

ZONING BOARD OF ADJUSTMENT PUBLIC HEARING AND MEETING
January 14, 2020

A public hearing of the Zoning Board of Adjustment was held on Tuesday, January 14, 2020 at 6:30 PM in the Auditorium, 229 Main Street, at City Hall.

Members in attendance were:

JP Boucher, Chair
Mariellen MacKay, Clerk
Steve Lionel, Vice Chair
Jack Currier
Rob Shaw (left at 7:40 pm)
Jay Minkarah

Carter Falk, Deputy Planning Manager/Zoning

Mr. Boucher explained the Board's procedures, including the points of law required for applicants to address relative to variances and special exceptions. Mr. Boucher explained how testimony will be given by applicants, those speaking in favor or in opposition to each request, as stated in the Zoning Board of Adjustment (ZBA) By-laws. Mr. Boucher also explained procedures involving the timing light, as well as the projector in front of the stage for plans to show the audience.

1. Unit Owners Association of the Villages at Kessler Farms Condominium (Owner) Pennichuck Water Works, Inc. (Applicant) 69 Kessler Farm Drive (Sheet G Lot 592) requesting special exception from Land Use Code Section 190-15, Table 15-1 (#278) to replace an existing water tank with a new one 11.33 feet taller, in same location. R9 Zone, Ward 2.

Alderman Rick Dowd said that the existing tank has been rusting for many years, and is an eyesore for the people who live in Kessler Farm. He said that the tank is critically important to the City, as it provides water and water pressure for this part of the City. He said that another aspect of this is the emergency communication system for the City of Nashua for Police, Fire and other emergencies is located here too, and it will have to be replaced first before they take down the tank, as the antenna is on top of the water tank. He said that he is very much in support of this.

Voting on this case:

JP Boucher, Chair
Mariellen MacKay, Clerk
Steve Lionel, Vice Chair
Jack Currier
Rob Shaw

Attorney Nicholas Frasca, Frasca & Frasca P.A., 2 Auburn Street, Nashua, NH. Atty. Frasca said that this is a special exception for the replacement of a steel water tank in Kessler Farm. He said that the existing tank has been there since 1987, and is currently in a state of disrepair now. He said that the trend today is to replace steel tanks with cement tanks, as the cement tanks have a much longer useful life, which is about 80 years, and they require much less maintenance. He said that the only discernable difference between the existing and proposed tank would be the height, as the new one would be 11.33 feet taller, which is due to the design of the structure, which would have a pitched roof to it, making it slightly higher.

Atty. Frasca said that the existing tank would be demolished, which would take between 8-10 months. He said that the request satisfies all criteria for the granting of a special exception, and it will not be out of character, as a tank already exists there.

Mr. Lionel asked what Pennichuck would be doing to maintain the water pressure once the tank is removed.

SPEAKING IN FAVOR:

John Boisvert, Chief Engineer, Pennichuck Water Works, 25 Manchester Street, Merrimack, NH. Mr. Boisvert said that they've made significant improvements to the distribution piping system in the northwest part of the City and leading out into Amherst. He said that they made improvements on Manchester Street, which increased the size of some piping from 12 inches to 24 inches. He said that they have replaced some smaller mains, have added pipeline near the Nashua Airport area that created some piping loops that have improved the water delivery, and can push water into the system from pumping stations at the treatment plant, as well as bringing water back from the existing bon-terrain tank in Amherst.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

Denise Trombley, 70 Ramsgate Ridge, Nashua, NH. Ms. Trombley said that she has a question on safety on Ramsgate, and what kind of traffic would it have, as there are a lot of children there. She asked about the construction timing schedule, and the noise and the dust and dirt during demolition. She said that when she first moved there, the trees were small, and now they're tall and hide the tank, and asked about tree removal or replacement. She asked how they would mitigate the dust and dirt.

