

**SPECIAL MEETING
BOARD OF MAYOR AND ALDERMEN
(PUBLIC HEARING)**

September 30, 1996

7:00 PM

Mayor Wieczorek called the meeting to order.

Mayor Wieczorek called for the Pledge of Allegiance, this function being led by Ald. Shea.

A moment of silent prayer was observed.

The Clerk called the roll. There were nine Aldermen present.

Present: Ald. Elise, Reiniger, Clancy, Shea, Domaingue, Pariseau, Cashin, Robert, Hirschmann

Absent: Ald. Wihby, Sysyn, Soucy

Mayor Wieczorek advised that the purpose of the hearing was to hear those wishing to speak in favor of or in opposition to a proposed Ordinance amendment; that the Clerk would present the proposed Ordinance for discussion at which time those wishing to speak in favor would be heard, followed by those wishing to speak in opposition; that anyone wishing to speak must first step to the nearest microphone when recognized and recite his/her name and address in a clear, loud voice for the record; that each person would be given only one opportunity to speak and any questions must be direct to the Chair.

The Clerk presented the proposed Ordinance:

“Amending the Zoning Ordinance of the City of Manchester by modifying Section 4.03 Item 71 and Article VII limiting parking lots for business uses within residential zones, as further amended by deleting Section 4.03 Item 45.”

Mayor Wieczorek requested that Robert MacKenzie, Director of Planning, make a presentation.

Mr. MacKenzie stated this zoning change was submitted by the Planning Board and as you remember it did come to the Board once before. There was an amendment that I had submitted the evening of that meeting, after discussions with the Building Commissioner and after a question was raised about that, I did check with Tom Clark because of the description of the title and had, he had suggested that we hold another hearing. So, that is why we are back tonight, there was an amendment and just to make sure that the short title which was published in the newspaper covered everything, we came back to this hearing. As you may remember, under the current interpretation of the Zoning Ordinance, you could have a development where you have a business zone as shown here on just a generic type situation, a business zone with a business on

one lot there who could actually acquire residential properties further into a residentially-zoned district and then allow parking within that area. As you can see it extends, they could develop it fully and building therefore and you could have significant activity within the residential zoning district. After dealing with these situations several times and it is becoming more likely these situations will occur and it's very difficult for some of the neighborhoods, it creates instability in some of those neighborhoods. The Planning Board then proposed a change to the ordinance which would try and make it clear that we want to make it crystal clear for businesses that commercial parking is not allowed within residential districts. So, the change...there are several changes to the Zoning Ordinance which would do that and the amendment that came in at the last minute during the last public hearing basically was to clarify and eliminate one section that might be a conflicting section. That's Section 45 says that basically you can, in certain instances have commercial parking in residential zones but you have to go to the Zoning Board of Adjustment and get a special exception. So, the amendment that did come in basically said you cannot have commercial parking within residential zoning districts. At this point, unless you have any more detailed questions, I don't want to go over it in any more detail again since it has been to the Board once before, but I'd be happy to answer any questions of the Board.

Mayor Wieczorek called for those wishing to speak in favor.

Emilia Biron, 777 Hanover Street, Manchester, NH, stated:

Referring to modifying Section 4.03 and Article VII, if the intent of these ordinance changes is to assure protection of residential zones from business projects abutting these zones, the wording of the ordinances must be more specific. This especially affects the older established residential areas where there still exists "Mom and Pop" stores or other small family-run businesses abutting residential-zoned lots. Consequently, when these businesses are sold, the new proprietors usually wish to enlarge the business, therefore, encroaching into a residential-zoned lot. The proposed change indicating "unless the business use is specifically within that residential zone" appears to do nothing but to give business lots within residential zones the right to use abutting residential lots for accessory advantages. The change recommended to Item 71, the word "may" should be changed to the word "shall". Given the amendment absolute direction. The amendment to Article VII 7.03(3) covering accessory requests by business or commercial projects abutting residential lots seems to give advantage to those petitioners. As I stated at the previous hearing, the essence of the proposed changes seems favorable, however, I strongly recommend that all ambiguity be addressed and that absolute language be applied. There should be no room to give appearance of accommodation or obliging of any particular project. Thank you.

