

APPROVED
New Castle Board of Adjustment
March 20, 2014

Public Hearing Re: Nancy Borden, owner of Henrys' Market, 52 Main St., Map 18, Lot 55

BOARD MEMBERS PRESENT: Todd Baker; Russ Cox; Mark Gardner; Donald Moore;
Ned Robinson; Susan Stetson

BOARD MEMBER ABSENT: Will Smith

Chairman Robinson called the meeting to order at 7:00 p.m.

Public Hearing Re: Nancy Borden, owner of Henry's Market, 52 Main St., Map 18, Lot 55:

GUESTS: Nancy Borden, applicant; Perrie Purcell, Manager; Trudy Hodkinson, Business Development Director, Assistant to the Manager, representing the applicant

Chairman Robinson announced this was a public hearing for Nancy Borden, owner of Henrys' Market, 52 Main St., Map 18, Lot 55. The applicant requests a hearing to consider whether a variance should be granted to the provisions of Article IV, Section 4.1.6 (Mixed Use District, Prohibited Uses, Section 3) of the New Castle Zoning Ordinance in order to permit Henrys' Market Café, located within the Mixed Use Zone at 52 Main Street, to serve beer and wine for consumption on site. The ordinance prohibits "the sale or dispensing of beer, wine or liquor to be consumed on the premises" in the Mixed Use District. The applicant states Henrys' Market/Cafe is struggling to survive as a viable business and, therefore, needs to adapt to the needs of the community to stay open. The public hearing has been properly advertised, abutters have been notified and all fees paid.

The Chair explained that the applicant would like the Board to give them a variance that will allow them to sell beer and wine with meals. The State Law provides that the Zoning Board of Adjustment shall have the power to:

(b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

- (1) The variance will not be contrary to the public interest;*
- (2) The spirit of the ordinance is observed;*
- (3) Substantial justice is done;*
- (4) The values of surrounding properties are not diminished; and*
- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.*

(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (i) *No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;*
and
- (ii) *The proposed use is a reasonable one.*

Moore pointed out that the ZBA has been taught as ZBA members that they cannot change the zoning ordinance. The Board is here for a variance request and he feels it is pertinent for the Board to think about that question and what it means to change the ordinance. The Board can hear an appeal for a variance. Does the ZBA have jurisdiction?

Stetson said if the applicant is not appealing from a ruling, why are they here?

Moore replied the ZBA has the authority to grant a variance but they cannot change the ordinance and that is why there is a fundamental question. In this case where you have an absolute prohibition is that subject to a variance?

Gardner pointed out that in every variance request there is some prohibition.

Moore replied this is a different case of degree; this is changing an absolute prohibition.

Chairman Robinson's thought when he first looked at this variance request is that the people of the Town of New Castle have spoken. They do not want to have alcohol served on Main Street for consumption on the premises. Is it not more proper to go before the Town Meeting to request that the ordinance be repealed or modified.

Baker said this Board is making one special exception for one instance here.

Dave McGuckin, Selectman, said approximately five or six months ago Nancy Borden came before the Select Board to request serving wine and beer and the Select Board referred them to the ZBA.

Cox has sat on this Board for over 20 years and he has never seen a case of economics brought up before where the Board considered whether it cost more or less. Frankly, he feels very uncomfortable injecting a dollar sign into the Board's deliberation. He has a hard time even considering whether the profitability of an enterprise warrants any change in the zoning ordinance. In twenty years, he has never seen this and, in his opinion, this is a whole different level of justification and submissions. Cox feels uncomfortable getting into the economics of a business.

Baker said the Board has been talking about the merits of the application and we have not decided if the ZBA is going to hear the application.

Cox does not feel the ZBA should hear a case about economics and emphasized that it is not in the ZBA's purview. This should be taken before the assessors for an abatement of value.

Discussion followed on the possibility of the applicant going before the Town Meeting in May and let the residents of the town vote on this matter.

Stetson agreed this is where this application should go.

