



JONATHAN F. MITCHELL
MAYOR

City of New Bedford
ZONING BOARD OF APPEALS

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ZONING BOARD OF APPEALS
NEW BEDFORD CITY HALL – 3rd Floor
WILLIAM STREET
NEW BEDFORD, MA
Thursday, February 14, 2019

MINUTES

- PRESENT:** Leo Schick (*Chairperson*)
John Walsh (*Vice – Chairperson*)
Stephen Brown
Robert Schilling
- ABSENT:** Allen Decker, *Clerk*
- STAFF:** Angela Goncalves, *Assistant Project Manager*
Tabitha Harkin, *City Planner*
Elizabeth Treadup Pio, *City Solicitor*
Danny Romanowicz, *Commissioner of Buildings and Inspectional Services*

CITY CLERKS OFFICE
NEW BEDFORD, MA
2019 MAR 22 A 10:48
CITY CLERK

1. CALL TO ORDER

Chairperson Schick called the meeting of the City of New Bedford Zoning Board to order at 6:03 p.m. He then explained the meeting process and protocol. The Chairperson explained that with only four board members present, the applicant would need a unanimous vote, and offered the applicants the opportunity to continue their matter to a meeting with a full board.

CONTINUANCES

Cases # 4363/#4364

A motion was made (JW) and seconded (RS) to continue the cases to the March 2019 board meeting in light of the missing board member. Board Member Walsh representing that he had a conflict on the cases.
Motion was unopposed.

2. PUBLIC HEARINGS

Note: These are minutes only. A complete copy of the meeting audio is available on the City of New Bedford website at: <http://www.newbedford-ma.gov/cable-access/government-access-channel-18/program-schedule/>

ITEM 1 - Case # 4360/#4361

Case #4360 - Petition of: John T. Ricciuti, Trustee of Ricciuti Realty Trust, C/O Holland & Knight LLP, Nadya Makenko, Esquire (10 Saint James Avenue, Boston, MA 02116) and Yearly Grind II Realty, LLC (PO Box 51147, New Bedford, MA 02745) for a Special Permit under Chapter 9, Comprehensive Zoning Sections 2200 (use regulations), 2210 (general), 2230 (table of principal use regulations-Appendix A, commercial - #23 restaurant, fast food) and 5300-5330 & 5360-5390 (special permit); relative to property located at 970 Ashley Boulevard, Assessors' map 127D lot 89 & 98 in a Mixed Used Business [MUB] & Residential B [RB] zoned districts. The petitioner proposes to construct a Dunkin' Restaurant with a drive through window per plans filed.

Case #4361 - Petition of: John T. Ricciuti, Trustee of Ricciuti Realty Trust, C/O Holland & Knight LLP, Nadya Makenko Esquire (10 Saint James Avenue, Boston, MA 02116) and Yearly Grind II Realty, LLC (PO Box 51147, New Bedford, MA 02745) for a Special Permit under Chapter 9, Comprehensive Zoning Sections 3100 (parking and loading), 3110 (applicability), 3140 (location and layout of parking and loading facilities), 3149 (special permit for commercial parking in residential districts) and 5300-5330 & 5360-5390 (special permit); relative to property located at 970 Ashley Boulevard, Assessors' map 127D lot 89 & 98 in a Mixed Used Business [MUB] & Residential B [RB] zoned districts. The petitioner proposes to construct a Dunkin' Restaurant with a drive through window per plans filed.

A motion was made (SB) and seconded (JW) that the following be received and placed on file: communication from the Commissioner of Buildings and Inspectional Services dated 1/25/19; communication from the Office of the City Planner dated 2/4/19; the appeal package as submitted; the plans as submitted; and, that the owners of the lots as indicated are the ones deemed by this board to be the lots affected; and the action of the clerk in giving notice of the hearing as stated be and hereby is ratified.

Motion passed unopposed.

A motion was made (JW) and seconded (SB) to consolidate the two cases for the purpose of hearing.

Motion passed unopposed.

Att. Brian Grossman, Dewey, stated that due to the lack of a 5th board member and their expectation that they would have to return in March due to planning board hearing results, they respectfully request a continuance to the March hearing.

Ms. Goncalves explained that the applicant would have to continue to the April meeting. The applicant was amenable.

