

MINUTES
PEMBROKE ZONING BOARD OF ADJUSTMENT
February 23, 2010 Approved 4/15/10

MEMBERS PRESENT: William Bonney, Chair; Bruce Kudrick, Vice Chair; Tom Hebert, Tom LoPizzo

ALTERNATES PRESENT: Mick Pinard, Mark Simard

EXCUSED: Dana Carlucci, Paul Paradis

STAFF PRESENT: Everett Hodge, Code Enforcement Officer; Susan Gifford, Recording Secretary

Chairman Bonney called the meeting to order at 7:05 p.m. Bruce Kudrick recused himself from Case #10-03-Z. Mick Pinard and Mark Simard were designated to vote for Dana Carlucci and Bruce Kudrick.

Chairman Bonney stated that the order of the cases would be reversed, as a Special Exception is not required in this particular instance. In the Table of Uses, there is not an “S” for “Eating and Drinking Establishment” in the R1 Zoning District. There is a dash “-” indicating this use is not permitted. Therefore, what is required is a variance.

Attorney Fritz Moeckel, on behalf of the applicant, respectfully disagreed. His research shows that although the Table of Uses lists uses that are 1) allowed by right, 2) not permitted and 3) permitted with a Special Exception in various zoning districts, this case involves a grandfathered, pre-existing use that is changing to another non-conforming use that is “substantially similar”. Therefore, what is required is a Special Exception under Article XIII Section 143-107. After reviewing the citation, Chairman Bonney agreed that a Special Exception is required, and ordered Case #10-03-Z to be heard first. Attorney Moeckel stated that the facts underlying both cases are the same. He asked if he should present the factual testimony for both at the same time. Granting a Special Exception would make mute the Use Variance application. Chairman Bonney stated that the Board would consider just Case #10-03-Z for a Special Exception first.

PUBLIC HEARING

Case #10-03-Z

Applicant:

Robert Cavanaugh dba Kimball’s Market
13 Fairview Avenue
Pembroke, NH 03275

Property Owner(s):

Robert Cavanaugh and Todd Smith
351 Pembroke Street
Pembroke, NH 03275

Agent:

Attorney Friedrich Moeckel
Tarbell & Brodich
45 Centre Street
Concord, NH 03301

Property Address:

351 Pembroke Street
Pembroke, NH 03275
Tax Map 565 Lot 241 located in the R1 Medium Density-Residential, and
AD Architectural Design Zoning District

Special Exception under *Article XIII Non-Conforming Uses, Structures and Lots, section 143-107 Change-* The applicant, Robert Cavanaugh dba Kimball's Market is requesting permission to change the existing retail store/deli to an eating and drinking establishment with no drive-in service. The existing use is a non-conforming use in the R1 Zoning District. A **Special Exception** is required to change the existing non-conforming use to another non-conforming use under Section 143-107A. The property is located at 351 Pembroke Street in the R1 and AD Architectural Design Zoning Districts.

Mr. Everett Hodge confirmed that all abutters were notified and that cards were received back from all abutters.

Chairman Bonney opened the public hearing at 7:10 p.m.

There were 3 regular members and 2 alternate members; therefore, there was a full five member board present for this hearing. Chairman Bonney explained the rules of the hearing.

Copies of assessment cards and a copy of two prior ZBA Decisions, #92-07-Z Replacement of non-conforming sign and #92-08-Z Appeal from Administrative Decision, Accessory Use Vending Machine Snack Shack and Change in Use, installation of booths.

Attorney Fritz Moeckel, representing the applicant, stated that the applicant intends to make the existing business a family restaurant. The applicant is requesting permission to operate an eating and drinking establishment that will not have drive in service on a lot that now is, and historically has been a retail and eating establishment. Louis Manias of Capital Appraisers will testify there would be no adverse effect to property value. Robert Cavanaugh spoke to Chief Lane before the Chief left on vacation. He submitted a letter dated February 23, 2010 from Lt. Dwayne Gilman and a petition for the change in use signed by 233 people. The current business is more than 50% food and deli related transactions.

