

Board of Adjustment
Canterbury, NH
Minutes of Continued Hearing
11 December 2024

Case No. 2024-5 GRJH, Inc.

Present were: Chairman Jim Wieck, Web Stout, Calvin Todd, Christopher Evans, Sean O'Brien and Alternates Scott Herrick and Brendan O'Donnell.

Also present were: Attorney John Arnold, David Frothingham and Beth Blair.

Chairman Wieck advised those present there are five regular voting member present and tonight is a continuation of a hearing for Case No. 2024-5 for a variance hearing to provide additional information requested by the Board. John Arnold from Orr and Reno representing the applicant introduced himself and David Frothingham from Wilcox and Barton (engineering firm). He reminded those present this is regarding the property located at 125 West Road and a gas station. They were here 23 October, and a special exception was granted allowing a gas station use in the commercial district. The hearing was continued for a variance on two counts; the first being to allow an underground fuel storage system in the groundwater protection overlay district and the second was to allow a fueling canopy within the front yard setback. At the last hearing they argued that the threshold matter on the UST (Underground Storage Tanks) system is a grandfathered use, a previously non-conforming use. It is entitled to continue; the threshold matter does not need a variance for that. The premise for the argument was that although the station closed in 2017, the owner spent considerable time and effort following that closure in order to reopen the station. The New Hampshire common law test for abandonment views that it has not been abandoned as a matter of law. The New Hampshire Supreme Court has said that abandonment occurs when two factors are met. The first is that there is an intent to abandon the use and the second is there is some overt act or failure to act that evidences the owner's intent to either relinquish or no longer have a relationship with the tenants. So, there are really two parts, the subjective intent but it's also an overt act or failure to act. Both of those factors need to be satisfied for it to meet the requirements of abandonment. So, that's where we left off and the Board wanted some more detail from us on the timeline between the station's closure in 2017 and today to understand if there has been an overt act. He apologized for the volume, explaining they wanted it to be absolutely complete and thorough considering the questions that the Board raised last time. He explained his intent was not to go through the affidavit line by line, but to give an overview and summary, stating he will do whatever the Board would prefer. The Board agreed a summary would be sufficient. Web said the only question he does have, and he is not sure if it is a typographical error in number 12, you have a purchase on it, but then on 14 the purchase fell through, that's actually after the.... dates right there. Attorney Arnold agreed it is a typographical error on the date. It turns out that is the date of the offer.

Attorney Arnold proceeded to give an overview of the affidavit and said if there were any questions feel free to interrupt. The station closed in February 2017 because the operator left, and the fuel tank needed to be replaced. That is where we started. At that point the owner considered two different avenues going forward. They considered selling the property or leasing the property and doing so in present condition, so that the new buyer coming in would do the repair work to get the station back up and running. Or they considered whether they would do the work themselves, replace the fuel tank, the septic system, get it all back up and running in top shape before someone came to operate it. So they explored those avenues simultaneously. Immediately they put the property on the market both for sale and for lease. Notably, the sale listing contained in the affidavit specifically markets the property for the gas station with a certain number of fuel pumps, says it's a prime location for that type of business. But the thing he would point out there is a change in ownership really has no bearing on whether the use is abandoned or not. So, if the use is grandfathered, the protection runs with the land and if there is a change in ownership that use can continue under the new ownership and it

doesn't have any bearing. So, it's significant that they marketed the property as the gas station and shows they intended for it to be continued to be used in that capacity. One of the next things they did, they put the underground fuel storage tanks into temporary closure with DES. The tanks are temporarily closed, we are permitted, but we are not using them right now. They have to comply with certain DES requirements for reporting, monitoring, while they are in temporary closure and then they can be closed for a certain period of time....a year, before they can be reactivated. That is significant because the temporary closure is just that. It signifies that they had an intent to resume the use of these tanks at some point in the future. If they were done with the gas station, if they said we are washing our hands, we are done with this, they would have permanently closed the tanks at that point which is a separate process through DES. So, despite their efforts at listing the property, they weren't immediately successful. It looked like they weren't going to find somebody wanting to own the property, to take on the repairs to the systems, so they began to explore doing that work themselves. They worked with a septic designer; they worked with a UST contractor. In that interim period, as we spoke about a minute ago, they got an offer to buy the property, but it was contingent upon the replacement tank, the underground fuel tank and the septic system, so again even if the purchase went through it was to be used again as a gas station. The contractor for the UST system couldn't do the work within that period of time, so that deal fell through. The owner proceeded with its own work to get those repairs underway. So, in the Fall of 2018 when that deal fell through, they had the new septic system designed and submitted the application to DES. Septic systems, which you may know, are designed based on flowage. The flowage is calculated by DES based on the use that is on the property. So, when a septic system is designed for one specific use so the flowage that comes from that septic system is capable of handling....so when they designed the septic system specifically for the gasoline station with islands, a convenience store with three employees. So, a septic system designed for the same use to continue in the future. To that point, if they hadn't intended to reopen the gas station they wouldn't have designed a septic system for a gas station. If they had a different use, they would have had it designed for a different use.

