

**TOWN OF CHESTERFIELD, NH  
ZONING BOARD OF ADJUSTMENT**

**MEETING MINUTES  
March 28, 2007**

**Present:** Chairman Burt Riendeau, Andy Cay, John Perkowski, Alternates Tony Souza, Renee Fales and Jim Larkin (arrived during deliberation) and Code Enforcement Officer Chet Greenwood.

The Zoning Board of Adjustment met at the Town Hall on Wednesday, March 28, 2007 at 7:00 pm. This is the continuation of **Pierre Saba's dba Riverside Plaza** request for a Variance from Building Ordinance Article 13.03, Height of New Buildings, to permit a 10 ft relief to include the stairwell houses, parapets and elevator shaft. The property is located at Riverside Dr, W Chesterfield (Map 14C Lot B1) Commercial/Industrial district.

The Board met to continue the public hearing. Riendeau opened the Public Hearing at 7:05. Mike Bentley was recognized. He noted that the Board had a meeting regarding Equitable Waiver decision for Lacroix in July 2002. He presented copies of the ZBA minutes from that meeting. Bentley pointed out the reason for the height limitations noted at the meeting as a fire safety concern. The 16,000-gallon water tank, the wet hydrant and the hotel being sprinkled address this. It was noted that the Lacroix project was a modular home where boxes are delivered and it is just there in one day with the violation present. The minutes noted that with a stick built building the progress is evident. The hotel construction has been going on since July 2006 but wasn't caught until March 2007, suggesting this was an honest mistake. Despite the checks and balances built in, this particular matter occurred. There is the issue of the parapets on the front and the slope on the back.

Bentley stated that in regard to fire safety the deck off the 1<sup>st</sup> floor would be constructed of steel and concrete with a 100 lb live load and a 100 lb dead load. If the purpose of the height limitation were to get up the building for the purpose of rescue, the deck would have the ability to support ladders. The proposed deck is to be 12 ft from the building. They could make it 15 ft for the ordinance requirements of having level ground 15 ft from the building. They could also wrap the deck around the south side of the building if the Board so desired.

Bentley advised that there would be no flags or welcome sign as proposed by Saba at the last meeting. Bentley advised he had spoken with Hazel Hunter at the site visit and asked her to contact neighbors who will hopefully testify to their support of the project and noting this would not diminish the values of their properties.

Bentley presented the plot plan with the pictures from the various vantage points around the building for the record. He noted that the roof is lower than the liquor store because it sits down in the hole. He stated that the Equitable Waiver issue was verbally requested to be before the Board but if the Board wants he could submit this in writing.

Bentley covered the 5 criteria for a variance using the Boccia analysis. He noted that if the public interest meant the strict application of the ordinance, there would be no need for the

Zoning Board of Adjustment. In relation to hardship, the variance is necessary in order to allow the development as designed. The building is there with substantial construction to date. Cutting off the 3<sup>rd</sup> floor is not fair or reasonable. This project would be a benefit to the Town as well as the applicant. Bentley stated that the financial consideration is always part of a variance consideration. There would be significant financial burden if relief were not granted.

Bentley stated they have already addressed the fire protection in regard to the spirit and intent of the ordinance. Is substantial justice done? He stated that it is unfair to have the rug pulled out at this time. Bentley reviewed how Greenwood mentioned how it happened. It should have been caught sooner but why it wasn't he did not know.

Bentley stated the surrounding property values won't be diminished and he hoped that the neighbors present would testify to this. He noted that this will be the first thing people will see coming over the bridge. It will be good for the Town and good for New Hampshire.

Bentley asks that the Board allow them to continue as the hotel has been constructed. Cay asked that they review the areas of deviations for clarification.

On the front:

- The front entrance distance from ground to top of roof is 29 ft 10 7/8 in with a parapet height of 2 ft 3 7/8 in.
- Left of the entrance distance from finish grade level to roof plus the parapet is 31 ft 10 7/8 in.
- The doghouses are 5 ft 7 in above the parapet and the elevator housing is 3 ft 4 in above the parapet.

In the rear:

- The height is 30 ft 3 3/4 in from finish grade including the parapet.
- The height south of the walkout is 41 ft 2 3/4 in from ground level to parapet. The length of the building along this area is 94 ft from the end of the building to the beginning of the stairway.
- It is roughly 48 ft 8 in to top of doghouse.

The natural ground level before this construction was noted. The front entrance area was approximately 240 ft going to 244 ft at the highest proposed grade. The north end of the building on the front was 240 ft and the south end was 241 ft.

