those on individual homeowners’ tanks are. They could allow it.

J. Dargie – disagreed. It is contrary to the public interest. Cited an instance where she noticed a strong gas odor from Suburban Propane and called 911. She was told they were filling tank and it was hot, humid day which makes it heavy. If she was living next door, whether it happens once or twice a year, it is not a pleasant odor for a reason. She was at Market Basket, which is a distance away. If she were looking at new oil tanks coming in, re comment about oil tanks there – you don’t get that gas smell with those. If they had somebody new coming in asking for new oil tanks, didn’t think they would allow it with the park next door, and the hospital, and on the other side of the street it is very residential. Even though Limited Commercial, she felt it was contrary to the public interest.

Z. Tripp - considering this lot for Limited Commercial District in adding propane tanks next to pre-existing fuel storage facility, doesn’t think it will change basic nature of the neighborhood which is already mixed use, already has fueling station. There is another fueling station down the street, set back a little more than this one would be. Believes with all federal regulations for a 30,000 gal tank, if everything in compliance would not threaten safety or general welfare. He lives in neighborhood that every house has a propane tank in back. Whether higher use rates of this commercial one would increase risk, he believed it was covered with regulations and existing precautions in place. So, yes.

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

M. Thornton – it would be preserved because of existing tanks there and light commercial character of the area. Didn’t believe this would be as high usage as some other commercial ventures could be in same area. Further, he believed the current character of the property would be enhanced and the spirit of the ordinance would be enhanced along with the neighborhood if that eyesore was removed and tank put in its place with proper setback, proper screening materials, etc.

J. Dargie – no. Spirit is not observed. Sincerely didn’t think this was promoting health, safety, general welfare. Smell of gas is not good for health or welfare.

F. Seagroves – At this time, will go with no. Discussing health, safety and general welfare of the community. Until he can answer safety question, he would say no.

Z. Tripp said, to phrase it differently, with evidence presented tonight wouldn’t be able to answer yes.

F. Seagroves agreed.

K. Johnson read from handbook “In deciding whether a variance would violate the spirit and intent of the ordinance the Board of Adjustment must determine the legal purpose the ordinance serves and the reason it was enacted.” Re reason it was enacted, looking at intent of 5.07.0 “The intent of the Limited Commercial-Business District is to provide areas for those business activities which are compatible with surrounding residential neighborhoods.” If they look at it as if the existing Rymes facility was not existing adjacent to the property, and view it as a standalone to put propane facility on this property in Limited Commercial, he didn’t think that on its own would be in the spirit of the ordinance.

Z. Tripp said Kevin already read intent. He read Acceptable Uses: offices’ health service facilities; schools; bed and breakfast; churches; funeral homes; single-family dwellings and their accessory uses and structures with their respective related conditions set forth in the Residence A District; two-family and multi-family dwellings and their accessory uses and structures with their related conditions set forth in the Residence B District; home occupations in accordance with Section 10.02.3; telecommunications facilities; farm roadside stands; day care facilities; hospice house; utilities, public or private; and dwelling, Mixed-use. Then by Special Exception: family day care homes; recreational facility, not for profit; reduced front, side and rear setbacks; building and structure height greater than allowed in 5.07.7:A and

5.07.7:B; accessory dwelling units. Question is whether or not a propane filling station is compatible with the surrounding residential neighborhood. How big is a neighborhood? That area has a lot of business and a lot of industrial. Part he struggled with is houses with propane tanks behind them. He happens to be one of them.

J. Dargie commented it is not a 30,000 gal tank.

Z. Tripp said propane tanks themselves are compatible in residential because residences have them. To him, it was whether the business of a filling station was compatible. Given mixed use of the neighborhood he thought it probably was. Can consider it within the spirit of the ordinance in Limited Commercial Business District.

3. Would granting the variance do substantial justice?

F. Seagroves – yes. The loss to the individual is not outweighed by gain to the public. Taking into consideration safety.

K. Johnson – no. the public has greater interest in maintaining character of this area and loss to the individual in this case would not be outweighed by gain to the public.

J. Dargie – no. Substantial justice is not done. Thought the loss to neighbors would be greater than gain to the applicant.

M. Thornton – substantial justice would be done for the oil company because they have a commonality of supply points. It would not be justice to the neighborhood because of fear, rational or irrational. Fear is there. The fact they have their own propane tanks which are nearer and much more a proximate danger, he felt granting variance would do substantial justice because safety factor is there. Public is served well by having the tank close to the supply points as well as on the far side where it is not in his back yard. One on far side is in his back yard. Never had a problem with that. Yes.

Z. Tripp – question of what would public gain by denying this. Already stated it is in public interest and spirit of the ordinance; not sure public would gain enough to offset loss to the applicant because he has already said it was in public interest and in spirit of the ordinance.

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

J. Dargie – it would diminish value of surrounding property, specifically the one abutter that is right next door. Personally she would never buy a house next to a propane tank. Granted, if a neighbor's small propane tank blows up, it blows up their house; but if a 30,000 gal tank blows up, per information provided, you would have to evacuate a huge area. She thought it would definitely diminish that one neighbor's.

