

**CANDIA ZONING BOARD OF ADJUSTMENT**  
**MEETING MINUTES OF**  
**May 28, 2019**  
**APPROVED**

ZBA Members Present: Bob Petrin, Chairman; Boyd Chivers; Ron Howe; Mark Raumikaitis Alt.; Ingrid Byrd

ZBA Members Absent: Judith Szot, V-Chair

Audience Present: Dave Murray (BI), Dennis Lewis (Road Agent), Dean Young (FD Chief), Scott Komisarek, John Cronin (Atty. for S. Komisarek) and many town residents.

Bob Petrin, Chair called the meeting to order at 7:00 pm immediately followed by the Pledge of Allegiance.

**The Board agrees to hear the Candia Crossing case in 2 parts. The Limitation of Building Permits variance request will be presented 1<sup>st</sup> and then the variance request under Definitions-Elderly Housing will be heard 2<sup>nd</sup>.**

**Case #19-005:**

**Applicant:** Candia Crossing LLC, 38 Fieldstone Lane, Candia, NH 03034; Owner: same; Property Location: High Street; Map 406 Lot 16; For a Variance under Article XVI Section 16.02 (I) Limitation of Building Permits; and for a Variance under Article III: Definitions-Elderly Housing.

**Intent:** To remove any limitations on the number of yearly approved building permits and relax the age restriction standard for elderly housing.

J. Cronin starts his presentation regarding the **Limitation of Building Permits** by stating that the permit issue came up 1<sup>st</sup> in the PB process. He reviewed the subdivision case that had been previously approved (2007) and was intrigued when he read the ordinance that there is a limitation on building permits and thought it was a Growth Control Ordinance. He mentions that there has been State litigation between 2000-2006 and in some surrounding town's such as Londonderry, they have implemented a Growth Control Ordinance and also, although unsuccessfully Nashua as well. The idea behind that is to only do this limitation during a period of unsustainable growth during which the Town would not have the resources to meet the demand with the ongoing development. The Town has to have a Master Plan and a CIP (Capital Improvement Plan), because this growth limitation can only be for a period of time for the Town to be allowed to catch up, by raising funds or building what is necessary to accommodate that growth. It is a timing mechanism not a limitation on development.

He goes on to say that the BI did his job correctly interpreting the ordinance, but when it comes to a legal issue with it, there are a couple options available to the applicant. An administrative appeal to the Board or a more simple way is to request a variance. A letter was written to the PB asking to waive the limitation based on the Town not having a CIP, there is no unsustainable growth in town, there is no plan in place to address unsustainable growth and legally not sure if the Town can do it. A letter was returned saying the matter needed to be heard by the ZBA. He gives 2 grounds for the Board to make its decision based on the above information. 1<sup>st</sup> that they can reverse the administrative decision of the Building Official saying although they read the ordinance correctly, the Town has not implemented the Growth Control Ordinance and therefore there should not be any limitation on the building permits that apply in this particular case. 2<sup>nd</sup> is to go with the variance request. Attorney Cronin goes over the criteria and how each aspect applies to this case. He completes his presentation and asks for any questions.

B. Petrin states that at this point the Board would prefer to take the administrative appeal route and are familiar with the basis of this request. He asks J. Cronin what amount of permits they are looking for. J. Cronin says that is a developer's decision but is usually aligned with the road work. B. Petrin points out that having the costs of renewing the unused permits each year is a factor the developer must think about when requesting the permits as well. J. Cronin says with the variables that are necessary to get to that point, though there is no limitation being requested, letting the market control its demand is best.

R. Howe asks if the model will be the same or different and S. Komisarek says that there will be a couple different types. R. Howe asks what a typical unit price will be and S. Komisarek states that they will average at approximately \$375k-\$400k each but again, the market will control that aspect as well. I. Byrd asks how many floors will the units have and where is the garage located. S. Komisarek states that some units will have only 1 story while others will have the 2<sup>nd</sup> story style. The layout for all the units will be 1<sup>st</sup> floor, ground level living and that includes the garage.

B. Petrin asks if there are any abutters or audience members that would like to speak. Tom DiMaggio (abutter) addresses the Board and provides them with his concerns in writing \*(see attached).

B. Chivers states that after receiving J. Cronin's letter and being reviewed by Town Counsel, it is thought that the Town should concede the argument. The limitation on the number of building permits lack the support required by the RSA that authorizes the Growth Management Ordinance. He says in his personal opinion that if the choice was to grant the variance or the administrative appeal, he would choose to overrule the administrative decision of the BI and instruct him to issue as many permits requested by the applicant.

I. Byrd clarifies that it is the PB's job to produce the material necessary to enforce this specific ordinance and that has not been done to date.