A motion was made (JW) and seconded (SB) to continue Cases #4360/#4361 to the April 25th meeting.

Motion passed unopposed.

ITEM 2 - Case #4362 (Administrative Appeal) - Notice is given of a public hearing on the petition of: Belleville LLC, (133 Faunce Corner, N. Dartmouth, MA 02747) and Koldys & Kelleher, P.C.,

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(449A Faunce Corner Road, N. Dartmouth, MA 02747) and John & Carol Souza, Kevin & Darlene Mendoza (42 Brown Street, Fairhaven, MA 02719) for an Administrative Appeal under Chapter 9, Comprehensive Zoning Sections 5220 (powers) and 5223 (to hear and decide appeals taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer under the provisions of M.G.L.A. c. 40A, §§ 7, 8 and 15); relative to property located at 101 Belleville Avenue, Assessors' map 85 lot 300 in an Industrial A [IA] zoned district. The petitioners are proposing to appeal the Planning Board's (December 24, 2018) decision approving the Site Plan for a proposed Dunkin' Restaurant at 101 Belleville Avenue per plans filed.

A motion was made (SB) and seconded (JW) that the following be received and placed on file: communication from the Commissioner of Buildings and Inspectional Services dated 11/20/18; communication from the Office of the City Planner dated 2/4/19; the administrative appeal package as submitted; the plans as submitted; and, that the owners of the lots as indicated are the ones deemed by this board to be the lots affected; and the action of the clerk in giving notice of the hearing as stated be and hereby is ratified.

Motion passed unopposed.

A motion was made (JW) and seconded (SB) to receive and place on file a letter of 2/6/19.

Motion passed unopposed.

The letter was made available to Att. Koldys.

Att. Greg Koldys stated the property acquired by Belleville LLC., is directly across the street from the property that is the subject of this appeal. Once the assessors were able to determine abutters, who do not appear on the abutters list, but the property was purchased from one of those abutters. He stated they are appealing the approval of the site plan in the case by the Planning Board. Att. Koldys stated that their concerns regarding the approval are that there are two drive-thru lanes on the property. He stated one is listed on the site plan as a bypass lane, but in effect it is a drive-thru lane where cars would que to pick up phone orders, where those in the drive-thru lane would yield to them. He displayed the property rendering and explained the same. He stated that parking spaces in that area would be blocked by any waiting vehicles in the bypass lane.

Att. Koldys stated that the front of the property contains a truck lane for deliveries, which was shown to the Planning Board.

A motion was made (JW) and seconded (SB) to receive and place on file a document termed "Truck Turn Exhibit" dated 10/18/2018.

Att. Koldys noted that the exhibit shows that when a delivery is made, and the truck is parked within the lane, there are three spaces toward the back of the property and five spaces toward the front that may become unavailable while the truck is on the property.

Att. Koldys stated that in addition the Planning Board reduced the required parking that zoning would require from 25 plus a loading space down to 15 without a loading space. He stated the applicant's concern is that with the flow of traffic with the second drive-thru lane and reduced parking, it will create traffic issues within the neighborhood affecting the property of Belleville

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LLC., and its ability to develop its own property, as on-street parking may become the norm, thereby reducing their ability to develop their property.

In response to Chairperson Schick, Att. Koldys stated he is familiar with the Kempton Street Dunkin' Donuts in the Walgreen's lot. Chairperson Schick commented that this layout is similar and does not appear to have parking problems. Att. Koldys noted the substantial parking available at that location. In response to Chairperson Schick, Att. Koldys stated their business use has not been determine as of yet. In response to Chairperson Schick, Att. Koldys noted that he is unaware of whether or not a reduction in parking from the zoning requirements was sought for the Walgreen's lot Dunkin Donuts. He added that this Dunkin' Donuts design seems to create some problems in addition to the parking reduction granted. He stated one purpose of the zoning requirement is to ensure adequate parking and safe and accessible vehicular circulation, as well as minimize traffic impact on city streets.

Att. Koldys stated their argument: that reducing the parking and putting in place this site design plan is not consistent with the purpose of the zoning requirements. He stated that in the zoning ordinance, regarding approval of the site plan, there lists the factors to be taken into account by the Planning Board. He then enumerated those factors and stated those factors are impacted in this case due to the site design and reduction of parking. Att. Koldys stated that for those reasons they believe the Planning Board exceeded its authority in approving this site plan, and said approval is not consistent with the requirements of the zoning ordinances. He then invited questions.