SPEAKING IN FAVOR - REBUTTAL:

Atty. Frasca said that with respect for safety, and traffic on Ramsgate, it will not be used during construction, it will be limited to Kessler Farm Drive. He said that if approved, the project will start in March, with an 8-10 month construction period. He said that for dust and noise, they will be using Best Management Practices. He said it may look similar to the cement tank that is at Rivier University, and future maintenance suggests that this tank will last for 80 years, and it is less maintenance than a steel tank, which requires much more significant maintenance, every 15 years it needs to be painted. He said that some trees will need to be removed to accommodate the new tank, mostly on the north side, but it will be limited to the trees that will be required to be removed.

Mr. Minkarah asked if any new trees will be planted.

Atty. Frasca said that they will put together a landscape plan with respect to tree removal.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS - REBUTTAL:

Ms. Trombley asked what the standard practice for trees, she didn't want the small trees.

Mr. Boucher said that this case will go to the Planning Board, and suggested she attend that meeting for more details.

Ms. Trombley asked in the Best Management Practices, what the policy is for dust and dirt.

Mr. Boucher said they will try to limit it as much as possible, contain the dirt as much as possible, keep it clean and minimally invasive as possible to the surrounding area.

Board members all expressed support for the application.

MOTION by Mr. Currier to approve the special exception on behalf of the owner as advertised. He said that it is listed in the table of uses, Section 190-15, Table 15-1 (#278).

Mr. Currier said it will not create undue traffic congestion, or unduly impair pedestrian safety, there will be some active construction for a short term during its construction, but long term will have no net effect, and the new tank will require less maintenance.

Mr. Currier said that the use will not overload public water, drainage or sewer or other municipal systems, it will actually be an upgrade to the public water system.

Mr. Currier said that all special regulations will be fulfilled.

Mr. Currier said that the request will not impair the integrity or be out of character with the neighborhood, or be detrimental to health, morals or welfare of residents.

SECONDED by Mr. Lionel.

MOTION CARRIED UNANIMOUSLY 5-0.

2. Jose Mendez & Angela Laro (Owners) Angela Laro (Applicant) 13 Alder Drive (Sheet 139 Lot 112) requesting special exception from Land Use Code Section 190-47 (B) to allow a major home occupation for an in-home day care for 12 children. R9 Zone, Ward 6.

Voting on this case:

Steve Lionel, Acting Chair

Mariellen MacKay, Clerk

Rob Shaw

Jay Minkarah

Mr. Currier and Mr. Boucher recused from this case. Mr. Lionel served as Chair.

Angela Laro, 13 Alder Drive, Nashua, NH. Ms. Laro said that she is requesting the special exception as advertised for the day care. She said that she has worked in many child care facilities, and almost has her degree in Early Childhood Education, and takes care of three other children, and wants to do this out of her home.

Mr. Lionel asked what modifications she is doing to the home.

Ms. Laro said that it would be in her basement, which is finished, and the only modification made is on the ingress, so that there are two means of ingress/egress.

Mr. Lionel asked about the construction vehicles parked in the lot towards the back.

Ms. Laro said that they won't be there, and she plans on using that area for parking to avoid any traffic congestion or any cars parked on the street.

Mr. Lionel said that twelve children are more than he's used to seeing for requests to the Board.

Mr. Falk said that twelve children is the maximum number that a homeowner can have, but the lot area must meet the minimum size for whatever zone they are in. He said that this lot exceeds the minimum size for the R9 zone.

Mr. Lionel asked if there would be any staff besides herself.

Ms. Laro said it would be herself and a friend of hers.

Mr. Minkarah asked if the back parking area would be paved or unpaved, and how vehicles would circulate on the property and exit.

Ms. Laro said that they would have access to the driveway, which will fit two more cars, and the side area is big enough to have cars pull in and turn around and head out. She said it is not paved, it has pebbles or gravel, but not dirt. She submitted pictures of the driveway and parking area.

Mr. Shaw asked about the hours of operation, and asked to confirm its Monday through Friday 7:30 am. To 5:00 pm.

Ms. Laro said that is what she has for the three children she watches now.

Mr. Shaw asked about play time outdoors.

Ms. Laro said that they would not be outdoors before 9:30 am.

Mr. Shaw asked if the play area would all be behind the fenced-in area, or by the parking area.

Ms. Laro said that the play area is separate from the parking.

