

DEERING ZONING BOARD OF ADJUSTMENT

762 Deering Center Road
Deering, N.H. 03244

NOTICE OF DECISION

Case No.: 2019-02

You are hereby notified that following public hearings on April 4, 2019 and April 25, 2019, the request by Robert Mashioff ("Applicant") for a special exception pursuant to Article 3, Section 3, Paragraph 2, of the Deering Zoning Ordinance ("Ordinance"), was **DENIED** by the Deering Zoning Board of Adjustment ("ZBA") by a vote of 4-1.

The property in question is located at 671 East Deering Road, Tax Map 212, Lot 1 ("Property"), and is located in the agricultural/residential zoning district. The Applicant seeks to utilize the existing barn on the Property for weddings ("Special Exception").

The Ordinance and criteria for a special exception.

The Ordinance provides the following criteria for the Applicant's requested special exception:

- 3.3.2** All other non-agricultural business, commercial or industrial ventures may be allowed by special exception, provided that the following regulations and restrictions shall be observed:
- (a) No business, commercial or industrial venture or use shall be permitted which would cause any undue hazard to health, safety or property values or which is offensive to the public because of noise, vibration, excessive traffic, unsanitary conditions, noxious odor, smoke or other similar reason.
 - (b) In the case of new construction, including contemplated construction and construction commenced less than three full years prior to the date of the

application for a special exception, sufficient acreage shall be included to allow the following setbacks:

- In the front, not less than 75 feet from a right-of-way to any building or parking lot having both an exit and an entrance and with grass or beautification in the buffer area.
 - Side and rear: Not less than 50 feet from a building or parking lot to the lot line.
- (c) Sufficient off-street parking to allow 300 square feet for each three anticipated patrons or employees on premises at the same time. In the case of service establishments, one car shall be deemed to contain four patrons.
- (d) Upon an affirmative vote of 75% of the members present, parking for the delivery and removal of inventory or refuse may be required. Parking reserved for these purposes may not be used to offset the requirements of paragraph 3.3.2 c).
- (e) On-premise advertising signs in connection with businesses receiving approval shall comply with the provisions of Article 7.
- (f) No commercial exception involving the storage, display or sales of food items to the public shall be allowed unless facilities, within the building where the commercial exception shall take place, are provided for the sanitary maintenance of the facility. Such facilities shall at a minimum include hot and cold running water and sewerage or septic service.
- (g) Mining, excavation, processing, or removal of soil, rock, sand or gravel or similar material shall be regulated as follows:
- New operations shall require a special exception from the Board of Adjustment subject to site plan approval by the Planning Board. For the purposes of this paragraph, "new" shall mean projects, except those operations exempt under RSA 155-E:2 or RSA 155-E:2-a, commenced after the effective date of this amendment and projects on existing excavation sites on which no excavation has been done since August 24, 1977.
 - All operations except those exempt Under RSA 155-E:2-a shall be regulated by the Planning Board.
 - Enforcement of these regulations, including revocation of permits upon the advice of the Planning Board, shall be by the Board of

Selectmen under the authorities invested in that Board by Section 5.1.3.

The Board concluded that subparagraphs (b) relative to new construction, (e) relative to signage, and (g) relative to mining activities, were not applicable to the requested special exception. Specifically, the Applicant proposes no new construction, no signage was proposed as part of the requested special exception, and the proposal does not contemplate mining or similar earth work activities.

The Board did not affirmatively vote by a margin of 75% to require reserved parking for vehicles involved with the delivery and removal of inventory or refuse, and therefore, subparagraph (d) is not applicable to the requested special exception.

The Board discussed at length whether subparagraph (f) relative to food items and sanitation was applicable to the requested special exception. A majority of the Board concluded by a vote of 4-1 that subparagraph (f) was applicable. While the Board was largely in agreement that subparagraph 4 could have been written better, the majority of the Board interpreted subparagraph (f) as being applicable for the following reasons.

First, while subparagraph (f) refers "to the public" and businesses involving the public, the Board did not interpret subparagraph (f) as being limited to public business such as retail sales or services. Understanding that the use of the barn would be for private weddings, the barn would nonetheless be open to the public in the much larger sense that any member of the public would be able to rent, reserve or use the barn for a wedding.