Moore made a point, especially if someone is thinking of a warrant article, independent of the merits of this particular application, he feels it is a flawed process to come before the ZBA, this is a Planning Board issue. All this Board can do is craft a variance and that is all we are charged with. He does feel this requires the Planning Board expertise and review because the Planning Board can investigate what other towns have done and can come up with remedies.

Moore said the first step should be a Planning Board review and if there are things the Planning Board would choose to say that becomes a ZBA question then this should become a two-step process.

Stetson agrees those are good points. She feels the ZBA was very supportive of the market when it first was presented to us. Obviously, it was not thought through well and perhaps it was not the ZBA's purview to do it. A number of adjustments have come up i.e., adding ovens, adding specific sandwiches that customers wanted and no matter what this Board has granted, they still continue to come back with some type of request to make it more viable. This is not the ZBA's purview.

Moore said that he voted for the market on his understanding that the market was going to sell milk, bread, sandwiches, etc. Now this market has turned into a café.

Stetson pointed out there were limits put on the number of parking spaces and limits put on the number of seats they could have inside the market/café. There is nothing that addresses that in the application. Are there going to be more seats? What is this eventually going to look like? Is it going to be expanded?

Gardner said that the ZBA should afford the applicant the opportunity to make an argument as to why they are requesting this variance. He is sympathetic to the request but he is troubled whether the ZBA really does have the jurisdiction at this juncture. Maybe it is more appropriate for the applicant to consider the warrant article.

Chairman Robinson asked Borden for her comments regarding the concerns the Board has. Does the applicant have an opinion as to why the ZBA has jurisdiction.

Nancy Borden said they are asking for a variance to an existing ordinance. Their understanding is they would need to go before the zoning board. Don Graves told her she should go before the ZBA.

Stetson noted that this Board should have something in writing from the Building Inspector.

Bill Stewart, Walton Road, said it is his understanding that Borden made an application to the State. The State then sent the application to the Town to see if the Town had comments. During the comment period, the Select Board reviewed the ordinances and said the applicant will need to have this heard by the Town. The zoning ordinance states they cannot serve beer and wine on this specific location and building. This created a zoning issue to be heard by this Board.

Stewart pointed out that over time, five years later, things evolved, and customer demands are different and economics are different. They have specific hours of operation, 7am to 7pm. It is not a late night bar and he feels the spirit of the ordinance was set up so that there would not be any late night hours or things happening in the center of New Castle. He does feel that there is an opportunity for zoning to look at this. It is specific to the zoning ordinance, it is specific to a building and it affects the business there.

Baker agrees with Stewart. It is a zoning issue and they are asking for a variance in the zoning ordinance. If the Board denies the request, the applicants have other ways like going before the Town Meeting.

The Chair then proceeded with the public hearing. The voting members for this evening will be Baker; Cox; Gardner; Moore; and the Chair. Stetson preferred not to vote this evening.

Cox said the issue is the survival of a business. He feels this Board needs to know more of the economics of this business to prove that the change will make it viable and for the Board to consider the change. He does not see any of this information.

Nancy Borden introduced to the Board Perrie Purcell, the new manager at Henrys' Market Café and her development director and assistant, Trudy Hodkinson. We are requesting a variance under Prohibited Uses in Section 4.1.6 in accordance with the State of New Hampshire Liquor Commission in Section 179.44 so that we may serve beer and wine with our meals. Many customers have requested this and we feel offering beer and wine with our meals would help to make Henrys' Market a more rounded experience for the dinners as well as making Henrys' self-sufficient and sustainable. Perrie and Trudy feel together they can train staff appropriately to take on a license to serve beer and wine, Henrys' has become an institution that has vitalized the village of New Castle. We hope that the Board's decision will help to make it prosper.

Borden said that Henrys' Market Café has served the New Castle community for over five years providing excellent service, groceries and meals to its people. Henrys' Market is a store for New Castle and most people agree that New Castle has benefited greatly from having a market café in our midst. They are seeking to thrive. It is their hope to offer light wines and beer at lunch and perhaps with early evening hors d'oeuvres. This request for a variance from the prohibition of serving wine and beer will only serve to bring value to the community and properties surrounding it and add to its sustainability.