Robert Cavanaugh,, 13 Fairview Avenue, Pembroke NH stated that he purchased the business four and a half years ago. Last year, the business had a fire and insurance premiums went up, property taxes have gone up and business as a market has gone down. Robert presented a petition signed by 233 people, mostly Pembroke residents, 116 of them have lived in town over 10 years, who would frequent a family restaurant at the site. Chief Lane, on vacation now, had no issues with the proposal and Chief Lane offered to schedule a drive through the parking lot at closing, as he does now, if the business becomes an eating and drinking establishment. Robert Cavanaugh has an off premise beer and wine license, which he will seek to change to an on premise beer and wine license (no hard liquor to be served). He also plans to have root beer on tap. The neighborhood wants a place of its own to relax, have some food and beverage and eat at the site. Robert Cavanaugh stated there will be no changes or addition to the exterior of the building. He provided a plan of the kitchen, beverage counter, deli counter and patron seating. Some grocery items that complement the deli will still be sold - chips, soda. The deli will be the same, with some items added, and will be available for take out or eat in. Robert Cavanaugh stated he will repave and stripe the parking lot. In response to Board questions, Robert Cavanaugh stated he has 225-250 patrons per day now. Some are repeat customers (visiting twice in one day) for both grocery and deli transactions. The cash register does not differentiate. He expects volume of patrons to decrease by one third, and fewer vehicles with more people in one vehicle as a restaurant. He expects to seat 72 people, 10-14 at the beverage counter, and 55-60 in seating areas. The parking requirement for a restaurant is one parking spot for every 4 seats. He has the 18 parking spots needed, with more parking available behind the building for staff. He will maintain pizza delivery and may increase part time employees from 8 to 15. Currently 3-4 employees work at the deli on Fridays. Only 8-9

staff will be working at any one time. There is a small rental apartment upstairs that uses one parking space. There is a detached rental house in the rear of the lot that has been there over 40 years. The building has Town water and sewer.

Louis Manias, appraiser with Capital Appraisers Association, 128 South Fruit Street, and patron of Kimball's Market, stated that his research shows there would be no diminution of value of the surrounding properties if the business changed to an eating and drinking establishment. Louis Manias viewed the property and the neighborhood. The market currently has seating licensed by the State for 24 patrons. The market is 3744 square feet, the apartment is 540 square feet, and the detached home is 1350 square feet over two floors. According to assessment cards, the buildings have been there since 1928 and 1940. The lot is 2 acres and frontage is 99 feet. The property is maintained well. There are two curb cuts on Route 3. The one on the south side enters a larger parking lot. The site has been a mixed use property for many years. The side parking lot is paved, and more parking is available at the rear of the lot. Louis Manias found that 35-40% of the properties from Academy Road to the Concord line are commercial properties or home businesses. These include Dandy Auto, Day Cares, a 40-unit 55+ housing complex, Mobil station and Lang's Ice Cream, among others. Because of the amount of commercial properties, there is little impact on abutting properties from the existing eating establishment and market. The current patron count of 250 per day would be reduced with a restaurant. Two to three patrons would arrive in each car. Traffic would be substantially reduced. The target market is lunch and dinner, with breakfast on Friday, Saturday and Sunday. The current traffic generated by Kimball's Market is less than one tenth of a percent now of the total, with 15,000 cars per day passing the property. Mr. Manias researched other towns, and found small neighborhood restaurants located in town centers with no negative impact. These restaurants service the needs of the community. There will be no adverse noise, traffic, lights or noxious odors. The Planning Board will require lighting for safety that will be designed for least impact to abutters. The current kitchen produces (good) odors. From an appraisal standpoint, the business is currently food related. Patrons purchase alcoholic beverages and take the food and drink off premises. Tom LoPizzo stated that Kimball's Market is a general store that sells food. Mr. Manias stated it is a retail store that serves food as a licensed food establishment. It sells both prepared and non prepared food. The difference is in the characterization of the property. The food side of the business is doing better than the market and sundries. An on premise alcohol license would be issued by NH Liquor Commission. No location can have both an on premise and off premise license. Mr. Cavanaugh would change to an on premise alcohol license. Mr. Manias did not do a highest and best use analysis as part of his assignment, but the existing store and rental property is not the best use. The proposed use would be an owner operated business with no negative impact on surrounding properties. There would be no change to the exterior of the building and no visual impact.

