

**Town of Bartlett
Zoning Board of Adjustment
Public Hearing
October 8, 2019**

Members present: Richard Plusch; Norman Head; Anita Burroughs; Julia King; Peter Gagne.
Members absent: None.

Also present: Shawn Bergeron; Richard Leavitt; Atty. John Ratigan; Vicky Garland; Ralph Cronin; Michael & Rachel Murphy.

The Chairman called the meeting to order at 7:00 pm and announced the case number, name of applicant, and purpose of this application, and advised the meeting notice was published in the Conway Daily Sun on September 30th and October 8th, 2019 and publicly noticed at the Bartlett, Glen, and Intervale post offices, as well as the Bartlett town hall.

1. Review and Approve Minutes: The minutes of the September 10th meeting were reviewed. Motion to approve the minutes, as written, was made by Norman Head; seconded by Julia King. Vote: 4-0-1, with Richard Plusch abstaining since he had not attended the meeting.

2. Public Hearing - File 2019-08:

Applicant:	Bergeron Technical Services LLC on behalf of Fram Real Estate Investments.
Location:	13 NH Route 16A
Bartlett Tax Map:	Tax Map 1RT16A, Lot 6L00
Purpose:	An Appeal from Administrative Decision or a Special Exception.
Zoning Ordinance Section:	Article XVIII, Section D-1(l)

Shawn Bergeron of Bergeron Technical Services presented, and provided colored photos showing two views of the subject building; one as seen from Route 16/302 and the other as seen from Route 16A. Mr. Bergeron said the application had been submitted with two different requests: an appeal from administrative decision or a special exception. He asked if the board could move past the appeal from administrative decision as he would like to deal with just the special exception, saying if that was successful then the appeal could be withdrawn. Mr. Bergeron gave a brief overview of the building, saying it had originally been constructed as a single-story ranch-style home on top of a full walk-out basement. Mr. Bergeron identified the original portion of the building on the photos. He said the three-story section had been added later as a garage, and eventually the whole building had been turned into office use. Mr. Bergeron said what this proposal was intending to do was to retain the single-story structure as office space and convert the three-story section into three residential two-bedroom units, one on each level.

Mr. Bergeron said he assumed that the existing offices pre-dated zoning since this property is in Residential District A where offices are not allowed. He said the current use of end-to-end and top-to-bottom offices was actually non-conforming and this proposal would make more of the building conforming than it was. He explained that Article XVIII, Section D.1 (letter) of the zoning ordinance could allow this conversion. This Article stated the ZBA can grant a special exception for certain uses and/or conditions not permitted in the ordinance, and Item 1 in that list allowed a special exception to be considered for a change of use to a Town Residential District A permitted use on a lot of record when setback, minimum lot size and/or minimum frontage cannot be met. Certain criteria had to be met before a special exception could be granted, and Mr. Bergeron said technically, considering what the applicant was trying to do, Item 1 required that only Items 6 and 7 needed to be satisfied to cause a building and use permit to be issued. Item 6 required that adequate area for safe and sanitary sewage disposal be provided, but Mr. Bergeron said this was one of the rare properties in Bartlett which was connected to the North Conway municipal sewer. Item 7 stated that operations in connection with such a use shall not violate the provisions of Article IV of the Ordinance, which Mr. Bergeron said was basically a list of general condition. He said the residential use being proposed for this project was certainly an allowed use, and made something which was totally non-conforming more conforming.

The Chairman asked if the board had any questions. Peter Gagne asked whether the applicant also had to comply with the requirements of the Lower Bartlett Water Precinct. Mr. Bergeron said they probably would. Norman Head asked whether they had been to the precinct yet, and Mr. Bergeron said they had not. Julia King asked about the requirements of Article IV which Mr. Bergeron had just mentioned. He explained these requirements by saying a residential use was an allowed use and most of the items listed were not applicable in this case, for example, they were not proposing a junk yard or a landfill, etc. Peter Gagne asked about parking, and how many spaces were provided on the parcel right now. Mr. Bergeron said he believed there were fifteen, including one handicap space. Anita Burroughs asked how many offices were in the building and how many more were being proposed. Mr. Bergeron said the building was presently almost empty, and the single-story space would contain one office. Rich Leavitt corrected that number and said there would be four offices, with the Miranda Leavitt Diabetes Center using the most space. He said he couldn't tell Ms. Burroughs exactly how many offices had been in the building previously since the number had fluctuated. He said the offices were basically a series of small rooms which people took over and used based upon their needs.