B. Petrin **motioned** to approve the administrative appeal for the number of building permits requested. I. Byrd **seconded. All were in favor. Motion passed.**

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**Intent:** To remove any limitations on the number of yearly approved building permits and relax the age restriction standard for elderly housing.

J. Cronin starts his presentation regarding the **Definitions-Elderly Housing** by stating that a federal law initially started this by saying you can't discriminate on age in housing with respect to anything but the government decided to "soften" that in order to give developers, communities and people an opportunity to live in the segregated communities if they choose to. The age criteria was a start to this by the over 65 years old projects. These did not help many during the initial installation in the 80's so the government decided, based on the activity of individuals to "soften" the age restriction more and did so by implementing communities of 55 years and older. This states that only 1 of the owners has to be 55 or older and no 2<sup>nd</sup> person limitation. That doesn't preclude a Town from putting in an ordinance as Candia did. The federal legislation gave you that power on a town to town basis. We're asking that 1 person be 55 and older and the 2<sup>nd</sup> or all others be 50 and above. Attorney Cronin goes over the criteria and how each aspect applies to this case. He completes his presentation and asks for any questions.

B. Chivers confirms with J. Cronin that he is conceding that this is not discriminatory under federal or state law and J. Cronin states no, and the Town has the power to do this. B. Chivers notes that the Board has never been asked to grant a variance on definitions and asks Attorney Cronin if this is common for him. J. Cronin states in his experience it is and has litigated cases in other surrounding areas.

M. Raumikaitis, Alt. asks if the applicant is required and/or has submitted a Marketing Plan to the Attorney General's Office to date and J. Cronin says yes they are but no, they have not completed the paperwork yet. There will be a Public Offering Statement that accompanies these documents that will entail the specifics of the community such as animals, common areas, age and other restrictions. M. Raumikaitis, Alt. states that his understanding is that the 55 is a federal number and if you change that number to 54 for example, then the bottom drops out of that number and now by changing that 55 standard in any way, it can be manipulated to any number. J. Cronin partially agrees but only by stating that federal law standards are only 1 person must be 55 or older and if that is the case, then there is no worry of breaking that guideline.

B. Chivers asks how this ordinance creates a hardship with respect to this property, that doesn't create a hardship with similarly situated properties where all owners are willing to abide by that restriction? J. Cronin states that as it applies to this project, that the hardship is there would be people that would be otherwise eligible that could be 1 or 2 years apart in middle age that would not be eligible to live in this community.

I. Byrd questions S. Komisarek as to whether or not the original Warrant Article that was passed by the Town that deals with elderly housing was written by him and his partner. S. Komisarek says no they didn't but were involved. I. Byrd notes that he was involved in going with the 55 years and older for all owners before but now as he doesn't like what's in place, instead of asking to change it or to have 3 people on this Board (the majority) go against what was voted by the Town. She tells S. Komisarek to write a Warrant Article that changes things to where he wants them to be and present it to the Town to vote on in the Spring. J. Cronin responds by saying if you took the fact that the town's people adopted an ordinance or a warrant article, there would never be a variance. The purpose of a variance is to alter what's been voted upon if you can meet certain criteria. It's narrow relief. I. Byrd states that people in the room need to know all the facts of a proposal.

S. Komisarek states that this project is beneficial to the community. By looking at the budget and the vast majority that for school, with no kids in the system it's not hard to figure out what the substantial revenue would be to the Town of Candia. When we look at competing projects in Southern NH, it would be the 1 owner that is 55 years old. It will be more marketable, successful and bring revenue to the Town.

B. Petrin states that potential buyers going into this community are under the assumption that it's a 55 and over but then they get documents and are told there are younger ages now here. If you grant the change from 55, 54 to 50, etc. and then someone eventually wants to do a new development with younger ages based on those earlier changes, how far does the Board vary on that, is it fair to the potential buyers of that project and others and also to future developers. J. Cronin states that when the buyers get the Public Offering Statement, they will have all the information and either buy the property or not.

B. Petrin asks if there are any abutters or audience members that would like to speak. T. DiMaggio (abutter) addresses the Board and again states his concerns and that he thinks the project should be sent back to the PB.

B. Petrin asks if the units will all be required to be ADA compliant? J. Cronin says he thinks they have to meet the ADA requirements or enhanced accessibility. Not sure how many units may be required to have them. They will have to meet the requirements of walkways for not only elderly but any housing requirement standards.

B. Chivers asks if there are other projects that he's seen like this that are limited to the over 55 years old? J. Cronin says it's a very small minority because most places don't have it written in the ordinance.

R. Howe asks about the potential possibility of a homeowner becoming the caregiver of a grandchild? J. Cronin states that it's usually based on the contract (HOA documents) and the best people to enforce that specific situation, would be the community.