Mrs. MacKay asked about the ages of the children she would be caring for, and if any of them have disabilities, and if she can accommodate them and modify the house.

Ms. Laro said that per State regulations, only four of them can be under age 3, and the rest will be older than 3, and school age. She said that they haven't come across any issues with disabilities, but would accommodate any child if needed.

Mr. Shaw said the Board, in the past, have done what would be called a limited approval, perhaps six or nine children, prior to going to twelve, because it's a pretty significant usage, and sometimes there are neighbor concerns about the scope of what might be going on. He asked if she has thought about a lesser number, and possibly transition to more in the future.

Ms. Laro said that she hasn't thought about a lesser amount, and has always worked with many children, and didn't feel that she needed to transition from a lower amount up to twelve, but is amenable to what the Board decides.

SPEAKING IN FAVOR:

Briana Dianta, 137 Peele Road, Nashua, NH. Ms. Dianta said that two of her children are cared for by Ms. Laro, and they love going there, she provides a nice, affordable, quality, loving place for children.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No one.

Mr. Minkarah said he'd support the request, and twelve children are a lot of children, but the applicant is experienced and the site appears to accommodate parking, access, and there were no complaints from any neighbors.

Mr. Shaw said that there is a large play area, enough room for parking, and the applicant already watches children and has many years of experience, and there is a high confidence level amongst the Board relative to the applicants ability and qualifications, and is in support. He said that the motion should include the hours of the outside play to not occur before 9:30 am, which has been a consistent determination in the past by the Board for day cares, and would support the stipulation that the neighbors trucks are not to be parked on this lot.

Mr. Lionel said that he is in support as well, but the applicant has an adequate background, and is well capable of watching the children.

Mrs. MacKay said that she is in support as well, her credentials speak for themselves. She said that she doesn't have a problem with the twelve children, and is in full support.

MOTION by Mr. Shaw to approve the special exception on behalf of the owner as advertised. He said that it is listed in the table of uses, Section 190-47 (B).

Mr. Shaw said it will not create undue traffic congestion, or unduly impair pedestrian safety, there is plenty of area for off-street parking and circulation of vehicles.

Mr. Shaw said that the use will not overload public water, drainage or sewer or other municipal systems.

Mr. Shaw said that all special regulations will be fulfilled.

Mr. Shaw said that the request will not impair the integrity or be out of character with the neighborhood, or be detrimental to health, morals or welfare of residents. He said that the lot exceeds the minimum area, it abuts the turnpike, and there is already fencing for a play area in the back, and plenty of parking.

Mr. Shaw said that the special conditions are that the hours of operation are Monday through Friday 7:30 am to 5:00 pm. He said

that there is no outside play before 9:30 am, and that there will be no parking of trucks or construction vehicles or other vehicles not associated with the residence or with the use of the day care.

Mrs. MacKay asked if the applicant can come back up to go over the special conditions for a day care.

MOTION by Mr. Lionel to re-open the public hearing.

SECONDED by Mr. Shaw

MOTION CARRIED UNANIMOUSLY 4-0.

Mr. Lionel asked if Ms. Laro is familiar with the special conditions.

Ms. Laro said that she is.

Mr. Lionel read the conditions, and Ms. Laro agreed that she meets them all.

SECONDED by Mrs. MacKay.

MOTION CARRIED UNANIMOUSLY 4-0.

Mr. Boucher said that he is aware that Mr. Shaw has to leave the meeting shortly, and with all the Board members present, asked the Board to do their first motions for Officers for 2020.

Mr. Boucher said he is amenable to step down as Chair if someone else is interested.

Mrs. MacKay said that she would be willing to step up to Chair.

Mr. Lionel said he may be absent for at least six meetings this upcoming year.

Mr. Currier said that he is open to anything, and is fine with any role. He said that he'd be happy to serve as Clerk if Mrs. MacKay is the Chair.

Mr. Shaw said that he'd rather not be in one of the leadership roles this year due to work conflicts, and is more than happy to support those that want to.

MOTION by Mr. Boucher to nominate Mrs. MacKay as Chair, Mr. Lionel as Vice Chair, and Mr. Currier as Clerk for the Officers for 2020.