Cay stated that in interpreting the height he would analyze it using the doghouses as the high point of the roof and the parapet as the eave in the rear.

Bentley advised that the balconies are on several rooms and would help in the event of evacuation due to fire. They are to be supported by columns. The balconies north of the stairway in the rear will be 8 ft deep. The balconies south of the stairway and above the deck will be 12 ft, the same as the deck. The parcel is 3.83 acres. The actual coverage for buildings, parking areas and walks will be 48%. The ordinance allows a maximum 70% coverage. The previous motel and other structures was 40%.

Fales asked for clarification of what was to be on the roof. There will be no AC units on the roof. There will be only waste vents added to what is there. The hotel rooms will have their

own individual AC units. The common areas would have units that would vent under the rear deck. There will be 8 rooms on the 1<sup>st</sup> floor, 2 conference rooms and lobby, 14 rooms on the 2<sup>nd</sup> floor and 12 rooms on the 3<sup>rd</sup> floor.

Dave Belanger, abutter, advised that Saba had gone above and beyond to minimize the impact. The work site is clean and the removal of the old motel benefits everyone. Belanger stated that Saba had brought in 3-phase power at his own expense from the Chesterfield Inn area and this benefits everyone, including the other businesses at that end of town.

Gary Avery, neighbor, stated this is a welcome change and will add to the property values. The new hotel will attract a different type of clientele than the old motel did. There had been quite a few Police calls to the area. This change will make everyone in the neighborhood more comfortable.

*Souza moved to close the public portion. Fales seconded the motion, which carried unanimously.*

Discussion: Riendeau advised that he had spoken with Crocker to get guidance. Crocker reviewed the function of the ZBA with him and suggested that the Board deal with what is before them and that is the variance request. The Board has accepted testimony for the Equitable Waiver.

The structure is on the site and it is not the responsibility of the Board to make it right. Usually the application comes before construction and if it had been, would the Board have granted it? The Board is not here to redesign projects but strictly look at the application. If the decision made is not in the applicant's favor it could be negotiated with the Select Board.

In 2002 when the Board looked at Lacroix's application it was a safety issue due to concerns that living space may be on the 3<sup>rd</sup> floor and the decision was particular to that application. The reasons for the height limitation were not all noted during that meeting, aesthetics is an issue also and is important through the whole town. This limit can be changed at Town Meeting by Town vote.

The Board needs to look at the ramifications with violations of this size. The Board has heard other applications for height that have been given relief in past years, Lacroix and a church steeple. The steeple was a reasonable request for relief. It was more a concern with living space on the 3<sup>rd</sup> floor. If the Board allowed a building at 49 ft and the ordinance is 30 ft, it would make it difficult next time when it comes before the Board.

Perkowski clarified that the Board will look at the plan not as partially constructed and will not negotiate changes on the plan. Riendeau stated it should be looked at as proposed. The applicant has the right to come back. This Board has the opportunity to get it right and our job is to grant variances when it makes sense to grant them. This was a new project and there were opportunities to make it right.

Cay reviewed the variance request using the Boccia analysis. The benefit sought could be achieved by another means. Cay stated that Bentley was correct in looking at the Equitable

Waiver. Section (b) deals with ignorance of the law or ordinance and bad faith on the part of the owner or his agent or a good faith error in measurement or an error in ordinance interpretation made by a municipal official in the process of issuing a permit. Cay does not think there was bad faith on the part of the owner but there were errors made. The Planning Board didn't get it right in not exercising diligence. Greenwood presumed the Planning Board approved plan was the same as the building plan. Error was also made in not having the required height documented. The only way to get into the door is for Equitable Waiver. Ignorance of the law is no excuse. The entire building is out of compliance with the height.

Cay stated that if this went to litigation it could set a big precedent. The Attorney works for the Board and the Town. The Select Board wouldn't do anything without the ZBA approval. This is a case of asking forgiveness and not permission.

Larkin asked to speak. Riendeau stated that now the Board was in deliberation and because he was not a voting member for this application did not allow Larkin to speak. Larkin stated the Board needs to revisit what an alternate can do on the Board and left the meeting.

Fales noted that both a Variance and an Equitable Waiver were on the table. The Board decided to handle the Variance request first. Souza stated that the riverside has the grossest violation of height. Fales asked if the 30 ft height is based on fire protection. It was noted that there were several reasons for the height limitation, fire protection being one. Perkowski advised he would not like to see a rooftop deck. If this were a flat roof without stairwells with a color to blend in it would be better. This location is better than the other side of Route 9 because of the elevation.

