



ZONING BOARD OF ADJUSTMENT
MINUTES MEETING OF JULY 21, 2014
APPROVED MEETING OF AUGUST 18, 2014

Present: S. Bogert, **Chair**; S. Perley, **Vice-Chair/Secretary**; D. Greski; M. Foote; O. Gibbs; R. Smith, **Alternate**; K. Geraci, **Alternate**

Absent: None

Staff: S. Saunders, Planning Director; K. Snow, Zoning Technician

S. Bogert called the meeting to order at 7:10 pm. He let the public know that the first order of business would be the minutes from the June 16, 2014 meeting.

Minutes: O. Gibbs moved to accept the minutes, as written, from the ZBA meeting of June 16, 2014. M. Foote seconded and all voted in favor of approval, 5-0. ,

S. Bogert re-opened the hearing for the site walk. He let the public know that the board was at a site walk and that is why the meeting this evening began a little late.

SITE WALK: The board met at 6:30 pm at 937 Weirs Blvd to conduct a site walk on the following hearing. After the site walk they returned to City Hall for the scheduled meeting.

Application # 2014-0008

MSL #194-248-4-11

CR Zone

Jason Cooper

937 Weirs Blvd

Variance

The applicant is requesting a variance from 235-35(B), side and rear setbacks, in order to construct a deck which would infringe into the side setback of 10 ft. This would allow a 5 foot setback at the closest point.

Applicant: J. Cooper stated that he had no further comments so S. Bogert closed the hearing to the public.

S. Perley said during the site visit, the abutters attended and they seemed to have a more positive approach to the variance request. They understand that the applicant could still build a deck and meet the setback but it would be a smaller size. S. Bogert said they were also afraid of the noise level, which seems to have been answered. S. Perley said they had expressed concern regarding tree cutting. There are none to be cut and they are all evergreens here in this area. S. Bogert said no tree canopy will be removed.

M. Foote said the proposal is for an open deck. S. Bogert said he feels that the abutter concerns all seem to have been addressed. They don't want to see the deck enclosed in the future and that can become a condition of approval tonight. S. Perley mentioned the building permit; he said he has submitted that. S. Perley asked about the power pole and S. Saunders said that PSNH should be notified.

D. Greski said on similar variances we have discussed, even though it is not fully the ZBAs concern, we have requested that additional information be required. He feels that PSNH should be notified before any construction is done as it is easier to address at that point.

J. Cooper said he would contact them and get any information to the building department.

Motion: D. Greski moved to approve application # 2014-0008 for 937 Weirs Blvd for the variance in order to construct the deck that would infringe into the 10 foot setback, allowing a 5 foot setback at the closest point.

The variance will not be contrary to the public interest and this does not alter the essential character of the neighborhood nor does it threaten public health, safety, or welfare. The abutters attended the site visit. They were originally against this but, once visiting the site and understanding the proposal, they are ok with it. Most of the deck can be built without a variance; only a small area is affected. There will be no roof over the area, and no living space. This is an open deck, the height of which is equal to the existing deck. The abutters seemed willing to accept the variance at that point.

The spirit of the ordinance is observed. There are shrubs in place and a parking lot located between this deck and the neighboring structure. There is no substantial change in the use. The proposal does not injure the public or private rights of others and is consistent with the spirit of the ordinance, which is to control reasonable use.

Substantial justice is done in the granting of this variance as the benefit to the applicant outweighs any hardship to the general public. The use is permitted here and is an appropriate use. The abutters attended the site visit and, while they were originally against the proposal, after visiting the site they agreed to it as most of the deck can be built without a variance. Again there is only a small area affected. There will be no roof, and no living space.

Property values in the area won't be diminished as this will have no direct effect on the adjacent property.

There would be an unnecessary hardship to the applicant in denying this proposal as the deck does not alter the essential character of the neighborhood and is a permitted use. This doesn't alter the essential character nor is it harmful to public health, safety or welfare.

The use is appropriate for the area and is reasonable. There is no threat to the public health, safety or welfare.

D. Greski asked if the applicant, at the time of submitting the building permit, can check with the utility company to ensure it meets their requirements.

He added two conditions of approval:

The size is to be 8 x 12

This will not have a roof and will not be enclosed to incorporate living space.

S. Perley seconded the motion and all voted in favor of approval, 5-0.

S. Bogert called for a recess in order to meet with legal council on the Gables application. O. Gibbs and R. Smith recused themselves and O. Gibbs left the meeting.

S. Bogert called the meeting back to order at 8 pm. He thanked everyone for their patience.

He let the applicant for 1092 Union Avenue know that the two hearings would be taken together but decisions would be made separately.

R. Smith was seated as full board member for this hearing in the absence of O. Gibbs.

NEW HEARINGS:

Application # 2014-0010	MSL # 327-220-1	C Zone
Cafua Mgmt LLC	1092 Union Ave	Variance

The applicant is requesting a variance from 235-58 (A), Table of Sign Regulations, in order to have a total of 7 signs on this property where the total permitted is 3.