SECONDED by Mr. Shaw.

MOTION CARRIED UNANIMOUSLY 5-0.

Mr. Boucher said that this has to be voted upon twice per the By-Laws.

3. Santa Tejada (Owner) 3 Lyons Street (Sheet 19 Lot 86) requesting the following variances: 1) From Land Use Code Section 190-31, to encroach 14 feet into the 20 foot required front yard setback to construct a 15'x20' detached pool house; and, 2) from Land Use Code Section 190-264, to exceed maximum accessory use area, 40% permitted, 76% existing - 109% proposed. RB Zone, Ward 7.

Voting on this case:

JP Boucher, Chair
Mariellen MacKay, Clerk
Steve Lionel, Vice Chair
Jack Currier
Rob Shaw

Angel Rivera, 3 Lyons Street, Nashua, NH. Mr. Rivera said that they're looking for a place for the pool furniture, and a play area for the children. He said that the house is only about 900 square feet in size. He said that they don't have much of a back yard. He said that this is pretty much the only place for the pool house. He said that he's been working in construction for over twenty years.

Mr. Lionel said that it looks as if construction has already begun, and it's significantly done, and asked about a building permit.

Mr. Rivera said that he hasn't applied for a building permit yet, and said that the Building Department has already been there. He said that he was told that he needed to apply for the variance.

Mr. Currier said that knowing that a variance would be required, he said that he didn't get a good feel for the back yard, and asked if there is any other location that could accommodate this structure, and asked if this is approved, would it be finished off.

Mr. Rivera said it would all be winterized, and closed up, it would have windows, door, it would be weather-tight, like a shed. He said it would be finished and look nice.

Mr. Currier asked if it would be a foundation, or a slab.

Mr. Rivera said that there is concrete, with footings for the columns.

Mr. Currier asked if there is another place on the property that could accommodate this pool house.

Mr. Rivera said not really.

Mr. Lionel said he's having trouble with this one, it is intrusive, in that it juts out from the front of the house, very close to the street. He said that he takes issue with projects that begin and then they realize they need a building permit.

Mr. Minkarah said that he's struggling with the special conditions of the property. He said that the lot doesn't seem distinct from other ones in the neighborhood, it is very regularly shaped, and the lots in this neighborhood are somewhat small. He said that there is a lot going on the property, there is already a pool, and an existing shed. He said he didn't agree with the statement on the application that for hardship, the applicant mentioned that it's already built and he'd have to take it down if not approved.

Mr. Currier said he feels the same way as Mr. Minkarah, and said he struggles with the front yard encroachment. He said once completed, it may be a nice structure, and there is nothing like this in the neighborhood. He said that it is a bit camouflaged with the front fence, but that is not a justification for approval. He said he's not seeing any special conditions with the lot, and is struggling to find support.

Mr. Shaw agreed, and said it's frustrating with these cases when something has already happened, and the Board has to deal with

undo construction, or remove something. He said he's asked what decision he'd make if nothing began construction, and if he'd still be in support. He said it would help if this had a lesser intrusion, but this is only six feet off of the property line, and there isn't a lot of extra city right-of-way here. He said he doesn't feel like the justification to approve this is there, and doesn't think he'd support it if it was an initial proposal that hadn't begun.

Mr. Boucher agreed, and asked if the Board gives the applicant the opportunity to come back with something different.

Mr. Lionel asked about the fence.

Mr. Falk said that there are no setbacks for fences, as long as they are six feet in height or lower, they can go right up to a property line. He said if it was a corner lot, the sight visibility triangle may be lower so as to not impede traffic views.

Mr. Shaw said that perhaps the construction could be scaled back, but still didn't know if he could support a scaled-back version. He said if the encroachment is not as significant, it may be a little easier to deal with, especially with sight lines along the road.

Mr. Currier said that his preference would be to just vote on it as is, and the Fisher v. Dover issue could be looked at to see if it's a different application if it's redesigned.

Mrs. MacKay said she's not inclined to make someone take down something they've already put up. She said that the lot is small, and there's no other place to go. She said that perhaps it could be scaled back.

