

**Town of Newington, NH**  
**ZONING BOARD OF ADJUSTMENT**

Meeting Minutes, Monday, March 21, 2016

**Call to Order:** Chair Matt Morton called the March 21, 2016 meeting at 6:30 p.m.

**Present:** Chair Matt Morton, Vice-Chair Ted Connors, Ralph Estes, John Frink, Jim Weiner; Building Inspector, John Stowell; Town Planner, Tom Morgan and Jane Kendall, Recorder

**Public Guests:** Attorney Alec McEachern; Erol Moe and Peter Beauregard with Stoneface Brewery; Jack O'Reilly; Rick Stern

**Public Hearings:**

- A) Appeal by Stoneface Brewing Company at 436 Shattuck Way on an administrative decision by the Building Inspector and Town Planner regarding uses permitted by the Zoning Ordinance.

Board member, Jim Weiner informed the Board that John Ricci was his brother-in-law and that Mr. Ricci's contracting company was a potential builder for Stoneface Brewing. He said he felt he could listen to the appeal and request impartially. Chair Morton asked the applicant if they had any issue with Mr. Weiner hearing the application and they said they did not.

Attorney Alec McEachern appeared before the Board as the applicant's legal counsel. He stated that Stoneface brewing held a State license for beverage manufacturing since 2013. He said they sold their product locally through distributors and the public from their facility on Shattuck Way according to RSA178:12.

Attorney McEachern said they now needed to expand their operation due to their success. He said they looked at another location in the Office zone, but that didn't work out and in the meantime found additional space for expansion in their current location.

Attorney McEachern said their license to serve their product to the public would require them to also serve food, which would require a commercial kitchen and public dining area. He said they planned on maintaining their manufacturing process in their current location, but hoped to expand with public food service in an another part of the building, as well as a multifunction tasting room that would include retail sales of hats, t-shirts and other items with their logo, storage and packaging. He said they would also

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like to have an outdoor patio area as well. He said they had already submitted a building application to the Building Inspector.

Attorney McEachren said their position in the appeal was that they didn't need zoning relief because all these activities were allowed by State statute with their beverage license. He said if it was determined that they were not allowed by license to have food service, then it should be allowed as an accessory use.

Erol Moe, co-founder, said many Nano brewers were growing in neighboring states and were offering food on premise or with food trucks, but New Hampshire had stricter requirements. He said they always envisioned larger productions, but they could only serve pints if they had restaurant service. Chair Morton asked what the State allowed them to sell to retail customers. Mr. Moe said they sought clarity because their bottles were 16.9 ounces, so they could not sell cases and could only sell one, fifteen-gallon keg per customer.

Board member, Ralph Estes asked why they went directly to the Building Inspector for a permit instead of requesting approval of the Boards. Mr. Moe said they were naïve and thought they didn't need a variance considering beverage manufacturing was an approved use that the landlord permitted, and Shogun restaurant was down the street as well.

Mr. Weiner said serving food and liquor was not allowed in the Waterfront Industrial zone and research had been done on the liquor license that was granted by the State. Former Selectmen, Rick Stern of Shattuck Way said he had called Town Administrator, Martha Roy who found out that the State did not send the permit to the Board of Selectmen to approve, but had sent it to the City of Portsmouth instead and it had never made its way back to Newington.

*Mr. Weiner said he wanted to make a motion that the Board take no further action until they received clarification from the Board of Selectmen on whether they would approve the license as it was, or petition the State's decision. John Frink seconded the motion for discussion.*

Jack O'Reilly of Fox Point Road suggested the Board make a motion for approval with the condition that the Board of Selectmen approve the license.

Vice-Chair Connors asked how long ago license was issued. Mr. Moe said it was issued in the Fall of 2013.

Vice-Chair Connors said he understood the motion, but he was concerned with penalizing them if the State and the Town dropped ball. Mr. Weiner clarified that it was the City of Portsmouth that dropped the ball.

Mr. Stern said he spoke with Lieutenant Youngman, the enforcement officer in Portsmouth that admitted that the permit was sent to Portsmouth and they had not forwarded it to Newington. He said even if it had been sent back, the permit would be for manufacturing, but retail was still not allowed in the Waterfront Industrial zone.

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Mr. Weiner said no one in Town could say they didn't know Stoneface Brewing wasn't in business for two years, however. He said unless the Selectmen contested the State license, the license would allow serving food.