M. Thornton – balance is tough on this one. Couldn't see properties across the street and behind the park being diminished in value. However, the house right beside the tank, he could see suffering a diminishing of value because of the presence of the current property and the presence of the tank. Either is a negative. Didn't feel tank would be a positive in this case. Felt it would be a negative.

F. Seagroves – would say no. Property would diminish because of it being in commercial area.

K. Johnson said Fletcher said yes.

F. Seagroves said yes, it would not.

K. Johnson didn't think it could be granted without diminishing surrounding properties. They had conflicting testimony. Applicant said he had not seen where these tanks in general cause a diminishing of property values. The attorney testified he believed it would. As Mike said, he didn't think this would diminish values of houses across the street, around the block, etc. However, he did think installation of a 30,000 gal tank next to a residence would diminish value to that one specific property. This could not be granted without diminishing surrounding property.

Z. Tripp struggled with this one, also. Surrounding properties are mostly mixed use commercial, some residential. Property values already in that neighborhood-wide area have the current filling station incorporated in the values, as the Ciardelli property incorporated into the property values. Would adding propane tank change existing property values? In neighborhood as a whole, no. Re one residential property directly next door, the plan showed it at back corner furthest from street, furthest from that property. He would have to put in a stipulation, if approved, to have evergreen trees screening along that

property to block from the site line to that commercial property. There will be lights, some of which will remain on 24/7. Traffic in and out could potentially be less than some of the approved uses; but he struggled with whether the propane tank would diminish value of that one house more than some of the allowed uses in the Limited Commercial district. He would have to say no.

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.

K. Johnson – didn't believe that unnecessary hardship would result if they deny variance. The law, RSA 674.33 is very clear in requirement there must be special conditions to the property that distinguish it from other property in the area. He read from *Criteria for Variances in the 21st Century* that provided a summation of Supreme Court ruling in Garrison v. Henniker, "It is not enough to demonstrate that the property would be difficult to use for other purposes" which is irrelevant in this case because there could be other purposes, "or that it is uniquely suited to the applicant's proposed use." That is what the applicant was claiming. It continues "Even if all those facts are present the applicant must still demonstrate the property is different in a meaningful way from others in the area." In looking at this property, it is no different than others in the area. It has a broken down house on it. That condition rehabbed or removed, giving a piece of prime real estate in Limited Commercial where you could put up an office building or other approved use that would be much more compatible to other properties in the area, especially to the direct abutter. That being said, it is moot whether proposed use is a reasonable one.

F. Seagroves – didn't see hardship due to special conditions of the property that distinguish it from the other properties.

M. Thornton – failed to find any unique condition that suits it for the specific purpose and no other. Having said that, what value is that land to the owner or any other person? That question is not for Board to answer. There is no substantial relationship that would distinguish it from any other property that would not be more distant from and more suited to the intended use.

J. Dargie – agreed with the others. No special characteristic about this property.

Z. Tripp – agreed with rest of the board. This is a perfectly complying lot to Limited Commercial Business District. It has a dilapidated house on it. That doesn't make a hardship. Applicant didn't claim having the house made it a hardship. If you take it down you could use it for any other uses in the Commercial District. Denying this variance would promote valid public purpose because you could have conforming use on a conforming lot. No hardship. Can use if for any acceptable uses. Hopefully, he answered reasonable use at the same time.

Board moved to vote on the criteria.

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

F. Seagroves – abstained; M. Thornton – yes; J. Dargie – no; K. Johnson – yes; Z. Tripp - yes

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

M. Thornton – yes; J. Dargie – no; K. Johnson – no; F. Seagroves – abstained; Z. Tripp - yes

3. Would granting the variance do substantial justice?

J. Dargie – no; K. Johnson – no; F. Seagroves – yes; M. Thornton – yes; Z. Tripp – yes

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

J. Dargie – no; K. Johnson – no; F. Seagroves – yes; M. Thornton – no; Z. Tripp – no

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.

F. Seagroves – no; M. Thornton – no; J. Dargie – no; K. Johnson – no; Z. Tripp - no

Z. Tripp asked if there was a motion to deny Case #2015-23, a request for a variance.

K. Johnson made the motion to deny Case #2015-23

J. Dargie seconded the motion.

Final Vote

K. Johnson – yes, to deny; J. Dargie – yes, to deny; M. Thornton – yes, to deny; F. Seagroves – yes, to deny; Z. Tripp – yes, to deny

Case #2015-23 was denied by unanimous vote.

Z. Tripp informed applicant his application was denied and reminded the applicant of the thirty (30) day appeal period.

J. Rymes asked if he could show it was a private utility, did he have to come before them again?

Z. Tripp said he would have to take that up with the Community Development Office.

K. Johnson said it was up to the Community Development Office and Planning Bd to determine if he qualified as private utility.