Mr. Shaw said that to get this to something that he may approve, if it is revised, perhaps it would meet the Fisher v. Dover determination.

Mrs. MacKay said that is a fair compromise.

SPEAKING IN FAVOR:

No one.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

No one.

MOTION by Mr. Lionel to deny the variance application on behalf of the owner as advertised, with all of the requests considered together. He said that the Board believes that the variance would not be appropriate, given the insufficient special conditions of the property for the benefit sought by the applicant, and there may be another reasonable method that they could apply to get what they want.

Mr. Lionel said that the Board does not feel that it is within the spirit and intent of the ordinance.

Mr. Lionel said that although there is no testimony, there is concern that due to the intrusive nature of this building that it will adversely impact surrounding property values.

Mr. Lionel said that the request is not within the public interest, and substantial justice is served to not grant this request.

SECONDED by Mr. Shaw.

MOTION CARRIED UNANIMOUSLY 5-0.

4. Albert F. Monaco (Owner) 39 Amherst Street (Sheet 63 Lot 27) requesting the following variances: 1) From Land Use Code Section 190-192 (C) to exceed maximum driveway width, 24 feet allowed - 40 feet requested; 2) to exceed maximum 50% of front yard paved - 66% proposed; and, 3) from Land Use Code Section 190-16, Table 16-3 for minimum open space, 35% required - 33% proposed. RB Zone, Ward 3.

Voting on this case:

JP Boucher, Chair
Mariellen MacKay, Clerk
Steve Lionel, Vice Chair
Jack Currier
Rob Shaw

Al Monaco, 39 Amherst Street, Nashua, NH. Mr. Monaco said that he is wishing to make his driveway larger, it was already about

30 feet wide. He said he just put a garage in, and said he tried to meet the 24-foot wide curb-cut, but altogether it's 40 feet, which is too close to Artillery Lane, it needs to be back further. He said that he is requesting to have his driveway a total of 40 feet wide, he said it will look a lot better and be more serviceable, now, it's just an area that is just stone, not manageable property.

Mr. Monaco said that the area can be pretty busy, and you can't park in the street during good weather. He said he can't park directly in front of the garage, as it's only 12 feet from the City right-of-way, and his vehicle would stick out, and has received parking tickets. He said that the drivers in his house all work off-hours, and people are coming and going at different times to go from one job to another job. He said that the driveway area adjacent to the garage works out very well. He said that it is much safer with the extra space. He said that aesthetically, the garage looks very nice. He said that many other houses on the street have driveways greater than 24 feet. He said that drainage will be improved as well.

Mr. Currier asked about the existing pavement, the way it is now, asked if it's a 40-foot curb cut, or if he is looking to fill in that patch area up to the street that is now dirt.

Mr. Monaco said he's looking to fill in that area, it has some drainage rock there, and wants it to be paved, so it's all pavement.

Mr. Currier asked what the curb-cut width is now.

Mr. Monaco said it is 30 feet.

Mr. Currier asked how wide the garage is.

Mr. Monaco said it is 23 feet wide.

Mr. Currier said that it appears as if there is a parking area to the left of the garage. He asked how far it goes over.

Mr. Monaco said that it is an additional 17 feet wide.

Mr. Currier said that it would be the 23 foot wide garage, and the extra 17 feet, for a total of 40 feet.

Mr. Monaco said that the widest part would be 40 feet, from one corner of the garage to the additional parking. He said that the 17 foot wide area matches aesthetically because it lines up to the set of stairs going to the house.

Mr. Minkarah asked about parking in front of the garage, and how he would get a ticket.

Mr. Monaco said that before the garage was up, if you were to park parallel to the street, it's actually considered a fire lane, so with the garage being there, there's still a risk of getting a ticket.

Mr. Monaco said that it is 12 feet from the front of the garage to the property line, so the back of a car would be in the right-of-way.

Mr. Falk said that there is a large swale area there.

Mr. Lionel asked how many vehicles park at the house.

Mr. Monaco said a total of four. He said it's pretty busy getting in and out of the house.

SPEAKING IN FAVOR:

No one.

SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:

Mr. Boucher read a letter in opposition into the record from Michael Brown, 10 Artillery Ln.

SPEAKING IN FAVOR - REBUTTAL:

Mr. Monaco said that the letter is from his neighbor at 10 Artillery Lane, who has a 41-foot curb-cut, and two sizeable trucks. He said he needs more room, as he can't park in front of the garage. He said it's safer the way it's proposed, and is aesthetically pleasing to the neighborhood.

Mr. Currier said that there are several other properties that may not have a paved driveway, but people are using the full width of it. He said that if it were filled in, it wouldn't be an outlier, it would almost look like the norm around that area.

He said that the garage with the stone work is very appealing. He said that he is inclined to support this application.

Mr. Boucher said he is in support of the application, he said that the special conditions of the property is that you can't park in the front of the house, it's only in the back. He said that the applicant has gone far to make this aesthetically pleasing, and supports the application.

Mr. Lionel said he was initially not supportive, but hearing more about it and looking at the rest of the neighborhood, he understands why the owner has done what he has done, and it makes sense. He said he is not enthusiastic, but can support it.

Mr. Minkarah said that it is true that there are other properties in the area with extra wide driveways, some paved, some not paved. He said that some are not paved, which may be better for drainage. He said he really doesn't want to see every property abutting the park with a 40-foot wide paved driveway, especially when the lot is 57 feet wide. He said that the right-of-way on Artillery is unusually wide, and that is a special condition that does impact the property. He said that Artillery in itself creates a special condition in that most people have to juggle their cars periodically, and across the street is a major sports field that is used heavily. He said he can support it.

Mrs. MacKay said she is in support, and understands the parking issue, and doesn't want people parking on their front lawns. She said that the applicant cannot even park in front of his garage without getting ticketed, and the parking area to the side is a safer place to park. She said that aesthetically, this has turned out well, and understands the size of the garage as well, and this makes logical sense.

MOTION by Mr. Currier to approve the variance application on behalf of the owner as advertised, with all requests considered collectively. He said that the Board believes that the variance is needed to enable the applicant's proposed use of the property, given the special conditions of the property, which, by testimony, is the extra wide right-of-way on Artillery Lane, the fact that it is adjacent to city owned land, ball fields that are heavily used in the summer can make parking particularly challenging, also, this row of homes have no

parking on the front, and all the parking is on the back, and it is therefore a reasonable request. He said another condition is that there are other driveways close by that are as large or larger than this one.

Mr. Currier said that the Board feels that it is within the spirit and intent of the ordinance.

Mr. Currier said that it will not adversely impact surrounding property values.

Mr. Currier said that the request is within the public interest, and substantial justice is served.

SECONDED by Mrs. MacKay.

MOTION CARRIED UNANIMOUSLY 5-0.

MISCELLANEOUS:

REHEARING REQUESTS:

1. SAVCAM, LLC (Owner) NH #1 Rural Cellular, Inc. (Applicant) "L" Silver Drive (Sheet A Lot 993) requesting the following: 1) Special exception from Land Use Code Section 190-15, Table 15-1 (#276) to construct a 130-foot tall monopole communications tower with an associated service truck containing radio equipment; and the following variances: 1) from Land Use Code Section 190-38 (C)(1) to allow a setback of 23'-8" to nearest property line - 400 feet required; and 2) from Land Use Code Section 190-38 (C)(2) to allow a tower within one mile of an existing tower. GB Zone, Ward 7.

Voting on this case:

JP Boucher, Chair
Mariellen MacKay, Clerk
Steve Lionel, Vice Chair
Jack Currier
Jay Minkarah

NOTE: This case was approved at the November 12, 2019 regular meeting.

Mr. Boucher asked if there was a procedural error, such as improper notice, or denying someone the right to be heard.

Mr. Currier said that there was a claim of improper notice, paragraph B. He said that he believes that proper notice was provided, and Mr. Falk showed a list of all the communities that were notified.

Mr. Falk said that the RSA mandates that all municipalities within a 20-mile radius must be notified. He said that staff did do this.