Borden addressed the five criteria:

- 1) *No diminution of property values, (See Attachment A.)*
- 2) *Granting the variance would benefit the public interest, (See Attachment A.)*

- 3) *Denial of the variance would be an unnecessary hardship to the owner, (See Attach. A.)*
- 4) *Substantial Justice. (See Attachment A.)*
- 5) *Not Contrary to the Spirit of the Ordinance, (See Attachment A.)*

Summary

Henry's Market is a small town establishment catering to the people of New Castle and their interests. Its operation and its value as a communal gathering place helps to preserve our small town way of life. Henry's has been in operation for over five years without incident. It has limited seating and limited hours of operation that make serving alcohol in no way contrary to the intent or the spirit of the ordinance. Henry's will operate with the public's interest and its safety in mind. All the staff will be properly trained on alcohol service and will adhere to all the New Hampshire liquor laws. Therefore, we ask that you grant us a variance to ordinance # 4.1.6 (Under Prohibitive Uses).

Stetson wonders at the wisdom of our getting into this, as she listened to Borden saying that the culture of drinking has changed. It brings to mind that about two years ago, a resident that lived near one of the locations that is a competitor of yours, was calling all over town trying to get relief from the noise and rowdy behavior that was interrupting the peace and quiet of their home. She asked Borden who is authorized to oversee noise. Are you requesting more seats?

Borden replied Perrie will be authorized to oversee noise and we have limited hours, from 7am to 7pm and we have 11 or 12 seats total.

Stetson assumed they have added a few seats from the original permit.

The Chair said that was from the Planning Board when they approved the site plan as there was a limitation based upon the parking.

Stetson does not see how the ZBA can make decisions on what to do without having what is in place now and what was permitted.

Moore asked Borden what kind of general liability insurance she presently carries.

Borden replied she does carry general liability insurance but she cannot tell him what type.

Moore replied there is a necessary factor in anybody having a liquor license is that they have to carry adequate general liability insurance.

Moore asked Borden how do they handle their trash presently.

Borden replied they put out their trash for the Town to pick it up.

Moore reminded Borden that the original plan stipulation was for the applicant (Borden) to take care of her own trash removal. He noted, for the record, this stipulation has been violated.

Moore asked Borden how do they make a breakfast sandwich.

Perrie Purcell, Manager, said they cook eggs on top of the stove.

Moore noted, for the record, there was a prohibition against cooking. That prohibition still exists and applicants stipulations are noted in the record from the first hearing.

Borden replied that was changed later on.

Moore does not believe so. This Board gave permission to have a Panini press. Cox agreed.

Moore said the applicant occupied the left side apartment on the first floor. What is occupied on the right side apartment on the first floor?

Borden replied there is another apartment on that first floor.

Moore has one last observation and would like to have an answer. The main issue when the ZBA considered the first application was parking in back. The Board came to a conclusion that it made sense, given the definition of the market and the availability of parking behind the Town Hall. Things have changed and the Town restricts parking behind the Fire House. It seems to him when you introduce wine and beer, it is inevitable that people are going to stay longer. I have trouble with the idea that everybody is going to walk. Some will walk but it seems to him that there is going to be increased parking impact. He asked Borden how she factored this into her request for a variance.

Trudy Hodkinson said they have had a large influx of people during these past two weeks and there has not been any problems with parking. She does not believe that adding wine and beer will increase the parking issue.

Moore replied, in his opinion, with beer and wine, people will take longer to eat and drink.

Hodkinson replied we are not trying to compete against the Wentworth. The people who might want to have an extra glass of beer and wine would most likely want to walk. This is a small café. We have very limited seating.

Borden emphasized that the limited seating will control the amount of parking.

Stetson questioned the applicant's plans for the early evening?

Hodkinson replied what they have talked about is to have an appetizer menu. Presently, on the menu we have a small plate section and she feels that will carry over to that. They have heard from the customers that have come in that it would be great to have a glass of wine or beer with their mussels on a Sunday afternoon.