Peter Gagne wondered whether there was going to be adequate parking to accommodate the tenants and renters. He said four offices would require at least four spaces, and three apartments would likely use two each. Anita Burroughs asked how many employees the diabetes center would have. Mr. Leavitt said they had two full-time staff with two exam rooms, so there would be two patients at any one time. Shawn Bergeron noted this building had been commercial space end-to-end up until now and there had never been parking problems. He said one of the things he learned over the years was that parking regulations always exceeded the reality of what was actually required. Julia King said we had parking regulations, and what happened in technicality doesn't have a lot to do with what the regulations are; the regulations are the regulations. Mr. Bergeron said he wasn't questioning that, but felt it was important to realize they were creating something anew and were not creating any new space. The building is already there and it is working, and what was being done was to make something more compliant. When asked how that was, Mr. Bergeron said because the whole building was in commercial use right now, and commercial use was not allowed in this zoning district. By putting three residential units in, it was creating a better-conforming situation. Peter Gagne noted the property was a commercially allowed use since it had an entrance within 400-ft. of Route 16/302. The Chairman and other members agreed with Mr. Gagne. Mr. Bergeron said that is where it becomes muddy, because according to the zoning ordinance this property was in the TRDA (Town Residential District A), so it wasn't in the commercial zoning district even though it may have a commercial use. Mr. Bergeron said even a denial letter from the selectmen indicated the property was in the TRDA and had 60-ft. setbacks.

The Chairman noted what Mr. Bergeron was proposing was really a partial change-of-use. Mr. Bergeron agreed it was. Rich Leavitt said about one-third of the building would remain commercial and two-thirds would become residential. Mr. Bergeron had calculated this as being 2,520 s.f. of residential space, which represented three floors each being 30'x28' or 840 s.f., and 1,900 s.f. of commercial space. Julia King noted this total square footage was less than 5,000. Ms. King also said she was confused as she was under the impression this application was within the framework of workforce housing, but instead it appears to be creating a mini-mall of multi businesses on one piece of property that was also non-conforming. Shawn Bergeron said apart from the diabetes center, the other so-called multi businesses were three small one-room operations of a medical nature, including one masseuse. When Julia King said this amounted to four businesses, Peter Gagne reminded her this was a commercial building and it really did not matter as they could have twenty-eight business there if they wanted to. Ms. King indicated she did not agree, and Mr. Gagne concurred it would also depend on how much parking was provided. Ms. King went on to state that density changed once a business was located on a property. Mr. Gagne pointed-out these were offices, not businesses, a comment Ms. King again disagreed with saying they were businesses. She said she didn't come prepared to discuss these types of issues as she thought we were dealing with workforce housing, but said her vague recollection was that once you get up to three businesses on a property the game changes in terms of density, but quickly added that was not septic density. Mr. Bergeron asked Ms. King where that was stated in the zoning ordinance, but she was unable to say where it was. When Mr. Gagne noted there were more than three businesses there right now and they had been there for

a long time, Ms. King said that didn't make it right. Mr. Bergeron said the non-conformity in its entirety pre-dates zoning and he did not think there was an expansion of the non-conforming use. He said this proposal was a reduction of the non-conformity. Julia King said we did not know whether there was ever a permit issued after zoning to increase the use, and did they just go willy-nilly. Mr. Bergeron said he did not know the answer to that. He also said if no permit was issued he did not know why his client should be held hostage for something which someone else did in the past since it was not under their care and custody, and which the town didn't take an enforcement option on back then, when perhaps they should have.