The recording secretary read the February 23, 2010 letter from Lt. Dwayne Gilman, Pembroke Police Department into the record. The business has a good working relationship with the police at this time.

Attorney Moeckel addressed the 9 points necessary for a Special Exception as they applied:

- 1) Please describe how the requested use is essential or desirable to the public convenience or the general welfare. *The proposed use is substantially similar to the existing use, and, in fact, seeks to respond to the public's desire and request for prepared food and drink at a sit-in restaurant, rather than the food (prepared and non-prepared) and drink as purchased from the existing type of business. Most notably, the public desires an eating establishment.*
- 2) Please state how the requested use will not impair the integrity or character of the district or adjoining zones, nor be detrimental to the health, morals or general welfare. *The proposed use is substantially similar to the existing use; the proposed use will not alter the essential character of the area or threaten*

- the public health, safety or welfare. Mr. Manias testified the use is essentially similar.*
- 3) Please describe how the specific site is an appropriate location for the proposed use and the character of adjoining uses will not be affected adversely. *The existing lot has been used for retail (restaurant and market) purposes in one combination or another for approximately forty years. The building and parking areas are inherently suited for retail use- the same thing happening on the property today.*
 - 4) Please show that no factual evidence is found that property values in the district will be adversely affected by such use. *There will be no substantial change in the use of the property. Therefore, there will be no adverse effect on the property value in the district. A property appraiser will testify to this fact at the hearing.*
 - 5) Will undue traffic or no nuisance or unreasonable hazard result from your proposed use? *No, the current property use demonstrates none of the concerns posed in this question. Since the proposed use is substantially similar to the existing use, the proposed use will also not create undue traffic, nuisance or unreasonable hazard.*
 - 6) Please explain how adequate and appropriate facilities will be provided for the proper operation and maintenance of the proposed use. *The existing use has adequate and appropriate facilities for its current operations. Since the proposed use is substantially similar to the existing use, the proposed use will have adequate and appropriate facilities for its proper operation and maintenance.*
 - 7) Please show that there are no valid objections from abutting property owners based on demonstrable fact. *There are no known objections from abutting property owners.*
 - 8) Please show that the proposed use has an adequate water supply and sewerage system and meets the applicable requirements of the State. *The existing retail building is connected to Town sewer and water. The property owners will obtain all necessary state permits and/or licenses prior to conduction of the proposed business.*
 - 9) If the proposed use is for multi-family dwellings, will it be served by the town water system and by the town sewerage system. *N/A*

Mr. Cavanaugh stated his desired hours of operation would be 11am to 10 pm Monday through Thursday, 7 am to midnight Friday and Saturday, and 11 am to 8 pm Sunday. He would like flexible hours, to be open later for special events. The current hours of operation are Monday through Wednesday 6 am to 8 pm in winter and 9 pm in summer. Current hours are 6 am to 9 pm Thursday, Friday and Saturday and 7 am to 8 pm Sunday. Robert Cavanaugh stated that since he bought the business 4 years ago, seven direct competitors have moved into the area - Mobil, Veano's, Meat House, Subway, Olympus Pizza, Friends Diner. Due to the economy, F&P Market and Granite Hill Market recently closed. Mr. Cavanaugh stated that his business won't last much longer as it currently operates.