Board member, John Frink said the Town was in favor of a tasting room, but just because a license would allow the expansion to serve food, it didn't seem that the Town would be bound to grant all uses the State allowed if the Town didn't know about it. Town Planner, Tom Morgan said the Board and applicant were bound by zoning ordinances and the State's error should not divert them from their obligation.

Chair Morton commented that he had heard that forty people had signed a petition to approve the use. Mr. Morgan said that petition had been presented in December to request a use variance at another location in the Office zone. Mr. Frink asked if that was the item that appeared as a warrant article at Town meeting. Attorney McEachern said they had attempted to withdraw the petition once they learned of the space in their building opening up, but it was too late.

Mr. Weiner said he spoke with the Selectmen on Friday, but they had not sent word to the Board on any decisions. Mr. Morgan said at the end of day the Board would still still need to go through the five criteria on whether it was reasonable to grant a variance. Mr. Stern agreed that the variance for relief would be the same even if the application for the liquor license was denied.

Mr. Frink asked if their manufacturing license was different than their liquor license or if it was the same. Attorney McEachern replied that they were able to request an "on premise" license once they held a manufacturing license. He said they already had their beverage manufacturing license and they wanted to obtain their "on premise" license, but State law required them to have on site food service.

Chair Morton asked Building Inspector, John Stowell if he had any issues with the applicant's request. Mr. Stowell said he and Mr. Morgan had worked with the applicant from the beginning and food service was not raised. He said he agreed with Mr. Morgan that it was not allowed in the Waterfront Industrial zone without a variance.

Mr. Morgan suggested that the Board focusing on the appeal first.

Board members asked several questions regarding floor space dimensions, parking and abutting businesses.

Mr. Estes asked if there would be any parking conflict for neighboring businesses. Mr. Moe said parking spaces in the back would be freed up if they had the opportunity to expand their business to the other end. Mr. Stowell said an expansion and food service would increase truck deliveries and he was concerned that parking on the north side of the building might impede traffic so he thought they should supply the Town with a site plan to be sure it would work. Chair Morton said the applicant would need to go back to the Planning Board for site approval.

Mr. O'Reilly passed out an article regarding the growing brewery business. He said town's people would enjoy another local establishment as they did Lexie's at Great Bay Marina in the summer. He said one establishment in the article talked about

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meeting the requirement by serving a pot of chicken soup, but Stoneface wanted to run a good operation.

Mr. Weiner said the permitted, current operation with a license had not been stopped at this point, but the Planning Board stopped the expansion because the use was not allowed.

Mr. Frink said the Board should act on the appeal of the administrative decision by the Building Inspector. Mr. Morgan pointed out that the appeal was regarding the use of land and the variance was if the Board didn't grant the appeal.

*John Frink moved to deny the appeal by Stoneface Brewing Company at 436 Shattuck Way on an administrative decision by the Building Inspector and Town Planner regarding uses permitted by the Zoning Ordinance. Ralph Estes seconded the motion for discussion.*

Mr. Frink said he agreed with the Building Inspector that the Zoning Ordinance prohibited retail and restaurant use in the Waterfront Industrial zone, but they had a right to request a variance. Attorney McEachern said there were two different applications, one for the appeal and the other for a variance if the appeal was denied.

Mr. Moe said their argument was that they were operating within their rights as a licensed liquor manufacturer, and there was a pattern of practice of retail for breweries.

Attorney McEachern said the administrative appeal had two arguments:

- 1) That their rights were encompassed in the State statute and
- 2) That it was an accessory use to the principle use even if the accessory use was not permitted in the zone.

Mr. Weiner said he was not comfortable with Attorney McEachern's giving interpretation of the statute without clarification.

Mr. Stowell said it was clear that the Zoning Ordinance did not allow the use and the State liquor license had nothing to do with it. Mr. Stern agreed that the State license did not trump or control zoning.

Mr. O'Reilly said the Board could move to the variance if they denied the appeal. Mr. Frink agreed.

*The motion to deny the appeal passed 4-1 with Ted Connors opposing.*

- B) Request by Stoneface Brewing Company for a variance to permit food service and retail sales at 436 Shattuck Way, Tax Map 7, Lot 12.**

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Attorney McEachern stated that he had submitted a memorandum to the Board regarding the variance.

Mr. Morgan said the ZBA also had a letter written in 1992 in response to Al Cabrera, the owner at the time who said he didn't think it was a fair requirement to go before the Planning Board every time he signed on a new business tenant. The letter said they no longer had to go before the Planning Board. He said he didn't know if the Planning Board would continue to honor that understanding now that the building was under different ownership, and they might ask for a site review, but that was not at issue here.