R. Howe asks if it is conceivable that the owner that buys the property can be below 55 and rent the property to others until they are of age to take over the property? J. Cronin states that the association documents can include the right to do a variety of things, which can include renting your property.

B. Chivers states that this project qualified for a conditional use permit because it met the requirement in section 5.06 in the ordinance that it's for Elderly Housing as defined in the ordinance at the time. Does this change anything? Would they still have their conditional use permit and all the waivers that have been granted if they successfully argued for the change in the definition. J. Cronin says sure, once they get the PB, you guys are the gate keepers and you can say no if that's not what you want to do.

Ron Lavadore (resident) asks to clarify the requirement as to the quantity of people in each unit and that water and sewage is also based on that. B. Chivers states it is 4 people per unit. B. Petrin notes that is what the PB

reviewed and sanctioned. He also repeats the only 2 issues before the Board tonight are the building permits and the age restriction.

**\*B. Petrin closes meeting to the public at 7:58pm**

B. Petrin requests that B. Chivers read through the variance criteria and the Board will vote on each as they are read out. All agree.

B. Chivers read as follows:

Under *RSA 674:33*; the Zoning Board of Adjustment shall have the power to hear, authorize or appeal specific case variances from the terms of the zoning ordinance if 5 criteria are met:

**1. The variance will not be contrary to the public interest**

*For a variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public?*

**Boyd moves the Board find that it is contrary to the public interest** because the public interest is for all to be 55+. **-All were in favor**

**2. The spirit of the ordinance is observed**

*To be contrary to the public interest,...the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives.*

**Boyd moves the Board disagree** because the spirit of the ordinance is 55+ and by relaxing that restriction it is going against that. **-All were in favor**

**3. Substantial justice is done.**

*...perhaps the only guiding rule is that any loss to an individual that is not outweighed by a gain to the general public is an injustice. A board of adjustment cannot alleviate an injustice by granting an illegal variance.*

**Boyd moves the Board disagree** because the gain to the Town is not equal to the gain of the developer. **-All were in favor**

**4. The values of surrounding properties are not diminished.**

*The ZBA members may draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since the function of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses.*

**Boyd moves the Board find that the values are not diminished** because this would have no value on the surrounding properties outside the community. **-All were in favor**

**5. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship.**

*When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in question makes it different from others can unnecessary hardship be claimed. The property owner needs to establish that, because of special conditions of the property, the application of the ordinance provision to his property would not advance the purposes of the ordinance provision in any "fair and substantial" way.*

**Boyd moves the Board find that it would not be an unnecessary hardship** because it was acknowledged by the applicant's attorney that there are 55+ projects around such as this in other communities and the definition was in the ordinance when the project was conceived. **-All were in favor**

B. Petrin suggests a motion be put forth to **deny** the variance. **All were in favor. Motion passed**

Approval of Meeting Minutes -April 23<sup>rd</sup>, 2019:

B. Chivers **motioned** to approve the minutes of April 23<sup>rd</sup>, 2019 as presented. R. Howe **seconded**. I. Byrd-**abstain** and M. Raumikaitis Alt. will not be voting. (quorum of: B. Chivers; B. Petrin; R. Howe) **All were in favor. Motion passed.**

Other Business

- Brief discussion regarding the case ruling in the Nicosia matter. The Courts Order was in favor of the Town of Candia. Any updates pertaining to the case will be provided by the Court to the Town in its usual manner.
- B. Petrin notes he will be going before the BOS on 5/29/19 to provide updates and insight with respect to the matters that have come before the Board and may need to be looked at more closely in the near future.

B. Chivers **motioned** to adjourn at approximately 8:12pm. I. Byrd **seconded**. **All were in favor. Motion passed.**

Respectfully submitted,

Lisa Galica ~Admin. Assist.  
Building/Land Use/Fire Dept.  
cc: file

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To the Zoning board

Please consider the following when deciding on the Candia Crossing request.

Candia crossing has been granted the following exemptions

1. Exemption on 2 story houses that the voters voted to have single story homes
2. Exemption on paying fire department for extra protection in one lump sum to payments based on the amount of homes built per year.
3. Special exemptions on frontage because it was to be over 55 homes.
4. Special exemption on road width and curbs.

At this time, I have a verbal agreement on my well if it is affected by the amount of water used by C.C.

I do not have any agreement on contamination due to sewage or storm water, because I am down hill from the development and have a surface well.

I believe this size of development does not belong in a small rural town as the cost of the unknown could cause the taxes to go up.

Therefor the town should require the following

- A. Storm, sewage & water impact and management plan.
- B. Transportation study
- C. A financial impact study to assure the town and residents it will not be negatively impacted financially.

Tom DiMaggio  
Resident

