

ZONING BOARD OF ADJUSTMENT	October 27, 2022 7:00 PM
TOWN OF HAMPTON FALLS	TOWN HALL

FINAL

A. CALL TO ORDER

J. DeLeire, Chairman, called the meeting to order at 7:00 PM.

B. ROLL CALL- ZONING BOARD OF ADJUSTMENT

3 MEMBERS and 3 ALTERNATES PRESENT: John DeLeire, Chairman; Steve Bryant, Vice-Chairman; Mark Call, Member; Alex Dittami, Member; James Hasenfus, Alternate; Weezie Vance, Alternate; Jim Manna, Alternate

2 ABSENT: Patricia Young, Alternate; Jude Augusta, Alternate

STAFF: Mark Sikorski, Building Inspector; Rachel D. Webb, Assistant Administrator.

GUESTS: Glenn McCrory (applicant) and Gretel McCrory.

C. PUBLIC HEARING

Case # 22-05: Application from **Glenn McCrory, Eastern Poker Tour**, for a Use Variance to the terms of Zoning Ordinance Article III, Section 4, E, 6, and asks that said terms be waived to permit Gaming Facility with a Restaurant and Sports Bar 7 Days a Week, in Zone BDS: Business District South, at property located at **1 Lafayette Road, Map 7, Lot 70**.

The applicant, G. McCrory, introduced himself and his wife G. McCrory, as co-owners of Eastern Poker Tour, Bar Poker Open, and Gorilla Gaming, that are a successful gaming table manufacturing company. They also run a successful poker league throughout the country. Their intent is to reopen the Poker Room as a gaming facility, as it has been for ten (10) years, to attract tourism to Hampton Falls at 1 Lafayette Road from other parts of NH and from all over the country.

G. McCrory presented his Variance application in terms of the following five (5) criteria:

1) *The Variance will not be contrary to the public interest.* This building and lot have already been a successful gaming destination for ten (10) years and an overwhelming positive impact on the local area. It was well known to be a great place to socialize, eat, drink, and play cards while raising millions of dollars for deserving local non-profit organizations.

G. McCrory provided revenue figures for all gaming destinations in NH. He said that he spoke with the Police Chief and quite a few people in the area to get a pulse of the history of the Poker Room. He said that he has been in the gaming industry for twenty (20) years but wanted to see how it was viewed locally. He said the Police Chief had positive comments and said that he had previously worked a Police Detail at the location. He described how the Police Department has a non-profit association and they would utilize the Poker Room to raise funds for that purpose. Additionally, G. McCrory stated that someone on the Planning Board, Eric Cimon, described how his wife was on the LAS PTO and how she told him the PTO would benefit from the fund-raising through the Poker Room, and that when it stopped it was a problem, that LAS PTO had to develop alternate fund-raising events/venues. G. McCrory also recounted another person, Bev Mutrie, had commented at Planning Board how the Historical Society and the Fire Association had benefited from fund raising through the Poker Room when it was open. He estimated that approximately \$100,000 per month would benefit local non-profit organizations, and those local non-profit organizations can be prioritized to the town. NH State Gaming requires thirty-five

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percent (35%) of gross revenues go to charitable non-profits, so this generates significant funds for local causes.

2) *The spirit of the Ordinance is observed.* This property is in a commercial zone and an economic revitalization zone. We are confident this facility will expand the commercial base on Rt 1, create more than 100 new jobs, increase tax revenues, and be a destination that will encourage tourism.

G. McCrory stated that he received overwhelmingly positive responses from the abutters he spoke with, regarding his proposal, and two (2) of them wrote letters of support, that were sent by the ZBA Secretary to the ZBA members. The letters of support were from the motel next door and the property owners across the street; both stated that they were excited with the proposed return to a use in similar form, of the prior Poker Room.

3) *Substantial justice is done.* This property was already a thriving gaming destination for ten (10) years. It's improvements and renovations during that time were uniquely based on that use already. Reopening this as a gaming destination will bring back the positive impacts that charitable gaming brings, as previously stated.

