



**Stratham Zoning Board of Adjustment  
Meeting Minutes  
February 21, 2023  
Municipal Center  
Time: 7:00 PM**

**Members Present:** Drew Pierce, Chair  
Bruno Federico, Member  
Phil Caparso, Alternate  
Brent Eastwood, Member  
Jameson Paine, Member  
Frank MacMillan, Alternate

**Members Absent:** None

**Staff Present:** Mark Connors, Town Planner (Filling in for Jim Marchese, Building and Code Enforcement Officer)

**1. Call to Order/Roll Call/Seating of Alternates:**

Mr. Pierce called the meeting to order and took roll call. Mr. Pierce appointed Mr. Caparso as a full voting member.

**2. Approval of Minutes:**

January 24, 2023

Mr. Pierce asked if there was a motion to accept the meeting minutes from January 24, 2023 as submitted. Mr. Caparso made a motion to accept the meeting minutes and Mr. Eastwood seconded the motion. All were in favor and the motion carried unanimously.

**3. Public Hearing:**

Mr. Pierce moved to the public portion of the meeting where the Zoning Board of Adjustment (ZBA) shall decide whether to grant or deny the following requests: Case #667 Stratham Retail Management, LLC 30200 Telegraph Road Suite 205 Bingham Farms, MI regarding 23 Portsmouth Avenue, Map 4 Lot 13, Gateway Commercial Business District.

Equitable Waiver of Dimensional requirements request from Article 3, Section 3.8.8 Table 2 of the Stratham Zoning Ordinance to obtain 2.3 feet of relief from the required sideline setback of 10 feet.

Case #667 Stratham Retail Management, LLC 30200 Telegraph Road Suite 205 Bingham Farms, MI regarding 23 Portsmouth Avenue, Map 4 Lot 13, Gateway Commercial Business District.

Variance request from Article 3, Section 3.8.8 Table 2 of the Stratham Zoning Ordinance to obtain 2.3 relief from the sideline setback of 10 feet.

Mr. Pierce invited the applicant to explain their case.

Kevin Baum introduced himself as an attorney with Hoefle, Phoenix, Gormley and Roberts, PLLC. Mr. Baum explained that the Board heard from Mr. Phoenix in the past, but he was unable to attend tonight's meeting. Mr. Baum introduced John Crowley, from Optima Dermatology, and stated that he could also answer any questions regarding the plans or construction. Mr. Baum stated that there are two requests; One request is for an equitable waiver and the other is for a variance. He stated that only one is needed, but they requested both in the case that if one is denied they would then ask under the other method of relief. Mr. Baum asked if the Board would prefer to hear one application before the other, stating that if one is granted they will withdraw the second application. He stated that he will speak on the equitable waiver application first.

Mr. Pierce agreed that Mr. Baum should present on one application, and then the other if needed, or withdraw the second if not needed.

Mr. Baum gave a brief overview of the project for the new Board members, explaining that the project is at 23 Portsmouth Avenue and is mostly constructed. He stated they received a sign variance a couple months ago. Mr. Baum explained they are at this meeting because after finishing the foundation and getting most of the building, canopy and roof up, the Building Inspector notified them that a portion of the canopy was in the setback. Mr. Baum explained that it is a 10 foot setback along one side. Mr. Baum referred to a diagram explaining that it is hard to see since the canopy narrows because of the angle of the building. (Diagrams were looked at). He explained that it extends out over the length of the canopy from 0 to 2.3 feet into the 10 foot setback. Mr. Baum stated that the foundation is fully compliant (the error was made in that the measurement was made to the foundation). He also explained that a canopy and a portion of the roof extend out from the building and extend out a little bit from the foundation which resulted in a technical violation of the 10 foot side setback. Mr. Baum stated that they would like to keep it for a couple reasons:

1. It was already largely constructed

2. They would like to keep consistency with the canopies as part of the overall design and part of the overall drainage design and they would like to keep it consistent throughout the building and the approved plans.