Application # 2014-0011	MSL # 327-220-1	C Zone
Cafua Mgmt LLC	1092 Union Ave	Variance

The applicant is requesting a variance from 235-58 (B), Table of Sign Regulations, in order to have 2 freestanding signs on this property where the total permitted is one per site.

Applicant: Mark Gross appeared for the applications. He gave the board an overview of the project. This is a lot that was developed in 2009/2010 for Dunkin Donuts. The existing structure, the Hathaway House, was left in place at that time. The applicant tried to deal with the structure but could not make it comply or sell it. They have now obtained a demo permit.

They want to build a second building on the lot, of approximately 5000 SF. At the same time they will do some improvements on the Dunkin Donuts site, including increasing the drive up queue.

They want a second freestanding sign and to allow 7 signs on the property where 3 are normally permitted. The 4 additional signs would be for the new structure. 3 are wall signs, one is freestanding.

Application 2014-0010: M. Gross said he would be addressing the first application, for the 7 signs. There are currently 3 signs on the property now. 2 wall signs, and one freestanding sign which were permitted in 2010 for Dunkin Donuts. The additional signs would be for the proposed retail space; 3 walls signs, one for each tenant, and an additional freestanding sign. They currently have the maximum signage that they are permitted, 64 SF and 3 signs.

They want a total of 5 wall signs and 2 freestanding sign as the retail building will require 4 signs. They need one wall sign for each potential tenant. That would be a total of 54 SF, 18 SF for each wall sign.

The total signage permitted on the site will be 183 SF. They currently have 64 SF for Dunkin Donuts, which is what is currently permitted. The retail is permitted to have 90 SF, so they are requesting a total of 154.5 SF. They would be permitted to have 183 SF so what they are proposing is still under what they would be permitted to have although they will have 7 signs total.

This won't be contrary to the public interest. This will allow the second building, a multi-tenant business located on the same site as the existing Dunkin Donuts, the same benefit of wall signs that every other business, including the existing Dunkin Donuts has along this commercial strip. Additionally, the individual wall signs will benefit the public by identifying where that particular business is within the retail building.

The spirit of the ordinance is observed as the parcel is large enough that the proposed retail building could exist on its own lot if it were to be subdivided; thereby the wall signage would be permitted by right at that point. All other aspects of the zoning restrictions will be met.

Substantial justice is done as this would allow the multi-tenant building signage that will be necessary for the advertising of the businesses to the motoring public and will allow the same rights to signage as all other businesses have in the immediate vicinity to this parcel.

Property values won't be diminished. The location, size and height of the proposed wall signs are significantly smaller than what is permitted, and will be in scale to the size of the building. It will meet all other aspects of the sign ordinance. The wall signs will fit in with the neighborhood in terms of signage that other businesses have on their respective lots, thereby not diminishing surrounding property values.

Special conditions exist here as the property was developed for Dunkin Donuts, who had the constraint of the Hathaway House at that time. It had been requested to preserve that structure. Circumstances changed since the original proposal, thereby allowing for additional development opportunities on the property for the second retail building, thus resulting in the need for the variance.

No fair and substantial relationship exists between the general public purposes of the ordinance and the specific application of that provision to the property. The current sign ordinance does not address multiple buildings and/or tenants on a single lot and the restrictions related to the number of signs has no fair and substantial relationship between the application of this part of the sign ordinance with respect to the number of signs as it relates to multiple buildings/users on a single lot, and the specific application of this provision of the ordinance to this property. Additionally the total area of signage permitted on this lot based on the frontage of the structures if calculated to be 183 SF and the actual sign area requested is much less at 154.5 SF.

The use is reasonable as it will allow the second building and its potential tenants' signage for this part of the lot and all other aspects of the sign ordinance, with respect to the wall signage, will be met.

Application 2014-2011: M. Gross let the board know this request is to permit a second freestanding sign for the retail building. This will be 36 SF in area and will meet all height and size requirement for the zone.

This won't be contrary to public interest as this will allow the second building, a multi-tenant business located on the same lot as the existing Dunkin Donuts, the same benefit of a freestanding sign that every other business, including the existing Dunkin Donuts, has along this commercial strip.

The spirit of the ordinance is observed as the lot is large enough that the proposed retail building could exist on its own lot if the property were to be subdivided; thereby the freestanding sign would be allowed by right. Additionally, all other aspects of the zoning restrictions for the freestanding sign will be met.

Substantial justice is done as this will allow the multi-tenant retail building signage that will be necessary for the advertising of the businesses to the motoring public and will allow the same rights to signage as all other businesses have in the immediate vicinity to this parcel.

The values of the surrounding properties will not be diminished because the location, size and height of the proposed freestanding sign will be in accordance with all other requirements of the sign

ordinance and will fit in with the neighborhood in terms of signage that other businesses have on their respective lots, thereby not diminishing surrounding property values.