4) *Granting a variance would not diminish the values of surrounding properties.* In anticipation of a successful new business, we plan to invest substantial funds in giving the property a tasteful face-lift and will continue to maintain the property. Our new customers will also encourage more local commerce and tourism to the area.

G. McCrory said that this was the theme he discussed with the abutters, that they were excited and thought that it would help their commerce and their property values.

5a) Describe the special conditions that exist, such that literal enforcement of the provision of the ordinance results in unnecessary hardship. (a) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property: We would not be able to have a gaming destination based on the letter of the law which states only one event per quarter, or four (4) annually, if this Use Variance is not granted. The proposed use is a reasonable one as this building and lot have already been a successful gaming destination for ten (10) years and an overwhelming positive impact on the local area. We were able to reinforce this further after conversations with the Planning Board and the Chief of Police, and the abutters.

5b) if the criteria above are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it. Since the Poker Room sold their business to the Seabrook Track, this location has been an unsuccessful Pool Hall for a brief period and now lies vacant. We believe the property is uniquely built, it was built for this purpose, even though it used to be a Dexter Shoe store, it has been renovated quite a

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few times since then either as a Function Hall or as a Gaming destination, and we feel that this is a much more viable option.

Chairman DeLeire inquired regarding the applicant's timeframe, if their proposal were approved by the ZBA, when would the renovations take place, and the response was that following ZBA approval, and putting together the agreement with the owner, that they would try to begin within ninety (90) days to open their doors.

Chairman DeLeire reminded the applicant that the Variance application must pass all five (5) of the Variance criteria to be granted. He stated that in 2014 the zoning was changed, and the Selectmen decided to limit gaming to once per quarter, and he described that what the applicant is requesting is far outside of that realm. He continued that in order for the ZBA to move forward the ZBA needs to find a way for all five (5) of the criteria to be met, and he said that a couple of the criteria presented as difficult, such as "explain how the spirit of the ordinance is met" because the ordinance states that it (Gaming Facility) is prohibited [except for four (4) times annually].

W. Vance asked if the applicant was proposing to lease the building, and if so what was the term of their lease, and the response was that they were proposing to purchase the building and to own it for a very long time.

A.Dittami asked if the building was currently set-up for gaming, are there tables and equipment still in there, and the response was there are no tables, but it is the most readily available building for gaming in the state. A. Dittami asked if it would need all new equipment to set up, and the response was yes. G. McCrory said that the layout was very open on both the upstairs and the downstairs.

A.Dittami asked if G. McCrory has a gaming facility license, and he responded no but that would be part of the process moving forward. A. Dittami asked if the applicant knew what happened to the Gaming Facility license when it was the Poker Room. G. McCrory responded that when the Poker Room owner sold their business to The Brook, they let it lapse. It is a primary game operator license that is not necessarily connected to the facility, but it is part of the criteria to have a viable building to host gaming. There was discussion around the requirement for more than one type of license needed to operate a gaming facility and clarification that all prior licenses had lapsed, and that the applicant would be seeking all new licenses for this venture.

A.Dittami asked about the intervening uses after the Poker Room closed that it was a Billiard Hall, and G. McCrory said that he was told at the Planning Board meeting that it was a Billiard Hall for a very short period of time. A. Dittami continued, and asked if that equipment was still in the building, and the response was no.

A.Dittami said that during the applicant's presentation that he stated that at one time the building was operating as a non-conforming use, and asked if he agreed that it is no longer a non-conforming use. G. McCrory responded that he was operating based on the recommendation of

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the town's land use attorney. He continued that the history of this ordinance was that in 2011 or 2012 the Poker Room opened, and shortly thereafter, based on articles that he read, it seemed that there was fear that this would be a bad thing. The fear led to this ordinance which was to not allow gaming unless the Selectmen allowed it for a few days a year. The history of the facility has shown, over ten (10) years, that the fear was unwarranted, and that it has been nothing but a positive impact on this community. It raised a lot of money for some non-profits, it caused no problems, and it is a great destination to revitalize that area.

