

NASHUA CITY PLANNING BOARD
January 5, 2023

The regularly scheduled meeting of the Nashua City Planning Board was held on January 5, 2023 at 7:00PM in the 3rd floor auditorium in City Hall AND via Zoom virtual meeting.

Members Present: Scott LeClair, Chair
 Adam Varley, Vice Chair
 Mike Pedersen, Mayor's Rep.
 Maggie Harper, Secretary
 Ald. Patricia Klee
 Ald. Derek Thibeault, Alt.
 Dan Hudson, City Engineer
 Bob Bollinger
 Larry Hirsch

Also Present: Sam Durfee, Planning Manager
 Linda McGhee, Deputy Planning Manager
 Scott McPhie, Planner I
 Christine Webber, Planning Coordinator

APPROVAL OF MINUTES

December 1, 2022

MOTION by Mr. Hirsch to approve the minutes, as written

SECONDED by Ald. Klee

MOTION CARRIED 7-0-1 (Bollinger abstained)

COMMUNICATIONS

Mr. McPhie went over the following items that were received after the case packets were mailed:

- A22-0240, 14B Railroad Square
 - o Correspondence from Atty. Prolman

REPORT OF CHAIR, COMMITTEE, & LIAISON

None

PROCEDURES OF THE MEETING

After the legal notice of each conditional, special use permit, site plan or subdivision plan is read by the Chair, the Board will determine if that the application is complete and ready for the Board to take jurisdiction. The public hearing will begin at which time the applicant or representative will be given time to present an overview and description of their project. The applicant shall speak to whether or not they agree with recommended staff stipulations. The Board will then have an opportunity to ask questions of the applicant or staff.

The Chair will then ask for testimony from the audience. First anyone wishing to speak in opposition or with concern to the plan may speak. Please come forward to the microphone, state their name and address for the record. This would be the time to ask questions they may have regarding the plan. Next public testimony will come from anyone wishing to speak in favor of the plan. The applicant will then be allowed a rebuttal period at which time they shall speak to any issues or concerns raised by prior public testimony.

One public member will then be granted an opportunity to speak to those issues brought by the applicant during their rebuttal period. The Board will then ask any relevant follow-up questions of the applicant if need be.

After this is completed the public hearing will end and the Board will resume the public meeting at which time the Board will deliberate and vote on the application before us. The Board asks that both sides keep their remarks to the subject at hand and try not to repeat what has already been said.

Above all, the Board wants to be fair to everyone and make the best possible decision based on the testimony presented and all applicable approval criteria established in the Nashua Revised Ordinances for conditional, special use permits, site plans and subdivisions. Thank you for your interest and courteous attention. Please turn off your cell phones and pagers at this time.

OLD BUSINESS - CONDITIONAL USE PERMITS

None

OLD BUSINESS - SUBDIVISION PLANS

A21-0299 145 Temple Street, LLC (Owner) - Greenridge LLC (Applicant) - Proposed three lot subdivision. Property is located at 145-149 Temple Street. Sheet 38 - Lot 93. Zoned "GI" General Industrial/"TOD" Transit Oriented Development. Ward 7. **[TABLED TO THE JANUARY 19, 2023 MEETING]**

OLD BUSINESS - SITE PLANS

A21-0300 145 Temple Street, LLC (Owner) - Greenridge LLC (Applicant) - Proposed site plan to show a 4-bay garage, office and storage. Property is located at 145-149 Temple Street. Sheet 38 - Lot 93. Zoned "GI" General Industrial/"TOD" Transit Oriented Development. Ward 7. **[TABLED TO THE JANUARY 19, 2023 MEETING]**

A21-0301 145 Temple Street, LLC (Owner) - Greenridge LLC (Applicant) - Proposed site plan to add asphalt manufacturing. Property is located at 145-149 Temple Street. Sheet 38 - Lot 93. Zoned "GI" General Industrial/"TOD"-Transit Oriented Development. Ward 7. **[TABLED TO THE JANUARY 19, 2023 MEETING]**

A21-0302 145 Temple Street, LLC (Owner) - Greenridge LLC (Applicant) - Proposed site plan to add proposed office use. Property is located at 145-149 Temple Street. Sheet 38 - Lot 93. Zoned "GI" General Industrial/"TOD" Transit Oriented Development. Ward 7. **[TABLED TO THE JANUARY 19, 2023 MEETING]**

Mr. LeClair said he would take case A22-0250 next.