The permitting process for the septic system took longer than usual. DES requested additional information a couple of times, back and forth took place, got stretched out over a year or two before the final approval came through. In February of 2019, the owner was up for a new recertification operating the UST system. They went through that certification process, got certified with DES specifically to operate the UST system at this property. Again, if they hadn't intended to reopen at this site with the UST system, they wouldn't have gone through the recertification process with DES at this point. Also in the Fall of 2019, that's when the owner submitted a proposal to replace the diesel fuel tank. That got approved in early 2020 and note this is about two years after the station initially closed. Part of the reason for this is because they needed to go through the septic design process before they felt they could proceed with the UST process because the septic system, the design of the septic system, the location of the septic system is based largely on soil types, water tables and you need a certain amount of land area to do it and it's a relatively small site. They felt the septic system design was going to be the driver in terms of, it could only go in a certain location. If it needed to shift, that may impact where the UST system could be located, and they permitted that. So, the first step in the process was figuring out what this new septic system was going to look like, how big it was going to be, where it was going to be located, what DES needed to approve before they felt they could move on to the UST permitting application. Web asked after they got the new septic system installed; they did that in the Spring of 2021? Is this when they began looking to reopening the gas tanks? Attorney Arnold clarified; the diesel tank is a problem. That had failed and needed to be replaced. That was one of the reasons for the closure of the site, but the gas tanks were still operational. They still had some useful life left in them and those were temporarily closed. So, when the septic system was done *in the Spring of 2021 they were looking to be in a position to reopen the site.* They began to look at reopening the gasoline tank system and at that point they decided this is taking a lot longer than we expected, the tanks are getting older, they have been sitting there for the past four or five years, we're better off just replacing the gas tanks at the same time and having a whole new system in there. So, rather than reopening the tanks, which was their initial intent, they decided to apply to DES to replace all the tanks with a new system David described at our last hearing. They worked with their engineers, David's office, the design for that for the application getting that into DES. They submitted the

application to DES in January of 2023. DES approved it in April of 2023. After it was approved, they realized they wanted to shift the location to facilitate fuel deliveries. They went back to DES who advised if they wanted to move the tanks' location, they needed to reapply. There's going to have to be a new application. So, they put in another application in January of 2024 for the new location of the tanks. That got approved by DES in March of 2024 and that leads to kind of where we are now where they began to do site work and then realized with the town that they had to meet with the town for approvals and that is what has brought us here. But back to the two-part test, as I said, both the criteria have to be met in order to find abandonment. The first criteria is whether the owner intended to abandon the use. You've heard from us in our written application, in our testimony tonight and at the last hearing and in an affidavit from Alicia Metz that there was never any intent to abandon the use. So, that's even on just the first criteria. If you get to the second criteria, I think that what we have here in the affidavit and was what described to you at the last hearing and tonight, there have been extensive efforts by the owner since 2017 to reopen this site either with a new operator, a new owner, or themselves, it was just the question of who to do the work to get the site back up to snuff. There wasn't any overt failure to act during that period of time or any suggestion the owner intended to permanently relinquish that use. Chris asked Attorney Arnold to reiterate the second criteria again. Under the second criteria from the New Hampshire Supreme Court, the second criteria is whether there has been some overt act, or failure to act that implies that the owner either claims or retains any interest in the use. Some examples of an overt act or failure to act in a situation would be like in 2017 instead of temporarily closing the tanks if they had the permit.....that's an overt act they intended to give up the system. Or if they had put the property on the market and said this is a prime retail site, unlimited opportunities, zoned for office use, zoned for general retail use, being clear they are marketing the property for something, they don't care about the gas station anymore. If they let the DES certifications lapse, if they got a septic design for an office building, or for general retail use. Those are common examples. I think with the timeline we have it would have shown there was some overt act or failure to act that would indicate they no longer intended to use the site as a gas station. I think realistically it took a lot longer than they would have liked and cost them a lot more money than they would have liked. It's a tough situation where everything took longer than expected and a lot of that happened during the onset of COVID which complicated getting contractors lined up, workers. That was part of the problem, they were trying to get UST contractors on site in a tight time frame. So, they've spent the last several years, spent several hundred thousand dollars trying to get this site back. We think it's very clear that based on all that under the common law test there hasn't been any abandonment. Dave spoke advising DES does not allow any tanks to be abandoned. If tanks go into full closure, they have to be removed.