A.Dittami asked the applicant if he agreed if it was a legitimate zoning objective to, for example, hypothetically prohibit industry in a residential zoning district, and G. McCrory responded that it depends on the industrial use and that is where the ZBA has the power to decide on whether this use makes sense. He continued that industrial uses vary and that is where the ZBA has the power to have some leeway.

A.Dittami asked if it is in the public's interest when they pass a law to have a board like the ZBA torpedo, or circumvent, that law and if so why or why not. G. McCrory responded saying that, generally speaking, he has shown that it is in the public's interest to have this facility. A. Dittami continued, that if the applicant is undermining a public vote of the Town (it was not the Selectmen who voted) how would the ZBA granting him a Variance not be contrary to the vote and interests of the public. G. McCrory responded saying that the board's land use attorney stated that the ZBA could grant a Variance, and so that is why he is here.

A.Dittami asked if the applicant is not granted the Variance, what loss will he incur, and G. McCrory responded that the building owner will incur the loss because he is the one dealing with a vacant and unsuccessful property at the moment. A.Dittami asked if there are prohibitions that keep the property from being utilized for other things like retail or a restaurant. The applicant responded that the property has been available for more than a year; whether it is marketable for other uses that is possible, but we have not seen that. He knows the property was used as a Pool Hall for a while but that was unsuccessful. He feels that this would be a successful venture and that it would be a great asset to the community.

A.Dittami asked G. McCrory if he knows whether any steps were taken to protect the grandfathered status of the use. The applicant responded that he is unfamiliar and that he took the path of least resistance by going by the recommendation of the Board's land use attorney.

A.Dittami said that legal counsel's opinion is based on the assumption that no action was taken, and A. Dittami was trying to ascertain if that assumption was correct or not. Chairman DeLeire stated that part of what legal counsel did was to look at the history and then they rendered a decision, so we must go by that conclusion. A.Dittami stated that the ZBA does not have to go by the conclusion of legal counsel.

G. McCrory said that he believes there are state precedents which state that you must make an action to lose your grandfathered rights. That inaction is not the assumption that you have lost the grandfathered rights. He went with the recommendation of the legal counsel, as the path of least resistance that would be the easy route to go, and everyone he spoke with was

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overwhelmingly positive about bringing this back, so he thought that the Use Variance was the easy way to go. G. McCrory continued: is there an absolute argument that they didn't lose their grandfathered rights? Absolutely. That is an argument that can be had. S. Bryant said that that is an easier argument, but the Use Variance is not an easy path. Just because the lawyer said that the ZBA has the power to grant a Variance does not mean that the ZBA will grant a Variance. There are five (5) very strict criteria that Chairman DeLeire and A. Dittami were clear on, and one was "substantial justice", and when the town voted and said they prohibited "X", the ZBA's ability to discard our fellow citizens' vote is a hard barrier to cross. S. Bryant asked if there is still a license out there available that is grandfathered. G. McCrory responded that the substantial justice to him was that the ordinance was changed in 2014, that was done in fear, and that was unwarranted. He was hoping to get some insight about why that was changed, because from what he read there were a few people who were a little upset, that they saw that it was supposed to be a Function Hall, then suddenly there was gaming.

S. Bryant said that whether it was an unfounded fear or not is irrelevant because the ordinance passed saying that the use is prohibited, so another avenue is to change the ordinance by having the public vote on the change again.

A.Dittami asked if there was anything unique about the setting or the environment of the parcel that makes it different from all of the other parcels that would make enforcement of the prohibition a hardship. The applicant responded that he thought he had previously covered that aspect that the building had been built for gaming, and it still has gaming signage in place. He asked, could it be used for anything else? Maybe, but historically it has not shown to be successful as anything else, so that is how it is unique. Gaming was in demand, and it was successful in that location. It was purchased by The Brook because The Brook did not want to compete with them.