Mr. Stern commented that Stoneface Brewing was not changing their business, but were asking for a change in zoning use.

*Ted Connors moved to grant the request by Stoneface Brewing Company for a variance to permit food service and retail sales at 436 Shattuck Way, Tax Map 7, Lot 12. Ralph Estes seconded the motion.*

Chair Morton said Attorney McEachern had written their reasons the variance would meet the criteria, which could be used by the Board. Mr. Frink said he was hesitant to use their reasoning because he didn't want to influence the Board. Mr. Morgan replied that he could take the opportunity to respond and influence if he wanted to.

Mr. Weiner said granting the request would not affect the public health, safety or welfare because a restaurant that served beer would be no different than Shogun down the street. He said the Planning Board had expressed a concern that such a use would put more people in proximity of Sea-3 Propane distribution and other industrial uses, but Shattuck Way was already heavily trafficked as a major cut through from Woodbury Avenue and Shattuck Way to access Route 16 down Town to right 16.

Chair Morton said the proposal would enhance the community by serving food and he was glad to hear they would be hiring more people.

Mr. Weiner asked the applicant if the landlord would permit them to landscape the outside seating area. Mr. Moe said the landowner was amendable, but they hadn't designed the area yet. Chair Morton reminded the Board that the applicant would still need to go before the Planning Board for site review and approval.

Mr. Frink said the spirit of the Ordinance was being glossed over. He said the intent of the Industrial District was to be conducive to industrial use and expansion and interfering with that intent was prohibited. He said it was clear to him that the brewery conforms to the Industrial District, but the additional use of food service would not and so he disagreed that it met the criteria. He said he was concerned that a precedent would be set regarding uses in the Industrial Zone that the Town provided to prevent the area from becoming a commercial zone. Chair Morton replied that was the applicant's reason for requesting relief.

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Chair Morton said he thought substantial justice would be met because it would benefit the public and he was looking forward to an improvement to the appearance of the building. Mr. Weiner added that there would also be a mecca of brewery goers.

Mr. Weiner said he didn't think the value of surrounding properties would not be diminished.

Mr. Weiner said so long as they had their liquor license and believed they could move forward with a growth plan, despite the permit being granted in error by the State, denying the variance would create a hardship and mean they would have to move out of town. Mr. Moe added that they had been contacted by the economic development center of Dover and Rochester, but they liked where they were.

Mr. Frink said he thought it was customary for applicants to present a letter from the property owner indicating he had no issues with the use in his building. Mr. Morgan replied that he was correct, and that Mr. Mooney had visited him personally and made it clear that he did not like vacancies and he was strongly in support of the use. Vice-Chair Ted Connors also noted that the applicant had cc'd the owner in their correspondence. Attorney McEachern said they had provided a letter from Mr. Mooney to the Planning Board and Mr. Mooney also visited Mr. Morgan and spoke on behalf of application.

Mr. Frink stated that he was still very concerned with setting a precedent in the industrial district and the Board needed to be cognizant that Tyco and others had previously made efforts to turn the Industrial District to a commercial zone at great legal expense to the Town. He said the Town had a legitimate interest in keeping the waterfront area industrial, even though many would like to build condominiums. He said he didn't think Mr. Mooney had a hardship because other businesses could still go into the building.

Chair Morton commented that a manufacturing brewery with a small restaurant as an accessory was different than a large chain. Mr. Frink said he had visited Smuttynose Brewery and didn't get a sense that their restaurant was the main business, but he still questioned granting the request as setting a precedent. Mr. Morgan suggested the Board could set a limit on the square feet. Chair Morton said the square feet the applicant requested would be fine.

Mr. Stern said the approval should also limit the use specifically to the brewery business. Mr. Frink added that it should be noted that it was as an accessory.

*Ted Connors amended the motion to limit the approval for accessory use to the brewery and square feet as indicated on the application. Mr. Frink added that the use was as provided for by the State beverage manufacturing license as well. Ralph Estes second the revised. The motion passed 4-1, with John Frink opposing.*

**Minutes:** *Ted Connors moved to approve the Minutes for the February 29, 2016 meeting with Jim Weiner seconded, and all were in favor.*

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**Adjournment:** Ted Connors moved to adjourn and Jim Weiner seconded the motion. The meeting *adjourned at 7:39 p.m.*

**Next Meeting:** TBD

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

*These minutes were approved for adoption at the May 9, 2016 meeting.*