Mr. Baum explained that an equitable waiver of dimensional requirements applies when you have an inadvertent good faith error in measurements or calculations that results in a dimensional violation that isn't discovered until after the structure is substantially completed. He explained that this is the situation which happened here. The foundation was poured, the structure was up and the canopies and roof were largely constructed already when they were notified, which is why they have come forward to ask the Board for relief. Mr. Baum explained that it is a four part test for equitable waiver, the first being the violation isn't discovered until after the structure is substantially completed, which is the case here. The second reads that the violation isn't due to ignorance of the law or bad faith, but a good faith error, and he explained that this was a mistake of measurement to the foundation, rather than to the partial canopy. Mr. Baum brought up plans and pointed out the canopies for those who aren't familiar with the building. Mr. Baum said that these were shown on the plans that were approved for a building permit and were just missed. He said it was ultimately caught by the Building Inspector, but unfortunately at that point the foundation was already in and they had already constructed the building and done most of the work. Mr. Baum stated that they meet the second criteria which was that it was a good faith error. He read the third equitable waiver criteria stating that, the violation doesn't constitute a public or private nuisance, diminish property values or interfere with permissible use of the property. Mr. Baum stated that at worst

94 it is a 2.3 foot violation narrowing down, that it is not the whole wall but just a part, that it is above  
95 ground and it isn't going to interfere with any of the surrounding uses, the use of the property or diminish  
96 property values. He stated that it is very unlikely that anyone would ever notice the violation with the  
97 naked eye, but only with professional measurements. Mr. Baum stated that they do not feel that it would  
98 have any effect on any of the surrounding property owners. The final criteria is that the cost of the  
99 correction far outweighs any public benefit to be gained. He stated that they see no public benefit in  
100 removing these and it is a significant cost to the applicant, both in undoing the construction and redesign,  
101 and they feel it is a detriment to the public as it interferes with the overall design plan, the drainage  
102 design, and it does not fit with the aesthetic of the building and the approved site plan. Mr. Baum  
103 explained that, for those reasons, they feel the equitable waiver applies in this case, to fix what they  
104 believe to be a fairly minor error, but unfortunately one that was caught after the work had been  
105 completed. Mr. Baum said he was happy to answer any questions the Board may have.

106 Mr. Caparso stated that Mr. Baum said it had been built. He asked in terms of percentages, how much  
107 work has been completed on this project?

108 Mr. Balm replied that on the outside of the building about 50% of the insulation is up, the steel is up and  
109 welded to the building (for the canopies), and the plywood sheeting has been installed to face off with  
110 break metal, so the scope of work is about 80% complete.

111 Mr. Caparso asked if this plan had been approved by the Planning Board and/or the Building Inspector  
112 before it had been implemented.

113 Mr. Baum said that it had been and it was shown on the approved plans, it was just missed. He did not  
114 know the level of detail on the plans, but it is his understanding that the canopies were part of the  
115 approved site plan.

116 Mr. Caparso confirmed that this was then brought before the Planning Board and the Building Inspector  
117 and was approved by them?

118 Mr. Baum said yes, a foundation permit and a building permit were issued.

119 Mr. Caparso asked if this (violation) was discovered after re-inspection.

120 Mr. Baum stated that after the foundation went in, construction continued, the foundation as-built plan  
121 was submitted and the foundation as-built plan showed the error.

122 Mr. Crowley said that it was brought to their attention to look into this by the Building Inspector for an  
123 onsite meeting inspection with their site supervisor asking to look into the site setbacks to make sure they  
124 comply, which is why they started looking into this..... (transcription not audible 15:25)

125 Mr. Caparso asked what it would cost to fix this (violation) and make it compliant?

126 Mr. Crowley said he did not have a solid number on this. He stated that the scope of work would include  
127 removing the canopy altogether, redesigning the exterior- because there are mounting brackets where the  
128 canopies attach to building (they would need to reface over that)- and then there are also the costs to  
129 acquire the scale and have it erected on the building.

130 Mr. Caparso asked if they would have to then undo the welding, the welds, the plywood, buy new steel  
131 and re-implement it, as well as disposal?

132 Mr. Eastwood said it looked like the canopy was put together this week with wood and he was curious  
133 about the timing of that before this meeting.

134 Mr. Crowley explained that they were told by Mr. Marchese to look into the setbacks....(inaudible  
135 recording) that they should stop any exterior construction on the building to make sure that they had  
136 properly addressed this and Mr. Marchese noted to them that they weren't being told to stop any course  
137 of construction. In their best efforts to try and get this building open, they proceeded with their normal  
138 schedule.

