

Town of Newington, NH

ZONING BOARD OF ADJUSTMENT

Meeting Minutes, Thursday, December 22, 2022

Call to Order: Chair Jennifer Weiner called the December 22, 2022, meeting at 6:39 PM.

Present: Board members: John Frink; Bob Raymond; Alternate Board members, Roger Dieker, and Will Gilbert; Planning Board Representative, Peter Welch; Town Planner John Krebs and Recording Secretary Jane Kendall

Absent: Derick Willson and Bob Byrnes

Public Guests: Gregg Mikolaitis, P.E. with August Consulting; Attorney Chris Mulligan; Town legal counsel, Attorney John Ratigan

Chair Weiner read an opening statement regarding applicant and Board procedures.

1) Request by **Subcom Cable System, LLC** for a variance from Article VII, Table VII-I, Minimum Setbacks to allow the construction of a 456 s.f. motorcycle parking area within the 50' setback on property located at **Tax Map 27, Lot 1 and 1D**.

The applicant was not available to attend and would reschedule at a later date.

2) Request by **RPT Crossings, LLC** for a variance from Article VII, Table VI-I to subdivide an existing, developed commercial property (known as the Crossings at Fox Run) into four separate stand-alone parcels on property located at **45 Gosling Road, Tax Map 34, Lot 3, 3-1, and 3-2**.

The applicant's legal representative, Attorney Chris Mulligan with Bosen Associates appeared before the Board to present their request to facilitate a proposed subdivision application with the Planning Board. Attorney Mulligan explained that they were not proposing additional development, dividing lines, fences, or gates visible to the public beyond what existed.

Attorney Mulligan stated that there were some internal property lines already in existence for tax purposes, but they were proposing to formalize those and some additional lot lines to allow single building lots on the 60 acres with a number of buildings and attached strip malls.

Attorney Mulligan went on to say that RPT Crossings, LLC acquired the mall a year ago for over 10 million dollars, and the goal was to monetize some of the more valuable parts to attract investors to attract capital.

Attorney Mulligan said they were proposing cross access and easements for maintenance to keep the malls interrelated and prevent any conflicts.

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Attorney Mulligan said they were proposing four lots, one with Aldi's, one with the Longhorn Steak House, one with McDonald's and a large remaining lot with the Regal Theater and other businesses.

Attorney Mulligan said there were existing non-conformities with the setbacks for McDonald's and PetSmart within the highway front yard setback that couldn't be changed. Attorney Mulligan said the only non-conformity that they would create with the subdivision was with Aldi's because they needed 16.4 feet for the rear and 5.5 feet for the side yard setbacks.

Town Planner, John Krebs pointed out that they were creating another non-conformity of 20.68 feet next to the Subaru dealership where the lot line was going across the corner. Gregg Mikolaitis, P.E. with August Consulting said they could move the line to allow four more feet.

Attorney Mulligan added that they could stipulate that they would jog the line over so wouldn't need another variance.

Attorney Mulligan reviewed the criteria for granting the request, saying that it would not be contrary to the spirit of the Ordinance or the public interest as the essential character of neighborhood wouldn't change at all with invisible lot lines, nor would it alter the health, safety, or welfare because it was already developed.

Attorney Mulligan said the relief would not result in the diminution of property values because the surrounding properties would not be negatively affected within the existing site. Attorney Mulligan said the subdivision would facilitate RPT Crossings, LLC to generate additional capital in trying economic times, and to retain a well-funded and maintained retail facility.

Attorney Mulligan said substantial justice would be done, and there would be no gain to the public to deny the request because it would increase tax revenue from the individual parcels, which would also be a benefit to the town.

Attorney Mulligan said denying the relief would cause an unnecessary hardship because of the unique character of the property from others in vicinity, and more than 20 times the minimum lot size for the zone, with oddly shaped frontage on Woodbury Avenue, Gosling and possibly the Spaulding Turnpike. Attorney Mulligan went on to say that the McDonald's and PetSmart lots were non-conforming, and the proposal wouldn't create additional non-conformity except for an internal lot line for the Aldi's and Barnes and Noble buildings. Attorney Mulligan said the two non-conforming lots already existed, and the non-conformity didn't impact abutters.

Attorney Mulligan said the existing use was reasonable and permitted by right. Chair Weiner closed the public hearing.

Board member, John Frink said he couldn't see the advantage of a subdivision where Aldi's lot would include an entrance off Woodbury Avenue, and McDonald's and the Longhorn lots had access off Gosling. Attorney Mulligan responded that it was a good point, but the conditions of the subdivision proposal would require that cross easements to allow access that would run with the land in perpetuity.

Attorney Mulligan explained that some brands were attractive to outside capital, especially if they were on stand-alone lots. Attorney Mulligan said they didn't want to

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see zombie malls with transient uses that wouldn't support attractive and vibrant businesses, and this would facilitate that without any negative effect on the general public.

Mr. Frink asked if they could sell the subdivision lots. Attorney Mulligan replied that they could, but they didn't anticipate that; however, that was the importance of cross easements.

Planning Board representative, Peter Welch commented that he thought they were getting ahead of themselves because there were so many things prompted when ownership of the mall was transferred that could create a landlocked parcel. Mr. Welch pointed out that there was no verbiage for utility easements, or allowing for things like snow plowing.

Mr. Mikolaitis responded that the application before the Zoning Board of Adjustment (ZBA) was for lot line relief for buildings, not the actual Planning Board application for subdivision and the conditions of access easements, maintenance, parking, and utility easements.