The special conditions of the property that distinguish it from others in the area are: The lot was originally developed for a Dunkin Donuts with a drive thru and it had the development constraint of the existing Hathaway House that was going to be preserved on the lot at the request of many people within the City of Laconia. Circumstances with respect to the viability of maintaining the Hathaway House on the property have changed over the past several years since the initial construction of the original site; thereby allowing for additional development opportunities on the property for the current second retail building on the property. The Sign Ordinance does not address multiple buildings on the property developed under these circumstances, so variances from the sign ordinance are required as a result.

No fair and substantial relationship exists between the general public purposes of the ordinance and the specific application of that provision to the property. The current sign ordinance does not address the issue of multiple buildings on a single lot and the restrictions related to the number of freestanding signs is related to frontage (two freestanding signs allowed with frontage exceeding 500 feet) but does not relate to the minimum frontage each which could have 6 separate buildings with 6 separate freestanding signs that are allowed by right. In that same distance of 300 feet + only two freestanding signs are allowed. Therefore, there is no fair and substantial relationship between the application of this part of the sign ordinance with respect to the number of freestanding signs as it relates to frontage and the specific application of this provision of the ordinance to this property. Additionally if the property were subdivided to allow each building on its own lot, then the freestanding sign would be allowed by right.

The proposed use is a reasonable one as it will allow the second building and its potential tenant's signage for this part of the lot and all other aspects of the sign ordinance with respect to the freestanding sign will be met.

BOARD: D. Greski said if the property were subdivided this would not require a variance, as they could put up the signs, so why aren't they subdividing. M. Gross said if they do subdivide, they need variances for other things so the property owner prefers to keep this as one property. He was just showing if it were done, they could have up to 6 signs.

D. Greski said it is rare that people ask for a variance when there is another option.

S. Bogert mentioned the car dealership on Union Avenue, with multiple lots with multiple signs, but have a continuous paved area that transcends the multiple lots. This could be applicable here. S. Saunders said it was that way since she was here, and she has never looked into it before but it is probably grandfathered.

M. Gross said if, for example, he had a large piece of property located in a commercial zone and wanted a strip mall, then he could need 10 wall signs – one for each proposed tenant.

S. Bogert asked if subdividing this would help meet the greenspace and M. Gross said no, he thinks it would be irrelevant if it was one or two lots. S. Bogert asked if they looked into multiple tenant signs for the freestanding sign - combining the Dunkin Donut sign with this one.

M. Gross said they have a second in/out on the lot so they want the freestanding sign there so someone coming from that direction could enter there instead of at Dunkin Donuts and getting in the queue line. This is to break up the traffic instead of funneling all into one entrance. If you are at

the Dunkin Donuts sign, you passed the retail building so they want the sign on the opposite side of the lot to capture the traffic going to that new building. This will help the traffic flow on the site.

S. Bogert asked if the second freestanding will be of like construction and style as the Dunkin Donuts sign, a passive type of sign.

M. Gross said it will be the same size as the Dunkin Donuts sign, but will have 3 panels, one for each tenant. It will be internally lit, the same as the Dunkin Donuts sign. S. Saunders said that doesn't matter here and S. Bogert said he was just curious. S. Perley asked why it doesn't matter and S. Saunders said the board would just deal with the number of signs and type. S. Perley asked if Planning will look at it and was told yes. S. Perley asked if the wall signs will be downcast lighting and was told these are not internally lit signs. S. Saunders said they could be lit at some point, as that is permitted in the zone.

M. Gross said there will be gooseneck lights over the 3 doors.

S. Bogert said it appears that the main entrance to the new building is on the northern end, the right side of the lot. Is that intended to be the main in/out with the center entrance a one way in? He was told yes, with the other the main entrance to Dunkin Donuts. That is fairly narrow, 16-18 ft wide, so they relocated access to Dunkin Donuts. If heading north on Union, you can take that Dunkin Donuts entrance and take a right or continue on to the next entrance. This is to get traffic off of Union Avenue.

S. Bogert asked S. Saunders about the entrances and she said this is in process of going before Planning. They may ask for a third party review. M. Gross said they could put up signs stating no left turn, or whatever is required. Someone exiting the retail building to go left, has to leave through Dunkin Donuts.

R. Smith clarified that they are now permitted 183 SF and was told yes but will keep it under at 154.5 SF.

Public: No one from the public spoke for or against the application.

Applicant: M. Gross asked the board to take into consideration that this will be a new building with multiple tenants and they need the wall signs. The second freestanding sign is needed for traffic to know where to enter. This should help traffic flow off of Union Avenue into the site properly. Planning will look at the internal traffic pattern.

S. Bogert closed the hearing to the public.

Board: D. Greski said doesn't see where the hardship has been met. They could subdivide the property and not need this variance. S. Bogert said that is right but then they would need other variances. One would create the other if the property were subdivided. The entrances have to move so there are setback issues. S. Perley said she feels this has less impact on the lot.

D. Greski said it would be nice for the applicant to state why it would be wrong to subdivide; he isn't hearing that so doesn't understand where the hardship is met. We heard that if the property were subdivided they would not need the variance but very little on the creating of the other variances.

S. Bogert said that is a good point and asked the board if there other points we need to discuss?

Are there any issues with the wall signs? S. Perley said she feels this is a good plan and that they made a good case for why they are doing it. This will be a commercial building in a commercial area, and it was a good presentation. She feels there are no issue with this.