Moore emphasized that the original application prohibits cooking.

Cox said the Panini sandwich came up and the ZBA only approved a Panini Press.

Moore brings this point up to point out a problem, whether it is an enforcement problem or whether the ZBA needs further stipulations if we were to approve this variance. This Board can put in any conditions they want, they can even put in a penalty on for a stipulation. We can even require the applicant to fund an enforcement officer.

Moore pointed out that the operation has advanced beyond what has been approved, whether that is good or bad, it happened.

The Chair expressed concerns regarding the ZBA and the Planning Board that have been involved with Henrys' Market Café and there is not necessarily ways to check what has been approved by each one of the Boards.

Chairman Robinson asked if the Board had further comments.

Hodkinson assured the Board that the general liability insurance will be covered and the alcohol is covered under Henrys' liability insurance.

Chairman Robinson asked for public comments.

Craig Strehl, abutter, 62 Main Street, supports the application to serve beer and wine at Henrys' Market Café. In terms of parking, we see people come and go every day and as an abutter, it has not been an aggravation. They have had wine tastings and there has never been a problem with parking.

Steve Cook, 110 Mainmast Circle, supports the application to serve wine and beer for Henrys' Market/Café. He has lived here for the past ten years and it has been very encouraging for the community. In his opinion, no one thinks of this application as negative. It is a small market and everyone seems to feel that Henrys' Market/Cafe has been very positive.

The Chair asked if the public had any negative comments. There were none. He then asked if the public had further comments.

Attorney Rob Ciandella, 51 Beach Hill Road, supports the application to serve beer and wine at Henrys' Market/Café. Going through the criteria, it is in the public interest. Henrys' is the Town's "third place" where you might rub shoulders with someone you're not affiliated with. Henrys' Market/Café is the towns "third place".

Ciandella said it is within the public interest and it is not contrary to the spirit of the ordinance because the town already permits wine and beer in the other three establishments in town. This is really a marginal difference of what is already permitted by the ordinance. It is within the spirit of the ordinance. Substantial justice is essentially met by the Public Interest argument. He does not feel there is any diminution in value of surrounding properties because of the hours and because there already has been several wine tastings without problems. There is not going to be any material impact on surrounding properties.

In terms of hardship, we have a very limited mixed use district. He feels this is the only commercial property in the mixed use district in Town. It meets the criteria and he feels the Board should grant the variance. He strongly supports the application.

Gardner asked Ciandella if he had comments about the ZBA's jurisdiction in this matter.

Ciandella has not seen the application but it is right in the middle of the ZBA's jurisdiction.

Gardner pointed out that this is a strict prohibition against serving alcohol in this district.

Ciandella replied the ZBA grants variances and special exceptions and he feels this is right down the middle of the ZBA's jurisdiction. Once this Board grants the variance you've modified the zoning ordinance. As a matter of zoning, the use that is permitted by the Board's prior act is now permitted. It is permitted by zoning. What is not permitted is serving alcohol with meals and that is what the applicant is asking for relief this evening. What is permitted by the ordinance is serving alcohol for purposes of tasting. He feels this is marginal in terms of the spirit of the ordinance, this is not breaking down the door. Also, Ciandella suggested that the concern this Board has regarding parking needs to be reviewed by the Planning Board.

The Chair asked if the public had further comments.

Sharon Houston, 60 Wentworth Road, supports the application and pointed out there are several very small restaurants and café in the area that serve wine and beer. All of these establishments are under very strict standards and have been for many years and nothing has never escalated from it.

Chairman Robinson mentioned the Board has received several letters from the public stating their approval of this application. The correspondence received are from Pam Cullen, 11 Becker Lane, who is in favor of the application; an e-mail from Bill Stewart, 100 Walton Road, who is in favor of the application; a letter from Jane and Ben Lannon, 110 Walton Road, who are in favor the application; a note from Ann Miller McAndrew, 27 Steamboat Lane, who is in favor of the application;

The Chair asked if the public had further comments.