NEW BUSINESS - SITE PLANS

A22-0250 Buckley-Amherst, LLC (Owner) - Application and acceptance of proposed one year extension to NR1763 to show a restaurant and lounge with up to 350 seats, with an outdoor patio. Property is located at 546 Amherst Street. Sheet H - Lot 178 Zoned "GB" General Business and "PI" Park Industrial. Ward 1.

MOTION by Mr. Bollinger that the application is complete and the Planning Board is ready to take jurisdiction.

SECONDED by Ms. Harper

MOTION CARRIED 9-0

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Ethan Beals, Hayner Swanson Inc, 3 Congress St, Nashua NH

Mr. Beals introduced himself as the representative for the applicant. With him is Atty. Brad Westgate from Winer & Bennett and applicant Ian Buckley.

Mr. Beals provided a brief overview of the proposed plan to convert a vacant educational office building to a restaurant with associated site improvements. The project was originally approved January 20, 2022. The original project was for a 275-seat restaurant with 3,000-sqft of retail space. They now proposed to eliminate the retail space and increase the total capacity of the restaurant to 350-seats, with 75-seats in the outdoor patio. They are now proposing a brew-pub component, which would be for restaurant patrons only, as an accessory to the restaurant. They are also requesting to extend the business hours to 10AM-11PM, in order to provide a weekend brunch. There are no external or site changes. The parking onsite is still well within the minimum required. The original traffic study has been updated to reflect the change in the proposed use and seating, which resulted in only one additional trip in the PM peak hour. Based on this, his client is amenable to a traffic corridor contribution totaling 19,600.00.

Mr. Beals said construction is scheduled to begin later this summer, with an anticipated opening date at the end of the year. The conditions in the staff report are acceptable, however they would request some consideration in rewording condition #3. They suggest a rewording to state that "all site plan approvals issued before January 20, 2022 are null and void".

Mr. Varley asked if there would be growlers for offsite consumption, or would it be for the bar and restaurant only.

Mr. Beals said it would be exclusively for restaurant patrons as part of the restaurant use.

SPEAKING IN OPPOSITION OR CONCERN

None

SPEAKING IN FAVOR

None

PUBLIC MEETING

Mr. LeClair closed the public hearing and moved into the public meeting. He said this is a straightforward application and pretty well received the first time around. It looks even better the second time.

Mr. LeClair asked staff if the proposed change to condition #3 would work.

Mr. McPhie said that would be fine.

MOTION by Mr. Varley to approve New Business - Site Plan A22-0250. It conforms to §190-146(D) with the following stipulations or waivers:

1. All prior conditions of approval are incorporated herein and made a part of this plan, unless otherwise determined by the Planning Board.
2. Prior to the Chair signing the plan, updates to the Amherst Street Corridor fee will be made. The updated fee amount of \$19,600.00 is subject to approval of the Division of Public Works.
3. All previous site plan approvals as of January 20, 2022 shall be null and void with the approval of this plan.

SECONDED by Mr. Bollinger

MOTION CARRIED 8-0

NEW BUSINESS - CONDITIONAL/SPECIAL USE PERMITS

A22-0240 Belans Inc. (Owner). Hitesh Punjabi (Applicant) - Application and acceptance of proposed Conditional Use Permit to allow a synthetic nicotine and electronic smoking device store and lounge within 1,000 feet of a school. Property is located at 14B Railroad Square. Sheet 43 - Lot 95. Zoned "D1/MU" Downtown 1/Mixed Use. Ward 3. **(Postponed from the December 1, 2022 Meeting)**

Ald. Klee recused herself from this case

MOTION by Ms. Harper that the application is complete and the Planning Board is ready to take jurisdiction.

SECONDED by Mr. Bollinger

MOTION CARRIED 8-0

Atty. Andy Prolman, Prunier & Prolman PA, 24 Trafalgar Square, Nashua NH

Atty. Prolman introduced himself as representative for the applicant. With him is applicant Hitesh "DJ" Punjabi and property manager Glen Cavanaugh.

Atty. Prolman gave a brief overview of the proposal and subject site. He said it was one year ago tonight that the Board approved a vape shop at Poor Pierre's. There was great concern over the nearby learning center, which triggered a 1,000-ft ordinance. The concerns being addressed by that ordinance are not present at 14B Railroad Square. The closest schools cannot see this site. There is a significant bend in this old railroad building, so that at the closest vantage point you can't see people coming and going out the front door. They have never seen kids on the front lawn of nearby Whitewing because the playground is in the back. The same concerns are not here.