S. Bogert said we had another case where we permitted two signs on a single lot, one in front, and one in the rear. R. Smith said Mike's and Valvoline on Union Avenue. We gave Mike's the variance for the second freestanding sign.

D. Greski asked about doing the multi-tenant sign and S. Bogert said dealing with the space would have to increase the height or size of the sign for the other tenants. Would that create sight issues? He used Lowe's as an example, in Gilford. That sign is located out of the line of sight. These signs should not hinder the line of sight but making it taller or larger, it could. They are trying to make signs look nicer, more of a New England style. S. Perley showed the picture on the applicant's package.

M. Foote said he feels this is a reasonable plan. The presentation has merit as the building does need signs, and the other freestanding sign seems appropriate. They will still have less than what they could possibly have. He said he has no issues with it.

S. Bogert asked the board members if they feel we should ask the applicant to come back with a comparison on what it would take to subdivide the property or just continue on this evening. R. Smith said he feels we should judge the application for what it is and move forward. M. Foote agreed.

Motion: 2014-0010: S. Perley moved to grant the variance for 2014-0010. The applicant is requesting a variance from 235-58 (A), Table of Sign Regulations, in order to have a total of 7 signs on this property where the total permitted is 3.

They are proposing to have 5 wall signs and 2 freestanding signs on the property were 3 signs currently exist. This proposal permits 3 new wall signs and one additional freestanding sign, for a total of 154.5 SF of total area, which is less than what they would be permitted to have.

This won't be contrary to the public interest. This will be a multi-tenant business on the lot where Dunkin Donuts currently is located. This will allow the 3 proposed tenants to have individual signs.

The spirit of the ordinance is observed as this allows the 3 tenants to have individual signs, and doesn't violate the zoning objectives. This is a reasonable use of the property and doesn't affect public health, safety or welfare. This permits the businesses to have the same signage as other businesses located in the area.

Substantial justice is done as this is consistent with use and the character of the neighborhood. There is no harm to the general public or abutters. The benefits to the applicant outweighs any negatives to the abutters.

Surrounding property values won't be diminished. The Hathaway House has seen its life and this will improve the site as the Hathaway House structure is dangerous now. This will improve the lot.

The special condition on the property is the Hathaway House. It is currently sitting there unusable. The owner has a large lot and wants to use it all, and not subdivide. The proposal doesn't alter the essential character of the neighborhood or threaten public health, safety, or welfare.

This is an allowed use in the district and is reasonable as it fits into the neighborhood.

R. Smith seconded the motion. S. Bogert suggested adding to hardship on the Hathaway House not turning out the way it was originally intended so this caused a hardship. R. Smith said he doesn't feel that is needed as it is a statement of fact. The vote to approve was 4-1, with D. Greski voting against the proposal.

Application # 2014-2011: The applicant is requesting a variance from 235-58 (B), Table of Sign Regulations, in order to have 2 freestanding signs on this property where the total permitted is one per site.

S. Perley moved to approve the application using the same criteria as above as the same items apply.

They are proposing to have 5 wall signs and 2 freestanding signs on the property where 3 signs currently exist. This proposal permits 3 new wall signs and one additional freestanding sign, for a total of 154.5 SF of total area, which is less than what they would be permitted to have.

This won't be contrary to the public interest. This will be a multi-tenant business on the lot where Dunkin Donuts currently is located. This will allow the 3 proposed tenants to have individual signs.

The spirit of the ordinance is observed as this allows the 3 tenants to have individual signs, and doesn't violate the zoning objectives. This is a reasonable use of the property and doesn't affect public health, safety or welfare. This permits the businesses to have the same signage as other businesses located in the area.

Substantial justice is done as this is consistent with use and the character of the neighborhood. There is no harm to the general public or abutters. The benefits to the applicant outweighs any negatives to the abutters.

Surrounding property values won't be diminished. The Hathaway House has seen its life and this will improve the site as the Hathaway House structure is dangerous now. This will improve the lot.

The special condition on the property is the Hathaway House. It is currently sitting there unusable. The owner has a large lot and wants to use it all, and not subdivide. The proposal doesn't alter the essential character of the neighborhood or threaten public health, safety, or welfare.

This is an allowed use in the district and is reasonable as it fits into the neighborhood.

M. Foote seconded and the vote was 4-1 in favor, with D. Greski voting against.

CONTINUED HEARING: UPON REMAND FROM THE SUPERIOR COURT

Application # 2012-0025

MSL # 244-430-32

RS Zone

The Gables on Paugus Bay Condo Assoc

Davidson Drive

Variance

The applicant is requesting a variance from the 1988 Zoning Ordinance, Section 14.45 (b) (3), Lot Coverage, to allow the coverage to increase from a minimum of 20% to a minimum of 30%.

R. Smith recused himself and K. Geraci was seated as a full board member for this hearing.

S. Bogert said that the ZBA had received additional info from Paul Bordeau. There was also a motion filed by Attorney Fitzgerald to prohibit presenting any new information. He said the first

thing to be discussed would be the motion filed by Attorney Fitzgerald. He let the public know this will be Board discussion only with no input from the public.