Greg DeSisto, 77 Abigale Lane, said he is in favor of the application for all the same reasons the public has already stated.

Wendy Poulin, 97 Abigale Lane, supports the application. She pointed out that many people have recently moved into the community and enjoy Henry's.

Dylan Kimmel, 266 Wentworth Rd., supports the application for all the same reasons.

Chairman Robinson closed the public portion of the public hearing.

Cox is reminded that whatever the ZBA does runs with the property as any variance from the property does and affects not only the present owner but any future owners, and also affects any representation they make verbally or nonverbally. There is no definition of the size of this application. His biggest concern is he sees no evidence of definition of profitability or lack of profitability and he does not feel that is the ZBA's responsibility and he has a huge problem in trying to inject that into the ZBA's format; he does not feel this Board should be trying to decide what is profitable and what is not profitable and whether beer and wine or liquor should be served.

As was previously mentioned, this is a learning process for the applicant and it is a constant change and we do not know what the next round is going to be. This is probably our fifth variance on this property and he would have a great deal of difficulty drawing a variance which would encompass what we feel is necessary to put this thing together. Parking is another problem and we do not know what the future might be with the change and if we do have a problem with the change, we cannot undo it and it runs with the property forever.

Baker asked if the Board could do a limited time period on this variance.

Gardner replied the Board could consider a limited time period or it could limit the ability to serve wine and beer at this building, as it exists now and no more. The point is that the ZBA has the power to impose restrictions if the ZBA decides to. The second point concerns the issue of economic consideration and variances. There is no variance that comes forth that does not have some component of an economic consideration.

Stetson asked if the Board could request a parking survey.

The Chair replied we could do that but it would have to go before a site plan review with the Planning Board.

Moore asked the Chair if he could review for him any site plan requirements where we could force the Planning Board to take jurisdiction on these issues.

Chairman Robinson replied that the ZBA could require the Planning Board to do a parking survey. The ZBA could make that a condition.

Moore has no objection to the Market serving wine and beer, per se. His concerns are two-fold.

1. The past neglect ignoring prior directives and stipulations. He would want that motion by us or the Planning Board crafted so that there would be some penalties and fees put in or the applicant would have to come in for a variance for release on those if they are unreasonable conditions;
2. There is the parking problem that we are ignoring.

The Chair said in one of the prior discussions is that we go by the number of chairs in the restaurant area to determine how many parking spaces they need. In addition, there may be a requirement that the liquor license provides they cannot serve beer and wine unless there is a place for the patron to be seated. That would be a Planning Board issue.

Moore said if the Planning Board has some site plan review, he feels they should be asked to hear about the liability insurance and make a judgment as to whether they have the adequate amount.

Stetson asked if they will have seats outside again and will they be able to serve beer and wine outside?

The Chair cannot answer that question. He believes that the Planning Board approved two seats and two tables.

Stetson said it was her understanding, because that adds to the parking situation, that if they had two tables outside, they would deduct it from the tables inside. She asked what about serving beer and wine in the presence of children?

The Chair did not feel that would be a problem today.

Moore would like the applicant to stipulate that they will go through a site plan review. Also, in the site plan review he would like the Planning Board to review all of the stipulations that has been created throughout the entire process in order to have a clear understanding on what has been approved.

Chairman Robinson agrees with Moore. We need to have all the conditions written down so that there will be something that people can look at for years to come and be on notice of what various Boards have approved.

Baker is in favor of granting the variance. He feels that Henrys' Market/Café is a good establishment and he feels the people in this town would like to enjoy what the applicant is suggesting. He has heard some comments regarding parking. He lives next door and he has two parking spaces in front of his house. He said only one space during the last two years that anybody parked there. He feels the parking that Henrys' is adding to the mix is not going to be a big problem for the people that live in that area.

Stetson feels you have to run the Town like a business. She would prefer to have, rather than anecdotal information, to have a parking survey done. That would be a Planning Board purview rather than the ZBA.

Gardner feels the Church and the Post Office cause more of a parking problem than Henrys'.