Atty. Prolman said there is a music school up on the corner of Lock Street, and because of all the buildings there is no visibility of this site. Even if the concern raised wasn't just line of vision, but proximity, Railroad Square is a confluence of a lot of traffic and a lot of businesses. It will blend in with all the other businesses in Railroad Square.

Atty. Prolman said there is a vape shop at 60 Main Street, but they are far enough away that there won't be any overcrowding or negative impact. The new ordinance requires no negative impact to abutters or the neighborhood, and they believe it will not. They haven't heard any concerns from the abutters. The site has been empty for over two years now, and the landlord did not want to rent to another bar or restaurant. This location has had a long history of restaurants and bars, and the owner is happy that the applicant will be the tenant of this site.

Atty. Prolman said the vape shop will be the third that Mr. Punjabi operates in the state. He has been to the Manchester store, and found it to be bright, clean, and friendly. This will be the premier shop for him. They are proposing no outside changes besides signage.

Atty. Prolman said the ordinance has three components. They have to show that there are no negative impacts to the abutters, neighborhood, or city, which they believe it will not. They have the waiver criteria, which his letter speaks to. Then, there is the conditional use permit under 190-133(F), which he has addressed under his submittals.

Atty. Prolman said the only comments he received from staff were from Joe Mendola, which prompted a full staff meeting on December 20th, which he addressed in his December 29th letter. As to the waiver request, they have two items of hardship. They should have received a letter from Mr. Durfee regarding the unique permitting history of the site, that they received a building permit for this in April 2022. If this request is denied they will have a significant financial hardship against the applicant. They don't believe this is contrary to the spirit and intent of the ordinance, as they are not overcrowding vape shops and there is no impact to neighboring schools.

Atty. Prolman said in regards to the Conditional Use Permit, he has submitted a letter addressing the nine criteria. They received comments from Engineering, which they have no issue working with the city to address.

Atty. Prolman shared copies of the interior layout with the Board. The applicant intends to fully renovate the interior, which is intended to be a first class operation.

Atty. Prolman said he believes they have addressed the conditions of the ordinance, the Conditional Use Permit, and the waiver request. However, he has to raise the issue of fairness. A building permit was issued for this on April 11th, and from April until late September, the applicant relied upon that permit, spent a lot of money, paid rent, bought display cases, and then in late September received a call from the city saying it was a mistake. This hearing was supposed to be on December 1st, and there was a noticing SNAFU. They have been delayed from September until tonight, and are hoping the Board will consider that. He was in the audience on the night that they approved the smoke shop at Poor Pierre's, and the concerns that were raised then are not present here. He doesn't see any adverse impact with this operation.

Mr. LeClair asked if there will be a smoke lounge.

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Atty. Prolman said there was an earlier concept with seating, but his client tells him there will be no seating as of right now.

Mr. LeClair asked what the function of the patio would be.

Atty. Prolman said that will be used for the customers.

Ald. Thibeault asked how far the schools are away from the shop.

Atty. Prolman said he wasn't sure of the exact distance, but on the GIS he used a 1,000-ft buffer and it definitely captured the Whitewing School and smoke shop at 60 Main Street.

Mr. LeClair asked staff of the distance.

Mr. Hudson said according to GIS the distance from the center of the shop to the Whitewing School is 470-ft.

Ms. Harper said there is another smoke shop on Main Street across from Railroad Square.

Atty. Prolman said it's a brand new ordinance and he would have to question whether some of these places fall under it. For example, just because something sells tobacco products doesn't mean it is a vape shop. There is some overlap. They were specifically focused on 60 Main Street because it called itself a vape shop. If there are other stores that sell a handful of vape products, they may be there.

Ms. Harper asked if they sell tobacco products.

Atty. Prolman said they may. It's to be determined.

Mr. Hudson asked what would be visible from the outside. What kind of signage would there be?

Atty. Prolman said it will be just signage. It can't be big signage either, because they are in the Historic District, which is what triggered staff to catch the application. No exterior changes beyond a small sign out front and signs in windows. It will look the same as before.

Mr. Varley said the ordinance refers to facilities designated with the primary use of superscript 3. What is that designation?