S. Saunders said we are deciding on whether the merits presented, under the motion to deny, are such that we should not review the new evidence.

S. Perley said she agrees with Attorney Fitzgerald's motion, as the judge told us to come back and reconsider the decision that was made by the board.

S. Bogert said the judge stated that the court found that the ZBA did not sufficiently determine whether or not the evidence to support the findings were supported by the record. The judge said that the board did not provide the evidence to support the decision that was made so he sent this back to the board for review. The judge stated that the board failed to sufficiently address the factual issues related to the 5 variance criteria. This means that the ZBA decision is vacated and remanded for further proceedings, per RSA 677:11. We need to review the substantial evidence for or against or, if we don't agree after discussion, we can make a motion that can be supported with factual evidence that was presented.

RSA 677:6, 10, 11, 13 says when a ZBA case is remanded by court that it is not an opportunity to enlarge the record or to introduce new evidence so the ZBA itself needs to clarify how it reached its decision. The judge remanded the decision back to the board, to take the record, as is, back to the discussion points and reformulate the motion based upon the evidence given at that time.

D. Greski asked for clarification on the new information and S. Bogert said that according to RSA 677:11, and that the judge stated, we should base our work on the evidence we already had and what was written in the conclusion.

K. Geraci said there would have to be a material change in order for us to consider new evidence. The burden is on the applicant to prove that. She doesn't see the material change so doesn't feel the new evidence should be heard. All were in agreement so S. Bogert asked if was the board's intention to make a motion to accept the motion to deny the new evidence.

Motion: S. Perley moved to grant Attorney Fitzgerald's motion to prohibit new evidence, and D. Greski seconded. All voted in favor, 5-0, so no further evidence will be considered.

S. Bogert let the board members know that they are now taking this back to the discussion point of the application. We will take the judge's motion, and discuss the application as presented at the time the original motion was made. We will formulate the motion, give it to the city attorney to finalize and bring it back to the meeting next month. There is no public input being accepted.

S. Bogert said the board will discuss the 5 criteria for granting of a variance. S. Bogert read from the minutes of February 19, 2013. S. Saunders pointed out the judge's statement regarding the spirit of the ordinance and public interest as he combined two criteria.

D. Greski mentioned that the motion made by S. Bogert, is on page 6 of the minutes.

S. Saunders said that the judge in his order stated the variance did not observe the spirit of the ordinance and would not be contrary to public interest so he did combine two of the criteria. D. Greski said we could take criteria 1 and 2, combine them, and discuss them.

D. Greski read the two criteria of the motion from the minutes: The board determined this would not be contrary to public interest. The granting of the variance to increase the coverage from 20% to

30% lot coverage, with the aforementioned conditions, won't be contrary to public interest as The Gables is self-contained. There is a perimeter road and green space that separates them from other villages and it won't impose any visual effects or encroach on any other part of the development.

Criteria #2 stated that the spirit of the ordinance is observed as there are only 32 units on 9.24 acres of land, and almost 80% green space. This exceeds the zone allowance. The approval allows The Gables to complete their process per their original drawings.

S. Saunders said that the judge stated the record did not show that the ZBA took any consideration for public health, safety or welfare, either alternation of the essential character of the neighborhood or threat to the public health, safety and welfare and character of the neighborhood or find that this would violate the ordinance's basic zoning objectives.

She said we need to discuss public health, safety, and welfare and the essential character of the neighborhood.

S. Perley said she did not agree with the motion, that she had a different mindset on this. She feels the reduction in the green space does have an impact. We did hear from a lot of members of the general public who were against this proposal. Southdown's governing committee, comprised of all of the 19 villages, denied it several times.

S. Bogert said this is a closed neighborhood, so this could have adverse impact on the overall community. S. Perley said they are part of an association so are subject to the association's rules and regulations and know that. They do have some issues but nothing that is different than several other villages. How are they different?

K. Geraci said she recalls that there are other villages with the same issues but The Gables was first to come forward. If given the right, this will change Southdown as a whole because others will potentially ask for the same thing. She said she remembered that discussion from the previous meeting.

S. Bogert asked if it had determined that other areas have the same restrictions in parking and land issues and K. Geraci said yes, that was discussed previously. This would be an alternation of the essential character of the neighborhood, and this village was the first one to come forward, so the fears seemed to be that if this is granted then other communities would come forward too, as they are dealing with the issues of limited parking, and that that would impact Southdown as a whole. That would impact the entire area.

D. Greski said he doesn't think that should be considered. We cannot look into the future. He said we should deal with what we do have, the 32 units on the 9.4 acres of land and almost 80% greenspace. S. Perley said they are asking to add about one acre of pavement for non-pervious development, which does have an impact. There are already issues with the infiltration of storm water, and there is nothing to prove it would not happen; it is already happening. We have received no scientific studies to show that additional impact won't occur. She doesn't think that was considered in the original motion, although they were discussed. Basic zoning objectives are to protect green space and provide for storm water runoff. You must consider this when you have such a high density of development in a small area.