Matthew Vassillion, 11 Chapel Street, Concord NH stated he grew up in Pembroke, spent some time as a mortgage broker, and is now back in town trying to make Kimball's Market a community store again. Residents of Pembroke do their grocery shopping in Concord. However, deli business at Kimball's Market has skyrocketed. There is some seating, but it is cramped. Robert Cavanaugh envisions room for an entire basketball team and their coach to come down and have a meal. There will be a family atmosphere.

Ron Fournier, 23 Whittemore Road, Pembroke, stated he and his wife frequent the deli 2-3 times a week. They would frequent a restaurant at least weekly. Plausawa opens for dining during golf season. The product today at Kimball's Market deli is fantastic.

Len Johnson, 454 Mical Road, Pembroke, stated he owns Len Johnson Electric and tries to frequent other local businesses. He is Bob's electrician at Kimball's and supports the transition to an eating establishment.

We don't want to see a local business fail in this economy.

Tom LoPizzo stated we must be very clear, and the Board needs to consider the criteria for a Special Exception under Section 143-107. Kimball's Market's existing use is non-conforming, and their request is to move to another non-conforming use. As a retail establishment, it sells food not including drive-in service. As an eating and drinking establishment, there will be some difference in the way Kimball's operates, but not a substantial difference. Tom requested that Attorney Moeckel address that there will be no observable difference in patrons, employees, and hours of operation. Attorney Moeckel stated that we are dealing with a pre-existing, non-conforming grandfathered use. Like a gas station, the market business grows over time. We want business to grow. What was permissible in 1932 is still permissible in 2010. Attorney Moeckel stated that the proposed use will be substantially similar. Today, Kimball's is engaged in selling food to the public - to take home, or eat there. Any business selling food to the public is substantially similar. Kimball's is responding to what the public wants. Will the hours of operation change? Yes. The use will be substantially similar. Testimony by Mr. Manias and abutters show that no adverse effects to abutters will occur. Attorney Moeckel stated that an argument Mr. Cavanaugh could make, but is not making at this time, is that expanding from 24 sets to 55-60 seat is a natural progression of his business. Instead Mr. Cavanaugh is showing that the use is substantially similar, and we meet all the requirements for a Special Exception.

Don Hill, 340 Third Range Road, Pembroke stated his mother is an abutter, Ruth Hill at 337 Pembroke Road. His family owns 353 Pembroke Street and used to own 351 Pembroke Street. When his family ran the site, it was Kimball's Store, Kimball's Ballroom, Kimball's Gardens - ever changing to meet the needs of the residents. Mr. Hill and Ruth Hill support the proposal.

Chairman Bonney summarized the case. Robert Cavanaugh is seeking a Special Exception under 143-107 to change to a substantially similar non-conforming use. After a fire last year, the interior was repaired and renovated. Mr. Cavanaugh is looking to change the use of the property because currently, 60% of the business is from deli and beverages. He envisions a family style restaurant, similar to Gaslighter in Concord, where residents can relax. The Police Department has stated they have a good working relationship with Kimball's Market. Mr. Cavanaugh would switch from off premise, to on premise liquor license for beer and wine to be served. A petition signed by 233 people was presented in support of the proposal. No changes to the exterior of the building are contemplated, unless mandated by the Planning Board. Take out and delivery of food will still be available. One parking space is needed for every 4 restaurant seats. The applicant will pave and stripe the parking lot. Currently there are 225-250 patrons per day. There would be less patrons, and more people per car. The restaurant plans to seat 72 and there are 24 seats licensed currently. Eight part time employees work at Kimball's now, and the owner expects to hire up to 15 part-time employees if business is good. The site has town water and sewer. The house in the rear has been there 40 years. The market occupies 3744 square feet. The lot is two acres with 99 feet of frontage. The site has been a mixed use property for a long time. 35% of the properties from Academy Road to the Concord line are commercial or home business. Capital Appraisers testified there would be no negative impact to abutting properties. There would be no expansion of the building. The use is substantially similar to the existing operation. Deli revenue is up and grocery revenue is down. The applicant hopes to have enough seating for an entire basketball team to have pizza and beverages in town, rather than go to Concord. There will be no readily observable difference in patronage, the site, service or characteristics of the site. The use is a natural progression of one type of business to another.