Ms. King said that we still had the issue of density to deal with and the fact that minimum lot size cannot be reduced because of town water and sewer. Mr. Bergeron repeated the comments offered earlier in his presentation and explained how his client only had to meet the requirements of Items 6 and 7 of the special exception criteria. He said Item 6 was not relevant since they did not need to provide safe and adequate area for sewage disposal as the site had off-site sewage, and they already complied with the requirements of Item 7. Mr. Bergeron said he did not see how the requirements for septic would become part of the conversation because they don't have any requirement for that. Ms. King said there was a requirement beyond septic.

Anita Burroughs asked whether this property had been conveyed to Mr. Leavitt, the proposed new owner, yet. She was told it had not, that it was dependent on the decision made by the ZBA tonight. At this point, Norman Head advised he was involved in the sale of the property and said he should have probably recused himself, but that he would not participate in any vote.

The discussion then shifted towards whether this property was classified as being in the residential or commercial zone, as it was located in both. The Chairman read the definition of a commercial property from the zoning ordinance, which this property met. Mr. Bergeron said the selectmen had referred to it as being in the TRDA and had cited residential setbacks in their discussions. He said this was something which needed to be determined before his client proceeded any further, since they would not want to make decisions based on inaccurate information which would impact what they could do. He suggested the hearing be continued until the matter could be resolved. The Chairman noted the town's attorney was present and asked Mr. Bergeron if he minded if we heard from him before continuing the hearing. Mr. Bergeron agreed, and Vicki Garland introduced Atty. John Ratigan and advised he was here tonight representing the board of selectmen.

Atty. Ratigan provided an eight-page handout for the board's review which he said addressed the issues the selectmen had concerns about. Atty. Ratigan said what we have was two conflicting provisions of the zoning ordinance. He described these two provisions as being Article VI, Section H which said the minimum land area requirements shall not be reduced because of the availability of community and/or off-site water supply or sewage disposal, and Article XVIII.D-1.1 which appears to authorize the ZBA to grant a special exception that would allow for a change-of-use on a lot of record which cannot meet the minimum lot size. He said this property was .4-acres, or 17,424 s.f., in size and noted the smallest lot size the town allows, even with best slopes and best soils, was 30,000 s.f. Atty. Ratigan asked when conflicts such as this arose, how does it get resolved? He answered that question by citing a 1978 decision made by the NH Supreme Court which found that when there was a conflict between two ordinances the latest, most recently adopted provision controls. He said this was particularly so when the later language deals with the subject in a specific way and the earlier language deals with it in a more-general fashion. He noted the earlier language was part of the original zoning ordinance when it was adopted in 1985, whereas the later language of Article VI was amended by a zoning amendment in 2011, therefore that 2011 language controls. Mr. Ratigan acknowledged the language only applies to lots that have water and sewer and said nobody is saying the ZBA does not have the authority to make a reduction in lot size and frontage requirements for lots that aren't on water and sewer; however, when they are, the language of Article VI controls. He said that was the basis of the selectmen's decision to deny the building permit and is also the reason why the ZBA does not have the authority to grant a special exception.

Norman Head clarified with Atty. Ratigan that what he was saying was even if the applicant complied with all the conditions of a special exception, that one could still not be granted. Atty. Ratigan said he agreed with Mr. Bergeron's assertion that only Items 6 and 7 were required to be met, but the language of Article VI overrode those items. Julia King quoted from the Minimum Land Area Requirements of Article VI of the zoning ordinance which read, "The following Minimum Land Area Required (MLAR) standards regulating lots sizes and the density of development are established for the purpose of promoting public health and welfare and preserving the traditional rural character of the town. This article provides instructions for determining the Minimum Land Area Required for all residential, commercial and industrial uses in applicable districts." She noted this article had been amended in its entirety in 2011. Atty. Ratigan said he agreed with that, and also agreed there was a legal non-conforming commercial use which had existed for a long period of time, but now they were coming forward and proposing a residential use. He felt this mixed use was simply too much to have on one lot. He said it was recognized that the commercial use could continue, and nobody was saying that had to stop, however in order to do that, they had to meet the minimum land area requirements which they can't do.