D. Greski said he doesn't think this is very dense. There are 32 units on 9.4 acres with 80% green space. This is pretty significant amount of green space. That was the rule at the time but it has since been changed to 20-30%. It was almost like overkill at the time that the units were built, so asking for the increase in lot coverage doesn't seem wrong.

S. Perley said you just cannot pull The Gables out and deal with it by itself. It is part of a bigger association and the complex should be dealt with as a whole.

M. Foote said he thinks the big question has always been does The Gables have the right to approach the Southdown Recreation Committee to ask for the right to do this. We have said that they have the right to approach their overall guiding organization. All of the associations have the same right. All are within Southdown and all have the right to approach the SDRA, which has the right to approve or deny. Can they approach their governing body and ask them to increase the impermeable space for safety, for convenience, for parking. Do they have that right? That is the question here.

S. Bogert said that Southdown has to stay within their current 20% but how they choose to allot it is their prerogative. Southdown has that property sitting in a "land bank". The judge said they have a right to ask the ZBA for the variance to request that. The next step is do we grant the increase from the 20 to 30% greenspace. We would not be giving all of Southdown that increase, just one group. The question is should we permit one group to have more? S. Bogert said The Gables has always had the right to go to the Southdown Master Association to ask them to take some of their percentage and give it to the Gables to add to their parking. He said he thinks that right was preserved in the original motion as we said that, even though the board was granting them this, Southdown had to approve everything ultimately. This would give Southdown Master Association 20% for everyone else and 30% for The Gables. He said that, listening to himself talk, he does think there was no hardship as all had the same amount at that time.

M. Foote asked if it is it unreasonable to pay a premium for more and S. Bogert said that is not a question for the ZBA, but one that the applicant would take up with the Southdown Master Association.

S. Saunders said the next criteria is the character of the neighborhood, public safety, health, and welfare. On the spirit of the ordinance and contrary to public interest, do we have any more points on that criteria?

S. Bogert said that the public is all of Southdown. Is this contrary to the public interest of Southdown as a whole? S. Bogert said that he would say yes, it would set 2 different sets of criteria for the board to control.

D. Greski said from a safety perspective it would provide additional off street parking. There were multiple complaints about the lack of parking causing safety issues. As for changing the character of the area it would allow uniform patio sizes as was originally laid out in 1990 when they did the site plan. This would not change the character as this is what was determined in 1990. We would just be allowing them to do that. That is safety, public interest and the character of the neighborhood.

S. Saunders said she is hearing 2 different things – yes, they have met the criteria and no they haven't. Is there a consensus on what to tell our legal counsel? D. Greski said he doesn't feel that is a bad thing, to have both points of view. Legal counsel will take the entire discussion to S. Saunders said that is true but she has to know if this was discussion for a motion to approve or discussion for a motion to deny.

S. Bogert asked D. Greski what he is using for the basis of public interest. Is he is considering all of Southdown or just The Gables. D. Greski said The Gables. That is what was presented, what the judge saw and what we looked at and what the judge told us to take another look at. He said he doesn't feel we should talk about the other villages as we cannot know what will happen in the future. S. Bogert said that is what the board has to do – look at all of the effects, both long term and short term. That is what we do on every occasion, look at not only what the current owners can do, but what the next owner will do.

S. Bogert said when we approve a variance it should transcend the owner. D. Greski said he thought this did. S. Bogert said we have to define what our public is. In this case is the public just The Gables or is it all of Southdown. D. Greski said the issue was brought up by, and argued by, the Gables. If the variance is locked in to the five criteria for The Gables, then that is what it is forever and ever no matter what the change of ownership is.

D. Greski said if you expand the public it is outside of The Gables S. Perley said each village is subject to the SDRA as well as to their own rules. D. Greski said, if he understands it, each village has its own Association and its own regulations. The other villages can take some sort of action in the future. S. Perley said that each village is subject to the rules of the SDRA. K. Geraci added, and their own rules.

D. Greski said their own rules contradict each other within those 12 Associations; they aren't all the same. S. Bogert said the Association's rules cannot be more lax than the master. S. Perley said they were all developed under the same ordinance with the same regulations. D. Greski said then the groups broke off and was told no. He asked how they got 12 villages.

S. Saunders said that each village was developed under the same rules and regulations. D. Greski said that there is nothing preventing the other 11 from coming in to ask for the same down the road and S. Bogert said that is the point. That is changing the current character of the overall neighborhood. M. Foote said isn't the point of this that any of the 12 can approach their governing organization to ask the question. S. Saunders said we still need to weigh this against our criteria. Yes, they do have the right and that is why they are before us. We need to weigh the same criteria.

K. Geraci said, when we are discussing the neighborhood, is it just The Gables or all of Southdown. The Gables did have some valid safety concerns, but Southdown as a whole didn't share those. Which way do we look at this? S. Saunders said that is for the board to decide.

