

MONT VERNON ZONING BOARD OF ADJUSTMENT

PUBLIC HEARING VIA ZOOM CONFERENCE

Tuesday, April 20, 2021

AGENDA

7:00 PM Case 4-2021 Green Rock Investments, LLC 54/56 Weston Hill Road

Application for Variance

Case 3-2021 Peter Shirley, 67 Francestown Turnpike

Application for Special Exception

Seated: David **Sturm**, Tony **Immorlica**, Steve **O'Keefe**; Jason **Johnson**, Charles **Schuessler****7:02 PM – Case 4-2021**

Meeting called to order via zoom conference by David **Sturm**, Chairman. Roll call was taken.

Sturm opened the public hearing on Case 4-2021. Present via zoom was the applicant Umberto Andrade of Green Rock Investments, LLC represented by Attorney Daniel Muller of Cronin, Bisson & Zalinsky P.C. **Attorney Muller** presented the Application for Variance on 54 & 56 Weston Hill Road. The request is to allow the maintenance of two existing dwellings on a single lot. The lot is approx. 3.35 acres in size located in the rural residential zoning district. The owner does not believe that a variance is required to continue the existing use of the property. Single family residences are a permitted use of the property. Our Zoning Ordinance defines a "single family residence" as a residence which stands apart from other buildings, except accessory buildings, and is used by a single housekeeping unit. There is no language in our Ordinance that prohibits multiple single-family residences on a single lot. The property's use fits within the definition of "single family residence". Each residence stands apart from other buildings, other than accessory structures. Each residence serves a single housekeeping unit. The Zoning Ordinance does not require more; nothing in the Zoning Ordinance limits the number of single-family residences per lot. The property was created prior to 1969 and the two residential structures date back to 1950. The property and its use predate the current regulations. Our zoning ordinance plainly allows such a use which predates the current regulations to continue. Change of ownership is not grounds to deem current zoning regulations applicable to an existing use. The use of the property has remained the same for an extensive period of time and the assessing records suggest that the Town was aware of the same. The only recent change was the change of ownership and such a change is not relevant from a zoning perspective. Should the Board find that a variance is necessary:

1. Granting the variance would not be contrary to the public interest. The granting of a variance will not unduly conflict with the basic objectives of the relevant zoning ordinances. It will not alter the essential character of the area or threaten the public health, safety or welfare. The owner seeks to maintain the existing development of the property. The owner has renovated the separate residential structures. As the owner is maintaining what has been the status quo for decades and doing so in a manner more consistent with the permitted use, the variance will not alter the essential character of the area. NH currently has a shortage of housing units. The denial of a variance would serve to eliminate another housing unit from the market contrary to the public need and welfare.

2. The variance would not be contrary to the spirit of the ordinance for the reasons stated above.

3. Substantial justice would be done because in the event that the variance is denied, the loss to the owner outweighs any gain to the general public. The owner purchased the property with a reasonable expectation that it

would be able to continue the use notwithstanding any current zoning regulations which arguably prohibited the same. That expectation formed a basis of what the owner could expect in terms of a reasonable return of its investment in the property, particularly with its plan to renovate the property. The denial of the variance would deny the owner a reasonable return on its investment by eliminating any reasonable use of the second residential structure existing on the property. The public would gain little if anything through the denial.

4. The proposed use would not diminish surrounding property values. The owner seeks to continue what has been the use of the property for decades. The owner has renovated the property; he has improved the value of surrounding properties by cleaning up the property and structures thereon. The use is more akin to the permitted single-family residence than the prohibited multi-family.

Denial of the variance would result in unnecessary hardship to the owner owing to the special conditions of the land because there is no fair and substantial relationship between the general purpose of the zoning ordinance and its specific application to the property and the proposed use is reasonable. The property is a non-conforming lot which has been improved by two residential structures since 1950, well before the Town adopted zoning. There does not appear to be a reasonable use for the second existing residential structure if the variance is denied. The denial of the variance would result in economic waste at a time when there is a public need for housing units. The denial of the variance would result in the taking of a vested right without just compensation contrary to the federal and state constitutions and variances serve to avoid such takings. There is no fair and substantial relationship between the general purpose of Section I-403.1 and its application to the property.

