

TOWN OF RYE – BOARD OF ADJUSTMENT

Wednesday, June 21, 2023

7:00 p.m. – Rye Public Library

Members Present: Sandra Chororos, John Tuttle, Chair Shawn Crapo, Chris Piela, Vice-Chair Patrick Driscoll

Also Present on behalf of the Town: Planning/Zoning Administrator Kim Reed

I. CALL TO ORDER

Chair Crapo called the meeting to order, led the Pledge of Allegiance, and introduced Board members.

II. BUSINESS

III. APPLICATIONS

1. Giorgia Nagle, applicant, Samonas Realty Trust, owner for property located at 1215 Ocean Blvd, Tax Map 17.3, Lot 6 requests an administrative appeal per NHRSA 677:2 and the Rye Zoning Ordinance §190-7.3 from the Building Inspector's denial letter and partial CO dated 4/25/2023. Property is in the General Residence, Business District and Coastal Overlay District and SFHA-Zone AO, Case #31a-2023.

2. Giorgia Nagle, applicant, Samonas Realty Trust, owner for property located at 1215 Ocean Blvd, Tax Map 17.3, Lot 6 requests variances from §190-5.0.A for size of the parking spaces which currently exist and may not meet the size requirements, from §190-5.0. B for the minimum number of parking spaces 11 exist and 19 is required to operate a restaurant; from §190-5.0.C for parking in the front boundary and within 10' of Wallis Road; from §190-5.0. D for off street loading. Property is in the General Residence, Business District and Coastal Overlay District and SFHA-Zone AO, Case #31b-2023

Giorgia Nagle, the applicant, stated that she's before the Board requesting to appeal an administrative decision on a Change of Occupancy for the property located at 1215 Ocean Blvd.

Chair Crapo asked if a previously approved project is being abandoned.

Ms. Nagle explained that she can't speak to that as it's the owner's jurisdiction and she's just a tenant.

Planning/Zoning Administrator Reed explained that both superior courts have been issued on the town's behalf. She explained that Mr. Samonas is weighing his options with Attorney Phoenix as to how and if he will move forward; he is allowing tenants and renters at the property to have income this summer.

Chair Crapo clarified that the relief granted to move forward with that project was upheld by the ZBA and Planning Board.

Planning/Zoning Administrator Reed explained that Attorney Maher is working with Attorney Phoenix to decide how to proceed since it's taken so long. In the meantime, Mr. Samonas wants to have the business run as usual this summer.

Chair Crapo observed that this business had been a takeout window and restaurant with the same amount of parking, and asked why it would now need more parking.

Ms. Nagle explained that she has requested 20 additional indoor seats, which the Planning Board has approved conditional to a parking variance.

The Board discussed the applicant's request to appeal items including a portapotty, bus stand, indoor seating, planned expansion of existing office, dumpster, an expiration date on a Change of Occupancy, and the ability to prepare and assemble precooked food.

Chair Crapo asked when this business last operated as a takeout window, which Ms. Nagle explained was two years ago as a BBQ restaurant with a full kitchen and food made in-house.

In response to Member Chororos' question, Ms. Nagle explained that there are 5-7 picnic tables outside.

Member Driscoll requested a more comprehensive presentation by the applicant.

Chair Crapo provided the applicant guidance on what to include in a presentation related to how the Board will make its decision.

Ms. Nagle explained that she is looking to use this location for the summer. She explained that the property has a full kitchen and has been a restaurant for years. She added that several of the items on the appeal were already existing on the property. She explained that she has requested from the Planning Board 20 indoor seats for the option of indoor dining.

Ms. Nagle discussed each of the points included in the denial letter. She explained that the location doesn't have an accessible bathroom so she requested a Portapotty as an ADA bathroom. She explained that she has it serviced twice weekly as a convenience to her customers and beachgoers at her own expense. She also explained that it's not 30' or 75' to the wetlands, can be moved at any point, has a lock, and she has looked at all administrative codes, none of which apply. She explained that it's a temporary solution to a temporary problem.

Ms. Nagle explained that the requested bus stand is a term for a host stand for dirty dishes.

In regards to indoor seating, Ms. Nagle explained that she's shown the Planning Board mockups, and they waived a site walk. The State Liquor Inspector did a walkthrough for a second opinion, and both the Fire Department and Police Chief have looked at it and all are okay with it conditional on parking.

Ms. Nagle explained that the expansion into the motel office would be where the 20 indoor seats are and it's attached to the kitchen and outdoor seating.