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Atty. Prolman said superscript three refers you back to the 1,000-ft language. It's a footnote at the end of the table.

Mr. Varley said it is facilities with a primary use designated with a superscript 3, shall be a minimum of 1,000-ft.

Mr. Hudson said the back of the staff report has a table, which is an excerpt.

A brief discussion of the use ensued.

Ald. Thibeault asked how far the cigarette outlet on 343 Main Street, is it within 1,000-ft?

Atty. Prolman said he would agree with that.

SPEAKING IN OPPOSITION OR CONCERN

Ald. Patricia Klee, Ward 3, 9 Maywood Drive, Nashua NH

Ald. Klee provided a history of the application and her involvement as a member of the Historic District. She provided an in-depth explanation on the drafting of the relevant ordinance and the circumstances surrounding its inception. She expressed concern about the type of business, the character of the area, and the negative impact on the surrounding area.

Mr. LeClair asked if when then drafted the ordinance if there was any discussion of a distance criteria in the downtown district versus other areas of the city? A lot of the land use codes have different distance requirements for things in the downtown. This one didn't make any provisions for different districts.

Ald. Klee said that was done with purpose, so that in a General Business zone such as Amherst Street you wouldn't have them one after another. The 1,000-ft distance was a happy median for all of these types of things. Rather than try to nitpick, they didn't a general discussion that the 1,000-ft met the criteria. They looked at the length of the downtown and Amherst Street, and this allowed businesses to come in but not be too close to each other. There is already a concentration in this area and she would hate to see more go in. She is sorry that this application was missed, but she doesn't think that the city, residents, or other businesses should be punished because a mistake was made.

Jay Guarneri, 46 Laton St, Nashua NH

Mr. Guarneri said he is a member of the Whitewing School Board and has a child in the school. This business would be within 1,000-ft of the school, closer to 500-ft. The primary play area for the kids is out in front of the school. He is not concerned about them seeing the shop, but the goal of the business is to attract customers. He is concerned about those customers walking by and using their vape products, or increasing the amount of vape litter on the ground. These children are 2-5 years old and are impressionable, and soak up anything they see. They see brightly colored litter on the ground, they want to touch it. He and his daughter the Nashua community music school, and when they walk they see a lot of that litter. For parents who drive, most of them are going to be driving right past this business. The kids will definitely be seeing it at that time. He understands the applicant's concerns about timing and the money he put into it, but he is concerned about the vaping product's visibility near the school.

Mike Apfelburg, United Way of Greater Nashua, 20 Broad St, Nashua NH

Mr. Apfelburg said he provided a letter to the Board, and that he would read it into the record. He said that since the zoning ordinance was changed to prohibit this, this plan would violate the spirit and intent of the ordinance and the letter of the law. His opinion is that this will have a negative impact on the surrounding uses. He feels the greater needs of the community takes precedence, and that the applicant should find a different location. The ordinance does not speak to whether the use is visible, it speaks to proximity. If visibility was a concern they would have written it into the ordinance. Now that he has heard it described as the "premier vape shop in NH" he is horrified. He requested that the Board disallow the application.

Janet Valuk, Nashua Prevention Coalition, 41 Roy St, Nashua NH

Ms. Valuk said she spoke at the meeting where the Poor Pierre's vape shop was considered. She agrees with what has been said by previous speakers. She is disappointed that this application slipped through the cracks and hopes that this be denied. She asked that this doesn't happen again. She doesn't want a vape shop on every street corner. She works to prevent young people from engaging in unhealthy behaviors, and the number one problem

in middle school and high school is vaping. On a state level, the state is encouraging all of the towns to do what was thought of with this ordinance, to disallow any more vape shops.

David Glajch, 25 Bicentennial Dr, Nashua NH

Mr. Glajch said he is an officer of the First Church of Nashua. They have the Nashua Community Music School, alongside their own daycare and teaching facility within the church, all of which fall within the 1,000-ft radius of this business. They don't believe line of sight is an important aspect, that 1,000-ft is 1,000-ft, and although he hasn't measured they are clearly within it. Even though they are not in line of sight, if you look at the traffic patterns to get to this facility, many of their people use Lock Street, Canal Street, and Orange Street to get there. That is another concern.