Ald. Cashin asked can I assume that the way it is reading, you are in opposition, is that what you're saying.

Ms. Biron replied the way it's written, I'm in opposition, but it just needs reinforcement.

Mayor Wieczorek stated she's on the wrong sheet. There's one in favor of and one in opposition to.

Ald. Cashin stated I think what she's saying, your Honor, and I don't mean to put words in your mouth, but if it was rewritten that she would be favorable.

Ms. Biron stated I'm in favor of the idea, almost the idea of it. But just the language, I feel that the language should be stronger and more absolute so that there is no misinterpretation.

Mayor Wieczorek called for those wishing to speak in opposition.

Artemis Paras, 1275 Hanover Street, Manchester, NH, stated:

As you know, on the 26th of August, I was in favor of the intent of this proposed ordinance at that time, none of us knew that there was going to be a major deletion of one of the table of use regulations - Section 4.03, Item 45 which always required a special exception to go into a residential lot. It was a way of notifying the abutters and making sure that they knew what was going to go into the area. I'm going to present, this evening, what I've typed, but I will probably modify it in view of what we heard Director MacKenzie say here this evening, however, before I begin, your Honor, may I please ask a question of Director MacKenzie.

Mayor Wieczorek replied in the affirmative.

Ms. Paras in addressing Mr. MacKenzie asked could you please tell me, in your letter to the Board of Mayor and Aldermen which was written last June you said that if this goes through then existing conditions would be grandfathered and we all know that a grandfathered use means a use that was legal before any amendment was made to the ordinance or legal before the ordinance was written, so are there significant grandfathered uses that we have to be concerned about because I'm wondering if the intent of this proposal is to assist to make what maybe didn't come under approval and making it legal now, could you please tell me now how many cases do we have because you do use the language "existing grandfathered uses", so I think it's important that we know what we're going to be grandfathering.

Mr. MacKenzie replied I haven't any idea of how many uses are out there now currently, but any zoning change that you propose allows existing situations to continue because it would be unfair to have a business that's been operating and then tell them that they can no longer operate. So, all zoning changes allow grandfathered uses that are not consistent with the proposed ordinance. And, in fact, in most, I believe in all cases is the example of the Burger King on the Daniel Webster Highway, they have parking that extends into the residential zoning district. Right now, that is not allowed fully by the ordinance, it's allowed by Item 45, so in effect it will not change. They will be grandfathered only for what they have presently under their current situation.

Ms. Paras interjected and if they met the legal requirements of the ordinance at that time. So, something now wouldn't be meeting what was existing, that's the point I'm trying to raise. Alright, the purpose of this evening's public hearing is to receive comments as they relate to the Planning Board's proposal for changes to the ordinance which now include further amending by deleting Section 4.03, Item 45 under "automotive service uses". In the revision sheet that was given to the Aldermen on August 26th it only mentioned what item and section was being deleted, but the text was not included and this is why I think it's difficult sometimes to know what you are deleting. I think it's helpful to have the text. Now, that we are combining this substantial deletion of a major use under the Table of Use Regulations, I think this alters completely the kind of testimony the Board may receive from parties like myself and the way I view it. This particular section 4.03, 45 has been consistently used for automotive service uses that needed a special exception. In other words, it was not a matter of right, so if we say that the current interpretation states that "a business property can acquire a residential lot and go in and do commercial parking or accessory parking", I don't think that's an absolutely correct statement because we still had on the books Section 4.03, 45 and that's why I'm somewhat puzzled, Director MacKenzie, and perhaps you'll understand my puzzlement. It was always the administrative ruling from the Building Department that determined that any automotive business use that wanted to go into a residential lot had to come under that section. You couldn't do it as a matter of right, so I think it's difficult when we start projecting that anybody can do this, we can not and let me explain why. Somehow an interpretation seems to have discredited the existence of this section and a current interpretation now allows business parking lots to be located in residential districts. Director MacKenzie states in his letter "it is my belief that it was not the original intent of the ordinance to allow this situation." I agree with Director MacKenzie. I think he's absolutely correct and I'll explain to you why. However, I also want to say that Director MacKenzie's letter further states "that the proposed ordinance does not permit the use of residential lots in residential zones for business parking although existing conditions would be grandfathered." Why do I agree with Director MacKenzie when he states that I don't believe that this was ever the original intent. In the first place, the current ordinance which is the Zoning Ordinance of the City of Manchester does not allow for businesses to cross district boundaries and do whatever they want as a matter of right. That is clear and I don't think that can be argued. Under Article II - Zoning Districts - I quote from the ordinance "the uses permitted within each of the named districts are shown in Sections 4.03 and 5.01. The current ordinance is very clear as to what is permitted by right, prohibited or may be prohibited by special exceptions." Section 4.03, 44 a commercial parking lot or a commercial parking garage are prohibited uses in all residential districts except R-4 your multi-family district. So, for now, unless I can be totally convinced, I have to withdraw my support as I gave it to the Board of Mayor and Aldermen and to Director MacKenzie in August for these proposed changes which are related to limiting business parking to business zones and I think that it's important for now to leave Section 4.03, 45 because it has been on the books and if there has been non-compliance to this section by an interpretation then perhaps it's time to find out what plans, what approvals went through not recognizing that this provision existed. I support status quo for now until we have some questions and answers; that we have answers to questions, I