Board Member Walsh addressed the potential harm his client alleges. He questioned whether the drive-thru in any way impacts his client. Att. Koldys stated he did not think the drive-thru as proposed impacts his client specifically, but the alternate drive-thru creates the possibility for a backup which will impact the ability for people to exit parking spaces that abut the alternate drive-thru. He stated they suspect the potential parking problems on the site will cause fallout into the surrounding area and streets.

In response to Board Member Schilling, Att. Koldys explained his client's location.

The City Solicitor advised that the public be allowed to express support or opposition.

There was no response to Chairperson Schick's invitation to speak or be recorded in favor.

In response to Chairperson Schick's invitation to speak or be recorded in opposition, the appropriateness of which was confirmed with the city solicitor, Att. Brian Grossman, on behalf of Weekly Grind, stated this is no plain concerned citizen. He stated this is a disgruntled landlord of the Dunkin' Donuts located a block away who had planned for relocation to this site, and they are petitioning to oppose the same. He stated they failed to appeal the special permit issued by this board, which plays into the board's findings this evening. He stated the parking on the site is very much a show, and they seek to upset the apple cart.

Att. Grossman stated the on-street parking concern is misplaced and a little ironic. He stated they are concerned about a couple of cars parking on Belleville, because they may want that the same. He stated the concern is not specific to them with no current development plan and no more right

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to have overflow parking than my client. The reality is there won't be. As the board knows, having heard the application for special permit for the drive-thru, while there is a walk-up window the vast majority here will be drive-thru.

There was no response to Chairperson Schick's invitation to speak or be recorded in opposition.

In response to Board Member Brown, Att. Grossman stated the appeal was filed by Belleville, LLC., He stated he believes the landlord is a related company with a controlling interest on the old property. The Weekly Grind will be the owner.

Board Member Brown stated he was confused about the claim of standing the former landlord may have. Att. Grossman stated they are manufactured, but they do own the property across the street.

Att. Grossman stated that all of the issues raised are not specific to Belleville, and none impact their property in any way specific to them. He stated with regard to adequate parking, et cetera, it was a criterion that the board had to decide when deciding to grant the special permit for the drive-thru restaurant. He stated effectively, Belleville is asking this board not only to overturn the Planning Board decision but also find that the ZBA made an error in your decision in December finding there was adequate traffic flow and parking. He stated none of the issues have any merit and explained his reasoning for the same, including parking, the bypass lane, deliveries, et cetera.

Jim Bernardino, Bohler Engineering, stated one item the appellant brought forth, regarding pedestrian access and circulation through the site, was a major component in discussion with the Planning Board. Conditions of approval reflect all those discussions and required them to provide one-way access and egress along with a striped sidewalk. He stated the Planning Board thoroughly reviewed site circulation and access and made conditions of approval.

In rebuttal, Att. Koldys stated the by-pass lane was looked at as a drive-thru lane in addition to a bypass lane, and while those people may have priority tell that to the four or five cars lined up. The priority cannot be enforced. Suggesting there will be no back up is disingenuous. He stated it was said that they have no right to on-street parking any more than anyone else, and while Att. Koldys stated he may agree, he noted they have a right to have the zoning provisions enforced for everyone. In regard to what was described as what is really going on, Att. Koldys indicated the applicant is Bellville, LLC., and Bellville LLC., has no connection with any other Dunkin' Donuts in any other location, and no relationship with the Weekly Grind. He stated Belleville LLC., is tied in with that person, but the site lease is with Dunkin' Donuts Corporate. He stated they have received no notice that there is any relocation of their store.

Board Member Brown stated this is a burden of proof argument that the determination by the Planning Board was wrong. He stated he needs more than anecdotal evidence and is having trouble finding sufficient evidence that the Planning Board exceeded the scope of their authority.

Att. Koldys noted that he understands this board is inclined to grant deference to the decision of the Planning Board. He stated he believed the evidence is the plans in front of the board that were approved. He stated the applicant for the project is saying this lane is never going to be backed up and no one is going to use it but a small percentage of people who have priority. He stated

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there isn't evidence of that. He stated it is just as likely that the people in line will not let the priority people in and it will create a backup. He pointed out parking places unavailable when trucks unload, which is already reduced from the requirements of the zoning ordinance.