Mr. Glajch said they are a non-smoking campus because they have children in their facility. They also have three apartment buildings and an office building, and even in those facilities they are nonsmoking. They continue to have problems with outsiders that walk through their facility and leaving ashes and cigarette butts, and they feel this will exacerbate the problem. The First Church and the Nashua Community School are both in objection to having this particular vape shop located at that facility. He hopes they find another location. He doesn't think in this particular neighborhood it is a good thing.

SPEAKING IN FAVOR

None

APPLICANT REBUTTAL

Hitesh Punjabi, Applicant, [Address not stated], Peabody MA

Mr. Punjabi said there were a lot of concerns about what is going on. When he opened in Manchester, the goal was to not open a shop where people complained and where kids could get products. He opened a gold standard store in Manchester. He believes he has created an environment that is safe and strict on kids.

Mr. Punjabi said he gets a lot of customers from Nashua, and they have been asking why he wasn't going to Nashua. He had a

handshake agreement with Mis'T Vapors to not come to Nashua. At the end of 2020, the manager came to him and told Mis'T Vapors was closing. At that time he went to city hall and did his due diligence in February. He asked the city over and over if it would be okay, does he have to do anything. He showed his Manchester store to every person on the second floor of City Hall. He wrote exactly what he would be doing, he made a plan. There is no lounge inside the store, it is a walk-in humidior. He wanted to bring something nice to Nashua.

Mr. Punjabi said nothing of his product is touchable. If anything was up front, the kids would want to look at it. Everything is in showcases, hidden and locked. He has 52 showcases sitting in a warehouse. He knows a lot of people are saying that he slipped through the cracks, it was a mistake. That mistake is going to cost him almost all of what he has made in his life, his savings. He hopes the Board will consider that the mistake would destroy his life and the employees who are counting on working at this store. There are a lot of lives counting on this store.

Mr. Punjabi said he doesn't think if he brings the testimony of neighbors from his Manchester store, that it will affect any of the opposition here. They have already made up their minds. It's hard for him to explain unless they come to his store. He could have brought 4-5 people to speak on his behalf, but he doesn't pressure other people. He hopes the Board will judge him by his work and who he is as a person. He was at City Hall 7-8 times for hours working with staff, that's how he got the permit. He started working because he got the permit. He made a lot of changes, when he does something he does it right. This is not just an oops moment, this is his lifelong work. The reason Manchester and Salem love him is because he does his due diligence and makes sure kids don't come into his store.

Atty. Prolman, Pruner & Prolman PA

Atty. Prolman said he has a couple of comments, but first he will speak as a witness. His client's Manchester store is on Elm Street and he lives within 1,000-ft of it. There are hundreds of apartment units surrounding his vape shop, and there have been no issues or concerns. He can tell them firsthand that he drives up and down Elm Street all the time, and all the concerns about kids coming and going, trash, and the issues that were raised, you don't see it there. It's a well run operation. It's clean,

bright, and wide open. Everything is in cases, everything is controlled. The concerns raised may apply to other vape shops that don't operate as well as his clients'. He was impressed with what he saw in Manchester.

Atty. Prolman said when he looked at the ordinance, he had the same thought the chair did. The 1,000-ft distance is a one size fits all approach. There was no consideration for the density of the downtown core, as opposed to the stretched out businesses and strip malls on Amherst Street. Think about all the businesses on Railroad Square, one on top of another. You have the First Church and the Whitewing school concerned about proximity. Look at all the other businesses around, you have the porch at Penuche's, it's packed all the time, drinking and smoking. If they are concerned about a vape shop where everything is interior, look at what Penuche's is.

Atty. Prolman said that Ald. Klee wants a mixture of businesses in the downtown core, they don't want smoke shops on every corner. That's fine to say, but what is worse? They want an active shop in this space, or an empty storefront? The owner of the property would tell the Board that his client is the only one to approach him in the last two years. They have not had any takers until his client came along. They will have an empty storefront, or a shop that is well run and respected. They will take away some dead space in the downtown core.

Atty. Prolman said they understand why the ordinance was prepared. Although there was talk of proximity, not so much line of sight, the whole discussion with Poor Pierre's and the Adult Learning Center playground was that it was visible. They were right on top of each other, and that's not the case here. You can't see this from Whitewing or the First Church or the music school. They believe it is unfair to tag this with the same concerns as the Poor Pierre situation with what they have here.

Atty. Prolman said they believe there will be no negative impact on the abutters or city. They have met the two waiver criteria in the conditional use permit, and believe they have met the criteria. If this request is not approved, his client just got screwed by the city.

