



Georgetown Zoning Board of Appeals

Memorial Town Hall ♦ One Library Street ♦ Georgetown, MA 01833

Phone (978) 352-5742 ♦ Fax (978) 352-5725

MINUTES OF A PUBLIC HEARING

ZBA FILE #14-10

Owner; Konstantina Bournakis, 550 Farm Road Georgetown, MA
& Applicant/ Lessee; Mohammed Jammader, 20 Silver St., Malden, MA 02148

Use Variance or Special Permit – Retail Store and Services

April 1, 2014 @ 7:30pm

Board Members Present:

Paul Shilhan, Chairman
Gina Thibeault, regular member
Sharon Freeman, regular member
Jeff Moore, regular member
Dave Kapnis, regular member

Zoning Clerk: Patty Pitari

Applicant present:

Mohammed Jamadder , 20 Silver St., Malden, MA 02148 - Lessee

Konstantina Bournakis, 5 Fazio Farm Road, Owner

Attorney Gary Evans, 65 Central St., Georgetown, MA- Rep for Applicant/Owner

Attorney Geoffrey Dowd, 472 Rt. 111, Hampstead NH 03841 – Rep for Mr. & Mrs. Gauron of 68 W. Main St.

P. Shilhan opened the Hearing at 7:32pm, and read the Rules of Procedure paragraph.

Jeff More read legal ad: A Public hearing will be held on April 1, 2014 at 7:30pm at the Georgetown Town Hall 3rd Fl. Meeting Room for a Petition, Use Variance request for 70 West Main Street, Georgetown, MA filed by Owner Konstantina Bournakis of Georgetown, MA and Lessee, Mohammad Jammader of Malden MA, to operate a convenience store (retail store and services) at 70 W. Main Street, Map 6C, Lot 117, located in the IA zone which requires a use Variance under MGL 40A, Section 10, and Georgetown Zoning Bylaw Chapter 165, Sections 9, 84 & 94 in order to operate a retail store or service use. *ZBA File #14-10*

Chairman Paul Shilhan introduced the Board members, and stated a use variance needs a supermajority vote.

Applicants Presentation:

Attorney Evans added to the supplement to the application he state it augments the first part and puts some exhibits from the assessor's office. He stated this is a pre-existing non-conforming use and as such a permit should be issued to the applicant for the use as a convenience store and the subject property has been used as retail/restaurant or restaurant/retail prior to zoning, it was Sawyer's Ice cream prior to zoning, then Currier's ice cream, the tax/assessor's card supports this. It is also mentioned in previous hearing minutes from this board that states is was a pre-existing non-conforming use, it has a 3 part test, does the current or proposed use reflect the nature and purpose of the use which prevailed when the ordinance or by-law took effect;

Here the quality and character of the use was the retail sale of food to the public. The difference between retail, it's really confusing; the definition of a restaurant is; enclosed and people are served inside a facility, according

to the bylaws. I looked for a definition of retail in the bylaws and I couldn't find one, so what I did is, I went over to the statute's and the common law and I found retail is really the breaking down of commodities from a larger product into smaller products to be able to give to the public, which is what this property has been doing since the beginning, there used to be a couple of ice cream stores there with lines down the street, it was really a retail operation. As far as the supplement goes, I looked at the permits that Richdale has and I went to a restaurant in town and I looked at the certificates/permits they had to run the business, and if you look at it, you have licenses for selling cigarettes, cigar and such, this restaurant didn't, but certainly one can do so. Richdale had a permit to operate a food establishments so did the Restaurant. Attorney Evans noted the attachment in the supplement lists Richdale's Permits and Restaurant permits which are just about the same, there is so much in common.

Attorney Evans – I did find some case law (see *Town of Bridgewater v. Chuckran* 351 Mass. 20,217 N.E.2d 726 (1966)). I look at it as if you have shirts and ties, one place selling 70% shirts and 30% ties, and then a place where you sell 30% shirts and 70% ties, there were objections to it, that it was considered a change in use, and the courts decided that it was not a change in use, it was a preexisting nonconforming use and simply an extension of that use. So the supplement talks about the legal criteria and if something is a preexisting nonconforming use and the criteria for the expansion for that use. I think perhaps the board continue if this is an extension of an already pre-existing use, or whatever you want to do, and maybe I could just go to the building inspector and he can issue a permit.

J. Moore – As a practical matter, can you reiterate what the proposed use entails, what you plan on doing to the property.