Mr. Currier said that his opinion is based upon reading the minutes, and the response by Attorney Grill, and feels that there was no procedural error, and notice was proper.

Mr. Lionel agreed, no error.

Mr. Minkarah agreed, no error.

Mrs. MacKay agreed, no error.

Mr. Boucher agreed, no error.

Mr. Boucher asked if it was an illegal decision, such as the Board failing to address each of the points of law required for the special exception and/or variance.

Mr. Currier said in paragraph A, it says that it was a request for a special exception and two variances, and that was posted, and that was heard. He said it was not illegal.

Mr. Lionel said it was not an illegal decision.

Mr. Minkarah asked if the requests for variances were in effect the same as the Board granting waivers.

Mr. Falk said the language in the ordinance specifically says the word waiver, but believes it was properly advertised and deliberated by the Board. He said that the special exception was for the use, that is a given. He said the variances are dimensional, and dimensional issues must ask for variances before the Zoning Board, for the setback and the distance to another tower. He said that staff believes that it was properly advertised and executed by the Board. He said that there have

been many other telecommunications towers considered by the Board, and how this was treated is consistent as far as rulings go. He said that the Planning Board may do waivers, and has never seen the Zoning Board do waivers, except an Equitable Waiver, and those are completely different issues.

Mr. Minkarah agreed, it was not an illegal decision.

Mr. Currier said it touches on the idea of a temporary, versus permanent variance. He said that the request was clearly for a temporary tower, it was an 18-month temporary variance. He said that if the Board was not permitted to have a temporary condition, so this could only be allowed in perpetuity, he couldn't vote in favor of it. He said that the Board has the ability for the temporary situation. He said that the temporary aspect of this is reasonable for us to speak to, and doesn't think it was an illegal decision.

Mr. Minkarah said that the applicant did request this as a temporary use.

Mr. Lionel said that if this were a request for a permanent tower, it would have been denied.

Mr. Falk said it is possible it would be up for less than 18 months, but the Board granted an 18-month time limit, and the Board can have reasonable stipulations for approvals, and the applicant agreed to this.

Mr. Currier said that the whole temporary granting was reasonable.

Mrs. MacKay said it was not an illegal decision.

Mr. Boucher agreed that it was not an illegal decision.

Mr. Boucher asked if the request for rehearing contain any new information not presented or available to the Board at the original Public Hearing.

Mr. Lionel said he didn't see anything substantive.

Mr. Currier said the only issue he saw that was new was that the tower is extremely visible to the apartments, and was surprised it was up, and thought they may wait the 30-day period. He said

he went there and there is no denying it is visible. He said even if the trees are sixty feet tall, it is a 130-foot tall tower. He said that the balloon test picture didn't look like it would be very high, and concurs it is tall. He said he didn't think it would change his mind on anything, as this was the information that was there before the Board, and it's a temporary structure. He said this wouldn't cause him to change his mind.

Mr. Boucher said it was clear to him that the residents in the abutting apartment complex would definitely see the tower, and knew it would be above the trees. He said he didn't find anything that would cause him to change his mind.

Mrs. MacKay said that the dimensions were given, the height of the trees, and the tower. She said that there is a shock value seeing it, but everything was told to the Board. She said it is new, and temporary. She said nothing substantially changes her mind.

Mr. Minkarah agreed.

Mr. Boucher asked if there is anything which would/could cause the Board to make a different decision.

Mr. Currier said his short answer is no. He said that in the minutes, there was a discussion about where else they looked for a location, and the applicant stated that they looked around and this was all they could find, but in hindsight, he would have liked to have seen a written list. He said that when you look around the neighborhood, there are plenty of parking lots that don't fill up, such as the Market Basket. He said that the lot is a compact site, with the fence and truck in this small area. He said he takes for face value that the applicant did look exhaustively around.

Mr. Boucher said that they did look at several lots, and their answer was that many were unavailable. He said that parts of the Pheasant Lane Mall are in Tyngsboro, and this tower has to be in New Hampshire. He said that he and other Board members did ask this question, on what else was available, and said that they answered it to his satisfaction. He said there is nothing that would cause him to change his mind.