Immorlica stated that the applicant's attorney makes frequent references to the fact that these structures existed since the 1950's prior to our zoning regs. His understanding is that the second structure was originally built as a barn. He questioned when the second structure was occupied as a residence. Has it been occupied consistently as a residence since 1969 or were there lapses from time to time? If a non-conforming use is abandoned for a year, then it is not grandfathered. Andrade does not know. **Johnson** noted that the application correspondence stated that the second structure was turned into an apartment in 1983 and that no permits were pulled at that time. Since that time, has the building ever been inspected by the Building Inspector to see if it conforms to any kind of code? He guesses that both structures are on a single well/septic system which does present concerns. The owner stated he went to the town to apply for a permit to replace the roof. He filled out a permit and left it. He repaired the roof and kitchen cabinets in both buildings. He was told he did not need a permit for those projects. He painted, put in floors, cleaned the yard and put in new appliances. **O'Keefe** questioned whether or not we have jurisdiction. What evidence do they have that show that these two residences were consistently occupied since the 1950's. Attorney Muller responded that they have the assessing records. When Mr. Andrade bought it, it had been occupied by the prior owners. Assessing records suggest that they are residential properties. **O'Keefe** asked what steps they've taken to make sure there is proper infrastructure to support two different residences on that lot; i.e., septic, water, well, so as to not impact any of the neighbors. Andrade said they did a septic inspection and it supports four bedrooms. He did not test the water. There is one well that feeds into the bigger house in the front. There is a filter where you put some salt. That feeds into the second structure. **O'Keefe** asked how many driveways there are. Andrade said there is a large parking area in front of the bigger house; there is a driveway for the second house and a third driveway that goes up to a horse barn. **O'Keefe** asked about power and electricity. Andrade is not sure if there are two meters or not. **O'Keefe** stated that there were not two families living there; it was one multi-generational family where the parents resided in one area of the residence and the younger family resided in the front. They did that for economic reasons. Andrade stated that they would look to do the same thing; sell to one family. **O'Keefe** asked what would prevent someone from renting out one of those units. Andrade said he did not know. **Schuessler** is concerned there is only one sanitary system for both buildings; how do you separate those residences from each other? Attorney Muller stated that there is no requirement by law that you separately meter residences. **O'Keefe** stated that it goes to the point of the division of these two buildings and future use. If one of them was to be a rental, which we've got zoning rules that strictly prohibit that type of activity or regulate that activity, it goes to the core of what we are trying to accomplish tonight by potentially issuing a variance about the use of that property going forward. Attorney Muller responded that we do have a rule in terms of multi-family but we've chosen to define it a particular way that simply does not cover this. From a legal standpoint, we cannot add or change words that are in the zoning ordinance to fit it after the fact. **O'Keefe** stated that we also have rules in regards to in-law apartments and rental