Evans – It's moving the Richdale at 65 E. Main across the street, it's the sale of small convenience type items, lottery, cigarettes, milk, butter, coffee, and such, potentially different food in the future, they used to sell hot dogs/coffee and such, but no changes to the exterior, not changing the footprint of the building, but to make minor modification inside like a counter, and shelves, that type of thing. We would need to apply for a sign permit. The only changes we made after speaking to the neighbor who had the concerns is they will put up a fence to the left of the property near the Gauron's at 68 W. Main, and we will pay for it, and we will put up signs stating no loitering, and a video monitoring system so the clerk inside can see outside where people would tend to gather, and the neighbors/abutter's at 68 W. Main Street were good with that.

D. Kapnis – What about the ice cream section?

Konstantina – It will be one room, taking that wall down.

J. Moore – You will also be removing the kitchen. Konstantina – Yes.

J. Moore - Can you speak about the history of the uses to date.

Evans In 1948 it was Riverside Dairy Inc, owned by the Currier's and before that the reason this was industrial property, there are 6 lots in this zone, there was a railroad track that came through there, what happened is the place behind where the Georgetown Electric use to be now the Water dept., and down Moulton St, that was a light manufacturing, then it starts cutting in half residential and industrial. Originally it was built as an ice cream store and since there have been sub shops, Athena's restaurant, pizza that type of thing. If the convenience store doesn't go in I would assume it would be another sub shop or something like that.

Audience

Mike Gauron 68 West Main St – We met with them and at the last meeting, we had the concerns with the loitering and they promised to address it with a fence shrubs and signs to deal with the loitering, also the video monitoring. The front of the store is not visible from my house, so we are good. There is a contribution of \$4,000 from them.

Evans – I spoke to the Gauron’s attorney, Geoffrey Dowd, and we will pay \$4,000 to deal with these issues they had from last meeting.

Mohammad Jammader - I would like to move across the street, there will be no door in the back only one door in front, so people can’t come in and out the back.

J. Moore – Do you know how long Richdale has been there. Konstantina – I have lived in town 34 years and it was there.

J. Moore – How many different restaurants have been in 70 W. Main

Konstantina – Many 4 or 5, it’s been pizza/subs.

J. Moore – I think the argument that the desired use is similar to what’s been going on for years is valid and there are similarities, I think the board can find the use is substantially similar to the existing use but I think it would represent an extension or alteration of that use to a certain extent and so it’s a pre-existing nonconforming use that being altered or extended, I believe we can find that this requires a Special Permit not a variance, I think a variance is fairly difficult to justify.

D. Kapnis – I agree, I think this should be a special permit.

Evans – If there is an advisory from the Board that it is if the board finds that the convenience store is a preexisting non-conforming use and the store would simply be a continuation of that use then the building inspector can just issue a permit. See criteria in his memo.

J. Moore – My thought is that if the board were to find it is substantially similar, more retail than restaurant and we can include some of the restrictions we talked about tonight, and the kitchen is coming out. What can change and be an improvement would be the removal of the exhaust fan (the noise), kitchen equipment, and the addition of the fence and screening, also video monitor we can maybe find it is less detrimental to the neighborhood, if we do that, grant that, then you can’t go back and change that back to a restaurant, so now going forward it’s not just a finding that we made but a permit that defines what we felt was reasonable so it is non-conforming after all.

Evans – So procedurally 165-94 how do I do that.

J. Moore – Well we would have to make a finding that the specific use as you presented to us, and the specific use that is existing nonconforming over time, as you have argued, we may or may not agree with that, but if is substantially the same if the board would find that the use is similar but being altered.

Discussion on IA vs. IB, and criteria. Evans discusses just getting a building permit.

J. Moore – We have to find the use is being altered enough and not detrimental to the neighborhood and it’s not detrimental and the conditions you came up with.

My opinion is at this point I think that we condition this a certain way, and you have argued it in your case, the building inspector might or might not give it to you, but I would like to see if there are further changes you have to come back.

P. Shilhan – are you not wanting the special permit.

Evans – I realize you’re trying to work with us.

J. Moore – The first denial was written as a new use, was based on the fact that the inspector had misread the table of uses, so you have a restaurant and want a retail, he corrected that, now you have created the link between the similarities to what's been there in the past, I don't think it's a stretch between these uses, I think it's an alteration of a nonconforming use, and if we so choose you can be on your way.

G. Thibeault – So, the restaurant was not necessarily allowed there either, so that's why its non-conforming, so then if you're saying the restaurant and retail are similar, its similar enough that it's a special permit. I feel that this is how this works the way Jeff is explaining it. You're altering the use.