There being no further input, Chairman Bonney closed the public hearing at 8:27 p.m.

Deliberations: Tom LoPizzo noted that the outside of the structure will remain the same. There will be no expansion of the business. Chairman Bonney read Section 143-107 so that the requirements are clear to all. Once a use is changed to a permitted use, or substantially similar use, further change is not permitted. If the use comes into compliance, it may not be changed back to the original use. The supporting testimony of Robert Cavanaugh, Louis Manias of Capital Appraisers and the members of the audience address the similarity of the proposed use. Tom LoPizzo led a review of the criteria of Section 143-107 for a Special Exception. *Patronage* would not change. Many of the regular 250 customers per day would continue to frequent the business. There will actually be fewer people spending a longer time at the business. Perhaps a thousand customers would be a substantial difference. *Service* will be similar. Currently there is seating for 24 people to enjoy pizza and prepared deli food. There is no wait staff or beverage counter. The eating and drinking establishment use would eliminate customers coming in for cigarettes and scratch tickets. Service would be expanded on the food side. *Site changes*, the building will look the same on the outside. The applicant stated he will repave the parking lot and stripe parking spaces. The paving would be an improvement. *Noise*, the applicant had not stated there will be bands at the site. All of the activity occurs inside the building. The only potential noise would be people talking in the parking lot. *Employment*, The owner currently employs 8 part-time staff. With the expanded food service, he would hire a total of 15 people part-time, with only about 8 working at one time. There are proposed expanded hours. Instead of closing at 9 pm, the business may close at 11 pm. The business is open 7 am to 11 pm on certain days now. There has been no opposition stated at the hearing from abutters. The proposal meets the criteria of 143-107 for a similar use.

Chairman Bonney disagreed this is a similar use. This is a substantial change from the 3 booths allowed in 1992, when the business was just a grocery store with prepared food. The changes may include different clientele, even if they arrive in less vehicles. The use is different because it expands the number of patrons seated from 24 to 75, three times more patrons. Are we creating a Veano's in the center of town? Chairman Bonney stated that he feels a variance is required for this change of use. Chairman Bonney stated that if this application came in and there were not seats already in the business, the applicant would need a variance for a restaurant use in that area. The Master Plan intent is to keep Route 3 as residential as possible. It would be against the spirit of the ordinance if there were not a food selling business already in that location.

Tom Hebert expressed concern about expanded hours past 11 pm in a residential area. The business is portrayed as a family style restaurant. Would families be eating at 10-11 pm? Mark Simard noted that there would also be pizza delivery and take out available up to closing time. Tom Hebert maintained that most other commercial businesses from Academy Road to the Concord line maintain fewer open hours, some 9 am to 5 pm, some 7 am to 6 pm (day cares). Most of the people who signed the petition are Pembroke residents, some live by Route 3, all of them want to keep the business in town. Does the ZBA want to limit the hours and business practices? It was discussed that while 35% of the lots from Academy Road to the Concord line are commercial, 65% of them are residential. Other businesses have conditions on their operating hours. Should an eating establishment be open until midnight on Friday and Saturday, even if it is on a busy route? Mark Simard noted that one abutting property has a hedge barrier. The proposed business would provide an opportunity to work for local teenagers. Chairman Bonney stated that 7AM to midnight is a long time for a restaurant to be open. Mick Pinard stated the late hours may attract a different kind of patron. Mick added the type of patron would depend on the prices, and most patrons would be local. This will not be a sports bar, or bar and grill. Delivery service and take out service would be available during open hours. Everett Hodge stated that if the Board chose to restrict operating hours, the applicant could come back in the future with a request for different hours, based on business experience.

Everett Hodge noted that the lot is an existing non-conforming lot, with 99 feet of frontage. The amount of frontage was a question asked earlier.