Mr. Varley asked if the applicant has signed a lease for this space.

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Atty. Prolman said yes.

Mr. Varley asked if this is monthly, or a commitment.

Atty. Prolman said it is a five year lease with a minimum of two five year extensions.

Mr. Varley said he stated that approximately \$75,000.00 had been invested so far.

Atty. Prolman said correct.

Mr. Varley asked how much of what relates to fit-up of the space, not purchase of inventory.

Atty. Prolman said it's a combination of all of the above. It's demolition work, contractor work, purchase of display cases, rent to the owner. Plus, to finish up the shop he's looking at another \$130,000.00 more, in addition to basement problems they are discovering. If he wants a breakdown, he can ask his client.

Hitesh Punjabi, Applicant

Mr. Punjabi said most of the money has gone into demolition and cleaning the area. It hasn't been used for so long, and the way Portland Pie was set up there were 9 bathrooms in the middle of the store. There were wires in the ceiling that were grandfathered in, and he had then removed. The Fire Dept. has been in the space and said they don't make people like him, that was one of the best compliments Nashua has given him. He could have saved \$15,000-20,000.00 not doing all that, but he wanted to do it the right way.

Mr. Punjabi said he did not ask for any signage on the windows, that's not what he does. He is only using the signage that was accepted for Portland Pie. He doesn't want window signs. He's not here to attract the kids. He's here to give a special service to a group of clientele. He only applied for what was approved for stores behind him.

Ald. Thibeault said Railroad Square in Nashua is much different than Elm Street in Manchester. Is there a patio at the one in Manchester?

Mr. Punjabi said no.

Ald. Thibeault asked if there would be no one using product outside in Manchester like there would be here.

Mr. Punjabi said it is in the downtown area, but most people come in a car and leave.

Ald. Thibeault asked if this store would have a patio.

Mr. Punjabi said there is no product of his that they could test. Testing is not allowed.

Ald. Thibeault asked what the patio would be used for.

Mr. Punjabi said well it is there. It's a bonus for him to use it. The whole back of that area was so bad, he cleaned that whole area. It looks beautiful, you can actually see the back of it now. He cleaned the train tracks, it's the human thing to do.

Ald. Thibeault asked if he planned to use the patio.

Mr. Punjabi said yes.

Ald. Thibeault asked if people would be using product there.

Mr. Punjabi said yes, but there is no exit out of the patio. The only exit is an emergency exit. He asked the Fire Marshall for advice, so there will be no exiting out of the patio. It's in his interest, so people don't rob him. He also doesn't want people to just come in and sit there. You have to come through his door, talk to him, and if they are accepted as clientele, only then are you allowed to go to the patio. They are not allowed to leave there, not go in there.

Mr. Hirsch asked if the patio is an important part of his business.

Mr. Punjabi said no. It just came with the store.

Mr. Hirsch asked if it brings value to his operation.

Mr. Punjabi said no, it's just a bonus. His other two stores don't have it.

Mr. Hirsch said it seems like that would expose it to the public.

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Mr. Punjabi said the goal is for it not to be used. Only for a customer to stay out there for a little bit. He is not accepting anyone from the outside, and there is no door to go in and out.

Brief discussion between Atty. Prolman & Mr. Punjabi.

Atty. Prolman, Pruner & Prolman PA

Atty. Prolman said they would be happy to stipulate that the patio not be used for customers.

Mr. Hudson asked if they granted a conditional use for this particular applicant, does it apply to a future use by another applicant for the same purpose?

Mr. Durfee said conditional use permits are not like variances, they do not run with the land. This would be for this applicant.

Mr. Pedersen asked aside from the vaping products, would there be tobacco products sold onsite?

Mr. Punjabi said yes.

Mr. Pedersen asked if that is what the humidor is for.

Mr. Punjabi said yes.

PUBLIC MEETING

Mr. LeClair closed the public hearing and moved into the public meeting. He said this is an interesting case, and that the Board may be clearing some of the errors the city has made. He not super happy about that in the big picture, but sometimes that's what they do.