D. Kapnis – I think it's less detrimental in my opinion; with a restaurant you have the dumpster with food, the fryolater the fan. I think the similarities are so close, I think it's much more detrimental than having another restaurant there.

G. Thibeault – I agree.

Discussion followed on having to re advertise for a special permit. J. Moore - Where we advertised for a variance which is a more restrictive permit than a special permit, so the board can grant a special permit which is lower, if you advertised for a special permit, you would have to re-advertise the hearing as a variance is a more restrictive permit.

J. Moore – Do you have anything in writing with what you and the abutter met on with conditions.

Mike Gauron the abutter at 68 W. Main stated he has an email between the abutters attorney and the applicant's attorney, Jeff Dowd, and Attorney Evans; S. Freeman read the email. G. Thibeault marked as Exhibit A. (*see attached*).

S. Freeman – It sounds like they are in agreement I went to the property, I thought about separate or different ways to discourage people from walking around the building. I wasn't sure if you had conversations about that. Maybe put the screening closer to the building.

Discussion on the back of the building.

G. Thibeault – I think the video monitoring would catch that.

D. Kapnis – Are there utilities or equipment to be maintained back there. The video monitoring also satisfies me.

Konstantina – There is the air conditioner, and septic tank and grease trap back there. There is lighting back there on the building.

S. Freeman – I wondered if we need to consider a bylaw for Retail or a definition, absent that, going forward would it be in the town's best interest to fix that.

J. Moore – You could. Patty – You would take it to the town planner and it would have to go to town meeting.

P. Shilhan marked plans;

Certified Plot Plan dated February 4, 1999, stamped by North Point survey services, Haverhill MA, engineer; Gregory Bowden PLS., marked at hearing as Exhibit B.

Existing plans first and second floor, drawn by K. U Associates, LLC, and dated December 17, 2013 marked as Sheet SMG A-1 and marked at hearing as Exhibit C.

Elevation Plans dated December 17, 2013 drawn by K. U Associates, LLC, and marked as sheet SMG A-1, and marked at hearing as Exhibit D.

Motion: Moved by J. Moore seconded by G. Thibeault

J. Moore - I move that this Board find that the application for 70 West Main Street, that the proposed use is substantially similar to the existing non-conforming use and is being altered by the applicant and further move that the Board Grant to applicant Mohammad Jammader, of Malden, MA and owner Konstantina Bournakis, of 5 Fazio Farm Road, Georgetown, MA, a Special Permit for retail sales and services use in the IA district, finding that the applicant met the prerequisites necessary to grant a Special Permit for a change in pre-existing non-conforming use.

Further I move that the Board find per 165-94 that the request is not more substantially detrimental than the existing nonconforming use to the neighborhood. Further that the Board find that per Chapter 165 §79 (a-d) of the Georgetown Zoning Bylaws, this special permit application for an accessory apartment is desirable to the public convenience or welfare; will not overload any public water or other municipal services so as to unduly subject any area to hazards affecting health, safety or the general welfare; will not impair the integrity or character of the district or adjoining districts; and, will not cause an excess of that particular use which could be detrimental to the character of the neighborhood. With the following Conditions:

1. The applicant construct a Sound Barrier/Fence on the 68 W. Main Street side of the property.
2. The applicant shall install reasonable screening on the 70 West Main Street side of the fence to reduce noise, installed near the property line.
3. The applicant place “No Loitering” signs at the property, particularly on the rear of the property farthest from the street.
4. The applicant shall install a video monitoring system on the sides of the lot discourage loitering.
5. No further changes/modifications may be made to the building or the use without re-applying to the Zoning Board of Appeals.
6. The applicant shall appear before the Planning Board for Site plan review if determined by the Building Inspector.
7. The operating hours shall be restricted to not open earlier than 6am and close no later than 11pm.
8. All existing restaurant equipment shall be removed.

Seconded by G. Thibeault, no further discussion.

Vote:

J. Moore – Yes. S. Freeman – Yes. P. Shilhan – Yes. G. Thibeault – Yes. D. Kapnis – Yes.
Motion carried unanimously. Granted Special Permit.

Motion to close the hearing D. Kapnis/Gina Thibeault at 8:30pm, all in favor. Motion carried.

P. Shilhan - The Zoning clerk has 14 days to file a decision any appeal of this decision shall be made pursuant to Massachusetts General Laws Chapter 40A, Section 17, within 20 days after the date the notice of decision was filed with the Town Clerk. An applicant may file this decision before the 20 days but does so at their own risk.

Patty Pitari
Zoning Administrative Assistant

Approved 5-6-14