Chairman Wieck clarified what is being decided tonight is whether or not there had been abandonment and if there had not been abandonment, there is no need for a variance. We have already granted the special exception at the last hearing. He asked if anyone had any questions from the Board. Beth Blair said she was curious if under the common law statute there is no onus on the owner to keep up the appearance that the property is not abandoned. The property has appeared to be abandoned, and she is curious about what the law says. Chris asked would that be a failure to act, is that the question? Attorney Arnold responded the test for the totality of the circumstances, so I think it would be fair to look at how the property is maintained but I don't think it's a controlling factor. It could be viewed as part of the overall....there is actually a New Hampshire Supreme Court case that's similar where a mobile home and non-conforming use and the owner walked away from it and just never came back and a vandal got in and wrecked it and it sat like that for maybe four or five years and the Board said yes, it is abandonment, you walked away from this and you didn't do anything with it. So, in that sense..... Chairman Wieck asked if there were any other questions from the Board. He clarified only those who were here for the initial hearing can vote tonight. Chris stated he thinks they have clearly shown that this property was not abandoned using the criteria. They continuously worked on offering the property as a gas station at the site. I don't see any failure to act as well. They clearly did not mean or intend to abandon this property. Brendan added I think at the end of the October hearing when I left, I was pretty convinced it had been abandoned, we have these really high level steps and pretty big gaps in what they had done in the last seven years, like the trash piled up and those kind of things. But this, what

they've provided is very, very thorough, it's much more detailed than what we had last time, and a number of the things really stand out, like the temporary closure, the actual concrete attempts to list it for sale, the fact that when that failed after a year they lowered the price, so I agree now that we have all of this information, I'm for that there's not an intent to abandon. Chairman Wieck spoke saying in this case we are making a decision of whether or not there has been abandonment. If there had been, they would need a variance. The decision about the canopy will be made after this one. Brendan spoke saying there are two variance requests. The first one is the underground storage tanks in the zone. That's where we can find out is there abandonment, in which case they need that....Chris asked so does a motion need to be made... discussion of everyone about procedure. Brendan made a motion: In Case 2024-5, move to find that a variance is not required for the underground storage tank in this zone because the pre-existing non-conforming use was not abandoned. Chris seconded the motion. The Board vote was a unanimous decision that in this instance the variance was not needed. The Board expressed its gratitude for all the additional information supporting this decision.

Attorney Arnold made reference to the plans for the fueling island canopy noting the existing canopy is 24x24 feet and is about 35.8 feet from the lot line. It is not entirely clear to him how this initial canopy was approved with a fifty-foot setback. He could not find anything in the town files showing that a variance had been granted for it. He could not trace the town ordinances back far enough to figure out if there used to be a front setback....but regardless, what we're doing today is replacing the canopy in a largely contained location. This is the new canopy, he said, pointing it out on their map. It's going to be slightly bigger, slightly longer in this direction, so it's still 24 feet in this dimension, but 36 feet in this dimension. The reason for that is because we're moving the two fueling stations apart. Under the existing conditions if you have fueled up there before, the two pumps are pretty close together so when you have a car parked at one of the pumps, a lot of times you cannot use the second pump until the first car pulls up far enough. The pumps are being spread out and as a result of that the canopy has to be larger. We're keeping it about the same distance from the front of the yard as it has been historically 36 feet. Today it will be 35.5 to the lot line that's there today. Visually, there will not be much of an impact. The variance criteria in the application, I'll just try to do a brief summary of them as well. The public interest in the spirit of the ordinance, I'll talk about those two together because they are related. The test is whether the variance will alter the essential character of the locality....Web interrupted asking what was the setback of the canopy, the new one that is proposed. Attorney Arnold advised it's 36 feet. Web asked what's the size of this lot. Attorney Arnold advised it is .57 acres. Web advised on page 22 in the Ordinances of the Town of Canterbury it reads: "In case of lots 25,000 square feet or less existing as of November 1, 1999, the minimum structure setback from the front property line shall be 25 feet". Attorney Arnold responded, well that's great. Web advised, Section 5.2 establishment of minimum lot size....you're welcome. Attorney Arnold thanked Web.

Chairman Wieck stated he did not think the Board needed to vote on this. It is a matter of opinion. He asked for a statement from the Board. Web stated, on the variance for number two for the fueling front setback, they do not need a variance due to Section 5.2, B7 where this lot is under 25,000 square feet and they are allowed 25 feet for the front setback. There is no need for a variance. Calvin seconded the statement. The Board vote was a unanimous one in favor. Chairman Wieck explained the thirty-day appeal process.

Respectfully submitted,

Lisa Carlson, Clerk

Boad of Adjustment