The Chairman asked what if the property were in the town commercial district. Atty. Ratigan said it doesn't have anything to do with what district it was in, it has to do with the fact they were looking for a change-of-use which can't be approved because they can't demonstrate they can meet the minimum lot size requirements. Norman Head asked Atty. Ratigan about the language on page 23 of the zoning ordinance in 2(a), which said an owner who wishes to use a lot, building, or structure in a manner not permitted by this Ordinance but which is included as a possible exception in paragraph D-1, shall submit an application to the Board of Selectmen under procedures and on forms prescribed by the Zoning Board of Adjustment. Mr. Head asked wouldn't that give the ZBA authority to consider a special exception. Atty. Ratigan said no. Mr. Head pressed further by saying he did not see how the authority given to the ZBA by that language could be denied because of the 2011 regulation change. Atty. Ratigan again referred to the 1978 supreme court decision which found if there were conflicting provisions of the ordinance, the more-recently adopted one which was more specific governed. He said the 2011 language called-out specific lots, i.e., those with municipal sewer and water. Atty. Ratigan said if there was a lot across the street which was exactly the same size but did not have water and sewer connections, that they could apply for the same thing and the board would not be bound by the 2011 restrictions because they would not apply. He repeated that the board's authority was not being denied or taken away. He further pointed out that item 2(a) is merely about procedures and explains how to go about applying for a special exception. Mr. Head kept questioning this issue, but Atty. Ratigan's opinion remain unchanged.

Shawn Bergeron asked to intervene. He said, with no disrespect, it was apparent the town had taken serious concerns with this application, even to the point of bringing legal counsel here tonight to present special information that the applicant was not privy to. Mr. Bergeron said this had only just landed in his lap. Atty. Ratigan replied that it had only landed in his yesterday morning, and cautioned Mr. Bergeron not to suggest the board of selectmen tried to ambush him. Mr. Bergeron suggested it was indeed an ambush, and should not have happened. He said the information should have been presented to them in a timely manner so they also had an opportunity to review it with counsel, if necessary. Mr. Bergeron said what he would like to do was to ask for a continuance until such time as they had a chance to regroup. Mr. Bergeron said he was very frustrated, and felt these actions were inappropriate. The Chairman said he could see Mr. Bergeron's point of view and said he was not opposed to a continuance so that both sides could lawyer-up if they wanted to. He asked whether the board had heard enough to be able to make that decision. Julia King indicated she agreed to a continuance. Peter Gagne asked Atty. Ratigan for clarification of whether this property was in the commercial zone. Atty. Ratigan said he did not think that had any bearing on the selectmen's decision. Mr. Gagne felt that information was important to know, as if that is what the application said, it could become a technicality in the event of an appeal. Atty. Ratigan agreed it may be good to have a black-and-white determination as to whether this property was commercial or residential. Shawn Bergeron said it could make a difference as to how his client proceeded and suggested the enforcing authorities should first establish which zoning district this property was in so he knew which requirements or restrictions did or did not apply.

The Chairman was made aware there were some abutters present who had not had an opportunity to speak. He asked them if they wished to comment. Michael and Rachel Murphy said not really; they were only here as an interested party. Mr. Murphy said he did have a few concerns and was anxious to hear the outcome of tonight's hearing.

The Chairman called for a motion to continue the public hearing. A discussion ensued as to what date board members and the applicant were available, since the date needed to be announced tonight to prevent further public noticing from having to take place. It was finally decided to meet on Monday, October 21st. A motion to continue the public hearing to October 21, 2019 was made by Julia King; seconded by Anita Burroughs. Vote: All in favor. Mr. Bergeron thanked the board for their time.

With no further discussion, the meeting adjourned at 8:15 pm.

Respectfully submitted,
Barbara Bush
Recording Secretary