units and that's the piece Andrade had referenced, whether or not somebody would be renting at that property and having the infrastructure to support two individual families on one lot. Lyn Jennings, 58 Weston Hill Road spoke in opposition. The lot size minimum is 5-acres; this is 3.35-acres. This was one residence with a barn in the back that was converted. Permits were not pulled; nothing was done properly. The BOS sent out a letter to the new owner on 12/1/20 stating that the property does not meet our zoning regulations and they would need to obtain a variance. She does not understand why they would do upgrades before knowing what they were allowed to do, before applying for any variance. She strongly disagrees that the variance will not alter the essential character of the area. The house is not up to code; there are no proper entrances or exits; there are not 2 driveways; the septic has failed on multiple occasions. Also, one well for two buildings is crazy; the prior owners were always out of water. The Jennings moved to Mont Vernon for residential properties; not rental units, not affordable housing for others. They pay high taxes to live in a residential neighborhood. She strongly feels that granting this variance will diminish her property value. Although Andrade stated that they would like to sell to another multi-generational family, there is no guarantee of that. They are an investment company; they have no interest in that property whatsoever. She respectfully requests that we deny this variance. Michael Warren asked how is the property intended to be marketed and is that based on a realtor's feedback and does that contradict anything that is currently established in the town. Andrade stated that it will probably be used for a multi-generational usage. Warren stated that there is no guarantee of that; he is concerned with how things might change after the property is sold and if any of the listing or marketing material would differ to the testimony he is providing to the Board. Andrade said he is marketing it to be sold as is.

Sturm stated this application and submission of evidence is closed.

Sturm opened the hearing on Case 3-2021. Peter Shirley, 67 Francestown Turnpike, is before the Board seeking a Special Exception to run a small on-line business from his home. He stated that he sells antique guns, swords, knives and books online. He has zero foot-traffic; there is no storefront. He does not have any sign. He feels he is no different than someone selling on eBay. He received a Cease and Desist from the Town dated 3/24/21 which is why he is before the ZBA seeking a Special Exception.

- I. 1. **Sturm** asked if this site is an appropriate location for the use that Shirley is planning to make of it? Shirley said yes, it is an appropriate location; all he is doing is working on a computer.
- II. 2. **Sturm** asked if the use will adversely affect the neighborhood? Shirley responded that since there is no traffic to his house, he doesn't feel it will affect the neighborhood in any way.
- III. 3. **Sturm** asked will there be any nuisance or serious hazard to vehicles or pedestrians? Shirley does not see how it could cause nuisance or hazard to anyone because he has no traffic at his house.
- IV. 4. **Sturm** asked will there be adequate appropriate facilities provided for the proper operation of the home business? Shirley said yes of course.
- V. 5. **Sturm** asked if the use would be seriously detrimental or offensive to any of his neighbors? Shirley stated that he doesn't see how it could be detrimental or offensive to anyone as he is in the house working on his computer.
- VI. 6. **Sturm** asked if it would radically reduce property values of any of the adjoining properties? Shirley does not see how it would affect the property value any more than any of his neighbors who work on a computer.
- VII. 7. **Sturm** asked if Shirley operates the business alone? Shirley responded yes. Most of his inventory is under his bed.

O'Keefe noted that when he checked on the Secretary of State website, Mr. Shirley does not have a licensed business. Mr. Shirley stated that his license had lapsed. **O'Keefe** stated that should he get approval he will need to make sure to have a valid license. He went on to say that there has been correspondence with the Board about Shirley testing firearms on his property. Shirley stated that he does not shoot or test any firearms from his business on his property. He shoots firearms for his recreation and in preparation for hunting. He went on to say that he has some neighbors present tonight who have been on a mission for thirty years to shut him down. His shooting range has nothing to do with his business. People don't shoot antique firearms. He sells revolutionary war guns all made before 1899. **Immorlica** questioned why he does not have a federal license to sell weapons. Shirley stated it is not required because he sells weapons manufactured prior to 1899. He also sells antique

ammunition as display items. **Immorlica** asked if he would ever seek to sell modern weapons in the future. Shirley stated that if he was to want to do so, he would have to come back to the Town for a different Special Exception because that would require special licensing with the State and the Federal Government.