A.Dittami asked if there is any asset or business that the applicant is going to lose or be harmed by if the Variance is denied, and G. McCrory responded the missed opportunity to the town and to charities. A.Dittami asked if the applicant had any other establishments like the one he was proposing and he responded no, that this would be their first endeavor. He said that he has a very seasoned Gaming Manager, who has been in the business for twenty (20) years who wants to be involved in this endeavor. A.Dittami asked some clarifying questions about how Eastern Poker Tour works and its potential relationship with the proposed use in Hampton Falls.

A.Dittami asked if there were any plans available to view of the planned "facelift" to the façade of the building, and the applicant responded that before they invested in any plans, they needed to obtain the Variance first and make sure that this was a viable option. Improvements planned were nothing major, just to brighten up the façade but to keep the character, improve landscaping and lighting on the exterior, in addition to many improvements on the interior.

A.Dittami asked if the applicant had any evidence that this proposed use will not negatively affect property values, and G. McCrory responded that by improving the building and the site it will improve the area and make a building that is currently closed improve other parts of the

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town. The abutters he spoke with were excited about the prospect of having a vibrant business there.

A.Dittami described his concern about perception, that when he would travel and return to town late at night and drive by the location when it was the Poker Room that there was traffic/congestion on the road and he would often see a Police car onsite. G. McCrory responded that there is a Police Detail typically scheduled nightly, and he reiterated his contention that the fear around the proposed use is unwarranted. He said that he spoke with the Police Chief who said that it was nothing but great things, the neighbors said that it would be great, and the local charities would benefit.

A.Dittami said that he spoke with the Police Chief this afternoon who stated that whenever there is alcohol, gambling and a bar there will be issues, but overall he took a neutral stance on this issue.

S. Bryant asked what the hours of operation would be, and Chairman DeLeire stated that the Planning Board may decide the answer to that question. G. McCrory said that his expectation may be to 1:00 AM, 7 days per week.

M. Call asked if the Zoning change in 2014 was a spirited debate or not. Chairman DeLeire said that he was a member of the ZBA at the time and he recalled the conversion of the site from the Dexter Shoe store to the Function Hall and that they needed a Variance for the septic system, which was granted. Afterwards he heard rumblings that there may be Poker Room in town, and there were some people who were not happy about that, who did not attend the ZBA Variance hearing. He continued saying that it was his understanding that much of what may have happened during that time was due to the “alarm being rung” that there was going to be a gambling institution in town. Some of it was unfounded, some of it was reality, and much of it was the parking.

A.Dittami commented in response to M. Call’s question, that he was the Chairman of the ZBA, at the time, and said that the debate (about the 2014 Zoning Change) was absolutely spirited; however, it was incredibly one-sided because he did not receive a single call with anyone saying *“that’s such a great idea, let’s have gaming in Hampton Falls”*. He continued regarding the historical review of the septic approval for the site not being built in the location where it was approved, and the issue of the paving of the parking lot when it was not supposed to be paved. He described that all those issues combined to not generate a lot of good feelings with the applicants/business owners at the time, and a couple of years later the proposed Zoning Ordinance change was on the ballot and was voted to prohibit Gaming Facilities.

A.Dittami said that in his personal opinion he would approve of the use, but the ZBA must apply the law the way that it exists, and if the five (5) Variance criteria are not met, then the ZBA cannot grant the Variance.

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Chairman DeLeire reviewed the application in terms of the five criteria, and said that the revitalization of that property is favorable, and that charitable foundations will benefit is also a plus. He reiterated that it is the five (5) Variance criteria that are the challenge for the applicant to pass (and all five must pass), whether or not individual ZBA members think the proposed use is a good idea or not. In terms of criteria #2 that the *ordinance is observed*, has been previously covered. The Ordinance has clear language stating that the use is prohibited. Criteria # 5 (a) regarding the *unnecessary hardship* is also a questionable one. This particular location could be many other things, and has been other things in the past. The unnecessary hardship usually gives the ZBA the situation where nothing reasonable can be done, but for what the request is, and in this circumstance that is not the case. Another difficult hurdle is Criteria 5 (b) “...*the property cannot be reasonably used in strict conformance with the ordinance*,” when in fact the property can be used for many other things within the ordinance. It does not have to be a Poker Room, nor a Gambling Facility. So those were three criteria that would be difficult to overcome, and all five must be overcome. There’s no dimensional limitation, there’s no restriction on use, but for this one. Chairman DeLeire summarized that although the applicant did a good job answering the questions, the answers don’t overcome those particular matters contained in the Zoning Ordinance which limit decisions. Based on what we have seen so far it is tenuous at best, unfortunately, even though the revitalization of that particular property used for a purpose that fits charitable needs and creates jobs are all great ideas, but whether the ZBA can make it happen or not is difficult to overcome.