D. Greski said he did not see the other 11 villages listed in any documentation anywhere. The only name he has ever seen is The Gables so he feels we should just be talking to the Gables. If the other 11 choose to go to Southdown and ask, do it. We may see another in the future for another village. D. Greski said he isn't comfortable trying to foresee what could happen.

S. Bogert said we need to agree on what the public is. The public, outside of this village, in the other Southdown organization, did not want this change so it would be contrary to public interest as the greater public doesn't want. They like it the way it currently is so, if including all of Southdown, it is contrary to public interest because the greater public doesn't want it.

S. Perley asked what the hardship is here, as they have the option of doing permeable pavers and are also no different from any other village. They were all developed under the same ordinance 20 years ago. Times do change but all developed under the same rules then. All of the villages suffer from a shortage of parking.

D. Greski said the hardship stated at the time was that they cannot provide safe off street parking. That was what was stated at the time. S. Bogert asked if village 12 is any different from village 11 or # 5 or are all equal?

D. Greski said he doesn't think our discussion will be unanimous and we should agree to disagree and move on and refer this to legal counsel to write the final motion. He doesn't think we are going to change anyone's mind on what we each consider the public.

S. Perley said we still need to discuss substantial justice, values of surrounding properties, and hardship.

S. Saunders said we need to clarify process wise. The process is to have the discussion and send this off to legal counsel to finalize the motion. If we disagree in every criteria and have a locked vote, we will have to continue this to the next meeting based on notes that she writes up.

S. Perley said we were told to have a discussion and we are. D. Greski said he agrees; we will probably have to come back and listen to input by legal, then make the final vote.

K. Geraci said what she pulled out of the judge's decision on substantial justice is we didn't talk about how does the general public gain from the variance. The Gables does, but how does the general public gain. S. Saunders said we need to talk about whether the gain to the general public is greater than the loss to the applicant.

K. Geraci said that what The Gables has at stake is the additional parking and patios they thought they were initially entitled to from the original site plan; she feels that is pretty significant. S. Bogert read from the judge's findings: The record does not reflect that the members in setting forth the denial of the variance would result in a gain to the general public. S. Bogert said that denial would keep the status quo.

D. Greski said this would prevent them from adding the additional parking and adding the patios. S. Bogert said he is not sure on the patios; what was not brought up was if the master board for Southdown was ever approached on expanding their driveways.

S. Bogert said he doesn't recall that an application from a homeowner was ever made to the master association on doing a larger driveway or their patio. If this was done it was not presented to the board. He doesn't feel that substantial justice was tested because we have no proof anyone ever asked for that of the master association. He doesn't feel that substantial justice was ever tested by them going to their master board. Does the public gain from permitting this?

K. Geraci said that is what we are looking at - weighing the loss to The Gables, who are just asking for what they thought they were entitled to from their original plans, vs keeping the status quo which is what everything else seems to want. She said she is having a problem with that right now; she is in the middle on that decision right now.

S. Perley mentioned, for substantial justice, there are negative impacts to the general public. She said this is a tough call. She keeps going back to the impacts which were water runoff and the effects on the other surrounding properties by adding more pavement to the area. That would be a negative impact.

M. Foote said each of the associations have been developed by different developers, and there was never any cohesive storm drainage done. Each was done under its own rules and vision, so that cannot be answered.

D. Greski said a study on environmental aspects would have to be done. Permitting the additional parking and allowing the patio sizes to increase does seem to be the right thing to do for The Gables but how do we make sure it won't affect their neighbors. S. Perley said they didn't want to do that study due to money. D. Greski said that will have to be done at some point by them.

S. Perley said we are being asked to approve this but were not provided any schematics, no drawings, and no real plans, so we don't know what the impacts could be. M. Foote said any development in The Gables should be supported with engineered drawings and asked if Southdown would have to look at the drainage issues. S. Bogert said it seems we are giving The Gables the right to have an increase in their greenspace but telling Southdown that they have to pay for a drainage study to be done.

D. Greski said no, just do it for The Gables. We can state that we are requiring an engineering study to be paid for by The Gables. If down the road the others want to do this, they should do their own. We have no clue what will happen in the future with the other 11 villages at this point and he feels it is unfair to make them do a study if they don't plan to.

M. Foote said he thinks it is reasonable that The Gables support their development with documentation of that sort. He doesn't feel it is unfair to ask for that study. S. Saunders said that would help them answer the question of substantial justice and health and safety. It would be possible for The Gables to do a drainage

study to show that with the increase in impervious surface that would result in an increase in off-site flows. If they came back and showed an increase in off-site flows they would have to take care of that on their own property so that the rest of the development would not have an increase in their water flows.

On the property values, D. Greski asked if we include properties outside of The Gables and S. Bogert said the general public including outside of The Gables, is all of Southdown.

D. Greski said he doesn't feel adding parking or patios, because the square footage is so small, is going to impact the surrounding real estate property values. S. Bogert asked what this is based on? S. Perley said that is what the judge stated.