Ms. Nagle explained that the dumpster is existing and has been there for longer than she's been in the area. She didn't ask for it and she's not planning to move it.

Ms. Nagle explained that part of the appeal is for the expiration of occupancy, which expires on October 15, 2023. She asked the Building Department if that's a usual part of occupancy, which they explained is not.

Ms. Nagle discussed the restriction to selling only pre-prepared food, assembled within the kitchen.

Ms. Nagle explained that the property is a year-round building and she would love the option to run the business year-round.

Member Piela, discussing the ADA restroom, asked if Ms. Nagle is appealing because there was an error in that it would be more than 33' to surface water and more than 75' from surface water or wetland. Ms. Nagle confirmed.

In response to Chair Crapo's question, Ms. Nagle referred to a photo to clarify the location of the portapotty.

Vice-Chair Driscoll asked if the Fire or Police Department reviewed the portapotty location. Ms. Nagle explained that they did not, nor did they review the dumpster, which she neither owns nor services.

Vice-Chair Driscoll asked if the indoor seating would need any construction. Ms. Nagle explained that it would not, it's just a vacant space in need of tables and chairs.

Vice-Chair Driscoll explained that he has no knowledge of food service and asked Ms. Nagle if she has any idea why pre-prepared foods would be an issue.

Member Chororos asked Ms. Nagle if she's intending to provide an online site for people to order ahead.

Ms. Nagle explained that she would only include online ordering with more growth. She also discussed pre-prepared foods and expressed that there should be a middle ground allowing certain items to be made in the building. She noted that it's a full kitchen with a grease trap and a septic system to handle that. Ms. Nagle discussed the challenges of being limited to only pre-prepared foods.

In response to Member Chororos' question, Ms. Nagle discussed her menu and desire to enhance pre-prepared foods with artisan foods made in-house such as sauces, roasted, or sauteed vegetables. She explained that the menu would still only include pizza, salad, and gelato, but she would like to include a two-burner to enhance those premade foods.

Chair Crapo discussed food assembly and safety regarding the grease trap.

Ms. Nagle explained that she's made sure the hood and suppression system has been cleaned and inspected. She added that the grease trap is Mr. Samonas' responsibility and he has had it cleaned and inspected and has sent records.

Speaking to **Chuck Marsden**, Town of Rye Building Inspector, Chair Crapo asked who inspects for restaurant codes.

Mr. Marsden explained that in the town of Rye, the state inspects for restaurant codes.

Ms. Nagle added that the health inspector has reviewed the space. It passed the health inspector's review and he checked to see that they were not using a fryolator. Ms. Nagle confirmed that it was a state inspector.

In response to Member Tuttle's question, Ms. Nagle confirmed that she'll use the existing dumpster.

Mr. Marsden discussed the proposed portapotty, noting that there have been complaints from Petey's Red Roof Market, which was forced to remove a portapotty from their property. Mr. Marsden explained the reason for removing Petey's Red Roof Market portapotty due to its proximity to the wetland buffer. He referenced NHDHHS portapotty regulations and the NH Code of Administrative rules regarding portapotty use and maintenance. He distributed a copy to the Board.

In response to Chair Crapo's question, Mr. Marsden explained that he misunderstood the term "bus stand". He clarified that the proposed stand for bussing tables would meet his approval without issue.

Mr. Marsden and Chair Crapo discussed the indoor seating, office space, and the building's change of use.

Planning/Zoning Administrator Reed, referring to the 5/22/23 Notice of Decision, explained that the Planning Board saw this as an existing restaurant and allowed indoor seating.

Ms. Nagle explained that the partial denial letter from Mr. Marsden was dated 5/27/23.

The Board discussed the Planning Board's approval of indoor seating at an existing restaurant.

Mr. Marsden discussed the history of the restaurant as only a seasonal takeout restaurant and clarified the 1996 conditions of approval stating that the restaurant is to be discontinued, approved for three two-bedroom apartments, and a soft-serve-only ice cream window.

The Board discussed the existing dumpster with Ms. Nagle. Mr. Marsden clarified that a restaurant is required to have sanitary storage, but a dumpster cannot occupy a required parking space associated with the property. He stated that if the dumpster is not taking a parking space, then it's not an issue.

Ms. Nagle clarified that the dumpster does not take a parking space.

The Board discussed the portapotty, its proximity to the water as compared with Petey's Red Roof Market's portapotty, the benefit of having a portapotty on site, the fact that it serves as an ADA option, and whether it could be a temporary solution until more is known about the future of the property. It was also discussed that a business isn't required to provide a bathroom for 25 or fewer seats and ADA is not required.