Second, subparagraph (f) applies to commercial exceptions "involving the storage, display or sales of food items," requiring that there be facilities for "sanitary maintenance," and that "such facilities shall at a minimum include hot and cold running water and sewerage or septic service." The Board discussed the issue of what "sale" meant in the context of this case. On the one hand, the evidence was that the Applicant would not be directly selling food to persons attending the weddings; on the other hand, the evidence was that food service was to be catered. Thus, there would be a financial transaction occurring as it pertains to the provision of food on the Property. The evidence was that food items would, in fact, be available for service to and consumption by the persons attending weddings, as would be typical or expected at any wedding event. The Board further discussed the interpretation of the terms "storage" and "display" of food items, and the fact that any such storage or display would necessitate per the Ordinance appropriate sanitation facilities, hot and cold running water, and sewerage or septic service. The Board felt that subparagraph (f) would be largely meaningless if sale, storage or display of food items meant food was being sold, stored and displayed, but not available for service to or consumption by patrons of the commercial exception. The Board ultimately concluded that if food items were available for service to and consumption by the persons attending weddings, then strictly speaking the food items would be sold, stored or displayed in some capacity within the meaning of subparagraph (f), and therefore,

subparagraph (f) applies to the requested special exception.

In support of this decision, the Board has made the following findings of fact:

1. The Board held public hearings on April 4, 2019 and April 25, 2019.
2. The Applicant proposes to utilize the existing barn on the Property for weddings. The Property is approximately 11 acres in size. The barn is approximately 85 feet x 40 feet. There was some question regarding the actual size of the barn relative to what was reflected in the Town's tax record. The barn is setback from the road approximately 140 feet. The house was not proposed to be utilized for the weddings or lodging of guests (there was some conflicting evidence that the home was being used as an Air B&B, and it is not clear whether guests associated with the wedding, for example the wedding party, would be staying in the home). All food service was to be catered. Alcohol would only be provided by appropriate vendors or wedding organizers properly licensed to serve alcohol. The maximum number of persons in attendance at any wedding would be limited to 150 persons, inclusive of guests and wedding participants. Weddings would only be held seasonally, between Memorial Day and Columbus Day. A typical wedding event would include a Friday evening reception, Saturday wedding service, and possibly a brunch on Sunday. The total anticipated number of events per year would be as many as 22. There would be no sales of alcohol; all alcohol and food service would be catered and provided by a party planner or other event organizer. Guests would be delivered to and from events via shuttle service; there would be no more than 25 vehicles parked on site, inclusive of the wedding party, guests, as well as, persons involved in catering the event (bartenders, servers, etc.). Music would cease at 10:00 p.m. No bathrooms on the Property would be utilized for wedding events; portable trailer style bathroom unit facilities would be provided. Food would not be heated or prepared in the barn; the only building on the Property proposed to be utilized to prepare, heat, or cook would be the detached garage located on the property.
3. The Applicant provided a written submission to the Board on April 25, 2019 to address certain issues raised at the April 4, 2019 meeting. The items addressed included traffic concerns, alcohol, open flames, lights, noise, sanitation facilities, property values, and benefits to the community.
4. Michael Luca provided testimony regarding the decibel levels associated with weddings and live music. Upon inquiry from the Board, Mr. Luca indicated he was not appearing on behalf of the Applicant or in any kind of representative capacity. He further indicated that he was a resident of Deering, but not an abutter. He indicated that the volume of a wedding would be 80 decibels, which he testified was comparable with a chainsaw or lawn mower. He further indicated that the decibel volume 400 feet away, which was approximately in the driveway of the nearest abutter, would be comparable to the

volume of the voices in the auditorium at the Board's meeting.

5. Numerous abutters appeared and testified in opposition to the requested special exception. Issues expressed by the abutters included security, noise, hours of operation, traffic, parking on street, lights, effect on property values, and how the proposed use was inconsistent with the exclusively residential and agricultural neighborhood.
6. The Board received testimony from Deering Police Department Captain Cavanaugh regarding traffic, on-street parking, off-street parking, access by emergency services, and the Town's noise ordinance.
7. The Board received testimony from Deering Building Inspector Borden regarding various Building Code and Life Safety Code issues such as classification of the land use for code purposes, emergency ingress and egress, labeling exits, fire sprinklers, crowd management, and pool fencing.