Baker commented on the insurance problem and feels that is at the risk of the business owner. He supports the application for the variance.

Gardner also supports the application for a variance. At first he was unsure but after listening to Attorney Ciandella's comments about this application, he totally agrees with him and feels this should be the ZBA's purview. He supports it.

Chairman Robinson has serious concerns regarding whether the ZBA has the authority to grant a variance because of the provisions of 674:33. He read from Page 41, in the 2009 Municipal Law Lecture Series, (A) *For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area.*

The Chair does not see special conditions of the property where Henrys' Market/Café is located. He has trouble finding hardship. It is certainly hardship to the people who are running the business but as far as hardship is defined by the new code, he has difficulty finding that hardship.

Baker asked the Chair how he felt about the other establishments down the road who are allowed to serve alcohol.

The Chair asked if Baker referred to the fact of going to the Wentworth Hotel, you can go to the "Salt" restaurant in the hotel and have a very expensive lunch or one can go to "Lattitudes" and have an equally expensive lunch and have a glass of wine.

Baker asked why the Chair did not feel this was a hardship.

The Chair said that the Marina and the Hotel are in a different zone than the Mixed Use District that Henrys' Market/Café is located, there is nothing to prevent the sale of beer and wine for on-site consumption in the Planned Development District.

Baker asked if the Board could give a temporary variance.

Moore replied a temporary variance is not permitted. The only ones that are permitted are the ones that are for people with disabilities.

Baker moved for the New Castle Board of Adjustment approves the variance, subject to site plan review by the Planning Board, including prior stipulations for which a variance has been granted. Variance of beer and wine is limited to the existing footprint area of the establishment for which variances have previously been given.

Moore questioned how one would deal with the noncompliance with the existing conditions. He feels they should be adhered to or modified, one or the other, and, therefore, he would be content to let the Planning Board review it. They cannot change the variance but they can make recommendations.

Gardner seconded the motion for purposes of discussion.

Discussion followed among the Board on revising the motion.

Baker moved for the New Castle Board of Adjustment to approve the variance subject to site plan review, including prior stipulations for which variance has been granted. Variance of beer and wine is limited to the existing area of the establishment for which variances have previously been given. Gardner seconded the motion.

Cox said the application for the variance is based upon economic hardship of the existing store. It is completely undemonstrated by any facts submitted. He also feels very uncomfortable with the ZBA trying to deal with something whether it is profitable or unprofitable. He feels that is beyond the ZBA's jurisdiction. The fact that this runs with the property indefinitely and the general lack of enforcement provisions in a town of our conditions on variances disturbs him. He feels that the hardship is unproven and he is concerned with the complete lack of enforcement in the town on many of these variance conditions. He votes against the motion.

Moore votes in favor of the motion. He is also concerned with the lack of enforcement and he hopes the Selectmen are listening because it is up to the Selectmen to enforce the ordinances which have not been enforced very well. Regarding the question of hardship, he does not base his vote on economic hardship that much and the need for reasonable scope of operations. To deny the requested operation would be an unnecessary hardship. He does not pay any attention to the economic liability but he can still support hardship.

Baker votes in favor of the motion. It is a reasonable request and he agrees with the hardship.

Gardner votes in favor of the motion. He agrees with the hardship that was articulated by Moore.

Chairman Robinson votes against the motion. He does not believe that it has been established that the ZBA has sufficient grounds to grant a variance. He believes that the hardship has not been established according to 674:33.

**Three votes for the motion
Two votes against the motion**

Motion Passed.

Chairman Robinson closed the public hearing for Nancy Borden.

Review of ZBA Minutes of February 20, 2014:

Gardner moved for the Board to approve the ZBA minutes of February 20, 2014, as presented. Cox seconded the motion. Approved.

ADJOURNMENT:

Baker moved to adjourn the meeting. Gardner seconded the motion. Meeting adjourned at 9:00 p.m.

Respectfully Submitted,

Anita Colby,
Recording Secretary

Attachment A: The five criteria addressed by the applicant