In response to Vice-Chair Driscoll's question, Ms. Nagle explained that she would serve liquor outside if indoor service was permitted.

Ms. Nagle discussed the portapotty's reduction of stress on the septic system and its location, which is 150' away from the water. She also noted that the portapotty is locked.

The Board discussed town portapotty locations and state regulations regarding portapotties. They also discussed whether the portapotty would be considered a temporary structure and whether a variance is needed for a temporary structure.

Member Chororos asked whether the existing bathroom could remain a non-ADA bathroom.

Mr. Marsden explained that when you reach a certain capacity, you are required to have ADA bathrooms, and it would depend on seating. He added that the septic system will not support 20 seats inside.

Vice-Chair Driscoll discussed previous uses of this site and the takeout window.

Mr. Marsden explained that all use in recent history have been takeout-only and it started with soft serve ice cream. He discussed the change of use, the 20-year-old septic system, and his

concerns regarding the portapotty as a replacement for an approved/functional septic system for the property.

Member Chororos noted that a portapotty is a better temporary alternative to adding use to a septic system next to Parsons Creek.

Mr. Marsden referred to NHDHHS language that states if you have onsite water, you don't need a portapotty.

Mr. Marsden discussed this septic system and what the design will allow. He explained that this septic system would not support a drip well, which is needed for serving ice cream.

Mr. Marsden described conversations he's had with Ms. Nagle regarding the limitations of the septic system and what that system will permit. He explained that in that conversation, Ms. Nagle outlined her proposed menu, which was met with approval by Mr. Marsden, who issued the Certificate of Occupancy and Building Permit in the following days. That was when the service was to be limited to outdoor seating.

The Board discussed the Planning Board's approval of indoor seating and expansion of outdoor seating.

Chair Crapo, speaking to Mr. Marsden asked about the differentiation between tables outside and tables inside.

Mr. Marsden explained that once you have indoor seating, you're required to have a bathroom facility.

Member Piela wondered if this certificate of occupancy is contingent on the expiration on October 15, 2023. He noted that this business is most likely catering to the beach community, which is why he's not as worried about parking.

Vice-Chair Driscoll asked if anyone has looked at the septic system.

Ms. Nagle explained that she's spoken with John Samonas about how often they pump it. She's gone over his records and his communications with the Building Department regarding approvals, inspections, etc. She noted that she hasn't personally had it serviced because it's not her responsibility.

Chair Crapo refocused the conversation on the appeal, the Certificate of Occupancy, and the partial denial. He explained that he can't support parking because it's a variance that would then carry with the land to future use.

Ms. Nagle explained that she began the application process in January, it's been a very long process, and the idea of having to go through this process again next year is excruciating to think

about. She explained that her appeal has more to do with avoiding having to reapply over the date of the expiration.

Chair Crapo discussed the renewal and explained that he doesn't see the need to be approved for next year as a reason to override this.

Ms. Nagle asked if it's common practice to have an expiration date on a change of occupancy to see how the business did.

Chair Crapo explained that the Board doesn't see it often, but Summer Sessions has to go back to the town for review annually. He noted that the future of the building is uncertain which affects his feelings on a parking variance. He added that parking has worked for all previous takeout businesses and the inside is not designed to be a sit-down restaurant.

Chair Crapo explained that, aside from the misunderstanding concerning the bus stand, it doesn't seem that there was an error with Mr. Marsden's denial letter. He explained that the building is designed to serve a takeout window and the parking and septic have kept other businesses from indoor service. He also noted that the letter does not deny the dumpster, but that a dumpster cannot take a parking space. He also acknowledged the Planning Board approved indoor seating, but only based on approval of additional parking.

Vice-Chair Driscoll noted that the Building Inspector's letter came before the Planning Board approved indoor seating.

Vice-Chair Driscoll, speaking to Mr. Marsden, asked if an inspection of the septic system by a certified inspector would change his findings.

Mr. Marsden explained that an NH-certified septic evaluator would only determine whether the system is functioning the way it should and at what level. They don't make assessments regarding what a system can handle. He explained that it was the septic designer, licensed by the state, who made the call to replace the system.

Planning/Zoning Administrator Reed shared the septic design information with Vice-Chair Driscoll.

Chair Crapo summarized Mr. Marsden's point that his denial is based on the design of the septic, and Vice-Chair Driscoll's question is whether a new inspection would modify the approval.

Ms. Nagle explained that the "approved for construction" notice that she's been working off was approved for a 50-seat dining room.