Mr. Welch asked why they didn't hadn't started with a waiver request from the Planning Board. Mr. Mikolaitis replied that the Planning Board couldn't grant the required variance.

Alternate Board member, Roger Dieker asked why they would want to create a higher tax base. Mr. Mikolaitis replied that higher credit rating tenants that were worth more. Attorney Mulligan added that there was a credit rating formula that was done throughout the country, and sometimes the parts were more valuable standing alone, such as McDonald's.

Mr. Dieker noted that McDonald's rent as a stand-alone would be higher than the overall property, and an appraiser would review that. Mr. Dieker went on to say if it was sold, they would pay twice the income than the whole property, which would increase the value of the smaller properties.

Mr. Krebs informed the Board that he had talked with RPT Crossings, LLC before the purchase, and told them subdividing the movie theater was off the table, and they had no issue with McDonald's or Longhorn variance, but there was an issue with Aldi's that was just approved three and a half years ago, and squeezed in the lot.

Mr. Krebs said that three-quarters of the lot had high tension power lines and surrounding wetlands. Mr. Krebs went on to say that he wasn't concerned with McDonald's or Longhorn, but he was concerned that the town would be stuck with non-conformities with redevelopment of the Regal Theater building, or iHop that were closer to the lot lines, and needed to meet a form factor that would require a waiver from the Planning Board.

Mr. Krebs added that the Fox Run Mall had five owners, and developers were reluctant to get involved with five owners.

Mr. Krebs said he assumed RPT Crossings, LLC did exhaustive title work. Mr. Krebs said he thought McDonald's, Longhorn and Subaru were separate lots, but Tax/Map 27-12 showed frontage along Woodbury Avenue in front of iHop.

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Mr. Mikolaitis responded that they had two different surveyors, and they never found those separate lots, thinking that they may not have been recorded. Mr. Krebs said Mr. Frink had done research on the mall plans that had been approved in 1985, and recorded as separate lots, but somehow had gone from separate lots to one lot in past years. Mr. Frink said McDonald's was not listed as a separate lot but had lease lines.

Attorney Mulligan asked what the consequence would be of iHop not having frontage on Woodbury Avenue. Mr. Krebs replied that if it had frontage, they wouldn't need a tail, and Aldi's wouldn't need a 5.5' setback allowance. Mr. Krebs said a 27.5' setback allowance was asking for a lot.

Chair Weiner asked if the applicant would consider amending to remove the request for relief on Aldi's lot from the application. Attorney Mulligan asked if the Board could vote on the three proposed lots separately.

Mr. Krebs asked if they needed a variance for McDonald's and Longhorn. Mr. Mikolaitis replied that they might need a front setback on those recorded lots.

Mr. Krebs said they could withdraw the request, and go to the Planning Board, but Town counsel, Attorney John Ratigan said that McDonald's was part of the larger lot, so it was not clear why they were allowed construction within the front setback, except that the right-of-way on Gosling Road may have grown because it is a State road. Mr. Mikolaitis agreed, noting there was a jog along the road frontage.

Mr. Krebs asked if could ask for a two-lot subdivision with front setback violation or ask for a variance.

Attorney Ratigan wondered how the setback violation occurred considering that there was still plenty of room for the municipal right-of-way with undeveloped land on either side. Attorney Ratigan said the Town may have worked something out to expand the right-of-way, making it a legal non-conforming use that could continue, but they would need to know what the right-of-way was at the time of development. Mr. Krebs said think so but no indication that McDonald's wasn't in compliance when built.

Chair Weiner proposed vote on McDonald's and Longhorn and separate out Aldi's because of concerns.

Chair Weiner moved to grant the request by RPT Crossings, LLC for a variance from Article VII, Table VI-I to subdivide an existing , developed commercial property (known as the Crossings at Fox Run) into three separate stand-alone parcels on property located at 45 Gosling Road, Tax Map 34, Lot 3, 3-1, and 3-2, noting that McDonald's had an existing non-conforming front setback of 34 feet where 75 feet was required. John Frink seconded.

Mr. Krebs recommend that the applicant withdraw the application For the Aldi's lot to avoid denial and proceed with a straw poll. Mr. Frink asked Attorney Ratigan about straw polls. Attorney Ratigan said it would better for each member to say if they were in support or not.

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Alternate Board member, Will Gilbert said he could see how the mall could be demolished, and a new mall could be affected by setbacks, so he was in favor of the variance.

John Frink, Bob Raymond, Peter Welch, and Chair Weiner all said they would vote against the current variance.

Attorney Mulligan asked to withdraw the application to present an amendment.

Attorney Ratigan suggested they go to the Planning Board or could take a non-binding application to the Planning Board to discuss other parcels and ideas. That might lead them back.

John Frink moved to accept withdrawal of the application. Will Gilbert seconded the motion. John Frink, Will Gilbert, Bob Raymond, Peter Welch, and Jennifer Weiner all voted in favor, and the motion passed.

2) Other Business and Discussions:

Attorney Ratigan reviewed the protocol of going through the five criteria with an explanation for their decisions on applications. Attorney Ratigan said it was up to the Board, but they could take turns going through each of the criteria rather than having one person do it all.

Minutes: *John Frink made a motion to approve the Minutes of May 12, 2022, meeting with. Will Gilbert seconded, and all were in favor.*

Adjournment: *Chair Weiner moved to adjourn the meeting. Bob Raymond seconded, and the meeting adjourned at 8:08 p.m.*

Next Meeting: January 2023 TBA

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary