

City of Rochester Zoning Board of Adjustment

Wednesday January 11, 2023

31 Wakefield Street, Rochester, NH 03867

(These minutes were approved on February 8, 2022)

Members Present

Larry Spector, *Chair*

Michael King

Members Absent

Matthew Winders, excused

Alternate Members Present

James Connor

Lance Powers

Laura Zimmerman

Staff: Shanna B. Saunders, *Director of Planning & Development*

Crystal Galloway, *Planner I*

These minutes serve as the legal record of the meeting and are in the format of an overview of the Zoning Board of Adjustment meeting. It is neither intended nor is it represented that this is a full transcription. A recording of the meeting is on file online at www.rochesternh.net for a limited time for reference purposes.

Chair Larry Spector called the meeting to order at 7:00 p.m.

The recording secretary, Crystal Galloway, conducted roll call.

3. Seating of Alternates:

Mr. Spector said the voting members for the meeting would be the five members present, Mr. King, Mr. Connor, Ms. Zimmerman, Mr. Powers, and himself.

4. Approval of Minutes:

A motion was made by Mr. King and seconded by Mr. Powers to approve the minutes from the December 14, 2022 meeting. The motion carried unanimously.

5. Continued Cases:

Mr. Spector let the Board know the applicant for case Z-22-35 withdrew his application.

Case Z-22-38 was heard after item 6, New Cases.

6. New Cases:

Z-23-01 Gregory Jeanson Seek a *Variance* from Sections 24.4 & 24.7; Tables 18-A & 18-B to permit a Home Occupation III and a Commercial Yard Sale in the R1 zone.

Location: 173 Old Dover Road, Map 253 Lot 90 in the Residential-1 Zone.

Applicant Gregory Jeanson said he is seeking relief from Code Enforcement to allow a yard sale and home occupation. He said what he does is a hobby, however Code Enforcement is calling it a business. Mr. Jeanson said he repairs homeowner power equipment to keep his mind and body busy.

Mr. Jeanson read through the variance criteria. He said granting the variance would not be contrary to the public interest because there is no excessive noise, traffic disturbance, disturbance of the peace, and no environmental emissions or discharge.

The spirit of the ordinance would be observed because the property remains a single-family residence used to its full potential without any negative impact to the neighborhood. Substantial justice would be done because it allows him to continue his hobby and metal and physical therapy for his medical condition. The values of surrounding properties would not be diminished because all changes to public view are temporary as items come and go and do not linger, there are no permanent changes to property and any uses related to this approval are reversible. Recent and current property values and sales have only increased in value. Denial of the variance would result in an unnecessary hardship because it does not harm the neighborhood and allows a service to support residents of same. He has the support of his neighbors in a number of letters.

Mr. Spector asked Mr. Jeanson if he has these letters of support because the City has not received any. Mr. Jeanson provided copies of letters.

Mr. Spector said he is not in favor of the variance because when driving by the property it looks like a junkyard, there's tractors everywhere, trailers in the front yard, it's a small lot, and it's creating noise when the power equipment and lawn mowers are started up.

Mr. King asked if there will be a sign. Mr. Jeanson said he doesn't have one proposed at this time.

Mr. Connor asked what size tractor the applicant works on. Mr. Jeanson explained they are lawn and garden tractors, push mowers, and rototillers.

Mr. Spector opened the public hearing.

Ms. Saunders read the following two emails staff received into the record:

Hello, my name is Jamie Forbes, property owner at 172 Old Dover Road, directly across from Gregory Jeanson. My concerns with this are: 1) parking. Where? Do not want customers parking or blocking my driveway again. 2) Inventory control 3) site control, prefer it not look like a junk yard. Thank you very much for taking the time to hear and address my concerns.

The second email:

I would like to start by saying that I wish to remain anonymous. I am a homeowner that has already seen the negative effects of this home business, which has already been operating for approximately 3 years. The front yard resembles an unkept commercial car/junk yard, attracting cars which pull in our driveway and on the lawn (I've seen this with my neighbors driveway as well). I chose my property as where I would be spending my golden years in a nice family-oriented neighborhood, and I never thought it would be next to a business with engines revving and traffic coming and going. This is a residential area and it should remain one. Please consider this my opposition to this variance and permit. Thank you for your consideration in this matter.

Ms. Saunders read the following letter submitted by the applicant:

Good morning/afternoon/evening,

If you're reading this, I have likely asked you for your help defending myself to the City of Rochester. The City of Rochester Planning Board and Code Enforcement have opted to mandate me applying for a zoning variance and business license to continue offering low cost repair services and used sales of homeowner power equipment here at my home. As you already know, I do not do this for income but offer it as a neighborhood service aimed at low/fixed income folks in the area and as therapy for myself while I continue to fight my own illness. This has already cost me a good deal of my own money for the applications and consideration to remain in existence and will continue to cost me money afterwards. If approved to continue, I will have to carry the financial burden of operating as a business while sacrificing the Federal tax exemptions that I currently realize as a hobby.

The City of Rochester doesn't care about any of that. Leaders in place now are clearly motivated by the fees they've been able to collect from folks like me and likely look forward to the increased taxable value of my home if it's approved for Multi-use instead of Residential. I served on the Planning Board when we last re-zoned. I, personally, reviewed or re-wrote many of the city ordinances and fought hard to protect or expand the existing rights of our residents instead of adding more restrictions like this.

Unfortunately, the City has the right to interpret these ordinances how they see fit and I cannot stop them from what they are doing... but they can stop me by rejecting my applications. I need your help standing behind me at this meeting on January 11th to let them know that I am not a business; I am not some greedy businessman and that I do this to add value to my community, FOR my neighbors and FOR my own health. I do this so that folks who cannot afford new equipment or pay exorbitant service fees have a place to turn to in order to have their needed power equipment fixed or replaced. I'm not stealing anyone's money, I'm not stealing business from other businesses... I'm helping folks who go home happy by paying only what they can afford and who wouldn't solicit those high cost businesses anyway.

Please join me at City Hall on January 11th at 7pm and stand with me to testify to the City that I want to continue to do what I've been doing; helping folks. If I can't convince them at this point, I will be shut down. Please help me avoid that.

Signed:

Eric Creutz, 175 Old Dover Road;
Francis Milinski, 72 Cormier Drive;
Stephanie Mahar, 37 Gooseberry Circle;
Nathan Redden, 197 Old Dover Road;
Margaret Burke, 175 Old Dover Road;
Ted Allen, No address given;
Irene Turner, 200 Lowell Street;
Brian Arriel, 138 Rochester Hill Road; and
Russell Allen, 22 Granite Street.

Mr. Spector asked for the City's position. Ms. Saunders explained a variance is granted, in part, when a property cannot be reasonably used in a manner that meets the ordinance because of special conditions of the property and that these special conditions make it different from any other property in the area. Or when the prohibited use does not serve the public purpose of the Zoning Ordinance. Ms. Saunders said each of these instances do not apply to this proposal. There are no unique or special characteristics of the property that make it different from any other property in the zoning district. She further explained the criteria for a Home Occupation is outlined in Section 275 -24.1 and includes all activity be conducted inside, no retail sales except barn sales, and no outside storage.

Mr. Spector spoke about the size of the lots and that all lots are small in this area. There was also discussion about who if the applicant's letters were abutters.

Mr. King said he didn't feel the applicant proved the hardship criteria and that this is more of a larger business.

Ms. Zimmerman asked for clarification because Mr. Jeanson told the Board he was told by Code Enforcement there was a preexisting variance. Ms. Galloway informed the Board there was no evidence found to support that a previous variance was granted for the property.

Mr. Spector asked how long the applicant has lived at this address. Mr. Jeanson replied twenty-two years. He said there was a previous business before he purchased the home. He said it was car repair and mentioned the former property owners. S. Saunders mentioned that if it was that long ago the approval would have expired.

Mr. Spector closed the public hearing.

A motion was made by Mr. King and seconded by Ms. Zimmerman to Deny the Variance in case # Z-23-01 because the applicant did not meet the criteria and there wasn't a sufficient hardship based on the earlier conversation. The motion carried unanimously by a roll call vote.

Z-23-02 Packy's Investment Properties, LLC Seeks an *Appeal of Administrative Decision* that the addition of thirteen (13) more trackers to a mini -storage (self-storage) site that already contains eleven (11) trackers is an addition of use of a Utility – Power Generation and not simply an expansion of an accessory solar use.

Location: 17 Sterling Drive, Map 208 Lot 18 in the Granite Ridge Development Zone.

FX Bruton of Bruton and Berube, PLLC respectfully requested Mr. Spector recuse himself pursuant to RSA 673:14 which is a disqualification standard where if you've expressed a negative opinion in regards to a project in another forum which comments were made before the Conservation Commission. Mr. Bruton said they feel those comments would qualify as a disqualification.

Mr. Spector explained he spoke as a resident on behalf of himself that night and not as a representative of the Zoning Board. He said he will not recuse himself but offered to postpone the application to the February meeting in order to speak to the City's Legal Counsel.

Mr. Bruton said they would be happy to move forward with application.

Mr. Bruton explained the lot is 6.6 acres located in the Granite Ridge Development zone off Farmington Road. He said two years ago the Planning Board approved a site plan to construct four self-storage units with eleven solar trackers.

Mr. Bruton said his client went through the Conservation Commission because he wants to install additional solar trackers in the wetland. He said his client was asked and has agreed to install a gate to limit access to site which is important.

Mr. Bruton explained they are appealing the decision by Ms. Saunders that says the additional trackers would be considered utility power generation facility. He said they meet the accessory use standard and the municipality would be preempted by state law in terms of limiting the location of the trackers.

Mr. Bruton explained the trackers produce less than one megawatt of alternative current which means under State Statute RSA 362-A the trackers are referred to as a customer generated small power. He said anyone that stands behind the meter is allowed to be considered a customer generator and they use what they need to use then turn the remaining power over to the grid.

Mr. Bruton went through the accessory use requirements. He said it is customarily or reasonably associated with the principal use; has hours of operation the same as or less than the principal use; is incidental and subordinate to the principal use; and is located on the same lot or tract as the principal use.

Mr. Bruton said the main use of the property is 24,000 square feet of self-storage units. He said the trackers would be subordinate to the primary use as the power generated would be used for the facility.

Mr. Bruton said the second part of the appeal is whether or not the City can regulate what district this use is in. He said there is no limitation on who can be the customer generator other than the customer generator has to stand behind the meter. There is a policy in the Statute which is very clear and states it is further found net energy metering for eligible customer generators may be one way to provide a reasonable opportunity for small customers to choose interconnected self-generation, encourage private investment,

stimulate in state commercialization of innovative and beneficial new technology, enhance the future diversification of the states energy resources, and reduce interconnection and administrative cost.

Mr. King asked how many trackers they are proposing. Mr. Bruton said there would be a total of 24 trackers.

Mr. King asked what percentage of power is going back to the grid. Applicant Packy Campbell said in New Hampshire under net metering it is monetized, the default rate is what it costs the utility company to deliver power to your home. He said if a solar power generator delivers power to the grid they monetize the default rate which is deducted from the bill. Mr. Campbell further explained it depends on how much solar power was generated, you could still owe a bill to Eversource or the bill could go negative in which case Eversource would send you a check quarterly if it goes negative. He said they are currently running negative by a \$1,000 per month on the 100-kilowatt systems. He said they expect in the summer to be \$2,000 to \$3,000 a month. The question of how much goes back to the grid is the wrong question. The state law defines by the size of the system. A Utility is big like Eversource. "Other materials" does not include sunlight. You are preempted by State law. The questions should be is this preempted by state law not how much goes to the grid.

Mr. King asked again how much is used on site and how much is sent to the grid. Mr. Campbell began to talk about the monetization of the power. Mr. King asked, please, just answer the question. Mr. Campbell explains it all goes out to the grid and then he just gets reimbursed. He uses about 30,000 kw hours annual and produces about 100kw hours annually.

Mr. Powers said each site may be under the threshold but should we look at Packy's Investment Properties as a whole? Does the City take that into consideration. Ms. Saunders explained the City looks at each property separately. You cannot look at all of the installations as a whole. She said staff looks at the ordinance and take into consideration the newly created laws and determines the use.

Ms. Saunders explained the title Power Generation Utility is defined as "A facility producing energy from gas, oil, coal, wood, nuclear, waste, hydro, and other materials for commercial purposes". She said staff believes that the use category fits what these trackers are doing at 17 Sterling Drive. Ms. Saunders further explained staff believes sunlight fits under "other materials".

Mr. Bruton said they still look at it as a subordinate use that was approved. He said there is no access to the general public to this use, it is not the traditional use described in the zoning ordinance.

Ms. Saunders said the use of power generation utility is not disallowed in the Granite Ridge Development zone. She said it is allowed by Special Exception.

Mr. King asked if the Public Utilities Commission is involved and whether or not they classify this as power generation utility. Mr. Campbell said they are regulated by the PUC rules 900 which says they are a customer generation facility up to 1 megawatt.

Mr. Spector closed the public hearing.

Ms. Saunders explained the PUC has not offered an opinion on this project in regard to the local ordinance which is what is on the table before the Board.

Mr. Powers said the issue is the accessory use to the storage facility. He asked what the threshold is for the City to not consider it an accessory use. Ms. Saunders explained the accessory use needs to be subordinate. So in this case the solar use needs to be subordinate to the self storage use. She said once they proposed so many solar panels on site it no longer is subordinate to self storage. It turns from accessory use to a secondary primary use. She explained another example is a hair salon and the retail component of a hair salon. The sale of a small amount of hair products is accessory. When people call they primary use is a hair cut, once there they purchase product. Once the retail outgrows the salon, it is no longer accessory it is two primary uses on one site. Once the solar outgrew the ministorage it was now 2

primary uses. You can have two primary uses on a site. Power Generation Utility is permitted by Special Exception.

S. Saunders explained the wording of the motion in relation to overturning the City's decision or upholding the City's decision.

A motion was made by Mr. King to Grant the Administrative Decision Appeal in case Z-23-02. No one seconded. The motion failed for lack of a second.

A motion was made by Mr. King and seconded by Mr. Connor to Deny the Administrative Decision Appeal in case Z-23-02 because the commercial use of Power Generation Utility is far greater than an accessory use. The motion carried unanimously by a roll call vote.

Mr. Spector called a break at 8:11pm at the request of the applicant.

Mr. Spector call the meeting back to order at 8:14pm.

Z-22-38 Packy's Investment Properties, LLC Seeks a *Special Exception* from Table 18-D to permit utility power generation.

Location: 17 Sterling Drive, Map 208 Lot 18 in the Granite Ridge Development Zone.

FX Bruton of Bruton and Berube, PLLC respectfully requested Mr. Spector recuse himself pursuant to RSA 673:14 because of comments made before the Conservation Commission.

Mr. Spector said he will not recuse himself but offered to postpone the application to the February meeting in order to speak to the City's Legal Counsel.