Frank Weber spoke in opposition to the application. He lives behind Peter Shirley. On Google the store has hours of operation listed as 8:00am – 9:00pm seven days a week. Shirley told the Weber's that he was going to cut down what trees remained on his property and put up a gun shop. For the last six months they have turned away people in their driveway looking for the gun shop. Most of them with out of state plates. What guarantees do they have that Shirley is not going to sell other kinds of firearms? Who is going to oversee this; who is going to make this a safe neighborhood? Nicole Martin lives across the street. She says that there have been many cars coming in from Massachusetts in the past few months going to Shirley's property. She did not realize at the time that it was for gun purchases, but she is aware now. Attorney Quinn spoke on behalf of the Hall family. The application requests the ability to run an on-line business. It does not say what kind of business – a gun business or a hair salon. Proper notice requires that the public be made aware with reasonable clarity what the proposal is that is being presented to the Board. He questions if this application meets that standard. It conspicuously omits the basic premise of this business. There is no way to effectively monitor what exactly is being sold and what testing of guns in connection with potential sales. There is really no way to distinguish between recreational shooting and commercial shooting. If this Special Exception is granted, we'll have a difficult enforcement issue unless the police are going to be out there on a regular basis checking it all out. This is a residential subdivision that backs up to open space. The open space has trails for hiking. What's the direction of the shooting; what weapons are being shot? Is the distance sufficient from the common boundary line to make sure that stray rounds don't make their way into the open space where there are people? He grants that there isn't anything in the Ordinance that allows the Board to regulate those activities when they are done in a purely personal, recreational setting. However, once you introduce a commercial operation into the mix, things change. They are concerned with the stockpiling of weapons of any type in a residential zone and particularly concerned with the inability of the Town to police the additional shooting that may occur with the business. Having applied for a Special Exception to allow this commercial sale of weapons from the residence, the lines of the recreational shooting vs the commercial shooting are blurred. The ZBA and the Planning Board have to impose conditions to ensure that any firing in the back yard is legal, safe and done in accordance with the necessary improvements. Bonnie Angulas questioned why the address was included on the website if no one is coming to the house to do business. Shirley said that it has to be on the website in order for him to be able to accept credit cards. He said that someone put something online on Google saying that he has a gun store. He has not been able to get it off there. Once and a while he gets calls from people who want to come by; he has to inform them that he does not have a place for them to go. There is no store that's open to the public. There is nothing on display at his house. Quinn said there is additional traffic being generated whether it's because his address is on the website or by word of mouth. It does impact traffic in the neighborhood. Quinn questioned if the applicant has ever sold a weapon that he has previously fired in the back. Shirley stated that he has bought and sold guns for thirty years; he's fired all kinds of guns out back. He worked for a huge firearms dealer for six years and fired hundreds of guns for that company in his back yard. There never was a problem or a question about it. That has nothing to do with his current business. He went on to say that Dave Hall went to the Planning Board and asked to make a subdivision in the back yard. Shirley explained at that time that he has a shooting range in the back yard that had been there for over twenty years. Dave Hall said at that time that the shooting range would not be a problem and there would not be an issue with it. Now he seems to want to make Shirley not be able to shoot in his backyard. Hall claims that the noise will stop him from being able to sell properties in the neighborhood. Hall moved into a house on the side of Horton Pond and then moved away because of the noise. But he knew the noise was there before he built the house. This is just another neighbor in a situation where they'd like him not to be allowed to use his property the way he has been using it for thirty years. He can certainly retire if that's what everyone would prefer. Then he won't have a business to work on anymore and he can go shooting from 8:00am until 5:00pm every day because he'll have nothing else to do. Quinn stated that this is not simply a dispute between the applicant and Mr. Hall. There are other people in the neighborhood with the same concerns that the Halls have. Yes, the noise is a problem. The concern is that this business is going to exacerbate the potential for that noise. The applicant just indicated that he has in fact sold guns that he shoots in his backyard. There is not a clean demarcation between recreational shooting and the business use that he's proposing. Attorney Quinn read a letter from Mr. Hall into the record (attached). Nicole Martin stated that Shirley was shooting at 6:45am on

Sunday morning. Shirley stated that he was not shooting on Sunday. **O'Keefe** asked Shirley if he would be willing to find another location for his shooting as a condition of the Special Exception? Shirley stated that he would not be willing; he will be shooting for thirty more years on his property.