G. McCrory said that he had elaborated as much as he could, and felt as though a lot of this could be looked at as opinion, and there is a lot of subjectivity to the questions, so in his honest opinion he has answered the questions, and has shown that this is the best and most reasonable use for the property, as shown through history. He continued that he thought the Ordinance in 2014 was created from people getting very upset, that they thought the approval got slid through the cracks without getting proper approvals, and believes that that was the true reason people were upset. And then history showed that there was really nothing to be upset about, it was all positive results. Of course, problems can arise when people are drinking, and this was a similar comment that was made by the Police Chief, that sometimes people drink too much. The un-necessary hardship criteria, the applicant felt, would be more of an issue for the building owner (if the Variance is denied) as the building will remain vacant. Another hardship would be felt by the neighboring hotel that was excited to have potential customers coming from out-of-state, would help to revitalize the hotel. It is currently attracting weekly and monthly renters because they are not attracting tourists, and the proposed use would do exactly that. Poker Tournaments are great ways to get people to travel from multiple states away, and the hotel would be a great beneficiary of that tourism. G. McCrory continued that the abutter at the auto mechanic shop said that people would come and get their car fixed, and then go across the street to play poker while the car was being repaired.

G. McCrory asked how do you prove “*spirit of the ordinance*”? How do you prove *spirit*? Look at the spirit of why people were so upset back in 2012 to 2014. They thought that someone slid something under the rug, and brought in this dirty, mean, poker game where who knows what is going to go on over there. Eight years later none of that materialized. So, G. McCrory said that

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the spirit was “let us stop this before this ugliness gets any worse”. And the history has shown that the ugliness has never happened. A lot of charities benefited a lot from that use, and people had a great place to play poker, it was a popular destination.

Chairman DeLeire said that he did not disagree with many of the things that G. McCrory said; unfortunately, the better result would be all of that evidence suggested to the Board of Selectmen and to the people of Hampton Falls to convince them to change the zoning to allow that type of use.

PUBLIC COMMENT:

Andre Carrier, President and CEO, The Brook, and the last tenant of the building. He said that he came to the meeting tonight to explain how the charities were accommodated when the businesses were consolidated. He said that the legislation changed within the state and allowed for two charities each day, and now each fund-raising day allows for twice the number of charities to benefit. So, the vast majority of the charities that wished to be accommodated that were Hampton Falls related and beyond, were accommodated. Another change was the growth of the NH gaming statute to allow a game called “Historical Horse Racing”, and now they are receiving more funds as a result. The local charities are being accommodated with particular attention to Hampton, Hampton Falls, and the Seacoast Area. As an evident competitor to the proposed use, he wanted to be a resource to the ZBA regarding the charities benefited as the ZBA contemplated the application.

S. Bryant asked for examples of the charities served, and A. Carrier responded the Police in Hampton have an organization, the Historical Society, and then service organizations on the seacoast that service Hampton, Hampton Falls, Seabrook and beyond.

A.Dittami asked A. Carrier about the licenses that were in place at the location, and he confirmed that he let those licenses lapse. A.Dittami asked how long it would take to get those three licenses, and A. Carrier recalled that it took them approximately six-to-eight months (6-8 mos) for the investigation to be completed by the State.

G. McCrory pointed out that there is currently significantly less (no) spirited objection to the proposed use this time (tonight), as compared to 2014.