In support of this decision, the Board has made the following findings of fact and conclusions of law:

1. Ordinance 3.3.2 (a) was not satisfied in this case, which provides that "no business, commercial or industrial venture or use shall be permitted which would cause any undue hazard to health, safety or property values or which is offensive to the public because of noise, vibration, excessive traffic, unsanitary conditions, noxious odor, smoke or other similar reason."

The consensus of the Board was that the proposed use will fundamentally and adversely impact property values in both a true monetary sense, as well as, undermine the basic quality of life to those residents living in the neighborhood. The proposed use would be a commercial use in an otherwise residential and agricultural neighborhood. The scope of the proposed use, which would be as many 22 events between Memorial Day and Columbus Day, with each event being as long as three (3) days, plus attendant activity on the Property relative to pre-event setup and post-event breakdown, would fundamentally alter the character of this quiet rural neighborhood. While the proposal contemplates limited parking on-site and shuttle bus transportation for guests, the proposal lacks feasibility from a practical perspective. Further, assuming compliance, the increase in traffic associated with the use as proposed would have a substantially adverse effect on the surrounding properties. Lastly, the noise associated with weddings, loud music and large crowds, would unduly and to a marked degree have an adverse and offensive impact on surrounding properties and property values. The Property is located at the height of the land in this neighborhood, and the Board heard credible evidence from numerous members of the public regarding how far noise travels from this site. Guests would not be confined to the interior of the barn and would be outside where the sound of voices, laughter, etc., will carry, even after the band has

stopped playing at 10:00 p.m. All of the members of the Board have attended numerous weddings, and recognize that the nature of the noise from a wedding, or similar celebration, or large party, including music and loud voices, are materially different from the quiet background noise regularly experienced in a rural setting, particularly during weekend or evening hours.

2. Ordinance 3.3.2 (b) was not applicable.
3. Ordinance 3.3.2 (c) was not satisfied. The Applicant proposes 25 parking spaces, which is the equivalent of 5,000 square feet of parking, based on a standard 10' x 20' parking space ($10 \times 20 \times 25 = 5,000$). The Ordinance requires 300 square feet of parking for each three (3) anticipated patrons. Based on the Applicant's proposal of a maximum of 150 persons being in attendance at any wedding, 15,000 square feet of parking are required ($150/3 \times 300 = 15,000$). Where the Ordinance requires 15,000 square feet of parking and only 5,000 square feet of parking is provided by the Applicant, Ordinance 3.3.2 (c) was not satisfied. The Board recognizes that the Applicant's effort to limit parking was intended to lessen impacts on the neighborhood. However, the Board does not have the ability to waive or alter the criteria for a special exception.
4. Ordinance 3.3.2 (d) was not applicable.
5. Ordinance 3.3.2 (e) was not applicable.
6. Ordinance 3.3.2 (f) is not satisfied. The Ordinance requires facilities for sanitary maintenance, which facilities shall at a minimum include hot and cold running water and sewerage or septic service. The facilities must be provided "within the building where the commercial exception shall take place." The barn has no sanitary facilities, and patrons will not be able to utilize the sanitary facilities within the home. The Applicant's proposal for portable sanitation facilities fails to satisfy the Ordinance because they are temporary facilities and not located within the barn.
7. Ordinance 3.3.2 (g) was not applicable.
8. The Applicant is required to satisfy each and every condition for a special exception in order for the Board to grant approval. The Applicant failed to satisfy each and every condition required for the special exception, which is therefore denied.
9. This decision shall be recorded at the Hillsborough County Registry of Deeds.

Dated: May 2, 2019

/s/ David E. LeFevre
Chairman, Zoning Board of Adjustment

Note: Any party or any person directly affected by the Board's decision has a right to appeal. Anyone wishing to appeal must act within thirty (30) days of the date the Board's vote was taken. The necessary first step, before any appeal may be taken to the courts, is to file a motion for a rehearing with the Zoning Board of Adjustment. The motion must set forth all of the grounds upon which the appeal will be based. See New Hampshire Revised Statutes, Chapter 677 for details.