Mr. Baum said that the building inspector was aware of this and aware of the ongoing construction because they filed this request in December, shortly after they discovered it, but they were told that Optima could continue construction, which is why it has been ongoing. Mr. Baum referred to some notes from conversations that occurred and said the contractor learned about this on December 1, 2022, at that point the building was up and the roof and canopy structures were already installed, so it was significantly far along at that point.

Mr. Caparso stated that they said the Building Inspector said it was fine for them to go ahead and continue working (construction) and he asked if they had that in writing or if it was verbal?

Mr. Baum said the he believed it came over email.

Mr. Caparso mentioned that they talked about the impact of drainage and asked if they could walk him through the differences in drainage from the current verses being compliant.

Mr. Baum said the difference is that part of these canopies are catching water and part of the overall drainage. He said he didn't want to overstate the value this has for drainage, but more that this is the drainage plan. For drainage (with this plan) the water will be caught with these canopies and then it would continue into the overall drainage structure. He stated that if they got rid of the canopy it would probably not have a huge impact on drainage (referred to images) but it would result in a slight redesign and it would result in change in the overall aesthetic design.

Mr. Crowley added that along the canopy line on the north side of the building between Optima and Market Basket there are two inlets approximately 2 feet off of the building with drainage that runs to the back storm water retention system, so part of this canopy does help divert it (the water) a bit away from the foundation of the building and in line with the drain piping.

Mr. Pierce asked if it were to be required to conform to the actual setback, would that impact their opening date?

Mr. Crowley said it would impact their opening date and overall construction budget which also impacts their end date. He stated that it is a challenge in the current construction environment, on this site in particular, as they did have some issues with their initial steel contractor and have worked with other vendors to get them out there at increased costs to do these smaller jobs. Mr. Crowley stated that to get someone out to do a job like this- to remove a canopy, break it down and truck it off site- would be at a premium cost to another vendor who otherwise would have provided the line item to install it. He stated that the cost would be at a premium.

Mr. Paine asked if they had a french drain or dedicated drainage for the structures, and if they could speak to what is beyond that in the buffer (in the 10 foot area) and what is in that area?

Mr. Baum pointed out the retaining wall and vegetated area.

Mr. Crowley stated that there were revisions to this that went in front of Mr. Marchese in a revised set to remove the retaining wall, and they lowered the mound that was dividing Market Basket and Optima at their expense since it gave the area a cleaner look rather than having a non-landscaped hill. This brought the grade down and removed the need to have a retaining wall along that side. The plan is to loam and seed that area in the spring.

Mr. Paine said he wanted to know if that area was going to be used for another purpose, or if they were proposing any other activity in that area.

Mr. Crowley stated that it would be a grass buffer zone and he explained that the utility tie-ins run from the nearest pole location.

Mr. Federico asked if they would be installing any vegetation in that area?

Mr. Crowley responded that the current plan is to loam and seed and that in conversations with Mr. Marchese, the Town did reserve the right to request additional vegetation as needed for soil erosion

management or aesthetics. He stated that it was part of the landscaping package that they would look at in the spring when it came time to install it.

Mr. Federico asked if the roof canopy was the same distance as the window canopies.

Mr. Crowley said that the roof canopy does not extend out as far.

Mr. Federico asked if the window canopies were further out than the roof canopies?

Mr. Crowley affirmed this.

Mr. Pierce asked if they had any photos of what it looks like right now.

Mr. MacMillan asked if the north side of the building was supposed to be parallel to the property line and it just wasn't built that way?

Mr. Baum replied that the idea was to keep it in line with the front set back explaining that they have asked for the most..... to include the roof canopies as well (inaudible recording). He explained that their request was for both the window and the roof canopies, stating that they know the greatest extent, which is the 2.3 feet for the window canopies. Mr. Baum stated that they have asked for the most since that will include the roof canopy as well.

Mr. Crowley stated that as the lot line extends back in the corner, most of it is that rear canopy and the roof line does have some additional buffer because of the position on the lot.