Mr. Varley said he thinks they would be in a very different situation if this case didn't have the procedural history it did. They can't change that. It seems to him that as Ald. Klee spoke of the balance that the Board of Aldermen was trying to strike in developing this ordinance, it's worth noting that the ordinance expressly permits the Planning Board to waive the 1,000-ft requirement on the same basis that they waive any other provision that would apply to a subdivision or site plan. It's the same standard they are faced with all the time, where applicants ask for the Board to waive one provision or another

of the ordinance. From his perspective, this seems to be a case that is ripe for application of the waiver, given the circumstances.

Mr. Varley said that as the applicant has stated, he has committed substantial time and resources to this project in reliance on a building permit by the city. He understands that this was a mistake and it shouldn't have been issued at the time it was, but that's where they're at. It wasn't corrected for a period of six months. It's not as if the applicant was made aware of this on a prompt basis where he could have potentially done something about it to mitigate the cost he was incurring. He agrees with the applicant that this is a different case than the Poor Pierre's genesis of the ordinance change, in that this does not abut a school or similar facility. The ordinance change removed the Planning Board's discretion there, there is no opportunity to waive if the properties abut.

Mr. Varley said he thinks the situation is different, and he would note that there is another tobacco shop that is within 1,000-ft of the music school and fairly close to the other school. The Mis'T store is as well. Based on all of those circumstances, the specific application, the other uses that are existing, the procedural history, and the burden this would place on the applicant, he would be in favor of granting the waiver and conditional use permit. He doesn't think it's fair or reasonable to ask the applicant to bear the burden of the city's mistake.

Ald. Thibeault said this is a tricky problem for the Board to have because of the ordinance. The applicant seems like a good guy and a good business owner. Atty. Prolman brought up Penuche's; they can't go close down a business that's been there for a long time. But if one comes up and the ordinance says what they should do, he struggles with this. Going by the ordinance itself he thinks they shouldn't put it there. But he doesn't want to saddle the applicant with the burden of the money he's spent. He is looking at the ordinance as it was written.

Mr. LeClair said one of the things he said about not closing a business down, it rings with him that this is almost like they are applying it to a business that is already there. The business was essentially partially constructed. Where is the line of whether the business is there or not? He is struggling with that. If they are applying this ordinance to something that

was partially built, they are stopping construction midway. Is that the same as closing a business down? It's not far off. He doesn't love having three smoke shops close to each other, he doesn't think the use is consistent with the Master Plan. But he is very sensitive to closing a business down. Looking at the history here, it seems like it was six days after the notice is when the building permit was approved. Then six to seven months, going on ten months of letting the operation move forward and incur costs. Is that different than shutting someone? It's a tough one.

Mr. Pedersen said although he is not a big fan of tobacco products, vaping, or addictive products, they are legal. The applicant put forth his life savings to operate a small business. For the city to give him a permit and find out later he now can't do it, they misled the applicant to put everything on the line for them to then turn around and say no. He thinks this time it's justified in overcoming the 1,000-ft barrier. He thinks they should allow this applicant's project to go through.

Ms. Harper said she is having a difficult time. She did not vote for Poor Pierre's even prior to this ordinance being in place. She felt that application did not meet the criteria. This business makes it more difficult with what money the applicant has put in and she has to think about it. It is difficult.

Mr. Hudson said there has been a lot of discussion of the hardship, and that is clear. He views it as an unfortunate set of circumstances, no one's fault, but a unique case. There are no other cases like this right?

Mr. Durfee affirmed that was correct.

Mr. Hudson said the other part is he believes the applicant has demonstrated no impact with the sense of no signage in the windows, no product use on the patio. The hardship is a strong part, but also the presentation itself is unique enough that he doesn't believe there would be that impact. He is not a fan of tobacco or vape shops. He thinks it's a good ordinance and the intent was good. Going forward, it would certainly be applied accordingly and they should not have this proliferation given that they have this new ordinance. He views this as one caught up in the transition period. For that reason he will support it.

Mr. Hirsch said he is against smoking and vaping. However, the applicant made a good faith effort to comply with the ordinance and the city and spent a lot of money. The Board is caught in a jam and have to think of that going forward.

Ald. Thibeault said he doesn't think the hardship makes the people who work or live around there feel any better that they would be voting for a vape shop to go there. It's unfortunate and a shame that they made a mistake somewhere. Penuche's was a good point; are they shutting a business down? Main Street has a ton of vape shops, they're all over the place. Eventually they're going to bust each other out and there won't be as many. You can only have so much competition. He feels bad for the people who live in the area and the schools, because it's not their fault that the city made a mistake. It's certainly not the applicant's fault.