Mr. Minkarah said that he assumes that the testimony given was

accurate.

Mr. Lionel said he didn't see anything that would cause him to change his vote on this.

Mrs. MacKay said nothing would change her mind, the questions were asked and answered repeatedly, six different ways. She said that there is nothing that would make her come up with a different decision. She said that the applicant did look around.

MOTION by Mr. Boucher to deny the rehearing request as advertised based upon the responses just mentioned. He said that the Board believes that there was no procedural error, which includes proper notice, the Board believes that it was not an illegal decision, and the Board did address each of the points of law required for a special exception or variance, the Board believes that it did not include any new information that was not provided or available to the Board at the original public hearing, and believes that there is nothing that would or could cause the Board to make a different decision.

SECONDED by Mr. Lionel.

MOTION CARRIED UNANIMOUSLY 5-0.

2. David & Steven Linatsas, Trustee of the Linatsas Family Trust (Owner) Ali Bird (Applicant) 1 Hardy Street (Sheet 62 Lot 152) requesting use variance from Land Use Code Section 190-52 (A) for a fenced in area for outdoor use for a dog day care. LB Zone, Ward 4.

NOTE: This case was approved at the 9-24-19 ZBA meeting, and a Rehearing request was denied at the 11-12-19 meeting.

Voting on this case:

JP Boucher, Chair
Mariellen MacKay, Clerk
Steve Lionel, Vice Chair
Jack Currier
Jay Minkarah

Mr. Lionel asked why this is here.

Mr. Boucher asked if anyone believes that the Board should be rehearing this.

Mr. Currier said that it looks like this is appealing to us a Planning Board decision.

Mr. Falk said that the Zoning Board does not have the authority to do, Planning Board decisions are appealed to the Court. He said that for this case, the Public Hearing was on 9-10-19, tabled to 9-24-19, and approved. He said that within the 30-day deadline there were two rehearing requests submitted, and both were denied on 11-12-19, so the 30-day deadline ended on or about October 24, 2019. He said that this request was somewhat different, and referred it to Corporation Counsel, who said that staff should present it to the Zoning Board, with the recommendation that it is untimely, and should not be considered, as it is past the 30-day deadline. He said that appeals from the Planning Board go before the Court. He said that this expired two months ago.

Mr. Boucher asked if anyone believes that the Board should rehear this.

Mr. Currier said that he believes that the Board shouldn't.

Mr. Falk said he believes that something has been filed with the Court, so perhaps this will be addressed one way or another. He said unless this is remanded from the Court, it does not come before this Board from an individual.

Mr. Lionel said that in the rehearing request, it was the Board's determination that we should not have heard this case in the first place, and for many many reasons, there is no reason to hear this rehearing, or even consider it.

Mr. Falk said that the Board should take a vote, but doesn't believe that they need to go over all the points in a rehearing request.

MOTION by Mr. Minkarah to deny the rehearing request by Clayton and Georgette Alexander on the grounds that it is not timely.

SECONDED by Mr. Lionel.

Mr. Currier said that the untimeliness is past the 30-day appeal.

MOTION CARRIED UNANIMOUSLY 5-0.

MINUTES:

11-26-19:

MOTION by Mr. Boucher to approve the minutes as presented, waive the reading, and place the minutes in the file.

SECONDED by Mr. Lionel.

MOTION CARRIED UNANIMOUSLY 5-0.

12-10-19:

MOTION by Mr. Boucher to approve the minutes as presented, waive the reading, and place the minutes in the file.

SECONDED by Mr. Currier.

MOTION CARRIED UNANIMOUSLY 5-0.

REGIONAL IMPACT:

Mr. Falk said that there is no agenda for the next meeting, as no applications were submitted, so there is no meeting for 1-28-2020.

Mr. Lionel said that the following meeting is on a Wednesday, February 12, 2020, due to the New Hampshire Primaries.

Mr. Falk said that they will post it so no one comes to the meeting.

ADJOURNMENT:

Mr. Boucher called the meeting closed at 8:39 p.m.

Submitted by: Mrs. MacKay, Clerk.

CF - Taped Hearing