Mr. Bruton read through the criteria for a Special Exception. He said the site is an appropriate location because the site is already approved for a mini-warehouse facility with two 100-kilowatt AC systems already operating and the site has been approved by Eversource for a total of four interconnection systems. The proposal is not detrimental, injurious, obnoxious, or offensive to the neighborhood because there would be no change to the present use of the property and the surrounding area is commercial and industrial use. There will not be any undue nuisance or serious hazard to pedestrian or vehicular traffic because the additional trackers are outside of all traffic and parking ways and not in a pedestrian used area. There will be adequate and appropriate facilities and utilities will be provided to ensure the proper operation of the proposed use because the site already has the electrical transformer installed to handle the additional trackers. The proposed use is consistent with the spirit of the ordinance and the intent of the Master Plan because solar is a desirable use of all properties, specifically allowed by state law for customer generation a right granted by RSA 362 A-9. The use is a permitted use by Special Exception in this zone per Table 18-D. Site plan Regulation Article III Section 8(d) encourages solar, as reflected by the City Planning Department encouraging solar at TRG in October 2020 for this site. Upon information and belief, Master Plan is silent on solar power generating or alternative "green" energy production.

Mr. King asked if any wetlands will be disturbed. Mr. Bruton said there will be minimal impacts to the wetlands. Mr. Campbell added there will be approximately 42 square feet of permanent impact to the wetland. He said as part of the conditional use permit review they have eliminated a service road in the wetland because they found it wasn't needed.

Mr. Spector opened the public hearing. No one from the public was present to speak.

Ms. Saunders said the City supports solar installation however, staff has to work within the process that is in the current ordinance.

Ms. Saunders said staff believes this proposal meets the Special Exception criteria and recommends the Board impose a condition of approval as they are allowed under 275-22.1G2 and 3 for additional landscaping of at least 3 – 4 feet along the frontage of Sterling Drive and the driveway into the site in order to screen and soften the viewscape of the trackers from the public way. If lilacs are used, they shall be at least 36 inches tall when planted.

Ms. Saunders further said the Board may want to discuss the location of the proposed use (criteria 275-22.2.A) and make sure they felt that the site is appropriate to fit all of the trackers proposed including those to be installed in the wetlands.

Mr. King asked if it was okay to disturb wetlands as long as they are replaced with something else. Ms. Saunders explained if you disturb a certain amount of wetlands you can mitigate by creating wetlands in a different location or by paying into the ARM fund.

Mr. Bruton said when creating a driveway you need a dredge and fill permit from NHDES which will happen as part of the Planning Board process.

Mr. Spector closed the public hearing.

Mr. Spector reminded the Board that even though this will be going before the Planning Board they can still look at landscaping, and wetlands. Ms. Saunders said under Special Exceptions in the zoning ordinance it states the Zoning Board may also impose in addition to any applicable conditions any conditions it finds reasonably appropriate to safeguard the neighborhood or otherwise serve the purpose of this chapter, including increasing setbacks, screening on the property, street, or adjacent property, landscaping, and excess of any minimum requirements in this chapter or the Site plan Regulations, modification of exterior features, limitation of the footprint and lot coverage.

Mr. Spector said he doesn't have any issues with the project except the trackers that are proposed within the wetlands.

Mr. King asked if the City would be against lilac bushes that are not 36 inches. Ms. Saunders explained the purpose of screening is it is supposed to serve a screening purpose and be opaque to a certain height.

A motion was made by Mr. Powers and seconded by Mr. King to approve the Special Exception for case Z-22-38 with the condition for additional landscaping of at least 3 – 4 feet along the frontage of Sterling Drive and the driveway into the site in order to screen and soften the viewscape of the trackers from the public way. If lilacs are used, lilacs shall be at least 36 inches tall when planted. The motion carried unanimously by a roll call vote.

7. Other Business/Non-Scheduled Items:

There was no other business to discuss.

8. Adjournment:

A motion was made by Mr. Powers and seconded by Mr. Connor to adjourn at 8:36 p.m. The motion carried unanimously.

Respectfully Submitted,

Crystal Galloway,
Planner I

and

Shanna B. Saunders,
Director of Planning & Development