Chair Crapo asked what system it was referring to.

Ms. Nagle stated that she believes it was referring to the same system that they had to inspect and approve to issue the approval for construction.

Chair Crapo explained that Mr. Marsden is referencing the system that was put in the ground. He explained that there have been several proposals for the site and requests were sent to the state. He suggested that approvals may have been granted with the assumption that a different system was in the ground.

Ms. Nagle discussed the length of the approvals process and the lack of clarity regarding who to speak to resolve the issues.

Chair Crapo explained that even if the Board granted each of the applicant's requests, an inspector may later pull everything because the proposed 2010 system was never installed. He added that, aside from the bus stand misunderstanding, everything else in Mr. Marsden's letter makes sense because of the limitations in place. He also noted that the Certificate of Occupancy, while limiting, still stands within the current status of septic on that site.

Ms. Nagle asked if there is any merit to what has been approved for the site for the past ten years in the same location.

Planning/Zoning Administrator Reed and Mr. Marsden discussed previously approved businesses at that site.

In response to Vice-Chair Driscoll's question, Ms. Nagle explained that both apartments on site are occupied, the parking is on the side, and there are adequate parking spaces.

Member Piela pointed out an error with the number of parking spaces required.

Mr. Marsden acknowledged that the Planning Board approved indoor seating and that the Fire Department may issue a Place of Assembly Permit, but at the end of the day, he still can't give a Certificate of Occupancy for indoor seating for 20 people because it doesn't work with the septic system that's there. No matter what kind of approvals come through, with the limits on the septic system, he can't permit indoor seating.

In response to Member Piela's comment regarding a new septic system inspection, Mr. Marsden stated that the system is 20 years old and the best solution is to have a new system installed.

Vice-Chair Driscoll noted that the septic design explicitly states, "takeout window" and the only person who could change that is the designer.

Mr. Marsden explained that, according to NHDHHS, after 20 years regulations for a septic system become more restrictive as to what you can or can't do.

Planning/Zoning Administrator Reed asked Mr. Marsden for clarification that even if the ZBA approved the parking and the Planning Board granted approvals for the indoor seating, he would not give a Certificate of Occupancy.

Mr. Marsden explained that he can't as it does not have a septic system to support 20 seats inside the building. He added that the design states, "restaurant is to be discontinued".

Chair Crapo wondered if some of the Planning Board's approval hinged on the applicant's presenting other permits, which may not be valid because they were based on Wentworth's septic system, which was never installed.

Planning/Zoning Administrator Reed added that the Planning Board also found no issue with the portapotty.

Ms. Nagle explained that this was not weighed heavily by the Planning Board.

Member Chororos wondered if the current time frame would limit Ms. Nagle from opening before summer's end.

Mr. Marsden clarified that Ms. Nagle's business is open now, and he worked to push through the gray area to approve what was necessary, aside from the CO and parking.

Speaking to Mr. Marsden, Vice-Chair Driscoll discussed restrictions to outdoor seating based on parking spaces. They also discussed the restriction of having menu items not prepared on site, which was imposed to protect the septic system.

Vice-Chair Driscoll discussed email correspondence between Ms. Nagle and Mr. Marsden regarding menu items. He asked for guidance regarding the CO and restrictions to see if he agrees with those restrictions based on all the information. He also discussed the importance of guiding the applicant.

Member Piela clarified that to grant the request for indoor seating, a new septic system would need to be installed. Mr. Marsden agreed.

Member Piela clarified that, in addition to a new septic system, the applicant would also need variances for the parking and she would need to have as many as 26 parking spaces if she were granted indoor seating.

The board discussed Ms. Nagle's Certificate of Occupancy and confirmed that she wouldn't need a variance for parking with the current business as a takeout window.

Mr. Marsden clarified that the relief for parking was only related to the request for indoor seating. Planning/Zoning Administrator Reed confirmed.

Chair Crapo asked what outdoor seating would require.

Planning/Zoning Administrator Reed explained that it's grandfathered with the existing takeout window business and no variance is required.

Chair Crapo closed to the public at 9:25 p.m.

The Board reviewed the denial letter point by point.

Chair Crapo stated that, aside from the bus stand, the rest of the items in the denial letter apply.

Member Piela discussed item #2 as a possible error.

The Board discussed the possibility of a portapotty on site.

Member Chororos stated that she doesn't agree and pointed out the NHDHHS regulation which states if there is water in a building, then a portapotty is not permitted.

Chair Crapo discussed possible circumstances which may lead Mr. Marsden to eventually approve a portapotty.