D. Greski said they are right, his view is not in a professional capacity. S. Bogert said he was in real estate for 5 years, and as you improve the left hand, the right diminishes in value. If this development has more than another development, all done under same criteria at one point in time, by granting them special credence does that not then diminish the values of the property that doesn't have the special conditions? D. Greski said he does understand but said we are not increasing values by doubling in size; these are small increments.

S. Bogert said parking is more important, that is at a premium. He said forget the decks in this case as they are minimal. This is all about the parking spaces. If "part a" has more parking should "part b" suffer because the rules are different? Which is worth more? Common sense would say, but he has no statistical data to prove this, which is worth more - that one with more parking or one that is more restrictive. Again common sense says this one would be diminished as they don't have the same parking.

K. Geraci said the judge said we don't have the proper evidence and, based on earlier discussion this evening, we still don't. No basis was provided to uphold that finding.

S. Saunders read from the judge's decision which states that this conclusion also fails to establish the evidence that the ZBA relied on to reach their conclusion. It says that the ZBA relied on the attorney's assertions to the board and there was no basis provided to prove these assertions.

D. Greski said this is tough, as we are comparing one condo association to another. If The Gables can only park 2 cars and another village can park 3, and we increase on off-site parking area for The Gables, then we don't hurt either one, we equalized it. S. Bogert said currently they all have the same and the same issues with parking. K. Geraci said she recalls that some of these only had 1 space.

S. Bogert said that is why the public space was made. K. Geraci said she doesn't think that every unit is equal right now when it comes to parking. She said she doesn't feel we have enough information. S. Bogert said we have no comparison; we have no evidence to provide us with the statistical information that it won't increase or decrease or harm the values of the surrounding properties. S. Bogert said we need to compare apples to apples, not apples to oranges, and based on that we have no evidence as there was no report provided. He said when you value a home, you value it to like homes. D. Greski said he feels this criteria is answered.

On the hardship, D. Greski said that this was originally based on the 1990 site plan, which had uniform patio sizes and now that is being taken away so that is a hardship.

S. Saunders read from the judge's decision: the records do not show what special conditions exist that makes The Gables distinguishable from surrounding properties and, as SDRA notes, the same coverage requirements exist at all surrounding villages. The records also do not reflect that the members considered whether or not a fair and substantial relationship exist between the public purpose of the coverage provision and its application to The Gables.

S. Perley said we have to determine what makes The Gables different from the other communities. They do have an alternative by installing permeable pavers as proposed by the SDRA.

D. Greski said the different between The Gables and the other 11 villages is that the other villages have different rules and regulations. S. Perley said she doesn't feel this has anything to do with it. S. Bogert said they are all still under the master, not the individuals.

S. Saunders said she feels we are looking at characteristics of the land. What are the special conditions of The Gables land? If they wrote bad condo docs that prohibit something, that is not a reason to ask for a variance.

D. Greski said that goes back to the engineering study. We need that to study and compare them. What would make this land more valuable in 3, 4, or 5 than it is in 7, 8, or 9 or are all equal? In the beginning were all of the land values approximately the same? Were they sold for the same pricing? Then you could say there was no difference.

S. Bogert said they share a lot of the same amenities. S. Perley said they have an alternative. They can use pervious pavers, which were approved by the SDRA, but they are refusing to do that.

S. Bogert said he isn't sure what hardship exists. S. Perley said overall there is some hardship, and S. Bogert said it is more discomfort than a hardship. S. Perley said what makes them different and S. Bogert said agreed, as they all have the same level of discomfort. We have no reports to say different and the onus is on the applicant to provide the information.

K. Geraci said one thing she recalls is them mentioning the location in terms of traffic and people having to walk, which is different from some of the other villages. Based on location they are set apart. D. Greski remembers the conversation about walking in the winter on ice.

S. Perley said she recalls that they have enough spaces on their lot now for other parking. S. Bogert said it was stated that there were no reports of injuries or harm in walking from the public parking spaces to their own.

M. Foote said he remembers one incident where someone fell. S. Bogert said it just happened to him. It took him 3 seconds to slip and break his femur so just because something hasn't happened doesn't mean that it couldn't. But is this a hardship. This could happen anywhere.

D. Greski said he is seeing nothing that is specifically different in The Gables. M. Foote said he isn't seeing any difference.

S. Bogert said that all of the criteria covered. We will take a look at this at the next hearing and see where we will go from there.

He continued the hearing to the next meeting in August.

R. Smith returned to the meeting.

OTHER BUSINESS: ZBA Rules Approval: S. Perley said she had given everyone draft copies of the ZBA rules a while back. S. Saunders said she will take the rules, pass them by legal, for a look at the procedures. S. Saunders said the rules had been tables so we will bring them up at the next meeting.

S. Saunders passed out copies of the Municipal Law Series for members who had indicated they had wanted them. She passed those out and will make more for the next meeting for the other members.

D. Greski requested a copy of a letter from S. Saunders.

ADJOURNMENT: S. Perley moved to adjourn the ZBA meeting of July 21. M. Foote seconded, with all voting in favor. The meeting adjourned at 10 pm.

RESPECTFULLY SUBMITTED:

Kristine Y. Snow
Zoning Technician