There were no other Public Comments. Chairman DeLeire closed the Public Hearing portion of the meeting, and moved to deliberations of the ZBA. W. Vance and J. Manna moved to the audience, as they were not voting members of the ZBA for tonight’s meeting.

A.Dittami referenced the State Handbook for ZBA (11-12), regarding the *spirit of the ordinance*, and cited an example that if an ordinance prohibits industrial or commercial uses in a residential neighborhood, the ZBA granting permission for such activity would be doubtful legally, because the ZBA cannot change the ordinance. M. Call agreed with A. Dittami, stating that the issue of the *spirit of the ordinance* is almost insurmountable for him. He said that the history of the

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facility has been described tonight. As a result of the early activity at the site, the voters of Hampton Falls, at the direction of the Planning, or Zoning, or Selectmen added something specially to the zoning laws that said that in Business District South, that Gaming Facilities are prohibited. M. Call continued, that to him, the only option is that the ordinance be changed. He said that he understands how the legal counsel suggested the applicant come to the ZBA to see if we would make a ruling, but he just did not see how the ZBA could possibly grant a Variance for something that is specifically prohibited in the Zoning Ordinance.

S. Bryant said that unless there is something so special about the property that differentiates it from any other property, to necessitate its use as a Gaming Facility. He said that he personally does not have a problem with the proposal, but he does have a problem with the ZBA's responsibility to uphold the ordinances as a representation of the town. S. Bryant added that he did not think the application met the *substantial justice* criteria.

MOTION: To deny Case # 22-05: application from Glenn McCrory, Eastern Poker Tour, for a Use Variance to the terms of Zoning Ordinance Article III, Section 4, E, 6, and asks that said terms be waived to permit Gaming Facility with a Restaurant and Sports Bar 7 Days a Week, in Zone BDS: Business District South, at property located at 1 Lafayette Road, Map 7, Lot 70. By reasoning that:

- 1) At one time, there was a non-conforming use that no longer exists, as opined by Land Use counsel and by the conduct of the parties involved at the time; a license formerly in place was not continued; gaming equipment was removed from the building; all the evidence points to the fact that the non-conforming use was abandoned.**
- 2) It would not be in the public's interest to violate a strict prohibition that was voted in by the town (in 2014); if the ZBA were to go against it the ZBA would be undermining the laws as they pertain to zoning.**
- 3) The spirit of the ordinance was straightforward, as the response was no exception. The grandfathered use was not protected. The spirit of the ordinance would be violated if the ZBA allowed the Variance.**
- 4) Substantial justice is determined if there is going to be a loss, and there was a loss of use but it was not as a result of anything that the town did. The loss of use was a direct result of the lapse of the licenses.**
- 5) Values of the surrounding properties have not changed in years, there is no evidence of property values going up or down. If they went up it was probably because of the general market going up in the region. Regarding unnecessary hardship, there are no physical characteristics identified that are unique to the site that would create an unnecessary hardship. The prior owner had the ability to protect the grandfathered use to avoid a hardship and did not by their inaction.**

MOTION: A. DITTAMI

SECOND: S. BRYANT

UNANIMOUS

D. REVIEW AND APPROVAL OF PREVIOUS MEETING MINUTES: 08/25/2022

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MOTION: To approve the meeting minutes from 08/25/2022, as written.

MOTION: J. DELEIRE

SECOND: A. DITTAMI

UNANIMOUS

E. OTHER BUSINESS There was no other business.

F. COMMUNICATIONS TO BOARD MEMBERS There were no communications to Board Members.

G. ADJOURN

MOTION: To adjourn the Zoning Board of Adjustment at 8:10 PM.

MOTION: J. DELEIRE

SECOND: M. CALL

UNANIMOUS

The next meeting of the Hampton Falls Zoning Board of Adjustment is scheduled for Thursday, November 17, 2022, at 7:00 PM at Hampton Falls Town Hall.

Zoning Board of Adjustment Minutes prepared by Rachel D. Webb, Assistant Administrator.