Mr. Marsden stated that the Board's approach is sound, fair, and reasonable that the applicant could apply to have a portapotty there based on a temporary structure and the state requirements. If he can't find cause to let her have it, then he'll write a denial letter based on that application. He stated that until that approval can be given, it should be removed.

The Board agreed to strike #2.

The Board discussed the indoor seating.

Has there been an error in any order, requirement, decision, or determination by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16?

Vote 5-0-0 (S. Chororos, J. Tuttle, C. Piela, P. Driscoll, and S. Crapo in favor)

Motion by John Tuttle to amend Exhibit A of the applicant's submitted packet, a partial-denial letter by the Building Inspector, with the condition that reasons one and two are struck from the letter. Seconded by Chris Piela.

Vote 5-0-0 (S. Chororos, J. Tuttle, C. Piela, P. Driscoll, and S. Crapo in favor)

The Board discussed the 10/15/23 expiration date placed on the Certificate of Occupancy.

2Chair Crapo opened to the public at 9:51 to ask Mr. Marsden if there is a septic or other reason that the takeout window couldn't operate year-round.

Mr. Marsden explained that he was not sure about the septic and that he would have to look into that to see if it was capable enough to handle year-round use.

Chair Crapo closed to the public at 9:52.

The board discussed limitations placed upon the applicant regarding menu items and their affect on the septic system. Vice-Chair Driscoll expressed that he'd like to strike any language from the denial letter which would further hinder the applicant from doing business in a way that previous owners were able to in recent years at that location.

Chair Crapo and Mr. Marsden discussed menu items' impact on the septic system and the technicalities of the grease trap.

The Board discussed striking language that would limit the applicants' ability to modify menu items.

Regarding the Certificate of Occupancy, has there been an error in any order, requirement, decision, or determination by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16?

Vote 5-0-0 (S. Chororos, J. Tuttle, C. Piela, P. Driscoll, and S. Crapo in favor)

Motion by Chris Piela to modify the partial denial letter as follows: strike, "This is a seasonal business in two locations" description and certificate restrictions; strike "CO expires on 10/15/23"; modify "outdoor seating area to be limited to six four-seat tables" to add "and limited to six four-seat tables through the months of May 16 and November 1; strike "see menu items on Certificate of Occupancy dated 4/25 for details. Gelato not prepared on-site, only served". Seconded by John Tuttle.

Vote 5-0-0 (S. Chororos, J. Tuttle, C. Piela, P. Driscoll, and S. Crapo in favor)

Ms. Nagle withdrew her request for a parking variance.

Motion by Chris Piela to adjourn at 10:18 P.M. Seconded by John Tuttle. All in favor.

Respectfully Submitted,
Emilie Durgin

BOARD OF ADJUSTMENT

-Rye, New Hampshire-

NOTICE OF DECISION

Applicant/Owner:

Giorgia Nagle, applicant, Samonas Realty Trust

Property:

1215 Ocean Blvd, Tax Map 17.3, Lot 6
Property is in the General Residence, Business District and Coastal Overlay District and SFHA-Zone AO, Case #31a-2023.

Application case:

Case #31a-2023 and Case #31b-2023.

Date of decision:

June 21, 2023

Decision:

The Board voted 5-0-0 that there was an error in the Building Inspector's denial letter (not dated).

The Board voted to remedy the letter by removing items #1 and #2 in the denial letter.

The Board voted 5-0-0 that there was an error in the Building Inspector's certificate of occupancy dated 4/25/2023.

The Board voted to remedy the Certificate of Occupancy by the following:

1. Under Description strike *this is a seasonal business and also strike October 15, 2023.
2. Under Certificate restrictions strike * See menu list dated 04-25-2-2023 for details. Gelato is not prepared on site, only served. Also strike * This is a seasonal business.
3. Add to the certificate restrictions in the last sentence the following:
*Outdoor seating to be limited to 6 4-seat tables May – November 1st.

The applicant withdrew the request for variances for parking.

Shawn Crapo, ps

Shawn Crapo, Chair

Note: This decision is subject to motions for rehearing which may be filed within 30 days of the above date of decision by any person directly affected by it including any party to the action, abutters and the Rye Board of Selectmen; see *Article VII, Section 703 of the Town of Rye Zoning Ordinance*. Any work commenced prior to the expiration of the 30 day rehearing / appeal period is done so at the risk of the applicant. If a rehearing is requested, a cease and desist order may be issued until the Board of Adjustment has had an opportunity to act on the rehearing request.