Chairman Bonney led a review of the Special Exception criteria. 1) Yes, the use is essential or desirable to the public, agree. 2) The use is currently a non-conforming use. 3) There was no testimony to any adverse effect. 4) There was extensive testimony that property values would not experience an adverse effect. 5) It appears there would be more people per vehicle, and less total traffic. 6) The Planning Board will provide site plan review. The applicant currently runs a good operation. 7) No one attended the meeting stating they were opposed. 8) Adequate services will be provided. 9) N/A

Motion: Tom LoPizzo moved to approve a Special Exception under Section 143-107 A to allow Robert Cavanaugh and Todd Smith dba Kimball’s Market to change the existing non-conforming use to another non-conforming use, an eating and drinking establishment that will not have drive-in service with the following conditions:

1. The applicant will meet all applicable State and local regulations.
2. Hours of operation are limited to closing no later than 10 PM Monday through Thursday, closing no later than 11 PM Friday and Saturday, and closing no later than 8 PM on Sunday.

Tom Hebert seconded.

Discussion: It was discussed that there are residences in that area, and even though they are not present, the hours of operation must take them into account. The owner is not yet sure what hours will work for the business. Considering the hours of the other commercial type businesses in the area, closing at 10 pm weekdays, 11 pm Friday and Saturday and 8 pm Sunday is not unreasonable.

VOTE: MICK - Y TOM L - Y MARK -Y
TOM H - Y BILL - Y

MOTION TO GRANT A SPECIAL EXCEPTION TO PERMIT AN EATING AND DRINKING ESTABLISHMENT THAT WILL NOT HAVE DRIVE-IN SERVICE AT 351 PEMBROKE STREET, MAP 565 LOT 241 , APPROVED WITH CONDITIONS ON A 5-0 VOTE

Housekeeping item - Based on the previous vote, on behalf of his client, Attorney Moeckel withdrew Use Variance application #10-04-Z.

PUBLIC HEARING

Case #10-04-Z

Applicant: Robert Cavanaugh
13 Fairview Avenue
Pembroke, NH 03275

Property Owner(s): Robert Cavanaugh and Todd Smith
351 Pembroke Street
Pembroke, NH 03275

Property Address: 351 Pembroke Street
Pembroke, NH 03275
Tax Map 565 Lot 241 located in the R1 Medium Density-Residential, Ad
Architectural Design Zoning District

Use Variance from Article IV Section 143-19 (Table of Use Regulations) of the Zoning Ordinance to change

the existing retail store/deli to an eating and drinking establishment with no drive-in service. The applicant, Robert Cavanaugh dba Kimball's Market is requesting permission to change the existing retail store/deli to an eating and drinking establishment with no drive-in service. The existing use is not an allowed use in the R1 Zoning District. A **Use Variance** is required for the applicant to continue the non-conforming use user Section 143-19 Table of Use Regulations. The property is located at 351 Pembroke Street.

MISCELLANEOUS

Next steps - Before the applicant can apply for required State licenses, Everett Hodge would need to issue an assembly permit stating the number of people who could safely occupy the building. The property owner will be required to install a sprinkler system for the eating and drinking establishment use. Planning Board review and approval will be necessary as well.

MINUTES OF PREVIOUS MEETINGS

Motion: Mick Pinard moved to approve the minutes of January 25, 2010 as amended. Tom Hebert seconded.

VOTE: MICK - Y TOM L - Y MARK -Y
TOM H - Y BILL - Y

MINUTES OF JANUARY 25, 2010 APPROVED AS AMENDED ON 5-0 VOTE.

OTHER

Date of next ZBA meeting – The March 2010 meeting will be on Monday, March 22, 2010.

ADJOURN Motion: Tom Hebert moved to adjourn. Tom LoPizzo seconded. Vote was unanimous in favor of motion. Meeting adjourned at 9:05 p.m.

Respectfully submitted,

Susan P. Gifford
Recording Secretary