Board Member Schilling confirmed that there was no indoor seating.

The public hearing was closed.

There was an extensive board discussion, including the probability of back up, the Appellant's standing under MGL Chapter 48, and the feeling that the Planning Board's decision should not be substituted with Zoning Board decisions or second guessed, as well as whether the Planning Board considered the issues and followed procedure, along with city solicitor input. A motion was then made (SB) and seconded (JW) to grant an administrative appeal to Belleville, LLC., relative to property located at 101 Belleville Avenue, Assessors' map 85 lot 300 in an Industrial A [IA] zoned district, to grant the petitioner's appeal from the Planning Board's (December 24, 2018) decision approving the Site Plan for a proposed Dunkin' Restaurant at 101 Belleville Avenue per plans filed, under Chapter 9, Comprehensive Zoning Sections 5220, and 5223 relative to property located at 101 Belleville Avenue, Assessors' map 85 lot 300 in an Industrial A [IA] zoned district.

Having reviewed this petition in light of the City of New Bedford Code of Ordinances, Chapter 9, sections as cited, the board finds board finds the following facts:

The proposed Dunkin' Restaurant will have two drive-thru lanes not separated from travel lanes in the parking lot; that some of the parking spaces shown on the plan do not appear to have sufficient space to back out without backing into what is in effect a drive-thru lane; the loading space provided for required delivery trucks will temporarily block access to parking spaces in that area.

Board Member Walsh noted the board was obliged to find specific facts on which to base their decision and requested an amended motion for specific findings made by this board. He then read the specific language to which he referred. He stated the appellant has raised issues concerning the drive-thru lane and the parking reduction, as well as the turnaround. He stated from his point of view the Planning board has followed proper procedures under the law and considered all the facts relevant to the same issues raised.

Board Member Brown stated he found no facts established or persuasive enough to overturn the Planning Board decision. Board Member Walsh stated his language would be that the board has found that the Planning Board at the original hearing took evidence and heard testimony on the reduction of parking issue, on the bypass lane issue, and on the turnaround issue, and based upon the facts they heard they made a determination to approve the site plan. Board Member Brown stated he adopts that language into the decision and adopts those findings. Board Member Walsh stated the two issues Att. Koldys complained about, that being the alternate drive thru and the turnaround were considered by the Planning board, which had a full and complete hearing on those issues, and the determination that they made to approve the site plan was within its discretion. He stated that there was no evidence presented to this board to contradict this determination, and that the Planning Board followed appropriate procedures and acted within its discretion.

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Board Member Brown amended the motion to grant the appeal adding the recognition that the Petitioner's main concerns were regarding the drive-thru lanes and the truck delivery lane, and in light of the ZBA's findings that the Planning Board had a complete hearing on this case. Those in favor of this motion will find that the Planning board exceeded its authority in allowing and approving that plan.

Roll-call vote as follows:

Chairperson Schick – No

Board Member Schilling – No

Board Member Walsh - No

Board Member Brown - No

Motion failed 0-4

3. APPROVAL OF MINUTES

A motion was made (LS) and seconded (JW) to approve meeting minutes of January 17, 2019, which addressed Cases #4355; 4356; 4358; 4357; and 4359.

Motion passed unopposed.

4. OLD/NEW BUSINESS:

There was discussion on the slate of officers for election. Chairperson Schick requested a roll call vote on the slate as follows: Chairperson Leo Schick.

Board Member Walsh nominated Leo Schick as Chairperson, the nomination was seconded (SB).
Motion passed unopposed

Board Member Walsh nominated Stephen Brown as Clerk, seconded by Board Member Schilling.
Motion passed unopposed.

Chairperson Schick nominated John Walsh as Vice-Chairperson, seconded by Board Member Brown.

Motion passed unopposed.

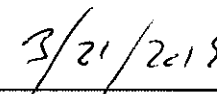
5. ADJOURNMENT:

The meeting was declared adjourned at 7:03 p.m.

NEXT MEETING SCHEDULED FOR April 25, 2019.



John Walsh, Vice Chair



Date