Mr. Eastwood asked Mr. Connors if one of the reasons for the setbacks were set for emergency vehicles and if they would inhibit a fire truck?

Mr. Connors responded that the setbacks are there for aesthetics, utilities, landscaping, traffic and are all part of that.

Mr. Baum said it was originally shown and approved as a retaining wall and a firetruck would not be using this access and that access would be through Portsmouth Avenue or a parking lot. He stated that it is no longer going to be a retaining wall, but it is going to be landscaped.

Mr. Pierce asked if there have been any conversations with the owner of the Market Basket Plaza since the setback is closer to their side of the building. Mr. Pierce asked if there was any feedback from them?

Mr. Crowley said there has been no particular feedback from them on this instance, but they had worked with them on leveling the lot and they were amendable to that change being made.

Mr. Pierce asked if the canopy (shown in the as-built plans with dotted lines) was shown on the plans that went through the Planning Board?

Mr. Connors said that he had a copy of the Planning Board approved plans. He stated that it goes through a third party engineering review so he would be surprised if that wasn't noticed.

Mr. Baum said it is his understanding that this as-built plan is what was shown on the building plans.

Mr. Pierce asked what the height of the underside of the canopy was from clearance to grade to the bottom of the structure.

It was confirmed to be 12 feet.

Mr. Paine asked if the parcel (23 Portsmouth Avenue) had been master planned into anything in this area as far as coordinating with Market Basket and the use of their property and are there any other uses/access points immediately adjacent?

Mr. Baum said that it accesses McGinnis Road on the side to the rear.

Mr. Connors stated that the back road does link in to the Market Basket side.

Mr. Crowley said that McGinnis Road does connect in the back to the left side of Market Basket.

Mr. Caparso referred to Mr. Marchese's staff review notes and read, "It is my opinion that the ZBA cannot grant an equitable waiver because it applies only if "the violation was not noticed (and this is underlined) until after a structure in violation had been substantially completed." Mr. Caparso further read, the building is under construction and as of 1/3/23 the canopy has not yet been constructed. Therefore, it does not appear that "a structure in violation has been substantially completed." Mr. Caparso stated that they (Optima) are saying it has been completed and that they have in writing permission from the Building Inspector to go ahead with the construction. Mr. Caparso stated that he was confused by the staff opinion verses what he is hearing.

Mr. Baum said he wished he had known about the staff opinion because they had applied for an equitable waiver. He went on to say that it may be a difference of opinion between them and the Building Inspector. He read, "the structure in violation has been substantially completed" and their interpretation of that was that it referred to the overall structure, rather than the canopy. The reason they took that approach is because it is part of an overall design, and the cost is all tied together. He stated that it's not as easy as just pulling out the canopy. He stated that he does not know the exact status of the canopies (based on the notes) and if they were partially in, or if the canopy was in, but the building (overall structure) certainly was. The roof lines at that point would have been already installed. That canopy may not have been installed on January 3d, but the steel package was ordered and shipped to site.

Mr. Paine stated that from his own experience it's: build at your own risk.

Mr. Eastwood asked if they should read Mr. Marchese's opinion?

Mr. Pierce asked if they had seen the staff review from January 6<sup>th</sup>?

Mr. Baum said he was filling in for Mr. Phoenix and it was possible they may have received the review, but he had not seen it. He stated that he did not need to see it, as he understands the issues. He stated that the language of the statute says "a structure in violation"... and he believes this Board can make its determination whether they apply their interpretation- which is the overall structure- or this specific canopy. Mr. Baum did note that he did not want to turn this into a fight over what was said, especially with Mr. Marchese being absent. He mentioned that they did also apply for a variance so if the Board feels that's a better approach, they are happy to go down that road as well.

Mr. Pierce noted that the landscaping plan that was presented to the Planning Board showed a lot of shrubs under the overhang and he didn't know if it impedes anything as the shrubs will be there also.

Mr. Federico asked if evergreens were supposed to be planted along the north side in the setback to create a buffer between Optima and Market Basket? He stated that somewhere in that 10 foot setback they will have evergreens. Mr. Federico read from the staff review that a row of evergreen trees would be planted along the northerly side and calls for a 7.7 foot minimum setback along the northerly wall.