Phase I – Cay moved to deny the variance. The variance portion of this request in applying the Boccia analysis is applicable. The Board finds that this application needs to be looked at, relative to a variance, as if it was an unimproved property or a proposed project that didn't have a structure there today and the Board finds that in applying the Boccia analysis that an area variance would be needed to do what they are asking for but that there are other alternatives for the use of the property to achieve their desired result. Therefore, the Board finds that under the Boccia analysis the condition of hardship is not met for the application.

Criteria for approval:

- A. Denial of the variance would result in unnecessary hardship for the property owner seeking it. Boccia analysis for hardship:
  - 1. The special conditions of the property make an area variance necessary in order to allow the development as designed. YesAnd;
  - 2. The same benefit cannot be achieved by some other reasonable feasible method that would not impose an undue financial burden. No
- B. The granting of the variance would not be contrary to the spirit and intent of the ordinance. No
- C. The variance is in the public interest. No
- D. Denial of the variance would result in injustice. No
- E. The variance may or may not diminish the values of surrounding properties.

Fales seconded the motion. Perkowski clarified the vote noting that a yes vote would deny the variance and then the Board would look at the Equitable Waiver.

The vote was called. The motion carried unanimously. The Variance is denied.

Phase II – Equitable Waiver.

Fales asked if this could be considered substantially completed because it is a shell. The modular that was delivered was virtually completed the day of delivery. Souza believes it is substantial. It wasn't stopped until after the doghouses caught attention. Saba stated that he has a little less than 2 million dollars invested in the project with the contracts.

Cay stated that he sees this as an honest mistake. If it was found at the beginning of the project it would not have been a problem but with \$2 million invested it is. Souza stated that it seems that the changes made to the plan were to improve the design without thinking of the height. He sees the use of the Equitable Waiver as a tool with good faith for Town and residents.

The Board reviewed the criteria.

I.

- (a) It was noted that it may not meet the test of substantially completed but there is a lot of money into it and it would cost a lot of money to fix it.
- (b) The Board sees no bad faith here but the violation was caused by good faith error. The Planning Board missed the 36 ft on the back and error in the building permit process. Cay stated there was ignorance of the law but there was also an error. The municipal actions had something to do with this falling through the cracks. Commercial projects of this size aren't often done in Town.
- (c) This is not a private or public nuisance.
- (d) Due to the degree of past construction the cost of correction outweighs any public benefit. The courts legally provide for honest mistakes.

II. The Board noted that II does not apply.

III. Deals with application and hearing procedures governed by RSA 676: 5-7.

IV. Waivers granted under this section are for dimensions only and not for uses. Height is a physical and dimensional aspect.

Cay noted that it comes down to a, b & c. (b) opens the door to looking at the Town's involvement in this process. We don't know all the facts in regard to the Planning Board. If the Board says no tonight the applicant would come back with new evidence requesting a rehearing. If the Board still says no it would go to Superior Court. They would rely on (b) suggesting that the Planning Board and the Code Enforcement Officer didn't do their jobs but it is a case for an honest mistake.

This is the time to talk about alternatives. It is not a variance. It is an error and won't happen again if the Code Enforcement Officer is aware and this will not set a precedent. The Board asked the applicant what modifications could they bring to the table to make this less non-conforming. It needs to be a proposal that aggressively addresses the height. The doghouses will have to be removed and perhaps look at the parapet height. The windows in the basement need to be addressed. What design changes need to be made to minimize impact? The impact is so great we have the responsibility to look at this carefully.

Cay asked Bentley if they could address this in a reasonable time frame. DeMarinis advised they would be ready for the next ZBA meeting April 10<sup>th</sup>.

The Board asked what was the use of the basement. DeMarinis advised it was for utilities and laundry. The window area was planned for a gym room and possibly a pool table. It was suggested that they could wrap the deck around the south side of the building to visually lower the elevation. They will remove the doghouses. They would like the parapets to remain as they help with snow but also add to the architectural design. They ask that the Board look at them as a utility like a chimney. When asked about the grading under the basement windows the Board advised they would like to see the grading go to the top of the foundation, just under the windows.

Perkowski moved to continue the meeting to April 10<sup>th</sup>. Fales seconded the motion, which carried unanimously.

**Adjournment:** The Board adjourned at 10:00 pm.

Respectfully submitted,

Carol Ross  
Secretary

Approved:

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Burton Riendeau  
Chairman  
Zoning Board of Adjustment

Date:\_\_\_\_\_