should say and no changes when the current ordinance is very clear as to what is permitted and prohibited in the named districts. As to grandfathered uses, if they weren't legal prior to the proposed amendment and now we're going to grandfather them, they can't claim legal, I mean non-conforming use as the definition in the ordinance states it. In other words, legal before the amendment was made. The zoning districts boundaries, I believe, are our guide. This proposal can't attempt to enforce that which we can already enforce by the district boundaries. In other words, the ordinance has named districts, Alderman Pariseau knows he served on the Zoning Board, you're either permitted certain uses or their prohibited or some may be permitted by special exception and for us to now say the current interpretation allows a business to go into a residential lot, I think the Aldermen have a right to ask how did this interpretation come about and what has happened as a result of this interpretation and let's get answers to those questions first before we go about and enforce something that is already supposed to be an enforceable document because it's the zoning map of the City of Manchester with its district boundaries that restricts or permits or prohibits or may permit by special exception; that's how I understand zoning, it's a pretty simple formula. Other than that, I would be happy to answer any questions and that explains why I changed my position because basically I'm questioning that current interpretation that no one, I don't know where it came from, there have been questions where it came from, no one seems to know and I thank you for this opportunity.

Leslie Auger, 53 Trinity Street, Manchester, NH, stated:

On behalf of my neighbors on Trinity Street and Woodland Avenue and for the record I'm now speaking to withdraw our support to the proposed amendments to the Zoning Ordinance in light of Revision #1'1 proposed deletion of Section 4.03, Item 45 in the Table of Use Regulations. Our support was originally given before the contents of Revision #1 were made public. Our support for the amendments in the draft of May 22, 1996 was contingent on maintaining stricter standards in Section 4.03, Item 45. Specifically, that parking in the residential zones, accessory to a business requires the granting of a special exception from the ZBA. Without Section 4.03, Item 45 in place there would be no established procedure for determining the appropriateness of allowing accessory business parking. Instead we would be left with the ambiguous language of the proposed amendment to Subsection 3, Article VII, Section 7 by the modification which reads in part "that business parking may not extend into residential districts" in accordance with Section VII, Subsection 5. The use of the phrase "may not" creates a gray area. Unlike, the phrase "shall not" which would mean that business parking is prohibited under "any and all conditions". The use of the word "may" allows that some business parking "may" be allowed and some "may not". However, without Section 4.03, Item 45 there are no set criteria for making such a determination or City department specifically empowered to do so. To create such a situation would leave the decisions made regarding parking in residential zones, accessory to business use open to legal challenge. In conclusion, we oppose these amendments to the Zoning Ordinance because their cumulative effect is to leave residential neighborhoods with less protection against the encroachment of business parking than exists at the present time. Thank you.

Mayor Wieczorek advised that all wishing to speak having been heard, the testimony presented would be referred to the Committee on Bills on Second Reading to be taken under advisement with reports to be made to the Board of Mayor and Aldermen at a later date.