Sturm stated this application and submission of evidence is closed.

The Board deliberated on the first case heard from Green Rock Investments, LLC. **O'Keefe** motioned to have a finding that the ZBA has authority and jurisdiction over the variance request seconded by **Immorlica**. All in favor. **O'Keefe** motioned to accept the variance request and approve the variance request as written seconded by **Johnson**.

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

Schuessler does not feel that having substandard well/septic is in the public's best interest. **Sturm** noted that there is not clear evidence that there had been two residential structures for decades as the applicant noted in their application. In fact, it seems that perhaps maybe there had been, but not certainly since the 1950's. Another issue raised by the applicant was that the issue with the use arose only after the change of ownership; that is when it came to the Town's attention. That argument would essentially impose an ambiguous statute of limitation on any zoning violation. **Immorlica** noted that the second building was turned into an apartment around 1983 which is well beyond when our zoning ordinance was in place. It doesn't appear that any permitting was done. It appears that it was done to accommodate family members and was done improperly.

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

O'Keefe stated that based on the testimony presented, that particular area of our community being a minimum lot acre size, he does not feel the spirit of the ordinance is observed in this proposal. With two different units, the lot size is just too small for the two structures to operate independently of each other with the infrastructure that is on site. **Immorlica** agrees. **Sturm** agrees because the argument that more than one single family dwelling can be placed on the lot is diametrically contrary to the spirit of the ordinance. Section I-205 states that specific areas are not set aside for two family/multi-family dwellings. **Johnson** and **Schuessler** concur.

I. 3. Substantial justice is done.

O'Keefe feels that granting this would do a substantial injustice to the neighbors and community in starting a precedent of multiple lot acres. He understands that each case stands on its own merits and there's no qualifications to future applicants based on what we decide here today, but feels that to have a multi-unit property in that area would be a substantial injustice. **Johnson** agrees and feels that at this point we would be essentially allowing all of the things that have happened without any regulatory guidance in the past, whether they happened in 1950, 1983 or 2020, we cannot just give a blanket pass for anything that was done out of course then at this point. It appears from a roadside drive by that this was someone's attempt to get passed something. They managed to pass it on to another owner but he does not think carrying it forward does any justice to the community. **Immorlica** agrees.

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

Sturm thanked the new owners for cleaning up the property; he knows it was a big job. **Immorlica** drove by the neighborhood and it appears to him to be a bunch of single-family residences. He feels that having two residences on one lot where the buildings are in such tight proximity would diminish the other properties which were all single-family properties. You're basically putting two residences on one lot, whether the people are related or unrelated. He doesn't see how we could enforce the stipulation that the occupants need to be related. In fact, when in-law apartment rules were changed to accessory dwelling unit rules, the State said that you don't have to have a family relationship with the people living in the ADU. **O'Keefe** agrees.

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

O'Keefe feels that the literal enforcement would not create unnecessary hardship. The ordinance was clear upon the purchase of the property. Contacts with our Building Inspector were attempted but not followed up on based on testimony. Any conversation with the Building Inspector would have made it clear that the requested use was not permitted based on our ordinance. **Immorlica** agrees and feels that the new owner did not do their due diligence. There was no follow up with the permit application. They moved forward with renovations at their own risk.

The Board voted unanimously (0-5) to deny the Variance.