Mr. Baum said that there may be some discussion about administrative landscaping changes, but there will be landscaping. He stated that the approved plans call for evergreens and a retaining wall, and that may change to have more loam and seed, but either way there is going to be landscaping there.

Mr. Pierce asked if there were any other questions from the Board. He asked if there were any comments from the Town on this.

Mr. Connors stated that he was stepping in for Mr. Marchese and that he did not have anything beyond what was in Mr. Marchese's email.

There were no abutters or residents present to speak either for or against.

Mr. Caparso made a motion to close the public portion of the meeting. Mr. Paine seconded the motion. All were in favor and the motion carried unanimously.

Mr. Pierce stated that this concludes the public portion of the meeting.

Deliberation:

Mr. Pierce stated that with the equitable waiver they would be voting on the 4 criteria. He stated that he has been on the other end of an equitable waiver before and it is pretty cut and dry- if you meet that criteria, you get the equitable waiver- and it is not a matter of discretion. Mr. Pierce did not believe there was much to be deliberated.

Mr. Federico stated that he felt that if there was an issue they should have stopped construction when this was noticed. He also stated that he did not feel it was a big issue since the plans were reviewed by a third party, and it was a non-malicious mistake that was not caught. He went on to say that if they required the applicant to remove the canopy it would involve substantial cost. Mr. Federico stated that he did not think the issue of a canopy within a setback was an issue since it is in the air and not impede any construction.

Mr. Pierce said that in reviewing the 4 criteria, the first criteria which states: the violation was not noticed or discovered by any owner until after the structure in violation had been substantially completed, he would argue that the structure is not the actual piece of the structure that is in non-conformance, but the structure itself. He stated that if you look at the definitions in the Zoning Ordinance it refers to overall structures, not individual pieces. Mr. Pierce said that he does agree that the building had been substantially completed. He said it did not appear to be an outcome or ignorance of the law or bad faith as the plans were very complete, they were approved, they went through a third party, and there were elevations in those plans that must have shown a canopy. He stated that whoever reviewed the plans didn't check to see if that canopy was sticking out, especially with the building being so close to that setback and he stated that somebody should have seen that. Mr. Pierce said that he does not feel like the fault lies directly with the applicant. He went on to say that it does not constitute a public or private nuisance noting that there were no abutters present and it has been a building that has been objected to by many people and boards in the town and none of the public are saying this is an issue (that he has heard of). The final criteria states that due to the degree of past construction of investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained... Mr. Pierce stated that he did not see any public benefit- except for saying they followed the ordinance to the letter of the ordinance. He stated that the cost would not bring any gain and he believed that it meets the criteria (for equitable waiver) and said they should vote on it.

Mr. Caparso stated that he thought it was unfortunate that the applicant had to spend time and treasure building a building they thought was in compliance only to find out that at the last minute that it is not and the remedy of the minor transgression would cost more time and treasure on behalf of the applicant, which he did not think was fair. He stated that the Town gains very little to nothing if they uphold the statutes strictly and it would cost the applicant time and treasure to remedy. He stated that he is in favor of the equitable waiver.

Mr. Pierce proposed a motion to grant the equitable waiver for Case #667 and took a roll call.

Mr. Pierce, yes; Mr. Caparso, yes; Mr. Federico, yes; Mr. Paine, yes. The equitable waiver passed 5-0 and the equitable waiver was granted.

Mr. Baum stated that since this is an appealable decision, therefore they would like to preserve the variance and would ask for a continuance for the variance application until the second meeting (or the meeting 31 days from now) where they would withdraw it at that time if the Board would entertain that.

Mr. Paine made the motion to move the variance request to the April 11, 2023 meeting. Mr. Pierce seconded the motion. All were in favor and the motion carried unanimously.

#### **4. New Business:**

Mr. Pierce formally welcomed new Board members Jameson Paine and Frank MacMillan. Mr. Pierce stated that Nicholas Garcia's application had been moved to the Select Board for approval.

317 **5. Other Business:**  
318 None

319  
320 **6. Adjourn:**  
321 Mr. Eastwood made a motion to adjourn the meeting. Mr. Caparso seconded the motion. All were in  
322 favor and the motion carried unanimously. The meeting was adjourned at 7:55 pm.  
323