Ald. Domaingue stated I have a question of Mr. MacKenzie. Mr. MacKenzie, before we pass this along, having heard the arguments raised and looking in this Ordinance at Article III, Item 5 does the phrase "unless the business use is specifically permitted within that residential zone" can that be interpreted to mean that if we delete Section 4.03, Item 45 that any use, that any business can then come in and be grandfathered, can that be interpreted that way.

Mr. MacKenzie replied, no.

Ald. Domaingue asked can you then in very brief form respond to some of the concerns that we've heard here tonight.

Mr. MacKenzie stated I think there's probably some skepticism of what the City is trying to do. I think the Planning Board's intent is very clear that they've gone into the neighborhoods, they recognize the concern about encroachment and traffic in these residential neighborhoods and they have proposed something that will try to make it crystal clear that it's not the intent to have commercial activities within residential zones. I do here skepticism, there is some semantics in terms of wording, certainly and I would not have any problem with revising, there's one section that I think they have a concern with that says "except that business parking may not extend into residential districts." Now, my reading of that would be that business parking may not extend into residential districts. If they would like to see that changed to "shall" to be crystal clear, I have no problem with that. But, certainly it's the intent of this ordinance to protect our residential neighborhoods from having commercial development in there. They're also concerned with the Building Commissioner's interpretation of the Zoning Ordinance, but the Building Commissioner is the interpreter, officially, of the Zoning Ordinance and he has full authority to do so unless proven otherwise in court. I think it's his desire to have the ordinance clarified too. He's reread it for dozens of years, he believes there's ambiguity, he would like to see it clarified and that's what we're trying to do here tonight.

Ald. Domaingue stated one further question, please. What is the problem with leaving Section 4.03, 45 intact and adopting this.

Mr. MacKenzie replied Section 45 you would get into the odd situation, now these people mostly are from a residential neighborhood that's been kind of battered by commercial development. If this, as proposed, went in tonight someone who wanted to go get a permit to put a commercial parking lot in a residential area would not get a permit, period. They could apply for a variance from the Zoning Board of Adjustment, but it's unlikely they would get that. If you did not eliminate 4.03 they would go into the Building Department, they would be told that they could have parking in the residential area by special exception and they'd have to go to

the Board of Adjustment to get a special exception. So, in both cases they would go to the Board of Adjustment, but in the first case a variance is technically very hard to get, you have to show a hardship on the property. A special exception can be given out by the Zoning Board of Adjustment if they feel in their wisdom that it's appropriate to the neighborhood, so it's crystal clear there's a difference between a variance and a special exception and the intent of eliminating 45 is to make sure that it's very clear that you cannot just go into a neighborhood and get a special exception. So, I think it's much tighter to eliminate 45, it makes the ordinance crystal clear in my mind.

Ald. Cashin stated, Bob, maybe I misunderstood you, but you said that if this isn't passed, it would be impossible to get parking, commercial parking in residential areas, is that what you said.

Mr. MacKenzie replied, I didn't understand, Alderman, did you say if this did pass.

Ald. Cashin stated if we didn't do something about this, it would be impossible.

Mr. MacKenzie replied, no, if you did pass this it would say there is no commercial parking in residential areas. If you don't pass this, the interpretation right now is that you can go in and get a permit from the Building Commissioner and they will allow commercial parking in any residential area. Right now, that would be the interpretation and that is the interpretation officially right now of the Building Commissioner. I know you've had some difficulties on Second Street. Someone wanted to buy two or three residential lots behind Second Street, convert that to commercial parking they would be allowed to without going to any boards and that's the current situation. As proposed tonight you would prohibit that.

Ald. Clancy stated over here on Section 4, why don't we say except that business "shall not" extend into residential districts, change the word from "may" to "shall" not extend into residential districts. Change the word from "may" to "shall".

Mayor Wiczorek stated it was being referred to the Committee on Bills on Second Reading.

There being no further business to come before the public hearing, on motion of Ald. Cashin, duly seconded by Ald. Reiniger, it was voted to adjourn.

A True Record. Attest.

City Clerk