The Board deliberated on the second case heard from Peter Shirley. **O'Keefe** motioned to approve the Special Exception to operate a business out of Shirley's residence. **O'Keefe** understands that vintage guns do not fall under ATF rules; an ATF license is not needed to sell them. Shirley is not operating any illegal firearms business on his property; he is looking to sell guns that may be inoperable or show pieces for mantles. Clearly there is a concern from the neighbors about increases to shooting on the property and creating a disturbance in the neighborhood. **O'Keefe** believes in the second amendment; he feels that Shirley has the right to do with his property as he sees fit as long as it does not interfere with the neighbor's ability to enjoy their properties as well. The only thing **O'Keefe** would have asked for, in operating specifically a gun business, would be that Shirley would agree there would be no additional shooting on the property and by doing that Shirley would seek elsewhere to partake in that. Shirley indicated he is not willing to do that, so **O'Keefe** is not making any special requests as part of his motion. **Sturm** noted that we have the ability to refer this to the Planning Board for a site plan review of the layout of the property as a condition. He added that there is a difference in the factual testimony presented by neighbors and Shirley in regards to traffic and credibility in this sort of thing is very important. **Immorlica** asked what we would we expect the Planning Board action to be? **Sturm** stated that the Planning Board could walk the property to assess the conditions and make recommendations. If Shirley followed those recommendations, it could go a long way towards assuaging some concerns raised by neighbors and perhaps by members of the Board before granting this application. Shirley said that since he does not use his shooting range for his business, where would the Planning Board look, under his bed? He stated that he does not need a permit to run a shooting range; he's had the range there for over thirty years. There have been five police chiefs brought there by the neighbors. It's been approved every single time. The shooting range is not what is up for discussion tonight; it's the operation of a small business that resides under his bed. If the Board would like to make a condition to the Exception that he will not use the shooting range for his business he would be agreeable to that, but he is not willing to give up his shooting range. **O'Keefe** rescinded his earlier motion and motioned to refer this to the Planning Board for a site review and evaluation seconded by **Immorlica**. **Sturm** stated that he would like to take Shirley up on his offer and make it a condition that we allow him to operate his business but not fire weapons that he is selling in his backyard. **Immorlica** went over the guidelines for the operation of a home business in Section I-406.4.3.2. Shirley stated that he runs his business out of his bedroom, on his computer. He probably takes deliveries from UPS/FedEx but there was no testimony as to how often these deliveries take place. **Immorlica** does not feel the business would be incompatible with the character of the neighborhood based on the type of business he is operating provided that he is not using these weapons outside of his home. As to the traffic, Frankestown Tpke is a fairly busy road. Even if people were to seek him out by looking at his website, he's not sure there would be a big volume of activity. **Johnson** agrees that it is a busy road. We generate far more traffic from Granite State, the ski area, and the golf courses in Frankestown than we do from any one single home-based business. Given the post Covid world, UPS/FedEx/Amazon are regular fixtures in every neighborhood in town. **Sturm** noted that here in NH we have very little regulation on shooting firearms. He spoke with the Police Chief who advised that as long as you don't shoot within 300' of an occupied structure or within 15' of a roadway, that's about it; Live Free or Die. We cannot invent any additional restrictions here on the ZBA, but we can apply conditions on the business. **O'Keefe** withdrew his motion to refer to the Planning Board for site plan review; **Immorlica** withdrew his second on that motion. **O'Keefe** motioned seconded by **Johnson**, to approve the Special Exception with the following conditions:

- I. 1.Sale of only pre-1899 guns and collectible ammunition, along with other antiques, are allowed.
- II. 2.No shooting of any guns or weapons that are for sale.

- III. 3.No sign advertising the business may be posted.
- IV. 4.Applicant will remove business hours from the website and use best efforts to remove hours from any other social media.
- V. 5.The limited liability company must be in good standing with the Corporate Division, Secretary of State, New Hampshire at all times.
- VI. 6.No storefront or in-person business visits to the house.

Sturm called for a vote on the motion. Four (4) in favor; one (1) against. The Special Exception was granted.

The Board reviewed the minutes of 3/16/21. **O’Keefe** motioned to accept the minutes of 3/16/21 as written seconded by **Johnson**. Four in favor; one abstention.

9:50 PM

As there was no further business before the Board, **Sturm** motioned to adjourn. All in favor.

Respectfully submitted,

Joan Cleary

Administrative Assistant