Mr. Pedersen said this unique situation seemed to arise due to a timing problem. The applicant went through the normal permitting process only to find out this new 1,000-ft rule ordinance. In the future this timing problem won't happen again and they will be able to approve these things without so much confusion and conflict. This will never happen again.

Mr. Hudson asked if they can stipulate no signage in the windows.

Mr. Durfee said they cannot. He would be entitled to those signs per the regulations. If he opts to not apply for those, he is free to do that. The Board does not have the authority to limit signage that would be permitted by right.

MOTION by Mr. Varley to approve Old Business - Conditional Use Permit A22-0240. It conforms to §190-133(F) with the following stipulations or waivers:

1. The request for a waiver of § 190-15(D)(6), which requires facilities with a primary use designated with the superscript "3" shall be a minimum of 1,000 feet from like-classified uses and 1,000 feet from schools or youth serving organizations, is granted, finding that the waiver will not be contrary to the spirit and intent of the regulation. Strict conformity with that requirement would pose an unnecessary hardship, and that hardship is based both on the procedural history and specifically the

detrimental reliance on the city's issuance of a building permit which should not have been issued, and the extended period of time on which the applicant relief on that building permit before it was brought to the city's attention. Also, the specific proposal the applicant is making and the determination of its lack of an undue or harmful impact relative to the use.

2. Prior to the re-issuance of a building permit, all comments in a letter from Joe Mendola, Senior Staff Engineer, and dated November 30, 2022, shall be addressed to the satisfaction of the Division of Public Works.
3. The patio area associated with the site shall not be used by patrons.

SECONDED by Mr. Bollinger

MOTION CARRIED 7-1 (Harper opposed)

Atty. Prolman thanked the Board for their time.

NEW BUSINESS - SUBDIVISION PLANS

A22-0159 Raisanen Homes Elite, LLC (Owner). Proposed 21- lot subdivision. Property is located at 15 Bartlett Avenue. Sheet 57 Lot 3. Zoned RA-Urban Residence. Ward 3. **(Postponed to the January 19, 2023 Meeting)**

OTHER BUSINESS

1. Review of tentative agenda to determine proposals of regional impact.

MOTION by Mr. Bollinger that there are no items of regional impact

SECONDED by Mr. Hirsch

MOTION CARRIED 8-0

2. Referral from Board of Aldermen on proposed Petition for Street discontinuance - Dozer Road, Lot - A-712.
3. Referral from Board of Aldermen on proposed Petition for Street Discontinuance - Dozer Road, Lots -A-990, 132-85, A-994, A-768, A-68, 132-1, A-67, and A-58.

Atty. Prolman, Prunier & Prolman PA

Atty. Prolman said one of the discontinuances is with respect to the subdivision project, and one for the flex space building. There are no legal issues to hold the subdivision back at this time. The flex space discontinuance has some legal questions he is working through with city staff. That one is not ready for the Board to consider. One of the conditions of approval with respect to the subdivision was the discontinuance of Dozer Road; that one is ready to go. He wants to get that going. There is some merit to taking them both together however, so if the Board wants to do that he would suggest tabling them both to the first meeting in February.

Mr. LeClair said efficiency wise they might want to do that. Otherwise they would just go backwards.

Mr. Bollinger asked if both petitions take up the entire length of the road, would they wipe the slate clean? As opposed to piecemeal. He thinks if there is one opportunity to clear that he would prefer that.

Mr. Varley said as opposed to doing it twice.

Ald. Klee said she agrees with Mr. Bollinger. The public hearing for this is not scheduled until January 11th, and she knows there has been some issue about at least one portion of this. Would it not benefit them to wait until the public hearing?

Atty. LeClair said the public hearing is just one more input. This is essentially a referral to the Board of Aldermen. The Board's piece is separate. He just doesn't like the piecemeal approach.

Mr. Durfee advised the Board on a motion to continue the two cases.

MOTION by Mr. Bollinger to continue Other Business #2 & #3 to the February 2, 2023, for the purpose of requesting additional information

SECONDED by Mr. Hirsch

MOTION CARRIED 8-0

DISCUSSION ITEMS

None

MOTION to adjourn by Ald. Klee at 8:55 PM

MOTION CARRIED 8-0

APPROVED:

Mr. LeClair, Chair, Nashua Planning Board

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Prepared by: Kate Poirier

Taped Meeting